Extraterritoriality & Antitrust
A Perspective on the U.S. Experience

Elizabeth F. Kraus
Deputy Director for
International Antitrust
U.S. Federal Trade Commission
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
Further Developments

- Hartford Fire (1993) – Sup. Ct. narrowed the application of the comity doctrine to cases involving true conflict between domestic and foreign law.
- 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.

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.