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# Ego or Equity? Examining United States Extension of the Sherman Act

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# Ego or Equity? Examining United States Extension of the Sherman Act

Jennifer C. Farlow\*

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## I. INTRODUCTION

This Comment analyzes the application of United States antitrust laws to wholly extraterritorial conduct. The United States First Circuit Court of Appeals recently held in *United States v. Nippon Paper* that wholly extraterritorial conduct which has substantial and intended effect within the United States may form the basis for criminal prosecution under Section One of the Sherman Act.<sup>1</sup> This Comment considers the impact of this decision on United States' efforts to achieve effective transnational enforcement of antitrust laws between itself and Japan. Part II explains the importance of effective transnational enforcement of antitrust laws in an increasingly global economy.<sup>2</sup> Part III details the particular need for the United States to deal with key antitrust issues between itself and Japan.<sup>3</sup> It further examines the key differences in each nation's approach to antitrust laws and the development of these laws in each economic system as an impediment to effective enforcement of antitrust laws between the two nations.<sup>4</sup> Part IV discusses the approaches utilized by the United States Department of Justice (DOJ) in enforcing transnational antitrust violations and examines the effectiveness of each approach as a tool in achieving effective transnational enforcement of antitrust laws.<sup>5</sup> Part V details the history of the United States application of the Sherman Act to extraterritorial conduct during the past one hundred years.<sup>6</sup> Part VI discusses *Nippon Paper*, the recent federal court decision which extended the reach of the Sherman Act to include criminal prosecution for wholly extraterritorial conduct with substantial and intended effect in the United States.<sup>7</sup> This section further details the reactions of United States and Japanese officials to this broad extension of the Sherman Act.<sup>8</sup> Part VII concludes that the *Nippon Paper* decision is an aggressive approach to a delicate situation between the United States and Japan which may

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1. See *infra* notes 176-244 and accompanying text (discussing the *Nippon Paper* decision, including relevant facts, analysis, and reactions by U.S. and Japanese officials); see also *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998).

2. See *infra* notes 10-22 and accompanying text (stating increased globalization has caused a concurrent crisis in the transnational enforcement of antitrust law).

3. See *infra* notes 23-34 and accompanying text (explaining it is of particular importance that the United States deal with key antitrust issues between itself and Japan because Japan is a leading U.S. trade partner and because Japan has failed to effectively enforce its antitrust laws).

4. See *infra* notes 35-71 and accompanying text (noting basic differences in the economic systems of the United States and Japan is an impediment to harmonization of antitrust laws between the U.S. and Japan).

5. See *infra* notes 72-143 and accompanying text (explaining the U.S. Department of Justice utilizes these approaches: coordinated enforcement activity, positive comity, and application of U.S. antitrust laws).

6. See *infra* notes 144-75 and accompanying text (detailing the development of the U.S. Supreme Court's view regarding the extraterritorial application of its antitrust laws).

7. See *infra* notes 176-235 and accompanying text (setting forth the relevant facts and analysis of the *Nippon Paper* decision).

8. See *infra* notes 236-44 and accompanying text (noting the decision has sparked criticism by a number of foreign nations, including Japan). Similarly, U.S. trade experts and economists have reservations about the decision. *Id.*

result in self-protective measures by Japan and an unwillingness on the part of the Japanese government to continue efforts to achieve effective enforcement of antitrust violations between the United States and Japan.<sup>9</sup>

## II. INCREASED GLOBALIZATION AND TRANSNATIONAL ANTITRUST VIOLATIONS

The United States presently faces a crisis in the transnational enforcement of law as a result of the recent explosion in international business.<sup>10</sup> In today's global economy, there is a need, more than ever, for effective transnational enforcement of antitrust laws.<sup>11</sup> No single international antitrust law currently exists.<sup>12</sup> Antitrust laws in existence in many countries are often weak, unenforced, or non-existent.<sup>13</sup>

As the economies of the world have grown increasingly global, there has also been a marked increase in anticompetitive activity.<sup>14</sup> Anticompetitive cartels still run rampant in many countries.<sup>15</sup> Effective enforcement of antitrust laws against violating individuals and corporations throughout the world is essential as a means

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9. See *infra* notes 245-56 and accompanying text (concluding that the goal of the U.S., enforcement of transnational antitrust violations through positive comity and coordinated enforcement action, may be hindered by the *Nippon Paper* decision). However, this may be the only means by which the United States can protect American consumers and corporations from Japan's failure to effectively enforce its antitrust laws. *Id.*

10. See Symposium: *Cultural Conceptions of Competition: Article: Enforcing American Private Antitrust Decisions in Japan: Is Comity Real?*, 44 DE PAUL L. REV. 1119 (1995) (stating "The explosion of international business over the past twenty years has created a crisis in the transnational enforcement of law."); see also Laura E. Keegan, *The 1991 U.S./EC Competition Agreement: A Glimpse of the Future Through the United States v. Microsoft Window*, 2 J. INT'L LEGAL STUD. 149 (1996) (noting internationalization has increased competition among corporations).

11. See BLACK'S LAW DICTIONARY 94 (6th ed. 1990) (defining "antitrust acts" as federal and state statutes which protect trade and commerce from unlawful restraints, price discriminations, price-fixing and monopolies); see also Julie A. Shepard, Comment, *Using United States Antitrust Laws Against the Keiretsu as a Wedge into the Japanese Market*, 6 TRANSNAT'L LAW. 345, 346 (1993) (quoting William P. Barr who said competition is international in today's global economy); see also WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESS 7:50 (James J. Garrett, ed., Aspen Law & Business, 1997) [hereinafter WORLD ANTITRUST] (stating the day has passed in which a company need be concerned only with the antitrust laws of its own country).

12. See Joseph P. Griffin, *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business*, 24 LAW & POL'Y INT'L BUS. 1051, (1993); see also Symposium, *supra* note 10, at 1119 (referring to the lack of legal standards in international law).

13. See John R. Wilke, *Hunting Cartels, U.S. Trust-Busters Increasingly Target International Business*, WALL ST. J., Feb. 5, 1997, at A1 (writing, "[a]broad, laws against collusion and price-fixing often are weak, unenforced, or nonexistent").

14. See *id.* (explaining that U.S. prosecutors assert there is a rise in criminal price fixing and collusion which has increased as the economy has grown global).

15. See BLACK'S LAW DICTIONARY 214 (6th ed. 1990) (defining "cartel" as "a combination of producers of any product joined together to control its production, sale, and price, so as to obtain a monopoly and restrict competition in any particular industry or commodity"); see also Wilke, *supra* note 13, at A1 (quoting Alan Wolfe, a Washington lawyer for Kodak, who says that cartels still currently exist in many countries). Wolfe cites the steel industry as an example, noting that U.S. steel producers claim that a cartel allocates the production of flat-rolled steel among European and Asian companies. *Id.* The United States is currently attempting to nurture antitrust laws in developing countries, such as Zimbabwe and Kazakhstan. *Id.*

of protecting open and free markets, safeguarding consumers, and impeding conduct that hinders competition.<sup>16</sup> Free markets provide competition, and competition provides an economy with the best allocation of resources.<sup>17</sup> The best allocation of resources is beneficial to society as a whole.<sup>18</sup> Antitrust law increases consumer choice and enhances competitive prices.<sup>19</sup> Antitrust law is particularly relevant to the world economy because it is meant to protect competition, not competitors.<sup>20</sup> Both the DOJ and the Fair Trade Commission (FTC) have made the enforcement of antitrust laws in the international arena a high priority.<sup>21</sup> According to United States Attorney General, Janet Reno, effective antitrust enforcement is needed more today than ever before.<sup>22</sup>

### III. UNITED STATES AND JAPAN

#### A. Specific Need for Enforcement

It is particularly important that the United States deal with key antitrust issues between itself and Japan.<sup>23</sup> Japan is a leading U.S. trade partner and is the second largest economy in the world.<sup>24</sup> The increase in globalization has significantly tipped towards Asia, and more specifically towards Japan.<sup>25</sup> For example, over the last twenty years in the high technology<sup>26</sup> industry, Japan's exports have increased

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16. AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENT, APPENDIX D: 1995 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (4th ed. 1995) 1449, 1450 [hereinafter ANTITRUST LAW DEV.].

17. *Id.*

18. *Id.*

19. *Id.*

20. See Jiro Tamura, *U.S. Extraterritorial Application of Antitrust Law to Japanese Keiretsu*, 25 N.Y.U. J. INT'L L. & POL. 385, 386 (1993) (explaining U.S. antitrust laws protect the U.S. economy from both domestic and international antitrust violations).

21. See ANTITRUST LAW DEV., *supra* note 16, at 1450 (noting the DOJ and the FTC are the federal agencies responsible for enforcing antitrust laws); see also Shepard, *supra* note 11, at 345 (maintaining the DOJ's policy regarding antitrust law points to the importance of export trading and reflects the DOJ's intent to extend its anticompetitive forces beyond the domestic aspects of United States trade).

22. See Bingaman Stresses Role of Antitrust in Markets with Evolving Technologies, 66 ANTITRUST & TRADE REGULATIONS RPT. 3, Oct. 26, 1995 [hereinafter *Bingaman*] (indicating in 1994 that United States Assistant Attorney General, Anne K. Bingaman, said there is no reason to believe that recent technological advances will eliminate the need for antitrust enforcement).

23. See *infra* notes 24-35 and accompanying text (explaining that Japan is a leading U. S. trade partner, and that its failure to effectively develop and enforce its antitrust laws hurts American consumers and corporations).

24. See Alex Y. Seita & Jiro Tamura, *The Historical Background of Japan's Antimonopoly Law*, 1994 U. ILL. L. REV. 115 (1994) (stating tension between the United States and Japan over the last ten years has increased steadily).

25. See Joel Klein & Preeta Bansal, *International Antitrust Enforcement in the Computer Industry*, 41 VILL. L. REV. 173, 180 (1996); see also Seita & Tamura, *supra* note 24, at 116 (noting Japan may be the United States' newest economic threat given the demise of Soviet Communism).

26. See Klein & Bansal, *supra* note 25, at 180 (discussing primarily the computer industry when making references to high technology).

from seven percent to sixteen percent, while exports of the United States decreased from approximately thirty percent to twenty-one percent.<sup>27</sup> These numbers reflect the major changes which have occurred in the last two decades between Japan and the United States. United States officials cite Japan as the United States' trade partner most fraught with anticompetitive activity.<sup>28</sup> Japan has failed to effectively develop and enforce antitrust laws to the extent desired by the United States.<sup>29</sup> A Japanese executive recently conceded to a U.S. court that it is common practice for executives of competing Japanese corporations to meet on a routine basis and discuss, among other issues, increasing market prices.<sup>30</sup> Those companies not participating in the anticompetitive activities are criticized.<sup>31</sup> Although Japan has developed broad and expansive competition laws, the actual application of these laws is rare.<sup>32</sup> Violations of antitrust laws in Japan, and Japan's failure to enforce its antitrust laws frequently affect American consumers and corporations. This

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27. *Id.* at 181 (explaining further that the European Union's exports fell from 46% to approximately 37%) *Id.* These figures represent exports in high technology exports. *Id.*

28. See Wilke, *supra* note 13, at A1 (quoting Hideaki Kobayashi, an official of Japan's Fair Trade Commission (JFTC), who stated although anticompetition laws are beginning to take affect in Japan, exemptions to the anticompetition laws are abundant). JFTC currently must battle anticompetitive activity within its own government. *Id.*

29. See *Antitrust: Head of Japan's FTC Asks Justice to Reconsider Antitrust Decision*, 73 DER A-4, April 15, 1992 [hereinafter *Head of Japan's FTC*] (noting in 1992 the United States Assistant Attorney General James F. Rill, Chief of the Antitrust Division of the Department of Justice, described Japan's Antimonopoly Law as not effective enough). Attorney General Rill described Japan's maximum penalty for violations of the Antimonopoly Law by corporations as significantly lower than those of the United States. *Id.* In 1992, the maximum penalty for corporate antitrust violations was US\$77,000. *Id.* Compare *Head of Japan's FTC with Sherman Antitrust Act*, 15 U.S.C. §1 (1890) (as amended 15 U.S.C. §1 (1964)) stating:

[E]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding US\$10,000,000 if a corporation, or, if any other person, US\$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

See also Seita & Tamura, *supra* note 24, at 122 (maintaining that the American perception that Japan has failed to enforce its Antimonopoly Law in a reasonable manner is inaccurate). The Antimonopoly Law was completely foreign to the Japanese government when it was imposed upon it during the occupation. *Id.* Another reason for the American misconception may be that Japan enforces the Antimonopoly Law through nontransparent methods. *Id.* For example, violators of the Antimonopoly Law often receive warnings or notifications of possible violations. *Id.* The JFTC rarely enforces the AML through the use of agency decisions or judicial cases. *Id.* Americans misunderstand the lack of judicial decisions and interpret this as a failure to enforce the Antimonopoly Law. *Id.*

30. See Wilke, *supra* note 13, at A1.

31. *Id.*

32. See Symposium, *supra* note 10, at 1122 (noting the incongruity between Japan's broad competition laws and its limited application of those laws); see also *FTC Hearings on Enforcement Policy Delve into Dynamics of Global Rivalry*, 69 ANTITRUST & TRADE REGULATIONS REPORT, Oct. 26, 1995 [hereinafter *FTC Hearings*] (comparing convictions for antitrust violations in developed countries). Between 1982 and 1992, the United States, with its strict enforcement of antitrust laws, completed 879 convictions. *Id.* In contrast, during the same years, Japan produced only two convictions for violations of its Antimonopoly Law. *Id.*

makes it more difficult for U.S. corporations to enter the Japanese market,<sup>33</sup> and results in increased prices for American consumers.<sup>34</sup>

### B. Obstacles to Effective Enforcement

One explanation for the United States' inability to harmonize its antitrust laws with those of Japan may be the inherent differences in their economic systems.<sup>35</sup> Basic differences in antitrust theories are substantial impediments to harmonization of antitrust laws between the United States and Japan.<sup>36</sup> "[M]ost nations regard antitrust law as nearly constitutional in significance and as an expression of their fundamental national ethos."<sup>37</sup>

The U.S. economy developed around and remains based upon anticompetitive and free market theories.<sup>38</sup> For over a hundred years, antitrust law has been the ultimate protector of the competitive process in the United States.<sup>39</sup> Antitrust law is essential to the United States' free market economy.<sup>40</sup> When the United States was formed in the latter part of the eighteenth century, the Founders clung tightly to Puritan notions of freedom, individualism, and democracy.<sup>41</sup> The Founders criticized centralization of power and valued individual freedom and free competition.<sup>42</sup> These Puritan ideals were incorporated into the early American common law which forbade monopolistic activity.<sup>43</sup> The Sherman Act codified the common

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33. See Shepard, *supra* note 11, at 347 (stating the United States government believes that the keiretsu practices, common in the Japanese system of business, are an obstacle to those American corporations trying to enter the Japanese market); see also *FTC Hearings*, *supra* note 32, at 487 (explaining that according to Thomas R. Howell, a representative for the Coalition for Open Trade (COT), United States corporations are at a great disadvantage to Japanese corporations because of differences in each country's antitrust laws and enforcement of those laws). Howell cites this as "by far the most important impediment to increasing U.S. sales in Japan." *Id.* The COT addresses "the problems presented for U.S. competitiveness by private anticompetitive practices in anticompetitive markets." *Id.*

34. See Wilke, *supra* note 13, at A1 (noting the meetings among Japanese owned paper manufacturers discussing prices, new products, and major orders resulted in a ten percent increase in prices for Americans); see also Seita & Tamura, *supra* note 24, at 116 (explaining the prevailing American perspective is that Japan's failure to enforce its antitrust laws results in American corporations' inability to enter the Japanese market).

35. See Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 348 (1997) (setting forth that "[n]ational differences impose significant limitations on harmonization").

36. See *id.* (noting that overcoming these obstacles is an impediment to the future of transnational enforcement of antitrust law).

37. *Id.*

38. See generally Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 4 PAC. RIM. L. & POL'Y J. 59 (1995) (detailing key differences in antitrust law between the United States and Japan).

39. See ANTITRUST LAW DEV., *supra* note 16, at 1450.

40. *Id.*

41. See Iyori, *supra* note 38, at 62.

42. *Id.* (noting that individual freedom and free competition were foundations of the English common law in the 17th Century and these notions were incorporated into the United States antitrust laws).

43. *Id.* (indicating at the end of the nineteenth century the common law prohibited all agreements which restricted free trade). The Sherman Act then codified the common law to guarantee free competition. *Id.*

law in 1890.<sup>44</sup> Since then, the United States has continued to uphold its antitrust laws as essential to a free market.<sup>45</sup> Antitrust law is regarded as being as central to the United States free market economy as the Bill of Rights is to civil freedom.<sup>46</sup> The Supreme Court has even referred to antitrust law in the United States as the "Magna Carta of capitalism."<sup>47</sup>

In contrast, there is a tendency in Japan to think in terms of the group.<sup>48</sup> The Japanese government believed that cartels benefitted society.<sup>49</sup> Historically, the Japanese economic system centered around "zaibatsu," which means literally a wealth group.<sup>50</sup> The zaibatsu consisted of combinations of up to hundreds of businesses controlled by one holding company.<sup>51</sup> Those companies which comprised the zaibatsu worked together for the betterment of the top holding company, rather than for the betterment of the individual businesses.<sup>52</sup> The zaibatsu's primary goal was to achieve oligopolist positions of somewhere between ten and twenty percent of the market output in various industries.<sup>53</sup> A common characteristic of the classic zaibatsu in Japan was control by a single family or a few families, and strong loyalty to the families and the zaibatsu.<sup>54</sup>

The zaibatsu reached its official demise during the United States' occupation of Japan at the end of World War II.<sup>55</sup> General MacArthur ordered the dissolution of the zaibatsu, in particular, of all holding companies, viewing them as a sub-

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44. *Id.* (noting antitrust activities increased during the Industrial Revolution).

45. *Id.* at 63.

46. *See* Wilke, *supra* note 13, at A1 (noting antitrust rules are accepted in the United States). The Supreme Court referred to the antitrust laws of the United States as central to economic freedom. *Id.*

47. *Id.*

48. *See* Iyori, *supra* note 38, at 64 (explaining American competition which was comprised of many small businesses competing amongst one another did not impress Japanese officials); *see also* Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L. J. 137, 145 (1995) (noting antitrust law was alien to Japan's regulatory culture).

49. *See* Iyori, *supra* note 38, at 64 (explaining the Japanese government once legalized cartels and viewed them as a benefit to society); *see also* Seita & Tamura, *supra* note 24, at 138 (indicating the Japanese government had a bias towards big business).

50. *See* JAPAN, A COUNTRY STUDY 576 (Robert E. Dolan & Robert L. Worden eds., 5th ed. 1st prtg. Federal Research Division, Library of Congress 1992) [hereinafter COUNTRY STUDY] (defining zaibatsu as "powerful industrial or financial combines that merged during the Meiji era and were implicated in the militarist regimes of the 1930s and 1940s").

51. *See* Shepard, *supra* note 11, at 348 (explaining zaibatsu consisted of a "central holding company which acted as the control center for directing a unified business strategy for a large complex of companies, including other holding companies").

52. *Id.*

53. *Id.*

54. *See* Seita & Tamura, *supra* note 24, at 140 (comparing the zaibatsu system to a feudalistic system in which employees throughout the hierarchical system owed a duty to the controlling family).

55. *See* Shepard, *supra* note 11, at 349; *see also* COUNTRY STUDY, *supra* note 50, at 576 (explaining central holding companies dissolved, and the families and owners of the zaibatsu were indemnified with non-negotiable government bonds). Mitsubishi, Sumimoto and Mitsui were the principal zaibatsu in Japan. *Id.*



stantial obstacle to the democratization of Japan.<sup>56</sup> In place of the zaibatsu, however, the "keiretsu" system developed and became a far more efficient and competitive economic system.<sup>57</sup> The restructuring of the Japanese economy was achieved through the enactment of the Antimonopoly Laws, a combination of American competition laws.<sup>58</sup> Japan, shortly after the close of World War II, amended the Antimonopoly Laws, thereby allowing for the creation of the keiretsu, the system upon which the Japanese economy is largely based today.<sup>59</sup>

Business in Japan is based in part upon the keiretsu, a system of business arrangements of industrial groupings which have developed in the Japanese economy.<sup>60</sup> The industrial groupings are comprised of companies connected together through various formal and informal institutions.<sup>61</sup> This system is more efficient than the zaibatsu; it replaced the family owned zaibatsu with a more competitive system developed and organized around a controlling bank rather than controlling families.<sup>62</sup> The keiretsu often consist of large manufacturing firms, central trading companies, insurance companies, and trust banks.<sup>63</sup> The large trading companies oversee the activity and organization of the keiretsu and thereby increase the effectiveness of the keiretsu.<sup>64</sup> Common characteristics of the keiretsu are networks of debt capital, stable shareholding and cross-shareholding, common traditions and shared corporate assets.<sup>65</sup>

U.S. businesses assert that the keiretsu business system is an obstacle to companies attempting to enter the Japanese market.<sup>66</sup> The United States has repeatedly urged Japan to restructure the keiretsu business system.<sup>67</sup> At the Structural Impedi

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56. See Shepard, *supra* note 11, at 349 (noting some Americans also viewed the zaibatsu as having influenced Japan to enter the World War II).

57. See Seita & Tamura, *supra* note 24, at 185 (explaining the keiretsu replaced the zaibatsu and became a far more efficient system than the zaibatsu). It is ironic that the United States' destruction of the "zaibatsu" made possible the commencement of the far more effective keiretsu system. *Id.*; see also Shepard, *supra* note 11, at 349.

58. See Shepard, *supra* note 11, at 349 (stating the Antimonopoly Law consisted of parts of the Sherman Act, the Clayton Act, and the Federal Trade Commission Act).

59. See Seita & Tamura, *supra* note 24, at 118 (explaining the Japanese Antimonopoly Law is the principal law regulating anticompetitive activity in Japan and is similar to U.S. antitrust laws).

60. See *infra* notes 61-68 and accompanying text (discussing the role of the keiretsu business system in the Japanese economy and its impact on U.S. businesses attempting to enter the Japanese market).

61. See Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436, 436 n.7 (1991) (defining keiretsu relationships as "closely-tied corporate relationships characterized by mutual stock-holdings, interlocking directorates, and the like."); see also Shepard, *supra* note 11, at 347.

62. See Seita & Tamura, *supra* note 24, at 154 (explaining the keiretsu were more competitive in the global market than the family owned zaibatsu empires).

63. See Shepard, *supra* note 11, at 350 (noting that there are two classifications of keiretsu: inter-market keiretsu and intra-market keiretsu).

64. *Id.*

65. *Id.* at 347.

66. See Tamura, *supra* note 20, at 399; see also Shepard, *supra* note 11, at 347.

67. See Shepard, *supra* note 11, at 347 (noting the United States has requested the Japanese government make its market more accessible to foreign corporations attempting to enter its market). See also Matsushita, *supra* note 61, at 443 (explaining the United States government argued at the Structural Impediments Initiative talks the

ments Initiative (SII) talks of 1990, the United States and Japan discussed the keiretsu system and the United States called for an end to the system.<sup>68</sup>

The inherent differences in antitrust theories may well be the greatest obstacle to the harmonization of antitrust laws between the United States and Japan.<sup>69</sup> Antitrust law is a cherished set of public values, and not a series of neutral theories, upon which all nations can agree as long as they attempt to agree in good faith and communicate as effectively as possible.<sup>70</sup> The differences between the United States and Japan in economic theories makes harmonization of antitrust laws between the two countries particularly difficult.<sup>71</sup>

#### IV. DEPARTMENT OF JUSTICE APPROACHES TO TRANSNATIONAL ANTITRUST ENFORCEMENT

In its efforts to achieve effective enforcement of transnational antitrust violations, the DOJ recognizes and utilizes, in varying degrees, three approaches: (1) coordinated enforcement actions; (2) positive comity; and (3) application of U.S. laws to conduct occurring abroad.<sup>72</sup>

##### A. Coordinated Enforcement Activity

Coordinated enforcement activity is the most promising approach presently utilized by the DOJ in its enforcement of transnational antitrust violations.<sup>73</sup> Coordination of antitrust enforcement involves nations strictly enforcing their own national competition laws and simultaneously cooperating to provide other nations with the tools necessary to prevent transnational anticompetitive behavior.<sup>74</sup> This

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keiretsu system impedes the entry of foreign businesses into Japan's domestic market).

68. See Matsushita, *supra* note 61, at 436 (defining the Structural Impediments Initiative Talks as a series of bilateral trade negotiations completed in 1990); see also Seita & Tamura, *supra* note 24, at 120 (indicating the aim of the Structural Impediments Initiative talks was to change the economic practices of countries which negatively impact other countries). The Structural Impediments Initiative talks were initiated, in part, because of perceptions by U.S. officials that the trade imbalance between the United States and Japan was a result of oligopolistic practices within Japan. *Id.*

69. See Waller, *supra* note 35, at 348.

70. *Id.*

71. See Symposium, *supra* note 10, at 1119 (reporting the lack of international antitrust laws leads parties to wrestle with conflicts created by diversified business cultures and consider the importance of competition laws to each sovereign); see also Waller, *supra* note 35, at 348.

72. Klein & Bansal, *supra* note 25, at 185.

73. See Seung Wha Chang, *Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts Within the Pacific Community*, 16 HASTINGS INT'L & COMP. L. REV. 295, 309 (1993) (explaining many commentators urge bilateral treaties are the best approach to the transnational enforcement of antitrust violations); see also Klein & Bansal, *supra* note 25 at 185.

74. See Wilbur L. Fugate, *Book Review, World Antitrust Law & Practice*. By James J. Garrett, *General Editor. Boston Massachusetts: Little, Brown & Co. (1995)(LOOSE LEAF)*, 36 VA. J. INT'L L. 503, 504 (1996) (stating recent international attempts at coordination and shared information have been more successful than efforts in the past). But see Waller, *supra* note 35, at 345 (noting the coordination approach is not perfect because it

method of enforcement allows individual nations to pursue their own investigations to the extent necessary and to receive the benefits of efforts by other countries in fact gathering and remedial measures.<sup>75</sup> In the fall of 1996, the Organization for Economic Cooperation and Development (OECD), consisting of twenty-eight nations, including Japan, commenced efforts on an agreement regarding effective coordination and enforcement policies.<sup>76</sup> Japan's efforts to improve scholarship within its academic community signifies a clear attempt by Japan to increase coordination through more efficient discussion regarding transnational antitrust issues.<sup>77</sup>

The OECD is a key forum for discussion of transnational antitrust issues and is especially effective in its efforts to coordinate enforcement activity in antitrust law.<sup>78</sup> The OECD's accomplishments in this area are many. For example, the OECD arranges meetings between antitrust officials of foreign nations and produces studies relevant to antitrust regulation.<sup>79</sup> The OECD also wrote the Recommendation of the Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade (Recommendation) for member countries detailing how to effectively handle transnational antitrust violations.<sup>80</sup> The OECD first set forth its Recommendation in 1967 and most recently revised the Recommendation in 1995.<sup>81</sup> The Preamble to the Recommendation explains nations "should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of anti-competitive practices,"<sup>82</sup> and it encourages "notification, exchange of information, coordination of action, consultation and conciliation."<sup>83</sup> While the Recommendation is regarded as having had limited success,<sup>84</sup> it is important because it provides a

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requires coordination and agreement among different antitrust enforcement systems of various countries).

75. See Fugate, *supra* note 74, at 504 (noting the International Antitrust Enforcement Act, enacted in 1994, allows federal antitrust agencies to obtain evidence requested by foreign nations which will be used in enforcing antitrust violations). For the Act to be implemented, requesting countries must also enact laws which allow federal agencies to receive relevant evidence from the requesting country. *Id.* See Klein & Bansal, *supra* note 25, at 185.

76. Wilke, *supra* note 13, at A1.

77. See Tamura, *supra* note 20, at 402 (explaining increased scholarship in antitrust law in Japan signifies efforts to broaden the dialogue regarding transnational enforcement of antitrust law). A common understanding of the fundamental goals will aid in focusing discussion on key antitrust issues. *Id.*

78. See Waller, *supra* note 35, at 361 (noting the OECD was originally founded to assist the implementation of the Marshall Plan).

79. See Fugate, *supra* note 74, at 505 (explaining the four volume Guide to Legislation on Restrictive Practices, comprised of the antitrust laws of OECD member countries, was published by the OECD Competition and Consumer Policy Committee); see also Waller, *supra* note 35, at 361.

80. See Organization for Economic Cooperation and Development, Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, 35 I.L.M. 1313 (1996) [hereinafter Revised Recommendation].

81. See Waller, *supra* note 35, at 361.

82. See Revised Recommendation, *supra* note 80, at 1315.

83. *Id.*

84. See Waller, *supra* note 35, at 361 (explaining that efforts to achieve coordination on a multilateral basis have been of limited success).

framework for the more common form of coordination, known as the bilateral agreement.<sup>85</sup>

The most common form of antitrust coordination is the bilateral agreement.<sup>86</sup> In 1995, the United States and Canada exemplified successful implementation of a bilateral agreement when they signed an agreement which set forth tools by which the two nations could achieve cooperation with regard to transnational antitrust issues.<sup>87</sup> This agreement mandates that the United States and Canada, among other requirements, share information regarding enforcement of antitrust activities and coordinate enforcement.<sup>88</sup> The United States and Canada also entered into an agreement in 1985 which called for increased cooperation in criminal prosecution of antitrust violations.<sup>89</sup> This agreement, the Treaty on Mutual Legal Assistance on Criminal Matters (MLAT), requires that U.S. and Canadian officials give one another support in issues pertaining to the investigation, prosecution, and suppression of certain activity.<sup>90</sup>

Recent cases demonstrate the effectiveness of coordination as a tool in the enforcement of transnational antitrust violations.<sup>91</sup> For example, coordinated enforcement tactics between the United States and Europe made an effective remedy possible in the Microsoft case.<sup>92</sup> The United States and a Microsoft competitor in Europe simultaneously took action against Microsoft; the Microsoft competitor lodged its complaint in the European Commission.<sup>93</sup> The United States charged, among other things, that Microsoft entered into excessively long licensing agreements, thereby precluding competitors from entering the market.<sup>94</sup> The European market for high technology items is dynamic and growing at a rapid pace.<sup>95</sup> An

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85. *Id.* at 362.

86. *Id.*

87. *See generally* Waller, *supra* note 35 (discussing cooperation agreements between the United States and Canada); *see also* Agreement Regarding the Application of Their Competition and Deceptive Marketing Practice Laws, Aug. 1 & 3, 1995, U.S.-CAN., 35 I.L.M. 309 (1995) [hereinafter U.S.-CAN. AGREEMENT].

88. *See id.* art. VII, 35 I.L.M. at 320.

89. *See generally* Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-CAN., 24 I.L.M. 1092 (1985) [hereinafter MLAT].

90. *See id.* art. II (2), 24 I.L.M. at 1093 (requiring the parties assist one another in other ways, including: (a) examining objects and sites; (b) exchanging information and objects; (c) locating or identifying persons; (d) serving documents; (e) taking the evidence of persons; (f) providing documents and records; (g) transferring persons in custody; (h) executing requests for searches and seizures). *Id.*

91. *See infra* notes 93-108 and accompanying text (referring to the recent Microsoft case and the series of plastic dinnerware cases to demonstrate the effectiveness of coordination in the enforcement of transnational antitrust violations).

92. *See* Klein & Bansal, *supra* note 25, at 180 (explaining coordinated enforcement activity ensured an effective remedy in the international computer software industry).

93. *See* Keegan, *supra* note 10, at 168 (stating this activity was the first coordinated activity by the United States and European Commission in enforcing antitrust violations).

94. *See id.* at 169 (noting the DOJ's complaint against Microsoft had three separate grounds for illegal monopolization, including exclusionary per processor licenses, unreasonably long licenses, and restrictive nondisclosure agreements).

95. *See* Klein & Bansal, *supra* note 25, at 179.

effective remedy necessitated coordination between the United States and Europe; an agreement extending to Microsoft's conduct in the United States and allowing Microsoft to continue its anticompetitive activity in foreign markets would have been inadequate.<sup>96</sup> The United States and the Commission of the European Communities (EC) entered into an Agreement regarding the application of their competition laws on September 23, 1991 (Agreement)<sup>97</sup> with the intent to overcome problems in the extraterritorial application of antitrust laws.<sup>98</sup> The Agreement benefitted both the United States and the EC as both received and offered assistance in the evidence gathering and prosecution.<sup>99</sup> The Agreement similarly helped Microsoft as it did not have concerns that an agreement entered with the United States may put Microsoft at a disadvantage when negotiating with the EC, as the agreement with the United States could potentially be used as leverage against Microsoft in its negotiations with the EC.<sup>100</sup> The Agreement effectively carried out the goals of both the United States and the EC during the course of the Microsoft investigation.<sup>101</sup>

Another instance demonstrating the effectiveness of coordinated enforcement action is the recent series of plastic dinnerware cases.<sup>102</sup> Coordination was key to the prosecution of a price-fixing cartel in the US\$100 million plastic dinnerware industry.<sup>103</sup> The exchange of confidential information between the United States and Canada made possible the execution of search warrants necessary in prosecuting the price-fixing cartel.<sup>104</sup> As a result of the cooperation between the United States and Canada, enforcement agencies seized essential evidence and seven executives and

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96. See Keegan, *supra* note 10, at 186 (explaining that the Microsoft investigation involved great efficiency in information gathering); see also Klein & Bansal, *supra* note 25, at 180 (explaining a remedy which extended only to Microsoft's activities in the United States would have been ineffective as it would have allowed Microsoft to continue its anticompetitive activity in Europe, thereby blocking access to markets abroad).

97. See generally Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-EUR. COMM., 30 I.L.M. 1491 [hereinafter U.S.-E.C. COMP. LAW AGREEMENT].

98. See Keegan, *supra* note 10, at 158 (noting the purpose of the agreement, to overcome problems in the transnational application of antitrust laws, can be divided into three areas). These areas are: "(1) conflicts between competition authorities, (2) obstacles to information-gather in a foreign jurisdiction, (3) differing rules under which multinational firms must abide". *Id.*; see also U.S.-E.C. COMP. LAW AGREEMENT, *supra* note 97, at 1492, art. I ("The purpose of this agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the parties in the application of their competition laws").

99. See Keegan, *supra* note 10, at 173 (noting that the Agreement helped authorities reach settlements in both jurisdictions).

100. See *id.* (explaining that Microsoft asked that the United States include the EC in negotiations regarding the consent decree so that both Microsoft investigations would end at the same time).

101. See Keegan, *supra* note 10, at 174.

102. See *Plastic Dinnerware Price Fixing Probe Nets Indictment, Guilty Plea Agreements*, 66 ANTITRUST & TRADE REGULATIONS REPORT 661 (June 16, 1994) [hereinafter *Plastic Dinnerware Price Fixing*] (discussing the conspiracy among plastic dinnerware executives to defraud purchasers of plastic dinnerware). One indictment charged a plastic dinnerware company with conspiracy to raise prices of products sold to Delta Airlines, Inc.. *Id.*

103. See Klein & Bansal, *supra* note 25, at 182.

104. See *Plastic Dinnerware Price Fixing*, *supra* note 102 (stating the United States FBI and the Royal Canadian Mounted Police engaged in coordinated raids).

three corporations pled guilty.<sup>105</sup> If the search warrants had not been executed simultaneously as a result of cooperation between the United States and Canada, important evidence likely would have been lost as coconspirators in one country could have informed fellow conspirators in the other country of impending investigation.<sup>106</sup> Janet Reno commended the coordinated enforcement activity between the United States and Canada saying, "This is the kind of international cooperation that is urgently needed in an age of shrinking borders and international antitrust conspiracies."<sup>107</sup>

### *B. Positive Comity*

A second approach recognized by the DOJ towards effective enforcement of transnational violations of antitrust law is positive comity.<sup>108</sup> According to the rules of positive comity, one nation asks the enforcement agency of another nation to commence enforcement activity and to give notice of its advancements into the requesting country.<sup>109</sup> This approach is not without limitations.<sup>110</sup> For positive comity to be an effective tool, it requires that the country involved have its own effective anticompetition laws which deem illegal those things which the Sherman Act deems illegal.<sup>111</sup> The anticompetition laws of the foreign nation must also provide for penalties substantial enough to deter the offending individual or corporation.<sup>112</sup> Furthermore, the foreign nation must have a political climate free

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105. See Klein & Bansal, *supra* note 25, at 182 (noting the three corporations were fined over U.S. \$9 million and the individuals received prison sentences).

106. *Id.*

107. See *Plastic Dinnerware Price Fixing*, *supra* note 102 (noting Reno expressed gratitude to the Canadian government, saying, "We are grateful to the Canadian government").

108. See Edith Y. Wu, *United States Application of Extraterritorial Jurisdiction*, 10 TRANSNAT'L LAW. 1, 6 (1997) (defining 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 or of other persons who are under the protection of its laws); see also Klein & Bansal, *supra* note 25, at 186.

109. See ANTITRUST LAW DEV., *supra* note 16, at 1469 (explaining comity is respect of other sovereigns). When determining whether it is appropriate to assert jurisdiction, the agencies consider interests of other sovereigns. *Id.* Factors which the agencies consider in performing a positive comity analysis include, but are not limited to, "(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 effects of the conduct on the United States as compared to the effects abroad." *Id.* See also Klein & Bansal, *supra* note 25, at 186.

110. Klein & Bansal, *supra* note 25, at 187.

111. See ANTITRUST LAW DEV., *supra* note 16, at 1470 (explaining the federal agency inquires first whether the activity is prescribed by the law of the interested country). Oftentimes, the law is the same as U.S. law and there is no conflict as more countries are now adopting antitrust law similar to that of the United States. *Id.*; see also Klein & Bansal, *supra* note 25, at 187 (noting that this approach is most effective when the activity occurred in one jurisdiction).

112. See Klein & Bansal, *supra* note 25, at 187 (declaring that the penalties must be high enough to dissuade companies from engaging in anticompetitive activity so that potential profits are not higher than possible penalties).

from political pressure, allowing the nation to freely enforce its antitrust laws which may, at times, be more advantageous to foreign individuals or corporations.<sup>113</sup>

Positive comity as an instrument to the enforcement of antitrust laws has been successful in many situations.<sup>114</sup> Efforts in this area are paying off; there is a new global interest in anticompetition law.<sup>115</sup> Efforts in positive comity with Japan have proven to be relatively successful.<sup>116</sup> The JFTC in 1995 established the Import Restraint Task Force, intended to encourage investigation and prosecution of anti-competitive activity.<sup>117</sup> Experts hope this reflects a true commitment by the Japanese government to routinely and effectively eliminate violations of its antitrust laws.<sup>118</sup> The United States continues its efforts with hopes of establishing an effective system for enforcing antitrust violations in Japan.<sup>119</sup> The United States urged the Ruling Party's Administrative Reform Team, a team of Diet members, to augment the staff and resources of the JFTC so as to make the antitrust enforcement capabilities of Japan equal to its status as one of the largest economies of the world.<sup>120</sup> The United States government also advocates the Japanese government should enhance the JFTC's administrative status, making it possible for the JFTC to better interact with industrial ministries in the enforcement of anticompetition law.<sup>121</sup> Ultimately, this would increase the JFTC's effectiveness in enforcing anticompetition violations.<sup>122</sup>

### C. Application of United States Antitrust Laws

The third approach utilized by the DOJ involves the direct application of United States antitrust laws to foreign antitrust violations.<sup>123</sup> A recent decision by the

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113. See ANTITRUST LAW DEV., *supra* note 16, at 1471 (noting that the agencies also consider whether the country encourages the activity, forbids the activity, or adopts a neutral stance); see also Klein & Bansal, *supra* note 25, at 187.

114. See Klein & Bansal, *supra* note 25, at 187.

115. See *id.* (stating that nearly one-third of all countries in the world and 8% of the world's GDP have now enacted some sort of anticompetition law).

116. See *id.* at 189 (indicating that although much still needs to be done to assure that the JFTC will effectively enforce domestic antitrust violations, there has been progress with Japan through the United States' efforts by positive comity).

117. *Id.*

118. *Id.* at 189.

119. *Id.*

120. See HIORSHI ODA, JAPANESE LAW 33 (Butterworth Legal Publishers 1993) (explaining that the Diet is the supreme body of state power in Japan); see also Klein & Bansal, *supra* note 25, at 189 (noting the Ruling Party's Administrative Reform Project Team suggests the implementation of legislation which would increase the effectiveness of the JFTC).

121. See Klein & Bansal, *supra* note 25, at 189.

122. *Id.*

123. See William K. Walker, *Recent Development - Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community—United States Antitrust Agreement—Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws*, Sept. 23, 1991, 30 I.L.M. 1487 (1991), 33 HARV. INT'L L. J. 583, 584 (1991) (explaining that

United States First Circuit Court of Appeals, *United States v. Nippon Paper*, is argued, by many, to be yet another example of the overzealous approach by the United States to the application of its antitrust laws to extraterritorial violations.<sup>124</sup> This Comment discusses fully in Section VI the *Nippon Paper* decision which held criminal prosecution under the Sherman Act may be based on wholly extraterritorial activity.<sup>125</sup> This approach is the least effective of the three and is regarded by many as one of last resort.<sup>126</sup> Academicians cite application of U.S. antitrust laws as the final alternative in efforts to achieve effective enforcement of transnational antitrust violations.<sup>127</sup> This approach increases the use of self-protective measures<sup>128</sup> by foreign nations and does little to stimulate effective solutions. For example, Japan warned prosecution in the *Nippon Paper* decision, and the other fax-paper cases, could gravely undermine Japan's efforts to harmonize its antitrust laws with those of the United States.<sup>129</sup> The U.S. approach to extraterritorial application of its laws has been described as zealous, protectionist, and imperialistic.<sup>130</sup> Others describe the United States' application of its laws to foreign nations as a blatant disregard for foreign sovereign's sovereignty<sup>131</sup> and as having passed beyond generally accepted principles of international law.<sup>132</sup>

Other nations also maintain laws which allow antitrust authorities to enforce violations of its antitrust laws when the violation involves wholly extraterritorial activity having substantial effect within the nation.<sup>133</sup> The Court of Justice of the

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the most common justification for the United States' application of its laws to foreign conduct is territoriality, a theory giving authority to a nation to apply its laws to activity occurring within its own borders). Another justification is nationality which permits a state to apply its laws to its own citizens, notwithstanding the locus of the conduct. *Id.*

124. See *infra* notes 236-44 and accompanying text (discussing the reactions by both U.S. and Japanese officials to the *Nippon Paper* decision). Japanese officials warn that this is a violation of international law. *Id.* U.S. economists warn that assertion of jurisdiction can create foreign policy conflicts and forbearance is appropriate in certain circumstances. *Id.*

125. See *infra* notes 176-235 and accompanying text (discussing the *Nippon Paper* decision, including the relevant facts and analysis).

126. See Chang, *supra* note 73, at 309 (noting many commentators argue diplomatic negotiation and bilateral agreements are better solutions than application of U.S. laws to foreign anticompetitive activity); see also Klein & Bansal, *supra* note 25, at 192 (emphasizing international sensitivities and difficulties in obtaining necessary evidence make this the approach of last resort).

127. See Tamura, *supra* note 20, at 403 (citing alternatives to application of U.S. laws to foreign conduct such as international cooperation, treaties or multilateral agreement). Another alternative is positive comity in which the United States could urge the JFTC to enforce the Antimonopoly Law. *Id.*

128. See *infra* notes 136-44 and accompanying text (detailing the self-protective measures which have developed in Japan which can and most likely will be used to block U.S. judgments against Japanese defendants).

129. See Wilke, *supra* note 13, at A1 (stating Japan is currently making efforts to coordinate its laws and cooperate with the United States in the enforcement of transnational anticompetitive activity).

130. See Wu, *supra* note 108, at 20 (citing a tax case in which the United States proceeded to assert jurisdiction despite the fact that the case fell outside U.S. borders and the effect in the United States was slight).

131. *Id.*

132. *Id.* at 26.

133. See *infra* note 134 and accompanying text (providing an example of a situation in which a country extended the jurisdictional reach of its laws to wholly extraterritorial activity with substantial effect in said country).



European Communities, for example, established in *In re Wood Pulp Cartel v. E. C. Commission (Wood Pulp)* that extraterritorial activity with substantial effect in the European Community comes within the jurisdictional reach of the European Court of Justice.<sup>134</sup>

Many foreign nations resort to protective measures such as blocking statutes<sup>135</sup> as an obstacle to application of foreign antitrust laws.<sup>136</sup> Article 200 of the Japanese Civil Procedure Act,<sup>137</sup> for example, establishes preconditions which must be met before the Japanese court will deem the judgment of a foreign court binding.<sup>138</sup> Article 200 of the Civil Procedure Act sets forth the following conditions which must be met before a Japanese Court will deem a foreign judgment binding on a Japanese corporation or individual: (1) that jurisdiction of the foreign court is not denied by laws and orders or by treaty; (2) that the defendant defeated, being a Japanese citizen, has received service of summons or any other necessary orders to commence procedure otherwise by a public notice or has appeared without receiving service thereof; (3) that the judgment of a foreign court is not contrary to the public order or good morals in Japan; (4) that there is a mutual guarantee.<sup>139</sup> Thus, a judgment deemed "contrary to the public order or good values" could potentially be held invalid.<sup>140</sup> This gives wide latitude to the Japanese court in

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134. See *In re Wood Pulp Cartel: A Ahlstrom Oy v. Commission*, 1988 ECR5193, reprinted in [1987-1988 Transfer Binder] Common Mkt. Rep. (CCH) P14, 491 91988 (involving 41 producers of wood pulp engaged in a conspiracy to fix prices). Non-European Community wood pulp producers conspired to fix prices and increased prices within the European Community. The participants in the conspiracy were located in Finland, the United States and Canada. *Id.* The *In re Wood Pulp* court noted, "The effect of the agreements and practices on prices announced and/or charged to customers on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices." *Id.*; see also Deanna Conn, *Assessing the Impact of Preferential Trade Agreements and New Rules of Origin on the Extraterritorial Application of Antitrust Law to International Mergers*, 93 COLUM. L. REV. 119, 133 (1993) (recognizing a number of authors cite *In re Wood Pulp* for its extension of the territorial reach of European law).

135. See Michael G. McKinnon, *Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond the Timberlane/Restatement Comity Approach*, 21 PEPP. L. REV. 1219, 1268 (1994) (explaining there are two types of blocking statutes, discovery blocking statutes and judgment blocking statutes). Discovery blocking statutes limit the ability of the United States to obtain or compel the production of evidence. *Id.* Judgment blocking statutes limit the enforcement of United States judgments. *Id.*

136. See Chang, *supra* note 73, at 319 (explaining blocking statutes can promote international conflict when the United States attempts to apply its antitrust laws to foreign conduct); see also Wu, *supra* note 108, at 24 (noting U.S. aggressiveness in the application of its laws to foreign nations has led many foreign nations to enact protective measures, such as blocking statutes). "These laws counter sovereign's efforts to extend jurisdiction beyond their borders and protect rights that said country prescribes as inherent"; *Id.* Australia, Canada, Britain, and France are among those countries which have enacted blocking statutes. *Id.*

137. See generally MINSOHŌ, Act. No. 61 (1926).

138. See Chang, *supra* note 73, at 302 (citing a Korean blocking statute, Article 203 of the Korean Civil Procedure Act). This is another statute which will likely be used to impede foreign judgments. *Id.* The blocking statute will most often be used in situations in which the United States judgment involves treble damages or in which the United States granted jurisdiction on an extremely liberal standard. *Id.* The relevant Korean Civil Procedure Act is modeled after Article 200 of the Japanese Civil Procedure Act. *Id.*

139. See generally MINSOHŌ, Act. No. 61 (1926).

140. See Chang, *supra* note 73, at 302.

determining whether preconditions have been met and whether it is appropriate to uphold the judgment by a foreign nation against a Japanese defendant. The Japanese court determines whether the foreign judgment meets the preconditions set forth by the Article.<sup>141</sup> Originally, the purpose of these requirements was not to block United States judgments based on antitrust laws.<sup>142</sup> Nonetheless, there is a strong likelihood that the provision will be utilized as a mechanism to impede United States judgments against Japanese defendants.<sup>143</sup>

## V. HISTORY: THE SHERMAN ACT APPLIED TO EXTRATERRITORIAL CONDUCT

The U.S. view regarding the extraterritorial application of its antitrust laws has changed dramatically in the past one hundred years.<sup>144</sup> The Sherman Antitrust Act, the key United States anticompetition statute, is broad in its language and ambiguous as to its application to foreign nations.<sup>145</sup> This places a special interpretive responsibility upon the judiciary.<sup>146</sup> In light of this, U.S. Courts have played a substantial role in the development of law regarding extraterritorial application of the Sherman Act.<sup>147</sup> The U.S. view regarding this issue has evolved from the

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141. *Id.* at 301.

142. *Id.* at 302.

143. *Id.* at 310 (noting for example, a U.S. judgment permitting recovery of treble damages against a Japanese corporation may be considered, "contrary to the public order or good morals in Japan" and thereby could be held invalid). The Japanese courts may also utilize this provision if U.S. Courts use unreasonably liberal standards of venue or personal jurisdiction in order to drag Japanese defendants into U.S. Courts. *Id.*

144. See James W. Perkins, Comment, *In re Japanese Electronic Products Antitrust Litigation: Sovereign Compulsion, Acts of State, and the Extraterritorial Reach of the United States Antitrust Laws*, 36 AM. U. L. REV. 721, 724 (1987) (explaining the Sherman Act is an essential element of the U.S. economy). The purpose of the Sherman Act is to maintain free competition. *Id.*; see also *infra* notes 150-75 and accompanying text (discussing the United States Supreme Court's view regarding application of U.S. antitrust laws to wholly extraterritorial conduct). The Supreme Court originally held that the Sherman Act should not extend beyond the borders of the United States. *Id.* In its most recent decision, the Court held that activities committed abroad having substantial and intended effects within the United States may form the basis for criminal prosecution pursuant to § 1 of the Sherman Act. *Id.*

145. BLACK'S LAW DICTIONARY 1377 (6th ed. 1990) (defining "Sherman Antitrust Act" as an act which "prohibits any unreasonable interference, by contract, or combination, or conspiracy, with the ordinary, usually and freely competitive price or distribution system of the open market in interstate trade"); See also Sherman Antitrust Act 15 U.S.C. § 1 (1890) (as amended 15 U.S.C. § 1 (1964)) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding US\$10,000,000 if a corporation, or, if any other person, US\$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.") *Id.*

146. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (writing in a concurring opinion, Circuit Judge Lynch wrote, "The broad general language of the federal antitrust laws and their unilluminating legislative history place a special interpretive responsibility upon the judiciary . . . As Professors Areeda and Turner have said, the federal courts have been invested with a jurisdiction to create and develop an antitrust law in the manner of the common law courts.").

147. See *infra* notes 150-79 and accompanying text (explaining the development of the United States Supreme Court's approach to application of the Sherman Act to wholly extraterritorial activity).

notion that the Sherman Act should not extend beyond the borders of the United States,<sup>148</sup> to the tenuous position recently enunciated by the First Circuit in *United States v. Nippon Paper* that activities committed abroad which have "substantial and intended effects" within the United States may form the basis for criminal prosecution pursuant to Section One of the Sherman Act.<sup>149</sup>

Before one can clearly understand the import of the *Nippon Paper* decision and its implications, one must comprehend the history of the United States' application of its antitrust laws to foreign conduct. The Court first deliberated over the extra-territorial application of the Sherman Act in 1909 in *American Banana Company v. United Fruit Co.*, (*American Banana*).<sup>150</sup> *American Banana* involved allegations that the defendant, United Fruit Co., intending to control the banana trade and prevent competition, developed an elaborate scheme to prevent the plaintiff from entering the market.<sup>151</sup> Allegations charged the defendant as having instigated the Costa Rican government to impede the plaintiff's attempts to build a railway.<sup>152</sup> This railway would have been the plaintiff's sole means of export.<sup>153</sup> Additionally, the plaintiff complained the defendant, through strategic outbidding, drove purchasers out of the market and precluded American Banana from buying for export.<sup>154</sup> Although this activity was clearly anticompetitive, all illegal activity took place in territory outside of the United States, in Panama, Columbia, and Costa Rica.<sup>155</sup> Justice Holmes wrote, "[T]he 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 . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions, rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."<sup>156</sup> The Supreme Court ultimately held the defendant foreign corporation's acts beyond the jurisdiction of the United States courts.<sup>157</sup>

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148. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909).

149. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 6 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998).

150. *American Banana*, 213 U.S. at 347.

151. *Id.* at 354.

152. *Id.*

153. *Id.*

154. *Id.* at 355.

155. *Id.*

156. *See American Banana*, 213 U.S. at 356 (holding what the defendant did was not within the scope of the Sherman Act, Justice Holmes wrote, "The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is *prima facie* territorial"). *Id.*

157. *Id.* at 357.

The Supreme Court, over time, began to break down the territorial walls which it established in *American Banana*.<sup>158</sup> In 1945, the United States Court of Appeals broadly expanded the application of the Sherman Act to foreign nations.<sup>159</sup> In *United States v. Aluminum Co. of America*, (*Alcoa*) the court considered application of the Sherman Act to an agreement made entirely in a foreign state.<sup>160</sup> The Court of Appeals held that the Sherman Act would extend to civil antitrust actions predicated on wholly foreign conduct having intended and substantial effect in the United States.<sup>161</sup> Judge Learned Hand, writing for the court, wrote "It is settled law . . . 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."<sup>162</sup> *Alcoa* broadly extended the reach of the Sherman Act in civil cases.<sup>163</sup>

Over time, dissatisfaction with *Alcoa* and its failure to accommodate interests of other nations and international law grew.<sup>164</sup> This led the Court in 1976 to *Timberlane Lumber Co. v. Bank of America Nat'l Trust and Sav. (Timberlane)* and an approach to extraterritorial application of the Sherman Act which considered international law standards and notions of sovereignty.<sup>165</sup> The *Timberlane* court developed a three part balancing test to determine the point at which judicial

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158. See JAMES R. ATWOOD & KINGMAN BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 146 (2d ed. McGraw-Hill, 1981) (explaining that as the Supreme Court slowly broke down the territorial walls, the Court always found a territorial nexus, meaning that it never extended jurisdiction to foreign conduct unless there was some allegation of activity within the United States territory). For example, in *United States v. 383, 340 Ounces of Quinine Derivatives, Admiralty No-98-242 (SDNY 1928)*, the presence in the United States of the imported commodity provided sufficient territorial nexus to extend jurisdiction. *Id.*

159. *United States v. Aluminum Co. of America*, (*Alcoa*) 148 F.2d 416 (2d Cir. 1945). See ATWOOD & BREWSTER, *supra* note 158, at 147 (indicating the Court of Appeals in the Second Circuit heard the case because the Supreme Court could not assemble a quorum of disinterested justices).

160. See *Alcoa*, 148 F.2d at 423 (involving a suit by the U.S. government to break up an international aluminum monopoly). Aluminum producers engaged in price fixing in an effort to increase prices in the United States. *Id.*

161. *Id.* at 444.

162. *Id.* at 443.

163. *Id.* at 444. See Wu, *supra* note 108, at 10 (referring to the *Alcoa* test as the "intended effects" test).

164. See BLACK'S LAW DICTIONARY 267 (6th ed. 1990) (defining "comity" to mean that the courts of one state or jurisdiction giv[e] effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect); see also ATWOOD & BREWSTER, *supra* note 158, at 159 (explaining *Alcoa* focused solely on the effects of anticompetitive activity in the United States, ignoring basic principles of positive comity and international law). The *Alcoa* test did not consider the consequences for other nations. *Id.* *Alcoa* could potentially result in the application of United States laws to foreign conduct in situations in which notions of comity would direct otherwise. *Id.*

165. See *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav.*, 749 F.2d 1378, 1379 (9th Cir. 1984) (involving an Oregonian partnership engaged in purchasing and distributing lumber and attempting to establish itself in Honduras). The partnership sought to export lumber to the United States. *Id.* The Honduran firms, displeased with the prospect of an American corporation operating on its soil, attempted to drive *Timberlane* out of the country. *Id.* Concerted efforts by the Honduran firms eventually resulted in *Timberlane Lumber Co.*'s inability to operate in Honduras. *Id.*

abstention is appropriate for wholly extraterritorial violations of the Sherman Act.<sup>166</sup> Specifically, the Court asked: (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 States be asserted to cover it?<sup>167</sup> This approach moderated the *Alcoa* test which looked only to the affects of extraterritorial activity, without considering the concerns of foreign nations.<sup>168</sup> While moderating the test enumerated in *Alcoa*, *Timberlane* placed the court in the awkward position of determining the relative interests of the foreign state.<sup>169</sup> The decision received praise from the DOJ and positive commentary for its consideration of international law and notions of sovereignty,<sup>170</sup> and was adopted by the Restatement (Third) of Foreign Relations Law.<sup>171</sup>

The Supreme Court reaffirmed the *Timberlane* holding in 1993, in *Hartford Fire v. California* (*Hartford Fire*), when it allowed a civil antitrust case to continue under Section One of the Sherman Act, despite the fact that the illegal activities occurred entirely in Great Britain.<sup>172</sup> The *Hartford Fire* case involved allegations that London reinsurers engaged in conspiracies to affect the market for insurance in the United States.<sup>173</sup> The *Hartford Fire* court reaffirmed the intended effects test,<sup>174</sup> explaining 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>175</sup>

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166. *Timberlane*, 749 F.2d at 1382.

167. See *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav.*, 549 F.2d 597, 614-15 (9th Cir. 1976) (setting forth factors to examine in determining the third part of the test, including: the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations; the extent to which enforcement by either state can be expected to achieve compliance; the relative significance of effects on the United States compared with those elsewhere; the extent to which there is explicit purpose to harm or affect American commerce; the foreseeability of such effect; and the relative importance to the violations charged of conduct with the United States as compared with conduct abroad).

168. See *ATWOOD & BREWSTER*, *supra* note 158, at 160.

169. See *Tamura*, *supra* note 20, at 390 (explaining that the *Timberlane* method puts an added burden on the court and citing *Laker Airways Ltd. v. Sabena World Airways*, 731 F.2d 909 (D.C. Cir.) (1984), as an example of the difficulties which courts face in applying balancing tests). These balancing tests involve political and diplomatic deliberations potentially beyond the boundaries of the judiciary. *Id.*

170. See *ATWOOD & BREWSTER*, *supra* note 158, at 162.

171. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* 244 (1987).

172. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (involving London and American reinsurers diminishing the availability of certain types of insurance in the United States by entering into anticompetitive agreements).

173. *Hartford*, 509 U.S. at 796.

174. *Id.*

175. *Id.*

VI. UNITED STATES V. NIPPON PAPER

On March 17, 1997, the United States First Circuit Court of Appeals held in *United States v. Nippon Paper* that activities committed abroad with substantial and intended effect in the United States may form the basis for criminal prosecution under Section One of the Sherman Act.<sup>176</sup> On January 12, 1998, the Supreme Court denied certiorari without comment.<sup>177</sup> The Supreme Court had already established in *Hartford Fire* that the jurisdictional reach of Section One of the Sherman Act extended in civil actions to wholly extraterritorial conduct with substantial and intended effect in the United States.<sup>178</sup> Therefore, the Court only had to determine whether the jurisdictional reach of Section One of the Sherman Act should be applied in the same manner for criminal cases as it is in civil cases.<sup>179</sup>

The import of extending the Sherman Act to criminal prosecution for wholly extraterritorial conduct is great.<sup>180</sup> Violators may be subject to stiff penalties and moral condemnation. Criminal prosecution is far more serious than civil liability.<sup>181</sup> The DOJ prosecutes a violation of the Sherman Act as a felony.<sup>182</sup> Upon conviction, corporations can be fined up to US\$10,000,000.<sup>183</sup> Similarly, individuals can be fined up to US\$350,000.<sup>184</sup> Individuals and corporations may also be imprisoned for up to three years, or by both fines and imprisonment.<sup>185</sup> Corporate executives can be personally indicted for participating in anticompetitive activity.<sup>186</sup> The Sherman Act, combined with other existing federal legislation, can significantly increase the already high penalties for Sherman Act violations.<sup>187</sup> For instance, the Sentencing Reform Act of 1984, when combined with the Sherman Act, allows penalties for violations of the Sherman Act to be based upon the violator's profit or the victim's loss.<sup>188</sup> This extension of the Sherman Act to criminal prosecution also carries with

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176. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998).

177. *Id.* See *Japan, Nippon Fax Case Rejected*, NAT. L. J., Jan. 12, 1998 (stating the Supreme Court rejected the case without comment). Nippon lawyers argued that the criminal prosecutions should not be allowed because the Sherman Act does not clearly say that it includes criminal penalties for wholly extraterritorial conduct. *Id.*

178. *Hartford*, 509 U.S. at 796.

179. *Nippon Paper*, 109 F.3d at 9.

180. See *infra* notes 181-90 and accompanying text (discussing the penalties and moral stigma which accompany criminal prosecution).

181. See *infra* notes 182-88 and accompanying text (noting the potential penalties for violation of the Sherman Act).

182. See generally 15 U.S.C. § 1 (1890) (as amended 15 U.S.C. § 1 (1964)).

183. *Id.*

184. *Id.*

185. *Id.*

186. See WORLD ANTITRUST, *supra* note 11, at 7:2:2.

187. *Id.*; see also *Plastic Dinnerware Price Fixing*, *supra* note 102 (quoting Assistant Attorney General Anne K. Bingaman in 1994 who said, "The days when corporate executives could regard antitrust penalties solely as a business cost are over").

188. See WORLD ANTITRUST, *supra* note 11, at 7:2:2

it the stigma of moral condemnation.<sup>189</sup> Criminal prosecution is a formal and solemn pronouncement of moral condemnation by the community.<sup>190</sup>

#### A. Facts

The facts in the *Nippon Paper* case are as follows: The United States brought criminal charges against Nippon Paper Industries, Co., Ltd., (NPI) alleging a violation of Section One of the Sherman Act.<sup>191</sup> NPI is a Japanese manufacturer of thermal fax paper.<sup>192</sup> A federal grand jury named NPI defendant in a 1995 indictment.<sup>193</sup> The indictment alleged that NPI engaged in anticompetitive activity consisting of intra-industry meetings to discuss and fix prices.<sup>194</sup> These meetings resulted in increased prices for fax paper in North America.<sup>195</sup> The conspirators achieved their objective of inflating prices by selling to unaffiliated trading houses in Japan on the condition that these trading houses would sell the fax paper at inflated prices to their subsidiaries in North America.<sup>196</sup> Subsidiaries in the United States then sold the fax paper to North American consumers at increased prices.<sup>197</sup> NPI oversaw the transactions to ensure that North American consumers paid inflated prices for fax paper.<sup>198</sup> None of the alleged criminal activity by NPI occurred in the United States.<sup>199</sup>

#### B. Analysis

The merits of the *Nippon Paper* case rest largely on statutory construction.<sup>200</sup> The First Circuit first explains that criminal prosecution for wholly extraterritorial conduct is “largely uncharted terrain” and that there is “no authority directly on

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189. See George K. Gardner, *Baily v. Richardson and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953) (explaining contempt by peers is punishment in itself).

190. See Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

191. *Nippon Paper*, 109 F.3d at 1.

192. *Id.* at 9.

193. See Wilke, *supra* note 13, at A1 (stating the indictment was part of a joint United States-Canadian investigation into the fax paper industry and into allegations of anticompetitive behavior within the industry). Several other Japanese fax paper companies were also indicted as a result of this joint investigation, including Kanzaki and Mitsubishi Corp. *Id.*

194. See *United States v. Nippon Paper Indus. Co.*, 944 F. Supp. 55, 58 (1996) (quoting the indictment at paragraph 7(b) which stated Nippon Paper and other Japanese fax paper companies “agreed to increase prices for fax paper to be imported in North America”); see also Wilke, *supra* note 13, at A1 (stating at the meetings the Japanese fax paper companies discussed prices, major orders, and new products).

195. *Nippon Paper*, 109 F.3d at 2.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 3.

this point.”<sup>201</sup> According to the First Circuit, it is common sense that courts should interpret the same language in the same section of the same act uniformly, regardless of whether the impetus for interpretation is criminal or civil. The *Hartford Fire* court affirmed that in civil cases Section One of the Sherman Act applied to wholly extraterritorial conduct having substantial and intended effect in the United States. The First Circuit explains accepted notions of statutory construction lead to the same result for criminal prosecution, stating: “It is a fundamental interpretive principle that identical words or terms used in different points of the same act are intended to have the same meaning.”<sup>202</sup> Therefore, the *Nippon Paper* court concludes Section One should be interpreted the same way in a criminal case. The First Circuit further reasons that the words of Section One of the Sherman Act have not changed since it held that wholly foreign conduct that has intended and substantial effect in the United States comes within the jurisdictional reach of Section One of the Sherman Act in civil actions.<sup>203</sup> The First Circuit explains that there is no reason to impute a different meaning to Section One simply because the case involved criminal rather than civil allegations.<sup>204</sup> The First Circuit reasons that to ascribe different meanings to the same language would be disingenuous.<sup>205</sup> Therefore, activities committed abroad with substantial and intended effects in the United States may form the basis for criminal prosecution under Section One of the Sherman Act.<sup>206</sup>

NPI and the Japanese government, amicus for NPI, set forth five reasons to support the argument that the reach of Section One should be measured differently in the criminal context than in the civil context.<sup>207</sup>

First, NPI, and amicus, cite the lack of precedent on this issue.<sup>208</sup> NPI argues this is the first time the United States has sought to extend Section One of the Sherman Act to criminal prosecution for wholly extraterritorial conduct.<sup>209</sup> The First Circuit’s answer to this argument is twofold: (1) there is a first time for everything,<sup>210</sup> and (2) the argument overstates the lack of precedent, as there is a plethora

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201. *Id.* at 4.

202. *Nippon Paper*, 109 F.3d at 5 (citing *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed. 2d 615 (1994), a case in which a single criminal penalty clause used the term ‘willfully violating’ in several provisions). *Id.* Identical terms in multiple places throughout a single statute normally have the same meaning. *Id.* The *Ratzlaf* Court interpreted the words ‘willfully violating’ as having the same meaning when applied in different contexts. *Id.*

203. *Nippon Paper*, 109 F.3d at 6.

204. *Id.*

205. *Id.*

206. *Id.* at 9.

207. *Id.* at 6.

208. *Id.* at 6.

209. *Id.* at 6.

210. *See id.* (concluding the lack of criminal actions under these circumstances is probably more a reflection of recent increases in globalization than evidence that criminal prosecution is inappropriate in this situation).



of analogous precedent.<sup>211</sup> The First Circuit cites cases in which a state's criminal statutes are applied to conduct which occurred entirely outside of the state's borders<sup>212</sup> and explains it is "not much of a stretch" to apply this concept internationally.<sup>213</sup>

NPI's second argument focuses upon the different strengths of presumption in civil and criminal cases. NPI argues the presumption against extraterritoriality is stronger in the criminal context than civil, pointing to *United States v. Bowman* (*Bowman*) to support this proposition.<sup>214</sup> In *Bowman*, the court cautioned that if the criminal law "is to be extended to include those [crimes] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard."<sup>215</sup> The *Nippon Paper* court explains the *Bowman* court never intended for a more resilient presumption in criminal cases.<sup>216</sup> Instead, *Bowman* merely reaffirmed the classic presumption against extraterritoriality which had been established in *American Banana*.<sup>217</sup> The court further explains, contrary to NPI's argument, *Bowman* actually supported the idea that the presumption is the same in criminal and civil proceedings.<sup>218</sup>

NPI further relies on the Restatement 3 of Foreign Relations Law and asserts Section 403 supports a distinction in criminal and civil cases dealing with extraterritorial activity.<sup>219</sup> Specifically NPI points to Comment f of Section 403 which reads, in part:

In the case of regulatory statutes that may give rise to both civil and criminal liability, such as the United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject

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211. See *id.* at 6 (citing *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) as analogous precedent). The *Strassheim* Court held, "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the state should succeed getting him within its power." *Id.*

212. *Nippon Paper*, 109 F.3d at 6.

213. *Id.*

214. See *Nippon Paper*, 109 F.3d at 6 (citing *United States v. Bowman*, 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149 (1922)).

215. *Id.*

216. *Id.*

217. *Id.*

218. See *id.* at 6 n.4 (explaining that *Nippon Paper* further relied on *United States v. United States Gypsum*, 438 U.S. 422 (1978) to support the argument that different strengths of presumption apply in criminal and civil cases). *Gypsum* held that to convict under the Sherman Act, criminal intent is required, but went on to explain that intent is not always a requirement for criminal prosecution. *Id.* Criminal intent is not a requirement when the conduct is per se illegal because of unquestionably anticompetitive effects. *Id.* Therefore, the *Gypsum* court did not differentiate between criminal and civil antitrust cases and does not support different strengths of presumption in criminal and civil cases. *Id.*

219. *Nippon Paper*, 109 F.3d at 7.

conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.<sup>220</sup>

The *Nippon Paper* court refutes this argument, noting the Restatement simply reaffirms the "classic presumption against extraterritoriality."<sup>221</sup> The *Nippon Paper* court explains a determination whether or not to prosecute wholly extraterritorial conduct is discretionary.<sup>222</sup>

NPI next claims Section One of the Sherman Act should not extend to criminal prosecution for wholly extraterritorial conduct because of the rule of lenity.<sup>223</sup> The rule of lenity provides, "In the course of interpreting statutes in criminal cases, a reviewing court should resolve ambiguities affecting a statute's scope in the defendant's favor."<sup>224</sup> According to the *Nippon Paper* court, there is no ambiguity in the present case.<sup>225</sup> Therefore, the rule of lenity is not applicable.<sup>226</sup> The Supreme Court in *Hartford Fire* conclusively established that Section One of the Sherman Act applies to wholly extraterritorial conduct.<sup>227</sup> An ambiguity does not exist merely because the courts and commentators have questioned the statute's interpretation.<sup>228</sup> The court explains the rule of lenity is inapplicable to the situation in the present case, and is suited only for those situations in which, after "seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended."<sup>229</sup> Therefore, the court ruled this argument is not applicable to the present situation.<sup>230</sup>

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220. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS, § 403 cmt. F (1987) (stating in full, "The principles governing jurisdiction to prescribe set forth in § 402 and in this section apply to criminal as well as to civil regulation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as the United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication").

221. *Nippon Paper*, 109 F.3d at 7.

222. *Id.*

223. See BLACK'S LAW DICTIONARY 1332 (6th ed. 1990) (defining "rule of lenity" as follows: "Where the intention of Congress is not clear from the act itself and reasonable minds might differ as to its intention, the court will adopt the less harsh meaning . . . The judicial doctrine by which courts decline to interpret criminal statutes so as to increase penalty imposed, absent clear evidence of legislative intent to do otherwise; in other words, where there is ambiguity in a criminal statute, doubts are resolved in favor of defendant . . . Under rule of lenity, statute establishing penalty which is susceptible of more than one meaning should be construed so as to provide most lenient penalty"). *Id.*

224. *Nippon Paper*, 109 F.3d at 7.

225. *Id.* at 8.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

NPI bases its final argument on the notion of international comity.<sup>231</sup> International comity is “a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.”<sup>232</sup> The *Nippon Paper* court explains, however, that the notion of international comity is appropriate only in two situations.<sup>233</sup> International comity is appropriate only when the laws of a country would require a defendant to act in a manner incompatible with the Sherman Act or in situations in which full compliance with the statutory schemes of both countries is impossible.<sup>234</sup> NPI’s international comity argument is attenuated in this situation because both Japanese and United States laws condemn NPI’s actions as illegal.<sup>235</sup>

### C. Reactions

Extension of United States antitrust laws to criminal prosecution for wholly extraterritorial conduct has sparked criticism by a number of foreign nations, particularly Japan.<sup>236</sup> The Japanese government entered the *Nippon Paper* case as amicus to *Nippon Paper* and argued that a finding against NPI would be a violation of international law and traditional notions of sovereignty.<sup>237</sup> Critics of the *Nippon Paper* case cite this as simply another example of the United States overreaching its limits on the international stage<sup>238</sup> and critics note that this overreaching by the United

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231. See BLACK’S LAW DICTIONARY 267 (6th ed. 1990) (defining “comity of nations” as “[t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws”); see also *Nippon Paper*, 109 F.3d at 8.

232. *Nippon Paper*, 109 F.3d at 8.

233. *Id.*

234. *Id.*

235. *Id.*

236. Wilke, *supra* note 13, at A1.

237. See Wu, *supra* note 108, at 6 (defining “sovereign immunity” as a doctrine of international law where domestic courts must refrain from asserting jurisdiction over foreign sovereigns); see also Wilke, *supra*, note 13, at A1 (explaining the entry of Japan into the case increased the stakes).

238. See Wilke, *supra* note 13, at A1 (noting that critics point to the Helms-Burton Act as another example of the United States reaching beyond its borders and into the sovereignty of other nations); see also Kern Alexander, *Trafficking in Expropriated Property: Civil Liability Under Helms-Burton*, 8 EUR. BUS. L. REV. 65, 78 (1997) (stating the Cuban Liberty and Democratic Solidarity Act, otherwise known as the Helms-Burton Act, was designed to increase pressure on the Castro regime). During the 1959 revolution, the Cuban government expropriated without compensation the property of U.S. entities and Cuban nationals. *Id.* Title III of the act would allow the Cuban nationals whose property was expropriated without compensation to sue any foreigners who benefit from the use of confiscated property. *Id.* The language of the act is broad, so broad that to fall within the ambit of this Act, one need only directly or indirectly benefit from confiscated property. *Id.* For example, all banks which make loans to persons who benefit economically from expropriated property, either directly or indirectly, will be subject to liability in U.S. Courts. *Id.* Any company with direct or indirect business dealings in Cuba and a U.S. presence would be subject to lawsuits in U.S. Courts. *Id.*

States often meets with retaliation or protective measures by foreign nations.<sup>239</sup> Many economists and trade experts have similar reservations about the *Nippon Paper* decision.<sup>240</sup> William Niskanen, former Reagan-administration chief economist, believes the policy violates the spirit of trade law.<sup>241</sup> Robert Litan, a former official at the DOJ, warns forbearance is appropriate in particular circumstances.<sup>242</sup> Litan explains the United States' assertion of jurisdiction abroad may be necessary at times, but states doing so "can create real economic and foreign policy conflicts with other countries, so we need to pick these cases carefully."<sup>243</sup> Of particular importance to this discussion, the Japanese government has warned that the *Nippon Paper* decision could seriously frustrate efforts by Japan antitrust enforcement officials to coordinate competition laws between the United States and Japan.<sup>244</sup>

## VII. CONCLUSION

The *Nippon Paper* decision and reactions by the Japanese government point to the difficulties which the United States faces in its efforts to effectively enforce transnational violations of antitrust law.<sup>245</sup> The argument regarding the enforcement of transnational antitrust violations is circular. Coordination and positive comity are effective solutions to the crisis in transnational enforcement of antitrust law. These approaches are mindful of international law and sovereignty concerns. They have proven to be successful in many situations.<sup>246</sup> Nevertheless, full realization of success through these approaches often takes a long time. In the mean time, the United States must protect itself from the damaging effects of foreign anticompetitive activity.<sup>247</sup> Therefore, the United States resorts to application of its laws to wholly

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239. See Alexander, *supra* note 238, at 78 (explaining that critics disapprove of the Helms-burton act as a violation of international law). Several countries reacted to the passage of the Helms-Burton Act with self-protective measures. *Id.* Canada and Mexico, for example, both condemn the United States' actions as violative of international law and have taken actions to avoid the ramifications of the act. *Id.* Mexico's Senate recently approved a law which imposes sanctions upon Mexican companies that submit to the lawsuits and sanctions imposed by the United States. *Id.*

240. Wilke, *supra* note 13, at A1.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. See *supra* notes 236-44 and accompanying text (noting the decision has sparked criticism by a number of foreign nations, including Japan). Japan warned that the *Nippon Paper* decision could seriously undermine efforts by Japanese antitrust enforcement officials to coordinate competition laws between the United States and Japan. *Id.*

246. See *supra* notes 73-122 and accompanying text (discussing coordination and positive comity as approaches to the transnational enforcement of antitrust law and recent successes through these approaches).

247. See *supra* notes 23-34 and accompanying text (noting that Japan is a leading U.S. trade partner). It is a nation fraught with anticompetitive activity. *Id.* Japan's failure to effectively enforce its antitrust laws to the extent desired by the United States hurts American businesses and consumers. *Id.*

extraterritorial conduct.<sup>248</sup> This application of U.S. law to foreign conduct often hinders efforts which have been made through positive comity and impedes attempts to coordinate enforcement activity.<sup>249</sup> Application of U.S. laws leads many nations to self-protective measures and an unwillingness to continue negotiations towards effective coordinated enforcement activity.<sup>250</sup>

This appears to be the situation which the United States presently confronts with Japan. Efforts through positive comity and towards coordinated enforcement action have been forward moving at a painstakingly slow pace.<sup>251</sup> The inherent social and economic differences between the United States and Japan make this a particularly difficult process.<sup>252</sup> Full realization of coordinated enforcement action between the United States and Japan may take years, if it is ever fully achieved. In the mean time, Japan's lax enforcement of its antitrust laws is having serious effects on the United States economy.<sup>253</sup> In order to protect U.S. consumers and businesses, U.S. officials have increased the stakes for foreign individuals and businesses by extending the Sherman Act to include criminal prosecution for wholly extraterritorial antitrust violations which have substantial effect within the United States.<sup>254</sup> The United States' goal, enforcement of transnational antitrust violations through positive comity and coordinated enforcement action, may be hindered by this recent decision.<sup>255</sup> However, this may be the only means by which the United States can protect American consumers and corporations from Japan's failure to effectively enforce its antitrust laws.<sup>256</sup>

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248. See *supra* notes 123-43 and accompanying text (detailing the third approach, application of U.S. antitrust laws to foreign conduct, and concluding this approach is the least effective of the three).

249. See *supra* note 136 and accompanying text (discussing the implementation of blocking statutes as an obstacle to foreign judgments).

250. See *supra* notes 135-43 and accompanying text (explaining many nations enact blocking statutes which limit access to evidence or limit the U.S. judgments).

251. See *supra* notes 76-77 and accompanying text (detailing efforts which Japan has made towards achieving effective enforcement of transnational antitrust violations).

252. See *supra* notes 35-71 and accompanying text (discussing the development of economic systems in the United States and Japan and key differences which make the coordination of antitrust enforcement activity between the United States and Japan particularly difficult).

253. See *supra* notes 23-34 and accompanying text (noting the particular importance to developing an effective system for enforcing antitrust violations between the United States and Japan). See generally Seita & Tamura, *supra* note 24 (stating that Japan is a leading United States trade partner).

254. See *Nippon Paper*, 109 F.3d at 1.

255. See *supra* note 244 and accompanying text (explaining that the Japanese government threatened that this decision could frustrate efforts by Japanese antitrust officials to coordinate competition laws between the United States and Japan).

256. See Klein & Bansal, *supra* note 25, at 192 (writing "Until, however, the full potential of the approaches of coordination and positive comity are realized through commitment by each country . . . we have no choice to keep open the option of applying our own laws to conduct occurring abroad but having effects within our territory. In short, at least for now, only through the application of all three approaches can effective antitrust enforcement be achieved in global industries").