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



- "[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

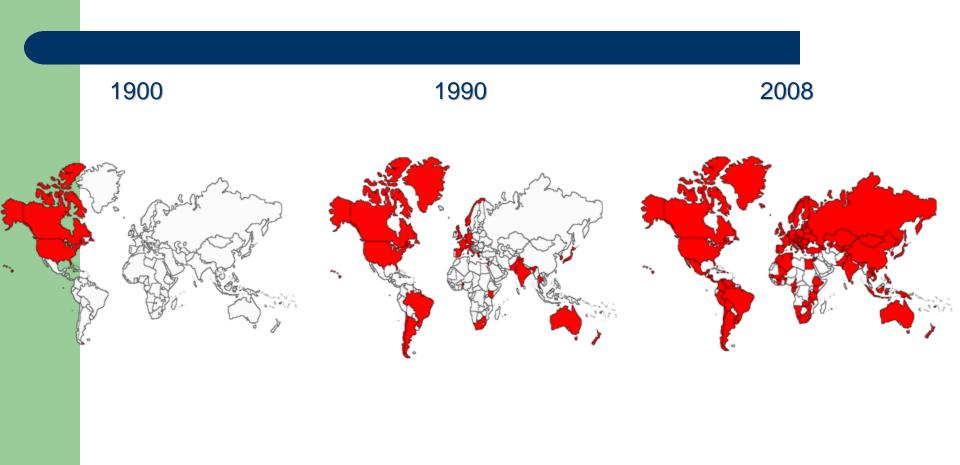
World Reaction

- 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

- <u>Timberlane</u> (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
- <u>FTAIA</u> (1982)

The Global Spread of Antitrust



Further Developments

- <u>Hartford Fire</u> (1993) Sup. Ct. narrowed the application of the comity doctrine to cases involving true conflict between domestic and foreign law.
- <u>Antitrust Agency International Guidelines</u> (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.