AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW

REPORT ON THE USE OF PRIVATE LITIGATION TO CHALLENGE PRIVATE ANTICOMPETITIVE CONDUCT AFFECTING U.S. FOREIGN COMMERCE

PRESENTED TO THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE
WASHINGTON, DC

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EXECUTIVE SUMMARY[1]

1. Practical obstacles to litigation challenging anticompetitive conduct affecting U.S. foreign commerce are common to both private and public litigation. Assertions of jurisdiction over individuals and entities with no significant, continuous U.S. presence for purposes of gathering evidence, conducting proceedings and enforcing relief can be costly, complex and delay-prone. This is likely to remain a significant barrier to U.S. litigation – both private and governmental – aimed at conduct affecting U.S. foreign commerce.

2. Private antitrust cases involving multiple jurisdictions characteristically bring into play serious differences as to substantive standards, legitimate expectations of private parties, proper accommodation of government policies affecting the competitive activities in question, and appropriate remedies. Standards and institutional mechanisms for reconciling these differences should be a topic of intense future study.

3. Private antitrust litigation is essentially a U.S. phenomenon and seems unlikely to play a significant role in other jurisdictions for the foreseeable future. Although non-U.S. private antitrust litigation is rare, many foreign antitrust authorities are extremely receptive to private petitioning conduct. Thus, absence of private litigation means neither that foreign antitrust regimes are unresponsive to private complaints, that they do not provide a role for private participation in antitrust proceedings, nor that such regimes are otherwise ineffective. In light of the spectacular worldwide proliferation of antitrust laws in the past decade – still underway – it is doubtful whether there is any generalized need for enhanced private antitrust litigation under foreign regimes as a means of addressing private anticompetitive conduct, including conduct that may restrain U.S. foreign trade. (Indeed, a paper distributed recently by the OECD Secretariat suggested that the OECD Guidelines for Multinational Enterprises are vestigial due to near-universal worldwide adoption of antitrust law.) This observation is independent of any issues that may exist concerning the broader efficacy of such foreign antitrust regimes.

4. The virtues of private initiative have proven to be mixed as a source for antitrust enforcement, private or public. Although any developed system of competition rules should recognize a legitimate role for private complaints, such complaints sometimes involve opportunistic uses of the legal process. Any effort to create, assess or reform mechanisms for private antitrust litigation must take account of this fact.

5. Reducing the question, therefore, to whether there are feasible reforms of U.S. private antitrust litigation that could increase its effectiveness in foreign commerce cases, the following suggestions are offered to ICPAC:

   a. There is value in studying the mechanisms available to the courts to solicit, receive and consider the views of foreign governments where claims or defenses in private

[1] The views expressed herein are being presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association.

antitrust litigation are based on foreign law or policy.

b. Private litigation suffers from inadequate standards and mechanisms for determining whether and under what circumstances the various aspects of U.S. private antitrust litigation – discovery, substantive rules, remedies – ought to be modified in order to accommodate foreign sovereign policies and the expectations of foreign nationals. Requiring literal inconsistency between U.S. and foreign law – the standard apparently adopted in *Hartford Fire Insurance* – appears to be too narrow for this purpose.

c. ICPAC could help to increase awareness that neither a direct, substantial and reasonably foreseeable effect on U.S. import commerce nor the denial of a U.S. export opportunity constitutes a substantive antitrust violation in itself. The requisite effect on commerce – whether import, export, or domestic commerce – is not a substantive standard for conduct but one of the necessary conditions for the exercise of Sherman Act jurisdiction. Substantive liability requires an adverse effect on *competition*. This clarification will simplify debate and permit the recognition and distinct treatment of "market access" remedies based on substantive standards different from those of antitrust law.

d. ICPAC should study whether the actions of foreign sovereigns should be subject to the decisional principles based on *Midcal Aluminum Co. v. California* with respect to competition-limiting actions of the States in the U.S.

I. THE GENERAL APPROACH OF THIS PAPER TO ICPAC QUESTIONS

This paper represents the Report of the Working Group on Private Litigation,[2] appointed by the Chair of the Section of Antitrust Law of the American Bar Association, to respond to certain questions on private antitrust litigation posed by the International Competition Policy Advisory Committee ("ICPAC") appointed by the Attorney General of the United States.

A comprehensive survey of private antitrust litigation involving effects on U.S. foreign commerce lies beyond the scope of study for this Working Group. The Administrative Office of the Courts reports that 30,445 antitrust cases were filed in the federal courts of the United States in the past twenty years (1978-1998). Only a fraction of these have involved foreign commerce. The Working Group has not attempted systematically to analyze even the foreign-commerce fraction of the cases.

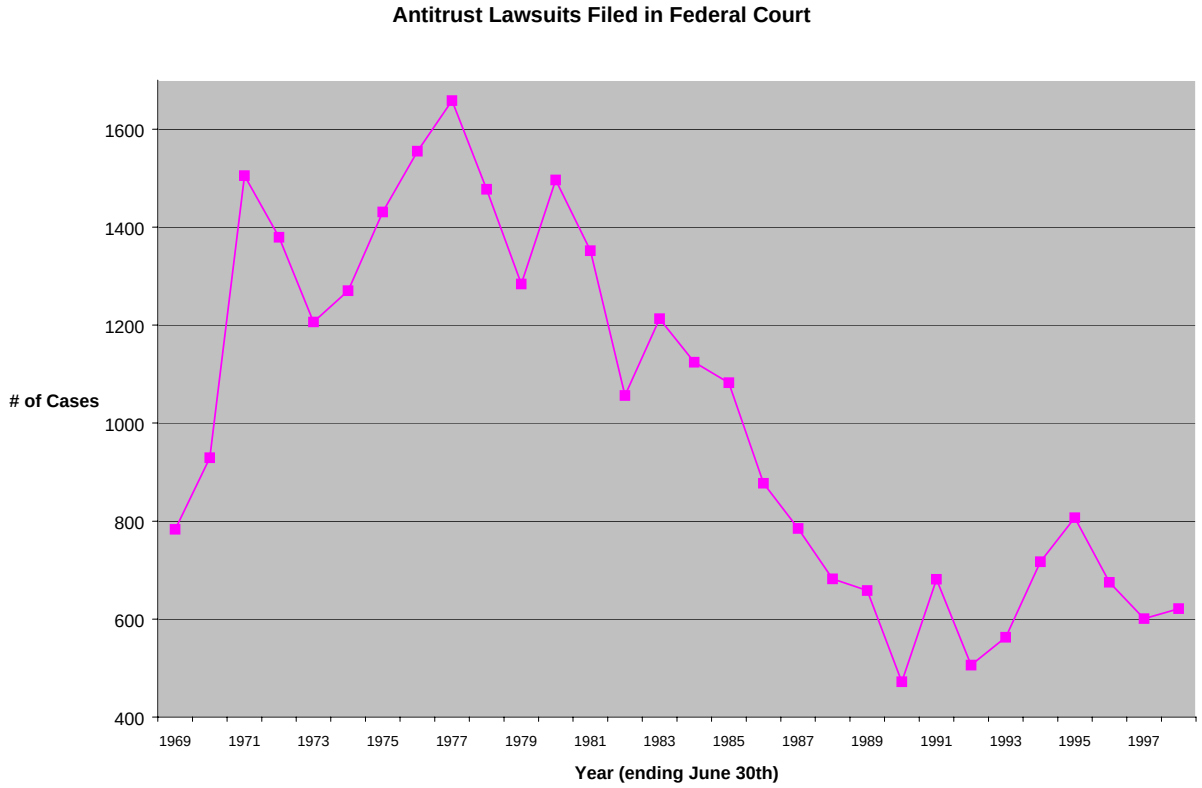
The Working Group notes, and calls the attention of ICPAC to, the Section of Antitrust Law's monograph on ***Special Defenses in International Antitrust Litigation (1995),*** which analyzes over 300 foreign commerce cases, and which "addresses the special defenses, immunities, and doctrines of abstention that arise when the United States antitrust laws are applied to international

[2] The Working Group is led by Margaret Guerin-Calvert and includes Thomas Greene, Abbott B. Lipsky, Jr. and Douglas E. Rosenthal.

commerce. In particular, the monograph analyzes those special defenses and immunities that relate to the role of foreign governments in anticompetitive conduct." The monograph covers foreign sovereign immunity, the act of state doctrine, the foreign sovereign compulsion defense, and the petitioning of foreign governments. It cites most of the notable foreign commerce antitrust cases that have been litigated, and discusses the issues raised therein, including practical issues of discovery, remedies, and expressions to the Judiciary of Executive Branch concerns.

This Working Group, in contrast, has chosen to focus on some typical dispute patterns and present to ICPAC a few generalizations based on the experiences of its members. The Committee provides brief summaries of six reported cases, three involving "outbound" trade and three involving "inbound" trade. At the end of each case, the Working Group offers comments on legal policy issues that tend to be confronted in such a case. Following all of the case descriptions and comments, the Working Group offers some general observations and reflections on the overall nature and direction of private antitrust litigation involving restraints on U.S. foreign commerce, and suggests some areas of inquiry for ICPAC.

As an overall matter, the Working Group notes the dramatic decline in private antitrust cases over the period 1978-1998, as reflected in statistics of the Administrative Office of the Courts:



On average less than 10 of these cases in any year are filed by the government, so the chart reflects the decline in private antitrust litigation over this period.

II. ILLUSTRATIVE PATTERN ANTITRUST CASES INVOLVING PRIVATE

CONDUCT IN FOREIGN COMMERCE

1. **Zenith Radio Corp. v. Hazeltine Research, Inc.**, 395 U.S. 100 (1969)

This litigation was filed by a U.S. manufacturer of radio and television receivers, Zenith Radio Corp. (*Zenith*). Before 1959 Zenith employed patents licensed to it pursuant to a "standard package license" granted by Hazeltine Research, Inc. ("HRI"). As the expiration date for this license approached, Zenith claimed that it could continue its activities without further need for any HRI license. This prompted HRI to sue Zenith for infringement in November 1959. In May 1963, Zenith asserted counterclaims alleging patent misuse and antitrust violations. The misuse claims were based on specific terms of the HRI license (e.g., package licensing) while the antitrust claims were based on an alleged international conspiracy to prevent Zenith from exporting its products to Australia, Canada and England.

HRI's parent Hazeltine Corporation ("Hazeltine") owned the foreign counterparts to HRIs U.S. patents. Hazeltine allegedly participated in Australian, Canadian and English patent pools with the local subsidiaries of General Electric, Westinghouse and other manufacturers of radio and television sets. "Zenith contended that these three patent pools had refused to license the patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American-made radios and televisions into those foreign markets." Zenith alleged that but for the activities of the Canadian pool, Zenith's 3% Canadian market share would have been much closer to its U.S. share of about 16%.

Although HRI prevailed on its infringement claims following a bench trial, the district court found that HRI had misused its patents "by attempting to coerce Zenith's acceptance of a five-year package license, and by insisting on extracting royalties from unpatented products." It assessed $50,000 damages on the misuse claim, which it trebled, and entered injunctive relief against HRI.

The district court also found that HRI and Hazeltine had participated in a conspiracy with the three foreign patent pools "to exclude Zenith from the Canadian, English and Australian markets. Hazeltine had granted the pools the exclusive right to license Hazeltine patents in their respective countries and had shared in the pools' profits, knowing that each pool refused to license its patents for importation and that each enforced its ban on imports with threats of infringement suits. HRI, along with its coconspirator, Hazeltine, was therefore held to have conspired with the pools to restrain the trade or commerce of the United States, in violation of §1 of the Sherman Act . . . and was liable for injury caused Zenith's foreign business by the operation of the pools." The district court awarded treble damages of nearly $35,000,000 for injuries incurred "as a result of the restraints imposed by the three pools upon Zenith's export business" during the relevant damages period. The court granted injunctive relief "against further participation in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market."

Judgment on the antitrust counterclaim was reversed by the Court of Appeals due to an asserted failure of proof that Zenith suffered injuries within the limitation period by any activities of the foreign pools. The Supreme Court reinstated the district court's findings as to the Canadian pool, but affirmed the Court of Appeals on those portions of its mandate that overturned the damage award attributable to activities of the Australian and English pools. Zenith had attempted to penetrate the Canadian market despite the efforts of the pool, and found only limited success. By

contrast, it held off from exporting to England until the local technical standards were revised in conformity with those of the U.S. (from 405 lines-per-second scanning signals to 525/625 lines-per-second). Although Zenith had the "facilities and the ability" to produce modified sets or to provide appropriate converters, it was clearly waiting for the technical standard to change. As to Australia, nothing in the record "would permit the inference that Zenith either intended or was prepared to enter" the market during the damage period.

In a footnote the Supreme Court accepted Zenith's Sherman Act theory:

> "The Court of Appeals did not disturb, nor do we, the findings of the District Court that HRI and Hazeltine conspired with the Canadian pool to deny patent licenses to companies seeking to export American-made goods to Canada. Accepting these findings, we have no doubt that the Sherman Act was violated. [Citing *Timken Roller Bearing v. U.S.*, 341 U.S. 593, 599 (1951); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1963).] Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble-damage liability of the domestic company participating in the conspiracy was beyond question."

The Court also found defects in personal jurisdiction requiring vacatur of relief as to the parent, Hazeltine. The Court later considered the case after remand on a variety of statute-of-limitations and damages-measurement issues.

Comments:

a. The case illustrates how an agreement among international competitors can be brought within reach of antitrust relief if even one of the parties can be found within a jurisdiction having effective laws. Could Zenith have avoided the impact of the pool by virtue of the injunction against Hazeltine, or would the Canadian pool have continued to interfere with Zenith's exports due to other patents beyond Hazeltine's own control? How did the vacatur of the injunction against Hazeltine limit the effectiveness of the relief?

b. It would be interesting to know the origins of the foreign patent pools. Would they have been unlawful under U.S. standards? Were those pools lawful under local competition standards? If unlawful under the local standards, why was nothing done?

c. It is noteworthy that the issue of jurisdiction over export restraints – the "footnote 159" issue – was never raised. Justice White thought it obvious that the violation had been proven. Would this have seemed as obvious if foreign pool members, including Hazeltine, had not had any U.S. presence? With that factual modification, the case is almost a classic "C. Itoh/Crab Imports"-type exclusion case.

2. ***Continental Ore Co. v. Union Carbide & Carbon Corp***, 370 U.S. 690 (1962)
United Nuclear Corp. v. General Atomic Co., 629 P.2d. 231 (N.M. 1980)

Continental Ore Company v. Union Carbide, 370 U.S. 690 (1962) (*"Continental*") and *United Nuclear Corporation v. General Atomic Company*, 629 P.2d. 231 (N.M. S. Ct., 1980)

("*United Nuclear*") represent, in cases involving an "outbound" and an "inbound" alleged restraint, respectively, controversial examples of how private antitrust litigation challenging practices involving foreign commerce can directly implicate policies of other national jurisdictions. In each case the court's personal and subject-matter jurisdiction seemed clear. Nevertheless, these cases were severely complicated when actions and policies of foreign nations were implicated. Accordingly, these cases may suggest to some that private antitrust litigation in the courts of one nation should be curbed when the interests of foreign jurisdictions are involved. Alternatively, these cases may suggest that the exercise of national jurisdiction is inappropriate where the markets and conduct in question span multiple jurisdictions with different and possibly conflicting laws and policies.

In *Continental*, the plaintiff, a U.S. producer of the mineral vanadium, alleged that defendants, competing producers, had eliminated plaintiff from the market for the supply of vanadium. The specific alleged acts of monopolization included purchasing and acquiring control over substantially all vanadium-bearing ore deposits and vanadium produced by others in the U.S. and fixing prices for the sale of vanadium. Plaintiffs also alleged that defendants deliberately excluded them from supplying vanadium to the Canadian market, in furtherance of the overall conspiracy to restrain and monopolize the vanadium industry. The latter allegation directly implicated the wartime procurement policy of the Canadian government, under which Electro Met of Canada, a wholly owned subsidiary of one of the defendants, was appointed as the Canadian government's exclusive agent for the purchase and distribution of vanadium in Canada.

United Nuclear involved allegations that the defendants committed fraud, breach of contract, breach of fiduciary duties, and violations of New Mexico antitrust laws by conspiring to control uranium reserves in the U.S. One aspect of this allegation was that Gulf Canada, a subsidiary of one of the defendants, acted beyond the scope of an international governmental uranium cartel in which Canada participated, and thereby became involved in the unlawful conspiracy to control the uranium market in the U.S.

In both cases the defendants refused to comply with orders for the production of documents located in Canada. In *Continental*, the lower courts agreed with defendants that they should not be forced to produce documents in violation of Canadian law, but the Supreme Court reversed and remanded the case for a new trial. In *United Nuclear*, the New Mexico Supreme Court upheld the lower court finding of willful and bad faith failure to comply with production orders, and entered default judgment in favor of the plaintiffs.

In both cases, the courts characterized the impugned conduct as a domestic conspiracy involving only U.S. corporations and conduct in the U.S. Nonetheless, both courts viewed evidence concerning conduct in Canada, and the role of the Canadian government, as indispensable to this conspiracy. In *Continental* the Supreme Court declared that its analysis concerned only conduct occurring in the U.S. which was part of an unlawful conspiracy to influence or direct the elimination of Continental from the Canadian market. Thus, the Court did not seek to "question the validity of any action taken by the Canadian Government or by its Metals Controller". But the Court found that respondents could not be insulated from Sherman Act liability absent evidence that Canada approved, or would have approved, of the effort to monopolize the production and sale of vanadium. Such a finding, however, would likely have involved an assessment and at least an implicit questioning of the scope of Canada's policy and actions taken in furtherance of that policy by the

Government of Canada.

The *Continental* court relied primarily on *United States v. Sisal Sales Corporation*, 274 U.S. 268 (1927). In that case, U.S. corporations sought to monopolize importation and sale of sisal in the United States, a product available only from Yucatan, Mexico. The U.S. companies persuaded the governments of Mexico and Yucatan to pass discriminatory legislation excluding all other buyers from the Mexican market, and appointed an official agent of the government as the sole buyer of sisal from local producers. That agent, in turn, appointed the defendant U.S. corporation as its exclusive selling agent, thereby conferring upon it a monopoly for sisal sales into the United States, and in all other markets of the world as well. According to the Court:

> Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. . . . The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.

The *Continental* court found this logic persuasive since the activities of the defendant had an impact within the United States and upon its foreign trade. The mere fact that Mexican legislation "aided" the establishment of the monopoly did not, the Court reasoned, insulate defendant's conduct from Sherman Act scrutiny. The court in *Continental* relied on *Sisal Sales* without considering any legitimate interests the Mexican government may have been pursuing in appointing a sole exporting agent. As interpreted by *Continental*, *Sisal* suggests that if conduct taking place abroad has an "impact within the United States and upon its foreign trade", it can violate the Sherman Act irrespective of whether the legislation of a foreign country may require or facilitate such conduct. Such an exercise of jurisdiction, however, seems somewhat questionable where the U.S. companies were operating not only in the U.S. market, but in all of the world markets for sisal, as the sole sales agent appointed by a Mexican government entity. The *Sisal* court arguably made insufficient inquiries into the nature and extent of the foreign export cartel authorization, and *Continental* simply followed *Sisal* without seriously questioning it.

Similarly, in *United Nuclear* the Court based its analysis on its view that the case "involves nothing more than an inquiry into what an American corporation has done in America". Nonetheless, the Court then proceeded with the "critical inquiry" into the "nature of the role played by the foreign government", and concluded that this inquiry could not take place without the discovery of documents located in Canada. In spite of statements from the Government of Canada that it "did not wish to permit the courts of [the U.S.] to inquire into whether Gulf exceeded the original scope of the cartel", the court did conduct such an inquiry:

> It is for the courts of this country, and not for the government of a foreign state, to determine whether our nationals took actions in our nation in violation of our laws. The existence of cartel evidence indicating that the cartel might have exceeded its original non-United States scope makes it imperative that our courts be free to conduct such an inquiry in this case.

The Court opined that ruling for defendant would mean that "if a foreign state compels an American corporation to take actions in the United States which are intended to and do have severe adverse consequences to free and fair trade in the United States, the American corporation is thereby immunized from the full force of the laws of its own sovereign." But it could have resolved the case by relying on the significantly narrower proposition that it should refrain from indirectly analyzing the conduct of the Canadian government, and applying its laws to Canadian corporations located in Canada, to force the production of documents from Canada in a manner contrary to Canadian law. The court's approach risked sharp and perhaps unnecessary conflict with the laws, policies and other legitimate interests of Canada.[3]

In *Continental*, Canada's wartime procurement policy had influenced its actions affecting vanadium supply. The court did not, however, consider whether the legitimacy of allied wartime policy, viewed from the perspective of its effect on competition, was a matter more appropriately within the competence of the Executive Branch. Likewise, in *United Nuclear* it seemed irrelevant to the court that Canada, along with France, South Africa, Australia, and other foreign nations, participated in an international uranium cartel as a protective measure against the adverse consequences of a U.S. uranium embargo in 1964, which blocked the importation of all foreign uranium into the United States, apparently to protect the U.S. industry. This was mentioned only in a footnote.

Eighteen months after *Continental*, the Supreme Court again considered the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Curiously, however, that opinion did not even refer to the decision in *Continental*. Rather, the same Court in *Sabbatino* stated:

> The doctrine formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Had it applied this statement of the doctrine to the facts in *Continental*, the Court might have framed the question as whether the action of Electro Met, as Canada's selected exclusive purchasing agent for vanadium, was the "act " of the Canadian state.

In *United Nuclear*, defendant GAC argued that because Gulf's participation in the cartel had been compelled by the Government of Canada, the cartel and all actions of Gulf taken pursuant to the cartel were thereby transformed into an act of a foreign state, thus precluding judicial inquiry into the cartel and Gulf's role in it since such an analysis would involve questioning the legitimacy of Canada's actions. According to the opinion, GAC had also failed to produce responsive information located in the United States about its conduct in the US. If true, this may have provided a basis for severe sanctions against GAC, and might have avoided implicating act of state concerns.

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[3] Ironically, the only government that ever convicted and punished any individual involved in the uranium cartel was the Government of Canada.

Although Canada's request to file an amicus brief was rejected, and the U.S. Executive Branch declined to participate, the Court, again without acknowledging that it was questioning the legitimacy of Canada's actions, found the basic purpose of the cartel to be "unquestionably clear" -- to set a floor for prices, divide production, and restrict supply. The Court also embarked upon an interpretation of the Canadian regulations implementing the cartel, concluding that they were "broad enough to encompass any documents or information concerning the uranium activities of an American corporation in the United States." Again, no distinction was made between discovery of information in Canada and of information in the United States. This course of analysis was pursued in spite of statements of the Canadian government to the trial court that the cartel did not include the U.S. market.

As articulated in some parts of the *Sabbatino* majority opinion, the act of state doctrine derives not from notions of sovereignty or even from international law, but rather from the U.S. judiciary's concern about possible interference in Executive Branch conduct of foreign affairs. In a more recent Supreme Court decision, however, *Kirkpatrick v. Environmental Tectonics*, 493 U.S. 400 (1990), Justice Scalia, after reviewing the evolution of the Supreme Court's interpretation of the doctrine, concludes:

> Act of state issues only arise when a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.

When the outcome of a case turns upon the effect of official action by a foreign sovereign, does this necessarily involve the judiciary in possibly interfering in Executive Branch conduct of foreign affairs? If not, do the two cases articulate different standards? If so, what weight, if any, ought the court to attach to Executive Branch statements regarding the foreign relations factors at issue? In particular, what ought a U.S. court to do if the Executive Branch chooses, as in *United Nuclear*, to simply ignore the statements of a foreign government, suggesting by silence that its conduct of foreign affairs is not impeded? Should this, by itself, be sufficient for a U.S. court to reject assertions based on the doctrine?

The *United Nuclear* Court treated as "relevant but not dispositive" statements by the Legislative and Executive Branch that the act of state doctrine was not available. It seems doubtful that a mere assertion by the Executive Branch should alone control a court's jurisdiction and its application of U.S. law to foreign governments. It would be useful in this area for the courts to develop a notion of what Justice Scalia in his dissent in *Hartford Fire* called "prescriptive comity" – a framework for applying the doctrine that accounts for the respect that sovereigns afford to each other by limiting the reach of their laws.

A foreign government that formally approves a cartel may be implementing a basic state policy. Under what circumstances is it appropriate for private litigants to raise before U.S. courts the detailed functioning of such a cartel, especially where the predominant adverse effects of that cartel are felt outside the United States? Where the cartel has its major impact on the U.S. domestic market, or where impact on U.S. commerce is its intended purpose, U.S. competition interests are particularly strong. Arguably, such strong U.S. interests were present in neither *Continental* nor *United Nuclear*.

In both *Continental Ore* and *United Nuclear*, a policy conflict between the Canadian and U.S. governments underlay the disputes between the private litigants. The multinational litigants became the conduit for what some viewed as the extraterritorial application of U.S. antitrust law, and implicated in civil litigation the policies of foreign nations. When the interests of a foreign nation are implicated in such private litigation between U.S. litigants, the U.S. Executive Branch may be a valuable source for views on whether the act of state doctrine should shield the foreign nation's conduct or policy from judicial scrutiny. While such statements should not necessarily be treated as dispositive by the courts, absent representations from the U.S. government the judiciary may be ill-equipped to engage in the proper balancing of interests. The courts have in fact been given "expressions" from various levels of the Executive Branch, with various courts expressing doubt that such expressions, at the Assistant or Undersecretary of State or Assistant Attorney General levels, should govern the judiciary. But even Justice White, dissenting in *Sabbatino*, indicated that he "would not disregard a declaration by the Secretary of State or the President that an adjudication in the courts . . . would impede relations between the United States and the foreign government." See in general, for a discussion in greater depth of these and related issues, the Section of Antitrust Law's monograph, ***Special Defenses in International Antitrust Litigation*** at 49-77 (1995).

In *Societé Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rodgers*, 357 U.S. 197 (1958), the Supreme Court stated that if a party "deliberately courted legal impediments to the production of documents", this would have a "vital bearing" on justification for dismissal of the action. In *United Nuclear*, the New Mexico Supreme Court ruled that Gulf's policy of keeping cartel records in Canada was motivated in large part by concern for secrecy. In the court's view Gulf's policy of moving cartel records to Canada from the U.S. ("parking") and its failure to press the Canadian government to make an exception to its order blocking production, improperly courted impediments. This finding, however, led to the draconian penalty of default judgment. One may ask whether this response by the Court was too extreme, in contrast to more measured responses such as contempt, striking testimony from the record, or making adverse presumptions for failure to produce the evidence.

Comments:

As antitrust laws proliferate, it becomes important to establish a rational and objective structure to consider foreign interests implicated by private litigation. Bilateral agreements like the MLAT between the U.S. and Canada, which governs criminal but not civil matters, may help mollify potential conflicts between private litigation and foreign interests. More effective structures should be developed, however, in order to govern judicial consideration of foreign interests in the context of private (civil) litigation.

3. *Daishowa International v. North Coast Export Co.*[4]

This case arose from a long-term contract for the supply of wood chips for export from the United States to Japan. According to Daishowa, a Japanese paper manufacturer, the dispute was triggered by an increase in U.S. Pacific Coast wood chip prices over the price set by the contract. North Coast, a northern California cooperative for the export of wood products, countered that

[4] 1982-2 Trade Cases & 64,774 (N.D. Cal. 1982).

Daishowa had agreed to pay the U.S. market price for chips under the contract, and had reneged on its deal by insisting on a lower price.

This contract dispute assumed antitrust aspects when North Coast uncovered evidence during discovery that Daishowa allegedly was a member of a monopsonistic Japanese buyers' cartel that divided the U.S. market and otherwise operated to depress the price of exported U.S. wood products. Based on this evidence, the trial court granted North Coast's motion to amend its complaint to add allegations of price-fixing, market division and boycott in violation of the Sherman Act.

Daishowa's initial defense exploited the symmetry between its own actions and those of North Coast: North Coast was a Webb-Pomerene association authorized by U.S. law to engage in conduct otherwise potentially violative of the Sherman Act. The association could not claim immunity, however, for any "agreement, understanding or conspiracy" that "artificially or intentionally enhances or depresses prices within the United States . . . or which substantially lessens competition within the United States."[5] Daishowa argued that since it was dealing with a legalized sellers' cartel in the U.S., it should enjoy a reciprocal immunity for its countervailing buyers' cartel. The court did not accept Daishowa's logic, reasoning that the conduct alleged against Daishowa would have no Webb-Pomerene immunity if engaged in by North Coast (because such activities would have had prohibited U.S. effects). Thus, it rejected Daishowa's reciprocal immunity argument.

Daishowa next argued that the extraterritorial application of U.S. antitrust law was prohibited by standards of comity, as articulated in *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*[6] The court derived from *Timberlane*:

> a three-part analysis to be used in evaluating the extraterritorial application of American antitrust laws: (1) Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?; (2) Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?; (3) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United Sates be asserted to cover it?[7]

North Coast asserted that adverse effects on U.S. markets had resulted from *per se* Sherman Act violations by Daishowa. Nevertheless, Daishowa focused its argument on the comity factor. The court listed seven factors affecting this aspect of the analysis:

(1) the degree of conflict with foreign law or policy;

(2) nationality of the parties;

(3) locations or principal places of business of the corporations;

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[5] 15 U.S.C. ə 62.

[6] 549 F.2d 597 (9th Cir. 1976).

[7] *Id.* at 608-09.

(4) the extent to which enforcement by either state can be expected to achieve compliance;

(5) the relative significance of the effects of the restraint on the United States as compared with those elsewhere;

(6) the extent to which there is explicit purpose to harm or affect American commerce; and

(7) the relative importance to the violations charged of conduct within the United Sates as compared to conduct abroad.

Daishowa argued that any exercise of jurisdiction by a U.S. antitrust court would create a conflict with Japan because Japanese law authorized the challenged buyers' cartel. Further, Daishowa argued, the cartel's activities were conducted by Japanese nationals in Japan. Daishowa also suggested that assertion of U.S. jurisdiction might lead to retaliation which, in turn, would jeopardize enforcement of any U.S. decree. Finally, the existence of the Webb-Pomerene Act was cited as evidence that U.S. policies were not hostile to state-authorized cartels designed to advance national economic interests.[8]

North Coast challenged Daishowa to provide direct evidence that a judgment against it would offend Japanese policy. In this regard, North Coast cited a Japanese newspaper article describing a Japanese prosecution of Daishowa for price-fixing in violation of Japanese law. North Coast also highlighted the effects of the buyers' cartel in depressing U.S. chip prices and the apparently intentional nature of the activity. North Coast noted that two of the three firms in the cartel were U.S. entities, and asserted that the U.S.-Japan trade relationship made retaliation highly unlikely. Finally, North Coast contended that Japanese law provided no practical remedy for its injuries.[9]

Reconciling the competing arguments, the court found no clear evidence of a conflict with Japanese law. Indeed, the court noted that Daishowa had not supplied it with the Japanese laws that were in asserted conflict with the Sherman Act. The specter of retaliation was dismissed as speculative, as were concerns about negative effects on the Japanese economy. The court found that the parties were before the court; there was a U.S. interest in providing a convenient forum and a prompt remedy; and that there was no apparent remedy in Japan. Taken together, the balance was struck in favor of U.S. antitrust jurisdiction.[10]

After *Daishowa* the Foreign Trade Antitrust Improvements Act (FTAIA)[11] was enacted. The FTAIA (*inter alia*) limits Sherman Act jurisdiction to conduct having a "direct, substantial, and

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[8] *Daishowa* at 71,789.

[9] *Id.*

[10] *Id.* at 71,789-71,790.

[11] 15 U.S.C. § 6a.

reasonably foreseeable effect" on U.S. foreign commerce. The Act does not address the role of comity analysis for conduct meeting this test. The Supreme Court did engage in a truncated comity analysis in a case involving import restrictions.[12]

Comments:

This case illustrates the challenges facing U.S. courts seeking to sort through the parties' claims concerning asserted conflicts with the laws of other nations. In this case, the U.S. court was not provided with relevant Japanese law but with speculation about potential trade conflicts. The court could have invited an *amicus* filing by the Government of Japan on the asserted conflicts between U.S. antitrust principles and Japanese law. While such filings might be expected to favor the position of the foreign state's nationals, at least there could be a somewhat more complete record regarding the foreign state's laws and policies.

This case also illustrates the difficulty of determining a true conflict when the law of the foreign state assertedly authorizes the challenged activity, but no more. Two bodies of domestic U.S. jurisprudence could be brought to bear on this problem. Within the confines of U.S. antitrust law, the relationship between sovereign states of the United States and the federal government is regulated by the state action doctrine. The familiar two-pronged test articulated in *Mid-Cal Aluminum Co. v. California* requires states to show that they have both authorized the activity and continue to supervise any anti-competitive conduct. Importation of this standard into comity analysis, while favoring U.S. jurisdiction, could perhaps provide greater certainty to the process.

The other body of U.S. law which is highly developed is that arising from Supremacy Clause analysis. This body of law has developed a variety of tools for assessing and balancing conflicts between state and federal law.[13] For example, the mere fact that one jurisdiction imposes an additional penalty or provides an additional remedy does not foreclose action by a state in our federal system.[14] This general approach to international conflicts was suggested years ago by former U.S. Assistant Attorney General William F. Baxter, but it appears not to have been pursued seriously.

4. ***Hartford Fire Insurance Co. v. California***[15]

In this case various states and private plaintiffs alleged that domestic insurance companies conspired to limit output of U.S. insurance coverage in the U.S. in a number of ways, notably the imposition of claims-made coverage which, as proposed, would have drastically reduced the temporal scope of coverage, and a complete ban on environmental pollution coverage. The immediate target of these proposed limits was commercial general liability (CGL) policies widely

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

[13] *See generally*, Tribe, American Constitutional Law 2d 479-496 (1988).

[14] *See, e.g., California v. ARC America Corp.,490* U.S. 93 (1989); *Silkwood v. Kerr-McGee corp.*, 464 U.S. 238 (1984).

[15] 509 U.S. 764 (1993).

purchased by corporations, non-profit institutions and governments.

According to the complaints, the conspirators were unable to convince the rest of the domestic primary insurance industry to accede to these limits on coverage. Therefore, it was alleged, the core U.S. conspirators first approached domestic reinsurers and then U.K.-based Lloyd's of London syndicates to force these changes on pain of losing reinsurance. Reinsurance allows firms writing primary policies to "lay off" risks to reinsurers. In general, reinsurance allows risks, particularly catastrophic risks, to be spread broadly among market participants. In its various forms, reinsurance is considered to be a critical input in the industry.

The McCarran-Ferguson Act[16] cloaks the insurance industry with antitrust immunity if, but only if, the alleged restraint constitutes the "business of insurance"; is regulated by state law and is not a "boycott". Plaintiffs alleged that defendants' activities constituted a boycott within the meaning of the Act and that the involvement of putatively unregulated foreign reinsurers dissolved the McCarran immunity for all participants in the alleged conspiracy.

The U.K. parties challenged U.S. subject matter jurisdiction. Under Judge Learned Hand's 1945 decision in *United States v. Aluminum Co. (Alcoa)*[17], jurisdiction is proper if the challenged restraint "significantly" or "directly" affects U.S. commerce, if it was intended to have such an effect; or was intended to have an effect on U.S. commerce and did, in fact, have such an effect.[18] A subsequent Supreme Court decision found subject matter jurisdiction proper when "the activities of defendant had an impact within the United States and upon its foreign trade."[19]

The *Alcoa* calculus was generally thought to be tempered by the comity doctrine. The key case is *Timberlane Lumber Co. v. Bank of America*[20] which articulates a "jurisdictional rule-of-reason"[21]. *Timberlane* suggests a three part analysis to evaluate extraterritorial application of U.S. antitrust law: (1) Does the alleged restraint affect, or was it intended to affect the foreign commerce of the United States?; (2) Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?; and (3) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[22] The third prong of the analysis implicates additional factors, including:

! the relative importance of the interests of the nations that are involved in or affected

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16 15 U.S.C. §§ 1012 *et seq.*

17 148 F.2d 416 (2d Cir. 1945).

18 *Id.* at 443-444.

19 Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962).

20 549 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).

21 1A Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 273c2 (1997).

22 549 F.2d at 608-09.

by the controversy;

- ! the nationality of the parties, their locations, and other indications of contact with the nations involved;

- ! the degree of international conflict that might result if jurisdiction is asserted; and

- ! the extent to which an exercise of jurisdiction is likely to result in successful enforcement and compliance.[23]

Both sides structured their briefs around the *Timberlane* factors, focusing particularly on the third prong of the analysis. The States further argued that comity analysis was inappropriate when a restraint met the requirements of the Foreign Trade Antitrust Improvements Act[24] (FTAIA), enactment of which post-dated *Timberlane*.[25]

When *Hartford* reached the Supreme Court, the jurisdictional aspects of the case were briefed by the parties as well as the governments of the United States, Canada and Great Britain, all appearing as *amici curiae*. In a splintered decision with two majority opinions (on different issues), a concurring opinion and a dissent, the majority characterized the question before it as whether the district court, which clearly had jurisdiction, should have refrained from exercising it.

At the outset, the Court sidestepped the FTAIA issue, determining that while Congress "expressed no view on the question" of whether comity was a separate basis for refraining from the exercise of antitrust jurisdiction, it need not decide the issue because "international comity would not counsel against exercising jurisdiction in the circumstances alleged here."[26] The Court summarized the "only substantial issue" before it as "whether `there is in fact a true conflict between domestic and foreign law [citation omitted]."[27]

On the conflict question, the Court accepted the representation of the United Kingdom that the conduct alleged in the complaints "was perfectly consistent with British law and policy."[28] However, it found that the "`fact that conduct is lawful in the state in which it took place will not, of

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[23] *Id.* at 614-615.

[24] 15 U.S.C. § 6a.

[25] The Ninth Circuit determined that: "We do not believe that a *Timberlane* [comity] analysis ... can be unaffected by the [FTAIA]. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a `direct, substantial and reasonably foreseeable effect' on American commerce, it is only in the unusual case that comity will require abstention from the exercise of jurisdiction. *In re Insurance Antitrust Litigation*, 938 F.2d 919, 932-3 (9th Cir. 1991), *aff'd in part and rev'd in part sub nom, Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

[26] 509 U.S. at 797.

[27] *Id.*

[28] *Id.* at 799.

itself, bar application of the United States antitrust laws" even where the foreign state has a strong policy to permit or encourage such conduct. [citations omitted]"[29]

Reviewing the British scheme for regulating Lloyd's syndicates, the Court found no prohibition on compliance with U.S. antitrust law. Specifically, the Lloyd's defendants were not required by British law to act in a fashion prohibited by U.S. law; neither was compliance with both U.S. and U.K. law "impossible". As a consequence, absent direct conflict, the exercise of jurisdiction by a U.S. court over the antitrust issues was proper.

Justice Scalia dissented, arguing that the majority's test was so "breathtakingly broad" that it would "bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries–particularly our closest trading partners."[30] In reaching his conclusion, Scalia took a completely different approach to the issues presented by the case. He began from the general canon of statutory construction that "[a]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains", quoting the Court's 1805 decision in *Murray v. Schooner Charming Betsy*.[31] Citing other maritime cases, he argued that the reach of U.S. law should be presumed to be limited by international law, a concept he characterized as "prescriptive comity". Using the Restatement (Third) of Foreign Relations Law of the United States ə 403 as a proxy for international law, he concluded that all factors in *Hartford* militated "against application of United States law"[32]

Lower courts have just begun to flesh out the rules established in *Hartford*. In the Ninth Circuit's first post-*Hartford* decision, the court concluded that a Korean system of registering tableware designs, which was assertedly used as a vehicle for restraining U.S. commerce, did not create a "true conflict" under the *Hartford* standard.[33] However, with this change, the court went on to assess the *Timberlane* comity factors and found that jurisdiction was appropriate.[34] In a potentially important first, the court determined that application of the *per se* rule was inappropriate on comity grounds, and instructed the lower court to use the rule of reason, even though the application of U.S. antitrust law was generally applicable to the challenged restraint.

A trial court decision concerning alleged illegal restraints involving milk pricing regulation in New Zealand concluded that the regulatory scheme in that country did present a true conflict, and that jurisdiction was inappropriate using a comity analysis.[35]

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[29] *Id.*

[30] *Id.* at 820.

[31] 6 U.S. 64, 2 Cranch 64, 118 (1804).

[32] 509 U.S. at 819.

[33] *Metro Industries, Inc. v Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996).

[34] *Id.* at 847.

[35] *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F.Supp. 733 (SDNY 1997).

Comments:

This case presents a number of important issues and challenges. The first issue concerns the effect of the "true conflict" standard on the exercise of comity. This test generally favors the exercise of U.S. jurisdiction. Indeed, this test, which has roots in the Court's preemption jurisprudence, is likely to be very expansive since it may preclude comity analysis unless compliance with U.S. and foreign standards is literally impossible.

The second issue is the relationship of the Court's "true conflict" test to broader comity principles represented by the *Timberlane* decision. As the Ninth Circuit's *Metro Industries* decision illustrates, *Hartford* may not foreclose a wide-ranging comity analysis. A related question, and one specifically left open by the Supreme Court, is the appropriateness of a full-blown comity analysis if a restraint meets the standards of the FTAIA, namely that the challenged conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.

Finally, *Hartford* brings to the fore questions relating to the correct institutional structure for informing courts of how foreign law and policy affects conduct challenged in the U.S. The Supreme Court was advised of the potential effects of the exercise of U.S. antitrust jurisdiction on the U.K. system for regulating Lloyd's by *amicus* filings. Given the importance of the precise details of the regulatory scheme to the Court's analysis, it may be appropriate to consider some augmented status for foreign states in private U.S. antitrust litigation to permit them to clarify the scope and nature of their regulatory systems.

5. ***Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation***[36]

In 1974, Zenith Radio Corporation sued twenty-one defendants involved in the manufacture or sale of Japanese consumer electronic products (CEPs), claiming they had violated Sections 1 and 2 of the Sherman Act,[37] Section 2 (a) of the Robinson-Patman Act,[38] Section 73 of the Wilson Tariff Act,[39] and the Antidumping Act of 1916,[40] by illegally conspiring to drive Zenith out of the American CEP market.[41] More specifically, Zenith alleged that the defendants conspired to raise, fix and maintain artificially high prices for television receivers and other CEPs sold by the defendants in Japan and, at the same time, to fix and maintain low prices for such products exported to, and sold in, the United States, with the intent and purpose of eliminating domestic competitors.

After full opportunity for discovery and extensive *in limine* hearings, the district court

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[36] 475 U.S. 574 (1986).

[37] 15 U.S.C. §§ 1, 2 (1998).

[38] Id. § 13 (a).

[39] Id. § 8.

[40] Id. § 72.

[41] Matsushita, 475 U.S. at 577-78.

granted summary judgment for defendants.[42] The Third Circuit, however, reversed.[43] Relying upon evidence previously excluded by the district court, the Third Circuit concluded that "a fact-finder might reasonably infer that the allocation of customers in the United States, combined with price fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market."[44] Put another way, the Third Circuit believed that a fact-finder might reasonably infer the existence of a conspiracy to "depress prices in the American [CEP] market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market."[45] Such a conspiracy, said the Third Circuit, would be a *per se* violation of the Sherman Act.[46]

The Supreme Court reversed in a 5-4 decision. The Court acknowledged evidence of collusive behavior, citing evidence that the defendants had conspired to charge high prices in the Japanese market and had substantial excess production capacity as a result, allocated five United States customers to each defendant in order to eliminate competition between them in the United States, and established "check prices" on television sets imported into the United States.[47] The Court viewed this evidence as insufficient to raise material fact issues. The Court found the price fixing in Japan irrelevant "because American antitrust laws do not regulate the competitive conditions of other nations' economies."[48] Regarding the "check" price agreements, the Court noted that Zenith could not complain about them because such conduct would not injure domestic competitors.[49] The same was deemed true concerning any conspiracy to impose non-price restraints that have the effect of either raising market price or limiting output (such as the five-customer limitation). As a consequence, the Court rejected such evidence as direct evidence of a conspiracy that could have imposed antitrust injury on plaintiff.[50]

The only conspiracy that Zenith might be able to recover against involved claimed predatory pricing to monopolize the American CEP market. But, said the Court, if the factual context of the case rendered the "respondents" claim implausible – it one that simply made no economic sense – respondents must come forward with more persuasive evidence to support their claim than would

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[42] Zenith Radio Corp. v. Matsushita Electric Indus. Co., Ltd., 513 F. Supp. 1100 (M.D. Pa. 1981).

[43] In re Japanese Electronic Prod. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983).

[44] Id. at 311.

[45] Id. at 309.

[46] Id. at 306.

[47] The major Japanese television manufacturers had entered into an export cartel agreement, at the behest of the Japanese Ministry of Trade and Industry (MITI), pursuant to which the manufacturers set minimum export prices for sales of television sets to the United States. These were referred to as "check prices."

[48] Matsushita, 475 U.S. at 582.

[49] Id. at 583.

[50] Id.

otherwise be necessary."[51] The Court also cautioned that "antitrust law limits the range of permissible inferences from ambiguous evidence" and, in order to survive a motion for summary judgment, the non-moving party must present evidence Athat tends to exclude the possibility that the alleged conspirators acted independently."[52]

In reviewing the reasonableness of inferring a predatory pricing conspiracy, the Court noted that such a conspiracy is by nature speculative, and that the success of such a scheme is inherently uncertain, stressing that while the short-run loss is definite, the long-run gain depends on successfully neutralizing the competition and maintaining monopoly power for long enough both to recoup the predators" losses and to harvest some additional gain.[53] The Court determined that the prospects of achieving monopoly power in the American CEP market were slight, giving particular weight to the fact that, two decades after the alleged conspiracy commenced, defendants were far from achieving their goal of monopolizing the market. The Court also discounted the possibility that defendants had obtained supracompetitive profits in the Japanese market since there was no motive to sustain substantial losses in the American CEP market in the absence of a likelihood of recoupment.

Concluding that evidence of the collateral conspiracies said little, if anything, about the existence of a conspiracy to charge below market prices in the American market over a period of two decades, the Court found the absence of any plausible motive to engage in the charged conduct highly relevant to whether a "genuine issue for trial exists."[54] Per Justice Powell, "if the petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."[55] The Court continued that, "in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice[d] to create a genuine issue for trial."[56] In essence the Court refused to allow the jury to speculate on whether there existed an *economically senseless* conspiracy."[57]

Comments:

With respect to the use of private treble damage actions to combat inbound competitive restraints, *Matsushita* suggests a number of issues for consideration:

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[51] Id. at 587.

[52] Id. (citation omitted).

[53] Id.

[54] Id. at 596.

[55] Id. at 596-97.

[56] Id.

[57] Id. (emphasis added) (citation omitted).

First, antitrust laws should not be used to forestall or prevent aggressive competition by foreign competitors. Restraints of trade in foreign markets, or even in-bound restraints that do not cause antitrust injury or injury in fact to domestic producers, are and should be regarded as insufficient to raise barriers to U.S. import trade.

Foreign competitors serious about participating in the U.S. market will ordinarily be prepared to defend themselves and fight to maintain the right to sell in this market notwithstanding lack of familiarity and general unease with U.S. antitrust challenges and the U.S. judicial system. In determining strategy to meet new competition (including competition from abroad), domestic competitors should never lose sight of the marketplace itself and the need to stay innovative, competitive and efficient. Reliance on the legal system to preserve a competitive position is, at best, a precarious strategy.

Where predatory pricing assertions are involved, there is no special rule for foreign defendants, either under the Sherman Act or, by implication, the Antidumping Act of 1916. Domestic competitors who perceive themselves aggrieved by "unfair" competition from abroad in the nature of dumping may peek remedies available under the Tariff Act of 1930.[58] Tariff Act standards are generally more accommodating to domestic claimants than antitrust standards with respect to price discrimination and injury. Administrative dumping proceedings, while not inexpensive, can be considerably less costly to pursue and much more expeditious than private antitrust litigation.

III. GENERAL OBSERVATIONS ON PRIVATE ANTITRUST CASES INVOLVING PRIVATE ANTICOMPETITIVE CONDUCT AFFECTING U.S. FOREIGN COMMERCE

Fifty years ago there was little private international antitrust litigation initiated in the United States and almost none initiated in other countries. By "international" we mean antitrust claims brought against domestic or foreign persons based on conduct beyond the boundaries of the nation in which suit is brought. There was U.S. governmental international antitrust enforcement, and much of it was controversial and challenged by other nations as a breach of international law.

Thirty years ago, private international antitrust enforcement in the United States emerged as a significant new phenomenon, and became no less controversial than U.S. governmental enforcement. Private international antitrust enforcement in non-U.S. countries remained almost nonexistent.

Today, private foreign antitrust enforcement outside the United States remains limited, though it is now easier for such cases to be brought. U.S. private international antitrust litigation continues to grow. It is significantly less controversial than before, perhaps because it is understood as a useful instrument to promote open and competitive markets without the necessity of involving government law enforcement. There is much less general hostility to what used to be referred to as

[58] 19 U.S.C. § 1673, et seq. (1998).

the "extraterritorial" enforcement of U.S. law "infringing on the territorial sovereignty of foreign states."

Nonetheless, there is still considerable (if less heated) criticism of several difficulties with private U.S. international antitrust enforcement – both among American and foreign experts – which U.S. statutory and case law, and U.S. enforcement policy, have not satisfied. Five criticisms are particularly noteworthy.

First, and most significant, U.S. law gives little guidance to governments and international business executives when there are direct conflicts between U.S. competition policy and the competition policy of foreign governments. It is not uncommon for individuals and corporations to find themselves caught between inconsistent desires or directives communicated by different governments in both of whose jurisdictions they do and want to continue to operate. It is difficult to find consistent principles for decision applied in four of the six cases discussed in this report: *Hartford Insurance*, *Continental Ore*, *United Nuclear* and *Matsushita Electric*. Three of these four cases lead many foreign observers to conclude that U.S. courts tend to apply only the consistent policy of finding a reason to uphold U.S. antitrust jurisdiction, regardless of the interests or concerns of friendly foreign governments.

Second, there is criticism when U.S. antitrust law is attempted to be applied not to promote consumer welfare in U.S. markets but merely to protect the export opportunities of U.S. exporters – even when foreign governments have domestic policies they consider legitimate and appropriate which such export protection may undermine. This issue is raised in *Continental Ore* and in *Zenith v. Hazeltine*. It would also be present in *Daishowa*, if the producers of wood chips sold to the Japanese buyers cartel had been beneficiaries of the antitrust exemption of the Capper-Volstead Act to permit the producers to organize a sellers cartel without the threat of antitrust liability. This was what happened in a Justice Department prosecution during the Reagan Administration in the Tanner Crab case.

Third, significant improvements should be sought in the process and standards by which competing interests are balanced for comity purposes and otherwise. Unfortunately, existing precedents in U.S. antitrust law for balancing conflicting government interests, or doing comity, are so complex, unbounded and difficult to apply as to permit widely disparate results on the basis of similar fact patterns.

Fourth, as several of these six cases demonstrate, U.S. courts are often asked to understand or intuit U.S. and foreign governmental policy interests at stake in particular private litigation disputes, without direct guidance from the concerned governments themselves. One possible reform be to encourage, if not oblige, U.S. federal, state and local judges hearing private disputes that raise claims or defenses based on considerations of governmental policy to invite concerned governments at an early stage in the litigation to submit their official views -- by diplomatic note, amicus brief or other means. As the OPEC cases demonstrate, the Executive Branch of the U.S. government may properly decide to remain silent; foreign governments

may also have reasons for silence. *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354 (1981), *cert. denied* 454 U.S. 1163 (1982).

Fifth, private international antitrust enforcement is generally not distinguished from purely domestic enforcement. Any determination of antitrust liability, even as to a matter of first impression where the law and the facts are evenly balanced between the two sides, leads to a judgment which can have enormous remedial effects against defendants found liable. Some of the six cases herein discussed are arguably ill suited to automatic treble damage liability, with attorneys fees awarded to a winning plaintiff, but not to a winning defendant. A second reform that might be considered would be to give discretion to judges to refrain from applying automatic treble damage remedies in close international cases, and perhaps to refrain from awarding automatic attorneys fees to prevailing plaintiffs; a countervailing consideration is that such a reform might substantially reduce deterrence of unlawful conduct.

It is even more difficult to make constructive recommendations addressing the first three problems. These problems are important and should be the subject of further sustained attention. Foreign governments and foreign legal scholars and practitioners should be heard on these specific issues and their recommendations should be considered. If other nations expand the private right to bring antitrust actions against foreign conduct in their domestic legal systems, these problems are likely to be exacerbated.

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