

## THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAW AND ITS ADOPTION IN KOREA\*

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In recent years, international trade and investment have significantly expanded. At the same time, national governments have broadened their regulation of international economic activity. Traditionally, states confined their regulation of economic activity to conduct occurring within national territory.<sup>1</sup> In recent years, however, national governments have increasingly applied their laws extraterritorially to business conduct occurring outside national territory.<sup>2</sup>

The extraterritorial application of national laws has led to growing problems internationally because of its ambiguity. Furthermore, extraterritoriality almost became synonymous with conflict in the antitrust and competition law fields. 'No single field of law has raised so intense and pervasive a volley of extraterritoriality conflicts as . . . U.S. antitrust law.'<sup>3</sup>

As aggressive unilateral enforcement in antitrust law continued to cause conflicts among close trading partners, so numerous theories to determine a reasonable jurisdiction have been developed. However, neither the courts, nor the legislature or government have clearly delineated the scope of U.S. antitrust jurisdiction in respect of disputes involving foreign commerce.<sup>4</sup> Notwithstanding this jurisdictional uncertainty, the extraterritorial enforcement of antitrust and competition laws has become more routine in both the United States and the European Union.<sup>5</sup>

The debate over the scope of extraterritorial jurisdiction in U.S. antitrust law arises from Sections 1 and 2 of the Sherman Act. Section 1 declares

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1 D. Lange and G. Born (eds), *The Extraterritorial Application of National Laws* (Paris: ICC Publishing, S.A., 1987) at 1.

2 *Id.*

3 D.E. Rosental and W.M. Knighton, *National Laws and International Commerce: The Problem of Extraterritoriality* (N.Y.: West Group, 1982) at VII.

4 H.C. Pitney, 'Sovereign Compulsion and International Antitrust: Conflicting Laws and Separating Powers' (1987) 25 Colum. J. Transnat'l L. 403 at 403.

5 P. Griffin, 'Extraterritoriality in U.S. and EU Antitrust Enforcement' (1999) 67 Antitrust L.J. 159 at 159.

illegal 'every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.'<sup>6</sup> Section 2 deems guilty of a felony 'every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations.'<sup>7</sup> These provisions are enforced through private treble damage actions and injunctive relief in federal courts pursuant to Sections 4 and 16 of the Clayton Act respectively.<sup>8</sup> The Sherman Act, however, gives no clear directions concerning jurisdiction over an American corporation's actions abroad or a foreign national's activity within its own country. Only the references in the Sherman Act to trade 'with foreign nations' suggest that the Act was intended to regulate certain foreign conduct that restrains or monopolizes trade within the United States.<sup>9</sup>

On the other hand, a number of Korean firms have been subjected to the extraterritorial jurisdiction of antitrust and competition law of both the United States and the European Union. Many of them have been indicted and heavy fines have been imposed upon them.<sup>10</sup> However, until March 2002, the Korea Fair Trade Commission (KFTC) was reluctant to apply Korean law extraterritorially.

This article reviews extraterritorial enforcement by the United States and examines Korea's response. Part I briefly traces the development of jurisdiction theories related to extraterritoriality. Part II describes the evolution of jurisdictional rationales in the United States, focusing on the 'jurisdictional rule of reason' and the 'intended effects test'. Part III examines congressional efforts and executive enforcement policy regarding extraterritorial antitrust jurisdiction. Part IV discusses the reaction of the international community to U.S. antitrust enforcements, and assesses the methods of overcoming international conflicts regarding the extraterritorial application of the U.S. antitrust laws. Comity, positive comity, bilateral and multilateral agreements will be discussed, both as interim and ultimate solutions. Part V considers the possible Korean response to the extraterritorial application of the U.S. antitrust laws.

## I. JURISDICTION

The meaning of terms like 'territorial' and 'extraterritorial' is, certainly, a matter of convention, and much semantic confusion arises from the varying uses of the term 'jurisdiction'.<sup>11</sup> In general, however, jurisdiction over

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6 Sherman Antitrust Act, 15 U.S.C. § 1 (1994).

7 *Id.* § 2.

8 R.P. Alford, 'The Extraterritorial Application of Antitrust Laws: The United States and the European Community Approaches' (1992) 33 *Vir. J. of Int'l L.* 1 at 7.

9 *Id.*

10 Between 1996 and 2001, four Korean companies had fines totaling US \$4,640,000 imposed on them by the U.S. Department of Justice (DOJ), while eight Korean companies had fines totaling EU € 74,827,000 imposed on them by the EU: Korea Fair Trade Association (2001), *Fair Competition Quarterly* 73 at 54.

11 L. Kramer, 'Extraterritorial Application of American Law after the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble' (1995) 89 *Am. J. of Int'l L.* 750 at 752, note 17.

conduct which occurs within a territory is described as territorial jurisdiction, and jurisdiction over conduct occurring outside a territory is described as extraterritorial jurisdiction.

The broad notion of jurisdiction may be divided into three subcategories: legislative (or prescriptive) jurisdiction, judicial jurisdiction, and jurisdiction to enforce.<sup>12</sup> Legislative jurisdiction is the authority of a nation-state to make its laws applicable to persons or activities,<sup>13</sup> whereas judicial jurisdiction is the power of courts to subject particular persons or things to the judicial process.<sup>14</sup> However, courts may not exercise judicial jurisdiction unless the courts also have subject matter jurisdiction, namely, the power to hear particular categories of cases.<sup>15</sup>

Under international law, the territoriality principle is the most basic and pervasive principle underlying the exercise of legislative (or prescriptive) jurisdiction.<sup>16</sup> Apart from the nationality principle, the territoriality principle confers jurisdiction on a state where the persons and goods in question are situated, or where the conduct in question takes place. Difficulties about which state has jurisdiction arises in situations where conduct commences in one state but is concluded in another state. To solve this problem, territorial jurisdiction has been extended to include subjective and objective territorial jurisdiction. The former permits a state to assert jurisdiction over acts that originated within its territory, even though they may have been completed abroad; the latter permits a state to exercise jurisdiction over a foreign national where a consummating act within the state's territory was a constituent element of a crime committed abroad.<sup>17</sup> In the context of increased movement of persons and commerce across borders, the subjective territorial principle proved to be quite impractical. This is particularly true of competition law infringements, because illegal conduct may have an effect within a particular territory without the perpetrators ever being present.<sup>18</sup> The objective territorial principle therefore has played a decisive role in the extension

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12 J.A. Trenor, 'Jurisdiction and the Extraterritorial Application of Antitrust Laws after Hartford Fire' (1995) 62 *Uni. Chi. L. R.* 1583 at 1586: Because the function of legislating, adjudicating, and enforcing the laws do not perfectly coincide with the roles of Congress, the Federal Judiciary, and the Executive in the modern regulatory state, the *Restatement (Third) of Foreign Relations Law of the U.S.* (1987) [hereinafter *Restatement (Third)*] recommends the use of the terms 'jurisdiction to prescribe,' 'jurisdiction to adjudicate,' and 'jurisdiction to enforce.' *Id.* note 13.

13 See *Restatement (Third)*, *supra* note 12, § 401; see also G.B. Born and D. Westin, *International Civil Litigation in United States Courts: Commentary and Materials*, 2<sup>nd</sup> ed. (N.J.: Prentice Hall, 1992) at 541.

14 See *Restatement (Third)*, *supra* note 12, § 401; *id.* at 1587.

15 Trenor, *supra* note 12, at 1588–89.

16 Alford, *supra* note 8, at 2.

17 Alford, *supra* note 8, at 3; George W. Haight, 'International Law and Extraterritorial Application of the Antitrust Law' (1954) 63 *Yale L.J.* 639 at 640. See generally Harvard Research in International Law, 'Draft Convention on Jurisdiction with respect to Crime, Art. III (Supp. 1935)' 29 *Am. J. Int'l L.* 435 at 486–87.

18 A.R. Fiebig, 'International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform' (1998) 1998 *E.U. Competition L. Rev.* 323 at 325.

of national jurisdiction in the field of competition.<sup>19</sup> The 'effects doctrine' was derived from the objective territorial principle.<sup>20</sup>

According to the effects doctrine, conduct outside a territory that has or is intended to have substantial effect within that territory justifies the latter's jurisdiction. This effects principle, recently developed in the 'intended effects' test in *Alcoa*,<sup>21</sup> was embodied in Section 402 of the *Restatement (Third)*<sup>22</sup> as a valid basis for the exercise of legislative jurisdiction.<sup>23</sup> However, this principle gave rise to the controversy surrounding the extraterritorial extension by a foreign country (especially the United States) of its economic regulation.

## II. THE EVOLUTION OF JURISDICTIONAL RATIONALES IN THE UNITED STATES

### A. *Before Hartford Fire*

#### 1. *Strict Territoriality*

The first important case addressing the issue of the extraterritorial application of U.S. antitrust law was *American Banana Co. v. United Fruit Co.*<sup>24</sup> In *American Banana*, the American Banana Company brought suit against the United Fruit Company for allegedly conspiring with the Costa Rican militia to monopolize the production and exportation of bananas from Central America to the United States.<sup>25</sup> Justice Holmes intimated that there were geographical limits to the U.S. antitrust authority, and took a skeptical stance towards jurisdiction because the events took place outside the United States.<sup>26</sup> Justice Holmes noted that the 'general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.'<sup>27</sup> 'In the first place the acts causing the damage were done, so far as it appears, outside the jurisdiction of the United States and within that of other states.'<sup>28</sup> For Justice Holmes, this was an aspect of sovereignty.<sup>29</sup> Any other view would be 'contrary to the comity of nations.'<sup>30</sup>

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19 *Re Wood Pulp* (1998) 4 C.M.L.R 901 at 920: But the United Kingdom argued that the territoriality principle permits jurisdiction to be asserted over foreign undertakings having subsidiaries or agents within the Community.

20 V. Gupta, 'After Hartford Fire: Antitrust and Comity' (1996) 84 Georgetown L.J. 2287 at 2289.

21 8F. 2d 416 (2d Cir. 1945).

22 *See supra* note, 12.

23 Trenor, *supra* note 12, at 1613.

24 213 U.S. 347 (1909); *see* Alford, *supra* note 8, at 7.

25 *Id.* at 354–55; *see* Alford, *supra* note 8, at 7.

26 *Id.* at 355.

27 *Id.*; *see* Alford, *supra* note 8, at 7.

28 *Id.*

29 *Id.* at 355–57.

30 *Id.* at 356.

Although *American Banana* explicitly established jurisdictional limits, the principle of strict territorial jurisdiction faded in due course.<sup>31</sup> In *United States v. Sisal Sales Corp.*,<sup>32</sup> the Supreme Court held that U.S. courts had jurisdiction. It attempted to distinguish *American Banana* by noting that a few of the agreements in the Sisal conspiracy took place in the United States and that the conspiracy was funded by a U.S. bank.<sup>33</sup>

## 2. 'Intended Effects' Doctrine

In 1945, the decisive step heralding the beginning of the modern 'effects doctrine' in U.S. antitrust jurisdiction commenced with Judge Learned Hand's landmark decision in *United States v. Aluminum Co. of America ('Alcoa')*.<sup>34</sup> In *Alcoa*, the Second Circuit addressed a complaint alleging an anticompetitive cartel involving several foreign corporations from Canada, Switzerland, Germany, and Great Britain.<sup>35</sup> The U.S. government alleged that 'limited,' an independent Canadian corporation set up by *Alcoa* to assume its foreign property, participated in a foreign cartel intending to fix a quota on aluminum imported to the United States.<sup>36</sup> With regard to the limitations customarily observed by nations upon the exercise of their powers, Judge Hand held that '[i]t is a settled law-as 'Limited' itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.'<sup>37</sup>

The *Alcoa* 'intended effects' doctrine rapidly gained acceptance in the United States.<sup>38</sup> After *Alcoa*, however, the Department of Justice continued to press for the extraterritorial application of the Sherman Act; consequently, various U.S. trading partners, affected U.S. firms, and some American commentators criticized the *Alcoa* approach as overbroad and intrusive.<sup>39</sup> Furthermore, aggressive assertions of U.S. antitrust jurisdiction after *Alcoa* in the 1950s, 1960s, and 1970s led to a considerable backlash from foreign governments, which took the form of the enactment of 'blocking' statutes, diplomatic protests, and counter-actions by foreign courts.<sup>40</sup>

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31 J.H. Chung, 'The International Antitrust Enforcement Assistance Act of 1994 and The Maelstrom Surrounding the Extraterritorial Application of the Sherman Act' (1996) 69 Temp. L. Rev. 371 at 381.

32 274 U.S. 268 (1927).

33 *Id.* at 275–76; see Alford, *supra* note 8, at 8.

34 *Supra* note 21. See Alford, *supra* note 8, at 3; the source of Judge Hand's effects principle is *The S.S. 'Lotus' (France v. Turkey)* (1927) P.C.I.J. (ser A) No. 10. The Court recognized the power of a country to legislate over conduct having an effect within its territory.

35 *Id.* at 442; see Alford, *supra* note 8, at 8.

36 *Id.* at 439, 442; see Chung, *supra* note 30, at 382.

37 *Id.* at 443; see Chung, *supra* note 30, at 382.

38 Alford, *supra* note 8, at 9.

39 L.A. Sullivan and W.S. Grimes, *The Law of Antitrust: An Integrated Handbook* (Minn.: West Group, 2000) at 97. Antitrust & Trade Reg. Rep (BNA) No. 13918.

40 Griffin, *supra* note 5, at 160–61.

### 3. Interest Balancing and the Jurisdictional Rule of Reason

International mistrust of the obscure nature of the 'effects doctrine' so intensified that the U.S. had to take a more conciliatory approach to extraterritoriality as developed by the courts. The U.S. government, first of all, tried to restrict the overuse of the effect doctrine, and considered evaluating international interests.

In these circumstances, several Courts of Appeals have modified the 'effects doctrine' by incorporating a 'jurisdictional rule of reason' in order to show due regard to the foreign sovereignty interests of third countries, in the interests of international comity.<sup>41</sup> The first case of this jurisdictional rule of reason was *Timberlane Lumber Co. v. Bank of America* ('*Timberlane*').<sup>42</sup> The plaintiff, an American lumber company, alleged that its efforts to acquire a Honduran mill to be used for exports to the United States were frustrated by tortious Honduran conduct (reminiscent of the conduct alleged in *American Banana*) that had been engineered by the defendants, the plaintiff's competitors, and an American bank.<sup>43</sup> At the outset, the Court in *Timberlane* noted that neither the 'act of state' doctrine nor the 'sovereign compulsion' defense precluded an assertion of federal court jurisdiction over the antitrust dispute.<sup>44</sup> Judge Choy held that 'the effects test by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country.'<sup>45</sup> Then, the Court of Appeals stated that at some point '[t]he interests of the United States are too weak and the incentive for restraint in the interests of international harmony too strong to justify extraterritorial assertion of jurisdiction.'<sup>46</sup> Accordingly, the court fashioned a 'jurisdictional rule of reason.'<sup>47</sup>

In *Timberlane*, the Ninth Circuit set forth a tripartite approach to determine the exercise of Sherman Act jurisdiction;

- (1) an intended or actual effect on American foreign commerce must exist;
- (2) the effect must be sufficiently large to constitute a cognizable injury to the plaintiffs that the U.S. antitrust laws should apply; and
- (3) the interests of, and links to, the United States must be sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.<sup>48</sup> For this 'third' interest balancing test, the court must inquire into the factors regarding international comity concerns. The court delineated eight relevant factors requiring

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41 Alford, *supra* note 8, at 10.

42 549 F.2d 597 (9<sup>th</sup> Cir. 1976).

43 *Id.* at 604–05; see Sullivan and Grimes, *supra* note 38, at 979.

44 *Timberlane I*, 549 F.2d at 605–07; see Chung, *supra* note 31, at 391.

45 *Id.* at 611–12.

46 *Id.* at 609.

47 *Id.* at 613–15; see Sullivan and Grimes, *supra* note 39, at 979.

48 *Id.* at 613; see Alford, *supra* note 8, at 11.

particular consideration,<sup>49</sup> drawing heavily from the factors outlined in the *Restatement (Second)* of United States Foreign Relations Law.<sup>50</sup>

Along the same lines, the 1982 Foreign Trade Antitrust Improvement Act ('FTAIA')<sup>51</sup> amended the Sherman Act<sup>52</sup> and Federal Trade Commission Act<sup>53</sup> according to the effects doctrine. It applies, however, only to export commerce and wholly foreign conduct. Also, jurisdiction would exist only when the challenged conduct had a 'direct, substantial, and reasonably foreseeable' effect on U.S. domestic commerce or on U.S. export commerce.<sup>54</sup> The FTAIA states that the Sherman Act 'shall not apply to conduct involving trade or commerce . . . such conduct has a direct, substantial and reasonably foreseeable effect . . . on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.' This 'direct, substantial, and reasonably foreseeable' effects test is, however, regarded as considering only questions of jurisdictional nexus, without reference to international comity.<sup>55</sup>

More significantly, in 1987, the *Restatement (Third)*<sup>56</sup> of United States Foreign Relations Law adopted a more detailed *Timberlane*-like balancing test

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- 49 (1) the degree of conflict with foreign law or policy;  
 (2) the nationality or allegiance of the parties;  
 (3) the locations or principal places of business of corporations;  
 (4) the extent to which enforcement by either state can be expected to achieve compliance;  
 (5) the relative significance of effects on the United States as compared with those elsewhere;  
 (6) the extent to which there is explicit purpose to harm or affect American commerce;  
 (7) the foreseeability of such effect; and  
 (8) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

50 Chung, *supra* note 31, at 393.

51 15 U.S.C. § 6(a), 45(a)(3)(1988).

52 15 U.S.C. § 6(a) provides:

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless:

- (1) such conduct has a direct, substantial and reasonably foreseeable effect  
 (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or  
 (B) on export trade or export commerce with foreign nations, or a person engaged in such trade or commerce in the United States.  
 (2) such effect gives rise to a claim under the provisions [of this Act] other than this section.

If [this Act] appl[ies] to such conduct only because of the operation of paragraph (1)(B), then [this Act] shall apply to such conduct only for injury to export business in the United States.

53 15 U.S.C. § 45(a)(3)(1988).

54 Griffin, *supra* note 5, at 162.

55 Alford, *supra* note 8, at 19.

56 While a restatement is not a formal source of law, it generally seeks to state the law already in existence and, as such, has an impact on judicial and diplomatic practice rarely matched by any other nonbinding pronouncement. K.M. Meessen, 'Conflict of Jurisdiction Under the New Restatement' (Summer, 1987) 50 *Law & Contemp. Probs.* 40 at 47.

that might limit exercising jurisdiction.<sup>57</sup> Section 402 provides that 'a state has jurisdiction to prescribe law with respect to . . . (1)(c) conduct outside its territory that has or is intended to have substantial effect within its territory . . .'. Specifically, Section 415 provides for the regulation of anticompetitive conduct occurring abroad. However, the *Restatement (Third)* Section 403 limits the assertion of jurisdiction by 'unreasonableness', which must be determined in the light of the eight criteria set forth in Section 403(2).<sup>58</sup> Moreover, Section 403(3) states that 'a state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, 403(2), if the prescriptions by the two states are in conflict.'

Regarding the assertion of extraterritorial jurisdiction under the antitrust law, it is noteworthy that the *Restatement (Third)* recognized and treated international comity explicitly, whereas the FTAIA drafters relegated comity concerns to the courts alone<sup>59</sup>

In the aftermath of *Timberlane*, however, the courts differed in their application of the test. For example, in *Mannington Mills Inc. v. Congleum Corp.*,<sup>60</sup> the United States Court of Appeals for the Third Circuit adopted the position that jurisdiction existed solely on the basis of a finding of intended effects on U.S. foreign commerce, but that a court may abstain from exercising jurisdiction if international interests prove sufficiently compelling.<sup>61</sup> But in *Laker Airway Ltd. v. Sabena*,<sup>62</sup> the United States Court of Appeals for the District of Columbia signaled a clear return to the principles of *Alcoa* by supporting the proposition that the judiciary is ill-equipped to handle the balancing test required by *Timberlane*'s third prong.<sup>63</sup>

The U.S. Supreme Court, however, had not taken any position on the 'jurisdictional rule of reason' developed in *Timberlane* until its 1993 decision in *Hartfort Fire Insurance Co. v. California*.

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57 Griffin, *supra* note 5, at 162.

58 The *Restatement (Third)* notes that 'unreasonableness' is determined by evaluating 'all relevant factors,' including;

- (a) the link of the activity to the territory of the regulating state;
- (b) the connections, such as nationality, residence, or economic activity;
- (c) the character of the activity to be regulated;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state might have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

59 Alford, *supra* note 8, at 27.

60 595 F.2d 1287 (3d Cir. 1979).

61 *Id.* at 1296-98.

62 731 F.2d 909 (D.C. Cir. 1984).

63 *Id.* at 922, 948.

## B. Hartford Fire and After

### 1. A Return to the Intended Effects Doctrine—Hartford Fire Case

In 1993, the Supreme Court examined the issue of extending Sherman Act jurisdiction over international parties in *Hartford Fire Insurance Co. v. California* ('Hartford Fire').<sup>64</sup> In *Hartford Fire*, nineteen states and various private parties filed suit against several domestic insurers and a group of London reinsurers, alleging an international conspiracy had taken place, primarily in London, to limit coverage terms on commercial insurance policies, effectively limiting the types of insurance coverage available in the United States.<sup>65</sup> The 5-4 majority held that 'it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.'<sup>66</sup> In evaluating its evaluation of the status of the jurisdictional rule of reason, the Court decided that the jurisdictional rule of reason formulated by some courts after *Timberlane* is not in fact jurisdictional, and goes only to the issue of whether the court should decline jurisdiction as a matter of discretion.<sup>67</sup> Justice Souter, writing for the majority on this issue, held that the only substantial inquiry is whether there is a 'true conflict' between domestic and foreign law.<sup>68</sup> He went on to define a true conflict as occurring only when foreign law requires the defendant to act, which is, in some ways incompatible with U.S. laws.<sup>69</sup> The Court, like Congress in enacting the FTAIA, specifically declined to express a view on the question of whether a court with jurisdiction under the Sherman Act should abstain from exercising such jurisdiction on the grounds of international comity.<sup>70</sup> But the Court concluded that 'international comity would not counsel against exercising jurisdiction in the circumstance alleged here.'<sup>71</sup>

After *Hartford Fire*, the course for federal courts seemed clear. First, courts should ascertain whether or not the foreign conduct was intended to have, and in fact did have, some substantial effect in the United States.<sup>72</sup> Second, if the effects test is satisfied, principles of *international comity* should be considered only if 'there is in fact a true conflict between domestic and foreign law.'<sup>73</sup>

It could be argued, however, that this judgement signals a return to a rather crude form of the 'effects doctrine.'<sup>74</sup> Such a 'true conflict' will indeed not arise in the vast majority of cases and this means that comity will play no role at

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64 113 S. Ct. 2891 (1993).

65 *Id.* at 2895-96; see J.S. McNeill, 'Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction' (1998) 28 Cal. W. Int'l L. J. 425 at 440.

66 *Id.* at 2909.

67 *Id.* at 2910.

68 *Id.*

69 *Id.* at 2911.

70 Griffin, *supra* note 5, at 164.

71 113 S. Ct. 2911 (1993).

72 McNeill, *supra* note 65, at 441.

73 *Id.* at 441-42.

74 P. Torremans, 'Extraterritorial Application of E.C. and U.S. Competition Law' (1996) 21 Eur. L. Rev. 280 at 282.

all in these cases.<sup>75</sup> This is even more worrisome since the court based its 'true conflict' on Sections 403 and 415 of the *Restatement (Third)*, because these provisions are general provisions and do not limit the analysis to antitrust law.<sup>76</sup>

## 2. Extension of Jurisdiction—Nippon Paper Case

The most recent evidence of the U.S. Government's willingness to assert extraterritorial jurisdiction, and the apparent limitations of comity considerations,<sup>77</sup> can be seen in *United States v. Nippon Paper Industries Co.* ('Nippon Paper').<sup>78</sup> The United States brought a criminal action against Nippon Paper, a Japanese corporation, alleging that it had conspired to fix the price of thermal fax paper throughout North America. The district court, declaring that criminal antitrust prosecution could not be based on wholly extraterritorial conduct, dismissed the indictment. The First Circuit reversed the decision, holding that '[i]n both criminal and civil cases, the claim that Section 1 of the Sherman Act applies extraterritorially is based on the same language in the same section of the same statute: . . .'.<sup>79</sup> Regarding the defendant's appeal to *international comity*, the Court contended that 'comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by *Hartford Fire*, in which the Court suggested that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign country required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible . . .'.<sup>80</sup> The defendants sought review of the case by the U.S. Supreme Court, but the Court declined to hear it.<sup>81</sup> In this case too, comity considerations appear to have had little impact on the outcome.<sup>82</sup>

### III. CONGRESSIONAL EFFORTS AND EXECUTIVE ENFORCEMENT POLICY FOR EXTRATERRITORIAL ANTITRUST JURISDICTION

#### A. Retaliatory Response to U.S. Assertions of Extraterritorial Antitrust Jurisdiction

In light of the confusing state of jurisdictional theories in the federal courts, the international community has increasingly disdained federal court assertions of extraterritorial jurisdiction and the imposing of U.S. antitrust policies.<sup>83</sup> The uncertainty in the U.S. rules of antitrust jurisdiction and the notion of private treble damage remedies for private antitrust claimant are

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75 *Id.*

76 *Id.*

77 Griffin, *supra* note 5, at 167.

78 109 F.3d 1, 8–9 (1st Cir. 1997).

79 *Id.*

80 109 F.3d 1, at 8.

81 118 S. Ct. 685 (1998).

82 McNeill, *supra* note 65, at 443.

83 John H. Chung, *supra* note 28, at 400.

two major points of contention for foreign countries. In response, they have issued discovery-blocking provisions, judgement-blocking statutes, claw-back provisions, and diplomatic protests.<sup>84</sup>

In general, discovery-blocking provisions permit the government (e.g. the Attorney General) to order their companies not to comply with foreign regulations, whereas judgement-blocking statutes contain regulations to prevent the enforcement of foreign antitrust judgements in said country.<sup>85</sup> Discovery-blocking statutes were enacted in Canada, England, Australia, New Zealand, Germany, France, the Netherlands, the Philippines, South Africa, and Switzerland. On the other hand, 'claw-back' provisions are those which are specifically designed to thwart the efficacy of treble damages awarded under United States antitrust law.<sup>86</sup> The British Protection of Trading Interests Act, for instance, allows persons doing business in the United Kingdom to sue for recovery of two-thirds of any foreign treble damage judgement when the judgement was not based solely on conduct within the adjudicating nation.<sup>87</sup>

The tension between nations resulting from antitrust jurisdiction brought about diplomatic protests, and consequently a need for communication. In the communication of mutual interests, executive officials have played an active role, because they are in a position to assess national and international interests, and issue an authoritative position statements on pending litigation.<sup>88</sup>

#### B. Congressional Efforts

As a response to foreign states blocking discovery requests, Congress in 1994 enacted the International Antitrust Enforcement Assistance Act ('IAEAA')<sup>89</sup> to facilitate the discovery of evidence in antitrust actions internationally,<sup>90</sup> and ultimately to lead to more antitrust sanctions against international parties.<sup>91</sup> The IAEAA gives the Attorney General and the Federal Trade Commission the right to enter into binding, bilateral agreements with other nations to provide for the reciprocal exchange of antitrust evidence.<sup>92</sup> This type of bilateral cooperative agreement had already been tested with Canada, Australia, and

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84 *Id.* at 401.

85 *Id.*

86 *Id.* quoted in S.W. Chang, 'Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflict within the Pacific Community' (1993) 16 *Hastings Int'l Comp. L.R.* 295 at 301 & note 36.

87 *Id.* at 402-03; The Australian claw-back provisions goes even further than that of England. Section 10 of the Foreign Proceedings (Excess of Jurisdiction) Act authorizes an action for full recovery, not just the punitive portion, of foreign treble damage judgements. *Id.* at 403.

88 *Id.* quoted in J.P. Griffin, 'Possible Resolutions of International Disputes over Enforcement of U.S. Antitrust Laws' (1982) 18 *Stan. J. Int'l L.* 279 at 290-92.

89 15 U.S.C.S. §§ 6201-6212.

90 McNeill, *supra* note 65, at 446.

91 Chung, *supra* note 31, at 404.

92 *Id.* at 404-05.

Germany before this Act.<sup>93</sup> But the difference is that under the IAEEA, a discovery production order may be issued merely on the application of an antitrust authority, pursuant to a bilateral exchange agreement. Without the IAEEA, discovery production orders can only be issued by a court of competent jurisdiction after the filing of a complaint and after balancing the considerations in a threshold jurisdictional inquiry.<sup>94</sup>

Under the IAEEA, the U.S. Attorney General can make an application to a federal court for a foreign antitrust authority seeking to gain discovery production within the United States. Then, according to Section 6203,<sup>95</sup> a federal court can issue an order for discovery production on request of the Attorney General. As a matter of course, the United States Attorney General can also make an application to a foreign antitrust authority or court for an order compelling the production of discovery documents located abroad.<sup>96</sup>

This change dims the jurisdictional question even further by leaving it unclear whether the enforcement authority or the court is determining the jurisdiction.<sup>97</sup> Moreover, the missing element in the IAEEA scheme is the complex jurisdictional analysis that should precede any United States or foreign court order,<sup>98</sup> although Section 6207 describes modest concessions to international interests which the Attorney General or the Federal Trade Commission should take into consideration to conduct an investigation. Thus, invasive discovery production orders could be issued without first

93 See *Memorandum of Understanding Between the Government of the United States of America and Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws*, reprinted in 46 Antitrust & Trade Reg. Rep. (BNA) No. 1156, at 560 (Mar. 15, 1984) (cooperative antitrust agreement); Canada-United States: *Treaty on Mutual Legal Assistance in Criminal Matters*, Mar. 18, 1985, 24 I.L.M. 1092 (agreement for the exchange of antitrust discovery); see also *Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation of Antitrust Matters*, reprinted in 43 Antitrust & Trade Reg. Rep. (BNA) No. 1071, at 36 (July 1, 1982) (cooperative antitrust agreement). *Id.* at 405 n.272.

94 McNeill, *supra* note 65, at 447.

95 15 U.S.C.S. § 6203. Section 6203 states:

Jurisdiction of the District Court of the United States.

(a) Authority of the District Courts.

On the application of the Attorney General made in accordance with an antitrust mutual assistance agreement in effect under this Act, the United States District Court for the district in which a person resides, is found, or transacts business may order such person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist a foreign antitrust authority with respect to which such agreement is in effect under this Act—

(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) in enforcing any of such foreign antitrust laws.

96 Chung, *supra* note 31, at 406.

97 McNeill, *supra* note 65, at 447; see Chung, *supra* note 31, at 406.

98 Chung, *supra* note 31, at 406–07.

establishing jurisdiction and balancing relevant considerations of effects, comity, economic impact, and international interests.<sup>99</sup>

Although the IAEEA contributes to discovery in the interests of prosecuting antitrust conduct on an international scale, it may also add to the confusion of extraterritorial jurisdiction determination.<sup>100</sup>

### C. Executive Enforcement Policy

In 1995, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) published their Antitrust Enforcement Guidelines for International Operations ('1995 Guidelines').<sup>101</sup>

The prototype of these Guidelines was released in 1977 by the DOJ. The 1977 Guidelines, 'Antitrust Guide to International Operations,' was published to provide domestic companies engaged in international operations with some framework for determining what conduct abroad might be prosecuted under the Sherman Act.<sup>102</sup> The DOJ presented their enforcement principles through a series of hypothetical business problems in the Guidelines.<sup>103</sup> To illustrate how their principles may operate in certain contexts, the DOJ annexed a number of examples to the cases. Basically, the DOJ's principles were founded on existing case law.<sup>104</sup>

In 1988, the revised 1988 Guidelines, 'Antitrust Enforcement Guide to International Operations,'<sup>105</sup> provided much more discussion of DOJ policy than its 1977 predecessor.<sup>106</sup> The 1988 Guidelines retreated from existing case law on extraterritorial jurisdiction and proposed that jurisdiction be exercised only when foreign anticompetitive conduct affected American consumers.<sup>107</sup> Moreover, the DOJ expressed comity concerns,<sup>108</sup> and took a preliminary 'effects test,' in keeping with the FTAIA. The DOJ inserted footnote 159 to limit the DOJ's extraterritorial application

99 *Id.*

100 McNeill, *supra* note 65, at 447: To date, this Act has had limited impact. Only one agreement (with Australia) has been negotiated, and it has not yet been signed. Negotiations with Canada are believed to be imminent. It remains to be seen to what extent the act facilitates U.S. enforcement against conduct abroad. Griffin, *supra* note 5, at 172.

101 United States Department of Justice and the Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations, *reprinted in* 68 Antitrust & Trade Reg. Rep. (BNA) No. 1707 (Special Supp.) (Apr. 6, 1995).

102 McNeill, *supra* note 65, at 448; *see* D. Brockbank, 'The 1995 International Antitrust Guidelines: The Reach of U.S. Antitrust Law continues to Expand' (1996) 2 J. of Int'l Legal Stud. 1 at 20.

103 *Id.*

104 D.I. Baker and B. Rushkoff, 'The 1988 Justice Department International Guidelines: Searching for Legal Standards and Reassurance' (1990) 23 Cornell Int'l L.J. 405 at 406.

105 Antitrust Division, United States Department of Justice, *Antitrust Enforcement Guidelines for International Operations*, *reprinted in* 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988) (Special Supp.) [hereinafter 1988 Guidelines].

106 McNeill, *supra* note 65, at 448.

107 *Id.*, *see* Baker and Rushkoff, *supra* note 103, at 410.

108 McNeill, *supra* note 65, at 448-49.

of antitrust laws only to those situations where there was a threat to American consumers.<sup>109</sup> Footnote 159 stated that although the FTAIA extends jurisdiction to conduct harming American exporters in the United States, the DOJ 'is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.'<sup>110</sup>

In 1992, however, footnote 159 was repealed in the wake of *Hartford Fire*.<sup>111</sup> The policy statement, repealing footnote 159 indicated that the DOJ would take 'action against conduct occurring overseas that restrains United States exporters, whether or not there is direct harm to U.S. consumers . . .'.<sup>112</sup> The new policy went on to state that the change renders antitrust policy consistent with the existing law protecting American exporters from restraints abroad.<sup>113</sup>

The 1995 Guidelines were a new, revised set of 1988 Guidelines. In these Guidelines, the 'Agencies' (the DOJ and the FTC) continue to assert jurisdiction under both the *Hartford Fire* test, in cases involving import commerce (an intended 'substantial effect in the United States'), and the FTAIA test ('direct, substantial and reasonably foreseeable effect'), in cases of export commerce or wholly foreign conduct.<sup>114</sup> The Guidelines also contain a number of illustrative examples, all of which deal only with international cartels.<sup>115</sup>

These Guidelines, though similar to both the 1977 and 1988 Guidelines in generalized format, exhibit a different emphasis. To enforce the Sherman Act internationally, the Agencies adopt a more aggressive, pro-enforcement stance regarding international antitrust violations.<sup>116</sup> Unlike the 1988 version, the 1995 Guidelines appeared to be more of a warning than a guide—a warning to foreign governments and enterprises that the Agencies intend to pursue actively restraints on trade occurring abroad that adversely affect American markets or damage American exporting opportunities.<sup>117</sup>

On the other hand, the Agencies stress that they will take account of 'international comity,' and Section 2 of these Guidelines sets forth a list of factors

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109 *Id.* at 449.

110 1988 Guidelines § 4.1, note 159 provides:

Although the FTAIA extends jurisdiction under the Sherman Act to conduct that has a direct, substantial and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.

111 Baker and Rushkoff, *supra* note 103, at 414–15.

112 DOJ Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports, *reprinted in* 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 483 (Apr. 9, 1992).

113 Brockbank, *supra* note 101, at 20.

114 Griffin, *supra* note 5, at 172.

115 Yet, none that deal with import commerce identify a foreign law conflict or comity issue. Sullivan and Grimes, *supra* note 39, at 9.

116 McNeill, *supra* note 65, at 450; *see* Brockbank, *supra* note 102, at 22.

117 Brockbank, *supra* note 102, at 24.

the Agencies will consider.<sup>118</sup> However, although they claim that these factors will be considered, the Agencies do not state what weight the various factors carry in determining whether extraterritorial jurisdiction is appropriate.<sup>119</sup> Moreover, soon after the list of these factors, the Guidelines reiterate the *Hartford Fire* dictum that no conflict exists in respect of international comity if a person can comply with the laws of both countries.<sup>120</sup> The Guidelines further indicate that where U.S. antitrust enforcement agencies are deemed to be better able to resolve the 'competitive problem,' the Agencies will handle the situation without regard to the laws and policies of foreign nations.<sup>121</sup>

In addition, the Agencies assert that in cases where the United States decides to prosecute an antitrust action, such a decision represents a determination by the executive branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The Agencies state thus: 'It is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.'

In sum, the evolution of DOJ enforcement policy from the 1977 Guidelines' effects on *commerce*, to the 1988 Guidelines' effects on *consumers*, to the expansive 1995 Guidelines' *Hartford Fire* conflict limitation has also contributed to international distrust of United States antitrust enforcement.<sup>122</sup> The 1995 Guidelines, above all, are sure to worsen relations with already-frustrated international market participants if the United States does not decrease its intrusion into the domestic markets of foreign countries.<sup>123</sup>

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118 1995 Guidelines, *supra* note 101, § 3.2. The DOJ would consider;

- (1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;
- (2) the nationality of the persons involved in or affected by the conduct;
- (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;
- (4) the relative significance and foreseeability of the conduct on the United States as compared to the effects abroad;
- (5) the existence of reasonable expectations that would be furthered or defeated by the action;
- (6) the degree of conflict with foreign law or articulated foreign economic policies;
- (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and
- (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.

The first six of these factors are based on previous Department Guidelines. The seventh and eighth factors are derived from considerations in the U.S./EC Antitrust cooperation Agreement; see 1995 Guidelines, *supra* note 101, cmt. n.74.

119 McNeill, *supra* note 65, at 450–51.

120 Brockbank, *supra* note 102, at 24.

121 *Id.*

122 *Id.* at 451.

123 Brockbank, *supra* note 102, at 24.

#### IV. STRATEGIES FOR OVERCOMING OF INTERNATIONAL CONFLICTS OVER EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAWS

Until now, U.S. efforts to resolve international conflicts caused by extraterritorial application of U.S. antitrust laws have been ineffective. This is partly because the U.S. has its own unique system like treble damage awards, and partly because other countries have been mistrustful of U.S. antitrust enforcement because of its inconsistency. Part IV examines several methods of addressing these conflicts: comity, positive comity, bilateral agreements, and multilateral cooperation.

##### A. Comity

When anticompetitive conduct abroad may have an effect in the United States, both the United States and a foreign nation may attempt to exercise legitimate jurisdiction over the conduct. In this situation, restraint by one of the nations is called for: the exercise of comity.

The concept of comity, however, is fraught with misconceptions. Much of the misconception about the nature of conflict of laws is due to the loose use of the term 'comity.'<sup>124</sup> The dictionary defines 'comity' as 'courtesy among political entities (as nations, states, or courts of different jurisdictions), involving especially mutual recognition of legislative, executive, and judicial acts.'<sup>125</sup> That is, comity is 'voluntary forbearance' in the exercise of legitimate jurisdiction when another sovereign also has legitimate jurisdiction under international law.<sup>126</sup> Comity, however, is not a matter of grace or altruism.<sup>127</sup> Faith in reciprocity or 'self-regarding respect for the relevant interests of foreign nations'<sup>128</sup> is a aspect of comity.

As conflicts between nations about the application of competition policy have increased with globalization, approaches like comity have become more frequent.<sup>129</sup> As mentioned above, governments and courts are interested in comity as a means to solve international conflicts.

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124 Herbert F. Goodrich and Eugene F. Scoles, *Handbook of the Conflict of Laws*, 4<sup>th</sup> ed. (1964), § 7 at 7–8.

125 Bryan A. Garner, *Black's Law Dictionary*, 7<sup>th</sup> ed. (Minn: West Group, 1999) at 261.

126 Harold G. Maier, 'Extraterritorial Jurisdiction at a Crossroads; An Intersection between Public and Private international Law,' 76 Am. J. Int'l L. 280, 281 note 1 (1982): The U.S. Supreme Court has defined international comity as 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens.' *Hilton v. Guyot*, 159 U.S. 113, 163–64, 16 S.Ct. 139, 40 L.Ed. 95 (1895). See *Laker Airways*, 731 F. 2d at 937: 'The central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability'; see also *Restatement (Third)*, *supra* note 12, § 403 cmt. ('comity' is a term understood as not merely an act of discretion and courtesy but as reflecting a sense of obligations among states); Alford, *supra* note 8, at 5–6, n.20.

127 Gupta, *supra* note 20, at 2289.

128 *Romio v. International Terminal Operating Co.*, 358, 383 (1959).

129 *Id.*, see *infra* note 164 and accompanying text.

To summarize:

In *Alcoa*, the court established 'intended effects' jurisdiction in antitrust cases without having no consideration for comity. However, in the following cases, comity was emphasized.

In *Timberlane*, the court added an explicit consideration of international comity to *Alcoa*'s 'intended effects' test.

In *Hartford Fire*, the court held that in cases where there is a true conflict between domestic and foreign law, the *Timberlane* comity analysis can be employed.

In FTAIA, Congress chose a 'narrow scope' for the legislation and chose not to disturb the 'comfortable ambiguity' of the comity doctrine that had been endorsed in *Timberlane*.<sup>130</sup> Congress left it the courts to develop further or even abolish the comity doctrine in the antitrust context.<sup>131</sup>

In IAEEA, Congress left jurisdictional analysis untouched, even stating that the Attorney General or the Federal Trade Commission may take international interests into consideration when conducting investigations.

In *Restatement (Third)*, Congress adopted a *Timberlane*-like comity analysis to limit the exercise of jurisdiction.

In 1995 Guidelines, the DOJ continues to endorse a *Timberlane*-type comity analysis. And the DOJ implies that the absence of a true conflict in the *Hartford Fire* sense does not always lead to the exercise of extraterritorial jurisdiction.

In reality, however, comity considerations have not played an important role. In *Hartford Fire*, the definition of 'true conflict,' which serves as the basis for considering whether that conflict requires the court to abstain from exercising jurisdiction, was narrowed. Furthermore, the comity suggestion of the 1995 Guidelines may be applicable only to public enforcement actions supported by the input of federal agencies involved in international relations.<sup>132</sup>

#### B. Positive Comity

Two other forms of comity have recently evolved from the traditional notion of comity: *positive comity* and *negative comity*. Generally speaking, the former is a principle of 'voluntary co-operation in competition law enforcement concerning requests from one country that another country begin or expand enforcement-related activities' in order to remedy allegedly illegal anticompetitive conduct, whereas the latter means 'calling for notice but not providing the requested country a right of consultation.'<sup>133</sup> According to the *OECD*

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<sup>130</sup> Gupta, *supra* note 20, at 2398.

<sup>131</sup> *Id.*

<sup>132</sup> McNeill, *supra* note 65, at 457; see Kenneth W. Dam, 'Extraterritoriality in an age of Globalization: The Hartford Fire Case' (1994) 1993 Sup. Ct. Rev. 289 at 319–20.

<sup>133</sup> Committee on Competition Law and Policy, 'Positive Comity (Report),' OECD 1 J. Competition L. 38, at 47, 58 (2000).

*Recommendation* (1998), positive comity may be described as the principle that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests.<sup>134</sup> Negative comity may be described as the principle that a country should (1) notify other countries when its enforcement proceedings may have an effect on their important interests, and (2) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.<sup>135</sup> Both positive and negative comity relate to the impact of a country's law enforcement on another country or countries. The difference between them may be described as follows:

Positive comity involves conducting a proceeding in order to assist another country;

Negative comity involves conducting all proceedings with a view to avoiding harm to other countries.<sup>136</sup>

This positive comity is also different from merely investigatory assistance, which provides assistance to the requesting country's enforcement action.<sup>137</sup>

Since 1991 there has at times been considerable discussion of a 'positive comity' form of co-operation that might improve the effectiveness and efficiency of competition law enforcement in international cases.<sup>138</sup> It was first articulated in the 1991 Co-operation Agreement between the United States and the European Community ('the EC/US Agreement'),<sup>139</sup> but the term 'positive comity' has never been formally defined.<sup>140</sup> Positive comity will be discussed in the following Sections on bilateral and multilateral agreements.

### C. *Bilateral Agreements*

The United States has negotiated bilateral agreements on antitrust enforcement with several countries.<sup>141</sup> In 1994, Congress authorized the enforcement agencies (the Attorney General and the Federal Trade Commission) to enter into antitrust enforcement assistance agreements.<sup>142</sup> The recent cooperation agreements require each signatory to assist the other in its antitrust

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134 Paraphrasing Part I.B.5. *Id.* at 58.

135 Paraphrasing Part I.B.5. *Id.* at 59-60.

136 *Id.* at 60.

137 Paraphrasing Part I.A.3 of Recommendations (1998).

138 Committee on Competition Law and Policy, 'Positive Comity (Report)', *supra* note 133, at 38.

139 *Id.*

140 *Id.* at 39.

141 *See supra* note 93 and accompanying text: The countries with whom agreements were negotiated and the dates thereof are: Germany (1976), Australia (1982), Canada (1995), the EC (1991 and 1998), Israel (1999), Japan (1999), Mexico (2000). These agreements are available on the Antitrust Division's web site: <http://www.usdoj.gov/atr>.

142 *Id.*

investigations and to respect the confidentiality restriction imposed by the other.<sup>143</sup>

The EC/US Agreement (1991)<sup>144</sup> was more comprehensive and went one step further compared to the OECD Recommendations and other bilateral agreements.<sup>145</sup> Comity played an important role in the agreement. Article VI provided for the normal negative form of comity and Article V, more importantly, provided for 'positive comity.'<sup>146</sup> The party affected by anticompetitive behavior on its territory could request the other party to undertake appropriate enforcement action. Such a request had to be considered and responded to.<sup>147</sup>

In June 1998, the E.C. Commission and its U.S. counterparts (the DOJ and the FTC) entered into a more detailed positive comity agreement ('1998 Positive Comity Agreement'), providing guidelines on how the authorities should deal with positive comity requests.<sup>148</sup> Under the new agreement a party may request the competition authorities of the other party to investigate and, if warranted, to remedy anticompetitive activity in accordance with the competition law of the Requested Party.<sup>149</sup> Such a request may be made regardless of whether the notified activities constitute a violation of the competition laws of the Requesting Party, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.<sup>150</sup> Normally, the competition authorities of a Requesting Party will agree to defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party with a proviso.<sup>151</sup>

Positive comity is intended to eliminate the long-running dispute concerning the propriety under international law of the assertion of extraterritorial jurisdiction.<sup>152</sup> Like the Guidelines, the Agreement, which contains positive comity, does nevertheless not interfere with private suits at all, because the agreement is not binding for the U.S. Courts.<sup>153</sup> Considering the fact that the extraterritoriality issue arises almost exclusively in the United States, and the antitrust cases before American jurisdictions are now of the private suit type, the application of positive comity would be limited and weakened.<sup>154</sup>

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143 L.A. Sullivan and W.S. Grimes, *supra* note 39, at 985.

144 The EC-U.S. Antitrust Cooperation Agreement, *Reprinted in* 30 I.L. M. 1491 (1991).

61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 382 (Sep. 26, 1991).

145 L.A. Sullivan and W.S. Grimes, *supra* note 38, at 985.

146 *Id.* Art. V (2): A similar 'positive comity' provision is Art. V (2) of the 1995 Canada/U.S. Agreement.

147 *Id.* Art. V and VI.

148 *Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws* (1998).

149 Art. III.

150 *Id.*

151 Art. IV.2.

152 Griffin, *supra* note 5, at 183.

153 Torremans, *supra* note 74, at 292.

154 *Id.*

Even though bilateral agreements show inherent drawbacks, including positive comity, they can play a role in the short term. Bilateral agreements could be the second best method of developing international competition policy in the future, and it will resolve numerous problems regarding anticompetitive behavior and the dominant position of multinational corporations.

#### D. Multilateral Agreements

To ensure the trust of the international trading community as the global economy expands, a change from the isolated determination of foreign anticompetitive act jurisdiction by the courts, the legislature and government agencies must be coordinated on a scale larger than that allowed by individual bilateral agreements.<sup>155</sup> There are two possible resources for coordinating international antitrust policy. One is the World Trade Organization (WTO), and the other is the Organization for Economic Cooperation and Development (OECD).

In December 1996, the WTO agreed to establish a working group to examine the relationship between trade and investment, including anticompetitive practices, in order to identify any areas that may merit further consideration within the WTO framework.<sup>156</sup> It was the reaction to the E.C. Commission's proposal of an international framework of rules on competition, which was as follows:<sup>157</sup>

- (1) As a first step, agreement should be reached on certain core elements of competition structures which should then be introduced by each country at the domestic level. Such core elements would have to address those agreements which are in restraint of competition, the abuse of dominant positions, as well as mergers strengthening or creating such positions.
- (2) In parallel, the WTO members are urged to identify and work towards the adoption of a core of competition principles which would enable closer co-operation and promote a gradual convergence of competition rules.
- (3) Furthermore, provisions on notification, information exchange and co-operation between competition authorities should be further developed by considering negative and positive comity instruments.
- (4) Finally, the WTO members should be committed to abide by agreed rules with an understanding that they shall be committed to enforcing the competition rules. Remedies in the absence of corrective action by a condemned country might include authorizing another country to take extra-jurisdictional action by applying its own domestic competition laws.

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<sup>155</sup> McNeill, *supra* note 65, at 455.

<sup>156</sup> Griffin, *supra* note 5, at 196.

<sup>157</sup> Sir Leon Brittan and Karel van Miert, 'Towards an International Framework of Competition Rules' Communication submitted to the Council, Para. III and Annex., Com. (96) 296 Final, June 18, 1996.

The WTO is expected to produce a unified and consistent competition policy.<sup>158</sup> The working group issued its report<sup>159</sup> in 1998, but decided to continue its activities.<sup>160</sup> A possible model for this work involves having WTO signatories adopt a basic policy of having no unreasonable restraints on trade.<sup>161</sup> The WTO would then act as an arbitrator in disputes between member nations involving anticompetitive practices that violate the basic agreement.<sup>162</sup>

Meanwhile, in 1967, the OECD adopted a 'Recommendation' that its member countries co-operate with one another in the enforcement of their national competition laws. The OECD Recommendation has been modified several times, most recently in 1995.<sup>163</sup> Principally, it provides that member states:

- (1) Notify other members timeously when the latter's 'important interests' are affected by an investigation or enforcement action;
- (2) Share information to permit the member whose interests are affected to make comments, and consult with, the proceeding member;
- (3) Coordinate parallel investigations where appropriate;
- (4) Assist one another in obtaining information located in each other's territory;
- (5) Consider addressing anticompetitive conduct affecting their important interests but occurring outside their territory by requesting the authorities in the country where the conduct occurs to take action ('positive comity').<sup>164</sup>

158 Eleanor M. Fox, 'Toward World Antitrust and Market Access' (1997) 91 Am. J. Int'l L. 1 at 24; but some argues that a multilateral antitrust standard is unrealistic and unworkable due to conflicts of national interests between parties. See Robert Shank, 'The Justice Department's Recent Antitrust Enforcement Policy: Toward a 'Positive Comity' Solution to International Competition Problems?' (1996) 29 Vand. J. Transnat'l L. 155 at 187; see also, *infra* note 167.

159 The report of the working group, WT/WGTCP/2 (98-4914), is available on the WTO website, <http://www.wto.org>.

160 Griffin, *supra* note 5, at 196.

161 McNeill, *supra* note 65, at 455; see Fox, *supra* note 158, at 23-24.

162 *Id.*

163 OECD, Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, OECD Doc. C (95) 130/FINAL (July, 1995), available at <http://www.oecd.org/daf/ccp/rec8com.htm>.

164 The OECD's first positive comity provision appeared in the 1973 Recommendation concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [C (73) 99 (Final)]. The 1979 Recommendation strengthened the comity provision and carried forward the strong positive comity provision of the 1973 Recommendation. The 1995 Recommendation made no substantive changes to the Recommendation itself. Contrary to statements made by various commentators, there appear to be articulations of positive comity in other multinational institutions (e.g. The 1991 EC/US Agreement, The Canada/US Agreement, the EC's 1996 Suggested WTO Competition Rules, the 1998 EC/US Supplement, and the proposed 1999 Canada/EC Agreement). *Id.*, at 47-50.

The outstanding characteristic of the 1995 OECD Recommendation is the suggestion of a broader positive comity for multilateral agreements.<sup>165</sup> To increase the role of competition in the world-wide development of efficient, productive economies, the OECD established the Committee on Competition Law and Policy (CLP).<sup>166</sup>

However, recent pronouncements by WTO and OECD officials indicate that progress toward international harmonization will be slow.<sup>167</sup> This is a result of the fact that the different levels of competition rules and policies in national economies leave little space for addressing antitrust problems harmoniously.<sup>168</sup> Nevertheless, although it is not easy to reach consensus, the prospects of creating a single global competition standard are increasing.

#### V. KOREA'S RESPONSE TO THE EXTRATERRITORIAL APPLICATION OF FOREIGN ANTITRUST LAW

Korea enacted the Monopoly Regulation and Fair Trade Act (MRFTA) on December 31, 1980 and the Act was amended 21 times thereafter. The latest amendment was passed on August 26, 2002.

The purpose of this Act is to promote fair and free competition, and to thereby encourage creative enterprising activities; to protect consumers; and to strive for the balanced development of the national economy by preventing the abuse of market-dominated positions by enterprisers and the excessive concentration of economic power, and to regulate undue collaborative acts and unfair trade practices. The main subjects covered by this Act are:

- The prohibition of abuse of market-dominated positions.
- Restrictions on the merging of enterprises and restrictions on the undue concentration of economic powers.
- Restrictions on unfair collaborative acts.
- Restrictions on resale price maintenance.
- Restrictions on the conclusion of international contracts.

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165 Committee on Competition Law and Policy, 'Positive Comity (Report)', *supra* note 133, at 48.

166 The name, CLP, was changed to the Competition Committee (CC) in November 2001.

167 Griffin, *supra* note 5, at 197.

168 Even the United States, with proven competition law, is suspicious of a global standard. McNeill *supra* note 55, at 456: The U.S. government has opposed the creation of a WTO-administered global antitrust regime for several reasons. First, the WTO is too large and diverse ever to adopt a common approach to anticompetitive practices in the context of trade and competition policy. Second, negotiations to achieve a minimum set of acceptable principles could lead to the adoption of a lowest common denominator set of principles. Third, competitively sensitive, confidential business information turned over to WTO bureaucrats could be used for other objectives. Fourth, the WTO dispute resolution mechanisms were inappropriate for review of individual decisions taken by domestic competition enforcement authorities. Griffin, *supra* note 5, at 197; see Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, Address: A Note of Caution with Respect to a WTO Agenda on Competition Policy, at 13–15 (Nov. 18, 1996); Joel I. Klein, 'No Monopoly on Antitrust,' *Fin. Times*, Feb. 13, 1998, at 20.

In order to promote the objectives of this Act, Korea established the Korea Fair Trade Commission (KFTC) as an enforcement agency. The KFTC functions as a quasi-judiciary body under the jurisdiction of the Prime Minister. It not only establishes and implements competition policy, but also hears and rules on cases of competition law. Thus, the KFTC may decide on a corrective measure and rule that the said enterprise or trade association complies with the measure. Any party which is dissatisfied with any actions taken by the KFTC with regard to this Act may file a lawsuit within thirty (30) days from the date on which the party receives an original copy of the decision (§§ 49, 51, 54).

Against the background of the extraterritorial application of foreign antitrust law, two measures can be identified. The one is to formulate any blocking statutes and the other is to apply the MRFTA equally to the anti-competitive activities of foreign enterprisers.

So far, Korea does not have any 'blocking statutes' in respect of the extraterritorial application of foreign antitrust law. However, Article 217 of the Korean Civil Procedure Act<sup>169</sup> allows Korea to block the enforcement of foreign judgments in antitrust cases involving Korean defendants.<sup>170</sup> For instance, a U.S. judgment allowing for the recovery of treble damages, thus moving beyond compensatory damages, against a Korean enterpriser, might be held to be 'contrary to the public order or good morals in Korea'<sup>171</sup> and therefore invalid.<sup>172</sup> It is also possible that Korean courts will invoke this provision to reject the enforcement of U.S. judgements,<sup>173</sup> if the U.S. courts use an excessively liberal standard in determining their jurisdiction over Korean companies.<sup>174</sup>

As for the application of the MRFTA to a foreign enterpriser, the MRFTA does not have any clear provisions. With the proposition that the MRFTA

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169 Civil Procedure Act. No. 547 (1960). Many Sections were amended on January 26, 2002 (Act No. 6626).

170 For foreign courts' judgments to be deemed valid, Korean courts must find that the conditions needed for the judgment are fulfilled. The conditions in article 217 of the Act are:

- (1) that according to Korean law and regulations, the foreign courts' international jurisdiction should be permitted;
- (2) that the defendant has received service of summons or any other necessary orders to commence procedure in a lawful manner and within appropriate time by a public notice, or has appeared without receiving service thereof;
- (3) That the acceptance of the judgement of a foreign court should not be contrary to the public order or good morals in Korea;
- (4) That there should be mutual guarantees.

171 *Id.*

172 Chang, *supra* note 86, at 302.

173 In order to enforce a foreign judgement in Korea, one must obtain an 'enforcement judgement' from the Korean court. One of the requirements for obtaining such an 'enforcement judgement' is that a foreign judgement must satisfy the conditions of the Korean Civil Procedure Act, art. 217. *See* Article 26 of the Civil Enforcement Act, Act No. 6627 (2002). *Id.*, at 302, note 45.

174 *Id.*

should be applied to enterprisers, it merely states that the term 'enterpriser' means a person who conducts a manufacturing business, service business, or any other business (§ 2, 1). Even though not approved by all commentators, it is generally recognized that foreign enterprisers are included in this definition.

On March 20, 2002, the KFTC made its first decision regarding the extraterritorial application of the MRFTA, in a case concerning *international cartels*. The KFTC decided to impose a surcharge of 11,242 million won (equivalent to US\$ 8,532,000) on six graphite electrode manufacturers from the U.S., Germany and Japan that participated in an international cartel.<sup>175</sup> The Commission asserted that 'the six companies (that comprise about 80% of the worldwide graphite electrode market) held several meetings in London, Tokyo and other cities from May 1992 to February 1998; later reaching agreements on price-fixing and market allocation targeting the world market, including the Korean market, consequently implementing their agreements.'<sup>176</sup> According to the KFTC, two companies, Showa Denko and Nippon Carbon, declined to attend the hearings because of lack of jurisdiction: The Commission replied by alleging that the extraterritorial application of antitrust laws to *international cartels* had become a global standard and Korean markets had been affected severely by the cartels. The Commission demonstrated that because of this international cartel, Korean steel manufacturers that used electric arc furnaces had incurred significant financial losses and the losses were further compounded by the fact that the manufacturers were completely dependent on imports.<sup>177</sup> However, being dissatisfied with the Commission's decision, all six companies filed lawsuits.

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175 The details of this case are *available on* the KFTC web site, <<http://www.ftc.go.kr>>, especially <<http://www.ftc.go.kr/english/html/index.htm>>.

176 *Id.*: The amounts of the surcharges are as follows:

UCAR International Inc. (USA), US\$513,000,

SGL Carbon Aktiengesellschaft (Germany), US\$731,000.

Showa Denko K.K. (Japan), US\$3,336,000,

Tokai Carbon Co., Ltd. (Japan), US\$913,000,

Nippon Carbon Co., Ltd. (Japan), US\$2,766,000, and

SEC Corporation (Japan), US\$273,000.

177 *Id.* ['They imported graphite electrodes amounting to US\$553 million from the six companies from May 1992 to February 1998, and during the period the import price increased from an average of US\$2,255 per ton in 1992 to an average of US\$3,356 in 1997 (about 48.9% price increase). The damage incurred by the companies importing graphite electrodes is estimated at approximately US\$139 million. Korea's major industries (such as automobile and shipbuilding which necessitate much steel) were also influenced by this international cartel. During the same period, the imports from non-cartel member companies amounted to about US\$54 million, and the import price increased from US\$2,205 per ton in 1992 to US\$2,407 in 1997 (about 9.1% price increase)'].

In making this decision, Korea became the fourth jurisdiction (after U.S., EU, and Canada) to apply its domestic competition law extraterritorially.<sup>178</sup>

## VI. CONCLUSION

Over the years, the extraterritorial application of U.S. antitrust laws has become an increasing source of international conflict between the United States and its trading partners. The conflict results from both the inconsistency of U.S. antitrust policy and the U.S. courts' assertion of jurisdiction. Furthermore, the treble damage remedy in private U.S. antitrust suits makes matters worse.

International co-operation is required to overcome this conflict, or to ensure concurrent jurisdiction in the enforcement of competition laws. Most important, a more courageous, alternative approach is advisable. Initiatives need to be taken at the public international law level to harmonize the basis for extraterritorial legislative action, and at the private international law level to harmonize the basis for extraterritorial jurisdiction.<sup>179</sup>

Even though promulgating a bilateral agreement can increase the potential for inconsistency, it should be employed as a temporary and preliminary step to enter into a multilateral agreement. This bilateral agreement should be based upon reciprocity and the balancing of the parties' national interests.<sup>180</sup>

Ultimately, the evolution of a multilateral consensus on antitrust policy should be emphasized and chartered. Although observers generally agree that a broad consensus on antitrust policy is still far away, the expanding global market virtually demands multilateral agreement.<sup>181</sup> With the emergence of multinational corporations and rapidly increasing inter-dependency, allocation of jurisdiction will work only if there is broadbased consensus among nations.<sup>182</sup>

To achieve these goals, facilitating and strengthening the use of the positive comity standard could be the means of deepening mutual cooperation which is the prerequisite for expanding and enhancing co-operation widely, and for developing a competition rule of uniform global application.

To date, the U.S. seems to have been primarily interested in controlling international cartels. However, the U.S., as a leading country, must

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178 *Id.*: On April 23<sup>rd</sup>, 2003, the KFTC announced that it had decided to issue corrective orders and impose surcharges on six vitamin producers in Switzerland, Germany, France, Japan and the Netherlands, that had participated in the vitamin international cartel. The total amount of the surcharges was 3,916 million won or USD 3,118,000. This was the second occasion on which the KFTC applied Korea's MRFTA to the anti-competitive practices of foreign businesses, following the case of the international cartel of graphite electrode manufactures (The details of this case are *available* on the KFTC web site, <<http://www.ftc.go.kr>>, especially <<http://www.ftc.go.kr/data/hwp/vitaminl.doc>>).

179 Torreman, *supra* note 74, at 293.

180 Chang, *supra* note 86, at 320.

181 Chung, *supra* note 31, at 411.

182 *Id.*

establish clear extraterritorial jurisdiction criterion that is predictable, consistent, and in harmony with the interests of other countries. Until such time, the United States should be prudent when exercising jurisdiction. In addition, the treble damage remedy, one of the principal causes of international antitrust disputes, should be eliminated in U.S. antitrust cases involving foreign commerce, through detrebling provisions in bilateral and multilateral treaties.<sup>183</sup>

Initially, Korea had been anxious about the extraterritorial application of the U.S. and EU antitrust law. This led Korea to become proactive in applying its law extraterritorially to international cartels. Now, after its recent actions, the KFTC has declared that it will launch further investigations into international cartels that may be causing damage and losses to Korean companies and consumers. Such action, however, should not be regarded as an overall application of Korean law, but rather as a limited application to international cases of serious illegality.

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<sup>183</sup> Chang, *supra* note 86, at 318.