ANTITRUST: Sherman Act can apply to criminal antitrust actions taken entirely outside the country, if these actions have foreseeable, substantial effect on U.S. commerce.

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In a decision predicted by many antitrust experts, the 1st U.S. Circuit Court of Appeals ruled March 17 that the Sherman Act applies to criminal antitrust allegations relating to actions taken entirely outside the United States, provided the alleged actions have a foreseeable and substantial effect on U.S. commerce.[1]

The 1st Circuit's decision is the first to apply the "effects doctrine" to a criminal, as opposed to civil, action under the United States antitrust laws.[2] Acting Assistant Attorney General Joel I. Klein characterized the court's decision as "very important to the Antitrust Division's enforcement effort against international cartels that harm U.S. consumers."

The result, he said, will help the Antitrust Division "to reach such cartels no matter where the cartel activity takes place."[3]

The case arose from a 1995 federal grand jury indictment against Nippon Paper Industries Co. Ltd., alleging that Nippon Paper's predecessor in interest, a Japanese manufacturer of thermal facsimile paper, had conspired with unnamed others to raise the price of facsimile paper ultimately sold in the United States and Canada.[4] Nippon Paper sold the facsimile paper in Japan to trading companies that exported it to the United States.

The U.S. Department of Justice alleged that Nippon Paper's actions were part of two criminal antitrust conspiracies under the Sherman Act: a horizontal conspiracy with other Japanese facsimile paper manufacturers to raise the price of the facsimile paper when it was sold in Japan, and a vertical conspiracy with trading companies to raise the price of the facsimile paper when it was sold in the United States. In both instances, the object of the alleged conspiracy was to raise the price of paper sold for use in the United States, not Japan.

In a significant setback to the Department of Justice, the U.S. District Court for the District of Massachusetts originally held that the Sherman Act did not apply to the horizontal conspiracy because Nippon Paper's alleged actions in furtherance of the conspiracy all occurred outside the United States.[5]

With respect to the vertical conspiracy, the district court avoided the jurisdictional issue altogether by holding that the indictment failed to allege the vertical conspiracy with sufficient particularity.[6] As a result, the district court dismissed the indictment against Nippon Paper.

The Department of Justice appealed and, in an opinion sometimes tinged with sarcasm, a majority of a 1st Circuit panel reversed. The court held that the jurisdictional reach of the Sherman Act is sufficient to reach the horizontal conspiracy alleged against Nippon Paper the indictment.[7]

In reaching this result, the 1st Circuit easily concluded that "civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States comes within [the Sherman Act's] jurisdictional reach." Any question on the civil side, according to the court, was resolved by the U.S. Supreme Court's 1993 decision in *Hartford Fire Ins. Co. v. California*, in which the antitrust laws were held to reach foreign conduct intended to affect the U.S. market.[8]

The novel question raised by the *Nippon Paper* case is whether the jurisdictional reach of the Sherman Act should be more limited for criminal actions. The district court had ruled that the Sherman Act should have a more limited reach for criminal actions based on the general presumption against extraterritorial application of federal statutes and a concern about adequate notice to foreign defendants of the potentially criminal nature of their actions.

The 1st Circuit agreed that there is a general presumption against interpreting federal statutes to apply to actions outside the United States. The court ruled, however, that this presumption has clearly been overcome in the civil context and that there is insufficient reason for distinguishing its application in the criminal context.

Relying initially on "common sense," the court observed that both civil and criminal antitrust action are based on the same language in sec. 1 of the Sherman Act, suggesting that the same standard should apply. The court rejected the district court's position that the higher standards of notice and fair play required in the criminal context -- which are reflected in the *mens rea* requirement -- should restrict the extraterritorial reach of the Sherman Act. Drawing from John Donne, the court observed that in today's shrinking world, potential antitrust defendants should be aware that "no man is an island," and that actions taken at home can lead to consequences, even criminal consequences, in foreign lands.

The 1st Circuit also rejected as "hollow" five arguments presented by Nippon Paper and the Government of Japan -- participating in an *amicus* brief -- supporting the district court's ruling. ***First***, the court was "not impressed" with the lack of precedent, observing that "[t] here is a first time for everything." ***Second***, although criminal, unlike civil, antitrust prosecutions require a showing of intent, "[t]here is simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality."

Third, a comment to the Restatement (Third) of Foreign Relations Law[9] observes that when regulatory statutes, such as the U.S. antitrust laws, may give rise to both civil and criminal liability, "the presence of substantial foreign elements will ordinarily weigh against application of criminal law." Again unimpressed, the 1st Circuit ruled that the comment "merely reaffirms the classic presumption against extraterritoriality, no more, no less."

Fourth, the rule of lenity counsels that statutory ambiguity should be interpreted in favor of a criminal defendant. The court found the rule inapposite where, as here, the "Supreme Court deems it 'well established' that Section One of the Sherman Act applies to wholly foreign conduct."[10]

Finally, the international comity doctrine did not help Nippon Paper because it generally "counsels voluntary forbearance" that "is more a matter of grace than a matter of

obligation." The court suggested that, under the Supreme Court's decision in *Hartford Fire*, comity considerations may well prohibit the exercise of jurisdiction only when the laws of a foreign state compel a defendant to violate the Sherman Act.

In any event, the court found little reason to forgo the exercise of jurisdiction in the case at hand. The alleged conspiracy was illegal under Japanese law as well as the Sherman Act. Moreover, the object of the conspiracy was to raise the price of thermal facsimile paper in the United States and Canada, not Japan.

Finally the court observed that, in today's global economy, prohibiting prosecution of extraterritorial actions that have a foreseeable and substantial effect in the United States would "create perverse incentives for those who would use nefarious means to influence markets in the United States."[11]

While the majority opinion gave the comity analysis relatively short shrift, Judge Sandra Lynch issued a concurring opinion observing that "where international law suggests that criminal enforcement and civil enforcement be viewed differently, it is at least conceivable that different content could be ascribed to the same language depending on whether the context is civil or criminal." Applying the traditional comity considerations to the instant case, however, Judge Lynch agreed that the United States could pursue the indictment against Nippon Paper.

Particularly because the sole objective of the alleged conspiracy was to raise paper prices for consumers in the United States and Canada, not Japan, she found that "the United States' interest in combatting this activity appears to be greater than the Japanese interest." A closer question would arise if "the consumer of the situs nation were injured as well." Judge Lynch further observed that Nippon Paper should have known that it was subject to treble damages in a civil action that could exceed the maximum criminal penalty faced by a corporation for Sherman Act violations -- a fine of $10 million.

This decision was, perhaps, a relatively easy one given the facts in the indictment. More difficult questions may emerge if, for example, a conspiracy in Japan to raise the price of goods sold for consumption in Japan had the secondary or incidental effect of raising prices in the United States. A further question arises as to who should conduct the comity analysis.

The Department of Justice "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'" once the department has decided to prosecute a case.[12] Although the Justice Department cited this concern in its brief, the 1st Circuit addressed the comity analysis without comment on the department's position.[13]

At this point, Nippon Paper is likely considering whether to file a petition for a writ of certiorari to the Supreme Court. While the government of Japan has no further judicial recourse, the decision may give additional impetus to calls for an international code covering multilateral antitrust and competition law issues. In an even more ambitious, and distant, proposal, some have called for the creation of an International Competition Authority under the auspices of the World Trade Organization, or WTO, or the Organization for Economic Cooperation and Development, or OECD.[14]

The Clinton administration has been eager to discuss antitrust policy and considers creation and enforcement of antitrust laws within individual countries as a means of ensuring fair access of U.S. companies to foreign markets. Its efforts so far, however, have been limited to educating individual countries about the benefits of competition laws and

how best to implement them. The Department of Justice has been less than enthusiastic about an international code for fear of a "lowest common denominator" approach that would weaken U.S. antitrust enforcement.

As the world economy becomes more interdependent, the extraterritorial reach of competition laws is becoming more important. Disputes will increasingly arise in which multiple nations are entitled to exercise jurisdiction. Clearly, the preferred solution in most cases is open communication and cooperation among the interested governments.

The *Nippon Paper* case reflects some progress on this front. The Department of Justice worked with Japanese prosecutors to raid the offices to two Japanese companies to gather evidence in the investigation.[15] The department also worked with Canadian antitrust authorities, which instituted parallel criminal enforcement proceedings in Canada. At the same time, however, the decision of the Japanese government to intervene as an *amicus curiae* on behalf of Nippon Paper suggests that much further work remains to be done.

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[1] *U.S. v. Nippon Paper Industries Co. Ltd.*, 1997 WL 109199 (1st Cir. ___, 1997). A free, full-text version of this ruling is available on the NLJ Web site, http://www.nlj.com.

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[2] A cogent summary of the historical development of the jurisdictional reach of the Sherman Act can be found in James R. Atwood and Kingman Brewster, "Antitrust and American Business Abroad," at ch. 6 (1981 and 1995 supp.).

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[3] March 18, 1997, press release of the Antitrust Division of the U.S. Department of Justice.

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[4] Indictments were also issued against several other Japanese companies, some of which pled guilty and paid fines aggregating to more than $10 million. An American company and one of its officers were acquitted in January 1997. Unlike Nippon Paper, the other Japanese defendants were alleged to have taken over actions in the United States in furtherance of the conspiracy.

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[5] 944 F. Supp. 55, 66 (D. Mass. 1996).

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[6] *Id.* at 64.

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[7] Because of its holding on the horizontal conspiracy, the court expressly declined to reach the question whether the indictment adequately alleged a vertical conspiracy.

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[8] 509 U.S. 764 (1993) (Sherman Act reaches conspiracy in London to affect U.S. insurance market).

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[9] Restatement (3d) of Foreign Relations Law at Sec. 403 (1987).

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[10] 509 U.S. at 796 (quoting *Hartford Fire*).

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[11] Interestingly, the 1st Circuit declined the Justice Department's invitation to draw from the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. . 6a (1994), a statute the court disdained as "inelegantly phrased" and one essentially ignored by the Supreme Court in *Hartford Fire*.

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[12] "Antitrust Enforcement Guidelines for International Operations," U.S. Department of Justice and the Federal Trade Commission at 21-22 (April 1995). (Citation omitted.)

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[13] This issue is discussed in Atwood and Brewster, supra, n.2, at Sec. 6.11 of the 1995 Supp.

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[14] Currently, neither the WTO nor the OECD has any authority to review competition laws of member countries.

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[15] In this regard, the Department of Justice is negotiating a revision to the 1991 agreement on antitrust cooperation between the United States and the European Commission. The contemplated revisions would provide for greater "positive comity" through enhanced cooperation in investigations and enforcement proceedings under United States and European Union antitrust laws.

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