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## Heisenberg's Uncertainty Principle, Extraterritoriality and Comity

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## HEISENBERG'S UNCERTAINTY PRINCIPLE, EXTRATERRITORIALITY AND COMITY

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### I. INTRODUCTION<sup>1</sup>

The American legal system is different from any other legal system in the world. One consequence of that reality is that

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1. This is a companion piece to Mr. Briggs' earlier article, *Schrödinger's Cat and Extraterritoriality*, 29 ANTITRUST MAGAZINE 79 (Fall 2014). The German physicist, Werner Heisenberg was a contemporary of Schrödinger. Introduced first in 1927, the principle states that the more precisely the position of some particle is determined, the less precisely its momentum can be known, and vice versa. It is related to a similar effect in physics called the "observer effect," which notes that measurements of certain systems cannot be made without affecting the systems being observed. See *Uncertainty principle*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Uncertainty\\_principle](https://en.wikipedia.org/wiki/Uncertainty_principle).

In the context of this article, the reference to Heisenberg is mainly intended to take note of the reality that whether, when, and under what circumstances

much of the rest of the world is locked into a love/hate relationship with our legal system. On the “love” side, foreign individuals and enterprises regularly seek access to the American legal system because of the perception, and sometimes the reality, that it provides generous benefits to persistent plaintiffs who can find a wrongdoer defendant over whom a U.S. court can claim jurisdiction. On the “hate” side, foreign businesses, as well as foreign governments, increasingly seem to resent the lack of respect that American courts give to the views and interests of foreign sovereigns, enterprises, and citizens.

Across the legal landscape, American courts assert jurisdiction over foreign enterprises and individuals for conduct occurring outside the United States in both criminal and civil cases. While the issues in criminal cases are significant, and sometimes the cause of quiet foreign sovereign annoyance, it is the civil cases that seem to create the greatest tensions, at least publicly. The civil cases most usually arise in settings where private plaintiffs are making claims that involve multiple damages and attorney’s fees, such as antitrust and Racketeer Influenced Corrupt Organizations (RICO) cases, or other cases where damage claims are large (i.e., securities claims) or where there exist clear opportunities for substantial punitive damages of the sort rarely available in the courts of other countries (i.e., tort claims). Private civil claimants and their counsel in these types of cases have every incentive to persuade American courts to take jurisdiction over foreign defendants and foreign conduct. Indeed, attorneys have an ethical duty to advance their clients’ claims as vigorously as possible, which more or less requires them to

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American courts will assert extraterritorial jurisdiction over foreign conduct by foreign actors, and whether, when, and under what circumstances those same courts will consider or apply any principles of comity is regrettably uncertain and has much to do with the presence or absence of such occasional judicial oversight as might from time to time be present.

push domestic courts to the limits of their jurisdiction, if not beyond.

For its part, the government, especially in recent years, has advanced relatively expansive theories of the extraterritorial reach of U.S. laws.<sup>2</sup> In antitrust cases, the statistics are staggering. The Antitrust Division of the Department of Justice (DOJ) has long been proud of its sentencing of individuals to jail for their antitrust infringements, without really highlighting the reality that many individuals sentenced are foreigners.<sup>3</sup> That same Antitrust Division seems to be even prouder of the many billions of dollars in fines that it has collected annually for the last

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2. See, e.g., Brief for the United States and the Fed. Trade Comm'n as Amici Curiae in Support of Neither Party on Rehearing En Banc at 8, *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 856-57 (7th Cir. 2012) (No. 10-1712), 2012 WL 6641190 (urging the Seventh Circuit to hold, as it did, that the word "direct" in the Foreign Trade Antitrust Improvements Act (FTAIA) should be interpreted to mean only a "reasonably proximate" causal nexus); but see Brief for the United States as Amicus Curiae Supporting Reversal, *Sachs v. Republic of Austria*, 737 F.3d 584 (9th Cir. 2013), cert. granted sub nom. *OBB Personenverkehr AG v. Sachs*, 135 S. Ct. 1172, 190 L. Ed. 2d 929 (2015) (urging that a foreign state may be held to carry on commercial activity in the United States through the application of common-law agency principles, but criticizing the Ninth Circuit's view that the buying of a ticket for an Austrian train amounted to an element of the plaintiff's strict liability claim. The fact that the Supreme Court has agreed to hear the case suggests that the Court might well be concerned about the inclination of various courts to engage in the extraterritorial application of American legal principles, in this case a tort principle of strict liability).

3. The most recent DOJ Antitrust Division statistics reflect that for the five-year period 2010-14: criminal fines collected amounted to nearly \$4 billion; almost 400 defendants were charged with criminal antitrust offenses and more than 300 actual cases were filed; the average prison sentence was 25 months. See *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More*, U.S. DEP'T OF JUSTICE (July 7, 2015), <http://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>; see also *Criminal Enforcement Fine and Jail Charts*, U.S. DEP'T OF JUSTICE (June 25, 2015), <http://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

several years from antitrust cartellists, although it does not quite so heavily advertise the reality that the overwhelming majority of these fines are collected from foreign companies for conduct that took place in foreign lands.<sup>4</sup>

The Antitrust Division data show that of the 124 companies suffering fines in excess of \$10 million, 110 were foreign. Of those, 67 were Asian, 38 European, and only 14 American.<sup>5</sup> Nearly without exception, these criminal “prosecutions” are the product of guilty pleas brought about by and large as a result of the American, European, or other leniency programs.<sup>6</sup> Indeed, in recent years, it is rare that a case goes to trial and results in a sentencing process that involves a district court rendering a decision to which the prosecution and defendant have not already agreed.<sup>7</sup>

Judges, especially federal judges with life tenure, seem to have very little incentive to exercise restraint in the exercise of their own extraterritorial jurisdiction. In antitrust, for example, where foreign non-import conduct generally is only possibly actionable if it produced a “direct, substantial, and reasonably foreseeable effect” in the United States,<sup>8</sup> many U.S. courts (at the urging of the DOJ and private plaintiffs) increasingly have viewed those words as expansive, and decreasingly have

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4. *Criminal Enforcement Fine and Jail Charts*, *supra* note 3.

5. *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More*, *supra* note 3.

6. See Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, presented at the Nat’l Institute on White Collar Crime, U.S. DEP’T OF JUSTICE at 3, 8 (2010) (discussing the success of leniency programs in the United States and efforts to implement similar programs by foreign countries).

7. *United States v. Hui Hsiung*, 778 F.3d 738 (2014), *cert. denied*, 2015 WL 1206283, is a rare example of this type of case.

8. 15 U.S.C. § 6a (2012).

viewed them as words of restraint.<sup>9</sup> Even the Supreme Court initially seemed to use these words to eliminate much of a role for comity,<sup>10</sup> but more recently reversed course on that.<sup>11</sup>

And while the Supreme Court increasingly has urged lower courts to exercise restraint in the extraterritorial application of U.S. law,<sup>12</sup> and has urged lower courts to take into account principles of comity,<sup>13</sup> those exhortations strangely seem not to have taken much root in the lower courts. In other words, the American courts are operating in the area of extraterritorial

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9. See, e.g., *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (interpreting the word “direct” as “reasonably proximate” rather than the more limited “immediate”).

10. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (stating international comity considerations would arise only if there were a “true conflict between domestic and foreign law”). In his dissent, Justice Scalia invoked a canon of statutory construction to the effect that an act of Congress should not be construed as violating international law if any other possible interpretation is available. *Id.* at 814-15.

11. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-69 (2004) (following Scalia’s logic in his *Hartford Fire* dissent by invoking international comity considerations in denying extraterritorial application of U.S. antitrust laws, even though the conduct at issue was unlawful under foreign law as well, because “American private treble-damages remedies to anticompetitive conduct taking place abroad had generated considerable controversy.”).

12. See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (stating “[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) (It is a “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”) (internal citations and quotations omitted).

13. See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (chastising the lower court for insufficiently considering international comity); *Empagran*, 542 U.S. at 164-65.

jurisdiction without close or regular supervision, and with few objective or clear restraining guidelines that provide limiting principles.

The Supreme Court has held that “where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.”<sup>14</sup> So, even when jurisdiction is contested, district court judges exercise considerable discretion to authorize “jurisdictional discovery,” so that the court can determine its jurisdiction. This jurisdictional discovery is regularly conducted under the auspices of Rule 26 of the Federal Rules of Civil Procedure, which normally authorizes the broadest imaginable discovery. And so a rule authorizing nearly unlimited discovery is called into play to authorize plaintiffs to rummage through foreign files of foreign companies and foreign persons to develop evidence that might persuade an American court that it, in fact, has jurisdiction over the foreign enterprise, or over a domestic enterprise, for foreign conduct with some perceptible impact on American commerce. There is, however, no consensus regarding the circumstances in which jurisdictional discovery should or will be granted and the circuits are by no means uniform on this subject.<sup>15</sup>

Few if any other legal systems in the world involve circumstances where powerful courts are called upon by private parties to exercise extraterritorial jurisdiction over foreign companies, individuals, and conduct. For many people, including even relatively sophisticated judges, lawyers, and academics, this proposition is seen as unremarkable. The bench and the bar in this country seem to accept the fact of this extraordinary

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14. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) (citing MOORE'S FEDERAL PRACTICE ¶ 26.56[6] (2d ed. 1976)).

15. For an especially trenchant and thorough discussion of this entire issue, see S. I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASHINGTON & LEE L. REV. 489 (2010).

power as if it were an obvious adjunct to “American Exceptionalism.”<sup>16</sup> But in nearly all other countries, the exercise of extra-territorial jurisdiction is more rare, and nearly always at the behest of a government acting through its executive branch or its legislature. Foreign courts seem to show more restraint in the exercise of their power, which is in any case more limited than that enjoyed by American courts. This might be changing. As the People’s Republic of China (PRC), along with other powerful countries, observe the American legal system, “learn” from it, and mimic it to their advantage, American or other firms whose conduct outside China can be claimed to have some perceptible effect on Chinese commerce will come to be treated in much the same way that our system treats Asian and European companies. Indeed this is already happening.<sup>17</sup>

It is the purpose of this article to begin to explore this area and to try to come up with a workable understanding of what comity means or should mean or might mean and, in the end, to

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16. There is also the related matter of the extraordinary power of American courts in general and the underlying reasons for that. As Francis Fukuyama observes: “The story of the [American] courts is one of the steadily increasing judicialization of functions that in other developed democracies are handled by administrative bureaucracies, leading to an explosion of costly litigation, slowness of decision-making, and highly inconsistent enforcement of laws. In the United States today, instead of being constraints on government, courts have become alternative instruments for the expansion of government.” Francis Fukuyama, *America in Decay: The Sources of Political Dysfunction*, 93 FOREIGN AFFAIRS, Sept.-Oct. 2014, at 5, 11.

17. See, e.g., Michael Martina & Mathew Miller, *As Qualcomm Decision Looms, U.S. Presses China on Antitrust Policy*, REUTERS (Dec. 16, 2014), <http://www.reuters.com/article/2014/12/16/qualcomm-china-antitrust-idUSL3N0TW2SF20141216> (noting that President Obama admonished “China against applying its anti-monopoly law to benefit Chinese firms using foreign companies’ technology,” and that, moreover, “[a]t least 30 foreign firms . . . have come under the scrutiny of China’s 2008 anti-monopoly law, which some critics say is being used to unfairly target non-Chinese companies.”).



propose some possible courses of action that might bring to this issue the attention we believe it deserves, to rein in somewhat the largely uncabined extraterritorial jurisdiction of American courts, and to bring the exercise of judicial extraterritoriality more into line within international norms.

## II. RUFFLED FEATHERS: MANY FOREIGN GOVERNMENTS TAKE ISSUE WITH AMERICAN “LEGAL IMPERIALISM”

In a variety of settings foreign governments have expressed and are expressing concerns about the extraterritorial application of U.S. law. The United States occupies a unique position in global trade and finance. The United States also has enacted far-reaching legislation involving commerce, banking and finance, business conduct, mergers and acquisitions, foreign corrupt practices, and a variety of other matters. The extraterritorial application of laws in these areas challenges the sovereignty of other nations and is often viewed as offensive. In anti-trust, the United States’ influence is the result of its status as the world’s largest importer of goods and services.<sup>18</sup> In finance, this influence is the result of the U.S. dollar’s status as the international unit of account: “Pretty much any dollar transaction—even between two non-US entities—will go through New York

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18. *Int’l Trade Statistics*, WORLD TRADE ORG. 26, 28 (2014), [https://www.wto.org/english/res\\_e/statis\\_e/its2014\\_e/its2014\\_e.pdf](https://www.wto.org/english/res_e/statis_e/its2014_e/its2014_e.pdf); cf. Brief for the Government of Canada as Amicus Curiae Supporting Reversal, at 1, *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226389 (noting that the effect of U.S. laws on Canadian policy is heightened by the level of “interdependence of the economies of Canada and the United States, which enjoy the largest bilateral trading relationship in the world[.]”) [hereinafter Canada Empagran Amicus].

City at some point, where it comes under the jurisdiction of US authorities.”<sup>19</sup>

The rampant extraterritorial application of U.S. laws has ruffled the feathers of foreign governments for a long time, beginning essentially with the cluster of private and government actions in the Uranium cartel cases back in the 1970’s and 1980’s. Close American allies, including Australia, Canada, France, South Africa, the UK, and others, reacted with hostility to the extraterritorial activism of the domestic judiciary by enacting “blocking” and “claw back” legislation.<sup>20</sup> Such reactions included the enactment of laws by the United Kingdom and Canada that prohibit enforcement of foreign judgments awarding multiple damages<sup>21</sup> and laws passed by the United Kingdom, France, Australia, and the Canadian provinces of Quebec and Ontario that limit or prohibit the removal of documents in response to a foreign order.<sup>22</sup>

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19. Felix Salmon, *America prosecutes its interests and persecutes BNP*, FIN. TIMES (June 5, 2014), <http://www.ft.com/intl/cms/s/0/edbec3b0-eca3-11e3-8963-00144feabdc0.html>.

20. See Briggs, *supra* note 1, at 79.

21. See UK and Netherlands *Empagran Amici*, *infra* note 23, at 17-18 (“The private actions . . . caused several countries, including the United Kingdom, to enact statutes blocking discovery of documents and other information needed to prosecute foreign defendants[,] . . . restrict[ing] enforcement of treble damage judgments and allow[ing] both firms and persons conducting business in the United Kingdom to sue in the UK to ‘claw back’ the penal portion of the foreign judgment . . . .”); Germany and Belgium *Empagran Amici*, *infra* note 23, at 27 n.11 (citing examples of United Kingdom and Canadian “blocking” and “claw back” laws).

22. See UK and Netherlands *Empagran Amici*, *infra* note 23, at 17 (citing the United Kingdom as one example of a country that passed a law making document discovery more difficult as a result of private actions in the United States); Germany and Belgium *Empagran Amici*, *infra* note 23, at 27

More recently, a number of governments have expressed their concerns about the application of U.S. laws abroad through amicus briefs, including Australia, Belgium, Canada, China, France, Germany, Japan, the Netherlands, South Korea, Switzerland, Taiwan, and the United Kingdom:<sup>23</sup> most of the United States' top fifteen trading partners.

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(discussing United Kingdom, French, Australian, and Canadian laws prohibiting removal of domestic corporation documents pursuant to a foreign court order).

23. See, e.g., Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees, *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723006 [hereinafter Australia Morrison Amicus]; Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724), 2004 WL 226388 [hereinafter Germany and Belgium Empagran Amici]; Canada Empagran Amicus, *supra* note 18; Brief of the Ministry of Commerce of the People's Republic of China as Amicus Curiae in support of the Defendants' Motion to Dismiss, *In re Vitamin C Antitrust Litig.*, 810 F.Supp.2d 522 (E.D.N.Y. 2011) (No. 06-md-01738), 2006 WL 6672257 [hereinafter China Vitamin C amicus]; Brief for the Republic of France as Amicus Curiae in Support of Respondents, *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723010 [hereinafter France Morrison Amicus]; Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724), 2004 WL 226390 [hereinafter Japan Motorola Amicus]; Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724), 2004 WL 226597 [hereinafter UK and Netherlands Empagran Amici]; Brief of the Korea Fair Trade Commission as Amicus Curiae in Support of Appellees' Opposition to Rehearing En Banc, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003), 2014 WL 2583475 [hereinafter Korea Motorola Amicus]; Letter of Ministry of Economic Affairs, Republic of China, Taiwan as Amicus Curiae to Express Its Views Regarding Application of the Foreign Trade Antitrust Improvement Act, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003). The European Commission also filed an amicus brief

These foreign governments have expressed a fairly wide variety of concerns about the potential for extraterritorial application of U.S. laws to interfere with those governments' policy decisions on such matters as liability, procedure, and damages. While most governments have regulatory regimes in place to police, for example, securities fraud and cartel behavior, these differ in many regards both from the American approach and also from each other, reflecting different cultural, social, and economic factors. These differences include the required showing for liability (e.g., definition of materiality in securities fraud cases),<sup>24</sup> procedural protections (e.g., class-action formation and

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in *Kiobel*. Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165345.

24. See Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 16-17, *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723009 (noting that U.K. securities laws differ from U.S. laws in their respective definitions of "materiality" and in their imposed obligations to disclose, which "are not only matters of language or nuance; they reflect legitimate policy decisions") [hereinafter UK Morrison Amicus]; France Morrison Amicus, *supra* note 23, at \*23 (stating countries "often have different schemes of disclosure, different pleading and substantive standards for scienter, different standards of reliance, materiality and causation, different rules governing contribution and indemnity, and different limitations periods.") (footnote omitted).

cost-shifting provisions),<sup>25</sup> and the availability of multiple (i.e., punitive) damages.<sup>26</sup> Applying U.S. law to actors, conduct, and effects appropriately considered under a set of foreign laws undermines a foreign government's ability to govern its own domain and, in the end, becomes an affront to its sovereignty.

Stepping on the toes of foreign governments' regulatory regimes also risks stymying the international development of policies and regulations beneficial to the United States. Countries without well-developed regulatory apparatuses are less

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25. See UK Morrison Amicus, *supra* note 24, at \*19 (noting that U.K. law conflicts with U.S. procedural rules for: "(i) The scope of discovery; (ii) The availability of class actions or other forms of multi-party litigation; (iii) The availability of 'opt-out' classes, whether by default or in the court's discretion; (iv) The availability of contingency fee arrangements for plaintiffs' counsel; (v) The availability of attorney's fee awards against an unsuccessful party; (vi) The legality of third-party litigation funding; (vii) The availability of jury trials; and (viii) The expected time to bring a case to trial"); France Morrison Amicus, *supra* note 23, at \*24 ("Foreign jurisdictions also generally have different rules governing attorney's fees, contingency fees, jury trials, and pretrial discovery. Although those rules are often characterized as 'procedural,' they have substantial practical effect and application of U.S. rules to foreign securities transactions could upset a foreign nation's carefully thought out balancing of plaintiffs' and defendants' interests.") (footnote omitted).

26. See Japan Motorola Amicus, *supra* note 23, at 5 ("The Japanese law and the laws of many (if not all) countries other than the US do not provide for treble damage awards in antitrust claims. Treble damages would be viewed as punitive damages, mixing civil and criminal liability."); Korea Motorola Amicus, *supra* note 23, at 3-4 (noting that Korea's antitrust laws do not provide multiple nor punitive damages); France Morrison Amicus, *supra* note 23, at \*23 (noting that "many foreign nations do not permit the award of punitive damages"); Australia Morrison Amicus, *supra* note 23, at 22 (same).

likely to develop them if the behavior is already policed by private plaintiffs in the United States or if the apparatuses would see their policy choices effectively overruled by U.S. policies.<sup>27</sup>

Foreign governments have also taken the view that extra-territorial application of treble damages threatens to undermine their own enforcement efforts. For example, they claim availability of private treble damages in the United States against their national companies for local conduct may have a detrimental effect on foreign leniency programs. These programs are a key tool for them in rooting out cartel activity, which has traditionally proven difficult to detect and prosecute.<sup>28</sup> “These leniency policies seek to balance the interests of disclosure, deterrence, and punishment,” but “disclosure and reform are greatly hindered when a company risks the imposition of treble damages in a U.S. court for confessing to another nation or authority that

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27. See *Canada Empagran Amicus*, *supra* note 18, at 20-21 (arguing that applying U.S. law too broadly would “remove the incentives of other foreign jurisdictions to implement comprehensive antitrust enforcement regimes and to expand their cooperative efforts . . . Thus, the unilateral assertion of jurisdiction by the United States would, ultimately, impair the interests of the United States in effective mutual cooperation and enforcement.”); *cf.* *China Vitamin C Amicus*, *supra* note 23, at 6 (arguing that application of U.S. antitrust policies to Chinese “regime instituted to ensure orderly markets” would harm China’s “transition to a market-driven economy”).

28. See *Korea Motorola Amicus*, *supra* note 23, at 4 (“Like the U.S. Department of Justice and the European Commission, the KFTC has adopted a delicately balanced leniency program that effectively detects and deters cartel activities, which by nature are often undertaken in secret.”); Brief of the Belgian Competition Authority as Amicus Curiae in Support of Appellees’ Position Seeking Affirmation of the District Court’s Order at 8, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003), 2014 WL 5422010 (noting that the Belgium competition authority “relies to a significant extent on that leniency program to enforce unlawful restraints of trade.”).

it has participated in an international conspiracy.”<sup>29</sup> When that reach is expanded outside of U.S. consumers in a U.S. court, “the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program.”<sup>30</sup> And as Germany and Belgium informed the Supreme Court in *Empagran*,<sup>31</sup> “[h]istorically, other nations have bristled at extraterritorial applications of United States antitrust laws. These concerns have resulted in foreign governments taking a number of measures to counter what they perceive to be an illegitimate encroachment into their sovereignty.”<sup>32</sup>

The enforcement of American law against foreign enterprises for their foreign conduct has become increasingly contentious and offensive, especially quite recently. The displeasure of the PRC seems particularly acute. In the *Vitamin C* litigation, a substantial treble damage jury verdict was entered against companies chartered by the PRC for their involvement in an export price-fixing cartel that the PRC itself claimed was conduct directed by a foreign sovereign in order to assure compliance with U.S. antidumping laws. The District Court rejected the interpretation of Chinese law advanced by the PRC and held that, under Rule 44.1 of the Federal Rules of Civil Procedure, the construction of foreign law was a factual matter for the court itself and that only “some degree of deference” was owed to the foreign

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29. Germany and Belgium *Empagran* Amici, *supra* note 23, at \*29-30.

30. *Id.* at \*30; *see also* Korea Motorola Amicus, *supra* note 23, at 4 (“[F]iling for leniency with non-U.S. antitrust authorities might actually result in a greater likelihood of facing private antitrust damages actions in the United States.”).

31. *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

32. Germany and Belgium *Empagran* Amici, *supra* note 23, at \*25.

sovereign's statement as to the meaning of its own law.<sup>33</sup> The case is now on appeal to the Second Circuit, where the PRC, through its Ministry of Foreign Commerce (MOFCOM), has filed a strong amicus brief expressing the view that the district court's dismissive attitude towards the foreign sovereign's explanation of its own law was "profoundly disrespectful and wholly unfounded." The brief further stated that "the district court's approach and result have deeply troubled the Chinese government, which has sent a diplomatic note concerning this case to the U.S. State Department."<sup>34</sup>

It is not just foreign governments who react angrily to what some call American Judicial Imperialism. Consider the reaction outside of the United States to a statute that took effect on July 1 of last year—the Foreign Account Tax Compliance Act (FATCA). It is not well known that the United States is virtually alone in the world in exercising jurisdiction over its citizens no matter where they might be. FATCA is intended to detect and deter tax evasion by U.S. citizens through the use of accounts held abroad. But the extraterritorial feature is that FATCA places the reporting burden primarily on financial institutions, wealth managers, and national tax authorities, rather than individuals. These are foreign entities. For example in the UK, information on U.S. citizens' accounts holding more than \$50,000 must be reported to HM Revenue & Customs, who will then pass details to the U.S. Internal Revenue Service (this latter step is the subject of a bilateral agreement between the U.S. and the UK).

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33. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 541 (E.D.N.Y. 2011) (quoting *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002)).

34. Brief for Amicus Curiae Ministry of Commerce of the People's Republic of China in support of Defendants-Appellants at 13, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. April 14, 2014), ECF No. 105.



Placing responsibility for compliance with the U.S. statute on foreign banks or other such institutions amounts to extraterritoriality writ large. The U.S. was and is able to engage in this kind of regulatory hegemony because it controls the world's finance system, at least for now. Americans, who are mostly unconnected with the international community, probably neither know nor care much about this. But outside the U.S., and in the business and financial community especially, FATCA (and other American regulatory provisos) are controversial. As Felix Salmon put it in the *Financial Times* last year:

America is using its banking laws not to make its financial system safer, nor to protect its own citizens from predatory financial behaviour, but rather to advance foreign policy and national security objectives. Only in America, for instance, would citizens have to apply to the finance ministry in order to get a visa to visit Cuba.

Leadership is important, and most countries would be fine with following America's lead for some things—cross-border rules governing stability, liquidity, and leverage, for instance. But even then the US has a tendency to ignore everybody else once the rules have been written, and decide to implement a set of entirely separate rules instead. The hegemon does whatever it wants, for its own, often inscrutable reasons, and it does not enjoy being questioned about its decisions.

No other country can get away with this: what we are seeing is unapologetic American exceptionalism, manifesting as extraterritorial powermongering. Using financial regulation as a vehicle for international power politics is extremely effective. It

is also very cheap, compared with, say, declaring war.

US officials never apologise for the fact that their own domestic law always trumps everybody else's; rather, they positively revel in it. The consequence is entirely predictable: a very high degree of resentment at the way in which the U.S. throws its weight around.<sup>35</sup>

The U.S. indictments, plea agreements and extradition requests in the Fédération Internationale de Football Association (FIFA) fraud scandal are triggering similar signs of international skepticism. The first criticism actually came from Russia,<sup>36</sup> which does not have much credibility in complaining about extraterritorial assertion of power, much less in complaining about the FIFA investigations (since it allegedly benefitted from the bribes that are being investigated). But that does not necessarily detract from the merits of the Russian criticism. Indeed, *The Economist* noted that Russia was onto something, observing that "American prosecutors . . . do indeed reach much farther than their peers elsewhere—sometimes too far" and that while the crack down on FIFA is welcome "when it comes to bribery, America has sometimes been too audacious."<sup>37</sup> DOJ's reliance

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35. Salmon, *supra* note 19.

36. *Russia Accuses US of Illegal Overreach with FIFA corruption Indictments*, THE GUARDIAN (May 27, 2015), <http://www.theguardian.com/football/2015/may/27/russia-accuses-us-overreaching-fifa-corruption-indictments>.

37. *The World's Lawyer: Why America, and not another country, is going after FIFA*, THE ECONOMIST (June 6, 2015), <http://www.economist.com/news/international/21653613-why-america-and-not-another-country-going-after-fifa-worlds-lawyer>.

on the RICO Act and Travel Act (rather than anti-bribery statutes) to establish jurisdiction to prosecute what essentially are bribery allegations does not help its cause.<sup>38</sup>

The extraterritorial adventures of U.S. courts in antitrust proceedings have not yet produced quite this much heat, but they are producing in their own way a great deal of heat, and one senses that the temperature is rising.

### III. INTERNATIONAL COMITY: WHAT IT MEANS AND HOW IT EVOLVED

The complaints by foreign allies about the extraterritorial assertion of U.S. laws all amount to pleas for greater adherence to international comity. The concept of international comity has existed for hundreds of years, but its meaning and purposes have evolved over time as geopolitical circumstances have changed. Notably, it has been shaped, in part, by wars and slavery, which is a reminder of how important the concept of comity is.

International comity doctrine originated on the European continent, where it still appears to command more adherence than in other parts of the world and especially than in the United States. It was first coined by seventeenth century Dutch legal scholars. They were looking for a conflicts-of-law principle that emphasized sovereign independence after the Dutch provinces had finally gained their independence from the brutal Spanish rule after decades of war. Northern Dutch legal scholar Ulrich Huber used the term “*comitas gentium*” (civility of nations) to describe the following principle: “Sovereigns will so act by way of comity that rights acquired within the limits of a government

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38. *Id.*; see also Noah Feldman, *U.S. Treats FIFA like the Mafia*, BLOOMBERGVIEW (May 27, 2015), <http://www.bloombergvew.com/articles/2015-05-27/u-s-treats-fifa-like-the-mafia>.

retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.”<sup>39</sup> The basis for his principle was one of mutual respect among states of each other’s sovereignty, which he metaphorically described as the high powers of sovereigns offering each other a helping hand.<sup>40</sup>

Notably, this discretionary concept of comity flowed from the then already well-established starting point that the laws of each state were limited to the territory of that state and had no force outside it.<sup>41</sup>

About a century later, it was slavery that brought comity to the forefront in the Anglo-American world. In *The Case of James Sommersett*, a British judge, following Huber’s discretionary concept of comity, refused to apply U.S. slavery laws and freed a slave traveling in the United Kingdom with his U.S. slaveholder because slavery conflicted with British policy.<sup>42</sup> He held that comity did not require recognition of U.S. slavery laws because slavery was “incapable of being introduced on any reasons, moral or political.”<sup>43</sup> Unfortunately, comity’s objective to encourage reciprocal respect and help diplomatic relations led to the opposite outcome in the United States. In its infamous *Dred Scott* opinion, the Supreme Court stated:

[n]ations, from convenience and comity, and from mutual interest, and a sort of moral necessity to do justice, recognize and administer the laws of other

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39. Ernest G. Lorenzen, *Huber’s De Conflictu Legum*, 13 ILL. L. REV. 375, 376 (1919), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5566&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5566&context=fss_papers).

40. ULRICH HUBER, HEEDENSDAEGSE RECHTSGELEERTHEYT 13 (1699).

41. Lorenzen, *supra* note 39, at 376.

42. *The Case of James Sommersett*, 20 How. St. Tr. 1, 3-4 (K.B. 1772).

43. *Id.*

countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself; and is never bound, even upon the ground of comity, to recognize them, if prejudicial to her own interests. The recognition is purely from comity, and not from any absolute or paramount obligation.<sup>44</sup>

Similar to *Sommersett*, the Court in *Dred Scott* suggested a discretionary comity test balancing foreign against domestic interests, but the laws of the slave states won out. Ultimately, this application of comity did not foster enough respect to avoid the Civil War.

The still-prevailing Supreme Court definition of comity came later, in 1895, in *Hilton v. Guyot*.<sup>45</sup> There, Justice Gray explained and defined comity as follows:

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory . . . shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' . . .

'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to

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44. *Dred Scott v. Sandford*, 60 U.S. 393, 460 (1856).

45. 159 U.S. 113 (1895).

international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.<sup>46</sup>

The *Guyot* Court's international comity analysis was thus still very similar to Huber's original articulation. However, the *Guyot* Court appeared to give less discretion to and impose greater duty on the courts to give due regard to foreign sovereigns' laws than Huber had originally envisioned.

That said, the *Guyot* Court ultimately concluded that, in this case, "the comity of our nation" did not require U.S. courts "to give conclusive effect to the judgments of the courts of France" because there was a "want of reciprocity, on the part of France"; the Court determined that French civil procedure did not require French courts to give conclusive effect to an equivalent U.S. (or other foreign) court judgment.<sup>47</sup> This reemphasized that reciprocity is a key characteristic of international comity. That is important to keep in mind as the U.S. asserts its laws and jurisdiction extraterritorially, because foreign nations will view reciprocity as a justification to likewise assert their laws and jurisdiction extraterritorially.

As international trade increased dramatically in the twentieth century, the rule that historically had underpinned the discretionary principle of international comity—that a sovereign nation's law cannot *by its own force* have effect beyond that sovereign's borders—started to loosen in the United States.

For example, in 1909, the Supreme Court still held in *American Banana Co. v. United Fruit Co.* that the U.S. antitrust laws did not apply to conduct outside the U.S. (in Latin America), based on "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined

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46. *Id.* at 163-64.

47. *Id.* at 210.

wholly by the law of the country where the act is done.”<sup>48</sup> It explained, “[i]n the case of the present statute, the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious.”<sup>49</sup> But then, in 1945, the Second Circuit (designated by the Supreme Court as the court of last resort) held in *United States v. Aluminum Co. of Am. (ALCOA)* that even conduct that occurred abroad was subject to U.S. antitrust laws if it had an intended (anticompetitive) effect in the United States.<sup>50</sup> The extraterritorial nature of the U.S. antitrust laws has since been codified in the Foreign Trade and Antitrust Improvements Act (FTAIA).

As a result, while courts traditionally had applied principles of comity primarily in deciding whether to apply foreign law or recognize foreign judgments in cases involving foreign parties, in the twentieth century courts increasingly started to consider principles of comity in deciding whether to extend domestic law to foreign conduct. The comity principle they applied, however, continued to be essentially the same one as Huber and the *Guyot* Court had originally envisioned.

Over time, U.S. courts collectively have developed the following factors to operationalize international comity in deciding whether to allow extraterritorial application of U.S. law:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible

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48. 213 U.S. 347, 356 (1909).

49. *Id.* at 357.

50. 148 F.2d 416, 444 (2d Cir. 1945).

for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted[;] (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.<sup>51</sup>

As discussed in the next sections, however, courts have applied these factors inconsistently and, thus, have reached widely different conclusions about comity and the extraterritorial reach of U.S. statutes. This has led the U.S. Government and Plaintiffs bar to push the envelope in pursuing extraterritorial cases.

#### IV. JUDICIAL RESTRAINT AND COMITY: A SOMETIMES THING

U.S. courts have periodically cautioned restraint in extraterritorial application of U.S. laws and sometimes even exercised it. But there do not seem to be many rules that are consistently applied, although this might well be changing.

More than 40 years ago, the Supreme Court stated, “[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws,

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51. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (AM. LAW INST. 1987).



and resolved in our courts.”<sup>52</sup> The Court thus bound parties to contracts that conflicted with U.S. laws when a foreign country’s interest in the matter outweighed U.S. interests, even if there was some contact in the matter with the United States.<sup>53</sup> Thereafter, the court followed this principle in compelling the parties to arbitrate disputes in antitrust and securities cases that previously were almost certainly have been subjected to private litigation in the courts of the United States.<sup>54</sup> These cases did not explicitly invoke principles of international law or comity, but they reflected a practical and very real view about the limits of the proper reach of American courts.

However, in 1993, the Court went in a somewhat different direction in holding that there must be a true conflict between domestic and foreign law (such that foreign law requires the conduct that is illegal under U.S. law) for a comity issue to exist. In *Hartford Fire Insurance Co. v. California*,<sup>55</sup> the actions by reinsurers in the United Kingdom that led to the antitrust claim under U.S. law were not illegal but also not required under British law; therefore, the Court held, there was no need for a comity analysis because the company could have legally changed its behavior in Britain to avoid breaking U.S. antitrust laws.<sup>56</sup> The decision thus allowed for domestic liability to be imposed under U.S. law even where a defendant was acting quite lawfully in its

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52. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

53. *Id.* (binding parties to a forum selection clause unless the plaintiff can meet a heavy burden of showing the contract to be unreasonable, unfair, or unjust).

54. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (binding the plaintiff to an arbitration clause in a securities fraud suit when a U.S. purchaser bought securities, but the sale mostly took place overseas); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (applying an arbitration clause that conflicted with U.S. law).

55. 509 U.S. 764 (1993).

56. *See id.* at 798.

home country under local law. In his partial dissent, applying the comity factors of the Restatement listed above, Justice Scalia concluded that it was “unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable” in this case given that Great Britain “clearly ha[d] a heavy interest in regulating the activity” of the British reinsurer defendants. It was therefore not appropriate, according to Scalia, to assume that Congress had intended such assertion of legislative jurisdiction.<sup>57</sup>

*Hartford Fire* reiterated what the Second Circuit had held in *ALCOA*: “the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”<sup>58</sup> It held that the London reinsurers’ express purpose to affect the United States commerce and the substantial nature of that effect outweighed the conflict with British law and required the court’s exercise of jurisdiction.<sup>59</sup> This was the result that the British government argued against in an *amicus* filing. Of course, more than a decade prior to the *Hartford Fire* decision, in 1982, Congress had enacted the FTAIA, which provided that the Sherman Act applied to foreign trade or commerce that has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce.<sup>60</sup> There was therefore also a statutory basis for the Court’s holding in *Hartford Fire* that permitted it to avoid dealing with comity in any particular depth.

But a decade later, Justice Scalia’s reasoning prevailed in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*<sup>61</sup> Foreign plaintiffs

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57. *Id.* at 817-20 (Scalia, J., dissenting).

58. *Id.* at 796.

59. *Id.* at 797.

60. 15 U.S.C. § 6a(1) (2012).

61. 542 U.S. 155 (2004).

had brought a class action suit under the Sherman Act against foreign defendants who had conspired to fix prices in a worldwide market for vitamins. In those circumstances, the comity principles dictated the Court's holding that no domestic claim was cognizable because foreign conduct independently caused foreign harm that alone gave rise to the plaintiff's claim.<sup>62</sup> Insofar as comity principles are concerned, the central notion of the case was that the statute had to be read consistently with the principles of comity to avoid offending foreign sovereigns.<sup>63</sup> The significance of the case is amplified when one appreciates that the foreign conduct did indeed have a significant effect on U.S. commerce, although one that was independent of the effect on foreign commerce. As Justice Kennedy put it, writing for the majority, the rule of statutory construction that had been advanced by Justice Scalia (to the effect that an act of Congress should never be construed as violating international law if any other possible interpretations are available):

cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of the nation's work together in harmony—a harmony particularly needed in today's highly independent commercial world.<sup>64</sup>

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62. *Id.* at 159-60. This "gives rise to" language echoes the language of the FTAIA and at the same time has strong parallels with the body of law involving "antitrust injury." In other words, the foreign conduct that violates U.S. law must "give rise to" an unlawful domestic effect in order to be actionable. This principle became much more explicit quite recently in the Seventh Circuit's decision in *Motorola*, discussed *infra*.

63. *Id.* at 164.

64. *Id.* at 164-65.

This brings us to some circuit courts, which have their own history of elasticity and inconsistency when it comes to extraterritoriality. It is useful to begin with the 2012 en banc decision of the Seventh Circuit in *Minn-Chem, Inc. v. Agrium Inc.*<sup>65</sup> The case involved a private treble damage price-fixing class action by purchasers of potash against several Canadian, Russian, or Belarusian potash producers. For present purposes, the pertinent part of the decision involves the meaning of the word “direct,” under the FTAIA. In the context of construing the Foreign Sovereign Immunities Act, the Supreme Court had earlier held that an effect is “direct” if it “follows as an immediate consequence of the defendant’s . . . activity.”<sup>66</sup> A divided panel of the Ninth Circuit embraced this definition as applying to the FTAIA.<sup>67</sup> The Seventh Circuit disagreed and adopted the interpretation urged by the Antitrust Division of the DOJ and the Federal Trade Commission in an amicus brief,<sup>68</sup> holding that the term “direct” in the FTAIA means merely a “reasonably proximate” causal nexus.<sup>69</sup>

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65. 683 F.3d 845 (7th Cir. 2012).

66. *Id.* at 856 (citations omitted).

67. *United States v. LSL Biotechs.*, 379 F.3d 672 (9th Cir. 2004).

68. Brief for United States and the Fed. Trade Comm’n as Amici Curiae in Support of Neither Party on Rehearing En Banc at 8, *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012) (No. 10-1712), 2012 WL 6641190.

69. *Minn-Chem*, 683 F.3d at 857. Thus construing the words resulted in conduct excluded from the reach of U.S. law being “recaptured” where the U.S. effect could be seen to be “direct [reasonably proximate], substantial, and reasonably foreseeable.” This expansion of the exception (coupled with the fact that the statute is no longer seen as limiting the subject matter jurisdiction of the court) has amplified the uncertainty involved and is in part the source of international friction.

But just this year, the Seventh Circuit, in *Motorola Mobility LLC v. AU Optronics Corp.*,<sup>70</sup> took something back from what it appeared to have given in *Minn-Chem*, based in part on considerations of “soft” comity. Once again, the issue of extraterritoriality arose in the context of the FTAIA. The *AU Optronics* panel, in an opinion authored by Judge Posner, limited the reach of the Sherman Act for a variety of reasons, among them because extraterritorial application of American antitrust law in that case would create “friction” with many foreign countries and hence be in conflict with the objectives of the FTAIA.<sup>71</sup> There were, to be sure, other dispositive grounds for the panel’s ruling, including that the foreign conduct did not “give rise to” an anticompetitive effect in the United States. Nonetheless, various foreign governments made amicus filings, and the panel was plainly sensitive to the comity issue.

Extraterritoriality and comity have not only featured at the Supreme Court in antitrust cases. The Court has taken up these issues in a number of different contexts, and seems much focused on it as of late. For example, just last year, in *Daimler AG v. Bauman*,<sup>72</sup> the Court relied upon principles of comity in reversing the Ninth Circuit and finding a lack of general jurisdiction over a German corporation. The Court chastised the lower court for insufficiently taking into account considerations of international comity, stating that: a “foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international

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70. 775 F.3d 816 (7th Cir. 2015), *cert. denied*, No 14-1122, 2015 WL 1206313.

71. *Id.* at 824 (stating “rampant extraterritorial application of US law ‘creates a serious risk of interference with a foreign nation’s ability independently to regulate its own affairs’” (quoting *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004))).

72. 134 S. Ct. 746 (2014).

agreements on the reciprocal recognition and enforcement of judgments.”<sup>73</sup> Nearly three decades earlier, in *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cnty.*, the Supreme Court had similarly warned state courts in California to consider the policy interests of foreign nations (and the unique burdens on an alien defendant of litigating in a foreign legal system) when exercising personal jurisdiction over foreign defendants.<sup>74</sup>

Five years ago, the Supreme Court decided *Morrison v. National Australia Bank Ltd.*,<sup>75</sup> a case involving foreign private plaintiffs suing foreign and American defendants under the U.S. Securities Exchange Act of 1934 for damages they suffered from alleged misconduct related to securities traded on foreign exchanges. In holding that the plaintiffs failed to state a claim,<sup>76</sup> the Court reiterated the longstanding but arguably moribund principle of statutory interpretation that American law, unless expressly and clearly stated otherwise, is meant only to apply within the territorial jurisdiction of the U.S.

The Court’s ruling against the plaintiffs gave no particular weight to the fact that some of the illegal conduct took place in the United States. It concluded that the 1934 Act was clearly confined to securities traded on a U.S. exchange, noting the risk of interference that extraterritorial application of the 1934 Act would entail given that “the [securities] regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions

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73. *Id.* at 763.

74. *See Asahi Metal Indus. Co. v. Superior Court of California, Solano Cnty.*, 480 U.S. 102, 115-16 (1987) (reversing the Superior Court of California’s finding of personal jurisdiction over a Japanese manufacturer).

75. 561 U.S. 247, 255 (2010).

76. *Id.* at 253, 273.

may be joined in a single suit, what attorney's fees are recoverable, and many other matters."<sup>77</sup>

In 2013, in *Kiobel v. Royal Dutch Petroleum Co.*, the Court held that this same "presumption against extraterritoriality" also applies to claims under the Alien Tort Statute (ATS), because nothing in that statute's text "evinces a clear indication of extraterritorial reach," even though the ATS was meant to cover offenses against the law of nations, including piracy (which inherently occurs outside U.S. territory).<sup>78</sup> Defendants' alleged aiding and abetting of a violent suppression of environmental protests in Nigeria, therefore, was not subject to the jurisdiction of a U.S. court under the ATS, according to the Court.<sup>79</sup>

Notably, these signs of increasing exhortations to judicial restraint seem to be most frequent and applicable in cases involving private actions for civil damages. When criminal conduct is involved, and criminal penalties are involved, the federal courts in this country do not seem to have flinched or shrunk from applying U.S. law against foreign companies and foreign individuals, imposing massive criminal fines on the foreign companies, and throwing foreign citizens in jail. Indeed in *Empagran*, the Court recognized and emphasized that there is a difference between a claim by the Government and a private plaintiff because the government seeks relief to protect the public with broad authority.<sup>80</sup> A somewhat similar distinction is evident in the Seventh Circuit's *Motorola* decision, where the court had little difficulty distinguishing between: (i) the failure of foreign conduct by foreign actors to "give rise to" an anticompetitive domestic effect sufficient to support a private claimant; and

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77. *Id.* at 269.

78. 133 S. Ct. 1659, 1666-67, 1669 (2013).

79. *Id.* at 1662-63, 1669.

80. *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 170-71 (2004).

(ii) the ability of the DOJ to prosecute that same conduct in federal courts.<sup>81</sup> The Ninth Circuit held that the same conduct in the same company (AU Optronics) also imported the government's successful criminal prosecution.<sup>82</sup> The Supreme Court denied certiorari in both cases.<sup>83</sup>

The fact that the Court has also addressed comity in the context of discovery is yet another indication that the Court has a noticeable concern about international relations in private damages cases. Nearly twenty years ago, in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, the Court urged respect for international considerations grounded in comity in international discovery, indicating that trial courts should draw a line between reasonable and unreasonable discovery based on the interests of the parties and governments involved. It held that international discovery issues require courts to exercise special vigilance to protect foreign litigants.<sup>84</sup>

#### V. THE DOJ SEEMS INCLINED TO PUSH THE COURTS TOWARDS AN EXPANSIVE VIEW OF ITS OWN AUTHORITY

Notwithstanding complaints from foreign allies, and notwithstanding the periodic urgings from the Supreme Court and some of the circuits for judicial restraint, the built-in and largely inherent incentives of all of a majority of the parties point in the other direction.

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81. See *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 825 (7th Cir. 2015).

82. *United States v. Hui Hsiung*, 778 F.3d 738, 760 (9th Cir. 2015), *cert. denied*, No. 14-1121, 2015 WL 1206283 (U.S. June 15, 2015).

83. *Motorola*, 775 F.3d 816, *cert. denied*, No. 14-1122, 2015 WL 1206313 (U.S. June 15, 2015); *Hui Hsiung*, 778 F.3d 738, *cert. denied*, No. 14-1121, 2015 WL 1206283 (U.S. June 15, 2015).

84. 482 U.S. 522, 544-46 (1987).



As we have mentioned, private plaintiffs (both foreign and domestic) and their counsel have no interest in complex policy matters such as comity or extraterritoriality. They seek to utilize the vast benefits of the American legal system for the pecuniary gain that the system offers to clients and counsel alike. The calculus for them is quite simple. The greater the extraterritorial reach of U.S. law, the greater: (i) the plaintiffs' class; (ii) the magnitude of their damage claims; (iii) the group of defendants (and thus the plaintiffs' recovery potential); and (iv) the costs and burdens on defendants associated with discovery. Even if the extraterritorial claims are weak, the size of the claim, the uncertainty of jury trials, and the costs associated with discovery help force a greater settlement amount, and thus a greater fee for the lawyers.

As Judge Posner put it in *Motorola II*:

[t]he position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and resentment 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. It is a concern to which Motorola is—albeit for understandable financial reasons—oblivious.<sup>85</sup>

Much the same might be said of the DOJ in this country. The criminal fines and civil penalties collected by the executive branch of our government are enormous in antitrust, False

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85. *Motorola*, 775 F.3d at 824 (7th Cir. 2015) (internal citations and quotations omitted).

Claims Act proceedings, RICO actions, London Interbank Offered Rate (LIBOR) and Foreign exchange market (Forex) machinations, and otherwise.

Institutionally, DOJ is much better placed than private plaintiffs and their counsel to consider international comity in deciding what cases and targets to prosecute and what sentences to seek. As part of the Executive Branch, the impact of its enforcement efforts on international relations should matter in its exercise of prosecutorial discretion. Indeed, DOJ has long had in place Antitrust Enforcement Guidelines for International Operations, in which it explains that it considers international comity when enforcing the U.S. antitrust laws extraterritorially, among others, by determining whether enforcement objectives can be achieved by deferring to foreign governments instead.<sup>86</sup> And there is, for example, an agreement between the U.S. and European Communities<sup>87</sup> under which they basically have agreed that the DOJ and European Commission (EC) will normally defer or suspend their own enforcement efforts in favor of the other's where the anticompetitive conduct may have an impact in its own territory but is primarily taking place in and directed at the other's territory.<sup>88</sup>

In actual practice, however, there is little visible evidence that international comity is a significant consideration for DOJ. As the nation's federal prosecutor, the DOJ—and especially its

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86. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INT'L OPS. § 3.2 (Apr. 1995).

87. U.S. Dep't of Justice, Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Law (June 4, 1998), *available at* <http://www.justice.gov/atr/agreement-between-united-states-and-european-communities-application-positive-comity-principles>.

88. *Id.* Art. IV(2).

prosecuting staff—usually seems singularly focused on securing guilty pleas, convictions, and large fines, including in a great many cases from foreign corporations and citizens. Its aggressive enforcement against overseas conduct and its advocacy efforts before courts in favor of an expansive view of the extraterritorial reach of U.S. laws<sup>89</sup> suggest that considerations of international comity typically take a backseat to enforcement and deterrence, if those considerations get a seat at all.

For example, in *Morrison v. National Australia Bank Ltd.*, the Solicitor General (part of the DOJ) argued for an interpretation that would have had the 1934 Exchange Act extend to fraud related to securities traded on foreign exchanges if the fraud involved conduct in the United States that was material to the fraud's success.<sup>90</sup> The Supreme Court rejected this because there was no express and clear indication by Congress that the 1934 Act applied extraterritorially. Despite *Morrison*, DOJ has continued to prosecute cases extraterritorially where statutes did not provide an express and clear basis for it.

A recent example is *United States v. Sidorenko*.<sup>91</sup> There, the DOJ criminally indicted three foreign nationals for wire fraud and bribery involving a federal program, based on alleged foreign bribery conduct involving a foreign governmental agency (the UN's International Civil Aviation Organization (ICAO) agency). The only link to the U.S. was the fact that the U.S. funds part of ICAO, yet there was no allegation that any of those funds were squandered as a result of the bribes. The Northern District of California dismissed the indictments as an "overreach," explaining that under DOJ's theory:

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89. See, e.g., Brief for the United States in Opposition, *Hsiung v. United States*, 778 F.3d 738 (2015) (No. 12-10492), 2015 WL 2353087.

90. 561 U.S. 247, 270 (2010).

91. *United States of America v. Sidorenko*, No. 3:14-cr-00341, 2015 WL 1814356 (N.D. Ca. Apr. 21, 2015).

there is no limit to the United States' ability to police foreign individuals, in foreign governments or in foreign organizations, on matters completely unrelated to the United States' investments, so long as the foreign governments or organizations receive at least \$10,000 of federal funding. This is not sound foreign policy, is not a wise use of scarce resources, and it is not . . . the law.<sup>92</sup>

The DOJ appealed this decision but then recently decided to drop its appeal.

In *United States v. Chao Fan Xu*, the DOJ secured from a federal court RICO Act convictions, 20-plus year jail sentences, and a \$482 million restitution order against four Chinese nationals, based largely on their defrauding of the Bank of China, in China.<sup>93</sup> The link to the U.S. was defendants' use of fraudulently obtained visas and passports to enter the United States and their use of the fraudulently obtained funds to gamble in Las Vegas.<sup>94</sup> The Ninth Circuit held that the RICO Act does not apply extraterritorially given *Morrison*, but nevertheless upheld the convictions because it agreed they were based partly on racketeering activity that occurred in the United States (the immigration fraud).<sup>95</sup> It vacated the district court's sentences (and \$482 million restitution order), however, because the court had improperly relied on the defendants' foreign conduct to determine the base offense for the sentences.<sup>96</sup>

In the antitrust context, as discussed above, the DOJ continues to prosecute criminal cases based on cartel conduct and

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92. *Id.* at \*6.

93. *See* 706 F.3d 965 (9th Cir. 2013).

94. *Id.* at 973.

95. *Id.* at 979.

96. *Id.* at 992-93.

transactions by foreign companies that occur exclusively overseas, on the theory that the cartelized components ultimately find their way into finished products that end up in the United States. The DOJ has been successful in persuading several courts to permit such extraterritorial enforcement of foreign component cartels where it can prove that the U.S. effects of the foreign cartel are sufficiently direct, substantial, and reasonably foreseeable.<sup>97</sup> But in some cases, such as the ongoing auto parts cartel investigations, one may wonder whether such direct, substantial, and reasonably foreseeable effect is present when the price-fixed parts were sold and incorporated in automobiles overseas, and make up but a tiny fraction of the entire value of automobiles that are sold in various countries across the world only one of which is the United States.<sup>98</sup>

In contrast, while the EC recently also reached across borders to penalize overseas cartel sales of components that ended up in finished products sold in the European Economic Area (EEA)—in the same liquid-crystal display (LCD) cartel case as DOJ and Motorola pursued—it did so only to the extent the overseas cartel sales of components were intragroup sales by a company that belonged to the same (vertically-integrated) corporate group that also sold the finished products in the EEA.<sup>99</sup> The European Court of Justice recently blessed that approach.<sup>100</sup>

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97. See, e.g., *United States v. Hui Hsiung*, 778 F.3d 738, 758-59 (9th Cir. 2015); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 825 (7th Cir. 2015).

98. Cf. *Hui Hsiung*, 778 F.3d at 758 (“the TFT-LCDs are a substantial cost component of the finished products—70-80 percent in the case of monitors and 30-40 percent for notebook computers.”).

99. See Case C-231/14P, *Innolux Corp. v. Commission*, ¶¶ 15-16.

100. *Id.* ¶¶ 66-77, 86.

Unlike DOJ, the EC otherwise disregarded purely overseas component cartel sales in calculating its fines.<sup>101</sup>

Perhaps the most notable example of DOJ's expansive position on extraterritoriality can be found in a brief that it filed with the Ninth Circuit in which it took the position that:

when the Executive Branch, which manages foreign relations, determines that the interests of United States law enforcement outweigh any possible detriment to our foreign relations, and accordingly decides to file a case, separation of powers principles, as well as the Judiciary's own recognition of its limitations in matters of foreign affairs, point to the conclusion that an American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary.<sup>102</sup>

This DOJ position seems extreme. First, it challenges judicial pronouncements from the Supreme Court that we have mentioned above, and second, few litigants, including the DOJ, have any long-term success telling the Judiciary what it cannot do. Specifically, DOJ's position ignores the fact that the legislative branch also ought to have a significant say in international relations, comity, and the extraterritorial reach of U.S. laws—indeed, probably by far the greatest say—and it is the Court's role

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101. *Id.* ¶¶ 15-16.

102. Reply Brief for Appellant the United States at 23, *United States v. LSL Biotechnologies, Inc.*, 379 F.3d 672 (9th Cir. 2002) (No. 02-16472), 2002 WL 32298182, <http://www.justice.gov/file/501546/download> (internal citations and quotations omitted); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INT'L OPS. § 3.2 (Apr. 1995) ("The Department does not believe that 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.'").

to interpret Congress's legislative intent as to the extent of extraterritoriality when interpreting the statute at hand.<sup>103</sup>

Of course, the DOJ's aggressive extraterritorial assertion of U.S. law in criminal cases inevitably feeds an increase in private suits that reach across borders, since the laws that the DOJ criminally enforces typically also feature a private right of action and since the plaintiffs' bar usually files suit as soon as the DOJ announces an investigation.

As a practical matter, most of the extraterritorial application of U.S. law goes unreviewed. The criminal cases almost never go to trial—virtually all are resolved with plea agreements—and when they do (as in *AU Optronics*) the issues presented are rarely nuanced or focused upon issues that give rise to much of a judicial incentive for restraint. The same is true of most civil cases, apart from the recent Motorola case against AU Optronics in the Seventh Circuit. And in a way, that case was almost a fluke. Motorola won almost every issue in the case throughout the more than five (5) years that it was part of the multidistrict litigation (MDL) proceeding in the Northern District of California. It was only after the case was remanded to the Northern District of Illinois that core issues of the applicability of the FTAIA were revisited.<sup>104</sup>

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103. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting) (quoting *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (“An act of congress ought never to be construed to violate the law of nations if any other possible construction remains.”)).

104. See Briggs, *supra* note 1, at 80-83, for a discussion of the tortured history of that case.

What's more, given the increasingly paramount position of the Judiciary in our system of government,<sup>105</sup> American courts in general also seem to be institutionally disinclined by and large to put limits on the territorial reach of U.S. law, much less their own jurisdiction. Examples of cases showing courts' disinclination to limit their jurisdiction over foreign conduct in foreign lands include the Second Circuit's decisions in recent RICO cases,<sup>106</sup> the D.C. Circuit's first decision in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,<sup>107</sup> the Ninth Circuit's decision in *Daimler AG v. Bauman*,<sup>108</sup> and the Northern District of California's decision in *In re: TFT-LCD (Flat Panel) Antitrust Litigation (Motorola Inc. v. AU Optronics)*.<sup>109</sup>

In a continuously globalizing economy and a rapidly shrinking commercial world, there is thus a significant and increasing risk that foreign companies and nationals either endure years of costly litigation in the U.S. (with corresponding invasive overseas discovery), or enter costly or painful guilty pleas

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105. See Fukuyama, *supra* note 16, at 11 (discussing the role of U.S. courts transforming from a constraints on government to an instrument for the expansion of government).

106. See, e.g., *European Community v. RJR Nabisco, Inc.*, 764 F.3d 129, 139-43 (2d Cir. 2014) (holding that, despite the presumption against extraterritoriality outlined in *Morrison v. National Australia Bank Ltd.*, the RICO Act reaches extraterritorial conduct to the extent the alleged predicate acts are violations of statutes that expressly have extraterritorial reach).

107. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003) (holding that purchasers stated a price-fixing claim despite their injuries not arising from U.S. effects of defendants' conduct), *vacated sub nom.* *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

108. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (finding wholly owned U.S. subsidiary was manufacturer's agent for general jurisdictional purposes), *rev'd sub nom.* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

109. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109 (N.D. Cal. 2008) (finding standing for both direct and indirect purchasers).



or settlements—all in cases that perhaps ought not be governed by U.S. laws or courts but rather by foreign laws, governments, and courts. As and when the world turns, and foreign legal systems begin increasingly to mimic the territorial reach of the American system, the day will come when the executive branch and the legislature might regret what has been allowed to develop.

#### VI. SCREENS THAT MIGHT RESTRAIN LEGAL IMPERIALISM

The aggressive extraterritorial application of American law has consequences and will have more consequences as time goes on. Some four decades ago we saw the adoption by some of our closest allies of “claw back” and “blocking” statutes, designed to avoid U.S. discovery, block enforcement of U.S. punitive damages awards, and allow claims in their home countries to claw back U.S. punitive damages awards. Now, as detailed above, we are seeing a substantial number of amicus filings by foreign governments in U.S. courts complaining about extraterritorial assertion of U.S. law and jurisdiction.

But more worryingly, we are also seeing other countries follow U.S. practice and increasingly assert their own law extraterritorially, regularly against American and European multinational concerns. Most notably, the PRC has been flexing its muscle overseas, especially in the antitrust arena, when it deems that foreign conduct or transactions by foreign companies threaten its domestic, often state-owned industries. For example, in 2014, MOFCOM, responsible for antitrust reviews of mergers, blocked an international joint venture by three foreign shipping companies (Danish, Swiss, and French shipping companies) based on what many have perceived to be protectionism rather

than antitrust merits;<sup>110</sup> both the U.S. and European antitrust authorities had cleared the joint venture reportedly due to significant associated procompetitive efficiencies.<sup>111</sup> Earlier this year, despite pleas from President Obama not to devalue intellectual property of American companies to the benefit of Chinese firms using U.S. technology,<sup>112</sup> China's National Development and Reform Commission imposed a fine of nearly \$1 billion and several licensing restrictions, including a royalty base cap, on Qualcomm for alleged abuse of dominance with respect to standard essential patents and baseband chips.<sup>113</sup>

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110. See, e.g., *China's shipping alliance rejection underscores protectionist worries*, REUTERS (June 18, 2014), <http://uk.reuters.com/article/2014/06/18/china-shipping-competition-idUKL4N0OZ1LK20140618>; Melissa Lipman, *China P3 Ban Short On Details But Shows Protectionist Bent*, LAW360 (June 28, 2014), <http://www.law360.com/articles/552786/china-p3-ban-short-on-details-but-shows-protectionist-bent>; Richard Milne, *China Blocks Proposed Three-way Shipping Alliance*, FIN. TIMES (June 17, 2014), <http://www.ft.com/cms/s/0/a9a188be-f60f-11e3-83d3-00144feabdc0.html#axzz3hZwVkpQq>.

111. Costas Paris, *Shipping Alliance Set to Make Waves*, WALL ST. J. (Mar. 26, 2014), <http://www.wsj.com/articles/SB10001424052702303802104579453252355203622>; Foo Yun Chee, *EU regulators clear Maersk, Nippon Yusen shipping alliances*, REUTERS (June 3, 2014), <http://uk.reuters.com/article/2014/06/03/uk-eu-containershipping-antitrust-idUKKBN0EE19V20140603>; Costas Paris and Clemens Bomsdorf, *Maersk, Partners Surprised by Chinese Regulator*, WALL ST. J. (June 17, 2014), <http://www.wsj.com/articles/shipping-alliance-blocked-by-china-1403001240>; Clement Tan & Christopher Jasper, *China Blocks European Shipping Pact, Sending Maersk Down*, BLOOMBERG (June 17, 2014), <http://www.bloomberg.com/news/articles/2014-06-17/china-rejects-ship-ping-alliance-application-by-maersk-msc-cma>.

112. See Michael Martina & Matthew Miller, *As Qualcomm decision looms, U.S. presses China on antitrust policy*, REUTERS (Dec. 16, 2014), <http://www.reuters.com/article/2014/12/16/qualcomm-china-antitrust-idUSL3N0TW2SF20141216>.

113. Notably, the U.S. Federal Trade Commission and European Commission are also investigating Qualcomm's licensing and business practices, which suggests there could be more international consensus in this case.

But it is not just the PRC. Other countries are also increasingly bold about asserting their laws extraterritorially, sometimes in questionable ways. France, for example, has pushed for European Union privacy laws to create global obligations for U.S. tech companies to remove information from websites, rather than obligations confined to the relevant EU member state territories.<sup>114</sup> A Canadian court recently made a similar, dubious reach across the globe with little consideration for comity, but in a trade secrets case rather than privacy case.<sup>115</sup> These cases touch upon a fundamental constitutional right—freedom of speech—which is treated very differently in different countries. One can and probably should seriously question whether one country should be able censor what information is available to the citizens of another country.

There is no reason to believe that other countries will not follow suit, and this could devolve into a sort of “race to the bottom,” especially between the new and old economic superpowers.

Right now, the major difference between the U.S. and other countries asserting their laws extraterritorially is still that

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114. Mark Scott, *France Wants Google to Apply 'Right to be Forgotten' Ruling Worldwide or Face Penalties*, N.Y. TIMES (June 12, 2015), <http://bits.blogs.nytimes.com/2015/06/12/french-regulator-wants-google-to-apply-right-to-be-forgotten-ruling-worldwide/>.

115. See *Equustek Solutions Inc. v. Google, Inc.*, 2015 BCCA 265 (June 11, 2015) (upholding an order requiring Google, a non-party to the underlying trade secrets dispute, to remove from globally used web properties any search results showing the allegedly infringing products); see also Mike Maznik, *Canadian Court: Yes, We Can Order Google To Block Websites Globally*, TECHDIRT (June 12, 2015), <https://www.techdirt.com/articles/20150611/13104231311/canadian-court-yes-we-can-order-google-to-block-websites-globally.shtml>; Vera Ranieri, *Canadian Court Affirms Global Takedown Order to Google*, ELEC. FRONTIER FOUND. (June 12, 2015), <https://www.eff.org/deeplinks/2015/06/canadian-court-affirms-global-takedown-order-google>.

most other countries do so primarily through civil or administrative government actions, while the U.S. also does so in criminal actions as well as at the behest of private parties in civil punitive damages suits. But that, too, could change. For example, certain countries are adopting criminal antitrust enforcement regimes as well as systems facilitating civil antitrust damages claims, similar to the U.S. system. Perhaps, therefore, it is not too farfetched to believe that the extraditions, jail sentences, and punitive damages awards at some point will start running the other way, and the U.S. might not like it. This may become particularly worrisome when U.S. companies and their executives engage in global conduct that is considered lawful (and perhaps even beneficial) in the U.S., yet unlawful and perhaps criminal in other countries.

To be sure, not all extraterritorial application of U.S. law and jurisdiction is inconsistent with international comity. In many cases, it may not be.<sup>116</sup> The “effects test” of *ALCOA* and

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116. Some argue, for example, that giving too much weight to comity considerations could undermine deterrence and harm U.S. consumers. *See, e.g.,* Joseph E. Harrington, Jr., *The Comity-Deterrence Trade-off and the FTAA: Motorola Mobility Revisited*, COMPETITION POLICY INT’L (Jan. 2015); Eleanor M. Fox, *Extraterritoriality and Input Cartels: Life in the Global Value Lane – The Collision Course with Empagran and How to Avert It*, COMPETITION POLICY INT’L (Jan. 2015). We agree that deterrence and protection of U.S. consumers is certainly one consideration in the international comity balancing test between domestic interests and foreign interests. But we disagree with the proposition that comity no longer is or should not be a consideration in extraterritorial antitrust cases once a “direct, substantial and reasonably foreseeable effect” on U.S. commerce has been established. In our view, this conclusion misses the point that the DOJ and many U.S. courts find such an effect too easily, without sufficiently considering comity considerations in the first place. What’s more, in thinking about deterrence, one should also consider that less extraterritorial overreaching might give foreign nations greater incentives and ability to put in place and enforce their own laws to deter harmful conduct. Finally, the authors’ observations (understandably) focus solely

*Hartford Fire* makes much more sense, and probably gives less offense to comity, where the conduct at issue is similarly unlawful under the law of the foreign jurisdiction in ways that are broadly comparable. But even so, in most cases the remedies are still often different. For example, most foreign governments still do not jail their citizens for price fixing in many of the circumstances that give rise to jail time in United States. Similarly, there is no country in the world with: comparable class-action machinery; treble damages; one way attorney's fees awards; the absence of contribution coupled with joint and several liability; or the vast discovery machinery authorized by Rule 26 of the Federal Rules of Civil Procedure. One might suppose that the incompatibility of these American civil and criminal enforcement regimes would give rise to a more thoughtful restraint being placed upon the American judiciary, but that has not happened.

Our purpose here, and it is but a modest beginning, is to mention a few approaches that might, in the fullness of time and the absence of domestic political dysfunction, become viable. Such screens (which could be managed by the executive, legislative, and judicial branches separately or with the branches of government acting in concert) might include institutionalization of the following types of measures:

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on antitrust harm and deterrence, while comity is in part about a much bigger picture. In the U.S., we have long considered cartel violations a supreme evil meriting significant jail sentences, fines, and treble damages to root it out as much as possible. Other nations have come somewhat to agree, but have not gone so far as to criminalize cartels, put individuals in jail, award exemplary damages, provide for one way attorney's fees, apply joint and several liability without any right of contribution, or embrace various other features of American antitrust law that make it so controversial outside the borders of the United States. In some ways, comity is about all nations "giving a little" so as to not over-impose their values on one another.

- 1) The adoption of a rule of prescriptive comity, “the respect sovereign nations afford each other by limiting the reach of their law,” along the lines suggested by Justice Scalia in his *Hartford Fire* dissent.<sup>117</sup> In the case of *Hartford Fire*, a prescriptive comity approach would have resulted in the court declining to exercise the Sherman Act extraterritorially because the conduct at issue was regulated under a comprehensive foreign regulatory scheme.<sup>118</sup> This approach would be different from, but quite analogous to, the more familiar State Action doctrine of long-standing vintage in this country.
- 2) The implementation of rules that guarantee foreign defendants a practicable and meaningful opportunity to raise extraterritoriality and international comity defenses or concerns at the front end of a case, and based on strictly limited discovery. Such an approach might put extraterritoriality concerns much closer to the level of subject matter jurisdiction.
- 3) A change to the rules of civil procedure so as to avoid remitting these issues, as they are now often remitted, to the vagaries of Rule 26. In FTAIA cases, this was the norm since, until recently, the FTAIA was treated as a limitation on the subject matter jurisdiction of the federal courts. Indeed, that might still be the case in various circuits

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117. 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

118. This approach is the subject of a thoughtful law review note, Stephen D. Piraino, *A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act*, 40 HOFSTRA L. REV. 1099, 1128-34 (2012).

where the issue has not been decided.<sup>119</sup> But now that many appeals courts no longer treat the FTAIA as limiting the subject matter jurisdiction of the trial courts, extraterritoriality and international comity defenses do not necessarily get resolved at the front end of a case before discovery commences. Instead, they can be at the back end of the queue. Indeed, in *Motorola*, the defendant was subjected to many years of full discovery before the issue finally was determined.

- 4) Implement a formal process whereby foreign targets of DOJ investigations are assured of the opportunity to raise extraterritoriality and international comity defenses with an independent, high-ranking DOJ official during the early stages of the investigation, before the pressure to enter a guilty plea becomes unsustainable. That same DOJ official should be obliged to confer also with the appropriate officials of the Department of State.
- 5) Implement a formal, mandatory, and early-stage process whereby the prosecuting staff of the DOJ must clear extraterritorial enforcement efforts with an independent, high-ranking DOJ official, also obliged to confer with the Department of State, so as to ensure that international comity is given appropriate weight in each exercise of prosecutorial discretion.
- 6) Where foreign nationals plead guilty to criminal offenses based on non-U.S. conduct the effects of

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119. See, e.g., *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc) (overturning *United Phosphorus Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc), which previously held that the FTAIA proscribes subject-matter jurisdiction).

which are primarily felt outside the United States, there should be a procedure whereby after sentencing these citizens are returned to their home country, which can choose to implement the sentence, or not.

- 7) Implement a procedural rule whereby the DOJ and courts overseeing private civil punitive or treble damages actions are required to solicit the views of the U.S. government when foreign defendants raise extraterritoriality or international comity defenses or objections.

We are under no illusion that any one of these “screens,” or any combination of them, would “solve” a “problem” that many do not recognize as either existing, or being particularly serious if it does exist. But we do think there is a problem inherent in the American legal system that will lead nearly always and ineluctably to the expansion of judicial extraterritorial jurisdiction. The idea of judicial restraint in this area is as admirable as it is chimerical. Many of our judges, state and federal, are not inclined to put limits on their own powers and have relatively little appreciation for international relations. In the absence of some machinery that can supply restraint, and in the absence of enforcement standards with some objective features, the problem will get bigger before it gets smaller. In practical economic terms, the stakes are potentially very high in an increasingly global economy where the United States is neither the only dominant economic power nor the only country with the will to apply its own law in various places around the world.





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