to do, and what it has so far accomplished should be especially useful to the principal United Nations body which currently seeks to state and to clarify international law on selected subjects. The Committee has not failed to note the fact of some divergence in thinking and in practice as between the newer states and the older members of the family of nations on certain questions,[15] and some of its records have particularly reflected this fact. This, however, has not precluded it, while it gives some priority to matters of special concern to Asian and African states, from co-operating constructively, through a system of observers and through exchange of records, with world agencies, and especially with the particular one of these agencies which currently has principal responsibility for statement of international law on such a basic subject as that of treaties.[16]

ROBERT R. WILSON

THE "EFFECTS" DOCTRINE OF JURISDICTION

As John M. Raymond mentioned in his "A New Look at the Jurisdiction in ALCOA," in the April, 1967, issue of this JOURNAL,[1] the ALCOA case contains the classic statement of the "effects" doctrine of territorial jurisdiction of a state. Judge Learned Hand there stated that it was "settled law" that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[2]

Mr. Raymond acknowledges that this doctrine "has been religiously followed by our courts in antitrust cases" (*loc. cit.* at 559). He believes however, that "sound legal principles" call for a "limitation" of the doctrine, one which he candidly states has "never been suggested before." The limitation he urges is that territorial jurisdiction based upon conduct

[15] On the general subject, see Judge Philip C. Jessup, "Diversity and Uniformity in the Law of Nations," 58 A.J.I.L. 341–358, at 357 (1964); R. P. Anand, "Rôle of the 'New' Asian-African Countries in the Present International Legal Order," 56 *ibid.* 383–406 (1962). See also G. M. Abi-Saab, "The Newly Independent States and the Rules of International Law: An Outline," 8 Howard Law Journal 95–121 (1962); P. Chandrasekhara Rao, "Wider Appreciation of International Law," 4 Indian Journal of International Law 323–328 (1964).

[16] Sir Humphrey Waldock, who was Special Rapporteur on the Law of Treaties for the International Law Commission from 1961 to 1966, has stressed that Commission's search for solutions that would be in the best interest of the international community as a whole. "By 1962," he points out, "the Commission had been enlarged to provide for a wider representation of the new states, and its constant aim was to find solutions which might so far as possible reconcile the points of view, on the one hand, of the old states and the new and, on the other, of states of differing political alignments. The readiness of members to look for common ground rather than to maintain a national point of view or to give up a personal conviction on a point of doctrine in deference to the convictions of others unquestionably owed much to their consciousness that the Commission's drafts must be such as would have a good prospect of obtaining the general assent of world legal opinion at a diplomatic conference." "The International Law Commission and the Law of Treaties," 4 UN Monthly Chronicle 69–76, at 72 (1967).

[1] 61 A.J.I.L. 558 (1967).

[2] United States v. Aluminum Co. of America, 148 F. 2d 416, 443 (2d Cir., 1945).

abroad having effects on the jurisdiction-asserting state should be impermissible "where there is no positive effect within the state but on the contrary merely a negative one, a failure to create or to continue effects within a state."[3] For a "failure to achieve a desired effect is at most a failure to realize the hopes or expectations of a state."

There is no doubt that the proposed limitation of the "effects" doctrine to "positive" effects would be novel. The *Restatement of Foreign Relations Law* (2d ed., 1965, Section 18, Reporters Notes, p. 55), in commenting upon the effects doctrine which it supported, observed that

> the Permanent Court of International Justice did not suggest [in the *Lotus* case, the leading international law case on the effects doctrine] that the exercise of jurisdiction based on effects in the territory of the extraterritorial conduct was limited to certain types of effects. The practice of states does not reflect any distinction among the types of effects involved.

Nor has the suggested "positive-negative" effect distinction been drawn in fields outside antitrust. As Justice Holmes observed in a domestic criminal fraud case, *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1910), the "usage of the civilized world" is that

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect if the State should succeed in getting him within its power.[4]

No differentiation between "positive" or "negative" detrimental effects was made by Justice Holmes. The *Restatement of Conflicts of Laws* (Proposed Official Draft, 1967) in Section 37 likewise draws no distinction between "positive" and "negative" effects caused in the jurisdiction-exercising state by an act done elsewhere, observing that a "state has a natural interest in the effects of an act within its territory even though the act was done elsewhere."

The fact that a proposition is novel is of course no fatal defect, though it might cause a glimmer of suspicion that perhaps, if after many years of experience the idea had not surfaced, something might be wrong with it! What is wrong with the suggested limitation, it is submitted, is that it is not based upon sound legal principles, or sound conceptions of public welfare.

The United States attempted earlier than other countries to assist in achieving political and economic democracy through fostering competition, and protecting against frustration of this effect through applying its antitrust laws to foreign conduct restraining American trade. In recent years,

[3] 61 A.J.I.L. at 568–569 (1967).

[4] See also Bishop, International Law: Cases and Materials 464 (2d ed., 1962), where he quotes a long-standing New York penal statute stating that "A person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which, if committed within this state, would be a crime, is punishable as if the act were committed within this state."

a substantial number of foreign countries, including the United Kingdom and the major European countries, have made similar efforts.

Since 1890, under the Sherman Act (15 U.S.C. Sec. 1 and 2), agreements or conspiracies in restraint of trade "among the several states, or with foreign nations" have been illegal, as well as monopolization of, or attempts to monopolize, such trade; both have been subjected to criminal and civil proceedings. Over the years American courts have identified many kinds of agreements as being *per se* (conclusively presumed) unreasonable restraints of trade. Among these are price fixing, division of market territories, limitation of production or control of supply, boycotts, allocation of customers, and division of fields of production.[5]

No distinction has been drawn, from the viewpoint of whether or not they are unreasonable restraints of trade, between the act of two persons abroad agreeing to fix the prices of goods they ship to the United States; their agreement to curtail sales (by limiting production or controlling of supplies) which would result in higher prices depending upon their market power; and their agreement not to sell to an American importer unless he agrees to limit his imports of a commodity to those sold by the two acting abroad. Their agreement to boycott the American importer, or to curtail sales in the United States, producing what Mr. Raymond would call a "negative effect" in the United States (a "failure . . . to continue effects within a state") is considered to be as unlawful as their act of price-fixing which causes a rise in prices—or what he would call a "positive effect."

This is as it should be. What is the aim of a collective boycott? Through the exercise of market power, the importer is to be forced to import exclusively the goods sold by the two or more persons acting abroad, which will result in higher prices, or a smaller range of goods sold here, or at the very least, a less competitive marketing system in the United States —all of this can be termed "positive" effects caused by "negative" (withholding or curtailing) methods, if one finds these terms helpful. But they are not helpful; they are essentially irrelevant. A state has the right to require that children not be mistreated by those in whose custody they are entrusted. Cannot, indeed, the state reprehend the withholding of food, as well as beatings, resulting in mistreatment? The ability to reprehend the effect—mistreatment—should not turn on the particular method chosen to inflict mistreatment. Withholding food in order to maintain but not permit an increase in the growth of a young child is no less mistreatment which the state should be able to reprehend if it wishes, and it should certainly so wish.

A state may reprehend agreements or conspiracies restraining its trade and commerce, whether or not the restraint results from acts done at home or abroad, whether or not the method employed to restrain that trade is through a collective withholding of goods, and whether or not the anti-competitive effect is reflected in a maintenance or a lessening of supplies.

[5] Fugate, Foreign Commerce and the Antitrust Laws 12–13 (1958).

Persons abroad have long been on notice that such conduct is interdicted. To do so is neither unfair to individuals nor unreasonable. Indeed it is indispensable as a system of legislation in the public interest which is patently within the discretion of a civilized nation to adopt and enforce. Any distinction between "positive" and "negative" effects would be inconsistent with the public interest of all countries and peoples.

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