

Extraterritoriality & Antitrust

A Perspective on the U.S. Experience

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International Scope of U.S. Antitrust Policy

- The Sherman Act prohibits anticompetitive restraints in, or monopolization of, any part of “trade or commerce among the several States, ***or with foreign nations.***” (emphasis added)

Court-Created Effects Test

- Alcoa (2nd Circuit, 1945)
 - “[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”
 - Required showing of intent and effects

World Reaction

- Dismay at “attempts by the United States [...] to impose its economic and other domestic policies on individuals and companies outside its territorial jurisdiction, without regard for the trading interests of other countries.”
- Led to the adoption of laws, policies and practices to frustrate U.S. enforcement - notably blocking and clawback statutes.
- Beginning of international efforts to alleviate conflict see 1967 OECD Cooperation Recommendation

Refinements

- Timberlane (9th Circuit, 1976) – Even if the Alcoa test is met, a court may decline jurisdiction on grounds of international comity and fairness
 - Set forth a list of factors to balance.
- Bilateral Agreements
- FTAIA (1982)

The Global Spread of Antitrust

1900



1990



2008



Further Developments

- Hartford Fire (1993) – Sup. Ct. narrowed the application of the comity doctrine to cases involving true conflict between domestic and foreign law.
- Antitrust Agency International Guidelines (1995)
- Bilateral and Mutual Assistance Agreements

Further Developments (cont)

- Empagran (2004) and progeny – Sup. Ct. held that the Sherman Act does not reach claims arising out of foreign injury that is independent of domestic effects of the anticompetitive conduct.
- Intel (2004) – Sup. Ct. expanded the availability of U.S. discovery for foreign litigants under 28 U.S.C.A. § 1782.

Where do we stand?

- The U.S. application of the effects test remains a work in progress.
- Agencies worldwide increasingly are working together to reduce the potential for conflict:
 - Increased emphasis on cooperation
 - Convergence toward similar antitrust policies and enforcement approaches promoted bilaterally and through international organizations, notably the OECD and the ICN.