PERSONAL JURISDICTION OVER ALIEN CORPORATE PARENTS AND AFFILIATES IN ANTITRUST ACTIONS: A PLEA FOR PERSPICUITY

I. INTRODUCTION

Whether an alien parent or holding company with at least one U.S. subsidiary is subject to the jurisdiction of a federal court is a perennial problem. Patterns of trade increasingly tend to ignore national boundaries. The normal frictions of competition and regulation generate transnational lawsuits. Corporations trading in two or more countries often prefer to organize subsidiaries within each jurisdiction. A frequently litigated issue is whether the court can bring the alien affiliates before it and provide an adequate opportunity to fully resolve legal disputes.

This Comment will consider antitrust cases in which an alien corporate defendant owns at least one domestic subsidiary. Typically, the subsidiary distributes goods produced abroad by the parent company. The factual circumstances in which personal jurisdiction will normally be asserted are reasonably well defined.[1] However, the theoretical grounds on which jurisdiction will be upheld or denied present a quagmire of total confusion. More than fifty years ago Judge Benjamin Cardozo observed:

> The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor . . . . The logical consistency of a judicial conception will indeed be sacrificed at times when the sacrifice is essential to the end that some accepted public policy may be defended or upheld.[2]

The purpose of this Comment is to read the entrails of judicial conceptions which have been sacrificed for reasons of public policy.

Antitrust law provides a fertile source of cases which consider

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1. *See generally* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 53-75 (1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 40-114 (2d ed. 1973); E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 33-68 (.974); Griffin, *The Power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 L. & POL'Y INT'L BUS. 375 (1974); Rahl, *Extraterritorial Substantive Scope of the Antitrust Laws of the United States and of the Communities and Member States*, in COMMON MARKET AND AMERICAN ANTITRUST 50-89 (J. Rahl ed. 1970); Johnson, Newberg, Fox & Rahl, *Extraterritorial Procedure and Enforcement of the Antitrust Laws of the United States and of the Communities and Member States, id.* at 117-35.

2. Berkey v. Third Ave. Ry., 244 N.Y. 84, 94-95, 155 N.E. 58, 61 (1926) (parent corporation held not liable in tort action involving its subsidiary).

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these problems. Almost since the passage of the Sherman Act,[3] alien corporations have been sued when acts committed abroad have adversely affected U.S. plaintiffs. The extraterritorial application of antitrust law is well established. In most antitrust cases against corporations, a single sixty-year-old statute governs venue and service of process.[4] There is nevertheless little agreement on its meaning.

After a brief review of the historical background, this Comment will consider present problems and trends in the case law. Misconceived corporate law and intricate federal jurisdiction questions have needlessly complicated the issues. *International Shoe* and state long-arm statutes provide straightforward solutions.

II. RECENT CASES

A reading of antitrust cases against alien or out-of-state parent corporations reveals a variety of different approaches. As District Judge Bownes explains, "A degree of confusion has pervaded this area of the law."[5] The following three cases illustrate the contrasts in extraterritorial antitrust jurisdiction. The basic facts in each are similar; all three involve Japanese manufacturers with domestic subsidiary distributors.

A. Zenith Radio Corp. v. Matsushita Electric Industrial Co.[6]

Zenith Radio was a consolidation of two antitrust actions brought by the Zenith Radio Corporation and the National Union Electric Corporation against more than twenty Japanese and American corporate codefendants.[7] The complaints charged Japanese manufacturers with the sale of consumer electronic products at lower prices in the United States than in Japan.[8] These practices were alleged to violate the antitrust laws, as well as various tariff

3. 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975) (enacted as Act of July 2, 1890, ch. 647, §§ 1-8, 26 Stat. 209).

4. Clayton Act § 12, 15 U.S.C. § 22 (1970) (enacted as Act of Oct. 15, 1914, ch. 323, § 12, 38 Stat. 736).

5. Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 130 (D.N.H. 1975).

6. 402 F. Supp. 262 (E.D. Pa. 1975).

7. The cases were consolidated pursuant to the Multidistrict Litigation Act, 28 U.S.C. § 1407 (1970) (amended 1976) (rules of procedure amended 28 U.S.C. § 1407 (Supp. V 1975)). *In re* Japanese Elecs. Prod. Antitrust Litigation, [1975-1] Trade Cas. ¶ 60,105 (J.P.M.D.L. 1975).

8. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 244, 246 (E.D. Pa. 1975). For the Japanese consumer's side of this issue, see Thompson, *Antitrust and the Multinational Corporation: Competition or Cartels?*, 8 INT'L LAW. 618 (1974).

and antidumping provisions.[9] Eight of the defendants moved to dismiss for lack of personal jurisdiction, improper venue, and insufficient service of process.[10] All were Japanese corporations with either United States subsidiaries or controlling interests in Japanese corporations with American operations or subsidiaries.

Interrelations among the moving and nonmoving corporate affiliates were analyzed in extensive findings of fact.[11] Generally, the court found that functional separations were formally observed, but it found substantial overlap and identity in products handled, use of trademarks, public representation, and actual corporate control.

The court's discussion of the legal issues dealt first with venue. The court stated that if venue were proper, personal jurisdiction could be obtained by extraterritorial process.[12] In antitrust actions, venue and service of process for corporations are provided for by section 12 of the Clayton Act which provides:

> Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.[13]

The issue before the court was whether the activities of the moving

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9. The complaints of both plaintiffs alleged violations of the Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2, (1970) (amended 1974 & 1975); the Wilson Tariff Act § 73, 15 U.S.gc. § 8 (1970); the Anti-dumping Act of 1916, .5 U.S.C. § 72 (1970); and the Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1970). In addition, the National Union Electric Corporation claimed relief under the Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1970) (amended 1973 & 1975); the Zenith Radio Corporation claimed under the Clayton Act § 7, 15 U.S.C. § 18 (1970).

Two companion opinions to the instant case, of the same name, dealt with motions to dismiss for failure to state a claim. Counts brought under the Robinson-Patman Act were dismissed, 402 F. Supp. 244 (1975) (both "legs" of a price discrimination violation must involve sales or use in the United States). Motions to dismiss counts under the Antidumping Act of 1916 were denied, 402 F. Supp. 251 (1975) (Act gave potential denendants adequate notice and was not unconstitutionally vague).

10. 402 F. Supp. at 267.

11. *Id.* at 268-317. The findings of fact were not only extensive; they were extraordinarily complex. The defendants fit into five groups of affiliated corporations. The structures within the groups ranged from the straightforward Japanese parent with American subsidiary distributor (Sharp Corporation, *id.* at 283-84) to the more elaborate pyramidal multinational with vertically integrated distribution systems (*e.g.*, Hitachi Limited, *id.* at 268-72, 288-95) and horizontally integrated multinational conglomerate (*e.g.*, Mitsubishi Corporation, *id.* at 279-83, 295-303, 312-17).

12. *Id.* at 317. *See id.* at 328-29.

13. 15 U.S.C. § 22 (1970).

parent corporations constituted "transacting business" in the New Jersey and Eastern Pennsylvania forums.

The court found the "transacts business" standard to be much broader than "found," "presence," or similar terms.[14] It noted that the "plain remedial purpose"[15] of the section was to give injured parties a local remedy and to substitute everyday commercial concepts for legal technicalities. Applying these concepts, the court held that venue was proper. Each of the defendant corporate groups marketed its products in the forums under common trademarks through integrated sales systems; each group held itself out to the public as a single entity.[16]

The court did not decide whether simple ownership of a local subsidiary amounted to transacting business. It rejected, however, the application of earlier case law which had held that subsidiary ownership was, of itself, neither "presence" nor "doing business."[17] The defendants argued strongly that none of the acts alleged to support venue was sufficient to show the parents' direct control of their subsidiaries. However, the court held that such an approach ignored "the actual unity and continuity of [their] whole course of conduct."[18] The court concluded that viewed as a whole, "[t]he . . . fact[s] . . . speak for themselves."[19] The relationships between the parent corporations and their subsidiaries transacting business in the forum were "of sufficient intimacy"[20] that the parent corporations could fairly be held to be transacting business there themselves.

Without further discussion, the court held that in personam jurisdiction over the moving defendants would not offend "traditional notions of fair play and substantial justice."[21] The court asserted that since the defendants had been shown to be transacting business, the due process tests of minimum contacts[22] and purposeful availment[23] were satisfied.

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14. 402 F. Supp. at 318.

15. *Id.*

16. *Id.* at 327-28.

17. *E.g.*, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925), discussed in detail at notes 157-64, 176-98 *infra* and accompanying text.

18. 402 F. Supp. at 321, quoting United States v. Scophony Corp. of America, 333 U.S. 795, 817 (1948). See detailed discussion at notes 138-56 *infra* and accompanying text.

19. 402 F. Supp. at 328.

20. *Id.*

21. *Id.* at 329; International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

22. 326 U.S. at 317, 319.

23. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

B. O.S.C. Corp. v. Toshiba America, Inc.[24]

Faced with facts similar to those in *Zenith Radio,* the Court of Appeals for the Ninth Circuit reached a different result and applied a markedly different interpretation of the Clayton Act venue provision.[25] *Toshiba America* was also an antitrust action against a Japanese parent corporation—in this case a manufacturer of desk calculators—and its domestic subsidiary. The alien corporation moved to dismiss on the grounds of improper venue and lack of personal jurisdiction. The question before the court was again whether the alien parent was "transacting business" within the meaning of section 12 of the Clayton Act.

The court held that the due process clause of the fourteenth amendment[26] limited the scope of what constituted "transacting business."[27] The parties agreed that the Japanese parent corporation, Tokyo Shibaura, had no agents, representatives, bank accounts, place of business, or property in California. All of Tokyo Shibaura's sales were made in Japan to its wholly-owned subsidiary, which imported the calculators into America.[28] Following other cases decided in the Ninth Circuit,[29] the court adopted the jurisdictional principles expressly rejected in *Zenith Radio.*[30] It held that the presence of a subsidiary within the forum did not mean that the parent was transacting business there. Thus, the court found no basis upon which to find proper venue or to assert personal jurisdiction over the defendant.

The court emphasized two factors. First, the court found that the parent corporation and its subsidiary were separate entities. The plaintiff had not sustained its burden of showing that the subsidiary was managed and controlled by its alien parent.[31] Second, the court stressed that deliveries took place in Japan. It ignored the plaintiff's

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24. 491 F.2d 1064 (9th Cir. 1974) (per curiam). *See generally* 8 VAND. J. TRANSNAT'L L. 249 (1974).

25. Clayton Act § 12, 15 U.S.C. § 22 (1970).

26. I.e., International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny.

27. 491 F.2d at 1066.

28. *Id.* at 1065, 1066. It is not clear whether Tokyo Shibaura had any sales other than to its American subsidiary, but all U.S. sales were made through the subsidiary.

29. Hayashi v. Sunshine Garden Prods., Inc., 285 F. Supp. 632 (W.D. Wash. 1967), *aff'd sub nom.* Hayashi v. Red Wing Peat Corp., 396 F.2d 13 (9th Cir. 1968) (per curiam); Wireline, Inc. v. Byron Jackson Tools, Inc., 239 F. Supp. 955 (D. Mont. 1964), *aff'd,* 344 F.2d 331 (9th Cir. 1965) (per curiam).

30. *Compare* 491 F.2d at 1067 *with* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 319-21. See note 17 *supra* and accompanying text.

31. I.e., other than as the sole shareholder.

argument that this was a mere technical nicety. The court held that while Tokyo Shibaura's calculators found their way into California, their presence did not support the conclusion that the manufacturer was transacting business in California.[32]

C. *Hitt v. Nissan Motor Co.*[33]

In *Hitt*, the court divided section 12 into its two component parts and considered the questions of venue and personal jurisdiction separately. The opinion was rendered in a pretrial consolidation of twelve private antitrust actions.[34] The defendant Nissan Motor Company, Ltd. (Nissan-Japan) challenged service of process in two of the actions, and venue and personal jurisdiction in eight actions.

Nissan-Japan manufactured Datsun motor vehicles, equipment, parts, and accessories. These were sold to and shipped by the Marubeni-America Corporation,[35] which delivered the products in America to Nissan-Japan's wholly-owned subsidiary, Nissan-USA.[36] Nissan-USA was a California corporation authorized to do business throughout the United States; it was the exclusive domestic wholesale distributor for Nissan-Japan's products.

Whether venue was proper turned on the court's construction of the "transacts business" criterion. The court noted, as did the court in *Zenith Radio,* that a liberal construction would be consonant with the congressional policies of expanding the availability of venue and allowing injured parties to redress antitrust violations in their home districts.[37] The test adopted by the court was "the practical everyday business or commercial concept of doing or carrying on business of any substantial character."[38]

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32. 491 F.2d at 1067-68.

33. 399 F. Supp. 838 (S.D. Fla. 1975).

34. *Id.* at 838 n.*. *In re* Nissan Motor Corp. Antitrust Litigation, 385 F. Supp. 1253 (J.P.M.D.L. 1974), adding to cases previously consolidated in 352 F. Supp. 960 (J.P.M.D.L. 1973). On the plaintiff's side, *Hitt* is an enormous class action suit, *In re* Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977). The cases were inspired by a successful Justice Department prosecution, United States v. Nissan Motor Corp. in U.S.A., [1973-1] Trade Cas. ¶ 74,333 (N.D. Cal. 1973) (consent decree).

35. Marubeni-America Corporation was an export-import company and was 100% owned by Marubeni-Japan. Marubeni-Japan owned 3.9% of the stock of Nissan-Japan, which owned approximately 5% of Marubeni-Japan. New motor vehicles were transported on ships chartered by the subsidiary, Nissan Motor Car Carrier Company, Ltd., 399 F. Supp. at 846.

36. *Id.* at 845.

37. *Id.* at 840; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 317-18 & n.29 (E.D. Pa. 1975). *See* United States v. National City Lines, Inc., 334 U.S. 573, 582-88 (1948), *modified,* 337 U.S. 78 (1949).

38. 399 F. Supp. at 840. *See* United States v. Scophony Corp. of America, 333 U.S. 795, 807 (1948).

The court concluded that corporate separations between Nissan-Japan and Nissan-USA, when viewed from the standpoint of the average businessman, could not insulate the parent corporation from a finding that it was transacting business in the forum districts. The court held that the parent's day-to-day control of its subsidiary was not required. The subsidiary was organized as Nissan-Japan's only means of distribution within the United States, and, as such, was a "mere conduit . . . for entering and exploiting the American market."[39] Also, Nissan-Japan had a number of representatives and technical advisors in the forum districts who assisted with the sales and service functions of Nissan-USA. The court held that these activities were enough to meet the broad "transacts business" test of section 12. The court additionally held that regardless of the exact degree of influence over the subsidiary, "Nissan-Japan's hold over Nissan-USA was sufficient to . . . control those decisions which might involve violations of the antitrust laws."[40]

The holding that venue was proper in the districts where the suits had originally been brought was buttressed by the court's holding that substantial sales within the districts constituted "transacting business" within the meaning of section 12 of the Clayton Act.[41] In all the districts, sales were substantial from the average businessman's point of view. That deliveries were made in Japan by Nissan-Japan and shipped C.I.F.[42] by Marubeni-America did not alter the basic fact pattern. The court stated that to give "blind deference to technicalities" would be to thwart the congressional policy of applying everyday business concepts to the "transacts business" requirement.[43]

In the eight actions in which venue was challenged, Nissan-Japan also challenged the courts' ability to assert in personam jurisdiction over it. The court first reexamined the facts, enumerating jurisdictional contacts rather than evidence of transacting business. In addition to Nissan-USA's contacts on behalf of Nissan-Japan, the court noted the parent's direct involvement in the management

39. 399 F. Supp. at 842. *Contra,* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d at 1066-67 (9th Cir. 1974).

40. 399 F. Supp. at 842.

41. *Id.* at 843-44. *See* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) (discussed in detail at notes 126-32 *infra* and accompanying text); Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 918-19 (5th Cir. 1962).

42. Risk of loss and title passed to Marubeni-America in Japan, 399 F. Supp. at 844 & n.13. *See* U.C.C. § 2-320 & Official Comment 1.

43. 399 F. Supp. at 844.

of Nissan-USA[44] as well as limited direct contact with the ultimate purchasers of its products.[45]

The court observed that the district courts could assert personal jurisdiction over the defendant based on local state long-arm statutes. The court noted that the reach of these statutes is circumscribed by the fourteenth amendment, but that their application is controlled by local law. Analyzing both the general requirements of such statutes and the particular statutes and contacts in each case,[46] the court concluded that in each case Nissan-Japan had "purposefully avail[ed] itself of the privilege of conducting activities within the forum State . . . ."[47] Nissan-Japan had therefore subjected itself to personal jurisdiction within the forums.

D. Comparisons

The three cases differed greatly in their treatment of fundamental issues. The courts in *Zenith Radio* and *Toshiba America* tended to blend venue and in personam jurisdiction into one issue, while the *Hitt* court justified its findings on each independently. In both *Zenith Radio* and *Toshiba America,* the critical question was the amount of corporate control by the alien parent, while in *Hitt* the degree of control was but one aspect of the alien parent's presence in the United States. Despite these similarities between *Zenith* and *Toshiba,* the court in *Zenith Radio* viewed the interlocking companies as single entities despite the absence of direct formal control, while the Ninth Circuit, in *Toshiba America,* found day-to-day control essential to jurisdiction. Although the opinion in *Toshiba America* stressed the fact that the parent's direct control over the product in question ended with delivery in Japan, the *Zenith Radio* and *Hitt* decisions treated this distinction as a technicality where the clear purpose and result of the parent's sales was American export.

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44. There was a great deal of overlap of directors, officers, and employees between the two companies, *id.* at 845.

45. During the early part of the jurisdictional period, Nissan-Japan issued warranties directly to retail purchasers of new Datsuns, *id.* at 846.

46. *Id.* at 847-54. There were two general classes of long-arm statutes. These were: statutes allowing jurisdiction based upon a "tortious act" within the state, *e.g.,* MO. REV. STAT. § 506.500.1(3) (1969) ("commission of a tortious act within this state"); statutes exerting jurisdiction over defendants "transacting business" within the state, *e.g., id.* § 506.500.1(1) ("transaction of any business within this state"). The court noted that "transacting business" for purposes of state long-arm statutes was a question of minimum contacts and not a question of federal law, 399 F. Supp. at 849-50. See notes 119, 336 *infra.*

47. 399 F. Supp. at 847; Hanson v. Denckla, 357 U.S. 235, 253 (1958).

Broad policy considerations are, at least on the surface, not the crucial issues.[48] The courts differ on complex questions of jurisdictional and corporate law. The cases are like block puzzles, wherein each of many solutions is apparently equally valid. There is no lack of precedent; these issues have been litigated many times. The difficulty is that very little of the precedent is consistent.

III. THE DEVELOPMENT OF EXTRATERRITORIAL ANTITRUST JURISDICTION

To understand the present state of extraterritorial antitrust jurisdiction, it is necessary briefly to review its history. The question addressed throughout this Comment—to what extent do American antitrust laws apply to alien corporations owning domestic subsidiaries but not doing business directly within the United States?—has two parts. First, is the court competent to rule on the legality of acts performed abroad by aliens; does the court have subject matter jurisdiction? Second, can the court "assert judicial power over the parties and bind them by its adjudication";[49] does it have personal jurisdiction over the parties? The key to personal jurisdiction is that the two issues are inextricably related.

A. The Intent of Congress

Subject matter jurisdiction under the federal antitrust laws is entirely statutory. Despite early common law doctrines prohibiting contracts in restraint of trade,[50] the common law was generally ineffective in checking abuses of economic power.[51] Part of the novelty of the Sherman Act[52] was putting federal teeth into trade regulation policies.[53] The legislative history lends support to judicial assertions about the competence of American courts to regulate the conduct of aliens abroad and sheds light on the willingness of courts to "lift the corporate veil"[54] and find personal jurisdiction over foreign or

48. *But see* 8 VAND. J. TRANSNAT'L L. 249, 254 (1974).

49. Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 224 (D.N.J. 1966).

50. *See generally* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629-46 (1960); Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954).

51. H. THORELLI, THE FEDERAL ANTITRUST POLICY 36-53 (1955) (summarized at 50-53).

52. 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

53. *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 139, at 23-24 (1967).

54. This phrase, which refers exclusively to situations involving parent-subsidiary relationships, is taken from Griffin, *The Power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 L. & POL'Y INT'L BUS. 375, 383 n.44, *passim* (1974). The terminology is helpful in distinguishing jurisdiction

alien corporate parents in antitrust cases.[55]

The basic American antitrust statute is the Sherman Act,[56] and "the policy unequivocally laid down by the Act is competition."[57] The Sherman Act was passed in 1890[58] to enforce a general belief in the virtues of competition and to appease popular fears that massive concentrations of capital and industry were taking over American economic life.[59] Section 1 of the Sherman Act makes all contracts, combinations, and conspiracies in restraint of trade illegal.[60] Section 2 prohibits monopolization, and attempts or conspiracies to monopolize.[61] Section 2 complements section 1, and it has long been established that the two are to be read together.[62] These are criminal laws, and violators are guilty of a felony.[63] Civil enforcement, however, is also provided for and actively encouraged by the treble damages provisions of section 4 of the Clayton Act.[64]

From the outset, the antitrust laws were intended to cover acts performed abroad as well as in the United States.[65] During debates

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over foreign corporate parents from other situations in which courts will "disregard the corporate fiction" or "pierce the corporate veil." *See also* Cohn & Simitis, *"Lifting the Veil" in the Company Laws of the European Continent,* 12 INT'L & COMP. L.Q. 189 (1963).

55. *But see* P. AREEDA, *supra* note 53, ¶ 106, at 5.

56. 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

57. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958). *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.).

58. Act of July 2, 1890, ch. 647, §§ 1-8, 26 Stat. 209.

59. *See* H. THORELLI, *supra* note 51, at 54-163 (summarized at 160-63); J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 19-24 (7th ed. 1976). Just which theory carried the most weight in Congress is debatable, *id.* at 214-21; *see* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. CHI. L. REV. 221 (1956).

60. 15 U.S.C. § 1 (Supp. V 1975) provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

61. 15 U.S.C. § 2 (Supp. V 1975) provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

62. Standard Oil Co. v. United States, 221 U.S. 1, 61-62 (1911).

63. 15 U.S.C. §§ 1-3 (Supp. V 1975) (amending 15 U.S.C. §§ 1-3 (1970) (formerly misdemeanors)).

64. 15 U.S.C. § 15 (1970) (corresponds to Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (repealed 1955)).

65. 21 CONG. REC. 2460-61 (1890) (speech of Sen. Sherman); *id.* at 3146, 3152 (remarks of Sen. Hoar). *See* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 19-21 (1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 6-8 (2d ed. 1973). *See generally* H. THORELLI, *supra* note 51, at 177-210.

in the Senate, arguments were made that the bill's effects could be easily evaded by entering into agreements abroad.[66] It was also maintained that smaller American businesses would suffer while foreign combinations and cartels, as well as the larger domestic concentrations of wealth, which could also operate abroad, would continue to flourish.[67] The bill which was finally passed, on the authority of the commerce clause,[68] extended the coverage of the Act to "trade or commerce among the several States, or with foreign nations."[69] Congress felt the law could not be effective unless its coverage was as broad as possible. The language in the Act purports to give it effect in all cases involving foreign commerce.[70]

B. The Subject Matter Jurisdiction

Most of the foreign antitrust cases have been brought under the first two sections of the Sherman Act, and the cases have generally involved United States imports and exports of commodities.[71] As Professor Brewster observed, "[t]he nub of all the cases . . . has been an alleged clog in the free flow of goods."[72]

Initially, courts were reluctant to assume jurisdiction over acts performed abroad.[73] Since 1911, however, the cases have uniformly

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66. 20 CONG. REC. 1458-62 (1889); 21 *id.* at 1765-72 (1890) (criticisms of Sen. George).

67. 21 *id.* at 1765-72 (1890) (criticisms of Sen. George); *see generally* H. THORELLI, *supra* note 51, at 170-200. The constitutionality of legislation purporting to assert judicial power extraterritorially was seriously questioned, as was the power of Congress over goods that had not yet entered or had passed out of interstate commerce. See notes 65-66 *supra*. *Compare* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (manufacturing purely local; thus, the Sugar Trust was not subject to the antitrust laws) *with, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) *and* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

68. U.S. CONST. art. I, § 8, cl. 3.

69. 15 U.S.C. §§ 1-3 (Supp. V 1975) (same language in all three sections).

70. *See also* Sherman Act § 6, 15 U.S.C. § 6 (1970), which provides quasi-in-rem jurisdiction over goods owned by combinations or being transported pursuant to an illegal agreement. The section has rarely been used, and only in foreign commerce cases where jurisdiction could not otherwise be obtained, *e.g.*, United States v. 5,898 Cases of Sardines, Adm. No. 105-37 (S.D.N.Y. 1930), CCH FEDERAL ANTITRUST LAWS, WITH SUMMARY OF CASES (1890-1951), Case No. 373 (1952). *See generally* K. BREWSTER, *supra* note 65, at 20; W. FUGATE, supra note 65, at 108-11. Section 8 of the Sherman Act, 15 U.S.C. § 7 (1970), expressly applies the Act's provisions to "corporations and associations existing under or authorized by the laws of . . . any foreign country."

71. W. FUGATE, *supra* note 65, at 29 & n.1.

72. K. BREWSTER, *supra* note 65, at 77.

73. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (Holmes, J.).

> [T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

Id. at 356;

> [T]he acts causing the damage were done . . . outside the jurisdiction of the United

affirmed the will of Congress and applied the Sherman Act to agreements entered into abroad whose purpose or effect was to restrain United States commerce.[74] Professor Rahl has noted:

> Probably nothing does as well to make a legal boundary as does a negative holding. But it appears that in the entire course of American antitrust history to date, only one reported litigated case, *i.e., American Banana,* has gone to final judgment for the defendant on the ground that the facts were too remote territorially from the statute's substantive reach.[75]

This consistency has been maintained despite shifting theories sustaining extraterritorial subject matter jurisdiction.

The rationale of many early cases was that when some overt act of a criminal conspiracy had occurred within the United States, the perpetrators could properly be held liable in the district courts.[76] The courts required some local activity upon which to base both subject matter and personal jurisdiction.[77] As the extent of international trade has grown, the modern cases have gone much further.[78]

States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

Id. at 355. *See generally* The Apollon, 22 U.S. (9 Wheat.) 362 (1824); Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 17, 20 (1965).

Though strict territoriality no longer limits jurisdiction, the holding of *American Banana* has not been overruled by any means; it is still good law under the act of state doctrine, Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 109-10 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972). *Compare* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3373 (Dec. 6, 1977) *with* Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 549 F.2d 597 (9th Cir. 1977). *See* Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad,* 9 J. INT'L L. & ECON. 233 (1974). *See also* Kintner & Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce—Variations on American Banana Since 1909,* 15 B.C. INDUS. & COM. L. REV. 343 (1973).

74. Representative cases include United States v. Sisal Sales Corp., 274 U.S. 268 (1927); Thomsen v. Cayser, 243 U.S. 66 (1917); United States v. American Tobacco Co., 221 U.S. 106 (1911).

75. Rahl, *Extraterritorial Substantive Scope of the Antitrust Laws of the Unitied States and of the Communities and Member States,* in COMMON MARKET AND AMERICAN ANTITRUST 56 (J. Rahl ed. 1970) (footnote omitted).

76. *See, e.g.,* United States v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87, 106 (1913); United States v. Hamburg-Amerikanische P.F.A.G., 200 F. 806 (S.D.N.Y. 1911), 216 F. 971 (S.D.N.Y. 1914), *rev'd as moot,* 239 U.S. 466 (1916). *See generally* W. FUGATE, *supra* note 65, at 68-73. See note 312 *infra.*

77. Oseas, *Antitrust Prosecutions of International Business,* 30 CORNELL L.Q. 42 (1944).

78. The history is outlined in ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, [OPPENHEIM] REPORT 65-83 (1955); SECTION OF ANTITRUST LAW OF THE ABA, ANTITRUST DEVELOPMENTS 1955-1968 40-60 (1968); Victor, *Multinational Corporations: Anti-*

Under the "objective territorial principle," jurisdiction may be based upon effects within the forum state.[79] The rule that has been applied in antitrust cases was stated by Judge Learned Hand in *United States v. Aluminum Co. of America (Alcoa).*[80] Judge Hand held broadly 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 . . . ."[81] Thus, any foreign act producing a prohibited effect in the United States may be viewed as a violation of United States law. Realizing, however, that trade restrictions anywhere in the world might eventually have repercussions in the United States, Judge Hand limited his rule to cases where the conduct was intended to and did affect imports.[82] The *Alcoa* formula has since been modified slightly, but its thrust remains the same.[83] The United States continues to assert sweeping subject matter jurisdiction over economic acts performed abroad substantially affecting imports, exports, or shipping.[84]

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trust Extraterritoriality and the Prospect of Immunity, 8 J. INT'L L. & ECON. 11, 11-16 (1973). *See also* P. AREEDA, *supra* note 53, at 63-64 & nn.191-96; Kintner & Hallgarten, *supra* note 73, *passim;* Note, *Extraterritorial Application of United States Law: A Conflict of Laws Approach,* 28 STAN. L. REV. 1005, 1006-10, 1017-20 (1976).

79. *See* The S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 10; Rivard v. United States, 375 F.2d 882 (5th Cir.), *cert. denied,* 389 U.S. 884 (1967).

80. 148 F.2d 416 (2d Cir. 1945).

81. *Id.* at 443.

82. *Id.* at 443-44.

83. *Compare* United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949), *final decree,* 115 F. Supp. 835 (1953) (knowledge of a likely effect sufficient) *with* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b) & Comment *f* (1965). *See generally* K. BREWSTER, *supra* note 65, at 286-308; Griffin, *supra* note 54, at 398-401; Stokes, Panel Discussion: Extraterritorial Application of Law, *Limits Imposed by International Law on Regulation of Commercial Activity,* 64 AM. J. INT'L L. [PROC.] 135-41 (1970). *See also* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1333-37, 1341-42 (2d Cir. 1972) (securities law; relation of extraterritorial subject matter jurisdiction to personal jurisdiction).

84. Whether the antitrust laws of the United States may extend to reach acts done abroad is no longer an open question. Scholarly debate about the propriety and legality of asserting jurisdiction over extraterritorial conduct has nevertheless been extensive. In addition to the articles and treatises cited herein, see Haight, *International Law and Extraterritorial Application of the Antitrust Laws,* 63 YALE L.J. 639 (1954); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws,* 33 BRIT. Y.B. INT'L L. 146 (1957); Maechling, *Uncle Sam's Long Arm,* 63 A.B.A.J. 372 (1977); Seidl-Hohenveldern, *The Limits Imposed by International Law on the Application of Cartel Law,* 5 INT'L LAW. 279 (1971); Timberg, *Antitrust and Foreign Trade,* 48 NW. U.L. REV. 411 (1953); Verzijl, *The Controversy Regarding the So-Called Extraterritorial Effect of the American Antitrust Laws,* 8 NETH. INT'L L. REV. 3 (1961).

C. Traditional Notions of Fair Play and Substantial Justice[85]

At about the same time federal subject matter jurisdiction was leaving national boundaries behind, personal jurisdiction was outgrowing the rigid formulas based on presence within a state. Acts done abroad may allegedly violate antitrust laws because of their effects on United States commerce, but the orders of a United States court may only apply to those foreign corporations subject to its jurisdiction in personam.[86] As restated in Judge Coolahan's lucid review in *Japan Gas Lighter Association v. Ronson Corp.*,[87] "[p]ersonal jurisdiction refers to the Court's ability to assert judicial power over the parties and bind them by its adjudication. Service of process is the corrollary [*sic*] requirement which sets the Court's personal jurisdiction in gear."[88]

American courts have experienced difficulty in adequately describing the standards which delimit their ability to subject an out-of-state or alien corporation to the courts' personal jurisdiction.[89] Part of the difficulty stems from ascribing anthropomorphic attributes to incorporeal statutory entities.[90] Jurisdiction over the person once referred to the sheriff's ability to physically produce the defendant in court.[91] However, the fictious legal "person" of the corporation does not exist anywhere; through its agents it performs acts in many places.[92] Much confusion has been generated by the use of such terms as "presence," "found," and "inhabitant."[93] The history of these Sisyphean labors of the law, as courts generated substitutes for physical presence by analogy, is already well documented.[94] By

85. Milliken v. Meyer, 311 U.S. 457, 463 (1940), *adopted in* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

86. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-12 (1969) (stipulation by subsidiary that it and parent corporation were a single entity not binding upon the parent which was neither named in counterclaim nor served; antitrust violations, abuse of patents); Pennoyer, v. Neff, 95 U.S. 714, 722-24, 727, 729-30 (1877).

87. 257 F. Supp. 219 (D.N.J. 1966).

88. *Id.* at 224.

89. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 577 (1958).

90. *See* United States v. Scophony Corp. of America, 333 U.S. 795, 802-03 (1948).

91. Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52 (1968); Note, *Jurisdiction of Federal District Courts Over Foreign Corporations*, 69 HARV. L. REV. 508, 509 & nn.6-7 (1956).

92. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

93. *See, e.g.*, Clayton Act § 12, 15 U.S.C. § 22 (1970); United States v. Scophony Corp. of America, 333 U.S. at 802; International Shoe Co. v. Washington, 326 U.S. at 315-19.

94. *See generally* Current Legislation and Decisions, *Foreign Corporations—Minimum Contacts—Due Process*, 36 J. AIR L. & COM. 346, 347-48 (1970); Note, *A Critical Evaluation*

the early part of this century there were a plethora of technical and arbitrary tests for determining whether a corporation was "doing business" in a jurisdiction and therefore amenable to service of process.[95]

In 1945 this amalgam of difficult and muddled distinctions was all but swept away.[96] *International Shoe Co. v. Washington*[97] announced the modern rule that the corporate defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[98] Mr. Justice Black's separate opinion criticized this formulation as vague and as having little or nothing to do with the due process question raised by the case.[99] However, the now famous "fair play" language only set forth the Court's broad principles. The rule laid down in *International Shoe* tied the extent of presence to the substantive reasons for which jurisdiction was asserted:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative . . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.[100]

The first sentence quoted above criticized the complex distinctions that had developed under prior case law. *International Shoe* effectively overruled cases that had depended on formal technicalities.[101] The second sentence states the rule. Where there are only

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of State Foreign Corporation Laws as a Bar to Federal Diversity Jurisdiction, 12 WM. & MARY L. REV. 416 (1970); Green, *Federal Jurisdiction In Personam of Corporations and Due Process,* 14 VAND. L. REV. 967, *passim* & n.1 (1961); Kurland, *supra* note 89, at 569-74, 577-86; Note, *Jurisdiction of Federal District Courts Over Foreign Corporations,* 69 HARV. L. REV. 508, 509-14 (1956); Foster, *Personal Jurisdiction Based on Local Causes of Action,* 1956 WIS. L. REV. 522, 527-40.

95. *See* Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930) (L. Hand, J., listing factors to be considered). *See also* Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943).

96. Kurland, *supra* note 89, at 586.

97. 326 U.S. 310 (1945).

98. *Id.* at 316.

99. *Id.* at 323-26. *See also* Twerski, *A Return To Jurisdictional Due Process—The Case For The Vanishing Defendant,* 8 DUQ. L. REV. 220, 224-28, 239-45 (1970) (criticizes "minimum contacts" doctrine).

100. 326 U.S. at 319.

101. Especially suspect are corporate methods of doing business intended to evade regu-

minimum contacts, subject matter of the suit and the substantive laws being applied must relate to the type of activity supporting jurisdiction within the forum.[102]

The "mimimum contacts" doctrine of *International Shoe* was clarified by a series of later decisions.[103] In *McGee v. International Life Insurance Co.*,[104] the defendant's only contact with the forum state was to assume a resident's life insurance policy and accept premium payments; all transactions were conducted by mail. This tenuous contact was nevertheless held sufficient to subject the insurance company to the jurisdiction of the state courts on a claim by the beneficiary of the policy.[105] In *Hanson v. Denckla*,[106] decided soon after *McGee*, the Court pointed out that the *International Shoe* principles did not do away with all restrictions on in personam jurisdiction.[107] The Court held that those principles also defined the limits of state court jurisdiction. Chief Justice Warren rephrased the minimum contacts doctrine: "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum . . . thus invoking the benefits and protections of its laws."[108]

Antitrust actions against aliens without domestic subsidiaries have followed the *International Shoe* guidelines where there have been only minimum contacts. In antitrust cases brought under the Sherman Act the substantive issue is whether the corporate defen-

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lation. *See* International Harvestor Co. of America v. Kentucky, 234 U.S. 579, 584-85 (1914) (state antitrust action); Kurland, *supra* note 89, at 586 & n.99 (reprinting portions of the *International Shoe* Transcript).

102. 2 MOORE'S FEDERAL PRACTICE ¶ 4.25[5], at 1173 (2d ed. 1977) summarizes the rule that developed out of *International Shoe:*

> If there are substantial contacts with the state, for example a substantial and continuing business, and if the cause of action arises [out] of the business done in the state, jurisdiction will be sustained. If there are substantial contacts with the state, but the cause of action does not arise out of these contacts, jurisdiction may be sustained. If there is a minimum of contacts, and the cause of action arises out of the contacts, it will normally be fair and reasonable to sustain jurisdiction. If there is a minimum of contacts and the cause of action does not arise out of the contacts, there will normally be no basis of jurisdiction . . . .

(Footnotes omitted.) *See* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 412-13 (9th Cir. 1977); Comment, *International Shoe and Long-Arm Jurisdiction—How About Pennsylvania?*, 8 DUQ. L. REV. 319, 320-26 (1970).

103. *See* 2 MOORE'S FEDERAL PRACTICE ¶ 4.25[4] (2d ed. 1977); Kurland, *supra* note 89, at 593-623.

104. 355 U.S. 220 (1957).

105. 355 U.S. at 223-24. *See also* Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

106. 357 U.S. 235 (1958).

107. *Id.* at 251.

108. *Id.* at 253; 326 U.S. at 319.

dant is distributing products pursuant to a restrictive agreement or practice, or pursuant to an illegal cartel, conspiracy, or monopoly.[109] Unless the defendant's activities are so systematic and continuous that he can be said to be present,[110] the jurisdictional test is whether that defendant's contacts in the forum relate to or are in furtherance of the violations charged.

In *United States v. DeBeers Consolidated Mines, Ltd.*,[111] the defendants were interrelated alien corporations controlling approximately ninety-five percent of the world's diamond output. Ninety percent of DeBeers's diamonds were ultimately sold in the United States. The court held that none of the defendants were "doing business" so as to be subject to process.[112] Very few sales were made by the defendants in the United States.[113] The court found that the companies' New York bank accounts were incidental to their business there, and it noted that purchases of equipment in the United States were only indirectly related to eventual distribution.[114] The court reasoned that advertising alone could not constitute sufficient contact for personal liability, since large domestic corporations did not subject themselves to jurisdiction anywhere in the country simply by using national advertising.[115] The *DeBeers* opinion does not expressly rely on *International Shoe,* but its analysis is similar. None of the United States contacts were sufficiently related to distribution or to the cartel practices alleged to violate the antitrust laws.

Obversely, two fairly recent decisions have based jurisdiction on fleeting contacts that were the basis of the antitrust actions. In *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*,[116] in personam jurisdiction over a Danish corporation was based on large United States sales, infrequent mailings, and a "close relationship" to distributors. The most significant contact, however, was a threatening transatlantic telephone call which was the subject matter of the complaint.[117] In

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109. *See* Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (Supp. V 1975).

110. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Systems Operations, Inc., v. Scientific Games Dev. Corp., 414 F. Supp. 750, 754 (D.N.J. 1976).

111. [1948-1949] Trade Cas. ¶ 62,248 (S.D.N.Y. 1948).

112. This holding may be suspect today, *see* W. FUGATE, *supra* note 65, at 107.

113. [1948-1949] Trade Cas. ¶ 62,248, at 62,480.

114. *Id.* at 62,479, 62,482. *But see* Crusader Marine Corp. v. Chrysler Corp., 281 F. Supp. 802, 804 (E.D. Mich. 1968).

115. [1948-1949] Trade Cas. ¶ 62,248, at 62,479-80.

116. [1973-1] Trade Cas. ¶ 74,594 (S.D.N.Y. 1973).

117. *Id.* at 94,632-35. As will be discussed at notes 271, 276 *infra* and accompanying text, the court broadened the concept of forum under the "national contacts" theory.

Cofinco, Inc. v. Angola Coffee Co.,[118] the court concluded that the alien corporate defendant's repeated transactions within the district through telex communications, and the institution of arbitration proceedings on behalf of all the defendants by one of them, clearly brought them within the court's jurisdiction pursuant to the New York long-arm statute.[119] The cases have more in common than illustrations of electronic communications contacts.[120] In both cases, the very limited intrusions into the forum were for the purpose of furthering illegal conspiracies.[121] As in *McGee,* minimum contacts were sufficient since they were directly related to the cause of action.

D. Alien Corporations Transacting Business Through Subsidiaries—Blurred Distinctions

Well before *International Shoe* was decided, Congress enacted legislation liberalizing the availability of venue and service of process in antitrust actions against corporations. Section 7 of the Sherman Act had provided that persons injured by antitrust violations could "sue therefore in any circuit court of the United States in the district in which the defendant resides, or is found . . . ."[122] The criteria of "resides" and "found" invoked the complex distinctions involved in the tests of "presence" and "doing business."[123] Plaintiffs were often unable to seek a remedy in the place where they had been injured. Congress sought to enlarge the choices of venue avail-

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118. [1975-2] Trade Cas. ¶ 60,456 (S.D.N.Y. 1976).

119. *Id.* at 67,055-56; N.Y. Civ. Prac. Law § 302(a) (McKinney 1972) provides in relevant part:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state; or
>
> . . . .
>
> 3. commits a tortious act without the state causing injury to person or property within the state . . . .

120. *See also* Weller v. Cromwell Oil Co., 504 F.2d 927, 933 (6th Cir. 1974) (Phillips, C.J., dissenting). *But cf.* San Antonio Tel. Co. v. American Tel. & Tel. Co., 499 F.2d 349 (5th Cir. 1974) (interconnection of a communications network and sharing of long distance revenues held insufficient to show that affiliated companies were transacting business locally).

121. [1973-1] Trade Cas. ¶ 74,594, at 94,632, 94,635; [1975-2] Trade Cas. ¶ 60,456, at 67,052-53.

122. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (repealed .955).

123. *See* People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918) (early domestic case denying jurisdiction over out-of-state parent with local subsidiary). *See generally* Harris, *A Corporation as a Citizen in Connection with the Jurisdiction of the United States Courts,* 1 Va. L. Rev. 507 (1914); Note, *State Control over Foreign Corporations Engaged in Both Interstate and Intrastate Commerce,* 1 Va. L. Rev. 477 (1914).

able to plaintiffs by enacting section 12 of the Clayton Act.[124] This section allowed suits against corporations to be brought "also in any district wherein it may be found *or transacts business.*"[125]

The first Supreme Court case to construe "transacts business" was *Eastman Kodak Co. v. Southern Photo Materials Co.*[126] Plaintiff filed the action at its Georgia corporate home, and the defendant was served personally at its principal place of business in New York. The Court held that the plain meaning of section 12 was that suits could be brought wherever a defendant transacted business, and process could be served wherever he could be found. The Court noted the remedial purpose of the legislation and reasoned that the additional language in the venue clause implied added meaning. Defining the broader standard for venue, the Court held:

> a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not . . . "found" therein and . . . amenable to local process,—if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character.[127]

Most phrases the Court gives their plain meaning in the ordinary and usual sense soon evolve into legal terms of art, but the everyday construction given "transacts business" is the key to *Kodak* and is still good law.[128] Elements identified by the Court included selling and shipping goods to local dealers and soliciting

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124. 15 U.S.C. § 22 (1970) (originally enacted as An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes, ch. 323, § 12, 38 Stat. 736 (1914)), quoted in full in text accompanying note 13 *supra.*

125. *Id.* (emphasis added). A comprehensive review of the legislative history of section 12 may be found in United States v. National City Lines, Inc., 334 U.S. 573, 581-93 (1948), *modified,* 337 U.S. 78 (1949); *see also* Eastland Constr. Co. v. Keasbey & Mattison Co., 358 F.2d 777, 780-81 (9th Cir. 1966). Unfortunately, the legislative history is not extensively discussed in either Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 374 (1927), or United States v. Scophony Corp. of America, 333 U.S. 795 (1948), both statutory interpretation cases where the history would have been helpful.

126. 273 U.S. 359 (1927).

127. *Id.* at 373.

128. United States v. Scophony Corp. of America, 333 U.S. 795, 807 (1948). *See* Systems Operations, Inc. v. Scientific Games Dev. Corp., 414 F. Supp. 750, 753 (D.N.J. 1976); *In re* Chicken Antitrust Litigation, 407 F. Supp. 1285, 1291-92 (N.D. Ga. 1975); Grappone, Inc., v. Subaru of America, Inc., 403 F. Supp. 123, 128 (D.N.H. 1975); Hitt v. Nissan Motor Co., 399 F. Supp. 838, 840 (S.D. Fla. 1975). *Compare* Note, *Venue in Private Antitrust Suits,* 37 N.Y.U. L. REV. 268, 280-82 (1962) (ordinary everyday construction is broad and general, but many courts look for contacts nevertheless) *with* Note, *Antitrust Venue: Transacting Business Under the Clayton Act,* 55 GEO. L.J. 1066, *passim* (1967) (analyzes factors of term of art).

business through salesmen and demonstrators.[129] The presence of an agent within the district was deemed unnecessary.[130] The Court gave the venue clause of section 12 an expansive construction in distinct contrast to the clause governing process.[131] In the process clause, the terms "found" and "inhabitant," like "present," determine where the corporation may be served, establishing jurisdiction in personam.[132]

Section 12 has proved to be workable and relatively straightforward as applied to domestic parent corporations.[133] Although the degree of the corporate parent's control over a subsidiary in the forum is relevant to whether the parent is transacting business locally, the parent's presence in the forum need not be established. If venue is proper under the "transacts business" test, an out-of-state corporation may be served in its state of incorporation or at its principal place of business.[134] Nationwide service is not the same as world-wide service, however.[135] An alien corporate defendant must somehow "inhabit" or be "found" in the district of the court issuing service.[136] Thus, in a foreign antitrust case, the difficult questions of "presence" and "doing business" reappear.[137]

The leading case on venue and personal jurisdiction over alien corporations in antitrust suits is *United States v. Scophony Corp.*

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129. 273 U.S. at 374. Neither activity would have sufficed to support personal jurisdiction.

130. *Id.* at 373.

131. *Id.* at 371-72.

132. Clayton Act § 12, 15 U.S.C. § 22 (1970) provides in part: "all process in such cases may be served in the district of which [the corporation] is an inhabitant, or wherever it may be found."

133. *Contra,* Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 130 (D.N.H. 1975).

134. *See* Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corp., 46 F.2d 623 (1st Cir. 1931); *In re* Chicken Antitrust Litigation, 407 F. Supp. 1285, 1291 (N.D. Ga. 1975); Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 370, 378 (D. Md. 1975); C.C.P. Corp. v. Wynn Oil Co., 354 F. Supp. 1275, 1278 (N.DV. Ill. 1973); Waldron v. British Petroleum Co., 149 F. Supp. 830, 836-37 (S.D.N.Y. 1957). *See also* Frederick Cinema Corp. v. Interstate Theatres Corp., 413 F. Supp. 840, 841 (D.D.C. 1976).

135. *See generally In re* Fotochrome, Inc., 377 F. Supp. 26, 28-32 (E.D.N.Y. 1974) (bankruptcy), *aff'd,* 517 F.2d 512 (2d Cir. 1975). Some antitrust cases have construed section 12 as authorizing extraterritorial service, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262, 329 (E.D. Pa. 1975); Scriptomatic, Inc. v. Agfa-Gevaert, Inc., [1973-1] Trade Cas. ¶ 74,594, at 94,632-33 (S.D.N.Y. 1973); Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70, 79-80 (S.D.N.Y. 1965). This problem is discussed at notes 277-82 *infra* and accompanying text.

136. Clayton Act § 12, 15 U.S.C. § 22 (1970). See note 132 *supra.*

137. United States v. DeBeers Consol. Mines, Ltd., [1948-1949] Trade Cas. ¶ 62,248, at 62,478, 62,480 (S.D.N.Y. 1948).

of America.[138] *Scophony* is also the Supreme Court's most important decision applying section 12 to parent corporations with local subsidiaries. The case strongly influences the outcome of all antitrust suits against alien corporate parents.[139]

The facts of the case were complicated and do not warrant explaining in detail.[140] Scophony Corporation Ltd. (Limited) was a British television technology firm trying to pull itself out of financial distress. The firm executed a series of patent-licensing agreements with three American companies and Scophony Corporation of America (SCA), in which Limited was the dominant shareholder. SCA was to have exclusive rights to the patents in the Western Hemisphere, and Limited reserved rights to exploit the Eastern Hemisphere. Partly because of the sheer complexity of the licensing agreements, the parties could not cooperate. Limited's and SCA's affairs came to a standstill. With both companies on the verge of collapse, the Justice Department instituted antitrust proceedings, seeking an injunction to prevent further territorial restraints of trade.[141]

The district court dismissed the complaint against Limited for lack of personal jurisdiction. The court held that it was settled law that a parent corporation does not "do business" within a district merely because of the presence there of its subsidiary.[142] The Supreme Court reversed. It held that through two agents present in New York, Limited was carrying on substantial business there.[143] Arthur Levy and W.G. Elcock, officers and directors of both SCA and Limited, were continuously and strenuously engaging in the only business Limited had: its American operations.[144] The Court rejected Limited's arguments that it was only protecting its investments as a stockholder.[145] It also rejected the argument that the corporate functions of SCA and Limited were so different that the two should be treated independently.[146] The Court held that such an approach ignored "the actual unity and continuity of the whole

138. 333 U.S. 795 (1948).

139. W. FUGATE, *supra* note 65, at 89.

140. In addition to the relation of the facts in the case itself, 333 U.S. at 796-802, *rev'g* 69 F. Supp. 666, 667-69 (S.D.N.Y. 1946), the facts are summarized in W. FUGATE, *supra* note 65, at 89-90; 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 121-25 (1968).

141. United States v. Scophony Corp. of America, 69 F. Supp. 666 (S.D.N.Y. 1946).

142. *Id.* at 668.

143. 333 U.S. at 810.

144. *Id.* at 812, 815-16.

145. *Id.* at 812-16.

146. *Id.*

course of conduct."[147] It concluded that "on the sum of the facts [Limited] was 'found' [in the district] within the meaning of the service-of-process clause of § 12."[148]

The result in *Scophony* cannot be questioned. The reasoning employed, however, has plagued courts ever since. In the lower courts, venue was not an issue.[149] When the case came before the Supreme Court, venue was neither certified nor argued in the briefs of either the Government or of British Scophony (Limited).[150] Nevertheless, the holding of *Scophony* was that "there can be no question of the existence of 'jurisdiction,' in the sense of venue under § 12, over Scophony in the Southern District of New York."[151] Throughout the case, the venue clause and the service of process clause of section 12 are confused. The Court, in effect, held that Limited was "found" in New York because it was transacting business there.[152]

The Court dismissed as dicta statements in *Kodak* that venue could be established where presence could not.[153] This holding inverts the logic of *Kodak* and does violence to a plain reading of the statute.[154] The expansive definition given "transacts business" in *Kodak* was expressly based on the addition of language to the venue clause that was not included in the process clause.[155] *Scophony* para-

147. *Id.* at 817.

148. *Id.* at 818.

149. 69 F. Supp. at 667.

150. Brief for the United States at 2, 16-19 (arguing that fifth amendment due process was controlled by the standards of *International Shoe*), Brief on Behalf of Appellee, Scophony, Limited at 6, 7 (arguing separate corporate entities), United States v. Scophony Corp. of America, 333 U.S. 795 (1948).

151. 333 U.S. at 810.

152. William Fugate, former Chief of the Foreign Commerce Section of the Antitrust Division of the Justice Department, summarizes the holding as follows:

> Thus, in obtaining jurisdiction of alien corporations in an antitrust case, the Court will sustain such jurisdiction if the corporation is carrying on business of any substantial character in the district, even though such activity may be through an *American* subsidiary. It is unimportant whether this be considered as a liberalization of the jurisdictional tests with respect to an interpretation of "found," or whether it represents, in effect, a decision to apply the test of "transacts business" to service of process as well as venue.

W. FUGATE, *supra* note 65, at 92. *See id.* at 107.

153. 333 U.S. at 809. *See* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. at 371.

154. In *Scophony*, the Court noted that, "[a] plain and literal reading of the section's words gives it [a] deceptively simple appearance." 333 U.S. at 802.

155. 273 U.S. at 374. See notes 126-32 *supra* and accompanying text.

doxically held that this expansive definition was intended to apply to the process clause as well.[156]

E. Cannon Manufacturing Co. v. Cudahy Packing Co.[157]

One final bit of history complicates questions of in personam jurisdiction over corporate parents with local subsidiaries. The most familiar context in which "disregarding the corporate fiction" is an issue is a situation where the plaintiff attempts to sue the shareholders of a corporation that is unable to satisfy its obligations. The issue of shareholder liability, however, is not directly relevant to the question of whether a court may "lift the corporate veil" for jurisdictional purposes.[158] When the issue is the substantive liability of a parent corporation, the parent pays the obligations created by the subsidiary. When the issue is the amenability to suit of the parent, the parent is subjected to jurisdiction where the subsidiary transacts some amount of business. The difference is that in the second type of case, the parent is being sued for its own acts, and the issue is whether it can be sued at all.[159]

In *People's Tobacco Co. v. American Tobacco Co.*,[160] an early antitrust case, the Supreme Court held that ownership of stock in local subsidiaries did not amount to presence in the forum under the old "doing business" tests. This rule was affirmed and amplified in the 1925 non-antitrust case, *Cannon Manufacturing Co. v. Cudahy Packing Co.*[161]

Cannon was a diversity suit in contract brought by a North Carolina corporation against the Maine parent of an Alabama corporation doing business in North Carolina. The Court found that the wholly-owned subsidiary was completely dominated and controlled by the parent, in substantially the same way, and through the same individuals, as were its branches and departments doing

156. 333 U.S. at 807-09, 817.

157. 267 U.S. 333 (1925).

158. Wellborn, *Subsidiary Corporations in New York: When is Mere Ownership Enough to Establish Jurisdiction over the Parent*, 22 BUFFALO L. REV. 681, 685-87 (1973). *See generally* H. BALLANTINE, BALLANTINE ON CORPORATIONS §§ 140, 142 (rev. ed. 1946); W. CARY, *Note on Service of Process*, in CASES AND MATERIALS ON CORPORATIONS 147 (4th ed. unabr. 1969); Comment, *Jurisdiction Over Parent Corporations*, 51 CALIF. L. REV. 574 (1963).

159. *See* Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.).

160. 246 U.S. 79 (1918).

161. 267 U.S. 333 (1925) (Brandeis, J.). The case was noted approvingly in Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12 (1925).

business directly in other states.[162] Technically, however, the formal separation was in all respects scrupulously observed. The parent and subsidiary kept separate books. Transactions between the two were recorded by each as if dealing with a stranger. The Court held that the Maine corporation was not "doing business within the State in such a manner . . . as to warrant the inference that it was present there."[163] Cases concerning the substantive liability of a defendant were deemed inapplicable.[162]

The rule in *Cannon* was that mere ownership and control of a local subsidiary would not subject its out-of-state parent to local jurisdiction. The Court held the formal separation was enough to insulate the parent. Given the degree of control shown in the facts, the case was remarkable.[165] Its holding was a major stumbling block in the *Scophony* decision. The lower court in the *Scophony* case expressly relied on *Cannon.*[166] It held that only control, not agency, had been shown. Before the Supreme Court, the briefs of both Limited and the Government argued for and against the application of the *Cannon* rule.[167]

The Supreme Court carefully distinguished the facts in *Scophony* from those in *Cannon.* The opinion refers directly to *Cannon* only once, in passing, in a footnote.[168] The Court stated at length, however, that the "manufacturing and selling cases on which appellee relies" would not be applied.[169] The Court indicated its distaste for the general approach of *Cannon,* but it left the *Cannon* rule intact in situations where a parent manufacturer distributed its products through a subsidiary engaged only in selling.[170] Unfortunately, it is in exactly this context that the great majority of antitrust actions are brought against alien corporate parents today.[171]

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162. 267 U.S. at 335.

163. *Id.* at 334-35.

164. *Id.* at 337.

165. Ballantine, *supra* note 161, at 13.

166. United States v. Scophony Corp. of America, 69 F. Supp. at 668.

167. Brief for the United States at 34-35 (Limited's officers had so injected themselves into the jurisdiction that the issue of SCA's agency was irrelevant), Brief on Behalf of Appellee, Scophony, Limited at 8, 10-11 (separate corporate entities were carefully maintained), United States v. Scophony Corp. of America, 333 U.S. 795 (1948). *See* Questions Presented, Brief for United States at 2, Brief on Behalf of Appellee at 6, *id.*

168. *"E.g., Cannon Mfg. Co. . . . "* 333 U.S. at 813 n.23.

169. *Id.* at 812-15, 816-17.

170. *Id.* at 817.

171. *E.g.,* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262, 328 n.37 (E.D. Pa. 1975); Hitt

IV. PRESENT PROBLEMS AND TRENDS

A. The Progeny of Cannon and Scophony

As previously noted,[172] present case law takes widely disparate approaches in applying section 12 of the Clayton Act.[173] The involuted logic of the *Scophony* opinion was perhaps bound to generate more confusion than clarification. Mr. Justice Frankfurter thought it was clear that Limited was "found" in New York and only concurred in the result in *Scophony:*

> To reach this result, however, I do not find it necessary to open up difficult and subtle problems regarding the law's attitude toward corporations . . . . I am not prepared to agree [with the majority] because I do not wish to forecast, which agreement would entail, the bearing of the Court's discussion upon situations not now before us but as to which such theoretical discussion is bound to be influential.[174]

This pronouncement correctly foreshadowed the paths the law would take. In *Scophony,* the Court fudged on two major issues. First, its construction of section 12 unnecessarily mangled the plain meaning of the statute. Second, the Court equivocated on the question of when an alien or out-of-state parent corporation may be subjected to jurisdiction based on the presence of its subsidiary. By implying that *Cannon* was still good law, the Court helped keep the case alive.[175]

1. CANNON TODAY

Today, *Cannon* leads a saltatory existence, alternately being declared controlling or no longer good law. *Restatement (Second) of Conflict of Laws* cites *Cannon* as the leading case on jurisdiction over parent corporations.[176] Most commentary recognizes *Cannon* as the starting point for any discussion of the issue.[177] In actions involv-

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v. Nissan Motor Co., 399 F. Supp. 838 (S.D. Fla. 1975).

172. See notes 5-48 *supra* and accompanying text.

173. 15 U.S.C. § 22 (1970).

174. 333 U.S. at 819.

175. *Id.* at 817. See text accompanying notes 168-70 *supra.*

176. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52, Comment *b,* Reporter's Note (1971). A caveat in the Reporter's Note, however, mentions that "[t]he bases of jurisdiction discussed in this Comment should diminish in importance with the increasing adoption by the states of 'long-arm' statutes . . . . " *Id.*

177. *See* Cardozo, *A New Footnote in Erie v. Tompkins: "Cannon is Overruled,"; 36* N.C. L. REV. 181 (1958) (a light-hearted but perceptive dream conversation with J. Brandeis);

ing antitrust,[178] patents,[179] and tort,[180] the case is still followed as binding the court.[181]

Cannon's continued viability, however, suffers from fundamental defects. *Cannon* was a case of federal common law decided well before *Erie Railroad v. Tompkins.*[182] Although jurisdiction was based on diversity, no local North Carolina decisions were cited. No constitutional questions were decided.[183] On the whole, this aspect of *Cannon* has gone unnoticed in cases citing it. Most judges and commentators criticizing *Cannon* have done so on the grounds that it predates *International Shoe.*[184] *Cannon* employed the complicated doing business tests of its time, under which significant amounts of activity did not qualify as presence.[185] Because *International Shoe* dispensed with these criteria, the case should be discarded.[186] More importantly, the *Cannon* rule operates without regard to the relationship between the cause of action and the degree of control or the function of the subsidiary within the structure of the parent's business.[187] Thus, both *International Shoe* and *Erie* should have over-

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Wellborn, *supra* note 158, at 683; Comment, *Jurisdiction Over Parent Corporations,* 51 CALIF. L. REV. 574 (1963). *See also* Comment, *Venue in Private Antitrust Suits,* 37 N.Y.U. L. REV. 268, 288 (1962); Note, *Jurisdiction over Foreign Corporations—An Analysis of Due Process,* 104 U. PA. L. REV. 381, 404 (1955). Note, *Parent-Subsidiary Corporations: Service of Process to Acquire Personal Jurisdiction over Foreign Corporations,* 1956 WIS. L. REV. 668.

178. *E.g.,* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974).

179. *E.g.,* Shapiro v. Ford Motor Co., 359 F. Supp. 350, 352 (D. Md. 1973).

180. *E.g.,* Harris v. Deere & Co., 223 F.2d 161, 162 (4th Cir. 1955) (holding that *Cannon* precludes minimum contacts analysis and citing *Scophony* for support; McPheron v. Penn Cent. Transp. Co., 390 F. Supp. 943, 949-56 (D. Conn. 1975).

181. *See* Crow Tribe of Indians v. Mohasco Indus., Inc., 406 F. Supp. 738, 740 (D. Mont. 1975) ("Although the *International Shoe* concept is most widely accepted, it appears that at least in the Ninth Circuit, as to parent-subsidiary corporation relationships, the *Cannon* rule is followed.").

182. 304 U.S. 64 (1938). *See* M. Cardozo, *supra* note 177, *passim;* Wellborn, *supra* note 158, at 684; 1956 WIS. L. REV. 668, 670 n.10. *Cf.* Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (B. Cardozo, J.) (questioning whether the N.Y. and the federal rules were different).

183. 267 U.S. at 336. *See* Hitt v. Nissan Motor Co., 399 F. Supp. at 849.

184. *See* Wellborn, *supra* note 158, at 684-85; Comment, *Jurisdiction Over Parent Corporations,* 51 CALIF. L. REV. 574, 574-78, 584-85 (1963); Note, *Jurisdiction over Foreign Corporations—An Analysis of Due Process,* 104 U. PA. L. REV. 381, 404 (1955). *See* Hitt v. Nissan Motor Co., 399 F. Supp. at 849; Stanley Works v. Globemaster, Inc., 400 F. Supp. 1325, 1331 n.9 (D. Mass. 1975) (patents); Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 361-63 (D. Colo. 1967) (antitrust, domestic); Waldron v. British Petroleum Co., 149 F. Supp. 830, 834-36 (S.D.N.Y. 1957) (antitrust; domestic).

185. 267 U.S. at 334-35.

186. *Contra,* Berkman v. Ann Lewis Shops, Inc., 246 F.2d 44, 50 (2d Cir. 1957) (diversity suit in contract).

187. *See* 267 U.S. at 336-37. In the district court, however, this relationship was one

ruled *Cannon.*[188]

Scophony did not overrule *Cannon,* however, and antitrust cases follow *Scophony's* lead when dealing with *Cannon.* There are three categories of conclusions about what *Scophony's* lead was. *Scophony* stated expressly, but in dicta, that *Cannon* would still be controlling were the parent and subsidiary engaged in the "very different businesses and activities of manufacturing and selling."[189] Thus, faced with a distributor subsidiary, some courts will not find either venue or personal jurisdiction over the parent corporation unless the relationship is one of agency.[190] On the other hand, the majority of courts, focusing on the general thrust of *Scophony,* hold that *Cannon* does not apply in antitrust actions.[191] Especially in suits against aliens, a variation on this theme has been to ignore *Cannon* completely. The court bases proper venue on liberal transacting business standards, and then employs state long-arm statutes to establish personal jurisdiction.[192] Finally, many courts adopt

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ground for the court's holding. See note 347 *infra. See also* McPheron v. Penn Cent. Transp. Co., 390 F. Supp. 943, 955-56 (D. Conn. 1975) (jurisdiction over holding company denied in tort action where participation in subsidiary's affairs was unrelated to operations).

188. Wellborn, *supra* note 158, at 685.

189. 333 U.S. at 817.

190. *Foreign antitrust:* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974); Williams v. Canon, Inc., 432 F. Supp. 376 (C.D. Cal. 1977); I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp., 408 F. Supp. 1023 (D. Minn. 1976); Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D. Utah 1962), *aff'd,* 325 F.2d 713 (10th Cir. 1963), *cert. denied,* 377 U.S. 931 (1964) (facts strong enough to show agency). *Domestic:* San Antonio Tel. Co. v. American Tel. & Tel. Co., 499 F.2d 349 (5th Cir. 1974); Tiger Trash v. Browning-Ferris Indus., Inc., [1976-2] Trade Cas. ¶ 61,141 (S.D. Ind. 1976), *rev'd,* 560 F.2d 818 (7th Cir. 1977); *In re* Chicken Antitrust Litigation, 407 F. Supp. 1285 (N.D. Ga. 1975); United States *ex rel* Martin-Trigona v. Bankamerica Corp., [1974-1] Trade Cas. ¶ 74,916 (D.D.C. 1974), *dismissed for lack of standing sub nom.* Martin-Trigona v. Federal Reserve Bd., 509 F.2d 363 (D.C. Cir. 1975); Frito-Lay, Inc. v. Procter & Gamble Co., 364 F. Supp. 243 (N.D. Tex. 1973); Hayashi v. Sunshine Garden Prods., Inc., 285 F. Supp. 632 (W.D. Wash. 1967), *aff'd sub nom.* Hayashi v. Red Wing Peat Corp., 396 F.2d 13 (9th Cir. 1968); Fisher Baking Co. v. Continental Baking Corp., 238 F. Supp. 322 (D. Utah 1965).

191. *Foreign antitrust:* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 318-21; Hitt v. Nissan Motor Co., 399 F. Supp. at 842-43; Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., [1975-1] Trade Cas. ¶ 60,213, at 65,831-32 (D.D.C.), *vacated as moot, id.* ¶ 60,293 (D.D.C. 1975) (Pioneer settled). *Domestic:* Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 130-31 (D.N.H. 1975); Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 372-73 (D. Md. 1975); Luria Steel & Trading Corp. v. Ogden Corp., 327 F. Supp. 1345 (E.D. Pa. 1971); Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 361-65 (D. Colo. 1967); Waldron v. British Petroleum Co., 149 F. Supp. 830, 834-35 (S.D.N.Y. 1957). *See generally* W. FUGATE, *supra* note 65, at 94-101.

192. Meat Systems Corp. v. Ben Langen-Mol, Inc., [1976-1] Trade Cas. ¶ 60,965 (S.D.N.Y. 1976); Heatransfer Corp. v. Volkswagenwerk A.G., [1975-1] Trade Cas. ¶ 60,308 (S.D. Tex. 1974); Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519 (S.D.N.Y. 1972); Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70, 75-76, 80 (S.D.N.Y. 1965).

Scophony's approach of avoiding the issue by distinguishing *Cannon* from the facts before them.[193] Whatever the better argument, whether the *Cannon* rule applies in antitrust cases is still an open question.[194]

The need for some rule makes the *Cannon* case attractive.[195] A court must base its decision on something, and the "transacts business" standard for proper venue is imprecise. Thus, courts have continued to apply the *Cannon* rule notwithstanding the case's fundamental defects, *Scophony's* criticism of *Cannon* in antitrust cases, and *Cannon's* total inapplicability to questions of venue.[196]

No case has found venue proper for a parent under section 12 using the *Cannon* case for support. However, that opinion stated, "[t]he defendant wanted to have *business transactions* . . . in North Carolina, but . . . did not choose to enter the State in its corporate capacity."[197] Admittedly, "business transactions" was not used as a term of art. Under section 12, however, venue is proper if a defendant "transacts business" "in the ordinary and usual sense."[198] This approach would avoid some of the problems *Cannon* has caused in antitrust, but realistically it adds little as a means toward clarifying the issues.

2. Jurisdiction and Venue

Courts have also experienced difficulty grappling with *Scophony's* confusion of venue and process. The general result reached by the Supreme Court in *Scophony* was that when Congress expanded the availability of venue, it similarly meant to expand

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193. *See* Dobbins v. Kawasaki Motors Corp., [1974-1] Trade Cas. ¶ 75,100 (D. Ore. 1974), *aff'g on rehearing* 362 F. Supp. 54, 64 (D. Ore. 1973); Phillip Gall & Son v. Garcia Corp., 340 F. Supp. 1255 (E.D. Ky. 1972) (domestic); Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. at 938-39. *See generally* cases cited notes 191-92 *supra*. *See* Wellborn, *supra* note 158, at 693-99; Comment, *Jurisdiction Over Parent Corporations*, 51 Calif. L. Rev. 574, 580-84 (1963).

194. Two very recent Court of Appeals decisions may help lay *Cannon* to a well-deserved final rest, *see* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 412-13 (9th Cir. 1977) (essentially limiting *Cannon* to its facts without expressly overruling prior Ninth Circuit decisions); Tiger Trash v. Browning-Ferris Indus., Inc., 560 F.2d 818, 822-24 (7th Cir. 1977), *rev'g* [1976-2] Trade Cas. ¶ 61,141 (S.D. Ind. 1976).

195. Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 364 (D. Colo. 1967).

196. *See* Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 130-31 (D.N.H. 1975).

197. 267 U.S. at 336 (emphasis added).

198. United States v. Scophony Corp. of America, 333 U.S. at 807, 819; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. at 373.

process.[199] Yet, the Court did not follow through and construe "found" broadly.[200] Dicta in both *Scophony* and *Kodak* indicated that section 12 did not authorize extraterritorial service or service outside of some district's boundaries.[201] The Government argued that the limits defined by the fourteenth amendment's due process clause should be applied by analogy to the fifth amendment.[202] However, the Court rejected this notion, stated that there was no constitutional question, and refused to apply the tests of *International Shoe.*[203] Instead, the Court held that because Limited was transacting business in New York, it was found there as well.

Blending the two clauses leads to two contradictory results, both of which have been upheld by the courts. First, the defendant may argue that since venue under section 12 is equivalent to personal jurisdiction, he may only be sued in a district where he is found or is an inhabitant. This conclusion was adopted, in effect, in the *Toshiba America* case where the court held—relying on *Cannon,* a jurisdictional case—that there were too few contacts to find that the defendant was transacting business in the district.[204] Second, the plaintiff may argue that since venue is equivalent to jurisdiction, an alien defendant is liable to an antitrust suit, and extraterritorial process may be issued, wherever he is transacting business. This result was adopted in *Zenith Radio,*[205] relying on *Scophony.*[206]

Courts which have tried to fathom the distinction between "transacts business" and "found" have had some measure of difficulty in applying it. The broad outlines of the "transacts business"

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199. 333 U.S. at 810, 817, notwithstanding *id.* at 813. Congress did not do this, Clayton Act § 12, 15 U.S.C. § 22 (1970); Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 359 (D. Colo. 1967).

200. 333 U.S. at 813.

201. *Id.* at 817; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. at 371.

202. See note 150 *supra.*

203. 333 U.S. at 804 n.13.

204. 491 F.2d at 1066, 1067-68. *See* Williams v. Canon, Inc., 432 F. Supp. 376, 380 (C.D. Cal. 1977). *See also* Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 341-42 (E.D. Mich. 1977); Pacific Tobacco Corp. v. American Tobacco Co., 338 F. Supp. 842, 844-45 (D. Ore. 1972).

205. 402 F. Supp. at 317, 328-29. See text accompanying notes 12, 21-23 *supra.*

206. *See generally* Systems Operations v. Scientific Games Dev. Corp., 414 F. Supp. 750, 752 (D.N.J. 1976) ("venue and jurisdiction under [section 12 of the Clayton Act] are to be viewed as congruent"); Pacific Tobacco Corp. v. American Tobacco Co., 338 F. Supp. 842, 844 (D. Ore. 1972). *See also* Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 842 (E.D.N.Y. 1971) (the "transacting business" standard of 15 U.S.C. § 22 is essentially the same as the "doing business" test of 28 U.S.C. § 1391); City of Philadelphia v. Morton Salt Co., 289 F. Supp. 723, 724 (E.D. Pa. 1968).

test are clear and have already been summarized.[207] But where, for example, there is general agreement that shipping a substantial volume of goods into a district constitutes transacting business in that forum, there is disagreement over whether this includes shipping the goods F.O.B. from some other place or district.[208] Most courts agree that the "transacts business" test is in some way broader than the tests for "found" or "present,"[209] but explicitly defining how much broader has proved troublesome.[210] The court in *Flank Oil Co. v. Continental Oil Co.*[211] forthrightly noted: "[E]ven though it is clear that some distinction does exist between the venue and service requirements of Section 12, the nature and meaning of that distinction is somewhat of a mystery."[212]

Delimiting the "transacts business" test when a defendant's only contacts within a forum are through ownership of a subsidiary has proved even more elusive.[213] The tendency of courts has been to decide whether a corporate parent "transacts business" locally in terms of corporate control. To rule in any close case, of course, the court must first decide: how much control? A wide spectrum of results exists.[214] At one extreme is the *Scophony* case, in which

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207. See notes 124-32 *supra* and accompanying text.

208. *Compare* B.J. Semel Assocs. v. United Fireworks Mfg. Co., 355 F.2d 827, 831-32 (D.C. Cir. 1965); Frederick Cinema Corp. v. Interstate Theaters Corp., 413 F. Supp. 840, 842-43 (D.D.C. 1976); Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 131-32 (D.N.H. 1975); Hitt v. Nissan Motor Co., 399 F. Supp. at 844 *with* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d at 1067; *B.J. Semel*, 355 F.2d at 833-36 (Burger, J., dissenting); Fox-Keller, Inc. v. Toyota Motor Sales U.S.A., Inc., 338 F. Supp. 812, 815 (E.D. Pa. 1972). *See also* Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1144 (7th Cir. 1975) (patent infringement).

209. See notes 126-32 *supra* and accompanying text. *See* Comment, *Venue in Private Antitrust Suits*, 37 N.Y.U. L. REV. 268, 280-81 (1962).

210. *See* Board of County Comm'rs v. Wilshire Oil Co., 523 F.2d 125, 131 (10th Cir. 1975). The court stated:

> We are aware that some courts hold that there is a difference—that fewer contacts are required in order to transact business than are required in order to do business.
>
> On the other hand, numerous decisions hold that the two terms are the same.

(Footnotes omitted.) Kolb v. Chrysler Corp., 357 F. Supp. 504, 508 (E.D. Wis. 1973) ("Precedents . . . offer little assistance."); Note, *Antitrust Venue: Transacting Business Under the Clayton Act*, 55 GEO. L.J. 1066, 1069-70 (1967).

211. 277 F. Supp. 357 (D. Colo. 1967).

212. *Id.* at 359.

213. See note 5 *supra* and accompanying text.

214. Recent cases discussing "control" are considered at notes 294-300 *infra* and accompanying text. Cases and practice through 1962 are compiled in Note, *Transacting Business as a Basis for Venue Over a Corporation Under the Antitrust Laws*, 1962 WASH. U.L.Q. 261, 270-71; Comment, *Venue in Private Antitrust Suits*, 37 N.Y.U. L. REV. 268, 288-90 (1962).

Limited's control was subject to the effective veto of SCA's two American shareholders.[215] At the other extreme, some courts have required evidence that the parent controls the subsidiary's day-to-day affairs.[216]

When the parent company is an alien corporation, the distinction between "transacts business" for purposes of the venue clause of section 12 and "found," the operative word in the process clause,[217] often evaporates completely. This is partly because the *Scophony* opinion blended the two clauses to reach its result.[218] A more fundamental reason is that a court's involved factual analysis of contacts and control, establishing proper venue, parallels the process that the court would use to demonstrate the minimum contacts required to support in personam jurisdiction.[219] Since *Scophony,* no case finding proper venue for an alien parent corporation has not also upheld personal jurisdiction.[220] Where a court has not found proper venue, consideration of the jurisdictional question has been unnecessary.[221]

The available precedent is wide-ranging and offers little in the way of specific guidance. Courts are free to pick and choose from a smorgasbord of tests and approaches. An inevitable result has been that often enough a court will base its opinion on as many tests supporting its position as it reasonably can.[222] Which issues are central is often left unclear.

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215. 333 U.S. at 800. *See* Hitt v. Nissan Motor Co., 399 F. Supp. at 841.

216. See note 158 *supra. See also* K.J. Schwartzbaum, Inc. v. Evans, Inc., 44 F.R.D. 589, 591-92 (S.D.N.Y. 1968) (daily activities controlled by parent corporation's executives).

217. "[A]ll process in such cases may be served in the district of which [a corporation] is an inhabitant, or wherever it may be found." Clayton Act § 12, 15 U.S.C. § 22 (1970). No alien corporation is an "inhabitant" of any U.S. district, *see Scophony,* 333 U.S. at 817.

218. See notes 149-56 *supra* and accompanying text.

219. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 328-29; Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930, 939 (D. Utah 1962), *aff'd,* 325 F.2d 713 (10th Cir. 1963), *cert. denied,* 377 U.S. 931 (1964). *But cf.* Hitt v. Nissan Motor Co., 399 F. Supp. at 845-50 (reconsidered the facts to establish jurisdiction).

220. *See* 333 U.S. at 817. *See generally* cases cited notes 190-92 *supra.*

221. *E.g.,* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d at 1068; I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp., 408 F. Supp. 1023, 1024-25 (D. Minn. 1976).

222. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 327-28; Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519 (S.D.N.Y. 1972). *But see* United States v. Scophony Corp. of America, which held:

> [T]he determination [is not] to be made for such an enterprise by atomizing it into minute parts or events, in disregard of the actual unity and continuity of the whole course of conduct . . . .

333 U.S. at 817. *See generally* Comment, *Venue in Private Antitrust Suits,* 37 N.Y.U. L. REV. 268, 282-86 (1962).

To an alien corporation's management and shareholders, it can hardly seem like "fair play and substantial justice" when the jurisdictional rules for violations of United States antitrust laws are different throughout the United States. It is important to keep in mind that "[t]he concepts of personal jurisdiction and of venue are closely related, but nonetheless distinct."[223] *Scophony* and its progeny have focused on the "transacts business" standard, but that only controls venue. Legal analysis of the issue of personal jurisdiction has often been obscured and has sometimes been omitted altogether.[224]

B. Venue for Aliens

A way out of the difficult and circuitous paths generated by the *Scophony* opinion can be found by ignoring the Clayton Act venue provisions. The general venue provisions provide that "[a]n alien may be sued in any district."[225] Unless section 12 of the Clayton Act must be applied exclusively, venue should never be a bar to an antitrust suit brought against an alien corporation.

An analogous problem arises in patent suits against aliens. For a time, this issue was more difficult in a patent suit than in antitrust because two Supreme Court decisions have held that "28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions . . . ."[226] Both cases invalidated the use of the general corporate venue statute[227] in the face of congressional policy to limit the forums available to plaintiffs.[228] However, these cases were distinguished from suits against aliens in *Japan Gas Lighter Ass'n v. Ronson Corp.*[229] The court held that section 1400(b) did not limit venue in suits against aliens.[230] Judge Coolahan

223. Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 224 (D.N.J. 1966).

224. *See, e.g.*, 333 U.S. at 818; 402 F. Supp. at 328-29; 491 F.2d at 1066, 1068.

225. 28 U.S.C. § 1391(d) (1970).

226. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 229 (1957); *accord*, Stonite Prod. Co. v. Melvin Lloyd Co., 315 U.S. 561, 563 (1942).

28 U.S.C. § 1400(b) (1970) provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

227. 28 U.S.C. § 1391(c) (1970).

228. 353 U.S. at 224-27; 315 U.S. at 565-66.

229. 257 F. Supp. 219 (D.N.J. 1966). *See* Seilon, Inc. v. Brema S.p.A., 271 F. Supp. 516 (N.D. Ohio 1967); Olin Mathieson Chem. Corp. v. Molins Org., Ltd., 261 F. Supp. 436 (E.D. Va. 1966).

230. Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. at 225. The court additionally distinguished its holding from *Fourco* on the ground that it was hearing a declaratory judgment action rather than an infringement suit per se.

pointed out that the requirement that the court obtain personal jurisdiction over the defendant was itself a serious practical barrier.[231]

This view was endorsed by the Supreme Court in *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*[232] The Court stated broadly that "suits against aliens are wholly outside the operation of *all* the federal venue laws, general and special."[233] *Brunette* may yet be limited to patent cases, but the extreme breadth of the language quoted above certainly suggests its application in antitrust suits against alien corporations.[234] Prior to *Brunette,* only one antitrust case had applied 28 U.S.C. § 1391(d) in a suit against an alien corporation.[235] Today, this approach, while not widely utilized, is generally accepted.[236]

Treating the Clayton Act as supplementing rather than supplanting the general venue provisions would make sense even if *Brunette* had never been decided.[237] The *Fourco* case held the patent venue provision to be exclusive because it embodied a congressional

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231. *Id.* at 229.

232. 406 U.S. 706 (1972).

233. *Id.* at 714 (emphasis added). *See In re* Hohorst, 150 U.S. 653 (1893) (alien does not inhabit any district and may be sued wherever it can be served).

234. W. FUGATE, *supra* note 65, at 93; E. KINTNER & M. JOELSON, *supra* note 1, at 41-42; SECTION OF ANTITRUST LAW OF THE ABA, ANTITRUST LAW DEVELOPMENTS 362 (1975); *cf.* UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1, E-3 n.20 (Feb. 1, 1977), *and in* TRADE REG. REPORTS (CCH) No. 266, pt. II, at 8 n.20 (Feb. 1, 1977) (citing Cofinco, Inc. v. Angola Coffee Co., [1975-2] Trade Cas. ¶ 60,456 (S.D.N.Y. 1975), which finds venue proper under 28 U.S.C. § 1391(d)) [hereinafter cited as INTERNATIONAL ANTITRUST GUIDE].

235. Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 387 (S.D. Ohio 1967); *see* W. FUGATE, *supra* note 65, at 93 & n.7.

Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70 (S.D.N.Y. 1965) had applied section 1391(d), and not the Clayton Act, to an individual defendant, but did not consider that section's application to a corporation. *See also* Albert Levine Assocs. v. Bertoni & Cotti, S.p.A., 314 F. Supp. 169 (S.D.N.Y. 1970).

236. Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 661 (D.N.H. 1977); Cofinco, Inc. v. Angola Coffee Co., [1975-2] Trade Cas. ¶ 60,456, at 67,056 (S.D.N.Y. 1975); Norman's on the Waterfront v. West Indies Corp., Civ. No. 515/1973 (D.V.I. July 17, 1974); Scriptomatic, Inc. v. Agfa-Gevaert, Inc., [1973-1] Trade Cas. ¶ 74,594, at 94,632 (S.D.N.Y. 1973). See note 234 *supra. See also* Ballard v. Blue Shield of S.W. Va., Inc., 543 F.2d 1075, 1080 (4th Cir. 1976); Board of County Comm'rs v. Wilshire Oil Co., 523 F.2d 125, 129-30 (10th Cir. 1975); Goggi Corp. v. Outboard Marine Corp., 422 F. Supp. 361, 364 (S.D.N.Y. 1976); Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 133 (D.N.H. 1975).

237. *Cf.* Pure Oil Co. v. Suarez, 384 U.S. 202 (1966) (*Fourco* doctrine limited to patent infringement suits; Jones Act venue provisions not exclusive).

mandate to alleviate burdens on defendants.[238] Section 22 of the Clayton Act was designed to expand the choice of forums available to plaintiffs.[239] These policy considerations are diametrically different. It would be unreasonable to infer that Congress took away with one hand what it gave with the other.[240]

C. Federal Due Process—Radical Approaches

Dispensing with some of the mystery and confusion surrounding antitrust venue for aliens leaves the question: When may a federal court assert personal jurisdiction over an alien corporation? Consideration of the exclusively federal nature of antitrust and other federal actions has led to new horizons in extraterritorial jurisdiction. The meaning of the familiar phrase "due process" takes on a fresh look when viewed in the context of the fifth, rather than the fourteenth amendment.[241]

Edward J. Moriarty & Co. v. General Tire & Rubber Co.[242] is a "seminal case."[243] In this antitrust suit, the Italian corporate defendant moved to dismiss for lack of personal jurisdiction and improper venue.[244] The question was whether service of process pursuant to Federal Rules of Civil Procedure (FRCP) 4(d) and (e) and the Ohio long-arm statute[245] was valid. The court reasoned that "jurisdiction over the person . . . does not relate to . . . the particular court . . .

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238. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957). See notes 226-28 *supra* and accompanying text.

239. See notes 122-25 *supra* and accompanying text.

240. *See* Board of County Comm'rs v. Wilshire Oil Co., 523 F.2d 125, 130 (10th Cir. 1975); California Clippers, Inc. v. United States Soccer Football Ass'n, 314 F. Supp. 1057, 1062-63 (N.D. Cal. 1970); Albert Levine Assocs. v. Bertoni & Cotti, S.p.A., 314 F. Supp. 169, 170 (S.D.N.Y. 1970); Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70, 83-84 (S.D.N.Y. 1965).

241. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . " U.S. CONST. amend. V; *accord,* U.S. CONST. amend. XIV.

242. 289 F. Supp. 381 (S.D. Ohio 1967).

243. Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 291 (D. Conn. 1975). In fact, the first case to endorse this argument was First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 736-39 (E.D. Tenn. 1962) (domestic defendant). This case, in turn, relied on the groundbreaking article by Thomas Green, *Federal Jurisdiction In Personam of Corporations and Due Process,* 14 VAND. L. REV. 967 (1961). However, both Green and *First Flight* were primarily concerned with problems in Federal Rule of Civil Procedure 4 that were substantially alleviated by the 1963 amendments. *See generally* Smit, *International Aspects of Federal Civil Procedure,* 61 COLUM. L. REV. 1031 (1961); 9 VAND. J. TRANSNAT'L L. 435 (1976). See note 250 *infra.*

244. 289 F. Supp. at 384, 387, 389-91.

245. OHIO REV. CODE ANN. §§ 2307.381-.385 (Baldwin 1975) (§ 2307.383 repealed in 1971, replaced by OHIO R. CIV. P. 4.3, 4.6(A); § 2307.384 repealed in 1971, replaced by OHIO R. CIV. P. 3(B)).

hearing the controversy, but to the power of the unit of government of which that court is a part."[246] Since federal law was being applied, due process should be construed under the fifth amendment. The Sherman Act prohibited violations in interstate and foreign commerce. Jurisdiction, accordingly, could logically be founded upon a defendant's "presence," or minimum contacts, within the United States as a whole.[247]

The last step is quite a leap. Many courts have been willing to accept the notion that fifth amendment due process is at issue in federal question cases. Most have assumed, however, that presence or minimum contacts in the district (or in the state, since district courts have statewide process)[248] were required.[249] Thus, the great majority of cases treat fifth amendment jurisdictional due process as equivalent, not just analogous, to fourteenth amendment due process.[250]

Since *Moriarty,* a number of cases have considered whether a federal court may base in personam jurisdiction upon a defendant's national contacts.[251] A few cases have expressly based jurisdiction on this theory.[252] The courts in these cases have misread *Moriarty*[253]

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246. 289 F. Supp. at 390; Green, *supra* note 243, at 967-68, 985. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, *passim* (1966).

247. 289 F. Supp. at 390 and cases cited.

248. FED. R. CIV. P. 4(f).

249. United States v. Scophony Corp. of America, 333 U.S. at 809, 817-18, 819; Brief for the United States at 38-46, *id.*; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. at 372-74; Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1143-44 (7th Cir. 1975); Fisons Ltd. v. United States, 458 F.2d 1241, 1249-50 (7th Cir. 1972); Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 440 n.3 (1st Cir. 1966). *See* 9 VAND. J. TRANSNAT'L L. 435, 440 & nn.24-26.

250. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 416 n.7, 424 n.19 (9th Cir. 1977); 2 MOORE'S FEDERAL PRACTICE ¶ 4.25[7], at 1183 (2d ed. 1964). Much of the pre-1963 case law discussing fifth amendment due process had the limited objective of showing that federal jurisdiction in personam was no less than that of the states. *See* Green, *supra* note 243, *passim;* Smit, *supra* note 243, at 1032-40; Note, *Jurisdiction of Federal District Courts Over Foreign Corporations,* 69 HARV. L. REV. 508 (1956). *See generally* 2 MOORE'S FEDERAL PRACTICE ¶¶ 4.31, 4.32[2], 4.41-1[3] (2d ed. 1964).

251. *See* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d at 416-19 and cases cited; Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339-42 (2d Cir. 1972); Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 661-64 (D.N.H. 1977), and cases cited at 663; Scriptomatic, Inc. v. Agfa-Gevaert, Inc., [1973-1] Trade Cas. ¶ 74,594, at 94,633-35 (S.D.N.Y. 1973).

252. Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 663-64 (D.N.H. 1977) (antitrust, service pursuant to state law, *id.* at 661); Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 289-92 (D. Conn. 1975) (patent infringement, service pursuant to state long-arm statute, *id.* at 288); Holt v. Klosters Rederi A/S, 355 F. Supp. 354, 357-58 (W.D. Mich. 1973) (admiralty, method of service not discussed); Alco Standard Corp.

and have devised their own jurisdictional law.[254] It is elementary that for service to be valid it must be statutorily prescribed.[255] There must be a coherent chain linking venue, the power of the court subject to due process, and a statute authorizing service calculated to provide adequate notice.[256]

The *Moriarty* court, after developing its "national contacts" theory of jurisdiction, pointed out that it could not apply this theory under existing federal law or rules.[257] FRCP 4(e) provides that a district court may use state long-arm statutes (or U.S. statutes) "under the circumstances and in the manner prescribed by the statute . . . ."[258] The special supplementary provisions for extraterrito-

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v. Benalal, 345 F. Supp. 14, 25-26 (E.D. Pa. 1972) (securities, service pursuant to FED. R. CIV. P. 4(i)(1)(C)).

253. *Compare* Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. at 291 *and* Holt v. Klosters Rederi A/S, 355 F. Supp. at 357 *with* Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. at 663 *and* Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. at 390. See text accompanying notes 257-62 *infra.*

254. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d at 418. The court in *Centronics Data* frankly admits this, 432 F. Supp. at 664.

255. 72 C.J.S. *Process* § 27 (1951); 62 AM. JUR. 2D *Process* §§ 5, 7 (1972). *See* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d at 416; Hitt v. Nissan Motor Co., 399 F. Supp. 838, 846-47 (S.D. Fla. 1975); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. at 390.

256. *See generally* Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219 (D.N.J. 1966).

257. 289 F. Supp. at 390. *See generally* Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838).

258. FED. R. CIV. P. 4(e) provides in part:

> **Service upon party not inhabitant of or found within state.** Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

There is a slight difference in FED. R. CIV. P. 4(d) which provides in part:

> Service shall be made as follows:
>
> . . . .
>
> (7) Upon a defendant of any class referred to in paragraph . . . (3) [corporations] of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in

rial federal process in FRCP 4(i)(1) only come into play "[w]hen the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held . . . ."[259] The *Moriarty* court read "under the circumstances" to mean that the use of state long-arm jurisdiction was only appropriate where there were state contacts.[260] This point is settled law in diversity cases;[261] it has not been definitively established either way in federal question cases. However, most of the cases discussing U.S. contacts have required state contacts, or at least have alternately based jurisdiction on state law.[262] Whether due process is construed under the fifth or the fourteenth amendments, the use of state long-arm requires state contacts.

FRCP 4(e) also provides for federally authorized extraterritorial process. In such a case, due process would be construed solely under the fifth amendment, and national contacts might be appropriate.[263] The Clayton Act may be read to authorize extraterritorial service, but care must be taken to avoid indiscriminately mixing the statutory provisions or confusing venue with jurisdiction.[264] For example, mechanically adding *Scophony* (in extraterritorial antitrust, venue and jurisdiction are equivalent)[265] to *Brunette* (an alien corporation

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an action brought in the courts of general jurisdiction of that state.

Whether the omission of the phrase "under the circumstances" in 4(d)(7) is exploitable is highly suspect. The court in *Centronics Data,* however, expressly relied on 4(d)(7) and not 4(e), 432 F. Supp. at 661.

259. FED. R. CIV. P. 4(i)(1).

260. 289 F. Supp. at 390. *See* SECTION OF ANTITRUST LAW OF THE ABA, ANTITRUST LAW DEVELOPMENTS 364 (1975).

261. *Compare* Arrowsmith v. United Press Int'l, 320 F.2d 219, 222-27, 230-31 (2d Cir. 1963) (en banc) (Friendly, J.) *and* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 516-22 (2d Cir. 1960) (Friendly, J., concurring) *with Arrowsmith,* 320 F.2d at 234-44 (Clark, J., dissenting) *and Jaftex,* 282 F.2d at 510-16 (overruled) (Clark, J.). *See generally* 2 MOORE'S FEDERAL PRACTICE ¶ 4.25[7] & nn.13-14 (2d ed. 1964); cases cited in *id.* ¶ 4.25[7] at 72-74 (1977-78 Supp.); von Mehren & Trautman, *supra* note 246, at 1123 & n.6; 9 VAND. J. TRANSNAT'L L. 435, 438-40 & n.23 (1976).

262. *See* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d at 418-19; Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1141-44 (7th Cir. 1975); Graham Eng'r Corp. v. Kemp Prods. Ltd., 418 F. Supp. 915 (N.D. Ohio 1976); Ag-Tronic, Inc. v. Frank Paviour Ltd., 70 F.R.D. 393 (D. Neb. 1976).

263. *See* 556 F.2d at 418.

264. Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 224-25 (D.N.J. 1966). *See generally* Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953); Polizzi v. Cowles Magazines, Inc., 345 U.S. 663 (1953); 1 MOORE'S FEDERAL PRACTICE ¶¶ 0.140[1.-2], 0.140[3] (2d ed. 1977).

265. United States v. Scophony Corp. of America, 333 U.S. 795 (1948); see notes 149-56, 199-206 *supra.*

is subject to suit anywhere)[266] would lead to the absurd result that any alien anywhere in the world may be sued in the district courts.[267] A more tempting, but similar, error results from pairing 28 U.S.C. § 1391(d) with the process clause of section 12 of the Clayton Act.

Section 12's process clause provides that "all process *in such cases* may be served in the district of which it is an inhabitant, or wherever it may be found."[268] If the section is read as a coherent whole, "such cases" refers to cases where venue is based on "transacting business."[269] There is no statutory basis for applying the process clause where venue is based on section 1391(d).[270] Assuming arguendo that "wherever it may be found" does mean "wherever in the world," circumventing the "transacts business" requirement would permit suits where the defendant had few if any factual connections.[271] The same problem arises if "national contacts" are the basis for the court's jurisdiction over an alien. Under this theory, since an alien may be sued anywhere, the only limit on where the defendant could be sued is the doctrine of forum non conveniens.[272] These illogical results are avoided if section 12's process clause is employed only when that section's venue requirements are met. Similarly, suits against aliens should be limited to courts which can clearly demonstrate personal jurisdiction.[273]

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266. Brunette Machine Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706 (1972); see notes 232-40 *supra*.

267. Apparently argued anyway in Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 339 (E.D. Mich. 1977). *Cf.* C. Civ. art. 14 (Fr.); Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies*, 21 Int'l & Comp. L.Q. 335, 340 n.19 (1972) (the French courts have jurisdiction in any case where the plaintiff is French).

268. 15 U.S.C. § 22 (1970) (emphasis added). The full statute is set forth in text accompanying note 13 *supra*.

269. *Contra*, Scriptomatic, Inc. v. Agfa-Gevaert, Inc., [1973-1] Trade Cas. ¶ 74,594, at 94,632 (S.D.N.Y. 1973) (an "obvious fallacy").

However, the interpretation suggested in text has usually been assumed. There has been little discussion about whether this must be so. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 317, 329; Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 370 (D. Md. 1975). See notes 133-34 *supra* and accompanying text.

270. See notes 257-62 *supra* and accompanying text.

271. *See* Scriptomatic, Inc. v. Agfa-Gevaert, Inc., [1973-1] Trade Cas. ¶ 74,594, at 94,633-34 (S.D.N.Y. 1973).

272. Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 664 (D.N.H. 1977); Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 290 (D. Conn. 1975).

Taking the "national contacts" theory one step further, forum non conveniens would only apply rarely. Since the alien must come all the way to the United States, it would not be that much more inconvenient if he had to travel a few miles inland. *But see* Holt v. Klosters Rederi A/S, 355 F. Supp. 354, 359 (W.D. Mich. 1973).

273. Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219 (D.N.J. 1966). *See In re* Hohorst, 150 U.S. 653, 660-62 (1893).

If venue is based on a finding that the defendant "transacts business" in the district, then process may be served "wherever [the defendant] may be found."[274] If "wherever" means wherever on earth, then a U.S. statute provides for extraterritorial service, and the special federal methods of FRCP 4(i)(1) may be employed.[275] Due process would be guaranteed by the fifth amendment. However, only one court considering the contacts necessary for process to be validly issued under the Clayton Act and Rule 4(i)(1) has yet held that only national contacts were required.[276]

There are many possible interpretations of the language "wherever it may be found" in the process clause of section 12.[277] The semantic distinctions produce little difference in practical application. First, the language, when enacted, was certainly intended to mean in whatever district the defendant might be found.[278] A

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274. 15 U.S.C. § 22 (1970).

275. See note 259 *supra* and accompany ng text. FED. R. CIV. P. 4(i)(1) provides in relevant parts:

> [I]t is also sufficient if service of the summons and complaint is made . . . (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court.

276. Scriptomatic, Inc. v. Agfa-Gevaert, Inc., [1973-1] Trade Cas. ¶ 74,594, at 94,633-35 (S.D.N.Y. 1973). The holding is of dubious validity since the court based venue on 28 U.S.C. § 1391(d). See notes 268-73 *supra* and accompanying text.

See generally Hunt v. Mobil Oil Corp., 410 F. Supp. 4, 8-9 (S.D.N.Y. 1975); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 317, 329-30; Hitt v. Nissan Motor Co., 399 F. Supp. at 840, 846-47.

277. Decisions involving the extraterritorial application of the securities laws are also relevant because the special venue statute controlling actions brought under the securities laws contains much of the same language as that found in section 12 of the Clayton Act. *Compare* 15 U.S.C. § 22 (1970) (set forth in full in text accompanying note 13 *supra*) *with* 15 U.S.C. § 78aa (1970), which provides in part:

> Any suit or action to enforce any liability or duty created by this title . . . may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Recent cases have provided a great deal of material for journals and law reviews. *See, e.g.*, Comment, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17 HARV. INT'L L.J. 315 (1976); Note, *Securities and Exchange Commission v. Kasser: Extraterritorial Jurisdiction in Securities and Exchange Cases*, 4 SYR. J. INT'L L. & COM. 141 (1976); 11 TEX. INT'L L.J. 173 (1976); 27 MERCER L. REV. 844 (1975); 7 VAND. J. TRANSNAT'L L. 770 (1974).

278. *See* Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519, 524 (S.D.N.Y. 1972); *In re* Electric & Musical Indus., Ltd., 155 F. Supp. 892, 894 (S.D.N.Y. 1957); SECTION OF ANTITRUST LAW OF THE ABA, ANTITRUST LAW DEVELOPMENTS 363 (1975).

This assumption was a major stumbling block in *Scophony*. See notes 200-03 *supra* and

second and more modern interpretation would accept this intention, but construe "found" as equivalent to presence or doing business or subject to suit by virtue of local contacts.[279] A third view would take the language as literally authorizing extraterritorial service.[280] However, any statute authorizing extraterritorial service must require at least minimum contacts as a prerequisite.[281] Thus, the second and third interpretations above produce the same result. The defendant's liability to suit in either case must be predicated upon "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[282]

In summary, the contacts required to assert jurisdiction over an alien corporation in antitrust are generally subject to traditional fourteenth amendment due process. In most cases, a state long-arm statute has been employed, or jurisdiction is based on state long-arm. If venue is based on 28 U.S.C. § 1391(d), a state long-arm statute should be employed. In the very narrow range of possible cases where the court uses section 12 of the Clayton Act and a method of service pursuant to FRCP 4(i)(1) which is not state long-arm, it must still be shown, for venue to be proper, that the defendant transacts business within the district. There is presently no statutory authority that would justify a court's basing jurisdiction solely on the national contacts of the alien.

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accompanying text. *See also* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972).

279. Thus, in most actual cases, this question is never raised where service is made pursuant to state long-arm statutes. *E.g.*, Hitt v. Nissan Motor Co., 399 F. Supp. at 846-54; Heatransfer Corp. v. Volkswagenwerk A.G., [1975-1] Trade Cas. ¶ 60,308, at 66,215 (S.D. Tex. 1974). *See generally* Comment, *Venue in Private Antitrust Suits*, 37 N.Y.U. L. REV. 268, 276-80 (1962).

280. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 329, 330; Scriptomatic, Inc. v. Agfa-Gevaert, Inc., [1973-1] Trade Cas. ¶ 74,594, at 94,633 (S.D.N.Y. 1973); Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70, 79 (S.D.N.Y. 1965); Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930, 939 (D. Utah 1962), *aff'd per curiam*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964). *See also* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d at 1340.

281. *See* Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. at 79.

282. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See* Hunt v. Mobil Oil Corp., 410 F. Supp. 4, 9 (S.D.N.Y. 1975); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 329-30.

283. Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 341, 348-50 (1947); Griffin, *supra* note 54, at 389-90; Griffin, *Foreign Governmental Control of Multinational Corporations Marketing in the United States*, 2 SYR. J. INT'L L. & COM. 179, 184 (1974); Wellborn, *supra* note 158, at 690-95; Comment, *Jurisdiction Over Parent Corporations*, 51 CALIF. L. REV. 574, 580-82 (1963). *See also* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 422-26 (9th Cir. 1977).

D. Traditional Approaches: Agency and Entity

Despite the theoretical appeal of federal jurisdiction in personam based on national contacts, an alien corporation should only be subject to suit where there are sufficient state contacts. Cases holding parent corporations subject to jurisdiction based upon the local activities of a subsidiary may be divided into two broad categories.[283] In one, the subsidiary is said to be the agent of the parent; in the other, the two are held to be parts of a single entity. The general outlines of these concepts have changed little over the years.[284] Antitrust cases against alien parent corporations, at least in their use of terminology, generally fall into one or both of these categories.

Courts have used a number of tests and standards in determining whether a subsidiary is the agent of its parent and whether the parent may validly be subject to the court's jurisdiction.[285] Alternative formulations such as "adjunct," "instrumentality," "alter ego," "branch," "creature," are common but are not helpful since they add nothing to an analysis of the problem.[286] Generally, the issue involves the extent of the parent's domination and control of the affairs of the subsidiary. Scrupulous formal separation, however, is not inconsistent with a great deal of control and domination.[287] There is little the 100% stockholder cannot do legitimately through selection of directors and review of their actions, or through manipulation of the bylaws to provide greater shareholder participation, that could be done by a branch supervisor.[288] Viewing the issue as whether or not shareholder power exceeds that permitted

284. *See* Berkey v. Third Ave. Ry., 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926) ("We find in the case at hand neither agency on the one hand, nor on the other abuse to be corrected by the implication of a merger."); E. LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS 60-63 (1936); F. POWELL, PARENT AND SUBSIDIARY CORPORATIONS 89-102, 147-50 (1931); Ballantine, *supra* note 161, at 15.

285. *See* Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367 (D. Md. 1975); Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., [1975-1] Trade Cas. ¶ 60,213 (D.D.C.), *vacated as moot, id.* ¶ 60,293 (D.D.C. 1975); Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D. Utah 1962), *aff'd per curiam,* 325 F.2d 713 (10th Cir. 1963), *cert. denied,* 377 U.S. 931 (1964).

286. Ballantine, *supra* note 161, at 18. *See also* E. LATTY, *supra* note 284, at 156-92; Douglas & Shanks, *Insulation From Liability Through Subsidiary Corporations,* 39 YALE L.J. 193, 195-96 (1929).

287. *See* Williams v. Canon, Inc., 432 F. Supp. 376, 380 (C.D. Cal. 1977); United States v. Watchmakers of Switz. Information Center, Inc., 133 F. Supp. 40, 45 (S.D.N.Y.), *reargument denied,* 134 F. Supp. 710 (S.D.N.Y. 1955); Comment, *Jurisdiction Over Parent Corporations,* 51 CALIF. L. REV. 574, 579-80 (1963).

288. *See generally* DEL. CODE ANN. tit. 8, § 141(a) (Michie Supp. 1976); N.Y. BUS. CORP. LAW §§ 620(b), 701 (McKinney Supp. 1977-1978).

by statute compels decisions like *Cannon* and its contemporary equivalents.[289] They require "day-to-day control" of the affairs of the subsidiary for the parent to be held liable.[290]

Cases holding that corporate affiliates comprise a single economic entity use a variety of tests that are more amorphous, and yet more consistent, than the agency cases. The value of the single-entity approach is its broad, practical flexibility, and no court has limited the concept with a static definition.[291] The factors supporting a finding that two corporations will be regarded for jurisdictional purposes as parts of a larger whole include: (1) whether both companies hold themselves out to the public as one business through shared trademarks and brand names, advertising, or business addresses; (2) whether the subsidiary has independent business of its own, or if its only function is to perform services for the parent; (3) whether the subsidiary is an integral part of the overall business of the parent; (4) whether directors, officers, or employees hold positions in both enterprises or are freely transferred between the two.[292] Ownership amounting to effective control but not agency is also an element to be considered. On the whole, the single-entity approach allows courts to concentrate on business realities without being bound by the rigid technicalities of agency analysis.[293]

In a variation on the agency approach, many courts will sustain

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289. This view of the issue also leaves the parent's liability to suit in the hands of the company's lawyers. Comment, *Jurisdiction Over Parent Corporations*, 51 CALIF. L. REV. at 581.

290. *See* cases cited note 190 *supra*.

291. The test suggested by Wellborn is whether "it is reasonable to conclude that the parent and subsidiary constitute a 'single economic entity.'" Wellborn, *supra* note 158, at 688 (italics omitted).

292. *See* Meat Systems Corp. v. Ben Langen-Mol, Inc., [1976-1] Trade Cas. ¶ 60,965 (S.D.N.Y. 1976); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 329-30; Hitt v. Nissan Motor Co., 399 F. Supp. at 850; Sunrise Toyota, Ltd. v. Toyota Motor Co., Ltd., 55 F.R.D. 519, 528-31 (S.D.N.Y. 1972); Flank Oil Corp. v. Continental Oil Co., 277 F. Supp. 357, 359-61, 364-65 (D. Colo. 1967); Waldron v. British Petroleum Co., 149 F. Supp. 830, 831-35 (S.D.N.Y. 1957). *See generally* Griffin, *Foreign Governmental Control of Multinational Corporations Marketing in the United States*, 2 SYR. J. INT'L L. & COM. 179, 187 (1974). *See also* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 425-26 (9th Cir. 1977) (trademark infringement); SCM Corp. v. Brother Int'l Corp., 316 F. Supp. 1328, 1332-35 (E.D.N.Y. 1970) (patent infringement); Boryk v. deHavilland Aircraft Co., 341 F.2d 666, 667-69 (2d Cir. 1965) (wrongful death).

293. Wellborn, *supra* note 158, at 688-89, 698-702. In antitrust cases, this type of analysis blends nicely into the everyday construction given the "transacts business" test for venue purposes. *See* United States v. Scophony Corp. of America, 333 U.S. at 810-17; Lee's Prescription Shops, Inc. v. Glaxo Group Ltd., [1977-1] Trade Cas. ¶ 61,499 (D.D.C. 1977) (per curiam); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 317-28. See notes 126-32 *supra* and accompanying text.

jurisdiction in antitrust cases where the parent "controls" its subsidiary. Use of the term "control" avoids the need to find a common law agency.[294] The term has a strong, commonsense appeal. Analytically, however, "control" is a meaningless test because the standards associated with it vary so widely. Some courts are still following *Cannon.* They require day-to-day control by the parent before finding jurisdiction or venue under the "transacts business" test.[295] On the other hand, some courts require very little actual control. An example is *Hitt,* where the court first ritually admitted that "mere whole ownership of a subsidiary doing business within a forum is insufficient to justify jurisdiction over the foreign parent . . . ."[296] Somewhat surprisingly, a factor considered by the court in finding personal jurisdiction was the "control potentially exercisable" over the subsidiary.[297] It seems fundamental that the 100% shareholder should always have at least potential control.[298] Intermediate tests are whether the parent "controlled the essential business decisions and operations" of its subsidiary,[299] and "whether the parent's control is sufficient to influence and control those decisions which might involve violation of the antitrust laws."[300] Thus, the consistent "control" terminology produces totally inconsistent results.

In many cases, the agency and entity approaches are mixed.[301]

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294. *See* K. BREWSTER, *supra* note 65, at 59; Comment, *Jurisdiction Over Parent Corporations,* 51 CALIF. L. REV. 574, 581-82 (1963).

295. San Antonio Tel. Co. v. American Tel. & Tel., 499 F.2d 349, 352 (5th Cir. 1974) (domestic); Williams v. Canon, Inc., 432 F. Supp. 376, 380 (C.D. Cal. 1977); *In re* Chicken Antitrust Litigation, 407 F. Supp. 1285, 1293-94 (N.D. Ga. 1975) (domestic).

296. Hitt v. Nissan Motor Co., 399 F. Supp. at 850.

297. *Id.*

298. *See also* Waldron v. British Petroleum Co., 149 F. Supp. 830, 833-35 (S.D.N.Y. 1957) (domestic; the presence of wholly-owned subsidiaries satisfies the "transacts business" standard.).

299. Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 134 (D.N.H. 1975).

300. Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., [1975-1] Trade Cas. ¶ 60,213, at 65,832 (D.D.C.), *vacated as moot, id.* ¶ 60,293 (D.D.C. 1975); Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 365 (D. Colo. 1967).

301. *E.g.,* Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 371-78 (D. Md. 1975); Tokyo Boeki (U.S.A.), Inc. v. SS Navarino, 324 F. Supp. 361, 366 (S.D.N.Y. 1971) ("all these facts illustrate that Boeki USA was both, in practical effect, the same entity as Boeki Japan for some purposes and its agent for other purposes."). *Call Carl* also illustrates the problems that arise when state common law causes of action are joined to the federal antitrust claims, 391 F. Supp. at 370-76, 377-78 (personal jurisdiction upheld with regard to each cause of action), 403 F. Supp. 568 (D. Md. 1975) (directed verdict for defendants on antitrust claims; damages reduced in action for fraud), *aff'd in part & rev'd in part,* 554 F.2d 623 (4th Cir. 1977) (defendants also won on fraud counts). Similar is Systems Operations, Inc. v. Scientific Games Dev. Corp., 414 F. Supp. 750 (D.N.J. 1976) (cited notes 110, 128, & 206 *supra*), 425 F. Supp. 130 (D.N.J.) (product defamation injunction proper, no violation thereof), *rev'd,* 555

Sometimes they are confused and the results are awkward. In the landmark New York decision *Frummer v. Hilton Hotels International, Inc.*,[302] the court found an agency relationship between two second-tier sister corporations, both subsidiaries of related U.S. parents.[303] A branch of Hilton Credit Corporation, Hilton Reservation Service (Service), accepted and confirmed reservations in New York for the London Hilton Hotel, owned by Hilton Hotels (U.K.) Ltd. (Hilton (U.K.)). The New York plaintiff was allowed to assert jurisdiction over Hilton (U.K.) in tort for injuries suffered in the London Hilton. The court held that Service was the New York agent of Hilton (U.K.) because "Service does all the business which Hilton (U.K.) would do were it here by its own officials."[304] It is difficult to accept the finding of agency on its face.[305] Domination and control may well have been exercised by the parents, but not by Hilton (U.K.) over Service.[306] The court expressly held that the working relationship between the two entities, not the fact of common stock

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F.2d 1131 (3d Cir. 1977) (injunction dissolved; district court erred in its choice of law) (antitrust action still pending).

In terms of result, the sole difference between the agency and entity categories is that only if agency is shown will service upon the subsidiary bind the parent. *See* Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930, 938-39 (D. Utah 1962), *aff'd*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964); H. BALLANTINE, *supra* note 158, § 140. *See generally* Stanley Works v. Globemaster, Inc., 400 F. Supp. 1325, 1335-36 (D. Mass. 1975) (domestic; patents); Tokyo Boeki (U.S.A.), Inc. v. SS Navarino, 324 F. Supp. 361, 366-67 (S.D.N.Y. 1971). *See also* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-12 (1969).

302. 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *cert. denied*, 389 U.S. 923 (1967).

303. The stock relationships between the various corporations were complex. Hilton Hotels (U.K.) Ltd. owned and operated the London Hilton Hotel. Hilton (U.K.) was a British corporation, nearly all the shares of which were owned by Hilton Hotels International, Inc. Hilton International was a Delaware corporation, doing business in New York, which owned directly or through subsidiaries many hotels outside of the United States. Hilton International was partly owned by Hilton Hotels Corporation and partly by the public. Hilton Reservation Service was a branch of the Hilton Credit Corporation. Hilton Credit was owned jointly by Hilton International and Hilton Hotels Corporation. Thus, Hilton Credit (with its Service branch) and Hilton (U.K.) were both second-tier subsidiaries of Hilton Hotels Corporation, and each was at least partly owned by Hilton International. *Id.* at 540, 227 N.E.2d at 855-56, 281 N.Y.S.2d at 47 (dissent).

304. *Id.* at 537, 227 N.E.2d at 854, 281 N.Y.S.2d at 44.

305. Griffin, *supra* note 54, at 397; 19 N.Y.2d at 539-44, 227 N.E.2d at 855-58, 281 N.Y.S.2d at 46-50 (Breitel, J., dissenting). Judge Breitel disagreed with the majority on the grounds that (1) Hilton (U.K.) was held to be "present," not subject to long-arm jurisdiction, (2) without any showing of misrepresentation or commingling of corporate activity. On the other hand, he referred to "the widespread Hilton Hotel enterprises" and "the Hilton complex," and admitted that "a layman would view them" as a single entity. *Id. See also* Wellborn, *supra* note 158, at 700-01.

306. Griffin, *supra* note 54, at 397.

ownership, gave rise to the agency.[307] However, in a suit against an alien car manufacturer and its New York distributor, the franchises' only business was handling the products of the manufacturers.[308] The New York court distinguished *Frummer* and found no agency, and no jurisdiction over the manufacturer, because the companies were separately owned.[309]

An even more unusual variant of the normal parent subsidiary-agent relationship arose in the well-known *Swiss Watch* case.[310] Seeking extraterritorial jurisdiction over two of the defendants, the government asserted that two U.S. parents were the agents of their Swiss subsidiaries.[311] The court rejected this unique argument; it was unwilling to hold that the subsidiaries dominated and controlled their parents.[312] The court did find jurisdiction was proper, but on the grounds that each parent and its subsidiary were in fact a single entity.[313] *Frummer v. Hilton Hotels International,* whatever the language used by the New York Court of Appeals, may also be more realistically viewed as a case where the court found that the corporate affiliates acted as one.[314]

Commentators have found much to quarrel with in the case law. Joseph Griffin's comprehensive comparative survey of this area suggests that courts have not carefully examined the factual issues

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307. 19 N.Y.2d at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45.

308. Delagi v. Volkswagenwerk AG, 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972).

309. *Id.* at 431, 278 N.E.2d at 897, 328 N.Y.S.2d at 656. The cases are compared and discussed in Griffin, *supra* note 54, at 395-97, and Wellborn, *supra* note 158, at 700-02.

310. United States v. Watchmakers of Switz. Information Center, 133 F. Supp. 40 (S.D.N.Y.), *reargument denied,* 134 F. Supp. 710 (S.D.N.Y. 1955). The facts and background of the case are discussed in depth in Haight, *The Swiss Watch Case,* in COMMON MARKET AND AMERICAN ANTITRUST 311-63 (J. Rahl ed. 1970). *See* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 127-32 (1958).

311. 133 F. Supp. at 46.

312. *Id.* at 46-48; K. BREWSTER, *supra* note 65, at 60. *Contra,* Johnson, Newberg, Fox & Rahl, *Extraterritorial Procedure and Enforcement of the Antitrust Laws of the United States and of the Communities and Member States,* in COMMON MARKET AND AMERICAN ANTITRUST 117, 134 (J. Rahl ed. 1970); E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 37-38 (1974).

In a later opinion, the court used the terminology, "the agency the law finds between members of a conspiracy," but this finding was based on their status as affiliates, not on control. 134 F. Supp. at 712. The conspiracy theory for purposes of jurisdiction found its zenith in Giusti v. Pyrotechnic Indus., 156 F.2d 351 (9th Cir. 1946), but is rejected today, *e.g.,* Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930, 933 & n.3 (D. Utah 1962), *aff'd per curiam,* 325 F.2d 713 (10th Cir. 1963), *cert. denied,* 377 U.S. 931 (1964).

313. 133 F. Supp. at 46-48. K. BREWSTER, *supra* note 65, at 60-61.

314. Griffin, *supra* note 54, at 396-97; Wellborn, *supra* note 158, at 700-02.

of intercorporate control.[315] At least in American antitrust, however, courts are willing to undertake exhaustive factual analysis.[316] Defendants are more likely to win motions challenging jurisdiction where discovery has been minimal.[317] More to the point is Griffin's observation that the concepts of agency and entity are not directly relevant to the boxes-within-boxes structure of the modern multinational.[318] Similarly, Charles Wellborn's survey of New York cases concludes that they make little sense in terms of agency and should be more rationally considered from the point of view of "single economic entity" analysis.[319] Both writers note that the legal terms, with which courts categorize the facts before them, oversimplify and tend to distort.[320] Describing a relationship as an agency or as a single entity is a conclusory assertion which itself calls for a test.[321] By putting new wine in old bottles, courts which justify new directions with the terminology of the past perpetuate the confusion and cacophony that characterizes this area of the law.

The legal concepts courts use to express their results also limit the scope of the issues they consider. As Judge Cardozo observed, "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[322] The landscape of personal jurisdiction over absent corporations has undergone vast changes since *Cannon* was decided. What were once

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315. Griffin, *supra* note 54, *passim*.

316. *E.g., In re* Chicken Antitrust Litigation, 407 F. Supp. 1285, 1294-1300 (N.D. Ga. 1975); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 269-317; Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519, 524-26 n.3 (S.D.N.Y. 1972).

317. *See, e.g.*, O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d at 1066-67. Although Griffin cites this case as an example of careful factual analysis, Griffin, *supra* note 54, at 395 n.94, this is disputed in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 319 n.30. *See also* I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp., 408 F. Supp. 1023 (D. Minn. 1976); United States *ex rel.* Martin-Trigona v. Bankamerica Corp., [1974-1] Trade Cas. ¶ 74,916 (D.D.C. 1974), *dismissed for lack of standing sub nom.* Martin-Trigona v. Federal Reserve Bd., 509 F.2d 363 (D.C. Cir. 1975).

The courts in the Southern District of New York may lean the other way, retaining jurisdiction pending further discovery, *see* Meat Systems Corp. v. Ben Langen-Mol, Inc., [1976-1] Trade Cas. ¶ 60,965, at 69,261 (S.D.N.Y. 1976).

318. Griffin, *supra* note 54, at 381-83. *See also* Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., [1975-1] Trade Cas. ¶ 60,213, at 65,832 (D.D.C.), *vacated as moot, id.* ¶ 60,293 (D.D.C. 1975).

319. Wellborn, *supra* note 158, at 695-703.

320. *Id.* at 695; Griffin, *supra* note 54, at 383.

321. Berkey v. Third Ave. Ry., 244 N.Y. 84, 94-95, 155 N.E. 58, 61 (1926); Ballantine, *supra* note 161, at 14, 18; Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 195 (1929).

322. 244 N.Y. at 94, 155 N.E. at 61. *See* United States v. Scophony Corp. of America, 333 U.S. at 818-20 (Frankfurter, J., concurring).

thought to be insurmountable natural barriers are now crossed easily. The narrow and technical issue of the corporate shareholder's liability to suit, however, remains locked in the language of the past. The terms courts use today are similar to those used fifty years ago.[323] *Cannon,* in essence, combined the substantial showing required to pierce the corporate veil with the strong showing needed, at that time, to establish that an out-of-state corporation was doing business locally.[324] The result was a prohibitively stringent standard.[325]

The *Cannon* rule has survived because courts continue to confuse substantive and jurisdictional liability.[326] Lip service is paid to the distinction, but the terminology used in the two types of holdings is virtually indistinguishable.[327] The important functional distinctions between the two contexts are ignored.[328] "Piercing the corporate veil" is a creditor's remedy and is essentially a penalty for abuse of the statutory privilege of limited liability.[329] Subjecting the foreign parent to jurisdiction where a subsidiary is present serves the different purpose of requiring the parent to defend claims in forums where it receives economic benefits.

An extreme example of the application of the *Cannon* rule is the recent antitrust case, *Williams v. Canon, Inc.*[330] Plaintiff Williams started out as a consultant to Canon U.S.A., Inc. (Canon U.S.A.) and eventually became the exclusive independent dealer for Canon calculators in the western United States. Canon U.S.A. was the wholly-owned subsidiary of Canon, Inc., a Japanese manufacturer.[331] Williams's territory was gradually reduced, and his contract was finally terminated. Canon U.S.A. preferred dealing with its

323. *See* H. BALLANTINE, *supra* note 158, § 140; Ballantine, *supra* note 161, *passim.*

324. F. POWELL, *supra* note 284, at 140-50.

325. *Id.* at 151. *See* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. at 336-37.

326. *See* Wellborn, *supra* note 158, at 685-88. *See also* Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367 (D. Md. 1975) (the opinion repeatedly uses the phrase "pierce the corporate veil," a term which primarily refers to substantive liability cases); Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., [1975-1] Trade Cas. ¶ 60,213, at 60,831 (D.D.C.), *vacated as moot, id.* ¶ 60,293 (D.D.C. 1975).

327. *Compare* Ballantine, *supra* note 161, *passim, with* Douglas & Shanks, *supra* note 286, *passim.*

328. Wellborn, *supra* note 158, at 685, 686.

329. *See generally* W. CARY, CASES AND MATERIALS ON CORPORATIONS 109-49 (4th ed. unabr. 1969).

330. 432 F. Supp. 376 (C.D. Cal. 1977).

331. The corporate relationships were straightforward: Canon, Inc. owned 100% of Canon U.S.A., Inc., which in turn owned 100% of both Astro Office Products, Inc. and Canon Business Machines, Inc. *Id.* at 378 n.1.

wholly-owned subsidiary, Astro Business Machines, Inc. (Astro). Williams also alleged that prior to his termination Canon U.S.A. sold its calculators to Astro at cheaper prices than he was charged, thereby undermining his dealership.

Relying on *Toshiba America,* the court found it lacked jurisdiction over Canon, Inc. in the California forum.[332] Two men served on the boards of all three companies. Takeshi Mitari was also the chairman of the board of Canon, Inc.; Seiichi Takikawa was also the chairman of the board of Astro and the president of Canon U.S.A. Takikawa was later made president of Astro at a board meeting of Canon, Inc. The court held that these relationships were immaterial because it found that when Mitari and Takikawa promoted Canon products in the United States they acted for the subsidiaries. The court held that the basic policy decisions of the subsidiaries, as to pricing and opening U.S. branch offices, came from Japan only because both men lived there. The court held that personnel of the parent operating training schools for subsidiary employees in California were not "transacting business." The parent owned twenty-three trademarks exploited by the subsidiaries throughout the United States. Securities of the parent were marketed throughout the United States. A domestic joint venture between the parent and a U.S. motion picture concern was held immaterial because the technical assistance and licensing agreements provided for Japanese arbitration. Judge Takasugi concluded that the facts were insufficient "to warrant this court's piercing of the corporate veil."[333]

E. Solutions

Distorted results are produced by the failure to adequately distinguish general from long-arm jurisdiction. Applying either state long-arm statutes or *International Shoe* should lead to the conclusion that an alien corporation which uses a domestic subsidiary to distribute goods will generally be subject to personal jurisdiction in an antitrust case. The key issue is: What is the nature of the violation? Whether foreign manufacturers are permitted to exploit U.S. markets and yet remain immune from antitrust enforcement should not turn on questions of corporate structure.

The rule of *International Shoe* and its progeny is that where a corporation's minimal intrusions into a forum for its own benefit are

332. *Id.* at 379-82.
333. *Id.* at 380.

related to the cause of action, the due process clause permits that forum to subject the corporation to personal jurisdiction.[334] The long-arm statutes of nearly all states expressly codify this formula.[335] They typically list a series of types of conduct on which jurisdiction may be based, with the explicit caveat: "When jurisdiction over a person is based solely upon this section, only a [cause of action] [claim for relief] arising from acts enumerated in this section may be asserted against him."[336] The antitrust laws redress economic injuries resulting from violations of laws designed to ensure free trade.[337] The *Alcoa* test requires both a violation and a foreseen domestic impact for the U.S. federal courts to take subject matter jurisdiction.[338] Personal jurisdiction may be based on either "presence" or long-arm contacts. Where the substantive law being applied prohibits shipping goods, or causing goods to be shipped, into the United States in restraint of trade,[339] the minimum contacts logically required should be the presence in the United States of a distributing arm of the violator, or the presence of an entity capable of maintaining or continuing the violation.

Remarkably, the cases hold that a domestic subsidiary must be controlled by, the agent of, or the same as its parent for the parent to be liable. If the subsidiary maintains its independence—which presumably includes managing its own affairs, having a different name, having its own directors and officers, and setting its own marketing and pricing policies—the parent will be immune.[340] This will be so, for example, even if the parent distributes widgets only

334. See notes 100-21 *supra* and accompanying text.

335. Those that do not, incorporate it implicitly. *E.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). *See generally* Gorfinkel & Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163 (1970).

336. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(b). *Accord*, Civil Practice Act § 17, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968); N.Y. CIV. PRAC. LAW § 302(a) (McKinney 1972) (quoted in part at note 119 *supra*). *See generally* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

337. See notes 56-64 *supra* and accompanying text.

338. See notes 80-84 *supra* and accompanying text.

339. Of course, U.S. trade may also be restrained by nonimporters. An agreement by an alien company with an importer or a domestic producer not to ship into the U.S. could have substantial U.S. effects. *See* P. AREEDA, *supra* note 53, at 63; W. FUGATE, *supra* note 65, at 87.

340. An even more insidious problem is raised by Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In treble damage suits alleging price-fixing or tying arrangements, only the "independent" subsidiary, not the injured consumer (the "indirect purchaser"), would have standing to sue. *See id.* at 736 n.16.

through its U.S. subsidiary, is the sole source of U.S. widgets, and is a member of an infamous widget cartel whose agreement providing for quotas, minimum prices, and world-wide territorial allocations is inscribed in twelve-inch roman capitals on the side of a mountain. The cases hold that owning a U.S. distributor, without more, is not a minimum contact.[341]

Approaching the jurisdictional problem as one of control or agency would be justified if the cause of action were unrelated to the presence of the local subsidiary. *Perkins v. Benguet Consolidated Mining Co.*[342] established that *International Shoe* left intact prior case law in situations where the defendant corporation could be said to be present.[342.5] *Perkins* held that if a defendant was engaged in "systematic and continuous corporate activities"[343] the due process clause did not forbid subjecting it to in personam jurisdiction on a cause of action unrelated to its activities.[344] This basis for jurisdiction is similar to the old tests for "doing business."[345] The agency standard comes down to us from those pre-modern times, and it is appropriate in two general types of cases: first, where the parent is alleged to be responsible for some act of the subsidiary;[346] second, where the cause of action against the parent is unrelated to the forum activity of the subsidiary.[347] In the first situation, the

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341. It is what constitutes "more" that is the subject of considerable debate. Courts are not insensitive to the strong public policies behind antitrust enforcement, and this factor has contributed to erosion of the *Cannon* doctrine. *See* United States v. Scophony Corp. of America, 333 U.S. at 817; Fugate, *An Overview of Antitrust Enforcement and the Multinational Corporation*, 8 J. INT'L L. & ECON. 1, 1 (1973). *See also* Griffin, *supra* note 54, at 388-89.

342. 342 U.S. 437, 446-47 (1952).

342.5 International Shoe Co. v. Washington, 326 U.S. 310, 317-18 (1945); Comment, *International Shoe and Long-Arm Jurisdiction—How About Pennsylvania?*, 8 DUQ. L. REV. 319, 322-23 (1970).

343. 342 U.S. at 445.

344. *Id.* at 446-48.

345. *See* Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 539, 227 N.E.2d 851, 855-58, 281 N.Y.S.2d 41, 46 (Breitel, J., dissenting), *cert. denied*, 389 U.S. 923 (1967). *See generally Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 930-32 (1960); Note, *Jurisdiction Over Foreign Corporations—An Analysis of Due Process*, 104 U. PA. L. REV. 381, 397-99 (1955).

346. This situation can arise in either of two contexts: jurisdictional (can the parent be sued?) or substantive (can the parent be made to pay?).

347. It is important to recognize that *Cannon* falls squarely within this category. As a general rule in all situations the case is useless; limited to its facts, the result is valid today. The lower court reported:

> The transactions out of which the alleged breach of contract in the present case grew had no relation to any activity of the Alabama [subsidiary] corporation. The alleged contract was made solely with the packing company, the Maine [parent]

control exerted by the parent is an essential element of its liability; in the second, unless the subsidiary is the agent of its parent, or the two are held to be a single entity, the parent has no local contacts.

Many of the foreign antitrust cases considered in this Comment involve the following pattern: the alien parent did something illegal and its subsidiary sold the goods here.[348] An analysis based on *International Shoe* should ask, What is the purpose of the subsidiary? The question is whether a cartel or monopoly has invaded our markets.[349] Regardless of the degree of control, if the function of the subsidiary is to permit the parent to avail itself of the benefits and privileges of U.S. markets,[350] then that subsidiary itself constitutes a substantial economic intrusion into a forum. That activity alone should be held to be a minimum contact upon which to base jurisdiction over the parent for violations of the antitrust laws.

Focusing on the relation between the function of the subsidiary and the substantive allegations against the parent, rather than on the degree of control or domination, will not necessarily expand or contract jurisdiction. It will make jurisdiction more appropriate. *International Shoe* emphasized the kind of contacts with the forum, not the amount.[351] If the local business of the subsidiary is unrelated to the product line or the services that are the subject matter of the complaint against the parent, long-arm jurisdiction should ordinar-

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corporation, and related to the manufacture of cotton sheetings for use in its meat packing business; and the Alabama corporation, as such, is in no way concerned with the merits of the controversy.

The counsel for both plaintiff and defendant agreed that the issue to be passed upon by the court is solely whether there is such an identity between the Alabama corporation and the Maine corporation as that the Maine corporation was present and doing business in North Carolina . . . .

Cannon Mfg. Co. v. Cudahy Packing Co., 292 F. 169, 170-71 (W.D.N.C. 1923). *Scophony's* distinguishing *Cannon* as a "manufacturing and selling case" makes little or no sense jurisdictionally. See notes 168-71 *supra* and accompanying text.

348. *E.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 244, 246, 402 F. Supp. 251 (E.D. Pa. 1975); Hitt v. Nissan Motor Co., 399 F. Supp. 838, 847-48 (S.D. Fla. 1975).

This characterization is, of course, an oversimplication; its point is to sharpen and distinguish issues. It would be more accurate to add that conspiracy between the defendant affiliates is also alleged in nearly all these cases. *E.g.*, Heatransfer Corp. v. Volkswagenwerk A.G., [1975-1] Trade Cas. ¶ 60,308 (S.D. Tex. 1974).

349. *See* Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 666-67 (D.N.H. 1977).

350. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958); International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

351. See text accompanying note 100 *supra*.

ily be unavailable.[352] Similarly, long-arm is inappropriate when the subsidiary's acts are the basis of the complaint, unless those acts are directed by the parent.[353] The presence of a wholly-owned subsidiary is relevant to long-arm jurisdiction when it is the conduit through which the parent violates U.S. law.[354]

Since 1911 antitrust cases have consistently applied American law to acts performed abroad,[355] and jurisdiction has regularly been asserted over foreign affiliates of domestic corporations.[356] The early cases struggled to base both subject matter and personal jurisdiction upon some domestic activity.[357] The separateness of foreign legal entities rarely presented a problem because the substantive allegations usually concerned monopolistic corporate acquisitions or combinations.[358] In one type of case, the jurisdictional allegation was that the conspiratorial or monopolistic acts affecting commerce had occurred in the United States.[359] In the other common type of case,

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352. Loose single-entity analysis can bring as many inappropriate cases into courts as strict agency standards can eliminate proper defendants. *See* Frummer v. Hilton Hotels Internat'l, Inc., 19 N.Y.2d 533, 539, 227 N.E.2d 851, 855, 281 N.Y.S.2d 41, 45 (Breitel, J., dissenting), *cert. denied*, 389 U.S. 923 (1967). *Cf.* Handlos v. Litton Indus., Inc., 304 F. Supp. 347 (E.D. Wis. 1969) (jurisdiction over parent upheld where plaintiff sued subsidiary shipbuilder for negligent manufacture; sister finance subsidiary shown doing business in the forum; agency language used but single entity purportedly shown).

353. *See, e.g., Williams v. Canon, Inc.*, in which it is clear that the plaintiff's complaint, aside from alleging conspiracy, charges the subsidiary, Canon U.S.A., with the wrongful conduct, 432 F. Supp. 376, 378 (C.D. Cal. 1977). Unfortunately *Toshiba America*, upon which the court in *Williams* relied, does not set forth the plaintiff's allegations with any more specificity than "antitrust action." 491 F.2d at 1065.

354. Hitt v. Nissan Motor Co., 399 F. Supp. at 842, 846-50. *See generally* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 419-22 (9th Cir. 1977).

355. See notes 73-75 *supra* and accompanying text.

356. *See generally* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 118-51 (1968) (nearly every case cited as illustrating the principles of extraterritorial antitrust jurisdiction subjects an alien parent or subsidiary to personal jurisdiction); THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 66-77 (1955); Oseas, *Antitrust Prosecutions of International Business*, 30 CORNELL L.Q. 42 (1944).

357. K. BREWSTER, *supra* note 65, at 70-74; SECTION OF ANTITRUST LAW OF THE ABA, ANTITRUST LAW DEVELOPMENTS 356 (1975); Oseas, *supra* note 356, at 44-45, 53-58; Note, *Extraterritorial Application of United States Law: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1017 (1976).

358. *See, e.g.*, United States v. American Tobacco Co., 221 U.S. 106, 171-72 (1911). *But cf.* United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 202 (S.D.N.Y. 1929) (different result where the French government, as majority stockholder of one of the defendants, claimed sovereign immunity).

> The defendant company being an entity distinct from its stockholders, immunity cannot be claimed by it or on its behalf on the ground that it and the government of France are identical in any respect.

Id.

359. *See* United States v. Sisal Sales Corp., 274 U.S. 268, 273-76 (1927); United States

some essential act of the violation was carried out here.[360] Because sales are an essential element in any business,[361] modern cases involving subsidiary distributors are akin to this second variation.[362]

An early case in which jurisdiction was based solely on the presence of a subsidiary doing business locally is *Dobson v. Farbenfabriken of Elberfeld Co.*[363] In *Dobson,* jurisdiction in personam over the German parent company, through service upon an officer of its domestic subsidiary, was upheld on the ground that the sole purpose for incorporating the American subsidiary was to market dyestuffs in the United States pursuant to an illegal cartel agreement. The subsidiary was held to be the agent and the "corporate creature"[364] of its alien parent, but there was no real showing of domination and control. Personal jurisdiction was based on mere ownership of the subsidiary. The crux of the logic of the case, far ahead of its time, was that the formation of the subsidiary constituted an attempt to avoid the consequences of the Sherman Act.[365] *Dobson* also illustrates the reason for assuming jurisdiction over alien parent corporations in many antitrust cases. The subsidiary may be doing nothing wrong. A New York corporation buying dyestuffs abroad and selling them in Pennsylvania does not necessarily violate the antitrust laws; a foreign cartel operating in the United States does.

Today's results bear out this analysis. The modern cases make sense if viewed as incorporating the *Dobson* rationale. Cases using the "control" approach stay well within the terminology of traditional case law.[366] Occasionally, however, the requisite "control" is minimal. This can always be justified by comparing a case to

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v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87, 106 (1913); United States v. American Tobacco Co., 221 U.S. 106, 145-46, 171-72 (1911).

360. *See* Thomsen v. Cayser, 243 U.S. 66, 88 (1917); United States v. Deutsches Kalisyndikat Gesellschaft, Equity No. 41-124 (S.D.N.Y. 1929) (unreported, summarized in Oseas, *supra* note 356, at 47-48 & nn.20-21), 31 F.2d 199 (S.D.N.Y. 1929). *See also* United States v. Nord Deutscher Lloyd, 223 U.S. 512, 517-18 (1912); United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945); United States v. Hamburg-Amerikanische P.F.A.G., 200 F. 806, 807 (S.D.N.Y. 1911), 216 F. 971 (S.D.N.Y. 1914), *rev'd on other grounds,* 239 U.S. 466 (1916).

361. Hitt v. Nissan Motor Co., 399 F. Supp. at 843-45; Sudbury Wire Rope Mfg. Co. v. United States Steel Corp., 129 F. Supp. 425, 427 (E.D. Pa. 1955).

362. Many recent cases demonstrate that courts continue to search for direct contacts by the parent into the forum to bolster jurisdictional claims. *See, e.g.,* United States v. Scophony Corp. of America, 333 U.S. at 815-16; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 271, 274, 277-78, 282-88, 290-317.

363. 206 F. 125 (E.D. Pa. 1913).

364. *Id.* at 128.

365. *Id.*

366. See notes 294-300 *supra* and accompanying text.

Scophony, where Limited's control over SCA was subject to the veto of the other American shareholders.[367] On such a slim showing there is no true agency, and the cases can only be understood as examples of long-arm jurisdiction.[368] Phrasing the test as "control those decisions which might involve violation of the antitrust laws"[369] misses the point where the parent's acts, not the subsidiary's, are at issue.[370] *Heatransfer Corp. v. Volkswagenwerk A.G.*[371] lists as "indicia of corporate control": (1) personnel of the subsidiary had been trained while employed by the parent; (2) the parent and subsidiary worked together to coordinate product design changes; (3) the parent tested the subsidiary's product which (4) carried the parent's brand name; (5) marketing information was exchanged regularly.[372] These elements do not demonstrate control by the parent; independent contracting parties do all of these things. The facts show a high degree of involvement. They show that the parent has purposely availed itself of the benefits of the forum as a marketplace.

Cases basing jurisdiction upon a showing of section 12 venue[373] make sense if "transacting business" can be shown to be an appropriate minimum contact. This result is asserted more often than it is explained.[374] Generally, jurisdiction may not be based on venue.[375]

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367. United States v. Scophony Corp. of America, 333 U.S. at 800. *See* Hitt v. Nissan Motor Co., 399 F. Supp. at 841-42; Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 364-65 (D. Colo. 1967).

368. *See* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d at 419-20.

369. Flank Oil Co. v. Continental Oil Co., 277 F. Supp. at 365; adopted in Hitt v. Nissan Motor Co., 399 F. Supp. at 842 & n.10.

370. Unfortunately, the substantive allegations were not discussed in *Flank Oil,* 277 F. Supp. 357 (D. Colo. 1957). *See also* cases cited note 353 *supra. Compare Flank Oil with* Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 126, 130, 134 (D.N.H. 1975) *and* Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 369, 371 (D. Md. 1975). Both *Grappone* and *Call Carl* specifically relate the *Flank Oil* test to allegations that the parent was responsible for the subsidiary injuring the plaintiff.

371. [1975-1] Trade Cas. ¶ 60,308 (S.D. Tex. 1974).

372. *Id.* at 66,213-14. *See* Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., [1975-1] Trade Cas. ¶ 60,213, at 65,832-33 (D.D.C.), *vacated as moot, id.* ¶ 60,293 (D.D.C. 1975).

373. See notes 205-20 *supra* and accompanying text.

374. *See* United States v. Scophony Corp. of America, 333 U.S. at 810, 818; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 317, 328-29, 330; Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., [1975-1] Trade Cas. at 65,833; Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70, 79 (S.D.N.Y. 1965). Note that because section 12 authorizes nationwide service, venue will, in effect, support jurisdiction in a wholly domestic case. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373-74 (1927); Frederick Cinema Corp. v. Interstate Theatres Corp., 413 F. Supp. 840, 841 n.1 (D.D.C. 1976).

375. *See* Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 224-25 (D.N.J.

That the plaintiff has selected a proper forum does not automatically subject a defendant to personal jurisdiction. In the context of section 12 of the Clayton Act, however, the "transacts business" test is the "everyday business or commercial concept of doing or carrying on business 'of any substantial character . . . . ' "[376] Because antitrust actions allege various unfair trade practices, it may be asked whether the business conducted is a sufficient minimum contact. If the cause of action arises out of the business transacted in the forum, then long-arm jurisdiction is appropriate. Trade conducted by a surrogate subsidiary for the benefit of the parent does not make the analysis less correct.

The single-entity cases also make more sense from the point of view of *International Shoe* than as cases where the parent has blatantly disregarded corporate separations.[377] The actual management structures of the modern multinational corporations take on widely varying forms.[378] The range of different degrees of delegation and autonomy or centralized control is beyond the scope of this writing. Within some areas of operations, local management may both control day-to-day affairs and have ultimate responsibility; within others, the parent-shareholder may control either minutiae or broad policy directions.[379] Asking precise jurisdictional questions limits the extent to which a plaintiff must discover and a court must confront intricate questions of structure and control. If the substantive allegations relate to acts of the parent, dumping or cartelization for example, the function of the subsidiary as a distributor should subject the parent to jurisdiction wherever the subsidiary markets the offending products.

1966); 2 MOORE'S FEDERAL PRACTICE ¶ 4.02[4] (2d ed. 1967 & 1975); 1 *id.* ¶¶ .140[1.-2], .140[3] (2d ed. 1974); cases cited note 264 *supra.*

376. United States v. Scophony Corp. of America, 333 U.S. at 807. See notes 126-32 *supra* and accompanying text.

377. See notes 291-93 *supra* and accompanying text.

378. *See generally* Steinbock-Sinclair v. Amoco Int'l Oil Co., 401 F. Supp. 19 (N.D. Ill. 1975); Golbert & Wilson, *Centralizing the International Operations of Multinationals,* 11 SAN DIEGO L. REV. 70 (1973); Griffin, *supra* note 54, at 378-83 and materials cited; Hadari, *The Structure of the Private Multinational Enterprise,* 71 MICH. L. REV. 731 (1973); Rubin, *The International Firm and the National Jurisdiction,* in THE INTERNATIONAL CORPORATION 179 (P. Kindleberger ed. 1970); Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law,* 83 HARV. L. REV. 739 (1970).

379. Griffin, *supra* note 54, at 380 & n.32. *See generally* Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 132 n.3 (D.N.H. 1975); K.J. Schwartzbaum, Inc. v. Evans, Inc., 44 F.R.D. 589, 592 (S.D.N.Y. 1968); Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930, 934-38 & nn.5-8 (D. Utah 1962), *aff'd per curiam,* 325 F.2d 713 (10th Cir. 1963), *cert. denied,* 377 U.S. 931 (1964).

One formula incorporating this idea has been used repeatedly in cases decided in the Southern District of New York.[380] In such cases the parent will be subject to jurisdiction where it "has wholly owned subsidiaries performing services in the local jurisdiction which ordinarily would be performed by service employees."[381] This standard was first applied in a domestic antitrust venue challenge where the court's analysis of the "transacts business" requirement was analogous to a minimum contacts approach.[382] The court stressed that the parent, not its subsidiaries, was the defendant.[383] The emphasis of the test is the same as the holding in *Dobson.* The out-of-state or alien parent cannot evade jurisdiction where its subsidiary performs acts for the parent's benefit which would subject the parent to liability had it done them itself.[384]

The long-arm analysis proposed here explains results.[385] Since 1960, thirteen antitrust cases have litigated the issue of whether an alien parent corporation is subject to personal jurisdiction in a forum where its subsidiary does some amount of business.[386] Jurisdiction has been upheld in nine cases, and denied in four cases in which the court applied restrictive theory. Ignoring theory reveals patterns of consistency. Four cases do not discuss the character of the substantive harm.[387] However, jurisdiction was successfully as-

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380. See note 384 *infra.*

381. Waldron v. British Petroleum Co., 149 F. Supp. 830, 835 (S.D.N.Y. 1957). Another version of this test is set forth in text at note 254 *supra. See also* Dobson v. Farbenfabriken of Elberfeld Co., 206 F. 125, 128 (E.D. Pa. 1913).

382. 149 F. Supp. at 834-37.

383. *Id.* at 834.

384. Unfortunately, the New York Court of Appeals expanded this test, in *Frummer v. Hilton Hotels International, Inc.,* to a finding of general agency, expressly applying it in a situation where there was admittedly no long-arm jurisdiction. See notes 302-09 *supra* and accompanying text. The court unanimously agreed that making reservations, the act in New York, had nothing to do with the negligent management of the London hotel where the plaintiff was injured. 19 N.Y.2d at 536, 539, 227 N.E.2d at 853, 855, 281 N.Y.S.2d at 43, 46. *Frummer* has blurred analysis of the difference between general and long-arm jurisdiction in subsequent antitrust cases applying New York jurisdictional law. *See* Meat Systems Corp. v. Ben Langen-Mol, Inc., [1976-1] Trade Cas. ¶ 60,965, at 69,200 (S.D.N.Y. 1976); Martin Motor Sales, Inc. v. Saab-Scania of America, Inc., [1974-2] Trade Cas. ¶ 75,196, at 97,389 (S.D.N.Y. 1974) (action brought under Automobile Dealer Franchise Act; *Frummer* cited as an example of long-arm jurisdiction); Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519, 528-29 (S.D.N.Y. 1972) (general jurisdiction where "Japanese parents have created wholly-owned subsidiaries solely to serve their interests"); Tokyo Boeki (U.S.A.) Inc. v. SS Navarino, 324 F. Supp. 361, 366 (S.D.N.Y. 1971).

385. *See generally,* Llewelyn, *A Realistic Jurisprudence—The Next Step,* 30 COLUM. L. REV. 431 (1930).

386. Cases cited notes 387-89 *infra.*

387. O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974); Meat Systems

serted in six out of the seven cases where the parent's acts were alleged to have harmed the plaintiff.[388] On the other hand, where the subsidiary harmed the plaintiff, jurisdiction over the parent was successfully challenged in two out of three cases.[389] Although all the cases required some degree of "control" by the parent to support jurisdiction, the absence of sufficient control was a bar only where the subsidiary, not the parent, had been the major actor.

V. CONCLUSION

The need for adequate guidelines is clear.[390] The chief difficulty courts have faced in deciding questions of personal jurisdiction over alien parent companies has been the confusion in the case law. To foreign countries, and alien shareholders and management, inadequate standards which produce apparently arbitrary results cannot seem much like "fair play and substantial justice." California should not be the only state in which a Japanese manufacturing parent cannot be sued for alleged antitrust violations.[391]

Corp. v. Ben Langen-Mol, Inc., [1976-1] Trade Cas. ¶ 60,965 (S.D.N.Y. 1976); Heatransfer Corp. v. Volkswagenwerk A.G., [1975-1] Trade Cas. ¶ 60,308 (S.D. Tex. 1974); Sunrise Toyota Ltd. v. Toyota Motor Co., 55 F.R.D. 519 (S.D.N.Y. 1972).

388. *Jurisdiction upheld:* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. at 328-30; Hitt v. Nissan Motor Co., 399 F. Supp. at 848-49; Dobbins v. Kawasaki Motors Corp., [1974-1] Trade Cas. ¶ 75,100 (D. Ore. 1974); Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930, 931, 939 (D. Utah 1962) (agency found), *aff'd*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964); Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70, 74-75 (S.D.N.Y. 1965). *Jurisdiction denied:* I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp., 408 F. Supp. 1023, 1024 (D. Minn. 1976) (subsidiary not shown to be transacting business in district).

389. *Jurisdiction denied:* Williams v. Canon, Inc., 432 F. Supp. 376, 378 (C.D. Cal. 1977); Norman's on the Waterfront v. West Indies Corp., Civ. No. 515/1973 (D.V.I. July 17, 1974). *Jurisdiction upheld:* Audio Warehouse Sales, Inc. v. U.S. Pioneer Elecs. Corp., [1975-1] Trade Cas. ¶ 60,213 (D.D.C. 1975) (facts at *id.* ¶ 60,282 (injunctive relief)), *vacated as moot, id.* ¶ 60,293 (D.D.C. 1975).

390. With much fanfare, the Justice Department this year published its *Antitrust Guide for International Operations.* Its purpose was to provide counsel with a working statement of government enforcement policy. Personal jurisdiction, however, is mentioned only twice. The *Guide* states that "[t]he Department will . . . seek to exercise the fullest permissible jurisdiction," utilizing modern trends of expanded personal jurisdiction. INTERNATIONAL ANTITRUST GUIDE, *supra* note 234, *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-3 & n.20, TRADE REG. REPORTS (CCH) No. 266, pt. II, at 8 & n.20. The *Guide* later states, without support, that the foreign subsidiary of a U.S. multinational is clearly subject to personal jurisdiction because the parent is doing business in the U.S. *Id., reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-15, TRADE REG. REPORTS (CCH) No. 266, pt. II, at 52-53.

391. *Compare* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974) *and* Williams v. Canon, Inc., 432 F. Supp. 376 (C.D. Cal. 1977) *with* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262 (E.D. Pa. 1975) *and* Hitt v. Nissan Motor Co., 399 F. Supp. 838 (S.D. Fla. 1975).

Whether or not the antitrust laws should or do operate abroad is not within the scope of this writing. The courts have consistently held that the Sherman Act prohibits foreign cartels and monopolies from marketing their products in the United States. A corporation whose clear intent is to exploit the American marketplace should not be permitted to insulate itself from the legal requirements of doing business here by incorporating a domestic subsidiary. Misapplied, technical rules of corporate law should not frustrate congressional policies. To arrive at a straightforward approach, the issues and concepts which in the past have only produced confusion should be discarded.[392]

The rule of *Cannon Manufacturing Co. v. Cudahy Packing Co.*[393] should be abandoned. *Cannon* was a case of federal common law that incorporated pre-*International Shoe* standards for corporate presence. *Cannon* is irrelevant to the reach of modern state long-arm statutes. As an antiquated technical rule that is riddled with qualifications and exceptions, the case no longer helps answer legal questions.

The Clayton Act corporate venue provision[394] should be ignored when an alien is sued. First, venue is never a bar because "[a]n alien may be sued in any district."[395] Second, whatever "transacts business" means, section 12 venue is as broad or broader than personal jurisdiction. Wherever the court has personal jurisdiction over a corporate defendant in antitrust, venue is proper. Unless the court has jurisdiction, venue or anything else is irrelevant.

Any modern analysis of personal jurisdiction must start with *International Shoe*.[396] Acts done abroad may violate the antitrust laws if their purpose or foreseeable result is to affect U.S. commerce. If the purpose of a domestic subsidiary is to promote and distribute products which its parent produced or priced in violation of the Sherman Act, then state long-arm statutes can subject the parent to personal jurisdiction. The cause of action arises out of acts done in the forum. The act done in the forum is the ownership of a local outlet for the offending products.

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392. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).
393. 267 U.S. 333 (1925).
394. Clayton Act § 12, 15 U.S.C. § 22 (1970).
395. 28 U.S.C. § 1391(d) (1970).
396. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 206-12 (1977).