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Chapter 23

EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAWS

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Competition laws have been around since at least Roman times. But they were always inherently local. That started to change in the last century. The major shifts started roughly 50 years ago, coinciding with this annual Fordham conference. This chapter traces a bit of that history, with some observations about the current state of extraterritorial application of the antitrust laws of the United States.

I. ORIGINS

Modern competition laws largely began in the United States. Kansas[1] led the way, followed by a number of other states[2] and, shortly afterwards, the federal Sherman Act of 1890.[3] Initially, the application of these statutes was geographically confined. State laws did not apply to conduct undertaken in another state.[4] Federal laws required a connection to interstate commerce, and the Supreme Court infamously ruled in the 1895 *E.C. Knight* case[5] that manufacturing was local and that the Sugar Cartel in issue was not interstate commerce. That the manufacturing equipment came from out of the state, while the sugar often was sold out of the state as well, made no difference. The next two antitrust cases in the Supreme Court involved railroads, whose interstate character was undeniable,[6] and so the Sherman Act was saved from being a complete dead letter. By the time of *Addyson Steel* just a few years later in 1899,[7] the Act clearly applied to at least some manufacturing and *E.C. Knight* was confined to a rule that purely intrastate cartels could not be reached by the federal law.

But what about the application of the Sherman Act to activities occurring in other *countries*? The Supreme Court reached that issue just 10 years later in *American Banana*.[8] There, the plaintiff sought to open a banana plantation in what is now Costa Rica but was obstructed by the banana cartel operating in Panama and Costa Rica. The argument was that the exclusion of the plaintiff would raise prices to buyers in the United States. The Supreme Court unanimously said "no" in an opinion by Justice Holmes:

> Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute

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[1] Act of Mar. 9, 1989, ch. 257, 1889 Kan. Sess. Laws 389.

[2] *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 669–70 (9TH ED. 2022).

[3] 15 U.S.C. § 1.

[4] *See Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 680–82 (Tex. 2006).

[5] *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). The first Justice Harlan dissented.

[6] *See United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

[7] *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

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

> the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious.... We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned.[9]

In the ensuing decades, the economy became far more global. Advances in shipping and the arrival of air travel made transporting items internationally far less expensive and far more common. In 1945, Holmes' old friend Learned Hand announced what became known as the "effects test" in the *Alcoa* case, ruling that conduct undertaken abroad was subject to the Sherman Act if it was made with the intent to affect and did in fact affect U.S. import commerce.[10] Still, despite this expansion of the application of the Sherman Act, there were real limits:

> Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.[11]

Alcoa's effects test was well-received. In the 1993 *Hartford Fire* opinion, the Supreme Court said 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."[12]

II. EXPANSION

The geographic scope of U.S. antitrust expanded even more dramatically in the 1970s and afterwards. Notwithstanding Hand's comment in *Alcoa* that the Sherman Act did not reach supply restrictions abroad having effects in the United States, when such supply restrictions abroad actually occurred and had effects in the U.S., U.S. courts had no difficulty in applying U.S. law.

The catalysts for this expansion were a uranium cartel and agreements by container shipping lines in the North Atlantic trade. The *Uranium* cases[13] were civil cases brought for treble damages. They involved price-fixing agreements made in France, Australia, South Africa, the Canary Islands, and England, as well as Illinois. Several of the foreign defendants refused to appear before U.S. courts and default judgments were entered in Illinois and New Mexico; the judgments were upheld by the Seventh Circuit and the Supreme Court of New Mexico respectively. The *Ocean Shipping* cases involved *criminal* prosecutions. Carriers in the United States, France, England, and Germany were members of an "ocean shipping conference" under the authority of the Federal Maritime Commission. Agreements of the conference members were expressly exempted from U.S. antitrust laws when approved by the FMC. The carriers, however, were alleged to have conspired to disadvantage non-

[9] *Id.* at 357.

[10] *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945).

[11] *Id.* at 443.

[12] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

[13] *E.g.*, *In re Uranium Antitrust Litig.,* 617 F.2d 1248 (7th Cir. 1980); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231 (N.M. 1980).

conference members, mainly Russian, in a manner the FMC had not authorized.[14] The criminal cases were resolved by pleas of nolo contendere, among the last such pleas ever agreed to by the Justice Department.[15]

The *Uranium* and *Ocean Shipping* cases were met with overt hostility abroad. Although Europeans had adopted their own antitrust statute, in the Treaty of the Rome in 1957, enforcement was limited then—and the remedial scheme in the U.S. was literally and figuratively foreign to them.[16] England, France, Canada, and Australia passed "blocking statutes," provisions that forbade compliance with U.S. antitrust discovery demands. Some also prevented enforcement of U.S. judgments.[17] This hostility prevailed largely until the fall of the Berlin Wall and the widespread adoption of competition laws globally that ensued.

III. FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT (FTAIA)

Congress finally faced the issue of antitrust exterritoriality in the Foreign Trade Antitrust Improvements Act of 1982. Clarity was evidently not much of a goal in the drafting. The text provides:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
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> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> >
> > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.[18]

The FTAIA caused a lot of confusion in the courts, which the Supreme Court tried to address in the *Empagran* case, involving a widespread vitamins cartel. The Court held there that "a purchaser in the United States [may] bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser [abroad may] not bring a Sherman Act claim based on foreign harm."[19] The ruling resolved some of the extraterritoriality issues, but many others were not addressed. Still, international cartel cases have become a fixture in U.S. antitrust enforcement. What was clear, as the Court had held in *Hartford*,

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[14] *See generally In re Ocean Shipping Antitrust Litig.*, 500 F. Supp. 1235 (S.D.N.Y. 1980).
[15] *See* D.C. Crim. No. 79-00271 (D.D.C. 1979).
[16] *See* ABA ANTITRUST SECTION, COMPETITION LAWS OUTSIDE THE UNITED STATES, ch. 5 (2D ED. 2010).
[17] *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 1367–69 (9TH ED. 2022).
[18] 15 U.S.C. § 6a.
[19] *F. Hoffmann-La Roche Ltd v. Empagran S*A, 542 U.S. 155, 159 (2004).

is that conduct abroad raising prices of imports to the U.S. was generally subject to the Sherman Act, both civilly and criminally.

IV. CARTEL ENFORCEMENT

In the wake of the fall of the Soviet Union, competition laws were passed in over 100 countries.[20] Although there are many differences, all prohibit price-fixing or bid-rigging agreements among competitors. And now, cartel enforcement is a fixture in almost every country in the world. In most countries, as well as the European Union, cartel enforcement is civil but with potentially large fines. The U.S. is fairly unique in proceeding criminally, and jail sentences of 2–3 years or more for individuals are common. Yet notwithstanding the wide consensus on the importance of cartel enforcement, some nations specifically exempt their own nationals when fixing prices or curtailing supply of exports to other countries. In the U.S., the Webb-Pomerene[21] and Export Trading Company[22] Acts specifically authorize price-fixing of exports for qualifying participants.

Despite the passage of so many competition laws, plaintiffs in civil cases typically seek to proceed in U.S. courts under U.S. law where they can. Competition law is clearer here on most issues, and the availability of liberal discovery and the automatic trebling of damages are especially attractive.

Cartel cases have presented the most frequently litigated issues of extraterritoriality, and some of the issues are thorny. When does a supply restriction in Asia, South America, Europe, etc. affect U.S. commerce sufficiently to warrant application of U.S. law? When does respect for the autonomy of other countries require U.S. law to stand down? And what is the rule when one country *requires* its nationals to fix prices in a way that would violate U.S. law? Authorities in the United States have had to grapple with these issues over the past 50 years.

V. FOREIGN SOVEREIGN COMPULSION

In some instances, countries may actually require companies to fix prices of certain exports. Where that is the case, U.S. law will not apply. But this sovereign compulsion defense is quite narrow. It does not apply when the foreign nation merely encourages the conduct, however strongly. Neither does it apply if the consequences of violating the foreign law are not sufficiently serious. Successful invocations of this defense have been rare, but where the penalty for a violation is real, U.S. courts have recognized the defense.[23]

VI. ACT OF STATE

A related doctrine also recognizes a defense where the challenged activity is in fact undertaken by a foreign nation or one of its instrumentalities. As the Supreme Court held in 1897 in *Underhill v. Hernandez*, "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit

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[20] *See* ABA ANTITRUST SECTION, COMPETITION LAWS OUTSIDE THE UNITED STATES (2D ED. 2010).
[21] 15 U.S.C. §§ 61–66.
[22] 15 U.S.C. §§ 4011–4021.
[23] *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 1331–33 (9TH ED. 2022).

in judgment on the acts of the government of another done within its own territory."[24] But this defense too is quite limited. It cannot be invoked unless the defendant is seeking relief or invoking a defense that "declare[s] invalid the official act of a foreign sovereign." Even the act of a foreign government official will not qualify absent proof of governmental insistence.[25]

VII. COMITY

International comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[26] This recognition is not an "absolute obligation," but neither is it based on "mere courtesy and good will."[27]

What does all that mean in the antitrust context? The circuit court decisions in *Timberlane*[28] and *Mannington Mills*[29] established that, even where the effects test (or FTAIA equivalent) has been met, U.S. courts may decline to exercise jurisdiction based on a multi-factor balancing test—focusing primarily on what nation has the larger interest in the case and the need to avoid unnecessary intrusions into the affairs of other nations. A variant of the *Timberlane* test was reflected in section 403 of the *Restatement (Third) of the Foreign Relations Law of the United States*, which states that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable" and prescribes factors relevant to that analysis.[30] The *Restatement (Fourth)* retains the "reasonableness" criterion but avoids reliance on the multiple factors, saying instead that it "gives effect to the principle of reasonableness by requiring a genuine connection between the subject of the regulation and the state seeking to regulate."[31]

The Supreme Court has never sustained the sovereign compulsion defense in an antitrust case,[32] but it did address the comity issue in *Hartford Fire.* There, in a 5–4 portion of the decision (and over Justice Scalia's dissent), comity was rejected. The issue was whether jurisdiction should be declined on the basis of the comprehensive British reinsurance scheme, under which the conduct in issue was strongly *encouraged* but not *required*. The Court said no, saying that there was no "true conflict" with the Sherman Act because the defendant insurers could comply with both sets of laws and that a true conflict was essential for the application of comity.[33] Justice Scalia's opinion disagreed, relying on the multi-factor test of the *Restatement (Third)*.[34]

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[24] *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)

[25] ANTITRUST LAW DEVELOPMENTS at 1321–30.

[26] *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

[27] *Id.*

[28] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

[29] *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *see also Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982), *vacated on other grounds & remanded*, 460 U.S. 1007 (1983); *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).

[30] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987).

[31] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–04 (2018).

[32] The Court considered but rejected the defense in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 69 (1962).

[33] 509 U.S. at 798–99.

[34] *Id.* at 820–22.

VIII. VITAMIN C

Comity and sovereign compulsion were front and center in the long-running *Vitamin C* case.[35] The case involved the Chinese Chamber of Commerce of Medicines and Health Products Importers & Exporters and its Vitamin C subcommittee. The major exporters were all required to be members of the subcommittee. Under the applicable Chinese regulations, exporters were required to "coordinate" and "administer" the "Vitamin C export market, price, and customers" under the supervision of the Ministry of Commerce (MOFCOM). MOFCOM did not specify the prices; instead, the direction was that the exporters had to agree among themselves on the prices to be charged. The evidence showed episodes of cheating and less than complete compliance.

The district court rejected both sovereign compulsion and comity, relying on a misperceived ambiguity in the translated regulations, the cheating, and the fact that regulations required the companies themselves to reach agreement *without governmental involvement* in setting the actual prices to be charged. These factors led the court to conclude that the challenged conduct was "voluntary" and not required. Even though MOFCOM appeared as amicus and explained that price-fixing was indeed required under its regulations—China's first ever appearance in a U.S. court—the district court rejected MOFCOM's explanation of its own regulations and ruled that price-fixing was not truly required. This meant that both comity and sovereign compulsion were unavailing. The court entered judgment for more than $150 million.

On appeal, the Second Circuit reversed. The court examined the regulations to conclude that the regulatory regime did plausibly require price-fixing. And because MOFCOM's interpretation of its own regulations was "reasonable," the court was "bound to defer" to MOFCOM's explanation. The court did not reach the issue of sovereign compulsion but, because a true conflict had thus been shown, held that dismissal was required on the basis of international comity. The Supreme Court granted certiorari on the question whether courts are "bound to defer" to a foreign government's explanation of its laws, and vacated the Second Circuit's decision. The Court ruled that complete deference was not required, only "respectful" consideration.

On remand, the Second Circuit (2–1) reversed the district court again and remanded for dismissal. The court again, applying respectful consideration, concluded that MOFCOM's explanation was reasonable, and even so that the text of the regulations made clear that price-fixing was required. The court then applied an analysis similar to the *Timberlane-Mannington* factors to conclude that dismissal would be required as a matter of international comity. All the conduct occurred in China, the product was made there, all the defendants were Chinese nationals, and the Chinese government had attached great importance to the case, protesting the district court's judgment in a Diplomatic Note to the State Department. The only U.S. connection was that the product was shipped here.

This time, the Supreme Court denied certiorari.[36]

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[35] *In re Vitamin C Antitrust Litig.* (*Animal Science Products v. Hebei Welcome*), 810 F. Supp. 522 (E.D.N.Y. 2011), *reversed*, 837 F.3d 175 (2d Cir. 2016), *vacated & remanded*, 138 S. Ct. 1865 (2018), *judgment reversed again*, 8 F.4th 136 (2d Cir. 2021), *cert. denied*, 143 S. Ct. 85 (2022). Mr. Jacobson represented the defendants in the court of appeals and the Supreme Court.

[36] 143 S. Ct. 85 (2022). Judge Wesley dissented. In his view, there was no true conflict because the companies agreed to charge prices above the minimum required to avoid anti-dumping exposure at the WTO, which was viewed as a "minimum" price. But the regulations required agreements on price and

Issues relating to the extraterritorial application of U.S. antitrust laws will arise with even greater frequency as the economy continues to become more and more global. The tools U.S. courts have developed to apply (and sometimes limit) antitrust prohibitions in the foreign relations context are well-suited to the task. The rarely invoked doctrines of sovereign compulsion, act of state, and international comity provide a necessary bulwark against undue intrusion into the affairs of other nations.

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the law is clear that the price level set does not matter. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59 (1940); *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960).

Principles Governing the Extraterritorial Reach of the Antitrust Laws, *Harold G. Maier,* 1980, p. 341-345, 346-352

I. INTRODUCTION

The propriety of applying an American regulatory statute to foreign persons or activities is determined by both international and domestic legal and political considerations. Courts in the United States, in determining the extraterritorial effect to be given to the antitrust laws, employ principles of international law, principles of comity, and principles of statutory construction designed to reveal the legislative intent of Congress in reaching their decisions. Most important, however, is the recognition that when dealing with statutes whose intended territorial scope is undefined, most of the rules articulated by the courts are, in fact, reflections of judicial perceptions of wise policy influenced by both the substantive goals of the statutes involved and by the need to preserve effective commercial interaction between the United States and its partners in the world economic community. This summary is designed to survey to all of these elements and to indicate the current state of judicial decisions concerning the extraterritorial reach of the antitrust statutes. Since there are few purely criminal antitrust cases raising issues of extra-

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territoriality, many of the cases mentioned involve treble damage actions brought by private plaintiffs. The principles developed in these cases taken together with those involving prosecutions by the Justice Department give an accurate reflection of the potential extra-territorial scope of the antitrust laws in criminal cases as well.

II. INTERNATIONAL LEGAL PRINCIPLES

There are five general principles governing the exercise of penal jurisdiction in international law. They are:

(1) the territorial principle, determining jurisdiction by reference to the place where the offense is committed;

(2) the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense;

(3) the protective principle, determining jurisdiction by reference to the national interest injured by the offense, usually an interest involving the security of the state's government or territory;

(4) the universality principle, determining jurisdiction by reference to the custody of the person committing the offense, until now accepted universally as the jurisdictional basis for the punishment of pirates;

(5) the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense.

See Harvard Research on International Law: Jurisdiction with Respect to Crime, 29 Am. J. Int. L. Supp. 1, 534, 445 (1935). Only the nationality principle and the territorial principle have been almost universally accepted as valid bases for a claim to exercise legislative jurisdiction.

That territorial jurisdiction extends beyond acts done solely within the territory of a given state to include acts done outside its territory having effects within it was recognized by the Permanent Court of International Justice in *The S. S. Lotus* Case, PCIJ Ser. A, No. 10 (1927). In the *Lotus*, negligence occurred on board a French ship on the high seas, causing a collision with a Turkish ship and injuring several Turkish citizens. The Court ruled that Turkey could

correctly assert criminal jurisdiction over the negligent French officer.

> . . . [O]ffenses ,the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially the effects, have taken place there.

The court went on to say that such effects must be inseparable from the offense itself, both in fact and in law. (For an excellent discussion of this aspect of the case, *see* Note, *Extraterritorial Application of the Federal Securities Code: An Examination of the Role of International Law in American Courts*, 11 Vand. J. Transnat'l L. 711, 723 (1978).) To avoid apparent conflict with the principle of absolute territorial sovereignty, this rule is often called the "principle of objective territoriality."

The United States' view of international jurisdictional principles is set forth in several sections of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) [hereinafter *Restatement*]. A state always has jurisdiction to regulate the conduct of its own nationals without regard to where that conduct occurs. *Restatement* § 30. Further, *The Restatement* adopts the view that a state may exercise jurisdiction over any conduct that occurs within its borders, without regard to where the effect of that conduct is felt and may exercise jurisdiction over any conduct outside its territory that either has a substantial and directly foreseeable effect within its territory or relates to a thing, status or other interest localized within its territory. *Restatement* §§ 17 & 18.

Since § 30 recognizes a state's legislative jurisdiction over all activities by its nationals, §§ 17 and 18 concern in fact only the power to assert jurisdiction over aliens. American courts generally rely on the *Restatement* as the source of interlational legal rules concerning jurisdiction. Thus, the *Restatement* and its judicial interpretations have become the international legal standard in United States courts, without regard to whether the *Restatement* accurately reflects the current customary law of nations.

III. THE USE OF INTERNATIONAL LEGAL PRINCIPLES

United States courts have adopted the following approach to the use of international jurisdictional principles.

(1) International law is part of American law and must be applied by United States courts as long as it does not conflict with an express legislative, executive or judicial act. The Paquete Habana, 175 U.S. 677 (1900). *See also Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 114 (1784).

(2) Where there is explicit conflict between a legislative intent and the rules of international law, United States courts must give effect to the intent of the legislature.

(3) Where there is ambiguity in the intent of Congress, congressional intent will be construed to reach a result in conformity with international law. *Murray* v. *The Schooner Charming Betsy*, 6 U.S. 34 (1804).

IV. THE PRINCIPLE OF COMITY

Contemporaneous recognition by the world community of both the nationality and territoriality principles creates the possibility that more than one state may have jurisdiction over the same acts of an individual or of a legal entity. The principle of comity is used to resolve such jurisdictional conflicts unilaterally.

The principle of comity is a pragmatic limitation upon an exercise of jurisdiction that would otherwise be legally permissible. The principle is not a rule of law but rather a rule of "practice, convenience and expediency." *Johnston v. Compagnie Général Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926). In this sense, it is a "golden rule" of transnational jurisdictional interaction.

> . . . [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953).

The principle of comity has been incorporated into the *Restatement* without calling it by that name.

§ 40. *Limitations on Exercise of Enforcement Jurisdiction.*

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other states,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

VI. LEGISLATIVE INTENT IN ANTITRUST STATUTES

The antitrust laws do not include clear expressions of legislative intent indicating the scope of their application. Therefore, the courts have developed for themselves two tests based on the territorial principle of jurisdiction to determine when subject-matter jurisdiction exists under these statutes over activities that involve United States foreign commerce. The "conduct test" supports subject-matter jurisdiction whenever culpable conduct has allegedly occurred within the United States. It is based on the strict territorial principle. The "effects test" supports subject-matter jurisdiction whenever there is a legally cognizable effect upon United States commerce. It is based on the principle of so-called "objective territoriality." In some cases, the nationality principle has provided a possible independent ground for the exercise of subject-matter jurisdiction.

VII. THE CONDUCT TEST

Whenever anticompetitive conduct occurs within the United States, the antitrust statutes give subject-matter jurisdiction over the case. In antitrust cases, the courts tend not to identify the conduct test separately since any anticompetitive conduct carried on inside the United States is virtually certain to effect American commerce so as to satisfy the effects test as well. *Branch* v. *Federal Trade*

conduct is carried on by Americans, the nationality principle also suggests subject-matter jurisdiction.

VIII. THE EFFECTS TEST

Whenever some effect on United States foreign commerce is caused by anticompetitive activity carried on outside the United States potential subject-matter jurisdiction exists. Since all commercial activities carried on almost anywhere will have at least some incidental effect upon American foreign commerce, the courts have attempted to limit the scope of the antitrust laws by reference to the quantum of effect on commerce actually caused. In *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand, sitting for the Supreme Court who could not muster a quorum, ruled that a cartel in which several foreign corporations agreed abroad to limit exports of aluminum to the United States was subject to the antitrust laws where it could be shown that the cartel members *intended* to affect American foreign commerce and did in fact affect it. The *Alcoa* doctrine was restated by the Attorney General's National Committee to Study the Antitrust Laws to require that the effects on American commerce be both "direct" and "substantial." Other courts have rung variations on this theme as does § 18 of the *Restatement*. More recent cases, however, have suggested that to require "substantiality" of effect on commerce as a prerequisite for subject-matter jurisdiction really goes to the question of whether there has been a violation of the statute—whether the effect on trade is "unreasonable"—not to the question of the legitimacy of extraterritorial application. In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *affirmed*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 5950 (1972), plaintiff alleged that defendants had convinced the governments of Sharjah, Great Britain and Iran to interfere with its ability to carry out an oil concession agreement with the government of Umm al Qaywayn. Defendants had allegedly encouraged those states to support claims to the territory in which the concession was located. The court found that sufficient facts to sustain subject-matter jurisdiction had been alleged despite the fact that all alleged acts had taken place outside the United States. The

court appeared to adopt a rule that any allegation of a direct effect upon American commerce would support subject-matter jurisdiction as long as the effect alleged was not "insubstantial." Issues concerning the substantiality of the effect would be considered in determining whether there had been a *violation* of the Sherman Act.

This same distinction between the effect required for subject-matter jurisdiction and the effect on trade needed to establish a violation was emphasized in *Timberlane Lumber Co.* v. *Bank of America,* 549 F.2d 597 (9th Cir. 1976). Timberlane alleged that defendants, American and Honduran corporations and individuals, had conspired to prevent plaintiff from establishing a lumber business in Honduras to produce lumber for export to the United States. The Court found that, although no "direct and substantial effect" on American commerce had been alleged, subject-matter jurisdiction could exist if there was any actual or intended effect upon United States foreign commerce. Whether a sufficiently substantial restraint on commerce had been alleged to state a cause of action for a civil violation was an issue that did not involve considerations of extraterritoriality.

IX. THE "INTENT TO AFFECT" TEST

Hand, in the *Alcoa* opinion, also suggested that an intent to affect American foreign commerce would be sufficient to establish subject-matter jurisdiction, even though no actual effect on that commerce could be demonstrated. This approach tracks that concept of criminal conspiracy that underlines Sherman Act provisions. Hand's analysis implies a kind of *mens rea* test. §18(b) of the *Restatement,* however, suggests a test grounded in concepts of tort rather than in the concepts of conspiracy. Section 18(b)(iii) requires that the substantial effect within the territory be a direct and *foreseeable* result of the conduct outside the territory. Foreseeability and intent are, however, two different concepts. Whether an ordinary reasonable businessperson should foresee the effect of his conduct on American foreign trade involves a different standard from the question of whether he *intended* the effect to occur in a criminal sense. The Sherman Act does not distinguish between standards to be applied in criminal prosecutions by the government and in treble damage

actions brought by private individuals. Where the prosecution of foreign defendants for acts committed abroad is concerned, it would make considerable sense to require a showing of specific intent to affect American commerce while applying the somewhat less restrictive foreseeability test of the *Restatement* to establish subject-matter jurisdiction in private treble damage actions.

X. THE CONCEPT OF COMITY IN ANTITRUST CASES

Considerations of the requirements of comity run throughout the antitrust cases involving foreign defendants or foreign activities by foreigners or Americans. In *Alcoa*, Judge Hand stressed the international complications that would arise from an attempt to treat acts abroad, not intended to affect United States commerce, as unlawful. Failure to observe the essential interests of foreign nations have led to significant diplomatic protests from abroad and to the refusal to recognize some American antitrust judgments. *See, e.g.*, *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504 (S.D.N.Y. 1951) and *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.* [1953] Ch. 19 (1952), [1952] 2 All. E.R. 780; *United States* v. *The Watchmakers of Switzerland Information Center*, 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1962) and the modified decree, 1965 Trade Cases ¶ 71,352 (S.D.N.Y. 1965); *United States* v. *General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949) and the implementing decree, 115 F. Supp. 835 (D.N.J. 1953). Even attempts to gather evidence abroad for use in a private antitrust treble damage action against foreign firms has led to threatened legislative reactions by foreign governments. A bill introduced last month in the British House of Commons, apparently a reaction to discovery attempts connected with the uranium cartel litigation, would permit a British firm suffering a private treble damage judgment in the United States in circumstances that a British court considered to be jurisdictionally unjustified to recover the punitive portion of the judgment from the British assets of the successful American plaintiff. *Protection of Trading Interests Bill*, No. 66, House of Commons.

Recent cases have treated considerations of comity as being of central importance to a determination of whether or not subject-

matter jurisdiction found to exist under other tests should be exercised. The district court in *Timberlane* treated these considerations as controlling. It set forth a series of elements to be considered, drawn from § 40 of the *Restatement*, and called for a "comprehensive analysis of the relative connections and interests of Honduras and the United States . . ." by the district court to determine whether or not the case should be dismissed. The court wrote:

> An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness. (549 F.2d at 613.)

In *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 U.S. 1287 (3d Cir. 1979), Mannington sued Congoleum for treble damages and an injunction, alleging that Congoleum had fraudulently acquired patents in 26 foreign countries and had thereby prevented Mannington from exporting to these countries in violation of § 2 of the Sherman Act. Although the court found subject-matter jurisdiction based on effects on United States commerce, it remanded the case with instructions to the district court to apply what it called the weighing of governmental interests test from *Timberlane* to determine whether considerations of comity required dismissal of the suit.

XI. ACT OF STATE DOCTRINE

Closely related to (but distinguishable from) considerations of comity is the act of state defense in American antitrust cases. The traditional formulation of the act of state doctrine is found in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897).

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

The earliest application of the doctrine in an antitrust case is found

in *American Banana* v. *United Fruit Company*, 213 U.S. 347 (1909), when Justice Holmes, relying on principles of strict territoriality, ruled that the seizure of plaintiff's plantation by the Costa Rican government at defendant's instigation was not actionable because the act of the foreign sovereign in its own territory by definition was lawful. This defense has been alleged in a series of antitrust cases since that time but has been successful in only a few. The mere participation of a foreign government in defendant's anticompetitive activities will not insulate those activities from antitrust penalties. Thus, where a foreign government agency acts within its discretion to aid defendant's restraint of trade, the act of state doctrine will not apply unless it can be shown that restraining trade was the object of the government's policy. *United States* v. *Sisal Sales Corp*., 274 U.S. 268 (1927); *Continental Ore Co*. v. *Union Carbide & Carbon Corp*., 370 U.S. 690 (1962); *Timberlane Lumber Co*. v. *Bank of American*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills* v. *Congoleum Corp*., 595 F.2d 1287 (1979).

Two relatively recent cases that have barred plaintiff's action on grounds of the act of state doctrine are *Occidental Petroleum Co*. v. *Buttes Gas & Oil Co*., 331 F. Supp. 92 (C.D. Cal. 1971) and *Hunt* v. *Mobil Oil Corp*., 550 F.2d 68 (1977), *cert. denied*, 434 U.S. 984 (1977). In *Occidental,* the court found that to consider plaintiff's claim it would have to inquire into the validity of Sharjah's claimed extension of its territorial waters limit. This would involve determining the validity of the act of a foreign state under international law and the court declined to do so. In *Hunt Oil*, plaintiff alleged that the government of Libya had been "duped" by the defendants, the "seven sisters" oil companies, into expropriating plaintiff's oil concession in order to prevent competition between himself and the defendants who produced most of their oil from the Persian Gulf. The court pointed out that since *Sabbatino* v. *Banco Nacional de Cuba*, 376 U.S. 398 (1964), it had been clear that the act of state doctrine in American courts was based on considerations of separation of powers—that the courts should refrain from adjudicating issues involving the acts of foreign states in order to avoid causing difficulty for the executive branch in the conduct of foreign affairs. Thus, even though Hunt specifically argued that he recognized the expropriation as valid inside Libya and in inter-

national law, the court said that to inquire into the *motives* of the Libyan government—whether it had been duped or possibly bribed —ran the risk of exacerbating United States-Libyan relations.

Thus, it appears that while the comity test goes to the question of the propriety of the application of the antitrust laws in the context of the need to maintain an effectively functioning world trading system, the act of state doctrine looks inward to determine whether difficulties for the United States government would be caused by judicial determination of the issues. Significantly, those cases in which the act of state doctrine has been successfully presented as a defense have involved acts by the foreign sovereign that go to the core of its sovereign status, not general discretionary acts by government agents that do not represent a government policy intended to injure the American antitrust plaintiff. Interestingly enough, while occasional judicial failures to recognize the importance of comity has led to angry reactions by foreign governments, the application of the act of state doctrine has led to considerable overreaction in the United States Congress in the form of a bill designed in its original form to make the doctrine entirely inapplicable in antitrust cases. *See* H.R. 4661, June 28, 1979.

XII. CONCLUSION

Criminal prosecutions under the antitrust laws based on extraterritorial activities of defendants are quite rare. Nonetheless, the principles governing the extraterritorial application of these statutes in private actions or suits by the government seeking injunctions are applicable *mutatis mutandis* to criminal actions as well. It is the exercise of prosecutorial discretion by government prosecutors rathers than any necessary limitations inherent in criminal actions that limits the threat of criminal prosecution for foreign anticompetitive activities to a greater degree than the jurisdictional principles described above.

Extraterritoriality—Export Cartels and the 1982 Legislation - Panel Discussion, *James T. Halverson, John E. Ferry, Karl M. Meessen, John H. Shenefield, John Temple Lang,* 1983, p. 639-640

MR. SHENEFIELD: I welcome the comments and find them helpful and reassuring in the sense that I distill from them a consensus on several broad points.

First, we all agree that this is an important problem, worth spending not just an afternoon on here in conference, but worth spending a substantial amount of additional time. I salute John Temple Lang, and the other four, in willing to be personally involved in solving what can become an increasingly difficult problem.

Second, I find in this group general approval of the balancing test, despite the reservations expressed by John Ferry, and I take considerable comfort on that point. I, myself, think it is an essential component of getting these problems solved. With all the reservations about it, there is still no other sensible way to do it.

Third, I also hear general approval of the suggestion that there are some useful things the United States can do in this connection, perhaps unilaterally. I agree that we perhaps have more to do than other countries. But I reiterate that other countries must join in this general cooperative effort to solve the problem.

The reason I suggested the particular variation on the private treble damage remedy that I did was precisely for the reason that you mention, Jim. A frontal assault on private treble damages in this country is not feasible, nor is it desirable. It is feasible to think of modifying it in a variety of ways. I would add others to the one that we discussed this afternoon. For instance, I believe that private treble damage suits ought to be precluded altogether, if all of the investigative work has been done in advance by a government criminal investigation. The whole notion of the need for an incentive, therefore, for private damage actions seems to be irrelevant at that point.

I think there are other discrete ways in which the private treble damage remedy can be carved back.

The final and concluding point is addressed to Jim Halverson's concern that these negotiations have got to be on a government-to-government basis. Jim has held high public office and thus knows from his own experience that there is an irresistible dy-

namic in government negotiations that is inconsistent with making progress. And, because there is always a particular case or a particular dispute or particular personalities or an election about to take place, I would suggest that as an adjunct to official negotiations, a lower level, more informal, quieter kind of discussion of this issue by people seasoned in the area to see whether progress couldn't be made along parallel lines.

Globalization and Antitrust: The Last Forty Years and Beyond, *Stephen M. Axinn, Christina Shin*, 2014, p. 518-521

2. *Reach of the Sherman Act*

As early as 1945, the U.S. was willing to extend the reach of the Sherman Act to capture conduct of foreign parties that resulted in prohibited effects within the U.S.[20] However, as globalization intensified, the frequency and extent of the extraterritorial application of U.S. antitrust laws dramatically increased. At the same time, many jurisdictions affected by the attempted international expansion of U.S. antitrust law resisted efforts by the U.S. government to extend its law to foreign nationals and conduct occurring on foreign soil. For example, enforcement efforts in the 1970s directed against foreign participants in a uranium cartel led a

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

number of nations, including the United Kingdom and Canada, to pass "blocking" statutes to impede discovery from U.S. antitrust proceedings against their citizens and resident companies.[21]

Although Congress and the U.S. courts have attempted to clarify the reach of U.S. antitrust laws, it remains an area of intense debate. Not surprisingly, the expansive application of U.S. antitrust laws has established extraterritorial application as an international norm, leading a number of other countries to claim extraterritorial application for themselves based on the "effects doctrine."

As globalization intensified, U.S. enforcers increasingly began to look beyond domestic conduct for the causes of disruptions occurring in the economy. Enforcement efforts began to extend to both foreign entity conduct within the U.S. as well as foreign conduct that affected the competitiveness of U.S. businesses either in the U.S. or abroad. Initially, determining the bounds of U.S. extraterritoriality was a matter left to the courts. Some early court decisions applied a "balancing test" between the U.S.'s exercise of jurisdiction and international comity.[22] However, as international displeasure intensified, Congress passed the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA")[23] in an effort to reduce international tensions and help resolve the increasingly important issue of when U.S. antitrust laws apply to foreign conduct.[24] Its passage, however, seems to have created more questions than answers.

Significant effort has been expended over the past three decades litigating the question of when conduct falls under U.S. jurisdiction under the FTAIA. While the Supreme Court has determined that the FTAIA does not permit the Sherman Act to apply to claims that rest "solely on foreign

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[21] See Tad Lipsky, The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?, THE ANTITRUST SOURCE (Aug. 2013), at 1, 3, available at http://webcache.googleusercontent.com/search?q=cache:ZRaW9XBWDPYJ:www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug13_lipsky_7_30f.authcheckdam.pdf+&cd=1&hl=en&ct=clnk&gl=us.

[22] Timberlane Lumber Co. v. Bank of America NT & SA, 549 F.2d 597 (9th Cir. 1976).

[23] The statute states that the Sherman Act:

"shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
(1) such conduct has a direct, substantial, and reasonably foreseeable effect—
(A) on trade or commerce which is not trade or commerce with foreign nations, or on import
trade or import commerce with foreign nations; or
(B) on export trade or export commerce with foreign nations, of a person engaged in such trade
or commerce in the United States; and
(2) such effect gives rise to a claim under the provisions of [the Sherman Act]"
15 U.S.C. § 6a.

[24] Interpreting this Act has led to a number of cases revolving around whether the statute creates a jurisdictional or non-jurisdictional issue, which will not be discussed here. For more information on this particular aspect, see Lipsky, supra note 21.

harms,"[25] there is still much confusion about what constitutes a "direct, substantial, and reasonably foreseeable" anticompetitive effect in the U.S. that may give rise to a claim.

Currently, the Circuits are split on what constitutes a "direct effect." In 2004 the Ninth Circuit determined that a "direct effect" is one that is the "immediate consequence" of the relevant conduct.[26] The Seventh and Second Circuits, however, have adopted a less stringent test and only require a "reasonably proximate causal nexus" between the conduct and the harm.[27] Nevertheless, the Seventh Circuit still found that the Sherman Act does not apply to price fixing of product components manufactured by foreign companies outside of the U.S. where only the final product, but not the components, were sold in the U.S.[28] Accordingly, the line between what harm remains "solely foreign," but is direct enough to fall under the Sherman Act, is still unclear.

Despite the continuing debate about the reach of U.S. enforcement authority, the U.S. Department of Justice ("DOJ") has made international cartel enforcement a "top priority" since the 1990s and efforts have only intensified. In 1993 it revised its Corporate Leniency Program to incentivize defection by cartel members, which has been remarkably successful and widely adopted by international agencies.[29] Between the 1990s and 2013, average jail sentences have increased from eight to 25 months. And in the last several years, the courts have sentenced an average of 11 foreign nationals to jail per year compared to three total from 1990 to 1999.[30] This year, the DOJ has also won its first extradition of a foreign national to face antitrust charges in the U.S.[31]

The U.S. is currently pursuing enforcement against a series of alleged cartel agreements involving automobile parts suppliers ("Auto Parts

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[25] See F. Hoffman-LaRoche Ltd. v. Empagram S.A., 124 S. Ct. 2359 (2004).

[26] United States v. LSL Biotech., Inc., 379 F.3d 672 (9th Cir. 2004).

[27] Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003, 2014 WL 1243797 (7th Cir. Mar. 27, 2014). Lotes Co., Ltd. v. Hon Hai Precision Indus., Co., Ltd., et al., No. 13-2280, 2014 WL 2487188 (2d Cir Jun. 4, 2014).

[28] See *Motorola Mobility*, 2014 WL 1243797.

[29] James M. Griffin, Deputy Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div., The Modern Leniency Program: "A Summary Overview of the Antitrust Division's Criminal Enforcement Program," Address at the American Bar Association Section of Antitrust Law Annual Meeting,(San Francisco, CA, Aug. 12, 2003), available at http://www.justice.gov/atr/public/speeches/201477.htm. See also Bank, infra note 97.

[30] Justice News, U.S. Dep't of Justice, Assistant Attorney General Bill Baer and Assistant Director of the FBI's Criminal Investigative Division Ronald T. Hosko Testify Before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights on Cartel Prosecution (Nov. 14, 2013), available at http://www.justice.gov/iso/opa/atr/speeches/2013/at-speech-131114.html.

[31] Press Release, U.S. Dep't of Justice, First Ever Extradition on Antitrust Charge (Apr. 4, 2014), available at http://www.justice.gov/atr/public/press_releases/2014/304888.htm.

Cartel"),[32] headquartered largely in East Asia. From currently available information, it appears that automobile parts suppliers have been alleged to have engaged in a series of specific bid-rigging and price fixing cartels that involved parts and assemblies purchased by both overseas and domestic automobile producers. Often, the agreements and their implementation occurred beyond the borders of the U.S., but the parts or assemblies were then shipped in the U.S. either as part of finished vehicles or as assemblies that were installed in the U.S. In a large number of district courts,[33] these criminal charges resulted in numerous, court-approved plea agreements and very substantial penalties against the parts suppliers and some of their executives.[34] Interestingly, in many instances, the DOJ has been more aggressive in prosecuting foreign cartel members in the U.S. than foreign agencies appear to be in prosecuting those same cartel members domestically.

As we will explore further below, these two reactions to globalization (i.e. rethinking competition policy and expansion of extraterritorial applications) have had a profound impact on not only domestic policy but also the direction of international antitrust development.

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[32] Division Update Spring 2014, U.S. Dep't of Justice, http://www.justice.gov/atr/public/division-update/2014/auto-parts.html (last visited Jul. 25, 2014).

[33] U.S. district courts where cases against automobile parts dealers have been brought include the Eastern District of Michigan, the Southern District of Ohio, the Northern District of Ohio, the Northern District of California, and the Eastern District of Kentucky.

[34] See Press Release, U.S. Dep't of Justice, Denso Corp. Executive Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Jun. 30, 2014), available at http://www.justice.gov/atr/public/press_releases/2014/306795.htm ("To date, 36 individuals have been charged in the DOJ's ongoing investigation and 27 companies have pleaded or agreed to plead guilty and agreed to pay a total of over $2.3 billion in fines.").

Private Litigation in the EU Panel Discussion, *Rein Wesseling, Sir Christopher Bellamy, Michael Hausfeld, Prof. Dr. Frank P. Maier-Rigaud, Stephen Neuwirth,* 2015, p. 204-206

MR. HAUSFELD: Thank you, Rein.

[Slide] In addressing the substance of private enforcement, it is always good to understand its context and, as well, what I call its genesis.

[Slide] The genesis arose in 2004 in the decision of the Supreme Court in *Empagran*, where foreign purchasers sought to bring their claims with respect to the global cartel involving vitamins in the United States under the Sherman Act.

[Slide] The Supreme Court said no. Why? Because the Supreme Court at that time was beginning a stage of judicial isolationism. Extraterritoriality became a focus of Supreme Court caution. They did not want to extend U.S. laws to claims that could be brought, and should be brought, in foreign jurisdictions, and they didn't want foreign claimants coming in to the United States to take what they considered advantage of U.S. laws. But more importantly, they expressed concern that they were stepping on the toes, if not the sovereignty, of other national court systems, who had the obligation and responsibility of providing their own regulations with regard to commerce within their borders.

It was viewed as the United States being the world's competition police officer, which averted the Supreme Court's involvement, in the *Empagran* case, in having foreign claims adjudicated in the United States under the Sherman Act. This was a trend that you also saw in Supreme Court decisions involving international human rights, as well as in securities. Extraterritoriality became a fulcrum for the Court's movement outside of that area and, in essence, bell-jarring U.S. antitrust law, as well as securities law, as well as the Alien Tort Claims Act, which would have been international human rights law.

[Slide] They asked, why should American law supplant the law of other nations? They could not find a reason, because, as recent courts have said, other nations have stricter antitrust laws in some respects, at least on the public side.

[Slide] Why? Since 2000, when the United States moved out of this field, other nations began serious aggressive enforcement. At the time of *Empagran*, there were basically five active public enforcement agencies outside the United States. Today there are over 150. Today there are over 300 countries that have antitrust laws that are virtually similar in principle to the main antitrust violations in the United States. Truly there is a consensus among civilized nations that competition is essential to the orderly economics or economies of all countries. There is an attempt to harmonize those laws and harmonize how that competition occurs throughout the globe.

There are differences:

- Cartels: Virtually identical. A cartel in the United Kingdom or in the European Union is the same, in principle, as a cartel in the United States.
- Resale price maintenance. There is a difference. Vertical restraints in the United States are treated differently than vertical restraints outside.
- Mergers. Two different approaches by the European Commission and the Department of Justice and the Federal Trade Commission.
- Monopolies. Monopolies in the United States require a degree of market share before a court will even consider as to whether or not the monopoly was acquired unlawfully or the monopoly power has been abused. In Europe it is abuse of dominant power. Far different considerations in the elements of the offense.

[Slide] But in staying out of foreign enforcement, U.S. courts still believe that foreign antitrust laws rarely authorize private damage actions. This was an expression as recently as this year in a very prominent antitrust case involving the Motorola Corporation. By the way, Motorola attempted to sue for its foreign purchasers outside the United States with regard to LEDs or LCDs — I forget exactly what it was. Interestingly, Nokia went to the United Kingdom, brought a claim in the high court, and settled it under U.K. law.

Is there a void? What happened between *Empagran* and *Nokia* in 2014? Europe saw the void. The United States saw the void. So there was a quiet but steady, slow evolution overcoming the antagonism in Europe or outside the United States to the perceived excesses of U.S. cowboy-style litigation.

[Slide] So what do we see today? We see as recently, again, as this year, in conferences involving the OECD, the U.K. participants urging private enforcement as a complement to public enforcement. The same in Brazil and the same in Korea. Why? Because there is now a consensus even among public enforcers that private enforcement and public enforcement can be integrated, as opposed to being compartmentalized and segregated. One benefits the other.

[Slide] Let's look at what happened in that interim period, as Rein said, with the European Directive, which started out slowly, first, I think, with a green paper and then with a white paper, where the Commission solicited counsel on the continent to give their ideas as to what a competition regime would look like in private enforcement. At the time, most of the input came from defense firms, so there was a bit of a skewing of what the information being provided to the Commission was. But there were some of us who were providing, as well, a view, not of American-style litigation, but what litigation could look like within the European culture that would fit European processes.

Antitrust And Intellectual Property In Asia: Convergence?, *H. Stephen Harris Jr., Mark Cohen, Dina Kallay, Elizabeth Xiao-Ru Wang, Koren Wong-Ervin,* 2016, p. 140-142

DINA KALLAY: Thank you very much, Steve.

I'm truly honored to be speaking at Fordham. I'm also delighted that Asia is the topic this year because I think it is a very worthy and important topic to discuss here and we haven't discussed it that much in the past.

I will present my views on three points. I want to point out that the views I present are my own views and not necessarily the views of Ericsson.

[Slide] The first point I want to talk about is to follow up on — I heard Robert Vidal earlier mention that we shouldn't live in an ivory tower and we should remember there are other frameworks around us.

As the topic is convergence, I wanted to remind everybody that we already have quite a bit of convergence in trade law, and we could perhaps build on that.

When the topic is antitrust/IP, there are two relevant multilateral treaties that I put on the screen. One is the WTO TRIPs Agreement, which sets a minimum standard for protecting intellectual property rights. And then specifically with respect to standards, there is the WTO Technical Barriers to Trade (TBT) Agreement, which sets out certain best practices relating to standards development or adoption of policies related to standards. I think these can assist in creating a common floor for antitrust cases where IP is involved.

Remember that practically all competition agencies around the world are subject to these obligations because they are part of governments that are WTO signatories.

[Slide] In the IP arena we have the WTO TRIPs Agreement. You see some main articles on the screen: patents confer the right to exclude; patent owners have the right to assign, transfer and license their patents; and members have to ensure that there is the possibility for effective action against any infringement of IPRs, including expeditious remedies to prevent infringement and remedies which deter further infringement. I think that is something competition agencies have to keep in mind when they think about scenarios that involve intellectual property rights.

[Slide] It's true that there are some exceptions to the WTO TRIPs Agreement, and I've put them on the screen. These are the ones that allow for competition law remedies. But I did want to remind the audience that the antitrust folks live and operate in that area of the exceptions, not the rule.

In the area of the TBT Agreement, it is also good practice for competition agencies to coordinate with their fellow trade agencies who are familiar with these treaty obligations if they are looking into conduct that involves standards.

The recently revised OMB Circular A-119 did that and advised competition agencies to speak with their trade colleagues. I think that is good to do.

[Slide] The second point I want to touch on is extraterritoriality and comity. Intellectual property rights are territorial in nature — e.g. there are Japanese patents or German patents — and they apply to a certain territory. That is why courts generally cannot prescribe global remedies unless the parties agree.

Competition agencies, on the other hand, have a broader jurisdiction because they need to have effective tools to solve their domestic competition problems.

I think this disconnect between the territorial nature of intellectual property rights and the potential for broader remedies like competition agencies is something we should all keep in mind.

[Slide] I think there are ways to try to minimize the conflicts between these two. I have put them on the screen. These are truly my musings on what could be done to minimize this problem.

- The first is ensuring that there is a strong nexus and that agencies interfere only when the conduct has a substantial effect in their own jurisdiction. This is the U.S. standard from *Hartford Fire*, a Supreme Court case. I think it might be good for all agencies to consider it as a best practice.
- A second best practice could be that when you select among the variety of remedies that solve your issue, you choose the one that is least intrusive to other agencies or that impinges the least on other agencies. There often are opportunities to do that.
- My third suggestion is that consultations between competition agencies would be a regular thing when extraterritorial remedies are considered. Currently it is found, I know, in the United States in some MOUs, but I think it should be broadly a best practice when it comes to extraterritorial remedies.
- Finally, again I want to remind everybody that under the WTO TRIPs Agreement there is already a set formal consultation arrangement in Article 40(3), which is the article that deals with competition exceptions for IPR protection.

[Slide] A second problem is the problem of forum shopping. You know, we see players attempting to use Asian competition agencies to try to obtain remedies or decisions that they failed to obtain elsewhere in the world. Arguments about royalty rates or bases in and of themselves being violations are one of them.

The solution is obviously improving convergence, but until that happens — and I realize that takes time because I used to work on trying to promote that — I think active case cooperation between competition agencies is key. If Asian agencies get a complainant talking about something, it should be pretty easy to ask, "Where else have you complained and what did they say?" I think you might find the answers interesting, and they can also save you time and effort.

[Slide] This is an example of forum shopping, again attempts to argue that a specific rate or base is in and of itself a competition violation. In the United States and European Union this has never been found to be a competition issue.

I have put on the slide a speech by FTC Chairwoman Ramirez from the fall of 2014, which speaks for itself.

[Slide] This is still from that same speech where Chairwoman Ramirez expressed concerns about competition law enforcement that would focus on reducing royalty payments for local implementers rather than focus on competitive analysis.

I want to be optimistic like her, because actually shortly afterwards, in early 2015, NDRC did take a decision in the matter which I think was on her mind. We have actually seen quite a bit of restraint. The implied violation there was not based solely on the royalty rate or base and the remedy was narrowly tailored to the boundaries of China. I think it is a good example of comity. I would like to remain optimistic that other Asian agencies considering these things would follow suit.

[Slide] Finally, just to briefly touch upon what Elizabeth said when she said China is becoming an innovator, I can only speak about cellular standards. I'm a one-trick pony. Those are the ones I know.

Of the ten largest contributors of technology to cellular standards — and we like to measure it by accepted technical contributions, so it's not just measured by the number of patents, which arguably you can play with — but by how many of your technical contributions were accepted into the standard, of the ten largest - five are Asian. So Asia has already arrived at the front line.

Half of the companies are Asian. Three of the five are Chinese — Huawei, ZTE, and CATT (Datang). No other nation has as many companies in the Top Ten list. The other two Asians, by the way, are one Korean and one Japanese company.

But I think it is important that we keep in mind that, at least when it comes to cellular technology, Asia has already arrived at the front line.

[Slide] I am just going to stop here and leave you with this teaser and later we are going to do a Top Ten Misconceptions list.

Thank you.