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## Extraterritorial Criminal Jurisdiction Under the Antitrust Laws

Herbert Hovenkamp\*

### Introduction

When foreign conduct is involved, the courts customarily appraise its substantive antitrust significance only after deciding whether the Sherman Act asserts jurisdiction over it. Nevertheless, “jurisdictional” and “substantive” inquiries are not wholly independent. Both inquiries rest on judgments about the apparent will of Congress with respect to foreign transactions. And both reflect two sound propositions: that Congress did not intend American antitrust law to rule the entire commercial world and that Congress knew that domestic economic circumstances often differ from those abroad where mechanical application of domestic antitrust decisions would make little economic, political, or social sense. Further, many appraisals of the appropriateness of asserting jurisdiction include an appraisal of the anticompetitive harm caused by the challenged restraint—and the latter is a largely substantive inquiry.

In examining a foreign restraint, the conclusion that Congress did not mean to cover it might be expressed either in terms of the statute's jurisdiction or subject matter reach, or else in terms of a substantive conclusion about the “reasonableness” of the restraint under the circumstances. In either event, the examination must consider conflicts with other countries, the international law and common law principles governing them, the availability of appropriate and effective remedies, and the nature and significance of the challenged conduct and its effects, which is what justifies the United States' interest in the first place. The circumstances surrounding a foreign restraint may dictate a legal conclusion different from that which would be appropriate to the same restraint at home. The relevant differences might be found in both the quality and magnitude of the restraint's threats to protected interests, offsetting virtues, and less restrictive alternatives.

### "Reasonableness" and the Interests of Foreign Nations

Most antitrust appraisals under United States law, whether domestic or foreign, demand an appreciation of the challenged conduct's harm to the American economy, redeeming benefits to the parties and society, and the alternative and less harmful means of accomplishing legitimate ends. The foreignness of a restraint can affect each of these three factors. Some of the anticompetitive tendencies of a particular type of restraint might be entirely irrelevant to the United States commerce with which the Sherman Act is concerned. Thus, the relevant harmful effects or tendencies of the particular restraint may be fewer in number and smaller in magnitude than for the same restraint occurring in a wholly domestic context. Indeed, foreign government regulations

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or other circumstances of foreign markets sometimes indicate that absent the restraint there would be no United States commerce at all in the good in question.<sup>1</sup>

The redeeming virtues might also be different in the international context. Risks, the need for combining complementary resources, or scale economies might be greater in some international combinations. Or the customary terms of dealing in foreign markets might be different such that the less restrictive alternatives available at home would not be available abroad.

Thus the conventional assumptions that courts make in appraising restraints in domestic markets are not necessarily applicable in foreign markets. A foreign joint venture among competitors, for example, might be more “reasonable” than a comparable domestic transaction in several respects: the actual or potential harms touching American commerce may be more remote; the parties’ necessities may be greater in view of foreign market circumstances; and the alternatives may be fewer, more burdensome, or less helpful.

Much conduct abroad, particularly involving agreements among competitors, would be illegal per se if it were domestic—that is, it would be condemned without proof of particular effects and with little regard for possible justifications. Does extraterritoriality call for a fundamentally different analysis? Perhaps sometimes, but clearly not always.

Domestic antitrust policy uses per se rules for conduct that, in most of its manifestations, is potentially very dangerous with little or no redeeming virtue. That rationale would be inapplicable to foreign restraints that either pose very little danger to American commerce or have more persuasive justifications than are likely in similar restraints at home. For example, price fixing in a foreign country might have some but very little impact on United States commerce at all. This would be true, for example, if a naked foreign cartel made no sales into the United States, either directly or indirectly. Alternatively, the foreign cartel it might be encouraged or even compelled by the foreign county’s domestic policy.

Nevertheless, one should not leap too quickly from the premise that additional “reasonableness” inquiries are necessary when the restraint occurs abroad, to the conclusion that all foreign restraints merit full rule of reason inquiries, including rigorous market definition, market power assessment, and a conclusion supported by a well-developed record about overall anticompetitive effects. To be sure, we sometimes say that the per se rule condemns practices without a showing of competitive effects in the particular case. By contrast, appraising restraints abroad requires an assessment of effects on American foreign commerce.

But the effects to be measured are not the same. An impact on prices or injury to several American traders or interests might be quite sufficient to indicate a significant effect on commerce, but identifying these effects alone would not be sufficient to a full

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<sup>1</sup> See, e.g., *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 958 (D. Mass. 1950) (Wyzanski, J., observing that if American exporters are denied access to a foreign country, then any agreement overcoming the denial could not “restrain” or “monopolize,” for in its absence there would be no trade at all).

rule of reason inquiry, which must often make some assessment of overall market impact and also consider defenses. This is especially true when considerations of comity point in favor of liability. For example, the competition law of the European Union and most countries today abhor “naked” cartels about as much as United States law does.<sup>2</sup> Jurisdiction in the courts of the United States over such a cartel under the “effects” test can generally be established simply by showing that the naked price fixing exists and that a substantial number of sales were made to United States buyers. No considerations of comity require analysis beyond the observation that the restraint is just as unlawful under the relevant foreign law as under the Sherman Act. At that point the same considerations that justify a per se inquiry for a domestic cartel would apply: Nothing is likely to be gained by a further, expensive inquiry into market definition or power or a consideration of defenses relating to the reasonableness of the prices charged and the like. Further, the rule of reason makes criminal prosecution virtually impossible, yet extraterritorial criminal jurisdiction under the federal antitrust laws seems relatively clear. Finally, discovery in rule of reason cases is difficult and costly enough in domestic antitrust disputes. These difficulties and costs can loom far larger when the relevant markets to be considered are abroad.

In sum, to say that domestic per se rules are not necessarily and automatically applicable in the international context is not to say that an antitrust court needs to hesitate very long before condemning restraints with significant and obvious effects on United States commerce and without any plausible purpose other than the suppression of competition with and in the United States, and in particular when United States policy is in alignment with the policies of other affected nations. Many of the major litigated international restraint cases fall into this category.<sup>9</sup> In *Timken*, the Supreme Court rejected a claim of “reasonableness” by defendants, who had eliminated competition among themselves in England, France, and the United States. But the defendants' claim was unpersuasive, given the facts that the restraint long antedated and was broader than the claimed justification and that the court found that competition was possible and would have occurred absent the long-standing restraint.

To this extent, the “effects” test as applied to extraterritorial jurisdiction resembles, at

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<sup>2</sup> E.g., *Stichting Sigarettenindustries*, Joined Cases 240-242, 261-262, 268, 269/82 E.C.R. 3831 [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶14,265 (1985). See Ivo Van Bael & Jean-Francois Bellis, *Competition Law of the European Community*, chs. 4-5 (4th ed. 2005); Lennart Ritter & W. David Braun, *European Competition Law: A Practitioner's Guide* Ch. 3 (3d ed. 2004).

<sup>9</sup> See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Holophane Co.*, 119 F. Supp. 114 (S.D. Ohio 1954), aff'd per curiam, 325 U.S. 903 (1956); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947); *United States v. GE Co.*, 80 F. Supp. 989 (S.D.N.Y. 1948) (price fixing and patent pooling covering both domestic and foreign markets); *United States v. GE Co.*, 82 F. Supp. 753 (D.N.J. 1949) (lamps; territorial division agreements between domestic and foreign firms); 115 F. Supp. 835 (D.N.J. 1953) (lamp remedies).

least roughly, the “affecting commerce”, test for domestic jurisdiction.<sup>11</sup> Strictly speaking, one cannot appraise the Constitutionally required effect on interstate commerce without looking at “effects” generally, an inquiry that goes beyond what is required by the per se rule. But in fact the courts have not required such an appraisal of actual magnitudes in the domestic setting. Rather, they simply require a showing of some not insignificant effect or of an inference that “as a matter of practical economics” the alleged restraint seems reasonably calculated to produce such effects.<sup>12</sup> The “affecting foreign commerce” test for extraterritorial jurisdiction is not different in principle, although conditions of comity may sometimes require somewhat more strictness in proof. For example, once the foreign cartel and actual imports into the United States are found, an effect on United States commerce can be presumed without proof of the amount by which output was reduced or price increased.

At the same time, of course, one must consider the possibility of important differences between domestic and international markets in (1) the environmental circumstances bearing upon the “reasonableness” of a given restraint, (2) the degree to which United States interests are significantly affected, (3) the involvement of foreign governments, and (4) the costs and other difficulties of discovery. On the second point, while a domestic Commerce Clause case raises concerns about local versus interstate impact, both are markets within the territorial jurisdiction of the United States. Commerce Clause limitations notwithstanding, the states are sovereigns that are still subordinate to the federal government. By contrast, when the restraint is abroad, the possibility arises that it has no or only limited effect on any interest that the United States government is authorized to protect.

The other important observation about the above mentioned points is that they do not always apply. When they do not, the general considerations of administrative economy that justify applying the per se rule should control.

The cases are not entirely consistent with these propositions. Most significantly, in *Metro Industries* the Ninth Circuit concluded that a rule of reason inquiry is necessary in all cases involving restraints abroad:<sup>13</sup>

Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, *per se* analysis is not appropriate. Indeed, when the alleged illegal conduct occurred in a foreign country, we must examine the impact on commerce in the United States before we can determine that we have subject matter jurisdiction over a claim.<sup>14</sup>

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<sup>11</sup>See 1B PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW ¶266d (4th ed. 2013).

<sup>12</sup>See *id.*, ¶266f, g, discussing *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 745 (1976); and *McLain v. Real Estate Bd., Inc.*, 444 U.S. 232, 246 (1980).

<sup>13</sup>*Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir.), cert. denied, 519 U.S. 868 (1996).

<sup>14</sup>*Id.* at 843.

The court later elaborated:

Thus, the potential illegality of actions occurring outside the United States requires an inquiry into the impact on commerce in the United States, regardless of the inherently suspect appearance of the foreign activities. Consequently, where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation.<sup>15</sup>

The court then concluded that because the defendant had not been successful in defining a relevant market, the case must be dismissed. However, then, and more elaborately, it also found that the restraint at issue was complex, had significant efficiency potential, and thus a rule of reason inquiry would be necessary in any event. Perhaps the court's conclusion that restraints abroad *always* require rule of reason analysis would have been more qualified had the restraint before it belonged more clearly in the per se category without offsetting considerations of comity.

The *Empagran* case<sup>16</sup> involved a cartel that was the subject of criminal prosecution. However, the Supreme Court never spoke of the offense in either per se or rule of reason terms. Neither did the D.C. Circuit's initial opinion, which the Supreme Court reversed.<sup>17</sup> The *Kruman* case, which was subsequently abrogated by the Supreme Court's *Empagran* decision, held that the per se rule should be applied to a cartel that involved one American and one foreign participant, and where the foreign plaintiff had purchased from the foreign participant.<sup>18</sup>

In its now superseded 1977 Antitrust Guidelines for International Operations, the Department of Justice stated only that the rule of reason should have somewhat broader application with respect to restraints abroad than over domestic restraints. This was true for two reasons. First, the court might have less experience with the foreign restraint; and, second, acts in foreign commerce might have some justifications that would not be recognized in the entirely domestic setting.<sup>19</sup> But the current international antitrust Guidelines issued in 1994 generally ignore the issue, noting only that the National Cooperative Research and Production Act.<sup>20</sup> requires that qualifying joint ventures be judged under the rule of reason—something that the Justice Department would ordinarily do anyway for bona fide joint ventures.<sup>21</sup> However, in measuring “substantial” effects on United States commerce, the Guidelines appear to be ready to look at the gross amount of such effects, rather than the proportionate impact within a

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<sup>15</sup>Id. at 845.

<sup>16</sup>See *F. Hoffman-La Roche, Ltd. v. Empagran*, 542 U.S. 155 (2004).

<sup>17</sup>*Empagran S.A. v. F. Hoffman-Laroche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), rev'd, 542 U.S. 155 (2004).

<sup>18</sup>*Kruman v. Christie's Intl. PLC*, 284 F.3d 384, 393 (2d Cir. 2002), cert. dismissed, 539 U.S. 987 (2003).

<sup>19</sup>Antitrust Guide for International Operations 2-3 (1977, superseded).

<sup>20</sup>15 U.S.C. §§4301-4306.

<sup>21</sup>Antitrust Enforcement Guidelines for International Operations §2.5 (1994).

relevant market.<sup>22</sup> Further, in an example involving a naked cartel shipping goods into the United States, the Guidelines offer only a brief analysis concluding that the government could assert jurisdiction, with no suggestion that the rule of reason would be applied in such a case.<sup>23</sup> Even when prosecuting criminals under the per se rule, the Government often issues penalties that are based on the volume of affected commerce.<sup>3</sup>

The *Metro Industries* decision was correct to note that an “effect” on United States foreign commerce must be established in a case involving activity abroad. But “effects” tests also govern Commerce Clause jurisdiction in domestic antitrust cases. Such tests hardly serve to undermine the per se rule. Even in per se cases, however, the court assesses effect by asking whether “as a matter of practical economics” the restraint is likely to have the alleged effect.<sup>24</sup> The assessment of foreign commerce proceeds in the same manner. Considerations of comity may sometimes require additional scrutiny in order to ensure that a sufficient United States interest is at stake, but only if the assertion of United States authority conflicts in an important way with the foreign sovereign’s policy.

The *Metro Industries* insistence on rule of reason treatment for all restraints abroad is in fact a logical outgrowth of the Ninth Circuit’s earlier and problematic *Timberlane* case. That decision required judges to consider numerous softer considerations of comity, thus permitting them to decline to address the merits of a case even when jurisdiction under the effects test is clear and the challenged activity was not compelled or necessarily even tolerated by foreign law.<sup>94</sup> Unfortunately the “jurisdictional rule of reason” that *Timberlane* adopted is cumbersome, often indeterminate, conducive to lengthy and expensive discovery, and thus extremely burdensome to both litigants and courts. While the Supreme Court’s *Empagran* decision did not purport to overrule *Timberlane*,<sup>95</sup> the Court’s much more generalized and speedier inquiry is largely inconsistent with the burdensome, fact-laden inquiry contemplated in *Timberlane*.

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<sup>22</sup>Id. at §3.11.

<sup>23</sup>Id., illustrative example A.

<sup>3</sup> See, e.g., *United States v. VandeBrake*, 679 F.3d 1030 (8th Cir. 2012); *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000); *United States v. Haversat*, 22 F.3d 790 (8th Cir. 1994).

<sup>24</sup>See 1B ANTITRUST LAW ¶266f1, discussing *McLain v. Real Estate Bd., Inc.*, 444 U.S. 232, 242-247 (1980).

<sup>94</sup>*Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976), on remand, 574 F. Supp. 1453 (N.D. Cal. 1983), aff’d, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 472 U.S. 1032 (1985).

<sup>95</sup>The Supreme Court cited *Timberlane* only once, for a proposition that it agreed with:

See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (C.A.9 1976) (insisting that the foreign conduct’s domestic effect be “sufficiently large to present a cognizable injury to the *plaintiffs*” (emphasis added)).

*Empagran*, 542 U.S. at 173.

One problem with *Timberlane* is that, notwithstanding its broad concept of comity, the court seemed excessively receptive to considering a dispute originating on foreign soil, and impeaching foreign judicial processes, merely because of a minor impact on goods that might ultimately reach American shores. Ultimately, however, the court quite correctly declined to apply United States antitrust law because the impact upon American imports seemed trivial and the activity challenged (foreclosure of a lien in Honduras) was peculiarly local.

A Honduran lumber firm was indebted to the Honduran branch of an American bank, which caused Honduran liens to be placed on the former's property. The bank allegedly bribed a Honduran judicial officer to enforce the lien and thereby close down the operation. In violation of the Honduran court's order, the debtor had surreptitiously assigned some of those assets to Timberlane, an American company, which then brought a federal antitrust action. The substantive antitrust claim was that the bank's foreclosure was part of some vague conspiracy to prevent the plaintiff from establishing itself in Honduras as a lumber supplier to the United States in competition with domestic lumber sellers in which the bank had some interest.<sup>97</sup> The jurisdictional claim was that preventing the plaintiff's entry into the Honduran lumber business affected imports into the United States and thus competition in the American lumber market.

We might well wonder why the Act of State doctrine did not foreclose inquiry into the official behavior of Honduran courts and their officials.<sup>98</sup> Further, even if all the challenged conduct had taken place within the United States, we might also wonder how the apparently lawful foreclosure on an indisputably valid and undoubtedly unpaid debt could violate the antitrust laws. Indeed, in the domestic context the invoking of legal process against a competitor is protected from antitrust challenge unless the invocation is a "sham," which requires a showing that asserting the legal process is objectively unreasonable.<sup>99</sup> Even bribery of a government official would not create antitrust liability for the person paying the bribe.<sup>100</sup> But let us put these questions aside and focus on the jurisdictional test adopted by the Ninth Circuit.

The court proceeded in three steps. *First*, it asked the basic jurisdictional question of whether the alleged restraint affected or was intended to affect United States foreign commerce. It refused to require an allegation or appearance of "direct and substantial" effects. Instead, the court held that subject matter jurisdiction is established upon a showing of "some effect," actual or intended, on United States commerce. The plaintiff ultimately satisfied this test by alleging its ability and willingness to supply the American market with lumber that would have competed in the domestic marketplace. After defining a relevant product market and finding that United States imports from Honduras accounted for less than 0.1 percent of the American lumber market, the district court

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<sup>97</sup>It did not appear whether the bank's interest was anything more than as a lender to other lumber firms.

<sup>98</sup>See 1B ANTITRUST LAW ¶274b.

<sup>99</sup>See 1 PHILLIP E, AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, Ch. 2A-1 (4th ed. 2013).

<sup>100</sup>See 1 ANTITRUST LAW ¶203.

had found a measurable effect,<sup>102</sup> notwithstanding some doubt about the market definition. The Ninth Circuit agreed.

However, the effects test standing alone was declared inadequate because it failed to reflect either the intensity of the foreign nation's interest, which may weigh against applying United States law, or the relationship between the alleged offender and the United States, which can more readily apply its own law to its citizens.

*Second*, the court asked whether the alleged restraint is “of such a type and magnitude so as to be cognizable as a violation of the Sherman Act.”<sup>103</sup> It gave an affirmative answer on the ground that an alleged conspiracy to prevent the plaintiff from milling lumber in Honduras and exporting it to the United States rises “to the level of a civil antitrust violation” that “has a direct and substantial anticompetitive effect.”<sup>104</sup> Although far from clear, the court seemed to mean that a conspiracy to obstruct a competitor is anticompetitive without further proof—a kind of per se offense. However, this is not a helpful description or analysis of the challenged conduct—the foreclosure of a mortgage securing an unpaid debt—as the court may itself have recognized in answering the next question. In all events, the court's second test seems to require the normal proof of an antitrust violation: very little for the so-called per se offenses and presumably much more where the rule of reason applies. Thus, while one might laud the court's decision to include the weightiness of the substantive antitrust allegations in its determination of whether to consider the claim, the weight given in this case seems to have been greatly exaggerated.

*Third*, the court asked whether regard for international comity and fairness counseled exerting jurisdiction over extraterritorial conduct. The distinctive holding of *Timberlane* is that notwithstanding sufficient effects and an antitrust violation, the court may still decline to assert its extraterritorial jurisdiction unless the effect on United States commerce is sufficiently strong in the light of (1) the degree of conflict with foreign law or policy, (2) the nationality or allegiance of the parties and their principal places of business,<sup>107</sup> (3) the extent to which either state can expect compliance,<sup>108</sup> (4) the relative effects on the several countries involved,<sup>109</sup> (5) an explicit purpose to harm

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<sup>102</sup>See *Timberlane, 1981-1 Trade Cas. ¶65,998* (N.D. Cal. 1982); *Timberlane*, 574 F. Supp. 1453, 1466 (N.D. Cal. 1983), *aff'd*, 49 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

<sup>103</sup>*Timberlane*, 749 F.2d at 1383.

<sup>104</sup>*Ibid.*

<sup>107</sup>Slightly in favor of jurisdiction is that all parties except one had United States citizenship, although all the crucial witnesses were Honduran citizens or residents.

<sup>108</sup>Slightly in favor of jurisdiction is that any money judgment against the defendant could easily be enforced.

<sup>109</sup>Strongly against jurisdiction is the minuscule effect on United States lumber markets, in which all Honduran lumber accounts for less than 0.1 percent of the total and less than 4 percent of pine imports. Not only are the effects more significant on the Honduran lumber market, but the bank's actions also affect employment there, foreign exchange, taxes, and internal competition.

or affect United States commerce<sup>110</sup> and the foreseeability of such an effect,<sup>111</sup> and (6) the relative importance of conduct inside the United States.<sup>112</sup>

After some ten years of litigation, the court dismissed the case, relying in essence on the legitimacy of the defendant's behavior within Honduras and the minuscule effects on competition in the United States. Interestingly, the court concluded that a request for dismissal of a claim under its "jurisdictional rule of reason" should be raised under Fed. R. Civ. 12(b)(1) as a motion to dismiss for lack of subject matter jurisdiction, rather than as a motion under 12(b)(6) for failure to state a claim or as a motion for summary judgment.<sup>4</sup>

A jurisdictional test that requires a decade of litigation to dispose of so insubstantial an antitrust claim seems much too unmanageable. Most important, some of the factors that the court cites—such as the relative effects of the defendant's conduct on the countries involved—require significant analysis of the merits of the antitrust dispute and the economic conditions and policies of the relevant countries.

Further, while the court listed the numerous and varied factors set forth above, it gave little in the way of a calculus or standard for assessing the weight of each or how they should trade against one another. The result may yield a clear decision when all, or nearly all, of the factors point in one direction. But the *Timberlane* test is calculated to produce much confusion and indeterminacy when the factors are divided.

Finally, given the insubstantial nature of the substantive claim, one wonders whether the court should have turned to such a complicated jurisdictional test at all. To be sure, the "jurisdictional" question as well as related questions of comity logically precede the decision on the merits, but in at least some cases where a very quick analysis of the merits shows the absence of any antitrust issue, dismissal should be appropriate for that reason, without application of so cumbersome a rule as the *Timberlane* court developed.

For example, if a quick look at the complaint and answer tells us beyond reasonable dispute that the antitrust suit's basis is the defendant's invocation of Honduran judicial process to enforce an apparently valid debt, use of *Timberlane*'s complex jurisdictional inquiry seems quite unnecessary. At the very least, one might say, the plaintiff must present a minimally plausible claim on the merits before the court is obliged to turn to complex jurisdictional inquiries. Under the *Noerr-Pennington* doctrine, suing to collect a

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<sup>110</sup>Against jurisdiction is that the defendant's acts were directed primarily toward securing a greater return on its investment and were consistent with Honduran customs and practices; the plaintiff did not show that the defendant had any particular interest in affecting United States commerce.

<sup>111</sup>Against jurisdiction is that the defendant simply enforced its mortgage in an attempt to recoup its investment. The effects were simply those that flow inevitably from attempting to salvage something from a failing business. No reasonable investor would have foreseen the minimal effect on the United States that occurred here.

<sup>112</sup>Against jurisdiction is that virtually all the alleged illegal activity occurred in Honduras.

<sup>4</sup> *Timberlane*, 574 F.Supp. at 1460-1461.

valid debt would be immune from the antitrust laws if the lawsuit had been filed in a United States court; the reasons for immunizing such a lawsuit when it occurs in a foreign court are at least as strong.

### **Criminal Liability for Extraterritorial Anticompetitive Conduct Harming U.S. Interests**

The language of the Sherman Act applies its prohibitions to both foreign and domestic commerce and also provides that a violation can be a felony.<sup>163</sup> Thus the statutory language certainly does not preclude that antitrust violations in foreign commerce could be criminal acts as well. At the same time, the government's long-standing policy and the ruling case law make only a small subset of violations criminal acts, and one might perhaps conclude that only acts committed within United States territory should constitute criminal violations. Traditionally, American courts followed Justice Holmes's prescription in the *American Banana* case,<sup>165</sup> that criminal jurisdiction was strictly territorial.<sup>166</sup> However, in *Pacific & Arctic Rwy.*,<sup>167</sup> the Supreme Court acknowledged that criminal antitrust jurisdiction could be obtained over all participants in a conspiracy that included both foreign and United States members.

Today general criminal liability can be and frequently is attached to acts committed entirely outside the sovereign's territory,<sup>168</sup> and the Sherman Act states no obvious reason why it should be treated as any different from other criminal statutes. The Restatement of Foreign Relations Law takes this position:

The principles governing [extraterritorial reach] apply to criminal as well as civil litigation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities law, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis

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<sup>163</sup>"Every contract, combination ... or conspiracy in restraint of trade or commerce ... with foreign nations is illegal. Every person who shall make [such a contract] shall be deemed guilty of a felony..." 15 U.S.C. §1.

<sup>165</sup>See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

<sup>166</sup>See, e.g., *United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979) (Mexican national's agreement, executed in Mexico, to sell a car in Mexico that had been stolen in the United States not within jurisdiction of the United States courts).

<sup>167</sup>See *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87, 106 (1913).

<sup>168</sup>See, e.g., *United States v. Perez-Herrera*, 610 F.2d 289, 290 (5th Cir. 1980) (agreement to smuggle marijuana into United States within jurisdiction of United States courts even though all relevant acts were committed abroad).

of express statement or clear implication.<sup>169</sup>

In *Nippon* the First Circuit concluded that price fixing that had occurred in Japan could be the subject of a United States criminal indictment.<sup>170</sup> *Nippon* and unnamed co-conspirators were accused of fixing the price of facsimile paper sold in North America, including the United States. The relevant meetings culminating in the challenged agreement all occurred in Japan. The alleged agreement was apparently facilitated with resale price maintenance agreements under which firms purchasing the paper in Japan promised to resell it at specified minimum prices in North America.<sup>171</sup> *Nippon* then allegedly monitored resale prices within the United States in order to ensure that the maintained price was the one actually charged.

In analyzing the Sherman Act and its case law,<sup>172</sup> the court concluded that “one datum sticks out like a sore thumb”— namely, “in both criminal and civil cases, the claim that Section One applies extraterritorially is based on the same language in the same section of the same statute...”<sup>173</sup> and

common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.<sup>174</sup>

The court then concluded:

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<sup>169</sup>Restatement (Third) of Foreign Relations Law §403, comment f (1986). The government's Antitrust Enforcement Guidelines for International Operations §2.1 (1994) expressly leave open the possibility of criminal prosecution for acts occurring abroad. Section 2.91 of the Guidelines also discusses treaties providing for bilateral criminal enforcement agreements, and illustrative example H notes that the Department has and will continue to explore the possibility of seeking the aid of local law in pursuing violations abroad. But the Guidelines then warn that if “...local law does not provide adequate remedies, or the local authorities are not prepared to take action, the Department will weigh the comity factors, discussed in Section 3.2 *infra*, and take such action as is appropriate...” These Guidelines are reprinted in Appendix B of the Supplement.

<sup>170</sup>*United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998).

<sup>171</sup>On the use of resale price maintenance to facilitate manufacturer collusion, see 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP ¶1606 (3d ed. 2011).

<sup>172</sup>Just like the Supreme Court in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993), the First Circuit refused to place any weight on the Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a. Of course, that Act was not intended to cover the situation of a foreign cartel targeting United States markets, although it might limit recovery against a United States cartel targeting foreign markets. Significantly, however, nothing in the FTAIA limits its reach to non criminal actions.

<sup>173</sup>*Nippon, supra*, 109 F.3d at 4.

<sup>174</sup>*Ibid.* The court then cited a basic canon of statutory construction that “identical words or terms used in different parts of the same act are intended to have the same meaning,” citing *Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235 (1996); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995).

It follows, therefore, that if the language upon which the indictment rests were the same as the language upon which civil liability rests but appeared in a different section of the Sherman Act, or in a different part of the same section, we would be under great pressure to follow the lead of the *Hartford Fire Court*.<sup>175</sup> and construe the two iterations of the language identically. Where, as here, the tie binds more tightly—that is, the text under consideration is not merely a duplicate appearing somewhere else in the statute, but is the original phrase in the original setting—the pressure escalates and the case for reading the language in a manner consonant with a prior Supreme Court interpretation is irresistible.<sup>176</sup>

Thus, for the First Circuit the question of determining the appropriateness of extraterritorial criminal prosecution was entirely one of parsing the language of the statute, which—as we have noted before—never distinguishes its criminal and civil applications. A concurring judge expressed reservations about this approach and concluded that:

The task of construing Section One in this context is not the usual one of determining congressional intent by parsing the language or legislative history of the statute. The broad, general language of the federal antitrust laws and their unilluminating legislative history place a special interpretive responsibility upon the judiciary.<sup>5</sup>

Nevertheless the judge found criminal jurisdiction appropriate in a case where raising prices in the United States was not only a foreseeable result of the challenged act, but it was also the principal and intended result.

The court rejected the defendant's argument that the lack of any precedent made the invocation of criminal liability improper—that is, the case law failed to give the foreign actor fair notice that its wholly extraterritorial act might subject it to criminal antitrust prosecution.<sup>178</sup> But as the court noted, while there is little in the way of *antitrust* precedent for applying a United States criminal statute to extraterritorial conduct, there was ample precedent from other statutes.<sup>179</sup> For example, the manufacturing and sale of addictive drugs abroad targeting United States markets has frequently been condemned under criminal statutes notwithstanding that the defendants performed no

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<sup>175</sup>See *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

<sup>176</sup>*Nippon*, 109 F.3d at 5.

<sup>5</sup> *Nippon*, *supra*, 109 F.3d at 9.

<sup>178</sup>*Id.* at 6.

<sup>179</sup>*Ibid.* at 6, citing *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (criminal acts committed in one state but causing injury in another state created jurisdiction in the latter when defendant intended to cause harmful consequences there).

acts within the United States.<sup>180</sup> Of course, the drug laws are explicitly criminal provisions, consistently enforced both inside and outside the United States. As a result, citation to them does not fully address the additional problems confronted by application of the Sherman Act, because that statute is now more than a century old, with little history of criminal prosecution for purely extraterritorial acts. At the same time, however, the alleged conduct in this case, although committed abroad, unquestionably targeted United States markets and was allegedly committed in a clandestine fashion so as to avoid detection and prosecution. Further, comity did not counsel against application of United States law, for the alleged acts were unlawful under Japanese as well as United States Law.<sup>181</sup>

### "Interest" Analysis

One important rationale for expansive reach and even criminal punishment in such cases is that the sovereign representing purchasers typically has a greater interest than the sovereign representing sellers. As a general matter, a cartel in one country fixing the price of its goods elsewhere transfers wealth away from the territory containing the buyers and toward the territory containing the sellers. As a result, sovereigns, including the United States itself, have typically been less concerned with condemning restraints on export trade where all the buyers are foreign than with restraints on imports. This aspect of United States policy is reflected in the Foreign Trade Antitrust Improvements Act (FTAIA)<sup>6</sup> as well as the Restatement (Third) of the Foreign Relations Law of the United States.

Thus an essentially territorial mode of analysis that looks at where the conspiracy was "formed"<sup>183</sup> seems much less appropriate to the general policy question than an "interest" analysis considering where the victims are. In this case the predominant, although perhaps not the only,<sup>184</sup> victims of the alleged conspiracy were consumers in

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<sup>180</sup>*Chua Han Mow v. United States*, 730 F.2d 1308, 1311-1312 (9th Cir. 1984), cert. denied, 470 U.S. 1031 (1985) (unlawful drug trafficking from Malaysia into United States); *United States v. Hayes*, 653 F.2d 8, 11 (1st Cir. 1981) (defendant intercepted by Coast Guard while at sea but en route to United States attempting to import unlawful drugs).

<sup>181</sup>*Nippon*, *supra*, 109 F.3d at 8. The court did not note the position frequently urged by the government and quite often accepted that comity concerns either do not weigh heavily or should not be considered at all in a case where the federal government itself is bringing suit. See ¶273c5. Ultimately, the lower court found that the alleged criminal conspiracy abroad had insufficient effect on foreign commerce during the limitation period. *United States v. Nippon Paper Indus., Ltd.*, 62 F. Supp. 2d 173 (D. Mass. 1999).

<sup>6</sup> See 1B ANTITRUST LAW ¶272i (4th ed. 2013).

<sup>183</sup>E.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913), & *Thomsen v. Cayser*, 243 U.S. 66 (1917).

<sup>184</sup>A Japanese cartel shipping all the cartelized goods elsewhere would have to reduce its output of goods into the cartelized market, perhaps with the result of a decline in locally consumed inputs, including employment. The size or impact of this decline would vary with the circumstances. For example, if the labor market were perfectly competitive, decreased

North America, where the cartel was targeted. By contrast, the principal beneficiaries were the owners of Japanese firms, perhaps their employees, perhaps the governments that taxed them, and perhaps others.<sup>185</sup> This makes United States authorities a more appropriate criminal prosecutor than Japanese authorities, at least until we consider problems of obtaining essential testimony, other evidence, and a suitable criminal penalty. As the concurring opinion pointed out, relying heavily on the Restatement of Foreign Relations Law:

Because only North American markets were targeted, the United States' interest in combatting this activity appears to be greater than the Japanese interest, which may only be the general interest of a state in having its industries comport with foreign legal norms. Japan has no interest in protecting Japanese consumers in this case as they were unaffected by the alleged conspiracy. The United States, in contrast, has a strong interest in protecting United States consumers, who were affected by the increase in prices.<sup>7</sup>

### Conclusion

In its 2012 *AU Optronics* decision a district court in California held that the government has the authority to pursue price fixing that occurred abroad under a per se rule, which is generally a predicate to criminal liability.<sup>8</sup> The court distinguished the Ninth Circuit's *Metro Industries* decision, which had held that wholly extraterritorial acts are to be governed by the rule of reason.<sup>9</sup> In that case, as the *AU Optronics* court had observed in a previous decision, the conduct itself was novel and strongly suggested a rule of reason approach quite aside from the extraterritorial question.<sup>10</sup>

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production of Japanese fax paper would shift some labor away from fax paper production and to other production, but would have no impact on the overall labor market.

<sup>185</sup> *Nippon*, 109 F.3d at 12.

<sup>7</sup> *Nippon*, 109 F.3d at 12 (relying heavily on the Restatement (Third) of Foreign Relations Law of the United States, §§403, 415).

<sup>8</sup> *United States v. AU Optronics Corp.*, 2012 WL 2120452 (N.D.Cal. June 11, 2012). The district court granted the government's motion in limine and obtained an order:

prohibiting defendants from presenting any evidence or argument that: (1) the agreements to fix or stabilize prices were "reasonable" or justifiable; (2) there were economic, benevolent, or other justifications for the agreements to fix or stabilize prices; (3) the agreements to fix or stabilize prices created real or imagined economic efficiencies for the defendants and their coconspirators; (4) agreements to fix or stabilize prices were necessary to avoid ruinous competition; (5) prices set for TFT-LCDs set by an agreement to fix or stabilize prices were reasonable; or (6) any variations on the foregoing.

<sup>9</sup> *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir.), cert. denied, 519 U.S. 868 (1996).

<sup>10</sup> See *United States v. Hsuan Bin Chen*, 2011 WL 332713 (N.D.Cal. Jan. 29, 2011).

In any event, the *Metro Industries* holding is not mandated by the Constitution or the statutory text in any antitrust provision, and it seems unwise as a matter of policy. The purpose of the distinction between the per se rule and rule of reason is to identify and distinguish situations where anticompetitive effects can be assessed at relatively low administrative costs from those that require more complete analysis. While the Ninth Circuit has spoken of a "jurisdictional" rule of reason, merging considerations of comity, foreign interests, and domestic effects from extraterritorial conduct into questions about market definition and competitive impact unnecessarily complicates a set of queries that are already complicated enough and are in fact quite different from one another.

At the same time, however, the "affects" query takes on additional relevance in cases involving extraterritorial conduct, because legislative jurisdiction under the Commerce Clause or statutory reach under the Sherman Act or FTAIA require some harmful effect in the United States. Thus, for example, a naked cartel abroad can be made subject to a criminal indictment and per se treatment. However, the government would also have to show a sufficient effect justifying invocation of United States law -- for example, that some of the price-fixed goods were shipped into the United States. Showing such an affect need not require a market definition; indeed, the purpose of per se inquiries is to identify circumstances where these effects are deemed inherent in the practice itself.

Interestingly, in *AT&T Mobility* the Ninth Circuit subsequently held that California's Cartwright Act, a state antitrust law permitting indirect purchaser claims, had extraterritorial application in a per se price fixing case involving foreign conduct similar to that at issue in the *Au Optronics* case.<sup>11</sup> Considerations of comity with foreign nations and other elements of extraterritorial jurisdiction weigh at least as heavily when the law to be applied is state rather than federal.

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<sup>11</sup> *AT&T Mobility, LLC v. AU Optronics Corp.*, \_\_\_ F.3d \_\_\_, 2013 WL 540859 (9th Cir. Feb. 14, 2013).