Exhibit 16

West Reporter Image (PDF)

475 U.S. 574, 106 S.Ct. 1348, 7 ITRD 2057, 89 L.Ed.2d 538, 54 USLW 4319, 1986-1 Trade Cases P 67,004, 4 Fed.R.Serv.3d 368

Briefs and Other Related Documents

Supreme Court of the United States
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al., Petitioners
v.
ZENITH RADIO CORPORATION et al.
No. 83-2004.
Argued Nov. 12, 1985.
Decided March 26, 1986.

American manufacturers of television sets brought suit against Japanese manufacturers alleging that the Japanese manufacturers had illegally conspired to drive the American manufacturers from the American market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by the Japanese manufacturers in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. The United States District Court for the Eastern District of Pennsylvania, 513 F.Supp. 1100, granted summary judgment in favor of the Japanese manufacturers. The United States Court of Appeals for the Third Circuit, 723 F.2d 238, affirmed in part and reversed in part, and the Japanese manufacturers petitioned for certiorari. The Supreme Court, Justice Powell, held that: (1) American television manufacturers could not recover antitrust damages against Japanese television manufacturers for any conspiracy by the Japanese manufacturers to charge higher than competitive prices in the American market since such conduct could not injure the American manufacturers who stood to gain from any such conspiracy, and (2) in order to survive a motion for summary judgment by Japanese manufacturers, American manufacturers were required to establish a material issue as to whether the Japanese manufacturers entered into an illegal conspiracy which caused the American manufacturers to suffer cognizable injury; because the factual context rendered the claims of the American manufacturers implausible, the American manufactures were required to offer more persuasive evidence to support their claims than would otherwise be necessary.

Reversed and remanded.

Justice White filed a dissenting opinion in which Justice Brennan, Justice Blackmun and Justice Stevens joined.

West Headnotes

[1] KeyCite Notes

29T Antitrust and Trade Regulation
29TXVI Antitrust and Foreign Trade
29Tk945 k. In General. Most Cited Cases
(Formerly 265k12(7))

American television manufacturers could not recover antitrust damages from Japanese television manufacturers based solely on an alleged cartelization of the Japanese market since American antitrust laws do not regulate the competitive conditions of other nations' economies.

[2] KeyCite Notes

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk963 Injury to Business or Property
29Tk963(3) k. Particular Cases. Most Cited Cases
(Formerly 265k28(2))

American television manufacturers could not recover antitrust damages against Japanese television manufacturers for any conspiracy by the Japanese manufacturers to charge higher than competitive prices in the American market since such conduct could not injure the American manufacturers who stood to gain from any such conspiracy; furthermore, the American manufacturers could not recover for a conspiracy to impose nonprice restraints that had the effect of either raising market prices or limiting output.

[3] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 k. Burden of Proof. Most Cited Cases

In order to survive a motion for summary judgment by Japanese manufacturers of television sets, American manufacturers were required to establish a material issue as to whether the Japanese manufacturers entered into an illegal conspiracy which caused the American manufacturers to suffer cognizable antitrust injury; because the factual context rendered implausible the claims of the American manufacturers that the Japanese manufacturers had conspired to increase prices in Japan while reducing them in the United States, the American manufacturers were required to offer more persuasive evidence to support their claims than would otherwise be necessary.

[4] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 k. Burden of Proof. Most Cited Cases

To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

***1349 *574** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.2d 499.

Petitioners are 21 Japanese corporations or Japanese-controlled American corporations that manufacture and/or sell "consumer electronic products" (CEPs) (primarily television sets). Respondents are American corporations that manufacture and sell television sets. In 1974, respondents brought an action in Federal District Court, alleging that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging

In a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. Respondents claim that various portions of this scheme violated, *inter alia,* § § 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. After several years of discovery, petitioners moved for summary judgment on all claims. The District Court then directed the parties to file statements listing all the documentary evidence that would be offered if the case went to trial. After the statements were filed, the court found the bulk of the evidence on which respondents relied was inadmissible, that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy, and that any inference of conspiracy was unreasonable. Summary judgment therefore was granted in petitioners' favor. The Court of Appeals reversed. After determining that much of the evidence excluded by the District Court was admissible, the Court of Appeals held that the District Court erred in granting a summary judgment and that there was both direct and circumstantial evidence of a conspiracy. Based on inferences drawn from the evidence, the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded ***1350** by excess profits obtained in the Japanese market.

Held: The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. Pp. 1354-1362.

(a) The "direct evidence" on which the Court of Appeals relied-petitioners' alleged supracompetitive pricing in Japan, the "five company ***575** rule" by which each Japanese producer was permitted to sell only to five American distributors, and the "check prices" (minimum prices fixed by agreement with the Japanese Government for CEPs exported to the United States) insofar as they established minimum prices in the United States-cannot by itself give respondents a cognizable claim against petitioners for antitrust damages. P. 1354.

(b) To survive petitioners' motion for a summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. If the factual context renders respondents' claims implausible, *i.e.,* claims that make no economic sense, respondents must offer more persuasive evidence to support their claims than would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. Pp. 1355-1357.

(c) Predatory pricing conspiracies are by nature speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment. Pp. 1357-1359.

(d) Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies. P. 1360.

(e) The Court of Appeals erred in two respects: the "direct evidence" on which it relied had little, if any, relevance to the alleged predatory pricing conspiracy, and the court failed to consider the absence of a plausible motive to engage in predatory pricing. In the absence of any rational motive to conspire, neither petitioners' pricing practices, their conduct in the Japanese market, nor their agreements respecting prices and distributions in the American market sufficed to create a "genuine issue for trial" under Federal Rule of Civil Procedure 56(e). On remand, the Court of Appeals may consider whether there is other, unambiguous evidence of the alleged conspiracy. Pp. 1360-1362.

723 F.2d 238 (CA3 1983), reversed and remanded.

***576** POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post,* p. ---.

Donald J. Zoeller argued the cause for petitioners. With him on the briefs were *John L. Altieri, Jr., Harold G. Levison, Peter J. Gartland, James S. Morris, Kevin R. Keating, Charles F. Schirmeister, Ira M. Millstein, A. Paul Victor, Jeffrey L. Kessler, Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Donald F. Turner,* and *Henry T. Reath.*

Charles F. Rule argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Wallace, Charles S. Stark, Robert B. Nicholson, Edward T. Hand, Richard P. Larm, Abraham D. Sofaer,* and *Elizabeth M. Teel.*

Edwin P. Rome argued the cause for respondents. With him on the brief were *William H. Roberts, Arnold I. Kalman, Philip J. Curtis,* and *John Borst, Jr.**

* Briefs of *amici curiae* urging reversal were filed for the Government of Japan by *Stephen M. Shapiro;* and for the American Association of Exporters and Importers et al. by *Robert Herzstein* and *Hadrian R. Katz.*

Briefs of *amici curiae* were filed for the Government of Australia et al. by *Mark R. Joelson* and *Joseph P. Griffin;* and for the Semiconductor Industry Association by *Joseph R. Creighton.*

Justice POWELL delivered the opinion of the Court.

This case requires that we again consider the standard district courts must apply ****1351** when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. ***577** *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238 (CA3 1983); 513 F.Supp. 1100 (ED Pa.1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that constitute the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs)-for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,[FN1] claiming that petitioners had illegally conspired to drive ***578** American firms from the American CEP market. According to respondents, the gist of this conspiracy was a " 'scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to

and sold in the United States.' " 723 F.2d, at 251 (quoting respondents' preliminary pretrial memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. 513 F.Supp., at 1125. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated § § 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, § 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

FN1. NUE had filed its complaint four years earlier, in the District Court for the District of New Jersey. Zenith's complaint was filed separately in 1974, in the Eastern District of Pennsylvania. The two cases were consolidated in the Eastern District of Pennsylvania in 1974.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them. The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.[FN2]

FN2. The inadmissible evidence included various government records and reports, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1125 (ED Pa.1980), business documents offered pursuant to various hearsay exceptions, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1190 (ED Pa.1980), and a large portion of the expert testimony that respondents proposed to introduce. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1313 (ED Pa.1981).

****1352** The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged ***579** conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. 513 F.Supp., at 1125-1127. After reviewing the evidence both by category and *in toto,* the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act § 2 claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the § 1 claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found no genuine issue of fact as to the conspiracy, it entered judgment in petitioners' favor on those claims as well.[FN3]

FN3. The District Court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1190 (ED Pa.1980). Respondents appealed this ruling, and the Court of Appeals reversed in a separate opinion issued the same day as the opinion concerning respondents' other claims. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 319 (CA3 1983).Petitioners ask us to review the Court of Appeals' Antidumping Act decision along with its decision on the rest of this mammoth case. The Antidumping Act claims were not, however, mentioned in the questions presented in the petition for certiorari, and they have not been independently argued by the parties. See this Court's Rule 21.1(a). We therefore decline the invitation to review the Court of Appeals' decision on those claims.

***580** B

The Court of Appeals for the Third Circuit reversed.[FN4] The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. 723 F.2d, at 260-303. These evidentiary rulings are not before us. See 471 U.S. 1002, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985) (limiting grant of certiorari).

> FN4. As to 3 of the 24 defendants, the Court of Appeals affirmed the entry of summary judgment. Petitioners are the 21 defendants who remain in the case.

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," 723 F.2d, at 304, but it found that "the legal problem ... is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." *Id.*, at 304-305. Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. *Id.*, at 305. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

1. The Japanese market for CEPs was characterized by oligopolistic behavior,**1353 with a small number of producers meeting regularly and exchanging information on price and other matters. *Id.*, at 307. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry. *Ibid.*

2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to *581 operate at something approaching full capacity in order to make a profit. *Ibid.*

3. Petitioners' plant capacity exceeded the needs of the Japanese market. *Ibid.*

4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. *Id.*, at 310. The parties refer to these prices as the "check prices," and to the agreements that require them as the "check price agreements."

5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*

6. Petitioners undercut their own check prices by a variety of rebate schemes. *Id.*, at 311. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

Based on inferences from the foregoing conclusions,[FN5] the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

> FN5. In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices which produced losses, often as high as twenty-five percent on sales." 723 F.2d, at 311. The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence. See n. 19, *infra.*

***582** The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check-price agreements, liability could not be premised on those agreements. The court concluded that this case did not present any issue of sovereign compulsion, because the check-price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese Government, notwithstanding a statement to that effect by MITI itself. *Id.*, at 315.

We granted certiorari to determine (I) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (II) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U.S. 1002, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985). We reverse on the first issue, but do not reach the second.

II

[1] [2] We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. ***1354** *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law ¶ 236d (1978).[FN6] Nor can respondents recover damages for ***583** any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940), but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five-company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F.2d, at 304-305.

> FN6. The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 1413, 8 L.Ed.2d 777 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). The effect on which respondents rely is the artificially depressed level of prices for CEPs in the United States.Petitioners' alleged cartelization of the Japanese market could not have caused that effect over a period of some two decades. Once petitioners decided, as respondents allege, to reduce output and raise prices in the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. The most plausible conclusion is that petitioners chose the latter option because it would be more profitable than the former. That choice does not flow from the cartelization of the Japanese market. On the contrary, were the Japanese market perfectly competitive petitioners would still have to choose whether to sell goods overseas, and would still presumably make that choice based on their profit expectations. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

***584** Respondents nevertheless argue that these supposed conspiracies, if not themselves

grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.[FN7] The thrust of respondents' argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting ***1355** monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

FN7. Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy-whether there is one conspiracy or several-respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 538-540, 103 S.Ct. 897, 908-909, 74 L.Ed.2d 723 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); see also Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, 93 Yale L.J. 1309 (1984). That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury.

The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,[FN8] ***585** if proved,[FN9] would be a *per se* violation of § 1 of the Sherman Act. 723 F.2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

FN8. Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. *E.g.*, *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 238 U.S.App.D.C. 309, 331-336, 740 F.2d 980, 1002-1007 (1984), cert. denied, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985). In such cases, "predatory pricing" means pricing below some appropriate measure of cost. *E.g.*, *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-235 (CA1 1983); see *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 698, 701, 702, n. 14, 87 S.Ct. 1326, 1333, 1335, 1336, n. 14, 18 L.Ed.2d 406 (1967).There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (I) pricing below the level necessary to sell their products, or (II) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

FN9. We do not consider whether recovery should *ever* be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. See generally Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 709-718 (1975) (discussing cost-based test for use in § 2 cases). As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one. See Part IV-A, *infra*.

III

[3] To survive petitioners' motion for summary judgment,[FN10] respondents must establish that there is a genuine issue of materialfact ***586*** as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed.Rule Civ.Proc. 56(e); [FN11] *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. *Supra,* at 1354. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," ****1356*** *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S., at 489, 97 S.Ct., at 697, because they actually tended to benefit respondents. *Supra,* at 1354. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

FN10. Respondents argued before the District Court that petitioners had failed to carry their initial burden under Federal Rule of Civil Procedure 56(c) of demonstrating the absence of a genuine issue of material fact. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Cf. *Catrett v. Johns-Manville Sales Corp.*, 244 U.S.App.D.C. 160, 756 F.2d 181, cert. granted, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985). That issue was resolved in petitioners' favor, and is not before us.

FN11. Rule 56(e) provides, in relevant part:"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Second, the issue of fact must be "genuine." Fed.Rules Civ.Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), [FN12] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943, 70 S.Ct. 423, 94 L.Ed. 581 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Problems***587*** in Drafting and Interpreting Procedural Codes and Rules, 3 Vand.L.Rev. 493, 504-505 (1950). Cf. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed.Rule Civ.Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592.

FN12. See n. 10, *supra.*

It follows from these settled principles that if the factual context renders respondents' claim implausible-if the claim is one that simply makes no economic sense-respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U.S., at 278-279, 88 S.Ct., at 1587. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.*, at 277, 88

S.Ct., at 1586. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*, at 280, 88 S.Ct., at 1588.

[4] Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." ***588** *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764, 104 S.Ct., at 1470. See also *Cities Service, supra*, 391 U.S., at 280, 88 S.Ct., at 1588. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764, 104 S.Ct., at 1471. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that ****1357** could not have harmed respondents. See *Cities Service, supra*, 391 U.S., at 280, 88 S.Ct., at 1588.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

IV

A

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, ***589** the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

> "Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, The Antitrust Paradox 145 (1978).

See also McGee, Predatory Pricing Revisited, 23 J.Law & Econ. 289, 295-297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U.Chi.L.Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more

rarely successful. See, *e.g.*, Bork, *supra,* at 149-155; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 699 (1975); Easterbrook, *supra;* Koller, The Myth of Predatory Pricing-An Empirical Study, ***590** 4 Antitrust Law & Econ.Rev. 105 (1971); McGee, Predatory Price Cutting: The *Standard Oil (N.J.) Case,* 1 J.Law & Econ. 137 (1958); McGee, Predatory Pricing Revisited, 23 J.Law & Econ., at 292-294. See also *Northeastern Telephone Co. v. American Telephone & Telegraph Co.,* 651 F.2d 76, 88 (CA2 1981) ("[N]owhere in the recent outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase"), cert. denied, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982).

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to ***1358** charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits***591** what they earlier gave up in below-cost prices. See *Northeastern Telephone Co. v. American Telephone & Telegraph Co., supra,* at 89; Areeda & Turner, 88 Harv.L.Rev., at 698. Two decades after their conspiracy is alleged to have commenced,[FN13] petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of petitioners. 6 App. to Brief for Appellant in No. 81-2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F.2d, at 316.[FN14] Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing-that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.[FN15]

FN13. NUE's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1953. NUE Complaint ¶ 52; Zenith Complaint ¶ 39.

FN14. During the same period, the number of American firms manufacturing television sets declined from 19 to 13. 5 App. to Brief for Appellant in No. 81-2331 (CA3), p. 1961a. This decline continued a trend that began at least by 1960, when petitioners' sales in the United States market were negligible. *Ibid.* See Zenith Complaint ¶¶ 35, 37.

FN15. Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Judge Easterbrook, commenting on this case in a law review article, offers the following sensible assessment:"The plaintiffs [in this case] maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United

States firms out of business, they could not recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation-recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition." Easterbrook, The Limits of Antitrust, 63 Texas L.Rev. 1, 26-27 (1984) (footnotes omitted).

592** ****1359** The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.[FN16] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial-as would likely be necessary593** in order to drive out the competition [FN17] -petitioners would most likely have to sustain their cartel for years simply to break even.

FN16. The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

FN17. The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and-as indicated above-the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[FN18]

FN18. The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

B

In *Monsanto,* we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *Monsanto,* 465 U.S., at 762-764, 104 S.Ct., at 1470. ***594** Respondents, petitioners' competitors, seek to hold petitioners liable for ****1360** damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.[FN19] But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto, supra,* at 763-764, 104 S.Ct., at 1470. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227, 234 (CA1 1983).

FN19. Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 505 F.Supp., at 1356-1363. Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. See 723 F.2d, at 277-282. We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV-A, *supra,* that suggest that such conduct is irrational.

In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra,* at 1357-1359, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the ***595** gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. See Easterbrook, The Limits of Antitrust, 63 Texas L.Rev. 1, 26 (1984). Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.

V

As our discussion in Part IV-A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. Cf. *Cities Service,* 391 U.S., at 279, 88 S.Ct., at 1587. The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." 723 F.2d, at 304. The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

****1361** The "direct evidence" on which the court relied was evidence of *other* combinations,

not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' ***596** claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market-the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, see *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), but its natural effect would be to raise market prices rather than reduce them.[FN20] Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

> FN20. The Court of Appeals correctly reasoned that the five company rule might tend to insulate petitioners from competition with each other. 723 F.2d, at 306. But this effect is irrelevant to a conspiracy to price predatorily. Petitioners have no incentive to underprice each other if they already are pricing *below* the level at which they could sell their goods. The far more plausible inference from a customer allocation agreement such as the five company rule is that petitioners were conspiring to *raise* prices, by limiting their ability to take sales away from each other. Respondents-petitioners' competitors-suffer no harm from a conspiracy to raise prices. *Supra,* at 1354. Moreover, it seems very unlikely that the five company rule had any significant effect of any kind, since the "rule" permitted petitioners to sell to their American subsidiaries, and did not limit the number of distributors to which the subsidiaries could resell. 513 F.Supp., at 1190.

That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations,***597** the conduct does not give rise to an inference of conspiracy. See *Cities Service, supra,* 391 U.S., at 278-280, 88 S.Ct., at 1587-1588. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below-market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." Fed.Rule Civ.Proc. 56(e).[FN21]

> FN21. We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.*, at 763-764, 104 S.Ct., at 1470. See *supra,* at 1356.

****1362** On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "ten[d] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically***598** senseless conspiracy. *Monsanto,* 465 U.S., at 764, 104 S.Ct., at 1471. In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in Part II, *supra,* respondents could not have suffered a cognizable injury from any action that *raised* prices in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check-price agreements. The sovereign compulsion question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, with whom Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), and *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962). After surveying the massive record, including very ***599** significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§ 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that ***1363** "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Ante,* at 1356 (quoting *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592). I also agree that " '[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.' " *Ante,* at 1356 (quoting *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

> "[T]he Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude ***600** that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante,* at 1353.

In a similar vein, the Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra,* as holding that "courts should not permit factfinders to infer conspiracies when such inferences are

implausible...." *Ante,* at 1360. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.[FN1] These holdings in no way undermine***601*** the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

> FN1. The Court adequately summarizes the quite fact-specific holding in *Cities Service. Ante,* at 1356.In *Monsanto,* the Court held that a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is not, *standing alone,* sufficient to create a jury question. 465 U.S., at 763-764, 104 S.Ct., at 1470. To understand this holding, it is important to realize that under *United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), it is permissible for a manufacturer to announce retail prices in advance and terminate those who fail to comply, but that under *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will sell the goods. Thus, a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is lawful under *Colgate, unless* the termination is pursuant to a shared understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. *Monsanto* holds that to establish liability under *Dr. Miles,* more is needed than evidence of behavior that is consistent with a distributor's exercise of its prerogatives under *Colgate.* Thus, "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U.S., at 764, 104 S.Ct., at 1471. *Monsanto* does *not* hold that if a terminated dealer produces some further evidence of conspiracy beyond the bare fact of postcomplaint termination, the judge hearing a motion for summary judgment should balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions***1364*** that invade the factfinder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ante,* at 1355, n. 8. This statement is premised on the assumption that "[a]n agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or ... some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasingexports ***602*** to this country resulted in depressed prices here, which harmed respondents.[FN2] Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that

petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.[FN3]

FN2. Dr. DePodwin summarizes his view of the harm caused by Japanese cartelization as follows:"When we consider the injuries inflicted on United States producers, we must again look at the Japanese television manufacturers' export agreement as part of a generally collusive scheme embracing the Japanese domestic market as well. This scheme increased the supply of television receivers to the United States market while restricting supply in the Japanese market. If Japanese manufacturers had competed in both domestic and export markets, they would have sold more in the domestic market and less in the United States. A greater proportion of Japanese production capacity would have been devoted to domestic sales. Domestic prices would have been lower and export prices would have been higher. The size of the price differential between domestic and export markets would have diminished practically to the vanishing point. Consequently, competition among Japanese producers in both markets would have resulted in reducing exports to the United States and United States prices would have risen. In addition, investment by the United States industry would have increased. As it was, however, the influx of sets at depressed prices cut the rates of return on television receiver production facilities in the United States to so low a level as to make such investment uneconomic."We can therefore conclude that the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements. Thus, the collusive behavior of Japanese television manufacturers resulted in a very severe injury to those American television manufacturers, particularly to National Union Electric Corporation, which produced a preponderance of television sets with screen sizes of nineteen inches and lower, especially those in the lower range of prices." 5 App. to Brief for Appellants in No. 81-2331 (CA3), pp. 1629a-1630a.

FN3. The DePodwin Report has this, among other things, to say in summarizing the harm to respondents caused by the five company rule, exchange of production data, price coordination, and other allegedly anti-competitive practices of petitioners:"The impact of Japanese anti-competitive practices on United States manufacturers is evident when one considers the nature of competition. When a market is fully competitive, firms pit their resources against one another in an attempt to secure the business of individual customers. However, when firms collude, they violate a basic tenet of competitive behavior, i.e., that they act independently. United States firms were confronted with Japanese competitors who collusively were seeking to destroy their established customer relationships. Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel members would not become involved. But just as importantly, each Japanese firm would be assured that what was already a low price level for Japanese television receivers in the United States market would not be further depressed by the actions of its Japanese associates."The result was a phenomenal growth in exports, particularly to the United States. Concurrently, Japanese manufacturers, and the defendants in particular, made large investments in new plant and equipment and expanded production capacity. It is obvious, therefore, that the effect of the Japanese cartel's concerted actions was to generate a larger volume of investment in the Japanese television industry than would otherwise have been the case. This added capacity both enabled and encouraged the Japanese to penetrate the United States market more deeply than they would have had they competed lawfully." *Id.*, at 1628a-1629a.For a more complete statement of DePodwin's explanation of how the alleged cartel operated, and the harms it caused respondents, see *id.*, at 1609a-1642a. This material is summarized in a chart found *id.*, at 1633a.

***603 **1365** The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents. [FN4]

FN4. In holding that Parts IV and V of the Report had been improperly excluded, the

> Court of Appeals said:"The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese television cartel. 505 F.Supp. at 1342-46. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue." *In re Japanese Electronics Products Antitrust Litigation,* 723 F.2d 238, 280 (CA3 1983).The Court of Appeals had similar views about Parts VI and VII.

***604** The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. See, *e.g., ante,* at 1360. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III-B, *infra,* I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [T]he 'direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Ante,* at 1361. The Court's position is without substance.

A

The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five company rule and check prices as " 'direct evidence' of a conspiracy that injured respondents." *Ante,* at 1354 (citing *In re Japanese Electronics Products Antitrust Litigation,* 723 F.2d 238, 304-305 (CA3 1983)). The passage from the Third ***605** Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Ibid.* The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five company rule could support a finding of antitrust injury to respondents.[FN5] The Third ****1366** Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id.,* at 306, 310-311. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five company rule was not a simple price-raising device:

> FN5. I use the Third Circuit's analysis of the five company rule by way of example; the court did an equally careful analysis of the parts the cartel activity in Japan and the check prices could have played in an actionable conspiracy. See generally *Id.,* at 303-311.In discussing the five-company rule, I do not mean to imply any conclusion on the validity of petitioners' sovereign compulsion defense. Since the Court does not reach this issue, I see no need of my addressing it.

"[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id.,* at 311.
I see nothing erroneous in this reasoning.

B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But ***606** the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. *Ibid.* The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors ... that suggest that such conduct is irrational." *Ante,* at 1360, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." 723 F.2d, at 282. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need-nor do I-to address the District Court's analysis point by point. The District Court's criticisms of DePodwin's***607** methods are arguments that a factfinder should consider.

IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm ****1367** the judgment below and remand this case for trial.

U.S.Pa.,1986.
Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.
475 U.S. 574, 106 S.Ct. 1348, 7 ITRD 2057, 89 L.Ed.2d 538, 54 USLW 4319, 1986-1 Trade Cases P 67,004, 4 Fed.R.Serv.3d 368

Briefs and Other Related Documents (Back to top)

- 1985 WL 669662 (Appellate Brief) Reply Brief for Petitioners (Oct. 24, 1985)
- 1985 WL 669661 (Appellate Brief) Brief for Respondents (Oct. Term 1985)
- 1985 WL 669668 (Appellate Brief) Brief of the Semiconductor Industry Association as Amicus Curiae in Support of Respondents (Sep. 06, 1985)
- 1985 WL 669667 (Appellate Brief) Brief for the United States as Amicus Curiae Supporting Petitioners (Jun. 17, 1985)
- 1985 WL 669666 (Appellate Brief) Motion of American Association of Exporters and Importers and Consumers for World Trade for Leave to File Brief as Amici Curiae and Brief as Amici Curiae in Support of the Petitioners (Jun. 16, 1985)
- 1985 WL 669660 (Appellate Brief) Brief for Petitioners (Jun. 14, 1985)
- 1985 WL 669665 (Appellate Brief) Motion for Leave to File Brief Amici Curiae and Brief of the Governments of Australia, Canada, France, and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners (Jun. 14, 1985)
- 1985 WL 669664 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief for the Government of Japan as Amicus Curiae in Support of Petitioners (Jun. 04, 1985)
- 1985 WL 669659 (Appellate Brief) Supplemental Brief for Petitioners Pursuant to Rule 22.6 (Jan. 23, 1985)

• 1985 WL 669658 (Appellate Brief) Supplemental Brief of Respondents In Response to the Brief of the United States as Amicus Curiae (Jan. 14, 1985)
• 1985 WL 669663 (Appellate Brief) Brief for The United States as Amicus Curiae (Jan. 04, 1985)
• 1984 WL 565879 (Appellate Brief) Supplemental Brief of Petitioners (Jul. 23, 1984)
• 1984 WL 565878 (Appellate Brief) Reply Brief for Petitioners (Jul. 18, 1984)
• 1984 WL 565877 (Appellate Brief) Supplemental Brief of Respondents (Jul. 17, 1984)
• 1984 WL 565881 (Appellate Brief) Motion of American Association of Exporters and Importers and Consumers for World Trade for Leave to File Brief as Amici Curiae and Brief as Amici Curiae in Support of the Petition for a Writ of Certiorari (Jul. 07, 1984)
• 1984 WL 565880 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief of the Government of Japan as Amicus Curiae in Support of the Petition for A Writ of Certiorari (Jul. 06, 1984)
END OF DOCUMENT

 West Reporter Image (PDF)

Exhibit 17

Not Reported in F.Supp., 1982 WL 1906 (W.D.Wash.), 1982-83 Trade Cases P 65,010
United States District Court; W.D. Washington.

United States

v.

C. Itoh & Co., Ltd., Kyokuyo Co., Ltd., Mitsui & Co., Ltd., Nippon Reizo Kaisha, Ltd., Nippon Suisan Kaisha, Ltd., Shinko Sangyo Trading Co., Ltd., Taiyo Fishery Co., Ltd., and Toshoku Ltd.

No. C-82-810

Entered October 20, 1982

VOORHEES, D. J.

Final Judgment

***1** Plaintiff United States of America, having filed its complaint in this case, and plaintiff and defendants, by their respective attorneys having consented to waive, solely for the purpose of this Final Judgment, their rights to contest the jurisdiction of the Court over their persons, and having further consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby,

Ordered, Adjudged, and Decreed as follows:

I.

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against each defendant under Section 1 of the Sherman Act (15 U. S. C. § 1).

II.

[*Definitions*]

As used in this Final Judgment, the term:

(A) "Person" shall mean any individual, corporation, partnership, firm, association, or other business or legal entity;

(B) "Processed seafood" shall mean any fish or shellfish prepared in or off the shore of Alaska by any commercial process, including canning, packing, freezing, or the addition of chemical substances;

(C) "JMPIA" shall mean the Japan Marine Products Importers Association and includes any formal or informal committee or subcommittee thereof;

(D) "Importer" shall mean any person, including each of the defendants, that purchases processed seafood from U. S. persons for resale in Japan;

(E) "Japanese translation" shall mean an accurate Japanese language translation of this Final Judgment.

III.

[*Applicability*]

This Final Judgment applies to the defendants, their successors and assigns and to their respective subsidiaries, officers, directors, agents and employees and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Purchase Price Fix; Information Exchange*]

Each defendant is enjoined from:

(A) Entering into, adhering to, maintaining, furthering, participating in, or enforcing any agreement, arrangement, understanding, combination, or conspiracy with any other importer or group of importers to fix, maintain, establish, or adhere to the prices, range of prices, or other terms or conditions for the purchase of processed seafood from any U. S. person or persons;

(B) Communicating with any other importer or group of importers to exchange information or opinions concerning (i) current season or future prices for the purchase of processed seafood from any U. S. person or persons; (ii) current season or future price offers or counteroffers made or received, to be made, or under consideration for the purchase of processed seafood from any U. S. person or persons; (iii) strategy, timing, or conduct of negotiations for the current season or future purchases of processed seafood from any U. S. person or persons; or (iv) quantity of processed seafood being or to be purchased from any U. S. person or persons; and

***2** (C) Attending or participating in any meeting with any other importer or group of importers

during which such defendant knows or has been advised that any importer will discuss any subject listed in paragraph IV(B) hereof.

V.

[*Permitted Activities*]

Except to the extent undertaken for the purpose of circumventing the prohibitions of Section IV hereof, nothing contained in this Final Judgment shall prohibit:

(A) Any necessary communication or negotiation between a defendant and any other person in connection with a contemplated or actual purchase or sale of processed seafood between such persons;

(B) Transactions or communications between a defendant and its parent or subsidiary or between the officers, directors, agents or employees thereof when acting in such capacity;

(C) Joint ventures for purposes of processing, storing, shipping, or harvesting fish or shellfish, and such transactions or communications as are necessary to the operation, management or business thereof;

(D) A defendant from engaging in any conduct, action, activity or communication with any other person, if such conduct, action, activity or communication is required by statute, law, rule or regulation having the force of law in the jurisdiction in which such conduct, action, activity or communication takes place;

(E) Any negotiation or communications between a defendant and any other person on questions of the definition of grading and quality standards; on-site inspection, grading and contract administration; shipping; packaging; and similar technical matters;

(F) Provision by a defendant of information on prices at which it has purchased processed seafood or on quantities of processed seafood purchased by, or delivered to, it to a privately operated system of data exchange under which the data is aggregated in such a way that neither the identity of the parties nor information relating to individual transactions is disclosed to or reasonably ascertainable by any other importer, and the receiving of such aggregated information;

(G) Communciation of information concerning existing contracts to the extent such information has already been publicly disseminated through regularly published newspapers, trade journals or trade periodicals;

(H) Participation in a meeting called and chaired or vice-chaired by an official of the Japanese Fisheries Agency at which participants discuss their estimates of the total amount of any processed seafood product or products that will be imported into the Japanese market during a particular period, provided that such meetings do not include discussions by individual firms of their own import plans; or

(I) Provision by a defendant of any information concerning the purchase of processed seafood to the Government of Japan or any agency or department thereof, provided that in the course of transmitting such information it is not divulged to any other importer.

VI.

[*Report on Meetings*]

For a period of five years from the date of entry of this Final Judgment, each defendant is ordered to file annually with the plaintiff an affidavit, prepared without direct or indirect communication with any other defendant, identifying each JMPIA meeting that defendant attended at which processed seafood was discussed and each meeting with any other importer or group of importers during which any subject listed in paragraph IV(B) was discussed. Such affidavit shall contain a detailed account of all discussion at such meetings relating to the purchase and importation of processed seafood, the date of such meetings, and to the extent known, the names and company affiliation of each person in attendance. If the defendant attended no such meetings, the affidavit shall so state. Such affidavit, if in Japanese, shall be accompanied by an English translation. Nothing in this Section VI shall require reports of discussions permitted by Section V hereof.

VII.

[*Compliance*]

***3** Unless otherwise provided, each defendant is ordered and directed to:

(A) Within thirty (30) days after the date of entry of this Final Judgment and annually thereafter for ten (10) years, furnish a copy of this Final Judgment (accompanied by a Japanese translation, where required) to its president or chief executive officer, and to each of its officers, directors, agents and employees (whether located in Japan or the United States) then responsible, in whole or in part, for making pricing decisions for, or purchases of, processed seafood;

(B) Furnish a copy of this Final Judgment (accompanied by a Japanese translation, where required) to each successor to those persons described in paragraph VII(A) hereof, within thirty (30) days after such successor assumes responsibility for pricing decisions for, or purchases of, processed seafood;

(C) Attach to each copy of this Final Judgment furnished pursuant to paragraphs VII(A) and (B) hereof a statement in Japanese advising each person of the nature, scope, and prohibitions of the U. S. antitrust laws and that it is the policy and the intent of the defendant to comply with the requirements of the antitrust laws and the Final Judgment. Such statement shall also include an instruction that each agent and employee is required to comply with the Final Judgment, describe the consequences, including possible civil or criminal penalties, to the defendant, and its agents and employees, of a failure to comply, and advise that the defendant's legal advisors are available at all reasonable times to confer regarding any compliance question or problem;
(D) Within thirty (30) days after the date of entry of this Final Judgment, furnish each member company of the JMPIA with a copy of this Final Judgment, together with a Japanese translation, by mailing a copy to the president or other appropriate officer of such member company or ascertaining that either the JMPIA or another defendant has done so; and
(E) File with this Court and serve upon the plaintiff, within sixty (60) days from the date of entry of this Final Judgment, a statement as to the facts and manner of its compliance with paragraphs VII(A), (C) and (D) hereof, and the measures that it has taken to assure compliance with paragraph VII(B) hereof.

VIII.

[*Inspections*]

(A) For the purpose of determining or securing compliance with this Final Judgment:
(1) Upon receipt of a written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, each defendant shall, on reasonable notice and subject to any legally recognized privilege:
(a) Provide within sixty (60) days to the Department of Justice in Washington, D. C., copies of any books, ledgers, accounts, correspondence, memoranda, and other documents or records in the possession or under the control of such defendant relating to any subjects covered by this Final Judgment;
(b) Submit written reports, under oath if requested, in English or accompanied by an English translation, with respect to its compliance with this Final Judgment as may, from time to time, be requested; and
*4 (c) Permit any duly authorized representative of the Department of Justice, subject to the reasonable convenience of each defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any subject covered by this Final Judgment. This paragraph shall not require international travel by the person to be interviewed. Such request and notice may be made by delivery to the person appointed pursuant to Section X of this Final Judgment to receive service of process on behalf of each defendant. Nothing in this paragraph VIII(A)(1) shall require any defendant to take any action in Japan which is prohibited by the Government of Japan pursuant to provisions of Japanese law, provided that the defendant has exercised good faith efforts to obtain permission of the appropriate person or governmental authority but such permisison has not been secured.
(2) Each defendant shall provide written notice in English to plaintiff prior to engaging in any transaction or activity that, but for the provisions of paragraph V(D) and V(F) hereof, would be prohibited by this Final Judgment. Such notice shall describe the transaction or activity and identify, if applicable, the statute, law, rule or regulation that the defendant believes requires such transaction or activity to be undertaken. In the event that such defendant is unable, despite the exercise of good faith efforts, to provide such notice prior to engaging in the required transaction or activity, the defendant shall do so as soon as practicable but not later than thirty (30) days thereafter.
(B) No information or documents obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law. The defendant from which such documents or information was obtained shall be given twenty (20) days written notice prior to the disclosure of such documents or information in any legal proceeding (other than a grand jury proceeding) to which such defendant is not a party or pursuant to a request under the Freedom of Information Act.

IX.

[*Retention of Jurisdiction*]

Jurisdiction is retained by this Court for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such orders or directions as may be necessary or appropriate for the construction or implementation of this Final Judgment, for the modification of

any of its provisions, for the enforcement of compliance with its terms, and for the punishment of violations of its terms.

X.

[*Appointment of Agent*]

Each defendant shall appoint a person located in the United States as its agent for service of process in any proceeding for the purpose of the construction, implementation, modification, enforcement of compliance, or punishment of any violation of this Final Judgment. Each defendant shall maintain such agent for the life of this Final Judgment and, within ten (10) days from the date of entry of this Final Judgment, file with this Court and serve on plaintiff a statement identifying such agent. In the event of a need to appoint a successor agent, defendant shall immediately file with this Court and serve on plaintiff a statement identifying the successor agent.

XI.

[*10-Year Term*]

***5** This Final Judgment shall expire ten (10) years from its date of entry.

XII.

[*Public Interest*]

Entry of this Final Judgment is in the public interest.

U.S. v. C. Itoh & Co., Ltd.

Not Reported in F.Supp., 1982 WL 1906 (W.D.Wash.), 1982-83 Trade Cases P 65,010

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Chapter 3

Natural Resources

Introduction

Natural resource trade is most likely to conform to trade as explained by a sta trade theory framework. As characterized by Yoffie (1993), industrial pol interventions (e.g. R&D subsidy, national regulatory frameworks) are significan less common than in R&D intensive sectors or internationally traded services.[1] the same time, the role of MNE strategy may also be substantially less importa This has two implications. First, trade is determined by country-cost advantages a that second, *ceteris paribus*, global market concentration will be lower than in otl sectors. The source of competitive advantage for firms in these sectors is determir by access to scarce natural resources. As scarcity increases, the opportunity cost production rises.[2] In turn, firms that can minimize costs in this traditio microeconomic sense will win international competition. Examples of this kind industry are basic textiles, agricultural and commodity products such as coffee. natural resource industries where firm economies of scale are important, produc are sensitive to the need to maintain output as a means of achieving (or getting clc to achieving) minimum efficient scale (MES). If all the firms compete vigorou for market share, then the least cost-efficient firms will lose out (a vicious spiral that faced with falling prices, firms with shrinking market share become less a less cost-efficient). An alternative, and certainly more acceptable one to high c producers, is to collude on market share. Sectors such as iron, steel and ba chemicals fall under the category.

Of course, in order for the collusion to be successful, it is necessary to raise en barriers. Thus, trade policy (if the main potential source of lower-cost competition import competition) can serve as the necessary barrier-to-entry. Where MNEs a present, they are likely to produce where they can access the natural resources lowest cost. Thus, multinational ownership is a function of access to scar resources rather than other motives as may be observed in other 'globa oligopolistic' sectors. High transport costs are often a feature of natural resou industries especially if the source of the commodities are distant from the fi market for the goods or the natural resource is dangerous to handle or bulky. Inde anything that can raise the costs of transport and storage for exporting firms is lik to substantially raise overall costs for producers.[3]

Research Questions

The chapter aims to answer the following questions:

(a) What are the characteristics of natural resource industries?
(b) How does the nature of natural resource industries determine trade and investment flows?
(c) What are the implications of this for trade policy and antitrust in isolation?
(d) What are the implications for the relationship between trade and antitrust?

Methodology and Structure

This chapter is based around two case studies. The first explores a case of how import cartelization acts as a barrier to entry for imports in a seafood sector: Tanner Crab. The persistence of import cartelization in this case is related to the lax enforcement of antitrust. Thus, inappropriate antitrust enforcement acts to frustrate international trade.

The second and main case is a detailed analysis of the EU soda ash sector. Both GATT (1993) and OECD (1998a) refer to this case as an example of the contradictions between trade and antitrust. The case illustrates the relationship between anti-dumping policy and domestic collusion. It demonstrates that where international trade is determined by access to scarce natural resources, a restrictive trade policy will lead to losses in allocative efficiency. Moreover, where there are economies of scale in production, domestic market structure will provide incentives to cartelize, especially if there is a source of lower cost competition.

The case shows that domestic manufacturers of soda ash used anti-dumping measures to facilitate domestic collusion thus demonstrating the pro-cartel impact of anti-dumping measures. This conclusion is similar to that of Messerlin (1990) whose work is explored in detail below. However, the key contribution of this case study is to go beyond Messerlin's approach which was to use official regulations and trade flows to 'calculate' the costs of protection to EU consumers and the fines imposed on EU firms for cartelization.

This case study uses a broader range of primary sources to build a detailed picture of the industry. It uses interviews with industry and government, working documents by the EU, submissions to DG I during the anti-dumping investigation, rulings of the ECJ on the EU cartel in addition to the official EU regulations and decisions. It is this detailed 'unpicking' of the case which aims to draw out the conclusions on the relationship between trade and antitrust in this sector. In a number of cases, both the documentation and especially in the interviews, it has been necessary to respect confidentiality. In cases such as anti-dumping and competition cases, both governments and firms are sensitive to the publication of commercially sensitive information and frequently request confidentiality. Moreover, EU institutions need to maintain confidentiality as a fundamental premise for their procedures. This chapter is organized as follows. The first section features the case of seafood. This sector demonstrates the classic problems of high-cost producers when faced with competition that has access to scarce resources. It details an attempt by Japanese high-cost producers to prevent the entry of Alaskan low-cost

producers through an import cartel. The apparent failure of Japanese authorities prosecute the cartel led to a US court prosecuting extraterritorially the activities the Japanese firms. This case study illustrates that poorly enforced antitr facilitates collusion that acts as a barrier-to-entry to import sources. It suggests t mutual liberalization of trade and antitrust is the optimal policy in this case.

The rest of the chapter forms the second and central case study for this chap This second case study explores the soda ash sector. It analyses the linka between the imposition of anti-dumping measures against the most cost-competit producers in the US and the incidence of an intra-EU cartel. There is an additic factor in this case in that although country-cost advantages were the predomin explanation for the competitive advantage of firms in the soda ash sector, the nat of production is such that economies of scale internal to the firm play a role in c reduction. It also means that firms may have incentives to collude when faced declining market share. As will be explained in below, successful collusion requi among other things, the need for high entry barriers. As will be analysed bel there is a case that in soda ash, anti-dumping served to provide those barriers entry. There is a concluding section that provides conclusions to the case studies a their implications for trade and antitrust.

Seafood: Alaskan Tanner Crab

In the *Tanner Crab* case, the US Department of Justice (DOJ) prosecuted a Japan import cartel of crab meat which was allegedly trying to use its market power depress the price that US seafood processing firms could sell to the Japanese fir *Tanner Crab* arose out of a complaint filed with the DOJ by a US fishermen's un against a group of Japanese trading firms including two major trading firms (*Sc Shosha*), C. Itoh & Co. and Mitsui & Co. who were accused of illegally exchang price information. US fishing fleets had complained to the JFTC but the imp cartel persisted. They therefore turned to the US authorities to seek extraterrito redress. Processed crabs caught by US fishing fleets were exported to trad companies in Japan. The complaint detailed an association called the Japan Marine Products Importers Association (JMPIA) created by the trading firms order to exchange price information. The JMPIA was based in Tokyo and wa broad association of seafood importers that included a crab committee. The JMI met periodically and acted as a forum for discussions concerning the importatior Japan of processed Alaska crab. Each trading firm disclosed the price offered a details of proposed purchases offered to it by the US exporters. The prim objective was to ensure that such an exchange of price information would ena each trading firm to agree prices at which they would be prepared to purchase tan crabs. If one firm learned that it had been offered a higher price than another trad firm had, it would negotiate the price down based on information gathered throu the JMPIA.

This import cartel had the effect of lowering the import price from what it wo have been in the absence of information exchange. The DOJ launched investigation into the case to determine whether there had been a violation of antitrust law and filed a civil suit against the Japanese trading firms. The Japan

firms proposed a consent judgment that was accepted and the JMPIA agreed to cease activities.

The graph below explains the economics of the import cartel described above. *D(dom)* is the demand curve of Japanese consumers who rely on imports of crabs. It is assumed that Japanese consumers prefer tanner crabs to domestically produced varieties. In the absence of the import cartel, Japanese consumers purchase quantity *OQc* of crabs at a price *OPc*. This is point *D* on the graph. If the JMPIA organizes the price cartel, by lowering the price that the trading firms are willing to pay *OPm*, they will lower the quantity supplied to *OQm*. In other words, the trading firms restrict their purchases up to the point where the marginal supply cost equals the marginal value of the imports at point *A*. The buying cartel gains the monopsony rent *P(dm)ABPc* at the expense of the suppliers and consumers (i.e. the amount saved due to the lowering of price) but it sacrifices the surplus *ABD* that is lost through the output restriction. ACD is the dead-weight loss.

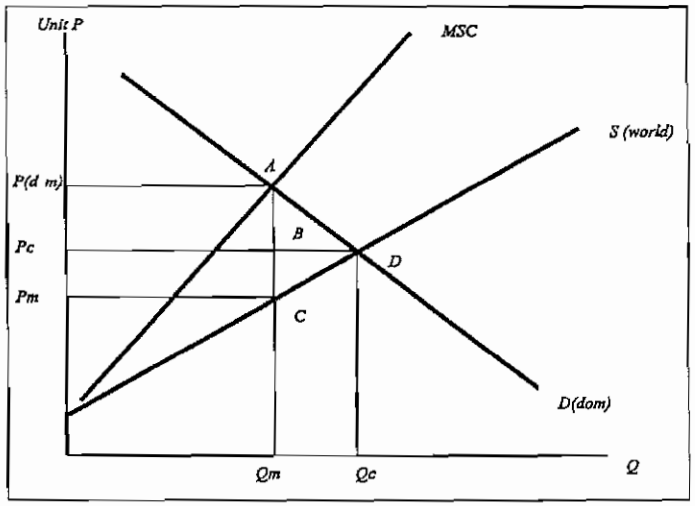

Figure 3.1 The Tanner Crab Import Cartel

Source: Author's own diagram

Matsushita (1991) is doubtful that the import restriction would have had the effect of raising the domestic price of the commodity imported into Japan. It would have been necessary to arrange a price-fixing cartel within Japan for this to succeed. This is because there would always be the possibility that the JMPIA may be unstable and break up. As with any cartel, Matsushita is arguing that there are potential gains from cheating and undercutting the cartel. The maintenance of the

cartel is crucially dependent on the ability of the JMPIA to punish potential che and block new entry. It would be economically disadvantageous for the JMI cartel to sell the restricted imports of tanner crabs at the price at which tl purchased them given that the cartel had successfully isolated the Japanese marl There would be considerable profit to be made in selling the imports at a hig price in Japan. Moreover, it may have made more sense in a broader context of domestic Japanese seafood industry for the JMPIA to restrict imports of crabmeat that would be competing with the domestic industry. In this way at le the domestic industry would be protected from foreign competition. The condit that would allow the import cartel to capture the profits would be an ability prevent Alaskan fishing fleets from importing directly into Japan to final custom This is precisely what the JMPIA prevented by acting as an exclusive importer i Japan. The key assumption made here is that by lowering the price of impor crabs, the JMPIA would make it impossible for US exporters to sell in Ja independent of the JMPIA. This would have the effect of reducing the market sh taken by non-Japanese sources. In Matsushita's view, the possibility that this mi have occurred is remote. However, if the aim of an import cartel were to rest foreign supply, an effective way of doing so would be to pursue a policy of pr information exchange. It is considerably more difficult to monitor and prove t imports were being restricted through lower prices. If US exporters are not will to supply at the price offered, it could be construed as a 'voluntary' exercise on part of the exporters not to supply the Japanese market. As the trading fir concerned agreed sole import agency agreements with the US crab meat processc then it is easier to monitor and prevent the parallel importation of the goods. Th the nature of import transactions in Japan through the use of trading firms co have created situations in which market access is difficult.

One problem with this case is that because it never went to a full hearing, the facts of the case never became known. However, the judgment did outline prohibitions on the JMPIA activities. These included the prohibition of each trad firm from 'entering into, maintaining, furthering, participating in, or enforcing a agreement, arrangement, understanding, combination, or conspiracy with any ot importer or group importers to fix, maintain, establish, or adhere to the prices, ra of prices, or other terms and conditions for the purchase of processed seafood.' addition, the JMPIA members were prohibited from communicating with any ot importer or group of importers to exchange information on future pricing offers US 'processed seafood'; 'strategy, timing, or conduct of negotiations for the curr season or future purchases of processed seafood'.[4] Given the consent judgm offered by members of the JMPIA, it is likely that US authorities had proba discovered an attempt by Japanese firms to maximize profits at the expense of producers and arguably, Japanese consumers. Surely, the US authorities w correct in seeking prosecution of the Japanese firms in the interests of US firms a Japanese consumers? This is especially the case given the fact that the JFTC did bring an end to the import cartel.

Conclusion

The findings of this case study are as follows. First, where the main source of cost-efficient competition is from imports, poorly enforced antitrust acts as a barrier to entry for import competition by facilitating domestic collusion. In other words, it allows firms to erect private trade barriers. Thus even if there are no government agreed trade barriers, the absence of antitrust policy (or the lack of its enforcement) serves the purpose of a restrictive trade agreement. Second, asymmetric enforcement of antitrust can also serve to promote extraterritorial application of domestic competition law (as with the US antitrust action in *Tanner Crab*) which undermines the multilateral trade process and increases international conflict even if the source of the inefficiency is rooted out by such action (see chapter 5).

The Chemical Industry: Soda Ash[5]

Introduction

This section explores the interface of trade and antitrust in the chemical sector. In particular, it includes a detailed analysis of the soda ash sector and this is the main research contribution to this chapter. As background, there is a brief historical section of the evolution of international cartels. This is complemented by a detailed discussion of the work of Patrick Messerlin who analysed cartelization and anti-dumping measures in low density polyethylene (LdPE) and polyvinyl chloride (PVC) in the EU. The starting point is the realization that most, if not all, chemical sub-sectors are imperfectly competitive. On a theoretical level, the industrial organization literature has contributed greatly to the understanding of competitive structures and conduct of firms in markets or sectors that are termed imperfectly competitive or oligopolistic. The analysis has tended to be focused on national or domestic industries rather than international cartels. Nevertheless, a number of the basic theoretical axioms are relevant. As discussed in chapter 1, imperfect competition implies the presence of supernormal profits for a small number of large firms producing in the market. From an antitrust policy perspective, the extent to which firms are able to exploit their market power is relevant when issues of anti-competitive practices are raised. Market contestability, a measure of the ease of exit and entry facing firms and its related costs, has become an intellectual and empirical yardstick by which markets and sectors have been examined by industrial organization. The implications for antitrust policy are that it rests on the premise that action should be taken only when incumbent firms are attempting to abuse their market power rather than the prohibition of large market share by itself. One of the primary aims of antitrust therefore has been the promotion of market contestability.

Another important characteristic of the chemical industry more generally is that with the exception of pharmaceuticals, many products in the industry are largely of an intermediate nature (being used downstream in other industries e.g. plastics for use in cars or consumer electronics). In this sense, sub-sectors of the chemical industry are vulnerable to significant cycles of demand in line with demand for downstream products. Given the nature of fixed costs and hence the need to

maintain capacity and economies of scale in the industry, firms may be forcec engage in cut-throat competition in order to maintain production in the face shrinking demand.[6] Moreover, if cost pressures rise in final goods mark producers of these goods may seek to economize on intermediate inputs or s lower cost alternatives.

These factors enhance the vulnerability of chemical firms and faced with s outcomes, the incentives for attempts at price co-ordination or other forms collusion are potentially high. This is enhanced by the presence of a relatively sn number of large firms. The costs of enforcing a cartel orchestrated by a relativ small number of firms who supply a large amount of the total market wit homogenous product may be less problematic than in situations in which there a larger number of firms producing differentiated products. Under th circumstances, market contestability cannot be assured without some attempt antitrust authorities to monitor and counter potential anti-competitive practices. question facing antitrust therefore is whether it is possible for firms to orgar successfully such anti-competitive activity.

The potential impediments to successful collusion are high across m manufacturing sectors. The dilemma facing any potential cartel is how they successfully enforce the rules and punish any firms who decide to break the ca without being discovered by antitrust authorities. Thus, the chemical industry sho be not be regarded any differently to any other industrial sector in the economy. when a close look is taken at the history of the industry, cartelization is rife. only have collusive activities been successfully carried out within countries, incidence of collusion at an *international* level is astonishingly high. For ma years, the large chemical conglomerates of Germany, the UK and the US maintai agreements whereby competition between firms was minimized and geographi market divisions were set up whereby the firms involved would agree not compete with each other. Stocking and Watkins (1946, 1948) detail late 19th early 20th century attempts at the formation of global cartels.

Trade Policy and Collusion

In recent years, Patrick Messerlin (1990) has studied the chemical sector with a vi to assessing the impact of trade protection such as anti-dumping on the ability firms to cartelize markets. Messerlin's work on the European polyethylene PVC LdPE market has shown that West European chemical firms exploited anti-dump policy against low-cost East European firms for the purposes of price maintena in the West European market by preventing the entry of lower cost competitors fr East Europe. Moreover, Messerlin estimates that the benefits to producers of hig prices in West European markets as a consequence of the anti-dumping duties the collusion far outweighed the eventual fines imposed on these producers cartelization. The polyethylene and PVC cases are far from unique since World W II. Another example of an international cartel was in the chemical fibre sector in 1970s. Japanese firms regarded as being competitive with their US and Europe counterparts in this sector and they thus represented a genuine threat to US European producers. As a result of a trade agreement between the US and Japan governments whereby the Japanese firms agreed to restrict their exports to the

Japan, the cost of fishing for crab in Japan was substantially higher than in Alaska. If the Alaskan crab companies could have sold direct to Japanese consumers, they would have significantly undercut the price of Japanese competitors and hence the need for protection.

However, in the more interdependent economy as depicted in chapter 1, the links between traditional policy boundaries have become blurred and thus as Ostry (1997) and Jacquemin and Sapir (1991) suggest, a restrictive trade policy effectively acts as a barrier to entry into an oligopolistic domestic market. In the starkest terms, anti-dumping facilitates domestic collusion.

By the same token, poorly enforced antitrust allows firms to erect their own trade barriers e.g. the JSAIA import cartel. A similar argument holds for the Tanner Crab case – the JMPIA were able to orchestrate their import cartel by virtue of inadequate investigation by the JFTC. It required US legislators to impose US law (rightly or wrongly) in order for the cartel to be broken up and to allow the Alaskan producers to exploit their competitive advantage. Thus, it was necessary for the JMPIA to orchestrate the cartel to erect a trade barrier: private actors imposing their own protectionism. Moreover, in scarce-resource industries, there are few arguments to support the pursuit of strategic trade policy or derogations from antitrust on the basis of the existence of external economies or learning economies of scale as in the case of innovation intensive industries. Competitive advantage can only reside among those firms who have access to those scarce resources.

Notes

1 Although the decision of the US government in 2002 to impose trade tariffs of 30 percent on steel imports is an exception to this rule.
2 Scarcity increases as non-renewable resources are used up. In general, as scarcity increases, the macroeconomy shifts away its usage of these resources. The speed with which that occurs is a function of the availability of substitutes. For those factors of production that remain in the increasingly scarce natural resource sector, the opportunity cost of production rises.
3 This does not deny that certain natural resource industries such as certain agricultural commodities resemble this.
4 Ibid. (Both citations in paragraph).
5 I am indebted to Toshihide Kasutani (MITI) and Hiroshi Kanai (Mitsubishi Kanai Petrochemical) for the expert advice on the economics and 'science' of the chemical industry.
6 See Sutton (1991) for a detailed discussion of this issue.
7 U.S. Congress Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, *Hearings on Administered Prices*, 86th Congress, 2nd Session, Part 20 pp. 11065, 11257 (1960).
8 United States v. Monsanto Co., Farbenfabriken Bayer AG and Mobay Chemical Co., Trade Case ¶ 72,001, p. 83,553 (W. D. Pa. 1967).
9 JFTC Decision 27 December 1972, *Shinketshusu*, 19 (1973), 124 *et seq*.
10 *Bundeskartellamt* Decision, 1972, *Wirtschaft und Wettbewerb* 525–48, Bkart A 1393, 1407, 1411 and 1915.
11 Messerlin claims that in the 1980s, 23% of all anti-dumping cases have been in cartelized sectors in the EU.

12 Although the revised anti-dumping code of the EU requires a 'Community Interest' t it is not entirely clear that the most recent cases (and the soda ash case reviewed in sect 6 of this chapter) have shown that the EU Commission has produced a workable a credible definition of the 'Community Interest'.
13 Messerlin (1990), p. 10.
14 Ibid.
15 Ibid. p. 13.
16 Messerlin (1990), p. 47.
17 Commission Decision of December 19 1990 relating to a proceeding under Article 85 the EEC Treaty IV/33. 133 – A: Soda-Ash – Solvay, ICI (91/297/EEC), recital 3 (O. 152, 15/06/1991).
18 Ibid. recital 5.
19 Isonex Inc. is an engineering consultancy who specializes in soda ash. Websi www.isonex.com.
20 Opcit., 28, recital 12.
21 Ibid.
22 Opcit., 49, recital 2.
23 Ibid.
24 Ibid.
25 Ibid.
26 Source: *Japan's Chemical Industry 1996* produced by the Japan Chemical Indus Association.
27 These are the national state-owned producers predominantly in the Former Yugoslav Bulgaria, Romania and (the then) Czechoslovakia.
28 Source: Isonex Inc.
29 In addition, Elf Acquitaine own Texas Gulf Chemicals Corp.
30 ANSAC was originally formed by three US producers to enter the Japanese market. December 1983, all six soda ash producers had joined ANSAC.
31 The EU soda ash manufacturers and the EU Commission point out that part of t increase in US exports to the EU may be explained by the loss of market share in Chi This would be probably due to the necessity for US firms to avoid capacity cuts and her rising costs.
32 Opcit., 28, recital 3.
33 Ibid.
34 It is a common view held by EU Commission anti-dumping administrators that in ca involving firms in market economies, dumping occurs because of forms of cross-subsi In the official documents used by the EU Commission in the administration of this case strong theme was on the US firms' positioning in other markets (especially Asian ones
35 Commission Regulation (EEC) No 823/95.
36 A confidential industry source.
37 The views of a confidential industry source that expressed dismay at the activities of l firms, describing them as 'cowboys'.
38 See following pages for a chronological list of the anti-dumping actions taken by the I Commission in this industry.
39 Ibid.
40 *Financial Times*, December 21 1990.
41 Ibid.
42 The Community v. Solvay et Cie SA and Imperial Chemical Industries Plc, Case I 33.133–A, 4 CMLR, p. 468.
43 The Community v. Solvay et Cie and chemische Fabrik Kalk (Case IV/33.133–B) [19 4 CMLR p. 482.
44 Opcit., 29, recital 1.

Exhibit 17-1

January 22, 1982.

[redacted]

Alaskan Tanner Crab Investigation

Gentlemen:

You have requested my advice as to the legality under Japanese law of certain activities of [redacted] in connection with the purchase of Alaskan tanner crab during the 1980 season.

F A C T S

The facts, as you have presented them to me, are as follows:

Japanese Purchases of Alaskan Seafood

Seafood is a major component of the Japanese diet. On a per capita basis, the Japanese people are the world's largest consumers of seafood. Most of the high-price seafood consumed in Japan is imported. In recent years, an increasing percentage of Japanese seafood imports have come from the United States, particularly from the state of Alaska.

During the past decade, [redacted] Japanese companies have become actively involved in the importation of tanner crab (both bairdi and opilio) from Alaska. During the 1980 season, for example, approximately 30 Japanese companies purchased Alaskan tanner crab for importation into Japan; some 21 of these companies each imported more than 100 metric tons (223,000 pounds) of tanner crab from Alaskan sources. In the 1980 season, [redacted] purchased over 850,000 pounds of Alaskan tanner crab--over 625,000 pounds from Morpac, a joint venture in which [redacted] and [redacted] each have 46 percent interest, and over 225,000 pounds from Pan Alaska Fisheries, a subsidiary of Castle and Cooke, Inc., a large United States corporation. In 1980, Japanese

purchases of Alaskan tanner crab totalled more than 28 million pounds.

Responsibilities of the Fishery Agency

Under Japanese law, the primary responsibility for regulation of the importation and marketing of marine products (including tanner crab) is entrusted to the Fishery Agency of the Ministry of Agriculture, Forestry and Fisheries. In certain areas, the Fishery Agency shares this responsibility with the Ministry of International Trade and Industry ("MITI").

Because of the important place of seafood in the Japanese diet, the Fishery Agency has long been concerned with the potentially serious adverse effect on the Japanese consumer of unduly high seafood prices. The Fishery Agency has been especially interested in preventing speculative purchases of major seafood products by importers; such speculative purchases, if made without adequate regard for the supply and demand situation in the Japanese market, can lead to rapid and undesirable fluctuations in the price of seafood to consumers. For example, speculative purchases of herring roe by Mitsubishi resulted in extraordinarily high prices for that product during the 1979 holiday season. These prices in turn led to a consumer boycott of herring roe and contributed to the bankruptcy of a leading herring roe company. Moreover, because of the greatly increased volume of Japanese imports of seafood (a trend which was intensified by the adoption in 1976 of a 200 mile fishing limit by the United States), the Fishery Agency has striven to prevent such imports from having a detrimental impact on domestic production of seafood.

Administrative Guidance

Because of these concerns, the Fishery Agency has repeatedly directed Japanese importers to maintain an orderly market in the importation of seafood and to avoid excessive competition in the buying of seafood products from foreign sources. These directives covered all imported marine products (including tanner crab). The directives were issued by, among others, the General Manager and Deputy General Manager of the Fishery Marketing Department of the Fishery Agency and were made with the knowledge and approval of the Director General of the Fishery Agency. The first such directive was issued in the fall of 1979 and this directive was reiterated through the entire 1980 tanner crab season. In accordance with Japanese practice, these directives were delivered orally by the responsible officials at meetings with the affected companies. The Fishery Agency's directives concerning the maintenance of an orderly seafood

market were the subject of extended discussion in the House of Representatives (Standing Committee on Agriculture, Forestry and Fisheries) of the Japanese Diet on February 20, 1980 and in the House of Councilors (Standing Committee on Budget) on March 14, 1980.

As explained by a high official of the Fishery Agency in an interview held a short time ago [redacted], the directives to the importers to maintain an orderly market and to avoid excessive competition* in buying seafood meant essentially this: the importers, in purchasing seafood from foreign sources, were to take due account of the supply and demand situation in the Japanese domestic market and to refrain to the extent possible from purchasing seafood at such high prices as would increase significantly the Japanese wholesale price.

JMPIA

The Japanese Marine Products Importers Association ("JMPIA") was formally established in September 1979 at the urging of MITI with the consultation and approval of the Fishery Agency. JMPIA had existed as an informal organization for more than ten years prior to its formal establishment. [redacted] all of the [redacted] leading Japanese importers of marine products are members of JMPIA. [redacted] most of the leading Japanese importers of Alaskan tanner crab were during the 1980 season also members of the Crab Committee of JMPIA.

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* [redacted]

In accordance with the Fishery Agency's directive to maintain orderly marketing and to avoid excessive competition, [redacted] many of the [redacted] leading Japanese importers exchanged certain information concerning the Alaskan tanner crab market. These exchange took place principally in connection with Crab Committee meetings. Among the topics discussed were general market conditions including such matters as Japanese supply and demand for tanner crab, the quality of Alaskan crab available, and the progress of negotiations between Alaskan processors and crab fishermen. For purposes of this opinion, I shall assume that participants on occasion also exchanged information concerning their current offering prices for tanner crab and their thoughts concerning possible future offering prices. These information exchanges related in large part to negotiations with one of the processors, Pan Alaskan Fisheries.

I have been advised [redacted] that at all times it exercised its independent business judgement concerning the quantities it would buy and the prices it would offer for tanner crab (taking into account the administrative directives it had received from the Fishery Agency) and that it never entered into any agreement with any other importer concerning the prices to be paid for Alaskan tanner crab or the quantities of crab to be purchased.

Grand Jury Investigation

The United States Department of Justice has been conducting a grand jury investigation of the Alaskan seafood industry in general and Alaskan tanner crab in particular. The Department is currently considering whether or not to seek a criminal indictment of [redacted] Japanese importers under the Sherman Antitrust Act for allegedly conspiring to fix the prices at which they purchased Alaskan tanner crab during the 1980 season.

QUESTIONS PRESENTED AND CONCLUSIONS

You have sought my advice as to the following questions:

1. Whether the Fishery Agency acted within the proper scope of its authority in issuing to the importers the administrative directives described above?

In my opinion, the answer to this question is quite clearly in the affirmative. The Fishery Agency has broad powers and responsibilities with respect to the importation and marketing of marine products, and administrative guidance of the type described plays an important role in the Japanese system of regulating and controlling business enterprises.

2. Whether [redacted] was obliged to comply with the administrative guidance issued by the Fishery Agency with respect to importation of marine products?

The answer to this question is in my opinion also clearly in the affirmative. No responsible Japanese company would refuse to comply with administrative guidance issued by a competent government agency. Non-compliance would have serious practical consequences for the non-complying company.

3. Whether the exchange of price information between competitors, or an agreement by competitors to exchange price information, is prohibited by Japanese antimonopoly legislation, in the absence of an actual agreement between those competitors to fix prices?

In my opinion, the answer to this question is in the negative.

ANALYSIS

1. Whether the Fishery Agency acted within the proper scope of its authority in issuing its administrative directives with respect to the importation and marketing of marine products?

Article 3 of the law establishing the Ministry of Agriculture, Forestry and Fisheries (May 31, 1949, Law No.153, as amended) designates the Ministry (to which the Fishery Agency is attached) as the administrative agency responsible for performing administrative duties and undertakings directed to, among other things, the improvement and development of the fishery industry, the promotion of the welfare of those involved in the fishery industry, and the provision of a stable supply of seafood to the Japanese people. Article 3(2) of the Establishment Law directs the Ministry to "work for promotion, improvement and coordination of trade and consumption of ... fishery products; drinks and foods; oils and fats; and those articles which are used exclusively for agruicultural, forestry, livestock and fishery industry."

Articles 73 and 74 of the Establishment Law authorize the Fishery Agency to exercise the powers and responsibilities of the Ministry with respect to fishery products. Among the powers thus delegated to the Fishery Agency is the power to control the price of seafood products:

> "Ministry of Agriculture, Forestry and Fisheries the following powers to execute its duties stipulated in this law, provided, however, that the powers shall be exercised in accordance with any law or regulation thereunder:
>
> . . .

15. Control prices etc. pertaining to the products falling within its duties."

Establishment Law, Article 4(15). See also Price Control Order Article 4 (March 3, 1946, as amended) (empowering responsible minister to control prices if prices increase or are likely to increase significantly and it is difficult to secure stability of prices through other means), Law Concerning Emergency Measures for Stabilization of Citizen's Life, Sections 1, 3, 16 and 17 (authorizing price controls and other measures in connection with extraordinary price hikes involving life-related products). An English translation of the pertinent portions of the Establishment Law is attached as Appendix A hereto.

Given the broad statutory responsibilities of the Fishery Agency with respect to the marketing and importation of marine products, there can be no real question but that the Fishery Agency acted within the proper scope of its authority in advising the importers to engage in orderly marketing and to avoid excessive competition in buying foreign marine products. In analyzing this point, it is important to have a proper understanding of the vital role played by administrative guidance in carrying out the work of Japanese administrative agencies.

Administrative guidance plays a very important role in controlling Japanese import and export trade. Indeed, it is probably fair to say that administrative guidance is the core around which all the legal measures for controlling international trade converge. Despite its importance, however, "administrative guidance" is not a concept which is readily amenable to precise legal difinition. One of the better difinitions of administrative guidance was provided by a senior official of Cabinet Legislation Bureau in a statement before the Committee on Commerce and Industry of the House of Councilors on March 26, 1974:

> "(Administrative guidance) is a request or a guidance on the part of the Government within the limit of the task and administrative responsibility of each agency as provided for in the Establishment Laws, asking for a specific performance or inaction for the purpose of achieving some administrative objective by the cooperation on the part of the parties who are the object of administration."

While there are several different types of administrative guidance,* the actions of the Fishery Agency with respect to importation of marine products plainly fall into the category of regulatory administrative guidance. Because of the respect and deference which Japanese businesses have traditionally paid to government directives (a deference which traces back to the system of imperial government prior to the Second War), Japanese administrative agencies have far less necessity than their American counterparts to achieve their objectives by formal rules or regulations or by statutory order. Instead, these objectives can frequently be achieved far more efficiently by informal administrative guidance.

Applying these principles to our situation, the administrative guidance from the Fishery Agency to the tanner crab importers to engage in orderly marketing and avoid excessive competition in buying was an exercise of governmental power which properly set policy to be followed by the importers. The Fishery Agency has a broad statutory mandate to regulate the fishery industry and imports of marine products. The fact that the Agency's directives to the importers were largely oral does not diminish in any way the authority of the administrative guidance provided. Administrative guidance in Japan frequently takes the form of face-to-face communications from the responsibile governmental official to officers of the affected companies.

2. Whether [redacted] was obliged to comply with the administrative guidance of the Fishery Agency to engage in orderly marketing and avoid excessive competition in the buying of foreign marine products?

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* Other types of administrative guidance including promotional administrative guidance (for example, government assistance in improving management of small enterprises) and adjudicatory administrative guidance (for example, mediation by a government agency of a dispute between private businesses).

In one sense, of course, compliance with administrative guidance is not compulsory. Administrative guidance is by its very nature informal and no specific sanctions are provided for its violation. To conclude from this, however, that Mitsui was free to disregard the administrative guidance provided by the Fishery Agency would be quite erroneous. Not only did Mitsui have a strong obligation under Japanese custom and tradition to follow the Agency's guidance, but non-compliance might well have had serious practical consequences. The combined effect of these factors is to render formal legal sanctions for non-compliance essentially superfluous.

First, as noted above, under Japanese custom Japanese companies usually have no alternative but to comply with governmental guidance. As a consequence, deliberate non-compliance by a responsible Japanese company with the administrative guidance of a government agency is very rare.

Second, deliberate non-compliance with government directives would subject the offending company to severe governmental criticism and might seriously complicate the offending company's future relations with the government agency in question. Moreover, non-compliance in this case would quite possibly result in increase of domestic seafood prices which would certainly be subject to severe public criticism.

In these circumstances, it is my opinion that Mitsui had no realistic alternative but to comply with the administrative guidance issued by the Fishery Agency.

3. Whether the exchange of price information between competitors, or an agreement by competitors to exchange price information, is prohibited by Japanese antimonopoly legislation, in the absence of an actual agreement between those competitors to fix prices?

Such an information exchange would not by itself violate Japanese law. The exchange of price information between competitors, or an agreement between competitors to exchange price information, is not prohibited under Japanese antimonopoly legislation in the absence of an actual agreement (express or implied) to fix, raise or stabilize prices. Under some circumstances, of course, an exchange of price information between competitors could be some evidence of a price-fixing agreement. Such an information exchange, however, would not, without more, constitute conclusive proof of the existence of such a conspiracy.

In our case, if the importers exchanged price information pursuant to the administrative guidance received from the Fishery Agency and if this contributed to the stabilization of Japanese domestic seafood prices, such an exchange would be in accordance with Japanese public policy and would not, in my view, constitute violation under Japanese antimonopoly legislation.

As your United States counsel has described American Antitrust law to me, the exchange of price information between competitors, or an agreement between competitors to exchange such price information, may constitute a violation of the Sherman Act even in the absence of a price-fixing agreement, where the effect of the information exchange is to raise or stabilize prices at non-free-market levels. See, e.g., United States v. Container Corporation, 393 U.S. 333 (1969). As noted above, the doctrine thus described is not recognized under Japanese law.

Very truly yours,

Mitsuo Matsushita

Mitsuo Matsushita

Exhibit 18

CASE COMMENTS

DAISHOWA INTERNATIONAL v. NORTH COAST EXPORT: AN ALTERNATIVE APPROACH IN THE JUDICIAL BALANCING OF INTERNATIONAL COMITY CONSIDERATIONS

In August 1974, several U.S. wood chip manufacturers, including North Coast Company, Inc., formed a Webb-Pomerene export association, North Coast Export Cooperative, Inc. (North Coast), to obtain a limited exemption from the Sherman Antitrust Act.[1] Later that year, in the course of its business dealings, North Coast entered into a long-term contract to provide wood chips to Daishowa International (Daishowa), a Japanese importer.[2]

On February 3, 1981, Daishowa sued North Coast for an alleged breach of that contract. During the discovery process, North Coast uncovered evidence of possible antitrust violations by the Japanese importer and subsequently amended its answer to include antitrust affirmative defenses and counterclaims.[3]

Claiming a "reciprocal exemption" from the antitrust laws, Daishowa filed a motion to strike the antitrust allegations.[4] Daishowa argued, alternatively, that the application of U.S. antitrust laws under the facts of the case would violate principles of international comity, irrespective of the question of reciprocal exemption.[5] The court rejected these arguments and held that Daishowa was not entitled to reciprocal exemption from U.S. antitrust laws.

1. The American Wood Chip Association was formed in accordance with the provisions of the Webb-Pomerene Act. 15 U.S.C. §§ 61–65 (1976). For a discussion of the Webb-Pomerene Act, see *infra* notes 9-10 and 14–15 and accompanying text.

2. Daishowa International v. North Coast Export, 1982-2 TRADE CAS. (CCH) ¶ 64,774, at 71,786 (N.D. Cal. 1982).

3. *Id.* For a discussion of the bases for North Coast's antitrust allegations, see *infra* note 22.

4. 1982-2 TRADE CAS. (CCH) at 71,786.

5. *Id.*

According to the court, considerations of international comity did not preclude the assertion of U.S. extraterritorial jurisdiction over Daishowa's actions.[6]

The *Daishowa* holding merits close examination because of the increasing potential for conflict between the United States and its major trading partners over the extraterritorial application of U.S. antitrust laws. Indeed, an analysis of the interaction of the Webb-Pomerene exemption and comity considerations suggests that the *Daishowa* decision gives rise to a double standard, the international perception of which may serve only to hamper U.S. international trade relations.

This Case Comment first will describe the Webb-Pomerene exemption to the Sherman Act and its application to the *Daishowa* litigation. The Comment next will examine the general policies which underlie the *Timberlane*[7] "balancing approach" and alternative approaches to extraterritorial assertion of U.S. antitrust laws. The Comment then will compare the *Daishowa* court's application of the *Timberlane* test with prior judicial interpretations. Finally, the Comment will propose an alternative approach in the judicial balancing of international comity considerations.

BACKGROUND

The Webb-Pomerene Antitrust Exemption

Congress enacted the Webb-Pomerene Export Trade Act[8] in 1918 to provide associations engaged solely in export trade with a limited exemption from the Sherman Act.[9] The exemption was established to enable U.S. producers and manufacturers to meet

6. *Id.* at 71,788-90.

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

8. 15 U.S.C. §§ 61-65 (1976).

9. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade occurring either in interstate commerce or international commerce. 15 U.S.C. § 1. The Webb-Pomerene Act, however, provides antitrust immunity for any association established "for the sole purpose of engaging in export trade" and for agreements made by its members for acts done in the course of export trade. 15 U.S.C. § 62. This exemption is circumscribed by the condition that neither the export association nor its acts or agreements may: "(1) Restrain trade within the United States; (2) Restrain the export trade of any domestic competition of the association; (3) Artificially or intentionally enhance or depress prices within the United States of commodities of the class exported by such association." *Id.*

aggressive competition from powerful foreign combinations operating in world markets.[10]

Of the several cases which have clarified the scope and conditions of the Webb-Pomerene exemption,[11] the decision in *United States v. Minnesota Mining & Manufacturing Company*[12] remains the most widely followed. That court held that an export association could not establish or operate jointly-owned production facilities abroad.[13] The *Minnesota Mining* court also delineated acceptable Webb-Pomerene activity.[14] Because the enumerated activities were normal

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10. *See* FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW 6 (1968). Congressional reports indicate that Congress intended primarily to protect small firms that were financially unable to conduct individual export trade programs. *Id.* at 4. Congress also intended to permit firms which competed with cartels abroad to export cooperatively (presuming that this would allow them to reduce their export costs), expand effective demand for their products abroad, and gain access to export markets on improved terms. *Id.* For a discussion of the controversy that surrounded the passage of the Act, see generally *id.* at 4–8.

The Justice Department and, to a greater extent, the Federal Trade Commission, administer and enforce the Webb-Pomerene Act. The Act requires every association engaged solely in export trade to file a statement with the Federal Trade Commission within 30 days of its creation, as well as annual statements detailing the association's conduct and business during the preceding year. 15 U.S.C. § 65. For a discussion of early FTC interpretations of the Act, see Diamond, *The Webb-Pomerene Act and Export Trade Associations,* 44 COLUM. L. REV. 805 (1944).

11. *See, e.g.,* United States v. United States Alkali Export Ass'n, 58 F. Supp. 59, 70–71 (S.D.N.Y. 1944); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968) (Webb-Pomerene Act provided no exemption for the price-fixing and quota-setting activities of defendants where burden of noncompetitive pricing fell on United States and foreign elements of the transaction were relatively insignificant); *aff'd*, 325 U.S. 196 (1945) (international agreement between Webb-Pomerene export association and foreign companies which allocated exclusive markets, fixed prices on an international scale, and sold through joint agents violated Sherman Act).

12. 92 F. Supp. 947 (D. Mass. 1950).

13. *Id.* at 963.

14. *Id.* at 965. The *Minnesota Mining* court stated that the following practices were consistent with the provisions of the Webb-Pomerene Act:

> The recruitment of four-fifths of an industry into one export unit . . . [t]he assignment of stock in an export association according to quotas . . . [the] firm commitments of members to use the unit as their exclusive foreign outlet, the refusal of the unit to handle the exports of American competitors, the determination of what quotas and at what prices each member should supply products to the unit, the fixing of re-sale prices at which the unit's foreign distributors should sell and the limitation of distributors for handling products of the members.

Id.

features essential to the stability of any joint enterprise, absent their unfair or oppressive use in a particular setting, the court reasoned that the activities were within the license granted by the Act.[15] The justifications for, and purported advantages of, the Webb-Pomerene exemption remain highly controversial.[16]

The Facts in Daishowa

On February 3, 1981, Daishowa International, a Japanese paper manufacturer,[17] brought an action in the federal district court for the Northern District of California against North Coast Export Company and North Coast Export Cooperative, Inc., a Webb-Pomerene association,[18] for alleged breach of contract.[19] During the

15. *Id.* The court also determined that:

> [I]t may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus, every export company may be a restraint. But if there are only these inevitable consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of congressional will that such a restraint shall be permitted.

Id.

16. *See generally* McDeermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 WASH. & LEE L. REV. 105 (1980).

17. Daishowa International imports wood chips from worldwide suppliers, including North Coast Export Cooperative. Plaintiff's and Third Party Defendant's Memorandum of Points and Authorities in Support of Their Motion to Strike Defenses and to Dismiss Counterclaims, at 2, Daishowa Int'l v. North Coast Export, 1982-2 TRADE CAS. (CCH) ¶64,774, (N.D. Cal. 1982) [hereinafter cited as Daishowa Memorandum].

18. As required by 15 U.S.C. § 65, the North Coast Combines, as a member of the American Wood Chip Association, are registered with the FTC as associations engaged solely in export and, as such, qualify for exemption from U.S. antitrust laws under the Webb-Pomerene Act (Copies of the Articles of Association and By-laws of the American Wood Chip Association, as well as the required annual FTC report are on file at the offices of *Law & Policy in International Business).*

19. In 1974, Daishowa and North Coast entered into a contract whereby North Coast would supply wood chips to Daishowa for an eleven year period. Daishowa Memorandum, *supra* note 17, at 71,786. North Coast alleged that the contract was subject to several conditions precedent, including obtaining financing to construct an export facility. Memorandum of Points and Authorities in Opposition to Counterclaim and Third-Party Defendants' Motions to Dismiss and to Strike, at 2, Daishowa Int'l v. North Coast Export, 1982-2 TRADE CAS. (CCH)¶64,774, (N.D. Cal. 1982) [hereinafter cited as North Coast Memorandum]. Daishowa alleged that North Coast repudiated the wood chip contract in 1980 when the market price of wood chips exceeded the contract price, and sued to enforce the agreement. Daishowa Memorandum, *supra* note 17, at 2. North Coast defended that it was

course of discovery, North Coast uncovered evidence of possible antitrust violations by Daishowa and its U.S. subsidiaries and by other major Japanese paper manufacturers and their U.S. subsidiaries.[20] Accordingly, the court granted North Coast leave to amend its answer to include antitrust affirmative defenses and counterclaims.[21] North Coast alleged that the Japanese purchasers of wood chips exported from North America had been operating as a buyers' cartel. Through this combination, North Coast claimed, the foreign companies were dividing the North American suppliers among themselves, fixing the price for export wood chips and boycotting North Coast for refusing to accept Japanese trading conditions.[22]

In its reply, Daishowa brought a motion to strike the antitrust affirmative defenses and to dismiss the antitrust claims[23] in the third-party complaint on the grounds that Daishowa was entitled to an implied reciprocal exemption from U.S. antitrust laws for alleged

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forced to terminate the contract in January 1981 when Daishowa repudiated its commitment to pay the market price for wood chips. North Coast Memorandum, *supra*, at 2.

20. North Coast stated in its memorandum that it had been unable to find any buyer for its export wood chips, despite its willingness on two occasions to sell the chips at auction below market prices. North Coast Memorandum, *supra* note 19, at 3.

21. 1982-2 TRADE CAS. (CCH) at 71,786. North Coast asked the court to enjoin Daishowa and the other Japanese companies from continuing the boycott and to require Daishowa to purchase North Coast's wood chips. *Id.* at 71,790.

22. North Coast Memorandum, *supra* note 19, at 3-4. North Coast cited notes of meetings of the North America Chip Committee of the Japan Paper Manufacturers Association which indicated that each U.S. seller had been allocated to a Japanese buyer who led in negotiations with the seller and which alluded to the employment of collusive strategy. *Id.* at 3. The quoted portion of the note stated: "It was agreed that we will no longer use the method of negotiating based on the market price in North America, but rather negotiate with the theory on how the chips should be." *Id.*

To buttress its antitrust allegations, North Coast claimed that no Japanese paper company had submitted a bid to North Coast since the contract had been terminated. Yet, the Japanese companies continued to make spot purchases of wood chips at prices higher than North Coast had offered to sell its product. *Id.* at 4. North Coast also asserted that there were several companies which indicated that they would be willing to buy from North Coast only if North Coast transferred its chips to another company's dock. *Id.* These acts allegedly depressed the market price of wood chips artificially along the entire Pacific Coast and threatened to destroy the North Coast Export Cooperative. *Id.*

23. A motion to strike is appropriate to eliminate from the pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. FED. R. CIV. P. 12(f). The court stated that it will not grant a motion to strike if the insufficiency of the defense is not clearly apparent, or if the defense raises factual issues that a court should determine in a hearing on the merits. 1982-2 TRADE CAS. (CCH) at 71,786-77.

cooperative conduct with other Japanese purchasers in transactions with an exempt Webb-Pomerene Association.[24] Daishowa further argued that, regardless of whether it was entitled to this implied exemption, the court should not apply U.S. antitrust laws according to the principles set forth in *Timberlane Lumber Co. v. Bank of America.*[25]

After conducting a hearing on the motion, the court refused to dismiss or strike North Coast's antitrust claims and defenses.[26] The court first determined that Daishowa was not entitled to a reciprocal exemption from antitrust violations.[27] The court then applied the *Timberlane* balancing test and concluded that it should exercise jurisdiction in light of the severity of the anticompetitive conduct alleged and the foreseeability of the resultant harm.[28]

Comity Considerations

The Timberlane Balancing Approach

In *Timberlane,*[29] the Ninth Circuit developed a set of preliminary guidelines for determining whether a U.S. court should exercise extraterritorial jurisdiction under the antitrust laws in a particular case.[30] In *Timberlane,* the private plaintiff alleged that the

24. Daishowa Memorandum, *supra* note 17, at 5. Daishowa argued that the court should imply this exemption to accomplish the Act's purpose of promoting trade with foreign buying cooperatives and to be consistent with the Act's exemption of U.S. foreign export trade. *Id.*

25. 549 F.2d 597 (9th Cir. 1976). The *Timberlane* court established a balancing approach to the extraterritorial assertion of U.S. jurisdiction which weighs seven factors in making a comity determination. *See* text accompanying note 36. Daishowa argued that the application of U.S. law would not further any clear U.S. government interest. *See* Daishowa Memorandum, *supra* note 17, at 5. The importer claimed that such an exercise would violate and invade Japanese government interests, and thus would be an improper extraterritorial assertion of U.S. antitrust law. *Id.*

26. 1982-2 TRADE CAS. (CCH) at 71,790.

27. *Id.* at 71,790. The court reasoned that it was neither a frustration of the purpose of the Webb-Pomerene Act nor inconsistent with the Act to permit a Webb-Pomerene Association to assert antitrust violations against a foreign cooperative because a Webb-Pomerene Association itself would not be exempt for unfair conduct used to monopolize commerce within the United States. *Id.* at 71,787-88.

28. *Id.* at 71,788.

29. 549 F.2d at 597.

30. The Ninth Circuit formulated a conflict of laws approach which suggests the weighing of seven factors. The same approach is reflected in the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (U.S. Dept. of State, 1976). *See also* text accompanying note 37.

intended result of defendant's conspiracy was to produce a direct and substantial effect on U.S. foreign commerce in violation of the antitrust laws.[31] The Ninth Circuit held that, as a matter of fairness and international comity, the traditional "effects" test[32] governing the extraterritorial application of the U.S. antitrust laws provided an insufficient basis for courts to assert extraterritorial jurisdiction over foreign defendants.[33] The court then set forth a three-part test for determining the circumstances under which a court should assert jurisdiction:

> Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[34]

To consider the third question, a court must evaluate and balance the relevant comity considerations in the case.[35] The Ninth Circuit

31. 549 F.2d at 601. The *Timberlane* plaintiffs alleged that officials of the Bank of America and others located in both the United States and Honduras conspired to prevent Timberlane from milling lumber in Honduras and exporting it to the United States, thus maintaining control of the Honduran lumber export business in the hands of a few select individuals who in turn were controlled by the Bank. *Id.* The Ninth Circuit vacated the district court's dismissal of the antitrust action and remanded the case. *Id.* at 615.

32. The "effects" test was formulated by Judge Learned Hand in United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416 (2d Cir. 1945). This test permits the courts to apply U.S. antitrust laws against acts committed by aliens outside the territorial boundaries of the United States which intentionally affect U.S. foreign commerce. *Id.* at 444. The liberal extraterritorial application of the antitrust laws after *ALCOA* often resulted in conflict with other nations. *See* Address of Sherman Unger, General Counsel of the U.S. Dept. of Commerce, Before the Foreign Trade Association, Jan. 28, 1982, at 7-8 [hereinafter cited as Unger Speech]. Consequently, the *Timberlane* court concluded that the "effects" test failed to take into account other nations' interests and the full nature of the relationship between the actors and the country. 549 F.2d at 611-12.

33. 549 F.2d at 613. The court instead advocated a "jurisdictional rule of reason" which considered whether the effects on U.S. commerce were substantial enough, relative to the foreign policy concerns involved, to justify the assertion of extraterritorial jurisdiction. *Id.* at 613-14.

34. *Id.* at 615.

35. *Id.* at 613-15. Under the *Timberlane* approach, the balancing test is considered an integral part of the jurisdictional determination. *See supra* notes 34-36 and accompanying text. *See also* J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §6.13 at 166 (2d ed. 1981) (discussing the integral part that the balancing process plays in the jurisdictional issue of the *Timberlane* case).

suggested that the seven factors to be weighed include:

> 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 as 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 within the United States as compared with conduct abroad.[36]

After assessing the conflict, the court must determine whether U.S. contacts and interests are "sufficiently strong, vis-a-vis those of other nations, to justify the assertion of extraterritorial authority."[37]

The Mannington Mills Approach

While the *Timberlane* court held that a court should review considerations of international comity as part of the threshold jurisdictional decision, a different application of the balancing test emerged in *Mannington Mills, Inc. v. Congoleum Corp.*[38] The *Mannington Mills*

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36. *Id.* at 614.

37. *Id.* Speaking for the Department of Justice, John H. Shenefield, Associate Attorney General, expressed a similar view in a discussion of the extraterritorial application of U.S. antitrust laws by the Department. John Shenefield, Remarks Before the International Law Institute and the American Bar Association's International Law Section (Dec. 10, 1980), *reprinted in* 1981 TRADE REG. REP. (CCH) ¶50,424 at 55,959 (Feb. 2, 1981) [hereinafter cited as Shenefield Speech]. Shenefield noted the manner in which the Justice Department carefully balances the U.S. interest in prosecuting a particular antitrust restraint against conflicting foreign interests. *Id.* at 55,960. He stated that:

> Our approach to international cases is not the one used by private plaintiffs when they file treble damage actions. Unlike the United States government, private firms hurt by restrictive business practices abroad do not have treaty or foreign policy obligations to consider, nor considerations of the national interests of foreign nations, or even of our own nation.

Id.

38. 595 F.2d 1287 (3d Cir. 1979). The plaintiff in *Mannington Mills* sued its competitor, Congoleum, for violation of the antitrust laws, claiming that the defendant had blocked U.S. competitors overseas by fraudulently obtaining patents in many foreign nations. *Id.* at 1290. The Third Circuit remanded the case for the application of a balancing test to

court applied the traditional "effects" test,[39] considering only the direct and intended effects of the alleged activity in the determination of the threshold jurisdictional issue. The Third Circuit endorsed the *Timberlane* foreign relations approach only as a secondary test used in an abstention analysis to determine whether jurisdiction *should* be exercised.[40] Under the *Mannington Mills* view, courts have jurisdiction whenever there is any effect on U.S. commerce.[41] As such, the balancing analysis does not go to the existence of

determine whether the exercise of subject matter jurisdiction was appropriate. *Id.* at 1294–98. The court expanded the balancing test to include ten factors:

> (1) degree of conflict with foreign law or policy; (2) nationality of the parties; (3) relative importance of the alleged violation of conduct here compared to that abroad; (4) availability of a remedy abroad and the pendency of litigation there; (5) existence and foreseeability of intent to harm or affect American commerce; (6) possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) whether an order for relief would be acceptable in the U.S. if made by the foreign nation under similar circumstances; (10) whether a treaty with the affected nations has addressed the issue.

Id. at 1297–98.

39. *Id.* at 1291–92. For a discussion of the effects test, see *supra* note 32 and accompanying text.

40. The majority in *Mannington Mills* did not acknowledge this analytical difference, glossing over it in their endorsement of the *Timberlane* test. 595 F.2d at 1297. Judge Adams' concurring opinion, however, made it clear that the court employed an abstention analysis:

> I do not agree that a court may conclude that it is invested with the subject matter jurisdiction under the Sherman Act but may nonetheless abstain from exercising such jurisdiction in deference to considerations of international comity; rather, it seems that those considerations are properly to be weighed at the outset when the court determines whether jurisdiction vel non exists, or in fashioning the decree.

Id. at 1299.

Thus, while *Timberlane* and *Mannington Mills* reveal a similar interest in comity and conflict issues, *Timberlane* calls for a jurisdictional analysis while *Mannington Mills* calls for more of an abstention analysis. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.13 at 165. Moreover, while *Mannington Mills* leaves the *ALCOA* "effects" standard untouched, *Timberlane* lowers the magnitude of effect necessary for the threshold test, requiring only "some" actual or intended effect. 549 F.2d at 613.

The Justice Department has noted this difference in approach. *See* Shenefield Speech, *supra* note 37, at 55,961–62. A recent case, Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680, 687–88 (S.D.N.Y. 1979), has also distinguished the *Timberlane* and *Mannington Mills* approaches on these grounds.

41. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.13.

jurisdiction, but to whether the court, in its discretion, should decline to exercise jurisdiction.[42] This treatment of the balancing test narrows the scope of appellate review of the trial court's determinations on balancing issues and permits the conclusion that the courts may waive the balancing test.[43] The federal courts have split in their adherence to either of these distinct decisions to resolve issues involving the extraterritorial reach of U.S. antitrust laws.[44]

ANALYSIS

The Daishowa Decision

The court's analysis in *Daishowa* emphasized the gravity of the anticompetitive conduct alleged and the foreseeability of the resultant harm without actually focusing on international comity concerns, the heart of the *Timberlane* test.[45] Moreover, while North Coast's Webb-Pomerene status may not have been a sufficient reason to extend reciprocal immunity, the exemption was a relevant factor in the comity balance which the court failed to consider. The court instead excluded issues of reciprocity from its balancing of comity considerations.[46]

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42. *Id.*

43. *Id. See also In Re* Uranium Antitrust Litigation, 617 F.2d 1248, 1255-56 (7th Cir. 1980) (court reviewed district court's jurisdictional conclusion within abuse of discretion framework and appeared to regard jurisdictional issue as waived by foreign defendants' default).

44. For those cases which have adopted the *Timberlane* approach, see, *e.g.*, Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981); Wells Fargo & Co. v. Wells Fargo Express, 556 F.2d 406, 427-30 (9th Cir. 1977); National Bank of Canada v. Interbank Card Association, 507 F. Supp. 1113, 1120 (S.D.N.Y. 1980).

For those cases supporting the *Mannington Mills* abstention approach, see, *e.g.*, Industrial Investment Development Corp. v. Mitsui & Co., Ltd., 671 F.2d 876, 884 n.7 (5th Cir. 1982); *In re* Uranium Antitrust Litigation, 617 F.2d 1248, 1255 (7th Cir. 1980); Conservation Council of Western Australia, Inc. v. Aluminum Company of America (ALCOA), 518 F. Supp. 270, 275-76 (W.D. Pa. 1981).

45. *See* 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,786. For the *Timberlane* test, see *supra* text accompanying note 36.

46. Although the first part of the court's opinion dealt exclusively with North Coast's Webb-Pomerene status and possible reciprocal exemptions, those factors never appeared in the court's eventual balancing of what it deemed to be the relevant considerations. *See id.* at 71,789-90.

The court began by noting that the procedural posture of a motion to strike suggested that Daishowa had a heavy burden of proof.[47] The court then correctly pointed out that neither the Webb-Pomerene Act nor its legislative history mentioned immunity from antitrust laws for foreign cooperatives doing business with U.S. Webb-Pomerene cooperatives.[48] The court concluded that it was neither a frustration of the purpose of the Webb-Pomerene Act nor logically inconsistent to permit a Webb-Pomerene association to assert antitrust violations against a foreign cooperative.[49]

The court's determination that no reciprocal immunity existed, however, was not supported by a finding that Daishowa's activities actually had gone beyond the limited exemption granted to U.S. Webb-Pomerene associations.[50] Instead, the court apparently assumed that the antitrust laws apply whenever any possible foreign anticompetitive effect is felt in the United States. *Timberlane*, in contrast, requires that more than an effect on U.S. foreign commerce be shown and mandates a balancing of the interests involved.[51]

After assuming the inapplicability of a reciprocal exemption and reviewing the *Timberlane* balancing test, the court concluded that "[d]ue to the serious nature of the anticompetitive conduct alleged, and the foreseeability of the harm occurring from the alleged activities," the balance of factors under *Timberlane* required the court to refuse to dismiss or strike North Coast's antitrust claims and defenses.[52] To support this conclusion, the court relied on the Ninth Circuit's suggestion in *Timberlane* that dismissal under Rule 12(b)(1) without the benefit of Rule 56(e)[53] discovery by the plaintiff

47. In addressing this aspect of the case, the court noted that as "striking a portion of the pleading is a drastic remedy and often used as a dilatory tactic," motions to strike are infrequently granted and "[c]ourts have even less sympathy for them in antitrust litigation." *Id.* at 71,786. The court then indicated that it would not grant the present motion to strike "if the insufficiency of the defense [was] not clearly apparent, or if it raise[d] factual issues that should be determined on a hearing on the merits." *Id.* at 71,786-87.

48. *Id.* at 71,787.

49. *Id.* The court reasoned that because North Coast was not totally immune from the Sherman Act, a foreign cooperative like Daishowa, acting in violation of U.S. antitrust law, had no basis to assert reciprocal immunity. *Id.* at 71,787-88.

50. Indeed, the court stated that the allegations raised substantial questions under the Sherman Act which North Coast should be permitted to pursue in discovery. *Id.* at 71,788. This question will not be resolved until the entire case is heard on the merits.

51. *See supra* notes 32-37 and accompanying text.

52. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,790.

53. The court in *Timberlane* noted that Rule 56 summary judgment treatment under the

"perhaps" would be sustainable "if it could be shown that defendants' activities had no effect on U.S. foreign commerce and were intended to have none."[54] The *Daishowa* court failed to recognize that this language was directed to the standard for summary judgment under Rule 56(e) in extremely complex antitrust litigation, and had nothing to do with the standard for the tripartite test set out later in the *Timberlane* opinion.[55] Thus, contrary to the *Timberlane* decision, the *Daishowa* court failed to measure the impact of international comity considerations. Furthermore, while the court quoted the Ninth Circuit's mandate that several elements be weighed in the comity evaluation,[56] the court's opinion provides no guidance as to the eventual balance of those factors.[57]

Instead, the court apparently employed the *Mannnington Mills* abstention analysis,[58] concentrating on the intended effects of the alleged conduct and giving only secondary consideration to comity concerns. In essence, the *Daishowa* court resolved the threshold jurisdictional issue when, under a Webb-Pomerene analysis, it determined that Daishowa's alleged conduct fell within the purview of the Sherman Act.[59] The court employed the *Timberlane* analysis only to determine whether it should abstain from exercising jurisdiction, and not to resolve the threshold jurisdictional question, as

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Federal Rules of Civil Procedure is not required for a 12(b)(1) dismissal. 549 F.2d at 602. Yet even if a party is secured Rule 56 treatment, it does not necesssarily follow that the party is entitled to full discovery under Rule 56(e), in order for dismissal under 12(b)(1) to be sustainable. *Id.* at 602-03 n.6.

54. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,788. The court went on to state that "[t]his is a rigorous standard for Daishowa to meet in order for this Court to grant dismissal of North Coast's antitrust claims. By application of the three-part *Timberlane* analysis, this Court may determine whether such a standard has been met." *Id.*

55. Indeed, the standard for exercising jurisdiction under *Timberline* is whether, in face of the degree of conflict with foreign law or policy, the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction. 549 F.2d at 614-15. In fact, the Ninth Circuit stated that the district court's judgment, which held only that the restraint involved did not produce a direct and substantial effect on U.S. foreign commerce, did not satisfy any of the relevant inquiries. *Id.* at 615. Accordingly, the Ninth Circuit vacated the district court's dismissal due to insufficient evidence on the comity question. *Id.*

56. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789. For the *Timberlane* factors which the *Daishowa* court cited, see *supra* text accompanying note 36.

57. *See generally infra* notes 60-82 and accompanying text.

58. *See supra* notes 38-44 and accompanying text.

59. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,788.

Timberlane requires.

Moreover, after making this jurisdictional determination, the court failed to consider the arguments in favor of a reciprocal exemption in the broader context of potential conflict with foreign law or policy. Thus, the *Daishowa* court erred by using the *Timberlane* test as only a secondary line of analysis and by giving inadequate consideration to potential conflict with foreign law or policy when it did eventually weigh the comity factors.

Degree of Conflict with Foreign Law or Policy

The *Timberlane* analysis involved a balancing of competing interests.[60] While the Ninth Circuit noted that "[a] *difference* in law or policy is one likely sore spot,"[61] ironically, it ppears that the *similarity* of U.S. and Japanese law in this area was an aggravating factor in the *Daishowa* case. In fact, as Daishowa asserted,[62] Japan specifically exempts certain import associations from its own Antimonopoly Law[63] through the Export-Import Transactions Law.[64]

Under article 19-(4) of the Transactions Law, a qualifying import association, according to its articles, may fix price, quantity, quality, or any other matter related to the import trading of the same

60. *See supra* notes 34–36 and accompanying text.

61. 549 F.2d at 614 (emphasis added).

62. Daishowa Memorandum, *supra* note 17, at 24–25. It is unclear why the court asserts that Daishowa did not cite the applicable Japanese law, as there are several citations within the memorandum. The court apparently confused the issue of whether Daishowa actually meets the requirements set out by the law, a separate issue which is addressed *infra*, at note 69.

63. DOKUSEN KINSHI HO (Antimonopoly Law) Law No. 54 of 1947 [hereinafter cited as the Antimonopoly Law]. The development of the Antimonopoly Law in the years following its enactment in 1947 has been marked by considerable fluctuation in the degree of rigidity in its enforcement. Matsushita, *The Antimonopoly Law of Japan,* 11 LAW IN JAPAN 57 (1978). The years 1947 to 1952 were marked by energetic enforcement of the Law's terms. *See Id.* Enforcement in the following years, through the mid-1960s, however, was significantly relaxed. *See id.* Since the mid-1960s the law has been enforced with renewed vigor for a variety of reasons: the continuous inflation during this period, the rise in consumerism, the liberalization of trade and capital transactions, and a shift in the goals of economic policy from high growth to welfare. *See id.* The Antimonopoly Law was amended in 1977 to strengthen its provisions and to toughen its enforcement. *Id.* at 58.

64. YUSHUTSUNYUU TORIHIKI HO (Export & Import Transactions Law) Law No. 299 of Aug. 5, 1952 *as amended, reprinted in* 5 EHS Law Bulletin Series (1969) [hereinafter cited as the Transactions Law].

or similar commodities,[65] upon approval from the Minister of International Trade & Industry (MITI).[66] Article 33 of the Transactions Law stipulates that the provisions of the Antimonopoly Law do not apply to matters relating to import trading that have been fixed through obtaining the approval required by article 19-(4).[67] As with the Webb-Pomerene Act, however, only a limited exemption is granted.[68]

Daishowa relied heavily on this Japanese exemption in its memorandum in support of its motions to dismiss and to strike, noting the irony of requiring the Japanese to respect the U.S. exemption, but not requiring U.S. exporters to respect the Japanese exemption.[69] Although consideration of foreign relations is really the heart of the *Timberlane* formulation, the Daishowa court never

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65. To qualify as an association exempted from application of the Antimonopoly Law, certain conditions must exist, and the measures taken must be necessary to eliminate those conditions. *Id.*, art. 7-(2). Cause for such measures is said to exist in any of three circumstances: (1) where the trade with respect to the commodity to be imported is restrained at the place of shipment or in the importing of other foreign countries from the place of shipment; or where, excessive competition in the import trading results in conspicuously disadvantageous terms and conditions being offered to the Japanese, as compared to the import trading terms offered to other foreign countries or the domestic trading terms; (2) where the commodity must be imported from a specific country due to an international arrangement between governments and such importation is, or is likely to become, difficult because the price is excessively higher than that of other countries or the quality is conspicuously different from that available from other countries; (3) where it is likely that it will become difficult to secure a commodity produced by exploitation of foreign resources because the exploitation of those resources cannot be undertaken or is likely to become difficult. *Id.*

66. *Id.*, art. 19-(4), para. 22.

67. *Id.*, art. 33.

68. For instance, there is no exemption from the Antimonopoly Law when "unfair business practices" are used or encouraged. *Id.*, art. 33-(1).

69. *See* Daishowa Memorandum, *supra* note 17, at 24-25. In its memorandum, North Coast responded that no conflict in fact arises unless Daishowa and its alleged coconspirators qualify for the Japanese import exemption. North Coast Memorandum, *supra* note 19, at 19 n.7. While Daishowa never expressly addresses this issue, it is implicit in its memorandum and reply memorandum that Daishowa comes within the exemption. *See* Daishowa Memorandum, *supra* note 17, at 24. In addition, North Coast cited a Japanese newspaper article which indicated that "Daishowa Seishi" was ordered to pay a fine for illegal cartel organization as an illustration of Japanese condemnation of activities in restraint of trade. North Coast Memorandum, *supra* note 19, at 19. In the present case, however, the fact that Daishowa was operating pursuant to the MITI authorization required by Article 19-(4) of the Transactions Law appears to be irrelevant. *See supra* notes 65-66 and accompanying text.

confronted this important issue and quickly dismissed the Japanese contentions: "It is not clear from the comity and fairness discussions whether a conflict of law exists. Daishowa does not cite the applicable Japanese law."[70] Thus, due to its narrow focus on the alleged activities' effect on U.S. foreign commerce, the court ignored the fact that it is the potential similarity of U.S. and Japanese law which gives rise to the present conflict. Furthermore, the court summarily dismissed another area of potential friction with Japanese antitrust law—the different manner of its enforcement as compared with that of the United States.[71]

Additional Comity Considerations

The *Daishowa* court also failed to address other fundamental questions of comity and fairness in its analysis. The *Timberlane* opinion explicitly designates the nationalities of the parties as a factor to be weighed in the analysis.[72] The *Daishowa* court, however, spoke solely of the "great interest in providing a convenient forum and a prompt remedy" because the "party asserting the antitrust violations [was] an American corporation."[73] This approach completely overlooked Japan's identical concern in providing a swift and convenient remedy for its nationals.[74] The court further failed to give weight to the fact that Daishowa's alleged anticompetitive conduct occurred primarily in Japan.[75] Instead, the court placed great emphasis on the fact that both parties were present in a U.S. court, a reliance which appears misplaced in light of the breach of

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70. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789. *See also supra* note 62 (noting that Daishowa did cite the applicable Japanese law even though the court said otherwise). It is not clear from *Timberlane* whether a rigorous analysis of the foreign law, such as the *Timberlane* court required, is a prerequisite to the balancing test.

71. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789-80. Unlike in the United States, private suits for damages on the basis of the Antimonopoly Law have yet to play a large role in Japan. *See* Matsushita, *supra* note 63, at 58. Instead, most of the enforcement has been done by an administrative agency, the Fair Trade Commission (FTC). *Id.*

72. The Ninth Circuit in *Timberlane* stated that, "Nationality is another [likely sore spot]; though foreign governments may have some concern for the treatment of American citizens and business residing there, they primarily care about their own nationals." 549 F.2d at 614.

73. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789.

74. One of the *Timberlane* court's criticisms of the "effects test" was that it failed to consider this foreign interest. *See supra* notes 32-33 and accompanying text.

75. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789.

contract issue involved in that suit.[76]

While the court devoted a considerable portion of its opinion to the effect of the alleged activity on U.S. foreign commerce, little consideration was given to similar, possibly detrimental, effects on Japanese commerce. Stating that "there [was] no evidence of harm to the Japanese economy from the alleged activities,"[77] the court failed to weigh the possible impact that a penalty of treble damages could have on the Japanese trading interests involved.[78] The court further exposed the inadequacy of its "balancing" by stating that "no remedy may be available under Japanese antitrust law for this American corporation."[79] This determination overlooks Japan's similar interest in not having its nationals subjected to punitive damages of potentially devastating proportions.

It thus becomes clear why the *Daishowa* court based its refusal to dismiss the antitrust claims on the "serious nature of the anticompetitive conduct alleged, and the foreseeability of the harm occurring from the alleged activities":[80] little else was considered in the "balancing" conducted. By returning to the traditional effects test,[81] the *Daishowa* court did little to advance the *Timberlane* concern for fundamental considerations of comity and fairness and repercussions in the international sphere. To the contrary, the *Daishowa* decision may intensify "[t]he heat which [the] United States antitrust laws continue to engender among nations which are otherwise friendly to the United States . . .."[82]

Policy Implications

The *Daishowa* court failed to weigh adequately the background of international protest against the extraterritorial application of U.S.

76. The court did not address Daishowa's suggestion that the traditional contract issues in the suit be considered separately from the issue as to whether Daishowa's activities were illegal under U.S. antitrust laws. Daishowa Memorandum, *supra* note 17, at 18.

77. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789.

78. *Id. See* Daishowa Memorandum, *supra* note 17, at 18-19 (discussing the great concerns to U.S. trading partners worldwide arising from the potentially devastating impacts of a treble damage penalty).

79. 1982-2 TRADE CAS. ¶64,774 at 71,789-90.

80. *Id.* at 71,790.

81. *See supra* note 32 and accompanying text.

82. Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697, 698 (1982).

antitrust laws against which the action was set.[83] Within the last two decades there has been dramatic growth in the number of private antitrust actions brought in the United States.[84] This increase is significant because the United States remains one of the few countries with a private right of action for injuries arising from antitrust violations, and the only country that rewards successful plaintiffs with treble damages.[85] Accordingly, British observers have written that "the plaintiff claiming triple damages in proceedings in the United States . . . is perceived abroad as a menace."[86] Unlike the government, the private plaintiff need not balance national interests in litigating a particular anticompetitive restraint against conflicting foreign interests.[87]

Although "[d]ifferent countries have different views as to the proper role of the civil law in the protection of free trade,"[88] many countries do exempt export and/or import associations from their respective antitrust laws.[89] Thus, the combining of such exemptions with the traditional effects doctrine, as employed by the *Daishowa* court,[90] gives rise to what may be perceived abroad as a double standard: "United States antitrust laws insist that foreign exporters act competitively in the international market, while the Webb-Pomerene Act allows United States exporters to act anticompetitively in that same market."[91]

Foreign governments increasingly have become more forceful in expressing their concern over the extraterritorial application of the

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83. For a discussion of increasing foreign sensitivity to the application of U.S. antitrust laws abroad, see *id.*

84. In 1960, less than three hundred private antitrust suits were filed in the United States. Shenefield Speech, *supra* note 37, at 55,961. In the year ending June 30, 1980, 1,457 suits were filed—a five-fold increase. *Id.*, citing ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, table 22 at 63 (1980).

85. Shenefield Speech, *supra* note 37, at 55,961. As already noted, in Japan there are rarely private suits for a violation of the Antimonopoly Law. *See supra* note 71 and accompanying text.

86. Pettit & Styles, *supra* note 82, at 698.

87. Shenefield Speech, *supra* note 37, at 55,960.

88. Pettit & Styles, *supra* note 82, at 698.

89. *Id.* at 699. Among the countries granting such an exemption are the United States, the United Kingdom, Canada, West Germany, Japan and Australia. *Id.*

90. For a discussion of the *Daishowa* court's application of the effects test, see *supra* note 58 and accompanying text.

91. Pettit & Styles, *supra* note 82, at 699.

U.S. antitrust laws. One response of foreign states has been to enact blocking statutes and other countermeasures designed to minimize the impact of U.S. antitrust enforcement, such as the recapture of treble damage awards.[92] Hence, decisions such as *Daishowa* can only serve to antagonize our foreign trading partners by undermining the sensitivity U.S. courts recently have shown to this international reaction and to the limits which international law and comity should impose on national regulatory policy.[93]

Ironically, against this backdrop of sensitivity to the extraterritorial application of U.S. antitrust laws, foreigners confront antitrust-exempt U.S. export associations seeking to apply U.S. antitrust laws to foreign nationals, similarly exempt under their own laws, for associating with other companies. From an international perspective, it is unclear why U.S. companies have a better claim to ignore the Japanese exemption than Japanese companies would have to ignore the U.S. exemption.[94] With the increasing possibility of foreign retaliation against the operation of Webb-Pomerene associations,[95] the United States may soon confront more vigorous extraterritorial application of foreign antitrust laws.

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92. These blocking statutes, which may obstruct foreign discovery in U.S. antitrust actions or impede the recovery of antitrust awards, have been enacted by Great Britain, Canada, Australia, South Africa, the Netherlands, Italy, West Germany, Japan and Australia. *See generally* Pettit & Styles, *supra* note 82.

93. The Department of Justice has also begun to show greater sensitivity to the interests of foreign governments and international comity in its enforcement policy, as demonstrated by its endorsement of the *Timberlane* approach. *See* Shenefield Speech, *supra* note 37, at 55,961; *see also* THE DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), *reprinted in* [Jan.-June] Antitrust & Trade Reg. Rep. (BNA), No. 799, at E-1, E-2, E-3 (1977).

94. *See supra* note 27 and accompanying text.

95. A striking example of foreign retaliation is the recent action taken by the Commission of the European Communities (EC Commission) against the Pulp, Paper & Paperboard Export Association of the U.S. (commonly called the Kraft Export Associaton or KEA) for alleged price fixing. *See* Unger Speech, *supra* note 32 (discussing trade issues central to U.S. foreign policy). A Justice Department summary of informal consultations held on January 14, 1982 in Paris states: "The [European] Commission considers that export associations whose activities have substantial anticompetitive effects in the Common Market may violate community competition law, even if the activities are authorized in the association's home country." [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1050 at 267 (Feb. 4, 1982).

ALTERNATIVE APPROACHES TO THE APPLICATION OF THE *Timberlane* FORMULA

The *Daishowa* court apparently followed the *Mannington Mills* approach by treating the balancing prong of the *Timberlane* tripartite test as essentially nonjurisdictional. The preferable approach, however, is to treat the balancing process as an integral part of the jurisdictional determination, as the *Timberlane* court's treatment of the issue clearly intended.[96] As *Timberlane* suggests, the second part of the tripartite test, which relates to the nature and magnitude of the restraint,[97] should bear on the substantive and not the jurisdictional scope of the Sherman Act.[98] This approach leads to a two-step analysis: Does the court have subject matter jurisdiction under the *Timberlane* comity analysis? If so, does the complaint state a cause of action under the Sherman Act?

Thus, the "effects" element of the *Timberlane* test is "jurisdictional" only in the narrow sense that the complaint must state a claim under the Sherman Act to survive a motion to strike.[99] Applying this analysis to the present case, in ruling on the motion to dismiss the *Daishowa* court should have treated the nature and extent of the impact of Daishowa's activities as a question of substantive law, rather than as a question of jurisdiction.

Yet, no federal court has applied the full scope of the *Timberlane* comity considerations within the antitrust context.[100] The frustration with which federal judges have faced this balancing task was

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96. *See supra* notes 31-37 and accompanying text. This is the view adopted by Atwood and Brewster, authors of AMERICAN BUSINESS ABROAD. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.13.

97. The second element of the tripartite test involves the question whether the alleged restaint is "of such a type and magnitude so as to be cognizable as a violation of the Sherman Act." *Timberlane,* 549 F.2d at 615.

98. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.13.

99. *Id.*

100. *Id.* at § 6.15. Judge Choy, in I.A.M. v. OPEC, 649 F.2d 1354 (9th Cir. 1981), considered the *Timberlane* factors, but found instead that the act of state doctrine precluded adjudication of the case.

manifested in the *In Re Uranium* case.[101] Indeed, "[i]f the ultimate issue presented by *Timberlane* and *Mannington Mills* is framed in terms of which country is most intensely interested in the case at bar and whose policies should therefore prevail, understandably the American judiciary may feel it is being asked to choose between being unpatriotic or disingenuous."[102] Moreover, the courts are often not in a good position to judge the magnitude of foreign government interest.[103]

In light of these inherent difficulties, the judiciary should adopt an alternative perspective on the *Timberlane* balancing process, by viewing the process as a balancing of two different U.S. interests: "the possible benefits of applying American antitrust laws to the conduct in question, compared to the possible damage to U.S. political and economic foreign policies if the court proceeds with a suit under circumstances where foreign governments object to the assertion of jurisdiction."[104] This approach puts the balancing process into a form which is familiar to the courts[105] and reflective of the reasons why the U.S. government has endorsed the relevance of comity

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101. In the *In Re* Uranium Antitrust Litigation, discovery was resisted by defendants on the grounds that it would offend foreign countries where the documents were located by violating their non-disclosure laws. 480 F. Supp. 1138 (N.D. Ill. 1979). Judge Marshall responded:

> Several defendants cite the Restatement, Second, Foreign Relations Law of the United States, § 40(a) or rely on broad notions of "international comity" for the proposition that we should balance the vital national interest of the United States and the foreign countries to determine which interests predominate. Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy.... It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.

Id. at 1148, *quoted in* J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.16.

102. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.17.

103. *Id.* This is particularly true where there are private parties involved that may not have access to U.S. or foreign government sources that could aid the court. Atwood and Brewster also reject as a reliable standard a possible inference of disinterest of the foreign government from the fact that it fails to appear as *amicus curiae*. *Id.*

104. *Id.*

105. Such an approach raises issues similar to those which the court must address under principles of conflict of laws and the act of state doctrine. *Id.*

considerations in antitrust jurisdiction.[106] In this way, the judiciary can assess "whether its exercise of jurisdiction over an international controversy will be perceived abroad as so excessive as to be, on balance, damaging to American interests."[107]

CONCLUSION

The *Daishowa* court struggled with the difficult task of balancing international comity factors in conjunction with the foreign relations problems raised by the Webb-Pomerene Act. Yet, the court's decision was, in reality, an application of the traditional "intended effects" test which never focused on the comity factors that comprise the *Timberlane* analysis. The court also erred in its secondary line of analysis by not giving adequate consideration to the degree of conflict with foreign law.

The *Daishowa* result produces a double standard which can serve only to intensify foreign hostility towards the extraterritorial application of U.S. antitrust laws. To alleviate this growing tension with our international trading partners, the judiciary should apply the *Timberlane* balancing formula consistently as part of the threshold jurisdictional determination.

In addition, results more consistent with notions of international comity can be achieved in the future if the burden of balancing U.S. interests directly against foreign interests is approached in a different light. The judiciary would be better able to fulfill this task and to weigh principles of international comity if it balanced the U.S. interest in applying its antitrust laws against the U.S. interest in preventing the erosion of its foreign relations. The continuing foreign challenge to the competitive position of the United States demands that mutual respect and sensitivity be shown by U.S. and foreign courts; a failure to meet this objective will effectively negate the protection that each country desires to afford its companies.

Cheryl R. Adler

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106. *Id.*
107. *Id.*

Exhibit 19

Case Note

Preserving Per Se

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

> "[W]e do not have two versions of antitrust law, one for international transactions and one for domestic: to the extent the law applies at all, it applies in a nondiscriminatory fashion."[1]

In 1995, the Department of Justice indicted Nippon Paper Industries of Japan for conspiring with other Japanese firms to fix prices on thermal fax paper sold in the United States, in violation of section 1 of the Sherman Anti-Trust Act.[2] In 1997, the First Circuit upheld the indictment,[3] becoming the first court to extend the jurisdictional reach of the Sherman Act to a criminal conspiracy formed solely among foreign firms.[4]

Yet the First Circuit decision and its subsequent implementation by the district court did not create a jurisdictional threshold that, once crossed, sets the typical antitrust prosecution in motion. To the contrary, *Nippon Paper* established a new element of the *substantive* offense—proof of "substantial effects"—that applies solely in international prosecutions. Not only does the new doctrine produce different substantive requirements for domestics and foreigners, it also undermines a half-century of case law holding that, once a particular restraint of trade is deemed illegal "per se"—as it was in

1. Diane P. Wood, The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction, Address Before the ABA Antitrust Section Spring Meeting (Apr. 5, 1995), *available in* 1995 WL 150745, at *2.

2. 15 U.S.C. § 1 (1994) ("Every contract . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

3. *See* United States v. Nippon Paper Indus., 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998). The district court had dismissed the case for lack of subject matter jurisdiction. *See* United States v. Nippon Paper Indus., 944 F. Supp. 55, 66 (D. Mass. 1996) ("[T]he criminal provisions of the Sherman Act do not apply to conspiratorial conduct in which none of the overt acts of the conspiracy take place in the United States.").

4. *See Nippon Paper*, 109 F.3d at 4 (describing "a criminal prosecution for solely extraterritorial conduct" as "uncharted terrain"). The alleged conspiracy did not merely include foreign firms but was formed abroad, at a meeting in Japan.

this case—effects need not be proven to convict.

After providing a brief background of the "per se rule," this Case Note outlines how courts have undermined the rule through their reluctance to subject foreigners to its forceful presumptions. The Case Note argues that the rule should be applied consistently against all defendants. One way to do this is to separate jurisdiction from substance, thereby allowing courts to make the jurisdictional determination of effects using presumptions that both comport with the rule's emphasis on efficiency and follow naturally from per se doctrine.

I

The First Circuit based its decision in *Nippon Paper* on *Hartford Fire Insurance v. California*,[5] a civil antitrust action in which the Supreme Court held that the Sherman Act applied abroad, provided "foreign conduct . . . meant to produce and did in fact produce some substantial effect in the United States."[6] The First Circuit extended the jurisdictional authority further, holding that *Hartford Fire* applied in the criminal context.[7] At trial, the district court put the question to the jury; but rather than separate the jurisdictional inquiry from the merits, the court included the *jurisdictional* effects requirement in its charge on the elements of the *substantive* offense.[8] In July of 1998, the trial ended with a hung jury.

Nippon Paper creates a conflict within criminal antitrust doctrine by requiring that effects be proven to find a substantive "per se" violation of the Sherman Act. The case was the first wholly foreign criminal antitrust action prosecuted under the per se rule, one of the two substantive frameworks used to decide antitrust cases. Under the other framework, the rule of reason, the circumstances justifying the restraint are balanced against the restraint's anticompetitive effects.[9] The per se rule, however, precludes consideration of either the effects of the restraint or the reasons for it.[10] The per se rule is potent because negative effects are *presumed*. Moreover, it is

5. 509 U.S. 764 (1993).

6. *Id.* at 796. While one might argue that the jurisdictional language in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) must also be examined, the FTAIA does not apply to import commerce. *See* 15 U.S.C. § 6a (1994); *see also Hartford Fire*, 509 U.S. at 796 n.23 (declining to place weight on language in the FTAIA); *Nippon Paper*, 109 F.3d at 4 (same).

7. *See Nippon Paper*, 109 F.3d at 9 (holding that "the Sherman Act applies to wholly foreign [criminal] conduct which has an intended and substantial effect in the United States").

8. *See* Record at 2127, 2138, 2199, *Nippon Paper* (Cr. No. 95-10388-NG). The judge listed a "number of different ways" to find substantial effects, including whether the volume of commerce or the share of the market was substantially affected by the conspiracy and whether competition in the entire market was substantially lessened by the conspiracy. *See id.* at 2199.

9. *See, e.g.*, Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) (defining considerations under the rule of reason).

10. *See infra* text accompanying note 31.

efficient because that presumption "avoids the necessity for an incredibly complicated and prolonged economic investigation."[11] As such, criminal antitrust prosecutions typically target only per se offenses.[12]

For more than fifty years, the Supreme Court has held that price-fixing agreements like that in *Nippon Paper* are per se illegal, relieving the government of its burden to prove their effects.[13] The Court, however, also has indicated that using presumptions to find elements of the crime may be unconstitutional.[14] Hence the significance of the *Nippon Paper* charge: By importing the jurisdictional effects requirement into the elements of the substantive offense, the court dispossessed the per se rule of its powerful presumptions.

II

Courts justified undermining the per se rule for foreigners based on comity principles.[15] The notion that it is somehow unfair to subject foreigners to U.S. law—even absent a conflict of laws—makes courts reluctant to use the per se presumptions against them. *Nippon Paper* provides one of two bad ways to reach the same bad result.

One way courts have eroded the per se rule for foreigners has been to try to preserve it through nonuse. Recognizing that an effects requirement is inconsistent with the per se presumptions, courts before *Nippon Paper* refused to apply the rule to foreign criminal conspiracies. Instead, they explicitly adopted the rule of reason for offenses that, but for the foreign defendant, would have been prosecuted under the per se framework.[16] The result is an asymmetric doctrine: Foreigners are tried under the far more forgiving rule of reason for the same offense that subjects U.S. parties to the per se rule.[17]

The First Circuit, by contrast, broke new ground in deciding that Nippon Paper would be prosecuted under the per se standard, not the rule of

11. Catalano, Inc. v. Target Sales, 446 U.S. 643, 646 n.9 (1980).

12. *See* DEP'T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 2 (1995) [hereinafter GUIDELINES] ("Conduct that the Department prosecutes criminally is limited to traditional per se offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging . . . .").

13. *See, e.g.*, *Catalano*, 643 U.S. at 650; United States v. Socony-Vacuum Oil, 310 U.S. 150, 224 n.59 (1940).

14. *See* Francis v. Franklin, 471 U.S. 307, 313 (1985) (holding unconstitutional presumptions related to elements where these presumptions may be understood by the jury as mandatory, conclusive, or requiring rebuttal); Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (same).

15. *Cf. Nippon Paper*, 109 F.3d at 8 ("[C]omity 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.").

16. *See, e.g.*, Metro Indus. v. Sammi Corp., 82 F.3d 839, 843 (9th Cir. 1996) ("Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, per se analysis is not appropriate.").

17. *Cf.* Albert A. Foer, *The Political-Economic Nature of Antitrust*, 27 ST. LOUIS U. L.J. 331, 337-38 (1983) ("[W]hen the rule of reason is applied, the defendant virtually always wins.").

reason.[18] The court even recognized the per se presumptions, stating that, "'conduct regarded as per se illegal'" has "'unquestionably anticompetitive effects.'"[19] The district court, however, precluded the use of those presumptions by including effects as an essential element, thereby requiring the government to prove the conspiracy's impact. *Nippon Paper*'s doctrine thus is not only asymmetric, but internally inconsistent. A per-se-plus-effects test for only foreigners raises the burden of proof for their conviction. Moreover, a per se rule that requires proof of effects is not a per se rule at all; it is a rule of reason and should be acknowledged as such.[20]

Either way, the presence of a foreign defendant does not justify weakening the per se rule. Every indictment of a non-U.S. party follows an executive branch decision that "the importance of antitrust enforcement outweighs any relevant foreign policy concerns."[21] Once that decision is made, courts should not undermine it by trying foreigners under weaker rules. The importance of enforcement particularly outweighs comity concerns in cases such as *Nippon Paper*, where foreigners specifically conspire to harm American consumers.[22] Indeed, the Sherman Act's substantive requirement of intent ensures that those convicted knowingly conspired to restrain U.S. trade. *Hartford Fire* also holds that comity is not a factor absent a conflict between domestic and foreign law.[23] The First Circuit recognized that *Hartford Fire* "stunted"[24] the comity doctrine.

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18. *See Nippon Paper*, 109 F.3d at 7 (holding that "the instant case falls within [the per se] rubric" and treating it as such).

19. *Id.* (quoting United States v. United States Gypsum Co., 438 U.S. 422, 440 (1978)).

20. The Department of Justice has stated that, although effects may be relevant ex ante to establish jurisdiction, on the merits "the standards themselves operate in a non-discriminatory fashion." Wood, *supra* note 1, at *4. Yet a per se standard that adds a substantive element to the offense for foreign offenders only is anything but nondiscriminatory.

21. GUIDELINES, *supra* note 12, at 15; *cf. id.* ("The Department does not believe it is the role of the courts to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.").

22. *See* 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273c4, at 395 (1997) (opposing extra comity considerations in cases like *Hartford Fire*, where "foreign insurers, selling a product in the United States, conspired ... to exclude ... American firms from the market—an alleged agreement whose only intended effect would be felt in the United States"). In *Nippon Paper*, the government claimed the conspirators specifically fixed a price, in U.S. dollars ($20), for sales in the North American market.

23. *See* 509 U.S. 764, 798-99 (1993) (noting that the "only substantial question is whether there is in fact a true conflict between domestic and foreign law" and, finding no conflict, holding that "[w]e have no need ... to address other considerations ... on grounds of international comity" (internal citation and quotation marks omitted)). *But cf. id.* at 812-13 (Scalia, J., dissenting) (arguing that courts must also consider whether Congress has asserted regulatory power over the foreign conduct); Timberlane Lumber v. Bank of America, 549 F.2d 597, 613-14 (9th Cir. 1976) (creating a test balancing effects with comity, allowing jurisdiction to be denied even upon finding effects to be present); 1 SPENSER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 6:10, at 28-29 & nn.4-10 (3d ed. 1997) (noting *Timberlane*'s acceptance before *Hartford Fire*).

24. *Nippon Paper*, 109 F.3d at 8 ("[Comity's] growth in the antitrust sphere has been stunted by *Hartford Fire*, in which the Court suggested that comity concerns ... defeat ... jurisdiction

Once courts make the decision to go forward, they should do so symmetrically. That means either abandoning the per se rule entirely or using it consistently. The First Circuit rightfully was unwilling to discard the per se standard; it produces enormous efficiencies, especially for practices like price-fixing, repeatedly found to harm competition.[25] The district court could have preserved the rule by separating the jurisdictional effects question from the part of the inquiry to which the per se rule actually applies—the substantive offense of conspiracy to restrain trade. The two inquiries may, and should, be separated,[26] especially since jurisdiction is a matter of law.[27] Determining jurisdiction may require findings of fact, but courts should set the conditions on how those facts will be applied.[28] Juries could then assist in the legal determination without importing substantial effects into the merits.

III

Continued use of the per se rule in international criminal antitrust demands that effects be removed from the elements of the offense. This would allow courts to use the per se presumptions against all defendants, rather than creating a new substantive doctrine for foreigners.[29] Once the

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only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act . . . .").

25. While courts recently have been willing to sacrifice the per se rule's efficiencies and use the rule of reason to uphold typical per se agreements with significant procompetitive effects, *see, e.g.*, Northwest Wholesale Stationers v. Pacific Stationery & Printing, 472 U.S. 284, 295 (1985); Broadcast Music v. Columbia Broad. Sys., 441 U.S. 1, 8-10 (1979), a similar sacrifice is not justified in the international context, *see supra* notes 21-24 and accompanying text.

26. As the court held in *Gough v. Rossmoor Corp.*:

> The jurisdictional issue under the Sherman Act is distinct from the substantive issue. . . . The jurisdictional question . . . is whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. . . . The substantive issue, on the other hand, is whether defendants participated in anticompetitive conduct of the kind encompassed within the statutory terms "restraint of trade." . . . When the issue is whether jurisdiction exists, the focus is upon . . . whether the defendant's conduct—unreasonably restrictive of competition or not—has a sufficient impact on interstate commerce . . . .

487 F.2d 373, 375-76 (9th Cir. 1973) (internal citations omitted).

27. *See* Zenith Radio Corp. v. Matsushita Elec. Indus., 494 F. Supp 1161, 1176 (E.D. Pa. 1980) (relying upon the "conventional understanding that subject matter jurisdictional determinations, even where factual findings are involved, are for the court").

28. Areeda and Hovenkamp argue that, as a matter of law, jurisdiction should be decided by juries applying facts to judge-made presumptions, consistent with the way antitrust law generally functions. *See* 2 AREEDA & HOVENKAMP, *supra* note 22, ¶ 321b-c (rev. ed. 1995). Another benefit of the per se rule is "business certainty." Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982). Creating standards under which juries would apply facts to decide the jurisdictional question would provide more guidance than leaving the determination to individual juries that, without any such frameworks, would likely reach different verdicts.

29. Removing effects as an element of the offense would allow the government to use presumptions to prove them. *See* Sandstrom v. Montana, 442 U.S. 510, 523 (1979). Not every fact in criminal antitrust cases must be proven beyond a reasonable doubt. For example, venue only

jurisdictional threshold is crossed, there should be only one antitrust law.

A two-part test separating jurisdiction from substance would retain the jurisdictional inquiry into effects for foreigners while ensuring that all offenders are treated equally on the merits. Establishing an inference or a presumption of effects, either from anticompetitive behavior or market share, seems one of the best ways to preserve the basic rationale underlying the per se rule.[30] A presumption of effects in a jurisdictional inquiry distinct from the merits follows logically from per se doctrine because " 'there are certain agreements which, . . . because of their pernicious effect on competition, . . . are conclusively presumed to be . . . illegal without elaborate inquiry as to the precise harm they have caused. . . .' "[31] In other words, activities classified as illegal per se are *only* those *presumed* to have a "pernicious effect on competition."

The Court has dealt most extensively with the jurisdictional effects requirement in cases involving intrastate commerce.[32] In those cases, the

need be proved by a preponderance of the evidence because it is not a "true element[]" of the crime, but rather "merely a fact." U.S. Court of Appeals for the Sixth Circuit, *Pattern Instructions*, *in* FEDERAL JUDICIAL CENTER, MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL PATTERN INSTRUCTIONS § 3.07 cmt., at 6-75 (1991) [hereinafter *Pattern Instructions*]; *see* EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.03, at 61 (Supp. 1998). None of the pattern jury instructions I have found include jurisdiction as an essential element of a section 1 offense. *See, e.g.*, *id.* § 51A.15 (including only two elements that need be proved beyond a reasonable doubt: (1) that the conspiracy was formed and (2) that the defendant intended to join the agreement—an instruction cited by the Supreme Court as the kind "generally given in similar antitrust cases." United States v. United States Gypsum Co., 438 U.S. 422, 463 (1978)).

30. I do not distinguish between inferences and presumptions. However, a permissive inference of effects may be more attractive, both because it is less forceful and because the Court has indicated that an essential element of the offense may be proved through such an inference. *Cf.* Francis v. Franklin, 471 U.S. 307, 314 (1985) ("A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves certain predicate facts, but does not require the jury to draw that conclusion. . . . Such inferences do not necessarily implicate the concerns of *Sandstrom* [i.e., prohibiting use of presumptions for essential elements]."). Thus, even if effects remain an essential element, a permissive inference might still be applicable.

This issue clearly merits more consideration. Another option might be requiring that effects be proven by a preponderance of the evidence. The emphasis on the probability of effects seems more aligned with a more-likely-than-not test than with a reasonable doubt standard. *See, e.g.*, Posters 'N' Things v. United States, 511 U.S. 513, 523 (1994) (" '[A]ction undertaken with knowledge of its probable consequences . . . can be a sufficient predicate for a finding of criminal liability under the antitrust laws.' " (quoting *Gypsum*, 438 U.S. at 444)). Preponderance is already used in antitrust prosecutions for nonessential elements, such as venue. *See Pattern Instructions*, *supra* note 29.

31. Catalano, Inc. v. Target Sales, 446 U.S. 643, 646 n.9 (1980) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)); *cf.* Summit Health v. Pinhas, 500 U.S. 322, 331 (1991) ("In cases involving horizontal agreements to fix prices, . . . we have based jurisdiction on a general conclusion that the . . . agreement 'almost surely' had a marketwide impact and therefore an effect on interstate commerce." (internal citation omitted)).

32. The substantial effects requirement for jurisdiction typically applies to both intrastate as well as foreign conspiracies, since neither are literally within interstate commerce. *See, e.g.*, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241 (1980) (holding that the law extends "beyond activities actually *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce").

Court indeed has relied on the per se presumptions to find effects. In *Burke v. Ford*, the Court held: "[T]erritorial divisions almost invariably reduce competition . . . . Thus, the [intrastate] market division inevitably affected interstate commerce."[33] From a presumption about the probable anticompetitive effects of a conspiracy outside interstate commerce came a conclusion that actual effects on interstate commerce were "inevitable." Later construing that case, the Court held that the conspiracy "substantially affected interstate commerce because as a matter of practical economics that division could be expected to reduce significantly the magnitude of purchases made."[34] "Practical economics" is important because practical economics underlie the entire per se doctrine. The per se presumptions are based on the notion that those agreements considered illegal per se are such that practical economics dictates that pernicious effects follow. Just as the Court has held that practical economics renders unnecessary an inquiry into effects, it also has indicated that the same standard allows a presumption of effects when such effects must be proved.

This presumption may be too hard on some foreign firms. It does not make sense to haul into U.S. court and charge firms that have exported little or nothing to the United States with conspiracy to restrain U.S. trade. Aside from the fact that the Department of Justice will not waste its time prosecuting them, such cases could be filtered out if effects are only presumable provided the defendant has sufficient business in interstate commerce. The Court has used this method. In fact, under this type of inquiry, the Court has presumed substantial effects even more quickly than the "anticompetitive effects" that automatically follow a per se offense:

> [P]etitioners [may] demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect . . . caused by the alleged conspiracy . . . . If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases.[35]

With substantial business in interstate commerce, effects are presumed if the conspiracy is proved. One court justified applying this standard because, "in a price-fixing case, . . . the government does not have 'the burden of ascertaining from day to day . . . economic conditions.'"[36]

33. 389 U.S. 320, 321-22 (1967).
34. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 745 (1976).
35. *McLain*, 444 U.S. at 242-43.
36. *See* United States v. Hayter Oil, 51 F.3d 1265, 1273 (6th Cir. 1995) (holding that the relevant inquiry is the general volume of commerce, not those transactions specifically targeted by

Consistent with the per se rule's rejection of detailed case-by-case review, general market share is far more easily ascertainable than are the specific effects of a conspiracy. Such an inquiry also satisfies comity concerns by ensuring a nexus with U.S. commerce sufficient to presume that a conspiracy would have some effect. Indeed, the *Nippon Paper* concurrence presumed effects from general activity: "NPI sold $6.1 million of fax paper into the United States.... NPI's price increases thus affected a not insignificant share of the United States market."[37] Notably, market participation has nothing to do with the substantive violation of section 1 of the Sherman Act. That substantial effects still may be found from such participation supports removing them from the elements of the offense.[38]

According to the Department of Justice, "once you're in the door... the same substantive rules apply to all cases.... [T]he framework for analysis will not shift just because a case has international elements."[39] *Nippon Paper* did shift that framework. A better way to advance international criminal antitrust enforcement is to decide the jurisdictional question by presuming substantial effects from the defendant's general market participation. Thereafter, as in any other per se prosecution, the anti-competitive effects of the conspiracy are assumed for the purposes of the substantive inquiry. Such a two-part test not only respects comity principles by ensuring that the foreign defendant is significantly involved in U.S. commerce, but it precludes the need for detailed inquiry into the conspiracy's specific effects—an inquiry that the per se doctrine explicitly rejects. By separating the jurisdictional question, the decision on the merits remains the same for all parties, while the jurisdictional standard is met through a presumptive framework that preserves doctrinal consistency by reasoning from the same principles that underlie the per se rule.

—*Abbe Gluck*

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the conspiracy (internal citation omitted)); *see also* Timberlane Lumber v. Bank of America, 749 F.2d 1378, 1385 (9th Cir. 1984) (holding that, since the company's business "represent[ed] only an insignificant part" of the U.S. market, "[t]he actual effect of Timberlane's potential operations on United States foreign commerce is, therefore, insubstantial").

37. *Nippon Paper*, 109 F.3d at 12 (Lynch, J., concurring).

38. A more stringent application of the presumption would return to the standard enunciated in *United States v. Aluminum Co. of America* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945), one of the earliest cases on the Sherman Act's extraterritorial reach. Under *Alcoa*, if the Government proved intent, the burden shifted to the defendant to prove the expected effect did not occur. *See id.* at 444. Burden-shifting was appropriate because, once "the parties took the trouble specifically" to enter into the conspiracy, "there is reason to suppose that they expected that it would have some effect." *Id.* This is just practical economics in another form. Notably, burden-shifting occurs in other areas of antitrust law. *See, e.g.*, *Hayter Oil*, 51 F.3d at 1270-71 (shifting the burden to the defendant to prove the conspiracy was abandoned once the government proved it existed).

39. Wood, *supra* note 1, at *4.

Supplemental Teaching Materials (3)
[Exhibit 19-1]

The TV Tube Case
JFTC Cease and Desist Order
7 October 2009

(Facts and issues involved)

JFTC (Fair Trade Commission of Japan) initiated actions under the Japanese Antimonopoly Law against Samsung, a Korean electronics company producing TV tubes, components of TV sets, other Japanese and Taiwan companies producing the same products ("the respondents"), held that those companies conspired to fix the price of TV tubes, issued cease-and desist-orders and imposed administrative surcharges on them (Order of JFTC on October 7, 2009). Samsung applied for administrative hearing before the Commission on the ground that the JFTC orders were wrongly issued due to the fact that they asserted too wide an extraterritorial jurisdiction. At this time, this administrative hearing is still pending at the JFTC.

A summary of the facts involved in the case are as follows. Samsung owns subsidiaries in South East Asia including Malaysia and its subsidiary in Malaysia produces TV tubes. Samsung directed its subsidiary in Malaysia to produce TV tubes and sell them to purchasers in that country. Samsung entered into competitors from Japan and Taiwan to fix the price of TV tubes to be produced and sold by their subsidiaries in Malaysia. Japanese TV producers including Toshiba and Sharp own subsidiaries in South East Asia including Malaysia and those subsidiaries produce TV sets there using TV tubes produced and sold by the subsidiaries. So the subsidiaries of Toshiba and Sharp purchased TV tubes from the subsidiary of Samsung in Malaysia at the price fixed by Samsung and others, produced TV sets and sold them to purchasers in South East Asia. The purchasers did not include Japanese purchasers in Japan.

Before JFTC initiated a proceeding, Samsung had cancelled the power of attorney to receive legal documents in Japan which it bestowed on its Japanese agent. Articles 70.17 /18 of the Antimonopoly Law states that JFTC can serve process on a person abroad by the consulate general located in the country where the respondent resides with the consent of the government of that country and, if this process is impossible, by publication at the headquarter of JFTC. So JFTC attempted to serve a complaint on Samsung in Korea but the Korean government refused to grant a permission to serve a

complaint in Korea. Likewise the Malaysian government refused to grant permission to serve a complaint on Samsung's subsidiary located in Malaysia. Thereupon, JFTC served by publication complaints and later cease-and-desist order and order to pay surcharges on Samsung and its subsidiary.

Before the JFTC proceeding, Samsung argues that there is no conduct in Japan which would constitute a violation of the Antimonopoly Law since the sale and purchase of TV tubes are all made in Malaysia and no TV sets incorporating TV tubes are sold in Japan. Samsung argues that the conduct of Samsung and its subsidiary in Malaysia had no effect in Japan and to apply the Japanese Antimonopoly Law on this conduct is an impermissible extraterritorial application of domestic law under the jurisdictional rules of international law.

To this argument, JFTC replies that Japanese TV manufacturers (Toshiba and Sharp) own subsidiaries in Malaysia. The TV manufacturers in Japan control and manage their subsidiaries in Malaysia and the parent company in Japan and its subsidiary in Malaysia constitute a single economic entity. Therefore, even if the subsidiaries of Toshiba and Sharp purchase TV tubes from Samsung's subsidiary in Malaysia, such purchases in substance amount to the purchases by the parents, Toshiba and Sharp in Japan, e.g., such purchases can be regarded as having been made in Japan.

At this time, the proceeding is still pending at JFTC and it is not known how long it will take before this proceeding is closed.

(Legal issues to be discussed)

In the above case, the reason why the Korean and Malaysian governments refused to grant permission to serve process in their countries is not known. It may be because those foreign governments thought that the attempt on the part of JFTC to apply the Japanese Antimonopoly Law on the conduct of a subsidiary of a foreign company producing only an indirect effect in Japan is an excessive jurisdictional exercise.

Is it appropriate to serve a process (complaints, orders and other legal documents) on a foreign person residing in a foreign country by publication in Japan when the government of the country of the residency of that foreign person refuses to give a permission to serve process in that country? Should "international comity" be considered when deciding whether a process should be served by publication on a foreign person located abroad?

On the other hand, if service of process abroad by publication is not allowed in the above situation, JFTC cannot initiate a legal action against Samsung. Is JFTC left with no remedy and has to forgo the exercise of enforcement agency?

What is the legal test to determine whether a domestic competition law applies to a conduct in a foreign country? Should it be an "effect" within the country of a conduct occurring abroad which would constitute an appropriate linkage between the conduct and the domestic competition law?

If an "effect" of a conduct occurring abroad justifies a domestic competition law to be applied to that conduct, is it necessary that such effect is a "direct, substantial and reasonably foreseeable effect" or is it sufficient that it is an indirect effect?

In the above case, the subsidiaries of Toshiba and Sharp in Malaysia purchased TV tubes from the subsidiary of Samsung there at a rigged price and so presumably the purchase price was higher than what it would have been if there had not been the price fixing agreement among Samsung and competing producers of TV tubes. The cost of the subsidiaries of Toshiba and Sharp in Malaysia was higher than it would have been had there not been the price fixing agreement. If there had not been the price fixing agreement, their costs would have been lower and their sales price of TV sets in countries other than Japan may have been lower. However, no TV set incorporating TV tubes is sold in the Japanese market. The only effect of this price fixing agreement in Japan would be that the cost of the subsidiaries of Toshiba and Sharp in producing TV sets in Malaysia would have been lower, their profits would have been higher and the dividends that Toshiba and Sharp (their parents) received would have been higher.

Is this a sufficiently direct effect of the conduct of Samsung and its subsidiary in Malaysia to constitute a jurisdictional link between the conduct and the Japanese Antimonopoly Law?

MOTOROLA MOBILITY LLC, Plaintiff–Appellant,

v.

AU OPTRONICS CORP., et al., Defendants–Appellees.

No. 14–8003.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 13, 2014.

Decided Nov. 26, 2014.

Amended Jan. 12, 2015.*

Background: Company that manufactured and sold cell phones brought action against foreign manufacturers of liquid-crystal display (LCD) panels used in cell phones, alleging they engaged in price fixing in violation of Sherman Act. The United States District Court for the Northern District of Illinois, Joan B. Gottschall, J., 2014 WL 258154, granted defendant's motion for partial summary judgment and certified interlocutory appeal. Company appealed. The Court of Appeals, Posner, Circuit Judge, 746 F.3d 842, affirmed. Subsequently, the Court of Appeals vacated that opinion, ordered rehearing, and directed further briefing and granted several requests for permission to file amicus curiae briefs.

Holding: The Court of Appeals, Posner, Circuit Judge, held that defendants' sale of price-fixed LCD panels to foreign purchasers did not give rise to antitrust claim under the Sherman Act.

Affirmed.

Opinion, 773 F.3d 826, amended and superseded.

1. Antitrust and Trade Regulation ⇐945

Foreign manufacturers' price fixing of liquid-crystal display (LCD) panels they sold abroad to cellular telephone manufacturer's foreign subsidiaries and which became components of telephones imported by manufacturer in United States did not have direct effect on domestic or import commerce, as required to give rise to an antitrust claim under the Sherman Act; LCD manufacturers were not selling the price-fixed panels in the United States, and manufacturer could not bring Sherman Act claim for injury to its foreign subsidiaries. Sherman Act, § 7, 15 U.S.C.A. § 6a.

2. Antitrust and Trade Regulation ⇐945

United States antitrust laws are not to be used for injury to foreign customers.

3. Corporations and Business Organizations ⇐1051

A corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties.

Thomas C. Goldstein, Goldstein & Russell, P.C., Washington, DC, for Plaintiff–Appellant.

Carl L. Blumenstein, Farschad Farzan, Christopher A. Nedeau, Nossaman LLP, William Farmer, Farmer Brownstein Jaeger, LLP, Gary Halling, Sheppard, Mullin, Richter & Hampton, Allison Ann Davis, Davis Wright Tremaine LLP, San Francisco, CA, Kirk Christopher Jenkins, Sedg-

* This amended opinion replaces the opinion in this case that was issued by the panel on November 26 and that is reported at 2014 WL 6678622.

wick LLP, Terence H. Campbell, Cotsirilos, Tighe & Streicker, Poulos & Campbell, E. Murphy, Jr., Murphy & Hourihane LLC, Nathan P. Eimer, Eimer Stahl LLP, James A. Morsch, Butler, Rubin, Saltarelli & Boyd, Daniel Cummings, Rothschild, Barry & Myers, William Yu, Lewis Brisbois Bisgaard & Smith LLP, Chicago, IL, Robert D. Wick, Jeffrey M. Davidson, Robert A. Long, Jr., Derek Ludwin, Covington & Burling LLP, Kenneth A. Gallo, Craig A. Benson, Joseph J. Simons, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Christopher M. Curran, White & Case LLP, Washington, DC, Jason M. Bussey, Palo Alto, CA, for Defendants–Appellees.

Before POSNER, KANNE, and ROVNER, Circuit Judges.

POSNER, Circuit Judge.

Back in March we granted the plaintiff's unopposed petition for leave to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from an order granting partial summary judgment in favor of the defendants (which include Samsung, Sanyo, and several other foreign companies besides AU Optronics), thereby extinguishing most of the plaintiff's case. The district judge certified the order for an immediate appeal. We agreed to hear the appeal, and without asking for further briefing or oral argument affirmed the district court's decision in an opinion, reported at 746 F.3d 842 (7th Cir.2014), that we later vacated, ordering rehearing and directing further briefing and oral argument, now complete. We have also granted several requests for permission to file amicus curiae briefs, including a brief from the Department of Justice and briefs from foreign countries worried about the implications of Motorola's suit for their own competition policies.

Motorola, the plaintiff-appellant, and its ten foreign subsidiaries, buy liquid-crystal display (LCD) panels and incorporate them into cellphones manufactured by Motorola or the subsidiaries. The suit accuses foreign manufacturers of the panels of having violated section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing with each other on the prices they would charge for the panels. Those manufacturers are the defendants-appellees.

The appeal does not concern all the allegedly price-fixed LCD panels. (We'll drop "allegedly" and "alleged," for simplicity, and assume that the panels were indeed price-fixed—a plausible assumption since defendant AU Optronics has been convicted of participating in a criminal conspiracy to fix the price of panel components of the cellphones manufactured by Motorola's foreign subsidiaries. *United States v. Hsiung*, 758 F.3d 1074 (9th Cir. 2014).) About 1 percent of the panels sold by the defendants to Motorola and its subsidiaries were bought by, and delivered to, Motorola in the United States for assembly here into cellphones; to the extent that the prices of the panels sold to Motorola had been elevated by collusive pricing by the manufacturers, Motorola has a solid claim under section 1 of the Sherman Act. The other 99 percent of the cartelized components, however, were bought and paid for by, and delivered to, foreign subsidiaries (mainly Chinese and Singaporean) of Motorola. Forty-two percent of the panels were bought by the subsidiaries and incorporated by them into cellphones that the subsidiaries then sold to and shipped to Motorola for resale in the United States. Motorola did none of the manufacturing or assembly of these phones. The sale of the panels to these subsidiaries is the focus of this appeal.

[1] Another 57 percent of the panels, also bought by Motorola's foreign subsidiaries, were incorporated into cellphones abroad and sold abroad. As neither those

cellphones nor their panel components entered the United States, they never became a part of domestic U.S. commerce, see 15 U.S.C. § 6a, and so, as we're about to see, can't possibly support a Sherman Act claim.

Motorola says that *it* "purchased over $5 billion worth of LCD panels from cartel members [i.e., the defendants] for use in its mobile devices." That's a critical misstatement. All but 1 percent of the purchases were made by Motorola's foreign subsidiaries. The subsidiaries are not Motorola; they are owned by Motorola. Motorola and its subsidiaries do not, as it argues in its opening brief, function "as a 'single enterprise.' " And from this we can begin to see the oddity of this case. If a firm is injured by unlawful acts of other firms, the firm may have a cause of action against the injurers but the firm's owner does not. The victims of the price fixing of LCD panels were Motorola's foreign subsidiaries. Motorola itself, along with U.S. purchasers of cellphones incorporating those panels, were at most derivative victims.

The district judge ruled that Motorola's suit, insofar as it relates to the 99 percent of panels purchased by the foreign subsidiaries, is barred by 15 U.S.C. §§ 6a(1)(A), (2), which are sections of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a. That act has been interpreted, for reasons of international comity (that is, good relations among nations), to limit the extraterritorial application of U.S. antitrust law. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 273c2 (3d ed.2006). Sections 6a(1)(A) and (2) provide that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless ... such conduct has a direct, substantial, and reasonably foreseeable effect ... on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations," and also, in either case, unless the "effect [on import trade or domestic commerce] gives rise to a claim" under federal antitrust law. See, e.g., *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161–62, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004); *Minn–Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853–54 (7th Cir.2012) (en banc).

It is essential to understand that these are two requirements. There must be a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce—the domestic American economy, in other words—*and* the effect must give rise to a federal antitrust claim. The first requirement, if proved, establishes that there is an antitrust violation; the second determines who may bring a suit based on it.

Had the defendants conspired to sell LCD panels to Motorola in the United States at inflated prices, they would be subject to the Sherman Act because of the exception in the Foreign Trade Antitrust Improvements Act for importing. That is the 1 percent, which is not involved in the appeal. Regarding the 42 percent, Motorola is wrong to argue that it is import commerce. It was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad and sold and shipped to it. So it first must show that the defendants' price fixing of the panels that they sold abroad and that became components of cellphones also made abroad but imported by Motorola into the United States had "a direct, substantial, and reasonably foreseeable effect" on commerce within the United States. The panels—57 percent of

the total—that never entered the United States neither affected domestic U.S. commerce nor gave rise to a cause of action under the Sherman Act.

If the prices of the components were indeed fixed, there would be an effect on domestic U.S. commerce. And that effect would be foreseeable (because the defendants knew that Motorola's foreign subsidiaries intended to incorporate some of the panels into products that Motorola would resell in the United States), could be substantial, and might well be direct rather than "remote," the word we used in *Minn–Chem, Inc. v. Agrium, Inc., supra,* 683 F.3d at 856–57, to denote effects that the statutory requirement of directness excludes.

The price fixers had, it is true, been selling the panels not in the United States but abroad, to foreign companies (the Motorola subsidiaries) that incorporated them into cell-phones that the foreign companies then exported to the United States for resale by the parent company, Motorola. The effect of fixing the price of a component on the price of the final product was therefore less direct than the conduct in *Minn–Chem,* where "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers.*" *Id.* at 860 (emphasis added). But at the same time the facts of this case are not equivalent to what we said in *Minn–Chem* would *definitely* block liability under the Sherman Act: the "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States." *Id.* In this case components were sold by their manufacturers to the foreign subsidiaries, which incorporated them into the finished product and sold the finished product to Motorola for resale in the United States. This doesn't seem like "many layers," resulting in just "a few ripples" in the United States cellphone market, though, as we'll see, the ripple effect probably was modest. We'll assume that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied, as in *Minn–Chem* and *Lotes Co. v. Hon Hai Precision Industry Co.,* 753 F.3d 395, 409–13 (2d Cir.2014).

What trips up Motorola's suit is the statutory requirement that the effect of anticompetitive conduct on domestic U.S. commerce give rise to an antitrust cause of action. 15 U.S.C. § 6a(2). The conduct increased the cost to Motorola of the cellphones that it bought from its foreign subsidiaries, but the cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce.

We have both direct purchasers—Motorola's foreign subsidiaries—from the price fixers, and two tiers of indirect purchasers: Motorola, insofar as the foreign subsidiaries passed on some or all of the increased cost of components to Motorola, and Motorola's cellphone customers, insofar as Motorola raised the resale price of its cellphones in an attempt to offload the damage to it from the price fixing to its customers. According to Motorola's damages expert, B. Douglas Bernheim, the company raised the price of its cellphones in the United States by *more* than the increased price charged to it by its foreign subsidiaries. We have no information about whether Motorola lost customers as a result—it may not have, if other cellphone sellers raised their prices as well. Perhaps because Motorola may actually have profited from the price fixing of the LCD panels, it has waived any claim that the price fixing affected the price that Motorola's foreign subsidiaries charged, or

were told by Motorola to charge, for the cellphones that they sold their parent. (We'll come back to the issue of waiver.)

[2, 3] Whether or not Motorola was harmed indirectly, the immediate victims of the price fixing were its foreign subsidiaries, see *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 173–75, 124 S.Ct. 2359, and as we said in the *Minn–Chem* case "U.S. antitrust laws are not to be used for injury to foreign customers," 683 F.3d at 858. Motorola's subsidiaries are governed by the laws of the countries in which they are incorporated and operate; and "a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties." *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir.1996). For example, although for antitrust purposes Motorola contends that it and its subsidiaries are one (the "it" we referred to earlier), for tax purposes its subsidiaries are distinct entities paying foreign rather than U.S. taxes.

Distinct in *uno*, distinct in *omnibus*. Having submitted to foreign law, the subsidiaries must seek relief for restraints of trade under the laws either of the countries in which they are incorporated or do business or the countries in which their victimizers are incorporated or do business. The parent has no right to seek relief on their behalf in the United States.

Motorola wants us to treat it and all of its foreign subsidiaries as a single integrated enterprise, as if its subsidiaries were divisions rather than foreign corporations. But American law does not collapse parents and subsidiaries (or sister corporations) in that way. Some foreign nations, it is true, treat multinational enterprises as integrated units. See, e.g., Binda Sahni, "The Interpretation of the Corporate Personality of Transnational Corporations," 15 *Widener L.J.* 1 (2005). A number of countries (mainly in the Third World) persuaded the U.N. General Assembly in 1974 to issue a resolution entitled "Charter of Economic Rights and Duties of States" that could be understood to intimate that First World parents were responsible for the actions of their Third World subsidiaries. For chapter 2, Article 2(b), of the Charter provides that each state has the right "to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph." But the United States and other developed countries refused to buy that theory. They insisted, and continue to insist, that corporate formalities should be respected unless one of the recognized justifications for piercing the veil, or otherwise deeming a parent and a subsidiary one, is present. See, e.g., *On Command Video Corp. v. Roti*, 705 F.3d 267 (7th Cir.2013); Sahni, *supra*, at 822-23. None is present in this case.

This is thus a case of derivative injury, and derivative injury rarely gives rise to a claim under antitrust law, for example by an owner or employee of, or an investor in, a company that was the target of, and was injured by, an antitrust violation. *Mid–State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1335–36 (7th Cir.1989); see generally *Brunswick Corp. v. Pueblo Bowl–O–Mat*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Those derivative victims are said to lack

"antitrust standing." Often, as in the example just given, their claims would be redundant, because if the direct victim received full compensation there would be no injury to the owner, employee, or investor—he or it would probably be as well off as if the antitrust violation had never occurred. If Motorola's foreign subsidiaries have been injured by violations of the antitrust laws of the countries in which they are domiciled, they have remedies; if the remedies are inadequate, or if the countries don't have or don't enforce antitrust laws, these are consequences that Motorola committed to accept by deciding to create subsidiaries that would be governed by the laws of those countries. (An important, and highly relevant, application of the concept of "antitrust standing" is the indirect-purchaser doctrine of the *Illinois Brick* case, discussed below.)

No doubt Motorola thinks U.S. antitrust remedies more fearsome than those available to its foreign subsidiaries under foreign laws. But that's just to say that Motorola is asserting a right to forum shop. Should some foreign country in which one of its subsidiaries operates have stronger antitrust remedies than the United States does, Motorola would tell that subsidiary to sue under the antitrust law of that country.

A related flaw in Motorola's case is its collision with the indirect-purchaser doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), which forbids a customer of the purchaser who paid a cartel price to sue the cartelist, even if his seller—the direct purchaser from the cartelist—passed on to him some or even all of the cartel's elevated price. Motorola's subsidiaries were the direct purchasers of the price-fixed LCD panels, Motorola and its customers indirect purchasers of the panels. Confusingly, at the oral argument Motorola's able counsel stated his approval of the *Illinois Brick* doctrine, yet Motorola's briefs assert, albeit without any basis that we can see, that the Foreign Trade Antitrust Improvements Act, because it does not mention *Illinois Brick* (or the indirect-purchaser doctrine, announced in that case), is not subject to it.

Because it is difficult to assess the impact of a price increase at one level of distribution on prices and profits at a subsequent level, and thus to apportion damages between direct and indirect (i.e., subsequent) purchasers (here, between Motorola's subsidiaries, Motorola the parent, and Motorola's cellphone customers), the indirect-purchaser doctrine cuts off analysis at the first level. This may result in a windfall for the direct purchaser, but preserves the deterrent effect of antitrust damages liability while eliding complex issues of apportionment. In this case the first sale was to a foreign subsidiary of Motorola that could sue the price fixers under the law of the country of which the subsidiary was a citizen, or the law of the countries of which the price fixers were citizens (or a country of which a particular price fixer that the subsidiary decided to sue was a citizen). Motorola, the American parent, the harm to which from the price fixing would be so difficult to estimate, could not sue under federal antitrust law.

Speaking of the difficulty of estimating harm to Motorola, we point out that although this suit is more than five years old there is a remarkable dearth of evidence from which to infer actual harm to Motorola. Its briefs lack the numbers one would need to infer, let alone to quantify, such harm. But the report of Motorola's expert witness on damages, B. Douglas Bernheim, provides a basis for informed speculation. Suppose hypothetically that a cellphone costs a Motorola foreign subsidiary $100 to

manufacture, and the subsidiary sells it to Motorola for $120 to cover the costs of assembling the components that go to make up the cellphone, and of shipment. Motorola in turn resells the cellphone to American consumers for $150. One of the components costs the subsidiary $10 (10 percent of the total cost of the cellphone—this appears to be an approximately accurate estimate for the LCD panels installed in the cellphones). The manufacturers of that component form a cartel and raise the price to $12, a 20 percent increase. Now the cost of making the cellphone is $102, and to reflect this cost increase Motorola could be expected to direct the subsidiary to raise its price to Motorola from $120 to, say, $122. What would Motorola do next? It would like to maintain its profit margin, and so we might expect it to raise its resale price—the price of its cellphones to the American consumer—from $150 to $152. That would be only a 1.33 percent increase. Would Motorola lose sales and therefore profits? Who knows? The price increase is tiny, and competitors might think it more profitable to match it than to undercut it; they might think their sales would not fall appreciably and that their profit margins would be slightly higher. This would be an example of tacit collusion, which is not an antitrust violation.

It is uncertainties like these that confirm the wisdom of the indirect-purchaser doctrine of *Illinois Brick*.

Motorola claims that it told the subsidiaries how much they could pay the cartel sellers for the panels—that its subsidiaries "issued purchase orders at the price and quantity determined by Motorola in the United States" and that therefore Motorola was the real buyer of the panels and so the panels were really imported directly into the United States rather than being sold abroad to the subsidiaries. In other words, Motorola is pretending that its foreign subsidiaries are divisions rather than subsidiaries. But Motorola can't just ignore its corporate structure whenever it's in its interests to do so. It can't pick and choose from the benefits and burdens of United States corporate citizenship. It isn't claiming that its foreign subsidiaries owe taxes to the United States instead of to the foreign countries in which they are incorporated, countries that may have lower tax rates, or be less efficient at tax collection. It isn't claiming that its foreign subsidiaries are bound by the workplace safety or labor laws of the United States. Having chosen to conduct its LCD purchases through legally distinct entities organized under foreign law, it cannot now impute to itself the harm suffered by them.

Motorola insists that it was the "target" of the price fixers—that they "integrated themselves into the design of Motorola's U.S. products, and intentionally manipulated Motorola's price negotiations by illegally exchanging Motorola-specific information." But this is just inflated rhetoric used to describe, what is obvious, that firms engaged in the price fixing of a component are critically interested in the market demand for the finished product—knowledge of that demand is essential to deciding on the optimal price of the component. If the price fixers are too greedy and fix a very high price for the component, this may result in so high a price for the finished product that the sales of that product will fall and with it the purchases of the component and quite possibly the profits of the price fixers.

Motorola's "target" theory of antitrust liability would nullify the doctrine of *Illinois Brick*. For we've just seen that in deciding how much to charge the direct purchaser, a cartel would always want to estimate the price at which the direct purchaser would resell in order to capture

some or all of the resale profits. There is nothing unusual about firms' trying to pass on cost increases to their buyers; the buyers are hurt but as long as *Illinois Brick* is the law their hurt doesn't give them an antitrust case of action. Thus in asking us not to "ignore the injuries defendants knowingly caused to Motorola's U.S. business through their deliveries abroad," Motorola ignores the fact that a cartel almost always *knowingly* causes injury to indirect purchasers, yet those purchasers are barred from suit by *Illinois Brick* and the doctrine of antitrust standing that the rule of that case instantiates.

It's true that the opinion in *Illinois Brick* states that a "situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Id.* at 736 n. 16, 97 S.Ct. 2061. But "might be" is not "is," and the distinction is significant in this case. Although Motorola, the "customer," owns its foreign subsidiaries—the "direct purchasers" of the components—they are incorporated under and regulated by foreign law. What remedies they may have, if they overpay for inputs that they buy abroad, are determined not by U.S. antitrust law but by the law of the countries in which the subsidiaries are incorporated and of which they are therefore citizens of, or the law of the countries in which the price fixers they bought from operate, or of the countries in which the purchases were made. And that is quite apart from *Illinois Brick* or other sources of U.S. antitrust law

But supposing this is wrong and Motorola is correct that it and its subsidiaries "are one," there was no sale by the subsidiaries to Motorola. Instead the component manufacturers (the price fixers) sold components to "the one," which assembled them into cellphones, and "the one" sold the cellphones to U.S. consumers. The sales to consumers would therefore have been the first sales in the United States—the first in domestic commerce, since "the one" bought the price-fixed components abroad. Remember that the Foreign Trade Antitrust Improvements Act requires that the effect of an anticompetitive practice on domestic U.S. commerce must, to be subject to the Sherman Act, give rise to an antitrust cause of action. "The one" (Motorola and its foreign subsidiaries conceived of as a single entity) would have been injured abroad when "it" purchased the price-fixed components.

Motorola makes a last attempt to wiggle out from under *Illinois Brick* by arguing that there should be an exception to the indirect-purchaser doctrine for any case in which applying the doctrine would prevent any American company from suing. But Motorola insists that it dictates the price at which it buys cellphones from its subsidiaries, and it would be odd to think that Motorola could obtain antitrust damages on the basis of its own pricing decisions.

In any event Motorola waived in the district court any argument that it could base damages on the effect of the cartel's pricing of components on the cost to Motorola of cellphones incorporating those components. It argued only that its foreign subsidiaries overpaid for the LCD panels. How the overcharge may have affected Motorola's cellphone business because of the component price fixing was a path that Motorola stepped off of after the pleadings. Its *complaint* alleged that it paid more for cellphones that it purchased from its subsidiaries, but it then dropped the point in favor of arguing (as it did for example in a brief opposing summary judgment) that "this 'effect'—the approval of a single, artificially-inflated LCD panel price in the United States—proximately caused all of Motorola's damages, because

that same artificially-inflated price applied wherever and whenever a Motorola facility placed a purchase order and paid for a panel." But Motorola's damages expert, Bernheim, discussed only the damages that Motorola's foreign subsidiaries incurred from having to overpay for LCD panels. He made no attempt to estimate the increase in the price paid by Motorola for finished cellphones. Motorola even refused to respond to one of the defendants' requests for an admission by saying: "Motorola is not basing its claims on the purchase of finished LCD Products [i.e., cellphones]."

There is still more that is wrong with Motorola's case. Nothing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers. See Gregory Tassey, "Competing in Advanced Manufacturing: The Need for Improved Growth Models and Policies," *Journal of Economic Perspectives,* vol. 28, no. 1, Winter 2014, p. 27, 31–35; Dick K. Nanto, "Globalized Supply Chains and U.S. Policy," Congressional Research Service (Jan. 27, 2010), http://assets.opencrs.com/rpts/R40167_20100127.pdf. Even Motorola acknowledges "that a substantial percentage of U.S. manufacturers utilize global supply chains and foreign subsidiaries to effectively compete in the global economy." Some of those foreign manufacturers are located in countries that do not have or, more commonly, do not enforce antitrust laws consistently or uniformly, or whose antitrust laws are more lenient than ours, especially when it comes to remedies, notably punitive damages (such as the treble-damages antitrust remedy authorized by section 4 of the Clayton Act, 15 U.S.C. § 15). As a result, the prices of many products exported to the United States doubtless are elevated to some extent by price fixing or other anticompetitive acts that would be punished in proceedings under the Sherman Act if committed in the United States. Motorola argues that "the district court's ruling would allow foreign cartelists to come to the United States" and "unfairly overcharge U.S. manufacturers." Not true; the defendants did not sell in the United States and, if they were overcharging, they were overcharging other foreign manufacturers—the Motorola subsidiaries.

The Supreme Court has warned that rampant extraterritorial application of U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffmann–La Roche Ltd. v. Empagran S.A., supra,* 542 U.S. at 165, 124 S.Ct. 2359. The Foreign Trade Antitrust Improvements Act has been interpreted to prevent such "unreasonable interference with the sovereign authority of other nations." *Id.* at 164, 124 S.Ct. 2359. The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and "resent[ment at] the apparent effort of the United States to act as the world's competition police officer," a primary concern motivating the Foreign Trade Antitrust Improvements Act. *United Phosphorus, Ltd. v. Angus Chemical Co.,* 322 F.3d 942, 960–62 (7th Cir.2003) (en banc) (dissenting opinion), overruled on other grounds by *Minn–Chem, Inc. v. Agrium, Inc., supra.* It is a concern to which Motorola is—albeit for understandable financial reasons—oblivious.

Motorola's foreign subsidiaries were injured in foreign commerce—in dealings with other foreign companies—and to give Motorola rights to take the place of its foreign companies and sue on their behalf under U.S. antitrust law would be an unjustified interference with the right of foreign nations to regulate their own econo-

mies. The foreign subsidiaries can sue under foreign law—are we to *presume* the inadequacy of the antitrust laws of our foreign allies? Would such a presumption be consistent with international comity, or more concretely with good relations with allied nations in a world in turmoil? To quote from the *Empagran* opinion again, "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" 542 U.S. at 165, 124 S.Ct. 2359.

So Motorola's suit has no merit, but it remains to note the amicus curiae brief filed by the Justice Department with endorsements by officials from the FTC, the State Department, and the Department of Commerce. Although an earlier such brief had urged us to vacate our original decision (which we did), and we assumed the Department wanted us to reverse the district court's grant of partial summary judgment in favor of the defendants, there is no such contention in its present brief. It asks us only to "hold that the conspiracy to fix the price of LCD panels had a direct, substantial, and reasonably foreseeable effect on U.S. import and domestic commerce in cellphones incorporating these panels." The brief argues that the criminal and injunctive provisions of the Sherman Act, which of course are provisions that the Justice Department enforces, are applicable to the conduct of the defendants. The brief is less than sanguine on whether Motorola can obtain damages. The indirect-purchaser doctrine is applicable only to damages suits, and the brief disclaims taking any position on the applicability of the doctrine to this case. It goes so far as to say that "permitting Motorola to recover on all its claims because it purchased some panels in import commerce would allow recovery for independently caused foreign injuries on the basis of happenstance."

All that the government wants from us is a disclaimer that a ruling against Motorola would interfere with criminal and injunctive remedies sought by the government against antitrust violations by foreign companies. The government's concern relates to the requirement of the Foreign Trade Anti-trust Improvements Act that foreign anticompetitive conduct have a direct, substantial, and reasonably foreseeable effect on domestic U.S. commerce to be actionable under the Sherman Act. If price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the Act would not block the Department of Justice from seeking criminal or injunctive remedies. Indeed, we noted earlier that the Department successfully prosecuted AU Optronics for criminal price-fixing of the LCD panels sold to Motorola's foreign subsidiaries. But the Department does not suggest that the defendants' conduct gave rise to an antitrust damages remedy for Motorola.

Motorola has lost its best friend.

That's something of a surprise but a bigger surprise, given that representatives of the State and Commerce Departments have signed on to the Justice Department's brief, is the absence of any but glancing references to the concerns that our foreign allies have expressed with rampant extraterritorial enforcement of our antitrust laws. We asked the government's lawyer at the oral argument about those concerns, and he replied that the Justice Department has worked out a modus vivendi with foreign countries regarding the Department's antitrust proceedings against foreign companies. We have

no reason to doubt this. Again private damages actions went unmentioned.

The United States has entered into bilateral cooperation agreements with the European Union, and with Canada and other countries. See U.S. Dept. of Justice, "Antitrust Cooperation Agreements," www.justice.gov/atr/public/international/int-arrangements.html (visited Jan. 9, 2015). Both the Justice Department and the Federal Trade Commission now work with their foreign counterparts in major antitrust cases. No longer is the United States "the world's competition policeman," as it used to be called, because other nations have stricter antitrust laws, in some respects, than ours. Motorola's inability to mount the kind of private antitrust suit that it is attempting in this case does not foredoom the use of antitrust law to prevent and punish the kind of foreign cartelization harmful to Motorola's subsidiaries. The Justice Department, at least, seems confident that effective governmental remedies remain—and, as mentioned, the Department was successful in its criminal prosecution of AU Optronics for conduct that Motorola seeks, improperly as we believe, to recover damages for in this case.

Of course Motorola wants damages for its subsidiaries, rather than just a cessation of the cartel activities that are hurting them. And foreign antitrust laws rarely authorize private damages actions. But as we said earlier, that's just to say that Motorola is asserting a right to forum shop; that if some foreign country in which one of its subsidiaries operates happened to provide a more generous private damages remedy than American antitrust law provides, Motorola would direct that subsidiary to seek that remedy in that country.

A recent article about Motorola's suit notes the problems with private antitrust suits of this kind. It points out that "virtually every product sold in the United States has some foreign-made component," implying an enormous potential for suits of this character should Motorola prevail, and noting too that "the U.S. government has reason to weigh comity and sovereignty concerns when bringing international component cartel case[s]," but "private plaintiffs do not." Robert Connolly, "Motorola Mobility and the FTAIA," *Cartel Capers* (Sept. 30, 2014), http://cartelcapers.com/blog/motorolablog/motorola-mobility-ftaia (visited Jan. 9, 2015). And Motorola has "only" 10 foreign subsidiaries. General Motors has 26. Walmart has 27. Exxon has 122. The mind boggles at the thought of the number of antitrust suits that major American corporations could file against the multitudinous suppliers of their prolific foreign subsidiaries if Motorola had its way. Given the further complications introduced by the *Illinois Brick* doctrine, limited however to damages suits, there is much to be said for the approach—skeptical of Motorola's suit but emphatic in asserting the government's power to obtain relief through criminal and injunctive actions without ruffling our allies' feathers—argued by Connolly and the government's amicus curiae brief.

Connolly amplifies his analysis in another recent article, "Repeal the FTAIA! (Or at Least Consider It as Coextensive with *Hartford Fire*)," *CPI Antitrust Chronicle* (Sept.2014), www.competitionpolicyinternational.com/repeal-the-ftaia-or-at-least-considerit-as-coextensive-with-hartford-fire/. As is apparent from the title, the article ranges far beyond the issues in our case. But the article does discuss the case at some length, offering (at pp. 3–7) a number of pertinent observations, particularly concerning the differences between a private damages suit and a government suit seeking criminal or injunctive remedies:

As the government notes in its amicus filings, there is a difference between actions brought by the DOJ and private class action damages. *Motorola Mobility* can be decided in such [a] way as to recognize these differences. The court can find jurisdiction under the FTAIA for DOJ prosecutions while addressing the concerns raised by China, Japan, Korea, and Taiwan about an unduly expansive application of U.S. law [that] they claim would undermine principles of international comity.... Finding jurisdiction for the United States to prosecute component price-fixing need not ignore the international comity concerns of foreign governments. No nation has objected to the DOJ's successful prosecution of foreign companies and even citizens of that country in the LCD panel investigation. As the United States notes in its brief, the DOJ seriously considers the views of foreign nations before bringing cases.... [T]he comity considerations with private plaintiffs are quite different. "[P]rivate plaintiffs ... often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." [citing *F. Hoffmann–La Roche Ltd. v. Empagran S.A., supra,* 542 U.S. at 171 [124 S.Ct. 2359], quoting Joseph P. Griffin, "Extraterritoriality in U.S. and EU Antitrust Enforcement," 67 *Antitrust L.J.* 159, 194 (1999)] ...

It is fair to require foreign subsidiaries of American companies to seek remedy in the courts of the country in which they choose to incorporate. Companies operate overseas facilities to take advantage of many legal provisions of that country: labor law, environmental law, and tax law. In non-legal terms: "You take the good with the bad." By contrast, American consumers have no realistic choice but to buy finished goods that are assembled from components sold and assembled around the world. Therefore, the antitrust laws should be read—where possible—to allow governmental enforcement against international cartels that were meant to have, and have had, a substantial effect[ ] on domestic commerce.... A foreign subsidiar[y's] position is more akin to an American citizen living overseas who buys price-fixed goods but then must seek any remedies under the laws [of the] country she has chosen to live in....

Domestic corporate purchasers are not without remedy when buying component parts from foreign vendors. First, the U.S. parent could buy directly from the foreign vendor and preserve the right to sue as a direct purchaser (while trading off the benefits the company gained from operating through a foreign subsidiary). Or, if a U.S. parent doesn't think that antitrust laws are sufficiently, or fairly, enforced in a given country, they certainly don't have to set up a subsidiary there.... So, an adverse ruling in *Motorola* would not eliminate every avenue of damage redress for component price-fixing.... The *Motorola Mobility* court should reach a decision that preserves the ability of the DOJ to protect American consumers and continue to lead the way in prosecuting international cartels—including appropriate component cartels. The court could also acknowledge the comity concerns of foreign nations and find application of *Illinois Brick* a bar to foreign component civil damage cases.

The district court's grant of partial summary judgment in favor of the defendants is

AFFIRMED.

Supplemental Teaching Materials (4)
[Exhibit 19-2]

The Empagran Case and Amicus Curae Brief of the Japanese Government:
Empagran SA et al v. F. Hoffman-La Roche Ltd., 2001 WL 76136 (D.D.C., June 7, 20001)

(Summary of fact and decision)

U.S., EU and other antitrust authorities investigated a large scale international cartel to fix prices of vitamins in which U.S., European and Japanese pharmaceutical companies participated. Criminal and administrative penalties were imposed on them. Later purchasers (consumers) who purchased vitamin from members of the cartel in foreign countries brought private suits in U.S. courts to recover treble damage caused by inflated prices of vitamin in their countries.

The fact of the case is presented in summary below.

A Japanese purchaser of vitamin (Mr. X) purchased vitamin in Japan from a Japanese company Y which had been a member of an international cartel in which Company Y and Company Z (a U.S. company) participated. Company Y and Company Z agreed to raise price of vitamin both in Japan and U.S. According to this agreement, Company Y raised price of vitamin in Japan and Company Z raised price in U.S. simultaneously. Mr. X brought an antitrust suit in U.S. under U.S. antitrust laws alleging that he had to pay overcharged price in Japan for vitamin because of this cartel agreement and requested the U.S. court to give him a damage award by which he would recover three times the amount of damage that he had sustained by this cartel agreement plus attorney fee that he had to pay.

U.S. District Court denied recovery for the reason that the alleged damage was caused by a price raising in Japan and the linkage between the damage and U.S. jurisdiction was too remote. U.S. Court of Appeals reversed this decision and stated that Mr. X stated a cause of action correctly because there would have been no price rise in U.S. but for the parallel price rise in Japan and, in this sense, the damage sustained by Mr. X in Japan is sufficiently connected to the U.S. jurisdiction.

The U.S. Supreme Court handed down a decision denying the recovery of damage claimed by Mr. X for the following reason. It stated that, to establish U.S. jurisdiction in this case, it would be necessary to state that there was a sufficient nexus between the damage in a foreign country and the effect of unlawful conduct in the U.S. market.

This nexus could not be a mere "but for" relationship between the foreign damage and a domestic effect. There had to be the relationship of " proximate cause" between them. The Supreme Court did not explain what this proximate cause was and this question is left to future decisions.

During the proceeding at the Supreme Court, the Japanese government submitted to the U.S. Supreme Court an amicus curiae brief in which it argued that an exercise of U.S. jurisdiction over this matter is an excess of jurisdiction which is not permitted under the rules of international law.

(Amicus curiae brief by the Japanese government)

See the attached amicus brief.

(Legal issues to be discussed)

(a) Under U.S. antitrust laws, a successful plaintiff in an antitrust suit can recover three times the damage sustained plus reasonable attorney fee that it had to pay. There is no such remedy in competition laws of any other country. Therefore, if a foreign person who has been injured in a foreign country by a conduct there which is linked with the effect in the United States, there would be a large number of antitrust suits in the United States brought by foreign persons against foreign companies. This will be an effective deterrence to unlawful international cartels. In order to strengthen the deterrent effect of competition law against international cartels, it is a good idea to permit such suits and allow U.S. courts to handle them.

(b) Major trading nations enforce competition laws and injured persons are encouraged to bring private suits in courts to recover the damage sustained. If foreign persons injured by anticompetitive conducts abroad are allowed to bring suits in the United States, courts in other major trading nations will be unused and hollowed out.

(c) There are two views on the Empagran Decision in the United States. Which would you think is more persuasive than other?

Amicus Curiae Brief Submitted to the Supreme Court of the United States by the Government of Japan

For Opinion See 124 S.Ct. 2359 , 124 S.Ct. 1901 , 124 S.Ct. 966

U.S.,2004.

Supreme Court of the United States.
F. HOFFMANN-LA ROCHE, LTD., et al., Petitioners,
v.
EMPAGRAN S.A., et al., Respondents.
No. 03-724.
February 3, 2004.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

Brief of the Government of Japan as Amicus Curiae in Support of Petitioners

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QUESTION PRESENTED

May foreign plaintiffs pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside United States commerce?

PARTIES TO THE PROCEEDING

Petitioners, who were Appellees in the United States Court of Appeals for the District of Columbia Circuit, are as follows: F. Hoffmann-La Roche, Ltd.; Hoffmann-La Roche Inc.; Roche Vitamins Inc.; BASF AG; BASF Corporation; Rhône-Poulenc Animal Nutrition Inc.; Rhône-Poulenc Inc.; Hoechst Marion Roussel S.A.; Rhône-Poulenc S.A.; Takeda Chemical Industries, Ltd.; Takeda Vitamin & Food USA, Inc.; Daiichi Pharmaceutical Co., Ltd.; Daiichi Pharmaceutical Corp.; Daiichi Fine Chemicals, Inc.; Eisai Co., Ltd.; Eisai U.S.A., Inc.; Eisai Inc.; Akzo Nobel Chemicals B.V.; Akzo Nobel Inc.; Bioproducts Incorporated; Chinook Group Ltd.; Cope Investments Ltd.; Degussa AG; Degussa Corp.; DuCoa, L.P.; DCV, Inc.; EM Industries, Inc.; Merck KGaA; E. Merck; Lonza Inc.; Lonza AG; Alusuisse-Lonza Group Ltd.; Mitsui & Co., Ltd.; Nepera, Inc.; Reilly Chemicals, S.A.; Reilly Industries, Inc.; Sumitomo Chemical Co., Ltd.; Sumitomo Chemical America, Inc,; Tanabe U.S.A. Inc. and UCB Chemicals Corp.

Respondents, who were Appellants in the United States Court of Appeals for the District of Columbia Circuit, are as follows: Empagran, S.A.; Nutricion Animal, S.A.; Winddridge Pig Farm; Brisbane Export Corp. Pry, Ltd. and Concern Stirol, on behalf of themselves and all others similarly situated.

West Headnotes

Antitrust and Trade Regulation 29T 945

29T Antitrust and Trade Regulation

29TXVI Antitrust and Foreign Trade

29Tk945 k. In General. Most Cited Cases

(Formerly 265k12(7))

May foreign plaintiffs pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside United States commerce? Sherman Act, §§ 1, 7(2), as amended, 15 U.S.C.A. §§ 1, 6a(2).

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*1 INTEREST OF THE AMICUS CURIAE[FN1]

FN1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3. In accordance with Rule 37.6, the Government of Japan states that Sonnenschein Nath & Rosenthal LLP recently acted as local counsel in Kansas state court for Petitioners Eisai Co., Ltd., Eisai U.S.A., Inc., and Eisai, Inc. ("Eisai") in a related state indirect-purchaser antitrust case, *Stephen L. Cox, et al. v. F. Hoffmann-La Roche, Ltd., et al.,* No. 00 C 1890 (Dist. Ct. of Wyandotte County, Kansas). This case has now settled. In addition, Sonnenschein Nath & Rosenthal LLP acted for Eisai more than four years ago in separate federal proceedings relating to vitamins. At present, Sonnenschein Nath & Rosenthal LLP does not represent Eisai. No counsel for a party in this case authored

this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae.*

Petitioners in this case include Japanese companies that are alleged to have participated in an international cartel to fix prices and allocate markets for bulk vitamin sales in various national markets. The Government of Japan has significant economic, political, and legal interests in ensuring that companies based in Japan shall comply with the Japanese legal system, and that Japanese companies running businesses elsewhere shall comply with "reasonable" jurisdictional requirements of other nations. Japan also has a significant interest in making certain that Japanese companies are not subject to the unreasonable extraterritorial reach of United States competition and class action laws by private foreign plaintiffs who purchased vitamins from Petitioners only in foreign markets and are now seeking treble damages in private lawsuits filed in United States courts against Japanese companies for such foreign purchases.

SUMMARY OF THE ARGUMENT

The Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring actions in United States courts for alleged injuries under United States antitrust laws. There is nothing in the legislative history of the FTAIA, or the Sherman and Clayton Acts it sought to clarify, to suggest that U.S. antitrust jurisdiction over foreign firms in foreign markets should be expanded, nor does this Court's decision in *Pfizer* change the fact that no statute expands such judicial jurisdiction. Giving foreign purchasers the right to damages for purely foreign market transactions undermines the important principle of comity, respect due to a sovereign nation to regulate conduct within its national territory. Such an interpretation of the FTAIA has international public policy implications which would adversely affect the ability of the Government of Japan to regulate its own economy and govern its own society. Therefore, the decision of the Court of Appeals for the District of Columbia should be reversed.

*3 ARGUMENT

I. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982 ("FTAIA"), 15 U.S.C. § 6A, WAS NOT INTENDED TO EXPAND UNITED STATES ANTITRUST JURISDICTION TO REACH ALLEGED INJURIES TO FOREIGN CONSUMERS FOR

PURCHASES IN FOREIGN MARKETS FROM FOREIGN CORPORATIONS, NOR WERE THE SHERMAN OR CLAYTON ACTS IT SOUGHT TO CLARIFY.

A. The FTAIA Sought to Clarify the Limits of United States Antitrust Jurisdiction in United States Foreign Commerce, Not Expand that Jurisdiction.

The FTAIA was a part of, and complement to, the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001 *et seq.* Both laws sought to promote U.S. exports by seeking to assure American businesses that they were not subject in foreign commerce to a "stricter regimen of [U.S.] antitrust than their competitors of foreign ownership." H.R. Rep. No. 97-686, at 10 (1982). The FTAIA made clear that:

American-owned firms that operate entirely abroad or in United States export trade [are freed] from the possibility of dual and conflicting antitrust regulation. When their activities lack the requisite [U.S.] domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors.

Id. The law was enacted to "level the playing field" between U.S. and foreign companies overseas, and to promote foreign antitrust enforcement over foreign conduct in foreign markets by *reducing* the perceived scope of U.S. ***4** antitrust jurisdiction abroad. *See* H.R. Rep. No. 97-686, at 14 ("[T]he clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets" under their competition laws.). There is nothing in the legislative history of the FTAIA to suggest that it was intended to expand U.S. antitrust jurisdiction to subject foreign firms in foreign markets to U.S. law.

B. If the FTAIA Had Been Seen to Expand U.S. Extraterritorial Jurisdiction to Foreign Corporations That Allegedly Injured Foreign Purchasers in Foreign Markets, There Would Have Been a Storm of Criticism by Foreign Governments.

The early 1980s were a time of international tension over the extraterritorial application of U.S. antitrust law. In 1982, many close allies of the United States were concerned that some U.S. antitrust enforcement against foreign persons for conduct in foreign nations, allegedly aimed at causing direct, substantial, and reasonably foreseeable injury in U.S. markets, exceeded established international law standards. *See generally* A.V. Lowe, *Extraterritorial Jurisdiction* (1983). Japan, for example, was concerned about a U.S. private antitrust lawsuit brought against the Japanese color television industry for alleged cartel activity in

Japan, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). In addition, the United Kingdom, Australia, and Canada all passed "frustration of judgments" statutes preventing the enforcement of foreign antitrust judgments inconsistent with their sovereignty and national interests. ***5** *See* Spencer Weber Waller, 1 *Antitrust and American Business Abroad* § 4:17 (3d ed. 1997).

The Supreme Court also appeared to recognize this tension when it began its analysis in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) by stating its understanding that "American antitrust laws do not regulate the competitive conditions of other nations' economies." By expanding U.S. jurisdiction to give Japanese consumers a U.S. legal claim against Japanese and other manufacturers selling into the Japanese market, the D.C. Court of Appeals' decision has done just that.

C. The Decision in *Pfizer* Does Not Change the Fact that the FTAIA Did Not Bestow on Foreign Purchasers the Right to Damages for Transactions Only in Foreign National Markets, or that Such a Right Was Not Bestowed by the Sherman or Clayton Acts, Which the FTAIA Sought to Clarify.

In *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978), the Court recognized that "[t]here is no statutory provision or legislative history that provides a clear answer" to whether a foreign government is a person under U.S. antitrust law. The Court concluded that "it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted." *Pfizer*, 434 U.S. at 312. The dissent criticized "this undisguised exercise of legislative power" by the Court in answering the question judicially. *Id.* at 320. A distinguishing feature in *Pfizer*, absent in the Decision below, is that one of the factors the majority relied upon when creating, *de novo*, this foreign governmental right to sue was that to ***6** not do so "would manifest a want of comity and friendly feeling" for foreign nations. *Id.* at 319. The Decision below seems to ignore considerations of comity.

It is apparent in reviewing the history of Sherman Act anti-cartel enforcement from *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) through *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) that there is no statutory provision or legislative history to the Sherman and Clayton Acts that justifies the Decision below. The Court would go well beyond what it did in *Pfizer* if the Court of Appeals' decision were affirmed, given the lack of any consideration of its impact on foreign sovereign jurisdictions.

II. INTERPRETING THE FTAIA TO ALLOW FOREIGN PURCHASERS OF GOODS IN FOREIGN MARKETS TO BRING SUIT AGAINST FOREIGN CORPORATIONS UNDERMINES COMITY, THE PRINCIPLE OF THE SOVEREIGN EQUALITY OF STATES TO GOVERN WITHIN THEIR NATIONAL TERRITORIES.

Since the seventeenth century and the rise of the nation state, the cornerstone of public and private international law has been that nation states are equal sovereigns, entitled to mutual respect and deference in the exercise of their sovereignty. As J.L. Brierly, the Oxford scholar, wrote in 1928:

At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states. ***7** When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory[.]

J.L. Brierly, *The Law of Nations* 162 (6th ed. 1963). Judicial comity reflects this principle in declining to prescribe where matters are more appropriately adjudicated elsewhere, thereby respecting the sovereign equality of states. *See generally* *Hilton v. Guyot*, 159 U.S. 113 (1895); *see also* Restatement (Third) of Foreign Relations Law § 403 (1986) (outlining the limitations on a state's jurisdiction to prescribe, including the consideration of the likelihood of conflict with regulation by another state). The Court of Appeals extended U.S. jurisdiction, without clear Congressional direction, so as to interfere with the regulation of transactions between producers and consumers in foreign national markets unrelated to the U.S. market. Doing so alters and, as discussed below, undermines Japanese sovereignty over the Japanese market and Japanese people. *See* Restatement (Third) of Foreign Relations Law § 403(3) (indicating that in exercising jurisdiction over a person or activity, "a state should defer to the other state if that state's interest is clearly greater"). "[S]tatutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part).

***8** III. AFFIRMING THE DECISION BELOW WOULD HAVE SERIOUS ADVERSE IMPLICATIONS, WHICH CANNOT BE FULLY ANTICIPATED, FOR REGULATION OF THE JAPANESE ECONOMY AND SOCIETY BY THE GOVERNMENT OF JAPAN.

Japanese law and policy already address the interests of Japanese consumers with regard to

transactions that impact the Japanese market. Japan has the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade ("the Antimonopoly Act"), Law No. 54 of April 14, 1947, which is enforced by competent authorities such as the Japan Fair Trade Commission ("JFTC"). Prime Minister Koizumi has stated that one of his government's goals is "[t]he enhancement of the JFTC system as the guardian of the market to establish [in Japan] a competition policy appropriate for the 21st century." *Annual Report on Competition Policy in Japan (January-December 2001)*, JFTC Doc. No. DAFFE/COMP(2002)27/21, at 3 (quoting Prime Minister Jun-ichiro Koizumi, Policy Speech (May 7, 2001)). However, U.S. lawyers will become antitrust prosecutors for the Japanese market if the Decision below is upheld.

Japanese law does not provide for treble damage awards in antitrust claims. Treble damages would be viewed as punitive damages, mixing civil and criminal liability. The Supreme Court of Japan has ruled that foreign judgments may not be enforced in Japanese courts beyond the level of actual compensatory damages. *Ore. State Union No-su-kon I v. Mansei Ko-gyo Co.,* 51 Minshú 2573 (Sup. Ct., July 11, 1997).

If the Decision below is upheld, a large number of lawsuits, including class action lawsuits, requesting ***9** punitive damage awards and an automatic award of attorneys' fees to prevailing plaintiffs are likely to be filed against persons (including juridical persons) in Japanese territory by persons having no connection to the United States. The Government of Japan is concerned that exercise by U.S. courts of such extraterritorial jurisdiction against its sovereign will would be inappropriate. Furthermore, the coexistence of class actions with punitive damages in the United States adds to the difficulties. If the Decision below is upheld, it would cause "forum shopping" in U.S. courts by plaintiffs from all over the world who seek large punitive damages awards through class action lawsuits.

Encouraging Japanese and other foreign consumers with no connection to the United States to file lawsuits under U.S. law could have a severe impact on Japanese interests. Private plaintiffs may selectively choose to sue only one or two alleged participants in an international cartel, and those selected defendants have no right of contribution from the remaining cartel participants. *See* *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). This means that if U.S. courts exercise such extraterritorial jurisdiction, a worldwide foreign plaintiff class could seek damages of scores of billions of dollars from just two or three Japanese defendants. This could, at the least, put Japanese firms at a serious competitive disadvantage with other firms in that industry. In *Radcliff*, 451 U.S. at 646, the

Court recognized that there were "far-reaching" policy questions raised by an antitrust defendant's claimed right to contribution, which were beyond the courts' competence to resolve. That can be no less true with respect to the Decision below.

***10** The likely impact of applying Federal Rule of Civil Procedure 23, relating to class actions, to a worldwide class of foreign consumers also raises a number of questions. Is it practicable to join consumers as a class in up to 150 national markets, with disparate market structures and conditions? Is it practicable to certify a worldwide class of foreign consumers potentially speaking hundreds of languages? How is a U.S. District Court to decide what is the "best notice practicable" to global class members? United States rules presume that class members wish to participate unless they give notice of opting out. Making that determination for Japanese consumers in the Japanese market, without the input of the Japanese government, is a concern. Who is to assure that the U.S. class action lawyers are properly serving the interests of their Japanese "clients"? Are Japanese government views of effective representation to be taken into account by the U.S. court?

The Government of Japan is fully confident that the U.S. government would never seek to expand its extraterritorial jurisdiction in such a dramatic fashion as to governmental enforcement. However, it is particularly troublesome that this right to, at the least, interfere with Japanese governmental regulation of the Japanese market would be given to private U.S. attorneys with little experience in international diplomacy and cooperation.

There is a network of international relationships among national antitrust authorities which provides lines of direct communication to lessen or remove sovereign national conflicts. Japan and the United States have a bilateral antitrust cooperation agreement. *See* Agreement Between the Government of Japan and the Government of the United States of America Concerning Cooperation on ***11** Anticompetitive Activities, Oct. 7, 1999. Japan and the United States are members of the Organisation for Economic Co-operation and Development ("OECD"). The 1995 Recommendation of the OECD Council recognizes the need for Member countries to "use moderation and self restraint in the interest of cooperation in the field of anticompetitive practices." *See* Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. No. C(95)130/FINAL (July 27, 1995). The Council encourages Member countries to exchange information, coordinate action, consult, and conciliate. Furthermore, there is the International Competition Network ("ICN"), in which the antitrust agencies of many of the world's governments consult to harmonize standards

and promote best practices in antitrust enforcement. *See* http:// www.internationalcompetitionnetwork.org (last visited Jan. 27, 2004). There is no comparable network by which foreign antitrust agencies, or their governments, can consult with private U.S. antitrust lawyers or with U.S. courts having jurisdiction over global class actions. The Government of Japan is concerned that neither national governments nor national courts are well suited to supervising and resolving the conflicts that would result if the Decision below is not reversed.

CONCLUSION

The FTAIA should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring suits in United States courts for alleged injuries under United States antitrust laws. Accordingly, ***12** the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

F. HOFFMANN-LA ROCHE, LTD., et al., Petitioners, v. EMPAGRAN S.A., et al., Respondents.
2004 WL 226390 (U.S.) (Appellate Brief)

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