

# PROJECTING THE LONG ARM OF THE LAW: EXTRATERRITORIAL CRIMINAL ENFORCEMENT OF U.S. ANTITRUST LAWS IN THE GLOBAL ECONOMY

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More than a dozen years ago, the nuclear engineer turned management consultant and business pundit, Kenichi Ohmae, predicted that “sooner than most people think, our belief in the ‘nationality’ of most corporations will seem quaint. It is already out of date.”<sup>1</sup> His prophecy largely has been fulfilled. McDonald’s and Starbucks are ubiquitous, thriving on main streets and malls around the globe. A former “big three” U.S. automobile manufacturer is now a German-American corporation, while the quintessentially British Jaguar is manufactured by Ford. Then there is the Seattle Mariners professional baseball team—and what could be more American than baseball?—financed by Nintendo and starring Ichiro Suzuki and Kazuhiro Sasaki. The examples are endless.

Ohmae was writing before the advent of the Internet, at a time when the term “E-commerce” had yet to be coined. Yet, he observed that the new world order already contained contradictions: “On a political map, the boundaries between countries are as clear as ever. But on a competitive map, a map showing the real flows of financial and industrial activity, those boundaries have largely disappeared.”<sup>2</sup> That observation captures the source of the problem discussed in this paper. While the globalization of business has accelerated, the political paradigm fundamentally remains the nineteenth century nation-state.<sup>3</sup>

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1. KENICHI OHMAE, *THE BORDERLESS WORLD* 10 (1990).

2. *Id.* at 18.

3. The European Community (EC) might be cited as an exception to this statement. The European Commission’s Competition Directorate-General has developed a strong and effective community-wide enforcement regime that has not just supplemented national competition law enforcement efforts, but has been well ahead of most member states in aggressively enforcing the competition provisions of the Treaties. Several member states did not even have competition laws, much less effective enforcement agencies, until quite recently. EC competition law enforcement occurs in the unique context of pervasive economic unification in the EC, which gives to the EC many of the attributes we associate with a nation-state. *See generally* PAUL CRAIG & GRÁINNE DE BÚRCA,

Under these circumstances, nations are confronted with three choices. They may: (a) permit business to function unhampered by any governmentally-imposed ground rules; (b) expand the reach of national regulatory schemes to cover multinational business activities; or (c) create multinational legal institutions that can regulate multinational business activities effectively.

In the area of competition—or antitrust—regulation, policymakers are not likely to embrace the first alternative, a kind of global *laissez faire*. Regulations have made tentative moves in the direction of the third alternative, the creation of a multinational enforcement regime, under the auspices of the World Trade Organization (WTO) or otherwise.<sup>4</sup> But for now, the method of choice is the second option, the expansion of municipal law jurisdiction to reach multinational activity. The United States has been at the forefront of this effort, providing an example that some other international political players are beginning to follow.

In this paper, I review the development, expansion, and current state of extraterritorial enforcement in the United States, look briefly at the presence or prospects of extraterritorial jurisdiction elsewhere, identify some of the problems presented by the unilateral exercise of extraterritorial jurisdiction, and suggest a view of the future.

## I.

The last decade of the twentieth century saw a veritable explosion in the exercise of extraterritorial jurisdiction in the enforcement of U.S. antitrust laws by the United States. Simultaneously, the Antitrust Division increased the use of criminal sanctions against foreign firms and individuals, as well as the severity of the sanctions imposed. The table in Appendix A lists fines of \$10 million or more assessed for antitrust violations. Observe that the first fine of such magnitude was assessed in 1996 and that twenty-seven of the thirty-two defendants listed are non-U.S. corporations. These developments may indeed reflect “a case-by-case common law process of law development” heralding the “emergence of international competition law,” as Professor Harry First has suggested.<sup>5</sup>

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EU LAW: TEXT, CASES, AND MATERIALS 891-1025 (2d ed. 1998); D.G. GOYDER, EC COMPETITION LAW (3d ed. 1998).

4. See, e.g., Wolfgang Fikentscher, *On the Proposed International Antitrust Code*, in ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 345-57 (John O. Haley & Hiroshi Iyori eds., 1995).

5. Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 733-34 (2001).

Or, they may represent an example of “U.S. legislative and judicial imperialism,” as characterized by former Commissioner of the Australian Trade Practices Commission, Warren Pengilly.<sup>6</sup>

In any event, the head of the Antitrust Division for most of the Clinton administration saw this expansive enforcement effort as a sterling accomplishment of his tenure. Proclaiming “the dawn of a new era in anti-cartel enforcement around the world,”<sup>7</sup> Assistant Attorney General Joel Klein announced that the Antitrust Division had collected more fines in fiscal year 1999 than in the entire history of Sherman Act prosecutions.<sup>8</sup> The \$1.1 billion collected equaled a nearly fourfold increase over the record setting amount obtained in 1998. Significantly, more than 90% of the fines assessed by the Division in 1997 and 1998, and almost all the criminal fines obtained in 1999, came from international cartel cases. The largest fines were assessed against non-U.S. firms. A single \$500 million fine assessed against one Swiss firm in 1999 exceeded the totals collected in any previous year and was, at the time, “the largest fine ever secured in any Justice Department proceeding under any statute.”<sup>9</sup> In addition, a “\$10 million fine [was] imposed on the German CEO of SGL Carbon AG,”<sup>10</sup> and the Department of Justice negotiated “precedent-setting agreements by two European executives to plead guilty and go to jail in the U.S.”<sup>11</sup> During the two preceding fiscal years, approximately 50% of the corporate criminal antitrust defendants were non-United States entities,<sup>12</sup> and of the twenty-six corporations against which fines of \$10 million or more were assessed, about half were foreign-based.<sup>13</sup> Moreover, some thirty-five grand juries then were investigating international cartels, evidencing a continued emphasis on international enforcement of U.S. municipal antitrust laws.

The process continued during the transition from the Clinton administration to the Bush administration. During fiscal year 2000, nearly

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6. Warren Pengilly, *The Extraterritorial Impact of U.S. Trade Laws: Is It Not Time for “ET” to “Go Home”?*, 20 WORLD COMPETITION L. AND ECON. REV., Mar. 1997, at 54.

7. Joel I. Klein, *The War Against International Cartels: Lessons from the Battlefield*, Address at the Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy 2 (Oct. 14, 1999), available at <http://www.usdoj.gov/atr/public/speeches/3747.htm>.

8. *See id.* at 6.

9. *Id.*

10. *Id.* at 7.

11. *Id.* at 6.

12. Joel I. Klein, *Status Report: International Cartel Enforcement*, Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy (Oct. 14, 1999).

13. Joel Klein, *Status Report: Criminal Fines*, Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy (Oct. 14, 1999).

one-third of the Antitrust Division's criminal investigations involved suspected international cartel activity, and the Division was pursuing thirty grand jury investigations of suspected international cartel activity.<sup>14</sup> A \$134 million fine was assessed against Mitsubishi Corporation in 2001 for its participation in the international graphite electrodes price fixing cartel.<sup>15</sup> Others prosecuted in that case (and the fines imposed upon them) were: SGL Carbon AG of Wiesbaden, Germany (fined \$135 million); UCAR International Inc. of Danbury, Connecticut (fined \$110 million); Showa Denko Carbon Inc. of Ridgeville, South Carolina (fined \$32.5 million); Tokai Carbon Co. Ltd. of Tokyo, Japan (fined \$6 million); SEC Corporation of Hyogo, Japan (fined \$4.8 million); and Nippon Carbon Co. Ltd. of Tokyo, Japan (fined \$2.5 million).<sup>16</sup> In another case, a Milan-based, Swiss subsidiary of ABB Asea Brown Boveri Ltd. pleaded guilty and was assessed a \$53 million fine for participating in a bid rigging conspiracy on a construction contract funded by the United States Agency for International Development (USAID) in Egypt.<sup>17</sup>

Corporations are not the only non-U.S. entities being sanctioned. Executives from Germany and Switzerland recently have served prison sentences in the United States following convictions of antitrust violations.<sup>18</sup> The U.K. chairman of Christie's, the prestigious British auction house, has been indicted along with his American alleged co-conspirator, the chairman of Sotheby's, on charges that they fixed commissions on auction items.<sup>19</sup> Also, four Japanese citizens, officers in Japanese chemical companies, were indicted recently for allegedly participating in a conspiracy to fix prices of food additives (sorbates).<sup>20</sup>

What, one may ask, accounts for these remarkable and unprecedented

14. James M. Griffin, Status Report on Criminal Fines, International Cartel Enforcement, and the Corporate Leniency Program, Address Before the Criminal Practice and Procedure Committee, 49th Annual Spring Meeting, American Bar Association Section of Antitrust Law (Mar. 28, 2001), available at <http://www.usdoj.gov/atr/public/speeches/8063.htm>.

15. Press Release, U.S. Dep't of Justice, Mitsubishi Corporation Fined \$134 Million for Its Role in International Price-Fixing Cartel (May 10, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/8186.htm](http://www.usdoj.gov/atr/public/press_releases/2001/8186.htm).

16. *Id.*

17. Press Release, U.S. Dep't of Justice, ABB Asea Brown Boveri Ltd. Subsidiary Pleads Guilty to Bid Rigging on USAID Construction Contract in Egypt (Apr. 12, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/7984.htm](http://www.usdoj.gov/atr/public/press_releases/2001/7984.htm).

18. See Griffin, *supra* note 14.

19. Press Release, U.S. Dep't of Justice, Former Chairman of Sotheby's and Christie's Auction Houses Indicted in International Price-Fixing Conspiracy (May 2, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/8128.htm](http://www.usdoj.gov/atr/public/press_releases/2001/8128.htm).

20. Press Release, U.S. Dep't of Justice, Four Japanese Executives Indicted in Price-Fixing Conspiracy (Jan. 23, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/7310.htm](http://www.usdoj.gov/atr/public/press_releases/2001/7310.htm).

results during the 1990s? There are a number of contributing factors. First, almost all of the cases were concluded through negotiated pleas rather than trials.<sup>21</sup> Second, although the Sherman Act, as amended through 1990, provides for criminal fines not exceeding \$10 million for corporations and \$350,000 (as well as imprisonment for up to three years) for individuals,<sup>22</sup> the Division increasingly has relied upon the alternative fine calculation authorized by the Criminal Fines Improvement Act of 1987, which permits fines against both corporations and individuals equal to twice the gain or twice the loss occasioned by the offense.<sup>23</sup> The resolution of cases through plea agreements removes the formidable difficulties facing the government in proving the gains/losses attributable to the antitrust violations.<sup>24</sup>

Third, all of the cases involved charges of horizontal price fixing. These per se violations of the Sherman Act do not require a showing of economic effect<sup>25</sup> and, hence, required neither proof of market definition nor the presence of market power. Thus, defendants had fewer bases on which to challenge the government's case, and faced a greater risk of conviction if brought to trial before an American jury.

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21. The only criminal prosecution of a non-U.S. defendant through trial occurred in the fax paper cases. *See United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173 (D. Mass. 1999); *infra* notes 86-100 and accompanying text. In the ADM case, two executives of that company, both U.S. citizens, were prosecuted through trial and ultimately received substantial prison sentences. *See United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000). *See generally* KURT EICHENWALD, *THE INFORMANT* (2000) (providing a fascinating account of the unraveling of the ADM case, which also involved Japanese and European companies).

22. 15 U.S.C. § 2 (1994). The Department of Justice has sought to increase the maximum to \$100 million. *See* Joel Klein, Statement Before the Subcommittee on Antitrust, Business Rights, and Competition Committee on the Judiciary, Concerning International Antitrust Enforcement (Oct. 2, 1998), available at <http://www.usdoj.gov/atr/public/testimony/1971.htm>.

23. 18 U.S.C. § 3571(d) (1994):

Alternative fine based on gain or loss.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

24. *See, e.g.*, Plea Agreement, *United States v. BASF Aktiengesellschaft*, Crim. No. 399-CR-200-R 5-7 (May 20, 1990), available at <http://www.usdoj.gov/atr/cases/f2400/basf.pdf>. Negotiated pleas typically contain language to the effect that the defendant agrees that the Sentencing Guidelines range exceeds the agreed-upon fine. *See id.* at 7. The base fine for Guideline purposes usually is calculated at 20% of sales volume, apparently a rule of thumb for estimating twice the gain or loss. *See* Gary R. Spratling, Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders, Address at the Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy (Oct. 15, 1999), available at <http://www.usdoj.gov/atr/public/speeches/3952.htm>.

25. Ordinarily, effect is not necessary to convict a U.S. defendant of price fixing. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). *But cf.* *Broad. Music, Inc. v. Columbia Broad. System, Inc.*, 441 U.S. 1 (1979). Whether a showing of economic effect is essential to finding a non-U.S. defendant guilty of a price fixing conspiracy where the operative acts all transpired outside the United States is a more complex issue. *See infra* notes 58-66 and accompanying text.

The Antitrust Division's successful efforts to strengthen its antitrust enforcement weapons also contributed to its success in obtaining convictions. Increasingly, the Division has utilized informants, search warrants, electronic surveillance (including wiretapping, video monitoring, and body wires), and the investigative resources of the Federal Bureau of Investigation (FBI) and other law enforcement agencies.<sup>26</sup> It has developed and refined a sophisticated corporate leniency program that provides significant inducement for both corporations and their employees to provide evidence of violations to the Division.<sup>27</sup> It has negotiated an effective border watch arrangement with the Immigration and Naturalization Service (INS) to detain foreign individuals who might have information related to investigations.<sup>28</sup> And, it has signed a Memorandum of Understanding with the INS that provides incentives for cooperation by foreign business executives.<sup>29</sup>

International cooperation is noticeably absent from this list of factors that contributed to the Antitrust Division's success in prosecuting non-U.S. corporations and individuals. Although the Division has pursued a policy it calls "positive comity,"<sup>30</sup> under which it has entered into cooperation agreements with Australia,<sup>31</sup> Canada,<sup>32</sup> Japan,<sup>33</sup> and the European Community,<sup>34</sup> these agreements played an insignificant role in

26. See Judy Whalley, *Priorities and Practices—The Antitrust Division's Criminal Enforcement Program*, 57 ANTITRUST L.J. 569, 571 (1988). See also EICHENWALD, *supra* note 21.

27. See Spratling, *supra* note 24, at 5.

28. Donald C. Klawiter, *Criminal Antitrust Comes to the Global Market*, 13 ST. JOHN'S J. LEGAL COMMENT. 201, 208-09 (1998).

29. Memorandum of Understanding Between the Antitrust Division, United States Department of Justice and The Immigration and Naturalization Service, United States Department of Justice (Mar. 15, 1996), available at <http://www.usdoj.gov/atr/public/criminal/9951.pdf>. See also Klawiter, *supra* note 28, at 206-07.

30. See Anne K. Bingaman, U.S. Antitrust Policies in World Trade, Address Before the World Trade Center Chicago Seminar on GATT After Uruguay (May 16, 1999), available at <http://www.usdoj.gov/atr/public/speeches/94-05-16.txt>; Joel I. Klein, International Antitrust: A Justice Department Perspective, Address Before the Fordham Corporate Law Institute (Oct. 26, 1995), available at <http://www.usdoj.gov/atr/public/speeches/fordhamjik.txt>. See also International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust 201-79 (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> [hereinafter Final Report].

31. Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl. 34 U.S.T. 388, available at <http://www.usdoj.gov/atr/public/international/docs/austral.us.txt>.

32. Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 1-3, 1995, U.S.-Can., 35 I.L.M. 309, available at <http://www.usdoj.gov/atr/public/international/docs/uscan721.pdf>.

33. Agreement Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan, available at <http://www.usdoj.gov/atr/public/international/docs/3740.pdf>.

34. Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, U.S.-E.C., State Dep't No. 98-106, 37 I.L.M. 1070, available at

prosecuting non-U.S. defendants.<sup>35</sup>

The Antitrust Division's success in prosecuting foreign firms and individuals benefited from negotiated pleas, expanded fines, and its newfound ability to deploy a powerful set of enforcement tools. However, these alone would not have produced such dramatic results. It first was necessary to establish the jurisdictional foundation for prosecuting non-U.S. firms and individuals for acts that occurred entirely outside the United States.

The development of a legal foundation for extraterritorial jurisdiction to enforce U.S. antitrust laws got off to a slow start. The Sherman Act by its terms reaches "trade or commerce among the several States, or with foreign nations,"<sup>36</sup> but Justice Holmes' decision in *American Banana Co. v. United Fruit Co.*, a narrow reading of international law's territorial jurisdiction concept, seemed to limit the reach of U.S. antitrust laws to acts committed within the United States.<sup>37</sup> Only two years later, in one of the leading cases under the statute, The Imperial Tobacco Company of Great Britain and Ireland was prosecuted and found to have conspired with The American Tobacco Company and other U.S. corporations and individuals not to compete in each other's primary markets.<sup>38</sup> The agreement at issue evidently was concluded in England, although U.S. firms participated.

Nineteenth century jurists generally agreed that the international law principle of territorial jurisdiction limited the reach of national law, other than in exceptional cases such as piracy on the high seas, to the territory of

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<http://www.usdoj.gov/atr/public/international/docs/1781.htm>. See also Agreement Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.C., 30 I.L.M. 1491, available at <http://www.usdoj.gov/atr/public/international/docs/ec.htm>.

35. Apparently, Japan provided some assistance in the fax paper cases, but may not have realized that a criminal prosecution would result. See Joel Davidow, *Recent Developments in the Extraterritorial Application of U.S. Antitrust Law*, 20 WORLD COMPETITION L. AND ECON. REV., Mar. 1997, at 8. The Government of Japan appeared as *amicus* in the case, supporting defendant's assertion of lack of jurisdiction to prosecute the case in the United States. See *United States v. Nippon Paper Indus. Co.*, 109 F. 3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). No cooperation was sought or obtained from the home countries of the defendants in the vitamin cases, but Canada and the United States apparently did cooperate in the prosecution. See First, *supra* note 5, at 717-18. The Antitrust Division press releases announcing success in the remaining cases do not mention international assistance.

36. 15 U.S.C. § 1 (2001).

37. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Two years later, in a case involving a crime committed in one U.S. state with effects in another, Holmes held that the latter had jurisdiction. See *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (stating "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.").

38. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). Curiously, the Supreme Court's opinion neither cited *American Banana* nor discussed the extraterritorial jurisdiction issue.

the enforcing nation.<sup>39</sup> Thus, Justice Holmes' invocation of this international law principle in *American Banana*<sup>40</sup> as a limitation on the extraterritorial reach of the Sherman Act arguably was consistent with the views prevalent when the statute was adopted two decades earlier.

Chief Justice Marshall cautioned against construing a federal statute in a manner inconsistent with international law principles.<sup>41</sup> But, that advice is more easily given than implemented. The development of extraterritorial application of U.S. antitrust law subsequent to *American Banana* illustrates the malleability of the jurisdictional principles of customary international law. Although quoted by Justice Scalia's dissent in *Hartford Fire Insurance Co. v. California*, Chief Justice Marshall's admonition retains little force. As the Ninth Circuit recently observed, "the Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party."<sup>42</sup> The Supreme Court, in its 1991 decision in *E.E.O.C. v. Arabian American Oil Co.*, did invoke the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"<sup>43</sup> By then, however, it was "well established that the Sherman Act applies extraterritorially."<sup>44</sup>

At least since the publication of the *Harvard Study*<sup>45</sup> in 1935, international lawyers have acknowledged that customary international law recognizes several principles that support extraterritorial jurisdiction: the "protective," "universality," "nationality," and "passive personality" principles. Commentators<sup>46</sup> and U.S. courts<sup>47</sup> continue to cite these principles. Could one or more of them be invoked to reach anticompetitive acts outside the United States that affect the American economy or citizens? The protective principle, which permits a nation to exercise jurisdiction to protect its important state interests, seems applicable on its face. However, it ordinarily is restricted to situations where critical national interests, such as national security or the national currency, are

39. MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 323 (3d ed. 1999).

40. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

41. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[a]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.").

42. *United States v. Corey*, 232 F.3d 1166, 1179 (9th Cir. 2000).

43. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

44. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting).

45. *Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935).

46. JANIS, *supra* note 39, at 322-30.

47. *See, e.g., United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988).

threatened.<sup>48</sup> Arguably, the United States could invoke the passive personality principle, which authorizes a nation to assert jurisdiction over anyone who injures any of its citizens in violation of its laws, regardless of where the harm occurs. However, that principle is the most controversial of the group and “traditionally has been an anathema to United States lawmakers”<sup>49</sup> (although it was relied upon in part in a case of air piracy involving some U.S. citizens<sup>50</sup>). The other principles clearly are inapplicable.<sup>51</sup>

Thus, U.S. courts must premise their jurisdiction on the territorial principle to avoid conflict with international law. The plasticity of international law principles comes into play here, for the concept of “objective territoriality” extends the territorial principle to encompass conduct outside the territorial boundaries that has effects within them. As the Permanent International Court of Justice observed in *The S.S. “Lotus” (France v. Turkey)*, “the courts of many countries . . . interpret criminal law in the sense that offenses are . . . regarded as having been committed in the national territory, if one of the constituent elements . . . more especially its effects, have taken place there.”<sup>52</sup> Today, the *Restatement (Third) of Foreign Relations Law*, which is accepted as an authoritative statement of international law principles,<sup>53</sup> expressly recognizes intended and actual effects as a basis for invoking jurisdiction in antitrust cases.<sup>54</sup>

The issue of the extraterritorial reach of the Sherman Act remained largely dormant for three decades after *American Banana*,<sup>55</sup> until Judge Learned Hand squarely confronted it in *United States v. Aluminum Co. of*

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48. JANIS, *supra* note 39, at 329. See *United States v. Columba-Colella*, 604 F.2d 356, 358 (5th Cir. 1979); *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968). See also IAIN CAMERON, *THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION* 4-5 (1994).

49. *Yunis*, 681 F. Supp. at 902.

50. *Id.* at 903.

51. The nationality principle recognizes the jurisdiction of a state to prosecute its citizens for violating its laws, no matter where the violation may occur. See, e.g., *Blackmer v. United States*, 284 U.S. 421 (1932). The universality principle, which accords jurisdiction to try the accused to any state that obtains custody over the accused, was applied originally against piracy on the high seas. Today it is used to prosecute “crimes against humanity.” See, e.g., *Demjanjuk v. Petrovsky*, 776 F. 2d 571, 582-83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

52. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7) (holding that a tortious act committed in one jurisdiction with injurious effects occurring in another gives rise to concurrent jurisdiction).

53. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

54. *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 415(2) (1986).

55. *But see* *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). In addition, Professor First has unearthed a series of prosecutions brought by Thurman Arnold during 1939-42 that involved non-U.S. corporations as defendants. See First, *supra* note 5, at 729-30.

*America*.<sup>56</sup> He held that Aluminium Limited, a Canadian corporation, violated the Sherman Act by participating in the “Alliance,” a cartel composed primarily of European companies who agreed to limit their aluminum ingot production. Neither Alcoa nor any other U.S. company was found to have participated in the cartel. Judge Hand’s statement of the issue makes clear that he viewed the reach of the Sherman Act purely as a question of U.S. law. “[T]he only question open is whether Congress intended to impose . . . liability [to conduct outside the United States of persons not in allegiance to it], and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law.”<sup>57</sup>

However, he did not, “impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.”<sup>58</sup> He concluded that such cartels were violations of the Sherman Act “if they were intended to affect imports [into the United States] and did affect them.”<sup>59</sup> As the government unquestionably had shown intent, concluded Judge Hand, the burden shifted to the defendant to show lack of effect.<sup>60</sup> Thus, notwithstanding Hand’s statement seemingly requiring both intent and actual effect, proof of intent to affect U.S. commerce is, by itself, sufficient to make out a prima facie case; actual effects (or their absence) apply only as an affirmative defense.

The “effects” principle laid down in *Aluminum Co.* is derived from the international law concept of territorial jurisdiction.<sup>61</sup> Judge Hand’s stated test for extraterritorial jurisdiction—intent plus some effect on commerce—became the standard, although its formulation has varied in subsequent judicial decisions.<sup>62</sup> While Judge Hand inferred effects from

56. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

57. *Id.* at 443.

58. *Id.*

59. *Id.* at 444.

60. *Id.*

61. JANIS, *supra* note 39, at 326 (stating “[e]xtraterritorial though it may be in practice, in theory the effects principle is grounded on the principle of territorial jurisdiction.”). *See also* *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984) (“[t]here is no constitutional bar to the extraterritorial application of penal laws.”).

62. *See* Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 806 (1986) (“Judge Hand’s intent, coupled with some effect on United States commerce standard, as articulated in [*Aluminum Co.*], has been reformulated in myriad ways. Among other variants, it has become an effects only test, a direct or substantial effects test, a direct and substantial effects test, and a some effects, regardless of whether they are intended or substantial, test.” [footnotes omitted]). *See also* *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 610-13 (9th Cir. 1976).

intent, in most subsequent cases the courts have looked for actual effects and have given little attention to evidence of intent. In the *Antitrust Guide for International Operations*, promulgated in 1977, the Antitrust Division adopted the “substantial and foreseeable effect on U.S. commerce” as the test for jurisdiction over foreign transactions.<sup>63</sup> Congress stepped in with the passage of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA),<sup>64</sup> which adopted a “direct, substantial, and reasonably foreseeable effect . . . on trade or commerce . . .,” as applied to export commerce.<sup>65</sup> The Antitrust Division adopted this language in its revised international guidelines for imports and mergers.<sup>66</sup>

Whether courts applying the *Aluminum Co.* standard (in any of its variations) should also consider other nations’ interests—*i.e.*, whether comity considerations should affect the exercise of territorial jurisdiction—remained a matter of dispute.<sup>67</sup> The Ninth Circuit in *Timberlane Lumber Co. v. Bank of America* said they should;<sup>68</sup> the Antitrust Division, however, argued that only where compliance with U.S. antitrust laws created an actual conflict with other nations’ laws did questions of comity come into play.<sup>69</sup> The Supreme Court resolved the issue in its 1993 decision in *Hartford Fire*.<sup>70</sup> The Court concluded that “it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States,”<sup>71</sup> thereby embracing the Division’s position.

In *Hartford Fire*, plaintiffs alleged that, at the request of several U.S. insurance companies, a group of London reinsurers met and agreed that all reinsurance contracts covering North American casualty risks would exclude specified liability coverage. The London reinsurers argued that the district court should have declined to exercise jurisdiction under the principle of international comity. They asserted that Parliament had

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63. Antitrust Division, U.S. Dep’t of Justice, *Antitrust Guide for International Operations* 7 (1977), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (Feb. 1, 1977).

64. 15 U.S.C. § 6a (2000).

65. “This cumbersome and inelegant language means that the antitrust laws do not apply to domestic or foreign conduct affecting foreign markets, consumers, or producers unless there is a direct, substantial, and reasonably foreseeable effect on the *domestic* market.” PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 272h2 (2000).

66. U.S. Dep’t of Justice, *Antitrust Enforcement Guidelines for International Operations* § 4 (1988), reprinted in 55 ANTITRUST & TRADE REG. REP. (BNA) No. 1391, at S-1, S-20-21.

67. “The effects test by itself is incomplete because it fails to consider other nations’ interests.” *Timberlane*, 549 F.2d at 611-12.

68. *Id.* at 613.

69. *Antitrust Enforcement Guidelines for International Operations*, *supra* note 66, § 5.

70. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

71. *Id.* at 796.

established a regulatory regime over the London reinsurance market and that their conduct was consistent with British law and policy. The Supreme Court rejected that argument, holding that no conflict with British law existed because British law did not require the reinsurers to perform any act prohibited by U.S. law, nor was compliance with the laws of both countries impossible.

The *Hartford Fire* decision, although controversial at the time,<sup>72</sup> removed any legal impediment to antitrust enforcement against foreign firms (and, by implication, individuals), at least in civil cases where U.S. firms also were charged with participating in the violation. The first appellate court decision to consider whether the same standard applied to criminal prosecution of non-U.S. firms for acts that occurred wholly outside the territorial boundaries of the United States was *United States v. Nippon Paper Industries Co.*<sup>73</sup> “Between the 1945 [Aluminum Co.] decision and the 1997 Nippon Paper decision, there was no reported case in which an attempt was made to apply U.S. antitrust law to conduct engaged in entirely outside the United States by non-Americans.”<sup>74</sup>

In *Nippon Paper*, the First Circuit held that the United States could prosecute a foreign corporation under the Sherman Act for activities that took place entirely outside the United States, if they were intended to and did have effects within the United States. The indictment charged that the defendant conspired with others in 1990 to raise prices for thermal fax paper in the United States by agreeing to sell it to independent trading companies on the condition that the latter would resell it in North America at inflated prices. It also charged that the alleged conspirators agreed to monitor the resales to confirm that the trading companies were adhering to the higher prices.<sup>75</sup> Concluding that “the criminal provisions of the Sherman Act do not apply to conspiratorial conduct in which none of the overt acts of the conspiracy take place in the United States,” the District

72. See, e.g., Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289.

73. 109 F.3d 1 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998).

74. Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 513 (1998).

75. The charge raises the obvious question why the manufacturers would pressure the independent trading companies to charge higher prices in the United States. For a fungible commodity such as fax paper, with a presumably downward sloping demand curve, manufacturers ordinarily would want the traders to resell it at a price equal to the traders' marginal cost, thereby maximizing the quantity demanded by the traders from the manufacturers. Absent explanation, the charged conduct “makes no economic sense” and is therefore “implausible.” See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As came out in the evidence at the subsequent trial, however, there was an explanation. See *infra* text accompanying notes 92-95.

Court granted the defendant's summary judgment motion.<sup>76</sup> The Court of Appeals reversed and reinstated the indictment. But its reasoning is vulnerable, and the underlying facts reinforce reservations about the propriety of prosecuting such cases in the United States under U.S. law.

The Court of Appeals acknowledged that federal statutes are presumed to reach only those acts that take place within the territorial jurisdiction, absent a clear congressional intent to the contrary.<sup>77</sup> The court concluded that, as to civil antitrust suits, *Hartford Fire*<sup>78</sup> had resolved the issue: Congress intended the Sherman Act to reach "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."<sup>79</sup> The court declined to distinguish *Hartford Fire* on the ground that it was a civil treble damage action. It concluded that as civil suits and criminal prosecutions for extraterritorial acts are "based on the same language in the same section of the same statute," both "common sense" and "accepted canons of statutory construction" require that the statute should be interpreted uniformly in civil and criminal cases.<sup>80</sup> *Hartford Fire* had found clear congressional intent to apply the Sherman Act extraterritorially in civil actions, and it would be "disingenuous" to interpret the same statutory language differently in a criminal proceeding.<sup>81</sup>

Having reached this conclusion, the court had little difficulty in rejecting the arguments of the defendant and the Government of Japan (which appeared as *amicus*). These arguments were lack of precedent, a stronger presumption against extraterritorial criminal prosecutions, the position taken by the *Restatement*,<sup>82</sup> the rule of lenity,<sup>83</sup> and comity.

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76. *United States v. Nippon Paper Indus. Co.*, 944 F. Supp. 55, 66 (D. Mass. 1996).

77. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

78. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

79. *Id.* at 796.

80. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

81. *Id.* at 6. This conclusion is difficult to reconcile with the holding in *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.19 (1978) ("Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the Act."). The court brushed *Gypsum* aside with the observation that "[r]educ[ed] to bare essence, *Gypsum* focuses on mens rea, noting that centuries of Anglo-American legal tradition instruct that criminal liability ordinarily should be premised on malevolent intent, . . . [but] [t]here is simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality . . ." *Nippon Paper Indus. Co.*, 109 F.3d at 7.

82. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. f (1996). In the case of regulatory statutes such as the antitrust laws, "legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication." *Id.*

83. "The rule . . . provides that, in the course of interpreting statutes in criminal cases, a reviewing court should resolve ambiguities affecting a statute's scope in the defendant's favor . . . But

The court rejected the defendant's and Japan's comity argument on the basis of *Hartford Fire*, which had held comity applicable only where a defendant could not comply simultaneously with both U.S. law and the law of the relevant foreign sovereign.<sup>84</sup> That clearly was not the case because, in the court's view, the defendant's alleged conduct also was unlawful under the law of Japan.<sup>85</sup>

Following a trial on remand, in which the jury was unable to reach a verdict, District Judge Gertner granted the defendant's motion for dismissal of the indictment.<sup>86</sup> She found that the evidence supported the allegation that some Japanese manufacturers conspired to fix the price of fax paper in the United States and that defendant Nippon was a part of that conspiracy. However, she also found that the defendant withdrew from the conspiracy prior to the beginning of the limitations period, with the result that the government failed to carry its burden. Several aspects of the opinion are germane to the larger issues involved.

First, "concerns about comity and the exigencies of a criminal prosecution [of non-U.S. firms] . . . figured prominently in the actual trial. Fundamental issues about language and meaning—which inferences were

the rule of lenity is inapposite unless a statutory ambiguity looms . . ." and the *Hartford Fire* decision forecloses any argument that the Sherman Act lacks extraterritorial reach. *Nippon Paper Indus. Co.*, 109 F.3d at 7-8.

84. "Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by *Hartford Fire* . . ." *Id.* at 8.

85. *Id.* No citation is offered by the court for the proposition that the defendants' conduct was illegal under Japanese law. The Japanese Antimonopoly Law does contain a general prohibition against price fixing. Act Concerning the Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, § 2(6) [hereinafter Antimonopoly Law], reprinted in HIROSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN* app. A, at 387 (1994).

The term "unreasonable restraint of trade" as used in this Act shall mean such business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

*Id.* See also *id.* § 3 (stating "[n]o entrepreneur shall effect private monopolization or unreasonable restraint of trade.").

However, until 1997, the Export and Import Transactions Law gave the Ministry of Trade and Industry (MITI) the authority to approve voluntary export cartels, which were exempt from Antimonopoly Law enforcement. See JOHN HALEY, *ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1947-1998* 56, 83-84, 194 n.45 (2001). As Professor Haley notes, "export cartels often reflected a Japanese response to pressures from foreign governments, especially in the United States, against dumping or voluntary export restraints as exemplified in automobile exports . . ." *Id.* at 84. As the subsequent trial made evident, Professor Haley's description fits the situation involved in *Nippon Paper*. See *infra* notes 90-92 and accompanying text.

86. *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173, 196 (D. Mass. 1999).

reasonable and which were not in light of Japanese culture and traditions—permeated the case.”<sup>87</sup> Specifically, the translators retained by the government and the defendant, respectively, disagreed over the correct English translation of critical terms used in the discussions between representatives of the Japanese manufacturers,<sup>88</sup> and the testimony of the “government’s star witness” had to be taken via video teleconferencing between Tokyo and Boston each evening at 6:00 p.m. Boston time.<sup>89</sup> One government witness acknowledged westerners’ difficulties in comprehending “shared values that the Japanese have” that may be implicit in their dealings with each other.<sup>90</sup> Yet, as the court noted, jurors are expected to draw inferences from their “shared perceptions.” If relevant Japanese perceptions are different, she concluded, the defendant has the burden of presenting evidence on that issue to the jury.<sup>91</sup>

Second, the evidence revealed that the impetus for the meeting between the Japanese manufacturers’ representatives was a threat by an American manufacturer to institute an anti-dumping proceeding against them, charging them with pricing their products in the United States “below their fair value.”<sup>92</sup> As the judge observed, “there was the aroma of a setup in all of this by the American companies . . .”<sup>93</sup> The Japanese manufacturers lawfully could meet to devise their strategy in response to this threat—they could even discuss prices—and each manufacturer could decide independently to concur in the pricing strategy of its rivals.<sup>94</sup> However, they could not agree to fix the prices they would charge in the North American market. Note the dilemma faced by the defendant and its alleged co-conspirators. If they failed to respond to the threat to initiate proceedings before the United States International Trade Commission, they could find themselves involved in costly litigation that could end in the assessment of punitive tariffs on their products, which would raise the prices charged in the American market. On the other hand, if their strategy discussions crossed the fine line that defines impermissible agreement, or appeared to do so, they would be subject to an antitrust suit or prosecution. Thus, the Japanese paper manufacturers were confronted with a situation where “the behavior proscribed by the [Sherman] Act is . . . difficult to

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87. *Id.* at 178.

88. *Id.* at 184-85 & n.21.

89. *Id.* at 184 n.18.

90. *Id.* at 183 n.16.

91. *Id.* at 183 n.15.

92. *Id.* at 180.

93. *Id.* at 180 n.12.

94. *Id.* at 180 (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984)).

distinguish from the gray zone of socially acceptable and economically justifiable business conduct,”<sup>95</sup> precisely the situation that led the Court in *United States v. United States Gypsum Co.* to differentiate between civil actions and criminal prosecutions under the Sherman Act.

Third, the definition of “effects” adopted by the trial court raises concerns. The jurisdictional basis for the prosecution was that the charged conduct was “intended to have, and did in fact have, substantial effects in this country.”<sup>96</sup> However, price fixing is a per se offense under the antitrust laws, and the mere agreement itself constitutes the offense.<sup>97</sup> No effects ordinarily need be proved (or even occur) to support a conviction. To resolve this tension, Judge Gertner adopted “something akin to a ‘per se plus’ test, adding to the traditional domestic analysis the requirement that the government show substantial effects by showing a substantial connection to the United States market.”<sup>98</sup> She charged the jury that they could find that substantial effects could be shown in any of the following ways:

- whether the volume of commerce affected by the conspiracy was substantial;
- whether the share of the market allegedly impacted by the alleged conspiracy was substantial;
- whether the conspiracy as a whole substantially lessened competition in the thermal fax paper market.<sup>99</sup>

Under this test, the jurisdictional requirement of “substantial effects” may be satisfied by presuming effects from sales volume, even though the charged conspiracy may have been wholly ineffectual in fixing (or even stabilizing) prices—as this one apparently was.<sup>100</sup>

The *Nippon Paper* case provides a cautionary tale in the expansion of

95. *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978).

96. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 2 (1st Cir. 1997).

97. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). *But cf.* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979); *California Dental Ass’n v. F.T.C.*, 526 U.S. 756 (1999).

98. *Nippon Paper Indus. Co.*, 62 F. Supp. 2d at 195.

99. *Id.* The government attempted to meet this requirement by showing that defendant had \$6 million in U.S. sales and the Japanese manufacturers accounted for about 30% of the U.S. market at the inception of the alleged conspiracy. However, by November 1990, when the limitations period of the indictment began, the Japanese share of the market collapsed.

100. *See id.* at 182. Compare *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444-45 (2d Cir. 1945), where Judge Hand held that, once intent to affect prices in the United States was established, the burden shifted to defendant to prove the absence of effects.

extraterritorial criminal jurisdiction over alleged antitrust law violations. One can only speculate as to why this particular case was selected for prosecution as the first prosecution of non-U.S. firms for acts committed entirely outside the United States.<sup>101</sup> Domestic competitors had threatened an anti-dumping proceeding (whose only purpose was to achieve that which the United States charged, but failed to prove the defendants accomplished: reduce output and raise domestic price levels), and appeared to provide the government with crucial evidence of the Japanese firms' allegedly unlawful response.<sup>102</sup> The case was commenced during the highly-publicized "Structural Impediments Initiative," a U.S.-Japan effort implemented at the impetus of U.S. firms complaining about obstacles to their successfully entering the Japanese market.<sup>103</sup> The likelihood of a price fixing conspiracy by the Japanese fax paper manufacturers having any significant effect on price or output in the collapsing U.S. market, 70% of which was supplied by domestic firms, seems small. And no such effects were found at the trial, although the jury was permitted to infer their existence from sales volume.<sup>104</sup> To the eye of the uninvolved observer, the evidence of an unlawful agreement was, at best, ambiguous. If there was such an agreement, it was in response to a particular threat and was of brief duration. In short, this was not a case in which incontrovertible evidence indicated a sustained effort by market dominating firms who intended to, and arguably did, effectively restrict output and raise prices in an important market, as appears to have been the case with the vitamin cartel.<sup>105</sup> The wise exercise of prosecutorial

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101. In light of Professor First's discovery of prosecutions by Thurmond Arnold during the 1930s and 1940s, it appears to have been the first such case in the modern era. See First, *supra* note 5, at 729-30. Judge Gertner viewed the Court of Appeals decision in *Nippon Paper* as "a case of first impression." *Nippon Paper Indus. Co.*, 62 F. Supp. 2d at 178.

102. There was the aroma of a setup in all of this by the American companies seeking not just to eliminate their Japanese rivals' competitive edge, but to eliminate their Japanese rivals entirely. One of the attendees at the March 30, 1990 meeting, KSK, was the parent company of Kanzaki Specialty Papers (KSP), an American company. (KSP was considered to be an American corporation for anti-dumping purposes.) Hirotsuke Fukuda, a KSP vice president, testified that he used KSK to get information about Japanese prices; KSK, in turn, directed its American company, KSP, to join with Appleton and threaten to file an anti-dumping petition. That, in turn, would force the Japanese companies to raise their prices and push them out of the market. *Id.* at 180 n.12.

103. The indictment was handed down in 1990. *Nippon Paper Indus. Co.*, 62 F. Supp. 2d at 178 n.7. The "Structural Impediments Initiative" was active from 1989 to 1992. Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L.J. 137, 163-64 (1995).

104. *Nippon Paper Indus. Co.*, 62 F. Supp. 2d at 192, 195.

105. "The *Vitamins* conspirators are large, sophisticated firms that spent millions of dollars and thousands of employee hours to implement and hide their cartel for a decade." Joel I. Klein, *The War Against International Cartels: Lessons from the Battlefield*, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE, INTERNATIONAL ANTITRUST LAW & POLICY 13, 14 (Barry

discretion arguably should have found a better use for the resources required. In retrospect, however, *Nippon Paper* paid its way, for it generated a sweeping jurisdictional precedent for the government.<sup>106</sup>

In summary, there was a dramatic increase in prosecutions of international price fixing conspiracies in the last decade of the twentieth century, many of which charged only non-U.S. firms based on acts that took place outside the United States. Enormous, precedent-shattering fines were collected. Non-U.S. executives of non-U.S. firms served time in U.S. prisons. But, only one case involving a non-U.S. defendant went to trial, and the government ultimately lost that case, although it established a critical precedent. The remaining cases against non-U.S. firms were disposed of by plea agreements and consent judgments.

An expansion in private civil litigation has accompanied the expansion in criminal cases. Some of these civil cases have resulted in settlements for staggering amounts, such as the nearly \$1.5 billion in the vitamin cases.<sup>107</sup> Settlements of treble damage claims against the auction houses, Sotheby's and Christie's, have amounted to a half-billion dollars thus far.<sup>108</sup> In fact, the United States has become a mecca for antitrust (and other) claimants.<sup>109</sup> Notably, non-U.S. plaintiffs seeking to recover treble damages against non-U.S. firms often have been unsuccessful in having their claims adjudicated by U.S. courts.<sup>110</sup>

Hawk ed., 1999). *See generally* First, *supra* note 5.

106. One still wonders why, after the Court of Appeals decision, the Antitrust Division did not seek a consent resolution of the "go and sin no more" variety rather than go through with an expensive, and ultimately losing, trial.

107. "On November 3, 1999, six of the main vitamins companies (Roche, BASF, Rhone-Poulenc, Takeda, Eisai, and Daiichi) agreed to a settlement in the private class-action litigation brought in federal court on behalf of direct purchasers of vitamins and vitamin premix. As befits the magnitude of the volume of commerce alleged in the government's criminal complaints, the settlement was for \$1.05 billion, the largest private antitrust price-fixing settlement in history. An additional \$335 million settlement has also been announced in private class actions and *parens patriae* cases brought by twenty-four state attorneys general on behalf of indirect purchasers (including the states themselves). These cases settle damages along a distribution chain that reaches from cattle feed lots down to consumers of vitamin-enriched foods. Still to be disposed of are the cases brought by those who have chosen to opt out of the direct purchaser settlement." First, *supra* note 5, at 718-19.

108. *In re Auction Houses Antitrust Litig.*, No. 00 CIV. 0648(LAK), 2001 WL 170792, at \*10 (S.D.N.Y. Feb. 22, 2001).

109. *See* *Kruman v. Christie's Int'l PLC*, 284 F.2d 384 (2d Cir. 2002) (holding that the FTAIA does not preclude buyers and sellers at foreign auctions from suing U.S. and foreign auction houses for injuries resulting from an alleged price fixing scheme that affected both U.S. and foreign auction sales). *But see In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001) (stating "a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA.").

110. *See, e.g., Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875 (W.D. Wis. 2000); Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15

## II.

While the extension of jurisdiction over the activities of foreign entities to challenge activities that take place entirely outside this nation's borders is the only currently viable remedy to transnational restraints of trade, it presents a number of problems. Several can be grouped under the general category of due process. These are especially acute in criminal cases<sup>111</sup> and administrative proceedings<sup>112</sup> prosecuted by the competition law enforcement agencies. Of perhaps greatest import are the constraints of distance. For business executives to take time out of their normal responsibilities to participate in judicial or administrative proceedings invariably is disruptive to the corporation's business (as well as the individual's life). This is especially so when they are top management. That may be seen as part of the price the citizen pays for the privileges of living under a rule of law. However, that disruption is magnified when the required appearance (or discovery proceeding) is in another country, perhaps thousands of miles distant, with the concomitant loss of additional time. Disruption is a cost to a business defending itself, and at the margin, will affect its decision whether to defend or settle.

The availability of witnesses who are not under the control of the business (former employees, customers, competitors, etc.) presents related problems. The same distance-related obstacles apply to both witnesses and executives, but the former neither are under the defendant's control nor have the equivalent motivation to come to the defendant's defense. The impediments of distance may well discourage an otherwise willing witness

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ANTITRUST 53 (2001). *But see* *Virgin Atl. Airways Ltd. v. British Airways PLC*, 872 F. Supp. 52 (S.D.N.Y. 1994), *modified*, 257 F.3d 256 (2d Cir. 2001) (holding that a complaint by a non-U.S. carrier alleging various "predatory acts" in trans-Atlantic air travel scheduling and pricing by defendant non-U.S. carrier that allegedly harm competition and consumers in the United States is justiciable even though any relief granted would have an extraterritorial effect). In *Virgin Atlantic*, plaintiff lost on the merits of its case, not on jurisdictional or comity grounds. 871 F. Supp. 52.

111. Few nations other than the United States impose criminal sanctions for violations of their competition laws. *See, e.g.*, Competition Act, R.S.C., ch. C-34, § 45.1 (1985) (Can.) ("imprisonment for a term not exceeding five years or . . . a fine not exceeding ten million dollars or both"); Antimonopoly Law §§ 89-100 (penal servitude up to three years; fines up to 5 million yen).

112. Although the European Commission does not have criminal sanctions, it may impose substantial fines against violators of Articles 81 or 82 of the Treaty. *See, e.g.*, CHRISTOPHER BELLAMY & GRAHAM CHILD, EUROPEAN COMMUNITY LAW OF COMPETITION § 12-075 (3d ed. 2001) ("[t]he fines imposed may range . . . up to a maximum of 1 million or 10 per cent of [the prior year's] turnover, whichever is greater."). For a recent example, see Press Release, European Commission, Commission Fines Eight Companies in Graphite Electrode Cartel (July 18, 2001), *available at* <http://europa.eu.int> (reporting that fines totaling 218.8 million were assessed against eight companies, two of which are U.S. firms and four of which are Japanese) [hereinafter Commission Fines Eight Companies].

from participating in the proceedings. Compulsory process available for a witness within the jurisdiction where the proceedings are under way normally is not available to compel attendance by a non-national residing outside the country.<sup>113</sup> And, as the problems encountered with the “government’s star witness” in the *Nippon Paper* trial demonstrate,<sup>114</sup> even contemporary technology does not provide a satisfactory solution. The government, moreover, possesses an advantage not available to the defendant in this regard. It can negotiate cooperation with the government of the defendant’s home nation to facilitate the prosecution. These extant cooperation agreements<sup>115</sup> do not contemplate assistance to defendants.

Finally, under the general heading of due process, one must include xenophobia or the fear of it. This was the motivation for adding to the Constitution the Sixth Amendment requirement that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .”<sup>116</sup> A foreign defendant’s concern that it may suffer disadvantage before a domestic tribunal, especially where the effective decision maker is a jury or similar lay body, is hardly irrational.<sup>117</sup> Add to these problems the inevitable confusion resulting from differences in language and culture<sup>118</sup> and it becomes evident that a foreign defendant confronts a significant set of obstacles to defending itself and obtaining due process of law.

One of the arguments offered in support of the Antitrust Division’s aggressive prosecution of foreign corporations and individuals for acts that took place outside of the United States is that all of these cases have involved price fixing agreements, which are unlawful under every

113. Cf. FED. R. CRIM. P. 17(e)(2) (“[a] subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.” The statute provides for service of a subpoena outside the United States upon a citizen or resident of the United States. See John D. Perovich, Annotation, *Subpoena, Under 28 U.S.C.A. § 1783, of Persons in Foreign Countries*, 32 A.L.R. FED. 894 (1977). Aliens resident in a foreign country do not fall within the scope of Section 1783. *Id.* § 5.

114. See *supra* text accompanying notes 88-89.

115. See *supra* notes 32-34 and accompanying text.

116. U.S. CONST. amend. VI (emphasis added). Article III, Section 2 already provided that “(t)he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.” The geographical limitation added by the amendment was a compromise between the common law requirement of a jury of the vicinage and absolute legislative discretion as to the location of a trial. See *Williams v. Florida*, 399 U.S. 78, 92-96 (1970).

117. As the retrial in *Nippon Paper* illustrated, a U.S. jury’s “shared perceptions,” from which it is expected to draw inferences about a defendant’s conduct, may well be different from those of a defendant from a foreign cultural environment. See *supra* notes 86-95 and accompanying text.

118. Cf. *supra* text accompanying note 88. The government’s and the defendant’s translators provided different meanings for a critical word in the *Nippon Paper* trial.

competition law and universally are deplored as adversely affecting consumer welfare.<sup>119</sup> This prosecutorial rhetoric suggests that price fixing and related agreements represent a contemporary version of *mala in se*. Many economists agree, but not all policymakers and their political supporters do. Every competition law regime is likely to include exceptions that permit cartels under certain circumstances, and often these cartels are backed by official compulsion. The United States certainly has its share, including the insurance industry,<sup>120</sup> large segments of agriculture, and, of particular relevance here, international trade.

The Webb-Pomerene Act of 1918<sup>121</sup> permits competitors to agree on price, quantity, market division, etc.—*i.e.*, to form export cartels—immune from antitrust concerns so long as they only agree as to exports and file their agreements with the Federal Trade Commission (FTC). Concerned that Webb-Pomerene cartels were not sufficiently successful, Congress enacted the Export Trading Act of 1982,<sup>122</sup> which broadened the immunity enjoyed by export cartels, provided they received a certificate from the Secretary of Commerce (with the concurrence of the Attorney General). Neither act provides immunity from proceedings brought by other nations for violations of their competition laws.<sup>123</sup> The European Court of Justice's (ECJ) decision in the *Woodpulp* case, for example, gave no significance to the fact that some of the agreements at issue were Webb-Pomerene agreements. The court noted that “the U.S. antitrust authorities had been informed of the proceedings at an early stage, and had not objected to them.”<sup>124</sup>

It seems inconsistent for the United States to visit criminal penalties on firms and individuals of other nations for engaging in conduct (export cartels) that U.S. law expressly permits and to which federal agencies are required by law to be party. Of course, the United States is not alone in permitting competitors to engage in restraints of trade exclusively

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119. See, e.g., Klein, *supra* note 105, at 14: “[C]artels are the equivalent of theft by well-dressed thieves,” and “people all over the world have come to realize that cartels . . . are a true scourge of the world economy.” See also OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels pmbl. (Apr. 28, 1998): “[H]ard core cartels are the most egregious violations of competition law and . . . they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others . . .”

120. 15 U.S.C. §§ 1011-1015 (2000).

121. 15 U.S.C. §§ 61-65 (2000).

122. 15 U.S.C. §§ 4001-4003, 4011-4021 (2000).

123. See U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations ¶ 3.1 (1995).

124. Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85, 129/85, A. Åhlström Osakeyhtiö & Others v. Commission, 1988 E.C.R. 5193.

affecting exports. And, there is no evidence the United States has sought to protect Webb-Pomerene or Export Trading associations from proceedings alleging violation of another nation's competition laws. Suppose, however, a country that the United States had a cooperation agreement with, such as Australia, seeks assistance from the United States in proceedings against a U.S. export association. Will the Antitrust Division cooperate with the Australian enforcement authority proceeding against a group of American firms possessing an export trade certificate issued by the Secretary of Commerce and approved by the Attorney General (*i.e.*, the Antitrust Division)?<sup>125</sup> One certainly can expect political pressure from association members and their allies, including members of Congress and perhaps the Department of Commerce, to dissuade the antitrust enforcers from cooperating. The United States could invoke the "public interest" provisions of the International Antitrust Enforcement Assistance Act of 1994,<sup>126</sup> the umbrella statute authorizing cooperation agreements, as a basis for non-cooperation.

The U.S. position on the effect of imports on U.S. industries, whether they are major industries like steel<sup>127</sup> or less economically significant ones like broom corn brooms,<sup>128</sup> also seems at odds with the policies marshaled in support of the prosecution of foreign cartels. The anti-dumping provisions of the Trade Act, which triggered the meetings among Japanese fax paper manufacturers, already have been noted.<sup>129</sup> Under the Tariff Act of 1930,<sup>130</sup> if the Commerce Department finds that imported products are being sold in the United States at less than "fair value"<sup>131</sup> and a U.S. industry is or might be "materially injured," the Department is authorized to impose countervailing tariffs on those products, which effectively raise

125. See GERALYN TRUJILLO, *Mutual Assistance Under the International Antitrust Enforcement Assistance Act: Obstacles to a United States-Japanese Agreement*, 33 TEX. INT'L L.J. 613, 626 (1998): "U.S. antitrust authorities may be unwilling to aid a foreign antitrust authority in its investigation of a U.S. export cartel . . . , especially if the cartel serves an important economic objective and does not have an anticompetitive effect on the U.S. economy."

126. International Antitrust Enforcement Assistance Act § 8(a)(3), 15 U.S.C. § 6207(a)(3) (1994).

127. See Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, 66 Fed. Reg. 54321 (Oct. 26, 2001).

128. See Press Release, United States International Trade Commission, Presidential Determinations Under Section 203 of the Trade Act of 1974 and Section 304 of the North American Free-Trade Agreement Implementation Act Concerning Broom Corn Brooms (Sept. 3, 1996), available at <http://www.ustr.gov/releases/1996/09/96-68.html>.

129. See *supra* notes 92-94 and accompanying text.

130. 19 U.S.C. § 1673 (2001).

131. The determination of "fair value" is complex and leaves ample room for the exercise of discretion by the Commerce Department. See, e.g., *AK Steel Corp. v. United States*, 226 F.3d 1361 (Fed. Cir. 2000).

domestic prices. In addition, acting under Section 203 of the Trade Act,<sup>132</sup> the President, on the recommendation of the International Trade Commission, may impose import quotas and punitive tariffs on a commodity on the sole grounds that U.S. producers are unable to compete with imports.<sup>133</sup> No showing of “dumping” or predatory pricing is required. Output thereby is reduced, prices are increased, inefficient firms are protected, and competition and consumers are harmed, all the evils attributed to cartels, but in this case it is done lawfully—by Presidential mandate. But, if Japanese steel manufacturers, for example, were to agree among themselves to reduce exports to the United States in order to forestall action pursuant to an anti-dumping proceeding or under Section 203, they would be subject to prosecution under the Sherman Act. On the other hand, should the foreign steel producers enter into an agreement with the Secretary of Commerce that they would restrict imports into the United States, provided the President refrained from issuing a Section 201 order, they implicitly might be immune from prosecution.<sup>134</sup>

### III.

Thus far, the United States has been the most aggressive in expanding the reach of its antitrust laws. But, given the increasingly global nature of business activity, the rapid embracing of market economy principles, the realization that international law jurisdictional principles pose no significant obstacle to extraterritoriality, and the understandable desire of other nations to protect their citizens from the adverse effects of international cartels, there is every reason to expect other nations to reciprocate.<sup>135</sup>

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132. Trade Act of 1974 § 203, 19 U.S.C. § 2253 (2001).

133. Of course the criterion is not quite so baldly stated in official documents, but nearly so:

Sections 201-204 of the Trade Act of 1974 authorizes [sic] the President of the United States to take action when a particular product is being imported into the country in such large quantities as to cause injury or threaten serious injury to a domestic industry. *This authority can be used even if the import is not priced unfairly.*

International Trade Data System, Sections 201-204 of the Trade Act of 1974 (last updated Mar. 12, 2002), available at <http://www.itds.treas.gov/sec201.htm> (emphasis added).

134. See Antitrust Enforcement Guidelines for International Operations, *supra* note 123, ¶ 3.4 Ex. M.

135. See Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L. J. 159 (1999):

Extraterritorial enforcement of antitrust and competition laws has become routine in both the United States and the European Union. Enforcement authorities on both sides of the Atlantic vigorously enforce their competition laws against conduct outside their borders to protect their consumers and markets. In many respects, the theories of jurisdiction espoused by U.S. and EU

Indeed, some already have done so. The most notable is the European Community (EC), which has construed the jurisdictional language in Article 81 (formerly Article 85) of the Treaty of Rome, “may affect trade between member states,” to reach non-EC firms.<sup>136</sup> The ECJ first embraced the extraterritorial concept in *ICI v. Commission*,<sup>137</sup> in which it upheld the Commission’s imposition of a fine against ICI (a British firm with continental subsidiaries) for assisting a price fixing cartel and thereby producing effects in the EC. In the *Woodpulp* case in 1988,<sup>138</sup> the ECJ affirmed the Commission’s exercise of jurisdiction over members of a cartel, none of which were EC firms. The defendants argued that the Commission incorrectly had based its decision on the “effects” doctrine. The Advocate General argued that reliance on the “effects” doctrine was appropriate so long as the effects in the member countries were “substantial, direct, and foreseeable.” However, the ECJ eschewed the term “effects,” concluding instead that an anticompetitive agreement entered into outside the EC subjected the actor to EC jurisdiction if the “implementation” of the agreement took place within the Community. Whether “implementation” is less broad than the effects doctrine has been a matter of controversy.<sup>139</sup> The Court of First Instance in a recent decision under the Merger Regulation relied expressly upon the “effects” doctrine,<sup>140</sup> but whether that approach will be adopted by the ECJ or will be extended to non-merger situations remains to be seen.<sup>141</sup> The current EC Commissioner for Competition has taken a strong position regarding

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competition enforcement officials are converging and cooperation is increasing; however, aggressive unilateral enforcement continues to provoke conflicts among close trading partners and to create uncertainty for transnational firms.

Events since Griffin’s article was published have confirmed the validity of his statement. See BBC, *US and EU Clash on Competition* (June 21, 2001), available at [http://news.bbc.co.uk/1/hi/english/business/newsid\\_1398000/1398718.stm](http://news.bbc.co.uk/1/hi/english/business/newsid_1398000/1398718.stm).

136. Kevin Coates & John Finnegan, *Intellectual Property*, in THE EC LAW OF COMPETITION 600-01 (Jonathan Faull & Ali Nikpay eds., 1999).

137. Case 48/69, *Imperial Chemical Industries Ltd. v. Commission*, 1972 E.C.R. 619. Britain did not become a member of the EC until 1973. See CRAIG & DE BÚRCA, *supra* note 3, at 14-15.

138. Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85, 129/85, A. Åhlström Osakeyhtiö & Others v. Commission, 1988 E.C.R. 5193.

139. See, e.g., Griffin, *supra* note 74, at 513 (“[t]he distinction between ‘effects’ and ‘implementation’ leads to different results in a narrow, but significant, group of cases.”); VALENTINE KORAH, I COMPETITION LAW OF THE EUROPEAN COMMUNITY § 1.05 (2000) (“[i]t was not clear whether a foreigner could be fined for making an agreement to keep out of the common market.”).

140. Case T-102/96, *Gencor Ltd. v. Commission*, 1999 E.C.R. II-753, ¶ 90 (“[a]pplication of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.”).

141. Coates & Finnegan, *supra* note 136, at 600.

non-EC firms in the areas of merger enforcement<sup>142</sup> and abuse of a dominant position.<sup>143</sup> The EC recently has imposed substantial fines against non-EC firms for participating in cartels with EC firms,<sup>144</sup> and has established in *Woodpulp*, as glossed by *Gencor*, the jurisdictional basis for aggressively pursuing non-EC cartels as well.

Germany appears to have been foremost among the member states of the EC to embrace extraterritorially. The German antitrust statute codifies the “effects” principle: “this statute applies to all restraints of competition which have an effect within the territorial scope of the statute, even when they are caused outside the territorial scope of the statute.”<sup>145</sup> Nevertheless, the application of the principle against non-German firms thus far has been limited in practice to mergers that would affect Germany.<sup>146</sup> It has not been invoked against non-German cartels or other extraterritorial anticompetitive acts.

Outside the EC, Canada has been most assertive in recent decades, moving generally from the traditional narrow territorial limitations inherited from Great Britain to the view that “[t]his country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here, . . .”<sup>147</sup> As Professor First has described,<sup>148</sup> Canada cooperated with the United States in the vitamin litigation and assessed high fines against German, Swiss, and Japanese firms in those and related cases.<sup>149</sup> Other nations with well-developed competition laws, such as Japan<sup>150</sup> and Australia,<sup>151</sup> have not yet extended

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142. See Mario Monti, The Future for Competition Policy in the European Union, Speech at Merchant Taylor’s Hall (July 9, 2001), available at [http://europa.eu.int/comm/competition/speeches/index\\_2001.html](http://europa.eu.int/comm/competition/speeches/index_2001.html).

143. See Mario Monti, Competition in the New Economy, Speech at the 10th International Conference on Competition (May 21, 2001), available at [http://europa.eu.int/comm/competition/speeches/index\\_2001.html](http://europa.eu.int/comm/competition/speeches/index_2001.html). See also Victorya Hong, *Microsoft, EU Enter Pivotal Period* (Oct. 15, 2001), available at <http://www.thedeal.com>.

144. See, e.g., Commission Fines Eight Companies, *supra* note 112 (U.S. and Japanese firms); Press Release, European Commission, Commission Fines Six Companies in Sodium Gluconate Cartel (Oct. 2, 2001), available at <http://europa.eu.int> (U.S. and Japanese firms).

145. Bekanntmachung der Neufassung des Gesetzes gegen Wettbewerbsbeschränkungen [Law Against Restraints on Competition], 1990 Bundesgesetzblatt, § 130 (BGB1. I 235).

146. *Id.*

147. *Libman v. The Queen*, [1985] 2 S.C.R. 178 (Can.), ¶ 67. The opinion surveys the history and policies underlying the concept of territorial jurisdiction.

148. First, *supra* note 5, at 718.

149. See *Canadian Court Metes Out Record Fines in Vitamin and Food Additive Cartel Cases*, 77 ANTITRUST & TRADE REG. REP. (BNA) 353 (Sept. 23, 1999); *Canadian Court Levies \$5.2 Million Fine in Vitamins Price-Fixing Conspiracy Case*, 78 ANTITRUST & TRADE REG. REP. (BNA) 259 (Mar. 10, 2000); *Firm Gets Multi-Million Dollar Fine for Participation in Feed Additive Cartel*, 77 ANTITRUST & TRADE REG. REP. (BNA) 374 (Sept. 30, 1999).

150. See 1 COMPETITION LAWS OUTSIDE THE UNITED STATES, *Japan*, ch. 2, 72 (H. Stephen

their reach beyond their territorial borders. It would be surprising if they did not do so in the near future. These disparate countries with different interests and competition law traditions hardly are likely to apply precisely the same criteria in adjudging violations. Therefore, the potential of inconsistent outcomes exists. Concerns already are being expressed about the plethora of jurisdictions enforcing conflicting standards in the merger area.

#### IV.

As there currently is no international competition enforcement regime, the only alternative for a nation seeking to protect its consumers from the adverse effects of international cartels is to apply its own municipal competition law in its own courts. The predictable duplication of enforcement, inconsistencies, conflicts, costs, and inefficiencies that result from each nation's proceeding unilaterally provide strong arguments for a deliberate move in the direction of international enforcement. It is, however, unlikely that an effective international regime could be established in the near future. Although the intertwining of competition law with trade issues suggests that the WTO might be the appropriate umbrella for such a regime,<sup>152</sup> there are sound reasons for rejecting that approach.<sup>153</sup> The Organisation for Economic Co-operation and Development (OECD) encompasses most of the industrialized nations and has taken a strong position against international cartels.<sup>154</sup> Thus, it might seem an appropriate institution for international competition law. But the OECD is a forum for developing and recommending economic policy, and it lacks legislative, adjudicatory, or enforcement authority.<sup>155</sup> The OECD could, on the other hand, provide a means of cooperation and coordination in the enforcement of national laws, thereby potentially reducing some

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Harris et al. eds., 2001).

151. See 2 COMPETITION LAWS OUTSIDE THE UNITED STATES, *Australia*, ch. 9, 97 (H. Stephen Harris et al. eds., 2001). The Australian Trade Practices Act does provide for extraterritorial jurisdiction over mergers of non-Australian firms that might have the effect of substantially lessening competition in an Australian market. See Trade Practices Act, 1974, § 50A (Austl.).

152. See, e.g., Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement, 65 ANTITRUST & TRADE REG. REP. (BNA) No. 1628 (Special Supp. Aug. 19, 1993).

153. See Final Report, *supra* note 30, at 249-51, 282-83.

154. See OECD, *supra* note 119.

155. OECD, *The OECD: What is it?*, Overview of the OECD, at <http://www.oecd.org> (“[t]he OECD groups 30 member countries in a unique forum to discuss, develop and refine economic and social policies.”) The OECD does sometimes develop “soft law,” as in, for example, its “Recommendation . . . Concerning Effective Action Against Hard Core Cartels.” See generally OECD, *supra* note 119.

of the problems discussed above. To the extent that national laws become more congruent, as a result of OECD-facilitated cooperation or otherwise, the potential for inconsistent outcomes may be reduced. However, experience to date indicates that such international cooperation has been at the behest of enforcement agencies seeking to improve the means of enforcing their respective competition laws, and has had no evident effect on protecting the interests of potential defendants.<sup>156</sup>

We are left with the prospect of relying on prosecutorial discretion, potentially informed by diplomatic and comity issues, to minimize transnational conflicts, duplication of enforcement, and unfairness to foreign individuals and entities. The *Nippon Paper* case provides reasons to be concerned with the lack of institutional safeguards against the abuse of such discretion.<sup>157</sup>

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156. *See supra* text accompanying notes 32-34, 115. The proposed International Competition Network, on the other hand, holds out the prospect of reducing analogous problems facing firms seeking to merge. *See, e.g.*, Press Release, U.S. Dep't of Justice, U.S. and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001), *available at* [http://www.usdoj.gov/atr/public/press\\_releases/2001/9400.htm](http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm).

157. *See supra* text accompanying notes 77-106. Moreover, in the United States, many of the same problems may arise in the context of private treble damage litigation, where neither prosecutorial discretion nor comity constrains the initiation and prosecution of punitive litigation. *See, e.g.*, *Kruman v. Christie's Int'l PLC*, 284 F.2d 384 (2d Cir. 2002).