

# EXTRATERRITORIAL ANTITRUST ENFORCEMENT AND THE MYTH OF INTERNATIONAL CONSENSUS

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## I. INTRODUCTION

The extraterritorial reach of U.S. antitrust laws has recently jumped from the pages of textbooks and law journals into the headlines. Commentators, policymakers, journalists and (perhaps most importantly) businesspeople have struggled with the question of whether conduct that physically occurs overseas falls within the ambit of U.S. law enforcement. Perhaps this dilemma is inevitable, as trade becomes increasingly international and sovereigns with different levels of regulation meet in the marketplace.<sup>1</sup>

Antitrust law has not been the only branch of U.S. law confronting the issue of extraterritorial application. American courts have also considered similar issues in the field of financial market regulation, particularly in the context of foreign nations' laws and policies that directly conflict with the enforcement of U.S. laws against securities fraud.<sup>2</sup> In doing so, courts have increasingly

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1. See Philip Wood, *Financial Conglomerates and Conflicts of Interest*, in CONFLICTS OF INTEREST IN THE CHANGING WORLD 74 (R. Goode ed., 1986). "Securities regulation is local. But securities trading is international. It is inevitable, therefore, that there may be collision between high and low-regulated states." *Id.*

2. The Second Circuit has played a prominent role in this post-war development. See Roberta S. Karmel, *The Second Circuit's Role in Expanding the SEC's Jurisdiction Abroad*, 65 ST. JOHN'S L. REV. 743, 749-50 (1991) (providing an overview of the evolution of extraterritorial application of U.S. securities law from the perspective of an enforcer focusing on Second Circuit case law); Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 216-17 (1996) (discussing Second Circuit case law). The Second Circuit has also taken the lead in addressing

discounted international comity as a reason to inhibit the extraterritorial enforcement of U.S. financial market regulation.<sup>3</sup>

The changes of the 1990s have increased the likelihood that U.S. laws regulating markets—such as securities laws that regulate financial and product markets—will become international in scope. Several developments have forced American antitrust law to address overseas conduct. First, actors in markets for goods and services no longer limit their activities within national borders to the extent that they once did.<sup>4</sup> Second, several legal cases, including the U.S. Supreme Court's 1993 opinion in *Hartford Fire Insurance Co. v. California*,<sup>5</sup> have raised questions about the role of U.S. courts in construing the scope of American antitrust law. Finally, the U.S. executive branch, as well as its counterparts abroad, has identified antitrust law as both a trade issue and a possible political concern.<sup>6</sup>

The Boeing-European Commission case presents a stark example of potential conflict. This battle over European approval—for a merger of two American companies with no European production facilities<sup>7</sup>—rapidly came to involve high-level officials, up to and including the U.S. President.<sup>8</sup> The Boeing battle also

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the role of comity in the context of foreign laws that inhibit U.S. financial market regulation. See Howard S. Erbsstein, *Palm Trees Hide More Than Sunshine: The Extraterritoriality of Securities Laws in Haven Jurisdictions*, 13 DICK. J. INT'L L. 441, 470 n.194 (1995).

3. Admittedly, not all commentators believe that extraterritorial enforcement of U.S. securities law is beneficial. See Choi & Guzman, *supra* note 2, at 216 (emphasizing that extraterritorial application of securities law creates a bias towards over-regulation and restriction of investors' freedom to choose the best legal regime for their capital). But it is well established that U.S. financial market regulation extends beyond U.S. territory. See Erbsstein, *supra* note 2, at 466-67. "[W]hen transactions initiated by agents abroad involve trading on United States exchanges, the pricing and hedging functions of the domestic markets are directly implicated, just as they would be by an entirely domestic transaction." *Id.* (quoting *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 110, 118 (7th Cir. 1984)).

4. See Jeffery E. Garten, *Dangers Lurk in the Global Economy*, WALL ST. J., Sept. 17, 1997, at A22 (noting that "[t]he share of U.S. GDP attributable to international trade has doubled in this decade, to 23%, and today, exports are responsible for 30% of our economic growth").

5. 509 U.S. 764 (1993).

6. See *Crash Landing: Boeing's Ordeal in EU Was Mostly of its Own Making*, WALL ST. J. EUR., July 28, 1997, at 1 (reporting that President Clinton, French President Jacques Chirac, and other European leaders became involved in an effort to resolve the Boeing-EU standoff without a trade war).

7. See *infra* note 139 and accompanying text.

8. See, e.g., *Clinton Hints U.S. May Retaliate if EU Tries to Block Boeing-McDonnell Deal*, WALL ST. J., July 18, 1997, at A2 (quoting President Clinton's comment that "it would be unfortunate if we had a trade stand-off with [the EU]"); *Air Freight: Threat of a Trade War Over Boeing Reflects Antitrust Limitations*, WALL ST. J. EUR., July 18, 1997, at 1 (describing President Clinton as joining the "battle" over the merger and quoting a U.S. official that "a complaint to

illustrates that nations whose courts and legislatures have in the past decried U.S. extraterritorial antitrust enforcement as an infringement on their sovereignty, now will not hesitate to enforce their own laws extraterritorially.

Times and markets have changed. Already, in a parallel reaction to these changes, when U.S. courts are faced with foreign laws inhibiting the extraterritorial reach of U.S. financial market regulation, the courts demonstrate limited comity concerns or reject comity concerns altogether. The concerns that have driven this shift in the field of securities regulation apply to the antitrust context as well.<sup>9</sup>

In *Hartford Fire*, the Supreme Court ruled that even assuming that a U.S. court could ever withhold the exercise of its jurisdiction based on comity, the only relevant inquiry would be whether a defendant was compelled by foreign law to violate U.S. law. Without definitively concluding that comity was necessarily a judicial concern, the Court narrowed the comity inquiry to the sole question of whether U.S. law prohibits what foreign law requires.

Since *Hartford Fire*, commentators on comity's relevance to extraterritorial enforcement of U.S. antitrust law have largely focused on comity's implications in international cooperation and effective regulation, given the Court's limited concern for comity in the context of the Sherman Act.<sup>10</sup> Additionally, some critics of *Hartford Fire*

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the World Trade Organization and retaliatory tariffs" were possible options if no resolution to the standoff was found).

9. Compare SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-18. (S.D.N.Y. 1981) (expressing concern that "secret foreign financial institutions . . . have allowed Americans and others to avoid the law and regulations concerning securities and exchanges") with United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997) (refusing to dismiss criminal antitrust charges on comity grounds since to do so "would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect").

10. Critics of *Hartford Fire* have focused on its possible negative impact on U.S. foreign policy. See, e.g., James P. Rhatigan, *Hartford Fire v. California: A Mixed Blessing for Insurance Defendants*, 47 RUTGERS L. REV. 905, 955 (1995) (arguing that abandonment of comity could make America a "commercial pariah in the arena of world trade"); Robert C. Reuland, *Hartford Fire Ins. Co., Comity, and the Extraterritorial Reach of United States Antitrust Law*, 29 TEX. INT'L L.J. 159, 208 (1994) (stating that the *Hartford Fire* Court "sows the seeds for renewed conflict in our international relations over inconsiderate extraterritorial application of our laws"); Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 283, 317-23 (advocating use of comity analysis, especially in "private treble-damage actions where . . . foreign policy considerations play no role in the private decision to bring the action"). But see John H. Chung, Comment, *The International Antitrust Enforcement Assistance Act of 1994 and the Maelstrom Surrounding the Extraterritorial Application of the Sherman Act*, 69 TEMP. L. REV. 371, 373, 399 (1996) (describing *Hartford Fire*

broadly argue for the resurrection of the more multifaceted comity inquiry the Ninth Circuit previously employed.<sup>11</sup> These critics contend that future U.S. courts will not be able to take appropriate account of foreign national interests, rendering American judges powerless to avert what the commentators perceive as unwarranted extensions of U.S. law that will irritate our trading partners.

However, commentators have not focused on the degree to which the rejection of comity accords with the *Erie* doctrine<sup>12</sup> and with U.S. case law in the field of financial market regulation. Conversely, a reanimation of comity would pose dangers for established notions of extraterritorial enforcement of American law in the financial market context and would confer a burden on U.S. courts that is probably misplaced. Nor has the focus been placed on the reduced benefits of comity, given the strong possibility that an international consensus regarding antitrust enforcement does not exist. *Hartford Fire* and some of its progeny appear to reflect the understanding that the case for comity depends largely upon the degree of consensus between different nations' laws and enforcement policies.<sup>13</sup>

Because there was no direct conflict of American and foreign laws on the facts of *Hartford Fire*, in order to rule that comity did not foreclose jurisdiction, the Court did not have to decide whether the limited inquiry that it described was in fact necessary. As a result, the question of whether comity is even applicable in the Sherman Act<sup>14</sup>

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as having helped create "jurisdictional chaos" and calling for a "non-judicial branch . . . to harmonize jurisdictional rules"). Those commentators not critical of *Hartford Fire* similarly base their support on positive predictions of that decision's impact on U.S. trade relations. See, e.g., William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 157 (1998) (arguing that judges should dismiss comity concerns in part "because a more permissive attitude towards anti-competitive conduct will allow domestic producers to increase their profits at the expense of foreign consumers to an extent sufficient to offset the loss to domestic consumers from the same anti-competitive conduct," and thus states have a systematic bias towards under-enforcement); Varun Gupta, Note, *After Hartford Fire: Antitrust and Comity*, 84 GEO. L.J. 2287, 2288, 2316-18 (1996) (arguing that comity is unnecessary because other factors, including the requirement of personal jurisdiction and international economic integration, protect foreign defendants and thus mitigate conflict with other nations).

11. See, e.g., Reuland, *supra* note 10, at 208-09 (arguing that the *Hartford Fire* majority's "discussion of comity is of questionable authority" and that comity should continue to be applied to reduce conflict between different nations' laws because "comity is desirable in every facet of international relations"); Dam, *supra* note 10, at 319 ("one may still find [a multifactor test] preferable to the supposed certainty of absolutism of *Hartford Fire*").

12. See *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938).

13. See *infra* notes 124-131 and accompanying text (discussing *Nippon Paper Industries*, 109 F.3d 1 (1st Cir. 1997)).

14. 15 U.S.C. §§ 1-7 (1994).

context is still an open one. Numerous commentators have concluded that the Court misfired and should have given greater weight to comity concerns.<sup>15</sup> While at least one commentator has endorsed the view that the *Hartford Fire* Court properly narrowed the comity inquiry,<sup>16</sup> this Article concludes that given U.S. case law on financial market regulation, the lack of a clear international consensus regarding antitrust enforcement, and the *Erie* doctrine's requirement that U.S. law have an articulable, positive source, in the appropriate case, the Supreme Court should reject the comity inquiry entirely.

Several considerations drive this conclusion. First, the increased ease with which comity can be exploited by wrongdoers in a global marketplace<sup>17</sup> counsels for a definitive repudiation of the judicial comity inquiry applied prior to *Hartford Fire*. Interestingly, in its line of cases addressing comity in financial market regulation, the Second Circuit did not apply different standards to private parties than to the government, as some commentators have advocated in the antitrust context.<sup>18</sup> Second, the contradictions in case law since *Hartford Fire* demonstrate the difficulties with judicial action in this area and illustrate the need for clear guidance from the Court. For instance, in upholding the extraterritorial enforcement of *criminal* antitrust law, the First Circuit supplied a rationale strikingly similar to that which led the Second Circuit to water down, if not altogether discard, comity in the field of financial market regulation.<sup>19</sup> Third, the Boeing incident shows that extraterritorial enforcement of antitrust law creates intensely political disputes among nations and that international consensus is imperfect, if not illusory.<sup>20</sup> In rejecting comity in the context of financial market regulation, the Second Circuit discounted the notion of international consensus to which it

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15. See discussion *supra* note 10.

16. See Dodge, *supra* note 10, at 104.

17. See *Nippon Paper Indus.*, 109 F.3d at 8 (noting that “[w]e live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale” and that violators may exploit “territorial firewalls”). This concern led the Second Circuit to curtail comity when confronting foreign laws that inhibit U.S. financial market regulation. See discussion *infra* Part II.

18. See, e.g., Dam, *supra* note 10, at 320 (stating that private plaintiffs fail to take into account the “foreign and economic policy considerations” that government plaintiffs weigh when deciding to bring an action); Gupta, *supra* note 10, at 2287 n.2 (addressing “considerations of comity in the context of private antitrust litigation only”).

19. See *infra* note 118 and accompanying text (discussing *Nippon Paper Industries*).

20. See discussion *infra* Part IV.

had previously pointed in support of comity.<sup>21</sup> Finally, judge-made limits on antitrust law enforcement that are justified by reference to customary international law<sup>22</sup> may conflict with the lack of a general consensus on the validity of customary international law.

Part II of this Article discusses the ways in which U.S. case law, and particularly that of the Second Circuit, is evolving towards a rejection of comity analysis when addressing foreign laws that inhibit American securities regulation. Part III outlines the approach to extraterritorial antitrust jurisdiction adopted in *Hartford Fire*, as well as questions posed by subsequent circuit court interpretations of comity in *United States v. Nippon Paper Industries Co.*<sup>23</sup> and *Metro Industries, Inc. v. Sammi Corp.*<sup>24</sup> Part IV examines the Boeing-McDonnell Douglas struggle with the European Commission, which suggests that the prior assumptions justifying a territorial approach are questionable. Part V briefly assesses the implications of the post-*Erie* debate regarding the validity of customary international law<sup>25</sup> for the suitability of the judicial inquiry into comity in the antitrust field. A short conclusion follows in Part VI.

## II. THE RISE AND DECLINE OF COMITY CONCERNS: CONFLICT BETWEEN FOREIGN LAWS AND THE EXTRATERRITORIAL ENFORCEMENT OF U.S. FINANCIAL MARKET REGULATIONS

Since the Great Depression, U.S. financial markets have been regulated through the enforcement of laws prohibiting fraud and the manipulation or misuse of inside information in the purchase and sale of securities.<sup>26</sup> To enforce these laws both criminally and civilly, the

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21. See *infra* notes 48-60 and accompanying text (discussing *Trade Dev. Bank* and *Banca Della Svizzera Italiana*).

22. Customary international law has been defined as the actual practice of States supported by their belief that such practice is legally mandated. See, e.g., BLACK'S LAW DICTIONARY 816 (6th ed. 1990) (defining international law as a "[b]ody of consensual principles which have evolved from customs and practices civilized nations utilize in regulating their relationships . . . hav[ing] great moral force"); Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: the Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 77-78 (1989) (defining customary international law as general and consistent state practice supported by *opinio juris*).

23. 109 F.3d 1 (1st Cir. 1997).

24. 82 F.3d 839 (9th Cir. 1996).

25. See Gupta, *supra* note 10, at 2288 (arguing, in part, that political circumstances have made possible "[e]conomically reasoned antitrust enforcement that is not hindered by political considerations").

26. See, e.g., Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1994); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ll (1998). State regulation of securities trading dates to considerably

government and private plaintiffs often depend on the discovery process to develop their cases; this dependence is echoed in cases involving the extraterritorial enforcement of U.S. securities laws.<sup>27</sup>

Over the past several decades, the Second Circuit has tried to reconcile the presence of foreign laws, ostensibly aimed at privacy, that penalize banks and bank employees for disclosing customer information and that tend to insulate the bank customers' overseas activities from discovery. As a result, the regulation of U.S. financial markets sometimes presents a direct conflict between American law mandating production of information in discovery and foreign laws penalizing its disclosure.<sup>28</sup> This conflict places banks, often nonparties to the underlying litigation, in a catch-22 situation: U.S. courts must determine whether they should alleviate this conflict or even address it at all. This discussion will focus on the jurisprudence developed by the Second Circuit in response to this conflict.<sup>29</sup>

The Second Circuit initially followed the guidance of the Supreme Court's decision in *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*.<sup>30</sup> In that case, the Supreme Court considered whether the district court had

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earlier. See, e.g., Thomas L. Hazen, *Rational Investments, Speculation, or Gambling?—Derivative Securities and Financial Futures and Their Effect on the Underlying Capital Markets*, 86 NW. U. L. REV. 987, 1014-15 (1992) (describing the 1829 New York Stock Jobbing Act).

27. See, e.g., *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (subpoena duces tecum sought that would require Canadian banks to produce records relevant to determine the fairness of a proposed settlement in a stockholders' derivative action); *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35 (2d Cir. 1972) (American insurance company sought discovery of records of Swiss bank claimant); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981); cf. *United States v. Time Warner, Inc.*, No. MISC.A. 94-338(HHG), 1997 WL 118413, at \*6 (D.D.C. Jan. 22, 1997) (action to enforce civil investigative demand seeking documents in antitrust investigation regarding overseas actions of demandees).

28. The American system of discovery has been described as uniquely setting the United States apart from other nations. See, e.g., GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS*, 261-84 (1989) ("the scope of discovery in most foreign countries is generally much more limited than pretrial U.S. discovery"); Daiske Yoshida, *The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals*, 66 *FORDHAM L. REV.* 209, 210 (1997) ("wide-open discovery in the American style simply does not exist in other countries"). This system provides for discovery production not just by parties to litigation, but by others who may have relevant information. See, e.g., *FED. R. CIV. P.* 31(a)(1) (stating that "[a] party may take the deposition of any person without leave of court" subject to a few requirements).

29. In the context of securities regulation, the Second Circuit has been called the "Mother Court," since its jurisdiction encompasses New York. The Second Circuit has developed a substantial and persuasive body of securities law. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting); see also Karmel, *supra* note 2, at 743 ("The Second Circuit has had . . . a profound impact on securities law.").

30. 357 U.S. 197 (1958).

properly dismissed the action of a Swiss company, which was seeking recovery of assets seized by the United States during World War II. Because a Swiss bank had refused to disclose bank records in accordance with Swiss penal laws, the district court dismissed the action.<sup>31</sup> The U.S. government claimed the documents were crucial to demonstrate that the Swiss bank and the corporate plaintiff were the same entity and to show that the bank, the plaintiff, and a German company had conspired to evade seizure under U.S. law during the war.<sup>32</sup> Nevertheless, the Supreme Court concluded that the district court properly dismissed the action because, in light of the bank's non-production, allowing the corporate plaintiff to argue that it did not have "control" of the documents would "invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records."<sup>33</sup> The Court recognized that the plaintiff was "in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans" that could "achieve a significant measure of compliance with the production order."<sup>34</sup>

Despite *Société Internationale's* rather skeptical view of foreign bank secrecy law, for some time thereafter, the Second Circuit treated such laws with considerable deference.<sup>35</sup> Indeed, the Second Circuit has concluded that because the benefits of punishing securities law violators could not outweigh comity interests, the court would not issue an order that would even *risk* compelling a violation of another nation's law.<sup>36</sup> In *Ings v. Ferguson*, the Second Circuit addressed whether, pursuant to a subpoena duces tecum served in an underlying shareholders' derivative action to which the bank was not a party, a Canadian bank with branches in the United States could be required

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31. *See id.* at 200.

32. *See id.*

33. *Id.* at 205. The Court did, however, rule that the action should not have been dismissed with prejudice. *See id.* at 212-13.

34. *Id.* at 205.

35. This tension was recognized explicitly in *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

Despite the teachings of *Société*, three early Second Circuit cases appeared to view foreign law prohibitions as an absolute bar to ordering inspection or production of documents. . . . All . . . of the . . . cases dealt with a nonparty witness and that factor may have been the one distinguishing these cases from *Société*. . . . In any event the Second Circuit has clearly moved to a more flexible position.

*Id.* at 114-15 (citations omitted).

36. *See Ings v. Ferguson*, 282 F.2d 149, 151 (2d Cir. 1960) (deferring without concluding that an actual conflict of laws existed, and resting its conclusion on the fact that a potential "conflict of theories" existed).

to produce records physically located in Canada.<sup>37</sup> The *Ings* court did not decide whether disclosure would in fact violate Canadian law, since it concluded that enough of a “conflict of theories exist[ed]” to “point[] to the desirability of having the impact of Canadian statutes passed upon by Canadian courts.”<sup>38</sup> The Second Circuit refused to order compliance with the subpoena, since “[u]pon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.”<sup>39</sup> The court observed that as evidenced by the fact that nations have long allowed the use of letters rogatory<sup>40</sup> to obtain documents in foreign countries, “international comity exists” “amongst civilized nations.”<sup>41</sup> Interestingly, there was no discussion of balancing or weighing; the mere possibility of conflict trumped any importance that the sought-after discovery might have had in the plaintiff’s case.

The *Ings* decision not to order compliance, despite the absence of a clear conflict between American and foreign law, was particularly influenced by the Second Circuit’s holding the year before in a case arising out of a tax evasion action, *First National City Bank v. Internal Revenue Service*,<sup>42</sup> in which an American bank challenged a subpoena to produce a Panamanian customer’s records. The bank argued that the records were located at its Panama branch, and that to produce them would violate Panamanian law.<sup>43</sup> The Second Circuit stated that “[i]f such were the fact we should agree that the production of the Panama records should not be ordered.”<sup>44</sup> However, because the court was unconvinced that production would in fact violate Panamanian law, it remanded the case for further proceedings addressing the question.

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37. *See id.* at 150-51.

38. *Id.* at 151.

39. *Id.* at 152.

40. A letter rogatory is defined as “[a] request by one court of another court in an independent jurisdiction that a witness be examined upon interrogatories sent with the request.” BLACK’S LAW DICTIONARY 905 (6th ed. 1990).

41. *Ings*, 282 F.2d at 151.

42. 271 F.2d 616 (2d Cir. 1959).

43. *See id.* at 619.

44. *Id.* at 619. The *Ings* court quoted this language. *See Ings*, 282 F.2d at 152. Somewhat discordantly, the *First National City Bank* court also noted, in dicta, that “[i]f the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom.” *First Nat’l City Bank*, 271 F.2d at 620.

Shortly after *Ings* and *First National City Bank*, the Second Circuit in *Application of the Chase Manhattan Bank*<sup>45</sup> affirmed a district court's order vacating a similar subpoena in light of evidence that disclosure would conflict with Panamanian law; the appellate court relied on *Ings*, which had been decided in the interim.<sup>46</sup> The court ruled that it could not order an action that would violate a foreign law—even where the penalty for such a violation was at most a \$100 fine.<sup>47</sup> In essence, the court refused to weigh the degree of the violation against the plaintiff's interest in discovery, even where prosecution of American justice would be impaired.

After these cases, the Second Circuit “moved to a more flexible position” in the 1960s.<sup>48</sup> To weigh the benefits of comity against the detriment of increasing the odds that violators will escape without penalty, the appellate court adopted a balancing test to address foreign laws that inhibit disclosure of materials in the context of securities fraud.<sup>49</sup> The test, based largely on section 40 of the Restatement (Second) of Foreign Relations which had been published in 1965 after the *First National City Bank*, *Ings*, and *Chase Manhattan Bank* decisions, balanced the vital national interests of each of the countries involved (as well as any hardship considerations for the parties to the instant action) and also considered whether the affected party had shown good faith.<sup>50</sup> In *Trade Development Bank v. Continental Insurance Co.*,<sup>51</sup> a claim involving securities fraud, the Second Circuit reviewed the trial judge's conclusion that Swiss law prohibited disclosure of customers' identities to the plaintiff and that “as a matter of comity he would therefore not require the Bank to identify the customers whose accounts were involved, particularly since in his view the identity was not essential to the issue on trial.”<sup>52</sup> The appellate court concluded that the trial court was “entitled in its discretion, after balancing the interests involved, to defer to Swiss

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45. 297 F.2d 611 (2d Cir. 1962).

46. *See id.* at 613.

47. *See id.* at 612; *see also* United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968) (discussing *Application of The Chase Manhattan Bank*).

48. SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 115 (S.D.N.Y. 1981).

49. *See First Nat'l City Bank*, 396 F.2d at 901-03.

50. *See Banca Della Svizzera Italiana*, 92 F.R.D. at 118-19. The test included several “less important” factors, including the place of performance, the nationality of the resisting party and the extent to which enforcement can be expected to achieve compliance. *Id.* at 119.

51. 469 F.2d 35 (2d Cir. 1972).

52. *Id.* at 40.

law.”<sup>53</sup> Notably, the circuit panel decided that “the relative unimportance” of the information sought was “entitled to be considered” alongside the other Restatement factors.<sup>54</sup>

As applied, this balancing test has gradually tilted the scales against deference to comity in a securities regulation claim. In *Securities and Exchange Commission v. Banca Della Svizzera Italiana*,<sup>55</sup> the United States District Court for the Southern District of New York applied the Restatement-based balancing test to a litigant’s challenge to discovery in a securities law action.<sup>56</sup> In ordering a foreign bank to comply with discovery, the court recognized that “the strength of the United States interest in enforcing its securities laws to ensure the integrity of its financial markets cannot seriously be doubted.”<sup>57</sup> The *Banca Della Svizzera Italiana* court also acknowledged that, since the earlier Second Circuit cases, Congress had determined that this enforcement “interest [was] being continually thwarted by the use of foreign bank accounts.”<sup>58</sup> The court concluded that no hardship considerations should outweigh U.S. interests; although the bank may “be subject to fines and its officers to imprisonment,” it may be able to avoid prosecution under the flexible application of Swiss law.<sup>59</sup> This rationale marked a considerable shift from the Circuit’s earlier refusal to force bank officials to risk a \$100 Panamanian fine in *Chase Manhattan Bank*.<sup>60</sup>

The Second Circuit and the district courts below continue to apply the *Banca Della Svizzera Italiana* balancing test to bank secrecy laws both inside and outside the securities law context.<sup>61</sup> In contrast

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53. *Id.* at 41.

54. *Id.*

55. 92 F.R.D. at 111.

56. *See id.* at 116-17.

57. *Id.* at 117. The court also noted that “[t]he Swiss government . . . expressed no opposition,” although the “incumbent Swiss Federal Attorney General” said that “a foreign court could not change the rule that disclosure required the consent of the one who imparted the secret and that [the bank] might thus be subject to prosecution.” *Id.* at 117-18.

58. *Id.* at 117. The court quoted Congress’ finding that “secret foreign financial institutions . . . have allowed Americans and others to avoid the law and regulations concerning securities and exchanges. . . . The debilitating effects of the use of these secret institutions on Americans and the American economy are vast.” *Id.* (quoting H.R. REP. NO. 91-975, at 12 (1970), reprinted in 1970 U.S.C.C.A.N. 4394, 4397).

59. *Id.* at 118.

60. 297 F.2d 611 (2d Cir. 1962).

61. *See, e.g.*, *United States v. Davis*, 767 F.2d 1025, 1033-36 (2d Cir. 1985) (compelling production of Cayman bank documents in underlying criminal fraud action); *Compagnie Francaise d’Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16, 29-33 (S.D.N.Y. 1984) (compelling production in underlying contract action); *Alfadda v. Fenn*, 149 F.R.D. 28, 33-35

to earlier case law that viewed a direct conflict between American and foreign law as sufficient to justify U.S. courts' deference to the foreign law on comity grounds, the Second Circuit now consistently uses this more flexible approach, allowing enforcement of U.S. laws even if they directly conflict with foreign law. Indeed, in the securities regulation context, the Second Circuit may have adopted a test that prohibits deference to foreign laws that halt U.S. discovery.<sup>62</sup> This rejection of comity may well spread farther than the Second Circuit; although many of the nations that have adopted bank secrecy laws view them as critical to the health of their financial industries,<sup>63</sup> it is difficult to imagine any American court concluding that the interests of these foreign jurisdictions should outweigh the U.S. interest in the integrity of its own financial markets. Moreover, to the extent that the *Banca Della Svizzera Italiana* court almost entirely discounted the potential civil and criminal liability of the subpoenaed bank under Swiss law, it is unclear exactly what level of hardship a litigant must face in order to justify deference for the sake of comity.<sup>64</sup>

This increasingly hard-edged view of foreign laws that inhibit discovery in American litigation contrasts sharply with the solicitousness of comity concerns and the emphasis on international consensus previously voiced by the Second Circuit in *Ings v.*

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(S.D.N.Y. 1993) (denying entry of protective order in underlying securities action prohibiting discovery of information of which Swiss bank secrecy laws allegedly forbade disclosure).

62. See *Ings v. Ferguson*, 282 F.2d 149, 151 (2d Cir. 1960) (deferring on comity grounds where a potential "conflict of theories"—not even of laws—existed); *Chase Manhattan Bank*, 297 F.2d at 619 (deferring where defendant would face a foreign \$100 fine). But cf. *Banca Della Svizzera Italiana*, 92 F.R.D. at 118 (refusing to defer and noting that even if the defendant were whipsawed by U.S. and foreign law, that "would be a result of [its own] bad faith").

63. See, e.g., Erbstein, *supra* note 2, at 449 n.37-38, and accompanying text (describing the Bahamas' legislative bolstering of bank secrecy, a "factor essential in the attraction of financial business," whose "strengthening . . . would bolster" "the interests of the Bahamas"); C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 455 (1992) (describing the prevention of capital flight as one reason for bank secrecy laws in developing and unstable countries); Jennifer A. Mencken, Note, *Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems*, 21 B.C. INT'L & COMP. L. REV. 461, 467-71 (1998) (describing Swiss bank secrecy laws as codification of Swiss bankers' customs aimed at stabilizing banking system in the face of prewar and World War II-era instability in Germany). But see DENNIS CAMPBELL, INTERNATIONAL BANK SECRECY 727-28 (1992) (describing EU process of scaling back the secrecy protections available in some member states in order to safeguard integrity of financial markets); *That Infernal Washing Machine*, THE ECONOMIST, July 26, 1997, at 20 (describing the Seychellais withdrawal, under international pressure, of laws offering a high degree of privacy to large bank depositors).

64. The *Banca Della Svizzera Italiana* court noted in passing that the insider trading transactions alleged in the underlying case would have profited the bank, and thus the bank's dilemma "would be a result of [its own] bad faith." 92 F.R.D. at 118.

*Ferguson*.<sup>65</sup> One explanation for this shift, as explicitly noted in *Banca Della Svizzera Italiana*, is that in the interim, U.S. courts and lawmakers have recognized that an international “consensus” was chimerical at best, and that U.S. courts could not defer to foreign law and expect justice to work itself out.<sup>66</sup> This realization was particularly persuasive in the context of financial market regulation. Notably the Second Circuit cases did not explicitly contemplate if the test would differ depending on whether the party seeking extraterritorial enforcement was the government or a private party—a fact perhaps most salient in the antitrust context. Given the U.S. interests at stake in this vitally important field, U.S. courts could no longer automatically defer on the grounds of comity.

### III. JUDICIAL COMITY CONCERNS IN ANTITRUST

American courts may be on their way to coming full circle regarding comity. Ninety years ago, courts undertook little or no comity analysis in antitrust litigation because they considered the Sherman Act wholly inapplicable to acts committed outside the United States.<sup>67</sup> In 1993, the Supreme Court applied comity analysis in *Hartford Fire*,<sup>68</sup> but explicitly stated that based on the facts of the case, such analysis might not be applicable.<sup>69</sup> The Court ruled that comity’s sole function was to prevent a defendant being placed in a “catch-22” between American and foreign law.<sup>70</sup> But since 1993, U.S. courts have attempted much more involved comity analysis, requiring the balancing of domestic and foreign concerns. The willingness of U.S. courts to defer to foreign law on comity grounds, even absent a direct conflict between American and foreign laws, echoes the Second Circuit’s earlier approach in *Ings v. Ferguson*.<sup>71</sup>

#### A. The Road to *Hartford Fire*

In its 1909 decision in *American Banana v. United Fruit Co.*,<sup>72</sup> the Supreme Court first considered, and ultimately rejected, the Sherman

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65. 282 F.2d 149 (2d. Cir. 1960); *see also supra* note 36 and accompanying text.

66. 92 F.R.D. 111 (S.D.N.Y. 1981); *see also supra* note 48 and accompanying text.

67. *See American Banana v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909).

68. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

69. *See id.* at 798.

70. *See id.* at 799.

71. 282 F.2d 149 at 152 (2d Cir. 1960) (deferring on comity grounds in the face of a *possible* conflict).

72. 213 U.S. 347 (1909).

Act's jurisdiction over foreign trade and commerce.<sup>73</sup> Writing for the Court, Justice Holmes noted that "the acts causing the damage were done . . . outside the jurisdiction of the United States" and the lawfulness of an act "must be determined wholly by the law of the country where the act is done."<sup>74</sup> *United States v. Sisal Sales Corp.*<sup>75</sup> broadened this narrow view of the Sherman Act's reach.<sup>76</sup> In that case, the Court considered the actions abroad of "parties to a successful plan to destroy competition and to control and monopolize the purchase, importation and sale of sisal,"<sup>77</sup> an organic fiber that was a key ingredient in more than eighty percent of the binder twine used for harvesting grain crops.<sup>78</sup> The *Sisal Sales* Court distinguished *American Banana* by noting that in that case, the Costa Rican government seized the plaintiff's plantation. The Court declared that a state seizure "is not a thing that can be complained of elsewhere in the courts."<sup>79</sup> By contrast, the Court described the conduct in *Sisal Sales* as "a contract, combination and conspiracy" whose "fundamental object was control of both importation and sale of sisal [within the United States] and complete monopoly of both internal and external trade and commerce therein."<sup>80</sup>

In *United States v. Aluminum Co. of America* (the "Alcoa" case),<sup>81</sup> the Second Circuit, sitting as a court of last resort,<sup>82</sup> explicitly abandoned the principle that the law of the country where an act is performed must determine the act's lawfulness.<sup>83</sup> The Court considered whether the Sherman Act punished agreements made overseas that "would clearly have been unlawful, had they been made within the United States."<sup>84</sup> In an opinion by Judge Learned Hand, the Court remarked that it should "not . . . read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict

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73. See generally *id.*

74. *Id.* at 355-56.

75. 272 U.S. 268 (1927).

76. See *id.* at 272.

77. *Id.* at 274.

78. See *id.* at 272.

79. *Id.* at 276.

80. *Id.*

81. 148 F.2d 416 (2d Cir. 1945).

82. See *id.* at 421.

83. See *id.* at 443.

84. *Id.* at 444.

of Laws.”<sup>85</sup> In concluding that the Sherman Act could be enforced against the agreements at issue, Judge Hand set forth an “effects” test, under which the Sherman Act prohibited acts occurring outside the United States “if they were intended to affect imports and did affect them.”<sup>86</sup> The Supreme Court later adopted this view.<sup>87</sup>

Subsequently, in its influential *Timberlane Lumber Co. v. Bank of America*<sup>88</sup> opinion, the Ninth Circuit expressed concerns that the *Alcoa* effects test failed to account adequately for other nations’ interests.<sup>89</sup> The *Timberlane* Court considered whether the Sherman Act could be applied properly to activity that had taken place in Honduras.<sup>90</sup> Guided by section 40 of the *Restatement (Second) of Foreign Relations Law*,<sup>91</sup> the Supreme Court explicitly recognized international comity concerns.<sup>92</sup> Although the Court concluded that the acts fell within the jurisdiction of U.S. antitrust law, it did so by applying a set of factors, known as the “jurisdictional rule of reason” which included:<sup>93</sup>

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.<sup>94</sup>

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85. *Id.* at 443.

86. *Id.* at 444.

87. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (holding that “[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries”).

88. 549 F.2d 597 (9th Cir. 1976).

89. *See id.* at 609.

90. *See id.* at 604.

91. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

92. *See Timberlane*, 549 F.2d at 613-14, 614 n.31 (inquiring “whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority”).

93. *Id.* at 613-614.

94. *Id.* at 614.

### B. *Hartford Fire*: Comity's End?

The schism between the approaches in *Alcoa* and *Timberlane* gradually diminished. By the time the Supreme Court decided *Hartford Fire*, it was “well established . . . that 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>95</sup> In *Hartford Fire*, the district court dismissed, on comity grounds, the antitrust claims of several states and private parties against foreign insurance brokers.<sup>96</sup> The plaintiffs alleged that “certain London reinsurers . . . conspired to coerce primary insurers in the United States to offer”<sup>97</sup> commercial general liability coverage only on specified terms, and to boycott those insurers who did not conform.<sup>98</sup> Applying the *Timberlane* jurisdictional rule of reason, the Ninth Circuit reversed, and “concluded that . . . the principle of international comity was no bar to exercising Sherman Act jurisdiction.”<sup>99</sup>

The Supreme Court affirmed the Ninth Circuit's decision, but undertook a strikingly different inquiry. Stating that it “need not decide” the question of “whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity,” the Court concluded that “international comity would not counsel against exercising jurisdiction in the circumstances” at issue.<sup>100</sup> According to the Court, “[t]he only substantial question in [the] litigation [was] whether ‘there [was] in fact a true conflict between domestic and foreign law.’”<sup>101</sup> Citing to section 403, comment e of the *Restatement (Third) of Foreign Relations Law of the United States*, the Court stated that “[n]o conflict exists . . . ‘where a person subject to regulation by two states can comply with the laws of both.’”<sup>102</sup> Because the defendants did “not argue that British law require[d] them to act in some fashion prohibited by the law of the United States or claim that their compliance with the laws of both countries [was] otherwise

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95. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

96. *See id.* at 765.

97. *Id.* at 795.

98. *See id.* at 788, 795.

99. *Id.* at 779.

100. *Id.* at 798.

101. *Id.* (quoting *Société Nationale Industrielle Aerospatiale v. United States Dist. Ct. for Southern Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

102. *Id.* at 799 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, cmt. e (1987)).

impossible,” the Court saw “no conflict with British law.”<sup>103</sup> Consequently, it saw no reason not to apply the Sherman Act to the British defendants.<sup>104</sup> In the Court’s view, no additional inquiry was required.<sup>105</sup>

### C. *Hartford Fire’s* Progeny

Although *Hartford Fire* set forth what the Supreme Court believed would be the appropriate comity inquiry<sup>106</sup>—assuming that such an inquiry could ever be appropriately undertaken—its guidance has raised questions for both commentators and lower courts. Two subsequent cases demonstrate the ambiguity remaining after *Hartford Fire*. In *Metro Industries, Inc. v. Sammi Corp.*<sup>107</sup> and *United States v. Nippon Paper Industries Co.*,<sup>108</sup> the Ninth and First Circuits, respectively, applied the Sherman Act with widely divergent readings of the requirements of international comity.

In *Metro Industries*, an American importer and wholesaler of kitchenware claimed that a Korean corporation’s use of a Korean design registration system, which gave Korean producers of holloware<sup>109</sup> the exclusive right to export a particular holloware design for three years, constituted a violation of the Sherman Antitrust Act.<sup>110</sup> According to Metro, Sammi used the registration system to prevent Metro and other kitchenware importers from acquiring Korean-made stainless steel steamers from Sammi’s Korean competitors.<sup>111</sup> Metro argued that such conduct constituted an impermissible market division and was a per se violation. That is, if Metro could prove Sammi’s alleged conduct, that conduct would constitute a violation of the Sherman Act, and no application of the rule-of-reason would be necessary.<sup>112</sup>

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103. *Id.*

104. *See id.*

105. *See id.* *But see id.* at 820-821 (Scalia, J., dissenting).

106. *See id.* at 799.

107. 82 F.3d 839 (9th Cir. 1996).

108. 109 F.3d 1 (1st Cir. 1997).

109. “Holloware” includes vessels such as bowls, cups or vases that have a significant depth or volume, as opposed to flatware.

110. *See Metro Indus.*, 82 F.3d at 841.

111. *See id.*

112. *See id.* at 843-44. As the court explains, “whether particular concerted activity violates section 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, ‘the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.’” *Id.* at 843. But certain types of restraints “have been held to be *per se* illegal . . .

The Ninth Circuit reviewed the district court's grant of summary judgment in favor of Sammi. In an opinion by Judge Wiggins, the court concluded that even if Metro could prove the alleged conduct, "application of the per se rule is not appropriate where the conduct in question occurred in another country."<sup>113</sup> The Ninth Circuit took an extremely restrictive view of *Hartford Fire's* implications for comity considerations. Rather than interpret *Hartford Fire* as limiting comity's restrictions on antitrust law to situations where American and foreign laws conflicted, the court concluded that *Hartford Fire* "did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane*."<sup>114</sup>

Although *Metro Industries* concluded that comity concerns alone could not compel its finding of a lack of jurisdiction, the court also applied a conventional antitrust rule-of-reason analysis, based in part on its conclusion in relation to per se treatment.<sup>115</sup> Under that analysis, the court affirmed summary judgment for Sammi Corporation, concluding that Metro Industries could not show the required injury to competition.<sup>116</sup>

Whereas the Ninth Circuit had examined *Hartford Fire* in a *civil* context, in *Nippon Paper Industries*, the First Circuit relied on *Hartford Fire* to support a U.S. *criminal* antitrust prosecution, based on acts committed abroad.<sup>117</sup> The *Nippon Paper Industries* trial court had dismissed the indictment against a Japanese corporation for allegedly fixing fax paper prices with several other Japanese manufacturers.<sup>118</sup> The indictment alleged that in meetings in Japan, the companies "agreed to increase prices for fax paper to be imported in North America."<sup>119</sup> The district court stated that "there is a strong presumption against extraterritorial application of federal statutes,

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[because they] always or almost always tend to restrict competition." *Id.* As the court noted, "a market allocation agreement between competitors at the same market level is a classic *per se* antitrust violation." *Id.* at 844.

113. *Id.* at 844-45.

114. *Id.* at 847 n.5.

115. *See id.* at 844-45 (holding in the alternative that rule of reason was applicable because the conduct at issue was not a "garden-variety horizontal division of a market.").

116. *See id.* at 847.

117. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2R1.1 cmt. n.7 (1998) (setting forth penalties and noting that "[t]he [Sentencing] Commission believes that the most effective method to deter individuals from committing [antitrust] crime[s] is through imposing short prison sentences coupled with large fines").

118. *See* United States v. Nippon Paper Indus. Co., 944 F. Supp. 55, 58 (D. Mass. 1996).

119. *Id.*

absent a clear expression by Congress to the contrary.”<sup>120</sup> While the district court read *Hartford Fire* to clarify that “this presumption has been overcome in the case of civil application of the federal antitrust laws,” it concluded that “the line of cases permitting extraterritorial reach in civil actions is not controlling.”<sup>121</sup> As a result, the district court focused on other cases that required different inquiries in applying criminal rather than civil statutes extraterritorially.<sup>122</sup> It concluded that the Sherman Act’s statutory silence and a portion of its legislative history<sup>123</sup> indicated that it was proper to dismiss the indictment. On appeal, however, the First Circuit disagreed with the district court’s analysis and accordingly reversed the judgment.<sup>124</sup>

In his majority opinion for the First Circuit, Judge Bruce Selya clarified the court’s opposition to the opinion below, writing that “in both criminal and civil cases, the claim that [the Sherman Act] applies extraterritorially is based on the same language in the same section of the same statute,” and that “common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.”<sup>125</sup> Judge Selya read *Hartford Fire* to “suggest[] that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible.”<sup>126</sup> Since the acts alleged were illegal in both Japan and the United States, there was no “founded concern about [the defendant] being whipsawed between separate sovereigns.”<sup>127</sup> Judge Selya went on to acknowledge that

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120. *Id.* at 65.

121. *Id.*

122. *See id.*

123. *See id.* at 66 (citing statement of Senator Sherman in 21 CONG. REC. 2461 (1890) that, “[e]ither a foreigner or a native may escape ‘the criminal part of the law’ . . . by staying out of our jurisdiction, as very many do, but if they have property here it is subject to civil process. . . . [A foreigner] may combine or conspire to his heart’s content if none of his co-conspirators are here or his property is not here.”).

124. *See United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 1 (1st Cir. 1997).

125. *Id.* at 4.

126. *Id.* at 8.

127. *Id.* *But see id.* at 10-11 (Lynch, J., concurring). In his concurring opinion, Judge Lynch inquired into the degree to which the indictment was valid under customary international law, which Judge Lynch had read as “articulat[ing] principles, derived from international law, for determining when the United States may properly exercise regulatory . . . jurisdiction over

[w]e live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. . . . [A] ruling in [the defendant's] favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect.<sup>128</sup>

His concerns echo those that had previously prompted U.S. securities regulators to reach extraterritorially and had caused the *Banca Della Svizzera Italiana* district court to voice its dismay that the “integrity of [American] financial markets” was “being continually thwarted by the use of foreign bank accounts.”<sup>129</sup>

Judge Selya’s opinion recognized that technically, in *Hartford Fire*, the Supreme Court did not accept the validity of comity analysis.<sup>130</sup> He described “[c]omity [a]s more an aspiration than a fixed rule, more a matter of grace than a matter of obligation.”<sup>131</sup> Moreover, Judge Selya’s concerns about the misuse of “territorial firewalls” mirror those in *Banca Della Svizzera Italiana*, rejecting comity concerns in the context of discovery for financial market regulation—even where defendants *were* being whipsawed.<sup>132</sup> The Second Circuit’s decisions have shifted from the nearly automatic withholding of jurisdiction if a defendant was whipsawed,<sup>133</sup> to the adoption of a comity balancing test,<sup>134</sup> to a refusal to apply comity

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activities or persons connected with another state.” *Id.* at 11. Notably, the Government of Japan filed an amicus brief in favor of dismissing the indictment.

128. *Id.* at 8.

129. 92 F.R.D. 111, 117 (S.D.N.Y. 1981) (quoting Congress’ finding that “secret foreign financial institutions . . . have allowed Americans and others to avoid the law and regulations concerning securities and exchanges. . . . The debilitating effects of the use of these secret institutions on Americans and the American economy are vast.”).

130. *See Nippon Paper Indus.*, 109 F.3d at 8. The Supreme Court “suggested that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible.” *Id.* (emphasis added). *See also* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798. “Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. [And we] *need not decide* that question here, however, for even *assuming* that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct, international comity would not counsel against exercising jurisdiction in the circumstances alleged here.” *Id.* (emphasis added and internal citations omitted); *see also* *United States v. Time Warner*, 1997-1 Trade Cas. ¶ 71,702, 1997 WL 118413, \*6 (D.D.C. Jan. 22, 1997) (strongly repudiating application of comity).

131. *Nippon Paper Indus.*, 109 F.3d at 8.

132. 92 F.R.D. at 117-118.

133. *See First Nat’l City Bank v. IRS*, 271 F.2d 616 (2d Cir. 1959).

134. *See Trade Dev. Bank v. Continental Ins., Co.*, 469 F.2d 35 (2d Cir. 1972).

because of suspicion that it could be exploited by wrongdoers.<sup>135</sup> In the early Second Circuit cases, the Court relied on the idea that a consensus among American and foreign regulators obviated the need for U.S. courts to exercise their Congressionally-granted jurisdiction. However, this consensus—if it ever existed—became less persuasive over time. Despite today’s “global marketplace,” it is unclear whether a consensus still exists with regard to antitrust law.

#### IV. THE BOEING INVESTIGATIONS: ANTITRUST EXTRATERRITORIALITY AS POLITICAL DYNAMITE

In the context of antitrust extraterritoriality, the American judiciary’s incremental movement toward rejecting comity contrasts sharply with the abrupt speed of the European Commission’s challenge to the merger of two American aerospace giants, Boeing and McDonnell Douglas. The Boeing/McDonnell Douglas merger investigations by the Federal Trade Commission (FTC) and the European Commission’s Directorate General IV (European Commission) and the surrounding political brinkmanship show that extraterritorial enforcement of competition policies can be a flash point of international conflict. The very existence of the European Commission’s investigation also suggests that an international understanding to forego enforcement of the competition laws of a nation or economic union against conduct beyond its borders no longer exists, if it ever did.<sup>136</sup>

The European Commission’s investigation was focused on a *merger*, rather than on past acts by companies that had participated in overseas product markets. While the merger involved overlapping jurisdictions, it did not involve a direct conflict of American and European law. As markets, economic actors, and regulators increasingly traverse national borders, the opportunities for conflict multiply. The force behind this conflict is identical to the pressure for

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135. See *Banca Della Svizzera Italiana*, 92 F.R.D. 111.

136. The United States and the European Union have recently signed a “positive comity agreement.” See *United States, European Union Sign Comity in Competition Pact*, 1 COMPETITION LAW 579, (1998) (reporting the June 4, 1998 signing of the “[a]greement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws”). The new agreement does not apply to merger enforcement and would, of course, not apply to private suits. See *id.* Its future impact is unclear, as its primary effect is to “outline[] procedures under which one government may request another government to use its own antitrust laws to address anti-competitive behavior affecting the requesting government.” *Id.*

trade protectionism: strong domestic interests in most democratic nations demand that politicians shelter domestic jobs and industries.<sup>137</sup>

The Boeing investigations illustrate the conflict stemming from divergent American and European interests and standards of pre-merger analysis. In December 1996, the Seattle-based Boeing Company announced its intention to acquire its biggest domestic competitor, St. Louis-based McDonnell Douglas. Combined, the two firms employed 190,000 workers,<sup>138</sup> and had no aircraft production facilities located in Europe.<sup>139</sup> Before the merger, Boeing was the United States' largest exporter, selling sixty percent of its merchandise abroad.<sup>140</sup> After the merger, Boeing would become the sole American manufacturer of commercial-jet aircraft, would possess two-thirds of the worldwide market, and would be the United States' second largest defense contractor.<sup>141</sup>

On July 1, 1997, the FTC announced that it had closed its investigation of the Boeing/McDonnell Douglas merger. Four of the five commissioners decided that "the acquisition would not substantially lessen competition in . . . either defense or commercial aircraft markets."<sup>142</sup> The FTC also found that "there are no current or future procurements of fighter aircraft by the Department of Defense in which the two firms would likely compete."<sup>143</sup> With respect to commercial aircraft, the FTC cited "evidence that (1) McDonnell Douglas, looking to the future, no longer [would] constitute[] a meaningful competitive force . . . and (2) there [was] no economically plausible strategy that McDonnell Douglas could follow, either as a stand-alone concern or as part of another concern, that would change

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137. Indeed, British legislators' catering to domestic insurers at the expense of American insurance consumers "permitted greater collusion among insurers than was permitted in the United States," possibly "because a more permissive attitude towards anti-competitive conduct [would] allow domestic producers to increase their profits at the expense of foreign consumers to an extent sufficient to offset the loss to domestic consumers from the same anti-competitive conduct." Dodge, *supra* note 10, at 156-57. This alleged bias towards the interests of domestic producers exists in U.S. law as well. See The Foreign Trade Antitrust Improvements Act, 15 U.S.C. §§ 6(a), 45(a)(3) (1994) (exempting U.S. export commerce from the U.S. antitrust laws, provided there are no "direct, substantial and reasonably foreseeable" effects on domestic commerce or other domestic exporters).

138. See Ken Silverstein, *The Boeing Formation*, HARPER'S MAG., May 1997, at 56-57.

139. See *A 'Dangerous' Merger?*, WALL ST. J., July 21, 1997, at A22.

140. See Silverstein *supra* note 138, at 57.

141. See *id.*

142. *Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney* (last modified Aug. 28, 1998) <<http://www.ftc.gov/opa/1997/9707/boeingsta.htm>>

143. *Id.*

that grim prospect.”<sup>144</sup> After a “lengthy and detailed investigation into the acquisition’s potential effects on competition,” the FTC concluded that McDonnell Douglas was “no longer in a position to influence significantly the competitive dynamics of the commercial aircraft market,” due to its failure to invest sufficiently in “new product lines, production facilities, company infrastructure, or research and development.”<sup>145</sup>

The European Commission did not view the merger so benignly. It notified Boeing of its objection to the merger in May 1997 and announced a July deadline for its official statement on the merger.<sup>146</sup> The European Commission’s investigation was driven by its Merger Regulation, which applies to all companies that have a “community dimension.”<sup>147</sup> Under the Merger Regulation, a proposed merger is reviewed using a three-step process that includes: (1) defining the relevant product and geographic markets; (2) determining whether the company in question has a “dominant position”; and (3) considering whether the dominant position, if any, presents a significant impediment to competition.<sup>148</sup> For the Boeing/McDonnell Douglas merger, the European Commission defined the relevant product market as “large commercial jet aircraft,” the relevant geographic market as worldwide,<sup>149</sup> and concluded that Boeing’s pre-merger sixty-four percent worldwide market share for large commercial jets and installed base of sixty percent of planes in service amounted to a dominant position.<sup>150</sup> The European Commission expressed concerns that the acquisition of McDonnell Douglas would increase Boeing’s customer base from sixty percent to eighty-four percent of those planes then in worldwide service, and that Boeing would have an increased ability to negotiate with customers for exclusive supply arrangements, such as those it had obtained with American Airlines and Delta Airlines, thus foreclosing competitors from significant segments of the worldwide market for large

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144. *Id.*

145. *Id.*

146. *See Cool Heads Needed in Brussels and Washington*, 9 FIN. TIMES BUS. L. EUR. 16, May 29, 1997 (reporting that the Commission had informed Boeing and McDonnell Douglas of its concerns).

147. *See* Commission Regulation 1310/97, 1997 O.J. (L 180) 1 (defining “community dimension”).

148. *See* Commission Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 16.

149. *See* Commission Decision of 97/816, 1997 O.J. (L 336) 17-19.

150. *See id.* at 22, 24.

commercial jets.<sup>151</sup> Citing the additional concern that Boeing's acquisition of McDonnell Douglas' defense division would enhance its access to government-funded research and development, the European Commission concluded that the merger would strengthen Boeing's existing dominant position.<sup>152</sup>

After several weeks of tense negotiations and political brinkmanship,<sup>153</sup> on July 30 the European Commission issued its final approval of the merger, specifically noting concessions it had wrung from Boeing.<sup>154</sup> The European Commission had decided that because Boeing's concessions would remedy the problems it had uncovered, the merger was not unlawful.<sup>155</sup> The key concessions were that Boeing would: (1) end existing and future exclusive supply deals with several airlines; (2) "ring-fence"<sup>156</sup> McDonnell Douglas' commercial division for ten years; and (3) license nonexclusive patents generated through government-funded research to other jet aircraft manufacturers.<sup>157</sup> While Boeing avoided sanctions and further litigation, it was forced to significantly change the future operation of the merged firm and submit to the Commission's ongoing monitoring of its government-funded research.<sup>158</sup>

The European Commission succeeded in extracting significant concessions from an American company with no European operations, without a comity analysis or other explicit deference, based solely on the European Commission's predictions of a merger's possible future effects within its jurisdiction and its power to levy sanctions.<sup>159</sup> Although the European Commission cited concerns including indirect subsidies to Boeing through U.S. defense contracts, a four-percent rise in Boeing's share of the worldwide commercial aircraft market, and Boeing's exclusive sales contracts, more than a few American officials saw another concern at work during the negotiations: Airbus Industrie, Boeing's major competitor, which historically has been subsidized by the governments of four of the

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151. *See id.* at 24.

152. *See id.* at 30-36.

153. *See A 'Dangerous' Merger?*, *supra* note 139.

154. *See* Commission Decision of 97/816, *supra* note 149, at 36-38.

155. *See id.* at 39.

156. To "ring-fence" a division, component, or subsidiary is to operate the unit as a separate business entity. *See Boeing-McDonnell Merger Clears Hurdle*, WALL ST. J., July 24, 1997, at A2.

157. *See id.* at 38-39.

158. *See id.* at 37-38.

159. For example, the Boeing faced a potential fine of up to 10% of its annual revenue. *See* Council Regulation 4064/89, 1990 O.J. (L 257) 21.

European Commission's member states.<sup>160</sup> European Commission officials denied this contention.<sup>161</sup>

Although the Boeing/McDonnell Douglas merger may appear unique due to the conflicting interests of Europe's Airbus, it would be a mistake to assume that such conflicts can only be produced by one case. Producers in different nations often have conflicting economic interests,<sup>162</sup> and different competition authorities use strikingly different criteria for decision making—another possible source of friction. For U.S. authorities, consumer welfare is the lodestone of merger review.<sup>163</sup> Likewise, the European Commission views consumer welfare as important, but it also considers non-competitive concerns such as fostering economic integration among member states.<sup>164</sup> Depending upon the interpretation of its regulations, the European Commission's guiding laws may expressly authorize antitrust actions aimed at protecting European competitors.<sup>165</sup> Concerns such as regional integration or protecting domestic industry

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160. See, e.g., Alex Fryer, *Europeans, Boeing May Have a Deal*, SEATTLE TIMES, July 22, 1997, at A1 (reporting that U.S. Representative Jack Metcalf (R-Wash.) planned to introduce a House resolution condemning the Commission investigation as an “unwarranted and unprecedented interference in a United States business transaction”); *Clinton Hints U.S. May Retaliate if EU Tries to Block Boeing-McDonnell Deal*, WALL ST. J., July 18, 1997, at A2.

161. See Official Press Release of European Union, IP/97/400 (May 13, 1997) (available at <<http://europa.eu.int/comm/dg04/pressre.htm>>) (quoting Karel Van Miert, European Commissioner in charge of Competition Policy, as stating that “our analysis of this case is strictly conducted along the lines and criteria which have been spelled out in the legal framework of the merger Regulation, and nothing else”).

162. See Dodge, *supra* note 10 (noting that nations have a systematic bias towards under-enforcement of antitrust regulation versus their domestic producers).

163. See, e.g., *Minutes of the Roundtable Conference with Enforcement Officials*, ABA Section of Antitrust Law, 45th Annual Spring Meeting (Apr. 11, 1997) (quoting FTC Chairman Robert Pitofsky as stating that the new merger guidelines do not view general welfare as a recognizable efficiency, and that “[a]ntitrust is about producing competitive markets that give consumers better products at lower prices”).

164. See, e.g., Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257), Recitals 2-4, 13 (reciting that the promulgation of the Merger Regulation was consistent with the goals of increasing Europe's industrial competitiveness and furthering European integration, as well as consumer welfare).

165. See Amy Ann Karpel, Comment, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029, 1057 n.168. “An attempt to foster European industry would not have been a contravention of EC law, for the goal of EC Competition Policy is not only to promote competition, but also to promote the strength of European industry.” *Id.* (citing Regulation 4064/89, recitals 4, 13, at 14-15, which state that mergers should be reviewed in part on their effect on the competitiveness of European industry and European integration).

are not generally considerations of the U.S. antitrust enforcement agencies.<sup>166</sup>

The differences in approach are not confined to the United States and the European Union. For example, Japan's Fair Trade Commission has historically made exceptions for "rationalization cartels" (also known as "depression cartels") in industries characterized by overcapacity.<sup>167</sup> China, an increasingly important market, has also fostered the creation of price fixing cartels in ailing industries.<sup>168</sup> By contrast, the U.S. Department of Justice views all intentional cartel formation or price-fixing behavior as a criminal offense, even where the defendant is a foreign entity.<sup>169</sup>

The European Commission's Boeing investigation demonstrates that, at least with respect to Europe, any American approach to comity regarding antitrust extraterritoriality cannot proceed on an assumed consensus among nations. Furthermore, a direct conflict between American and foreign law, while perhaps not present in the Boeing investigations, is increasingly likely to occur now that the Boeing investigation has paved the way for greater extraterritorial enforcement of antitrust law in the future. To the extent that the United States further engages in enforcement that conflicts with the authority and law of other nations, U.S. courts will often have to address what weight to give those nations' laws.

## V. THE *ERIE* PROBLEM, OR WHENCE COMITY?

The *Hartford Fire* Court presumed that, were a comity analysis necessary, it would be guided by the principles of the *Restatement*

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166. See *Minutes of the Roundtable Conference*, *supra* note 163.

167. See W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 590 (1996) (listing exceptions to Japan's Antimonopoly Law, including "depression and rationalization cartels"); M. Matsushita, *The Antimonopoly Law of Japan*, 11 *LAW IN JAPAN* 57, 66 (1978) (noting that the exception for a depression cartel agreement is possible "when the price of [manufacturers'] product drops below the average production cost and it would be hard to overcome this difficulty through rationalization").

168. See *China Fosters Price-Fixing Cartels as Economy Crimps Firms' Profits*, *WALL ST. J.*, Dec. 3, 1998, at A17 (noting that "[g]overnment officials say the steps are necessary" but that "Chinese economists . . . say China needs antitrust legislation").

169. See, e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 2 ("[T]he United States attempt[ed] to convict a foreign corporation under the Sherman Act . . . alleging that price-fixing activities which took place entirely in Japan are prosecutable because they were intended to have, and did in fact have, substantial effects in [the United States].").

(*Third*) of the *Foreign Relations Law of the United States*.<sup>170</sup> The First Circuit in *Nippon Paper Industries*<sup>171</sup> and the Ninth Circuit in *Metro Industries*<sup>172</sup> followed similar reasoning. Many courts have also presumed that federal common law incorporates customary international law (CIL).<sup>173</sup> In fact, the concurrence in *Nippon Paper Industries* espoused a similar view, finding it necessary to adopt an “interpretation of the Sherman Act [that] does not conflict with other legal principles, including principles of international law”<sup>174</sup> and then applying the *Restatement (Third) of the Foreign Relations Law of the United States*, which “restates international law, as derived from customary international law and from international agreements.”<sup>175</sup>

There is disagreement, however, on whether CIL forms part of the body of federal common law.<sup>176</sup> In general, the critiques on Sherman Act extraterritoriality stem from the positivist inquiry regarding CIL. This line of inquiry asks “what is the source of [CIL] norms, . . . how can they apply as law within the United States, . . . [and] who are judges to be making this law?”<sup>177</sup> Professors Curtis

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170. 509 U.S. 764, 799 (1993) (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403 cmt. e, 415 cmt. j(1987)). See also *id.* at 813-21 (Scalia, J., dissenting).

171. 109 F.3d at 8.

172. 82 F.3d 839, 846 n.5 (9th Cir. 1996) (quoting *Hartford Fire*'s view of comment e of section 403, and comment j of section 415 of the *Restatement*).

173. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (noting the “settled proposition that federal common law incorporates international law”), *cert. denied*, 518 U.S. 1005 (1996); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (stating that “the law of nations is part of federal common law”), *cert. denied*, 508 U.S. 972 (1993); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (deeming it “well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law”).

174. 109 F.3d at 10 (Lynch, J., concurring).

175. *Id.* at 11.

176. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 876 (1997) (stating that “both the academy and the courts have taken for granted fundamental propositions about the domestic legal status of CIL”); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1266 (concluding that “[b]ecause asking the courts to apply customary international law to control the executive in foreign relations matters is, as *Erie* makes clear, asking them to claim authority over foreign relations matters, if the courts do not have that authority they must decline the invitation to act as though they had the authority”).

177. Lawrence Lessig, *Erie Effects*, 110 HARV. L. REV. 1785, 1796 (1997) (characterizing the dilemma posed by Professors Bradley and Goldsmith regarding the validity of CIL as federal common law). See, e.g., Weisburd, *supra* note 176 at 1267 (maintaining that “to the extent the federal courts may apply customary international law, this law is subject to all the limitations to which other branches of federal common law are subject”).

Bradley and Jack Goldsmith remark that “for several decades after *Erie*, it remained an open (and generally unaddressed) question whether CIL was part of th[e] new federal common law.”<sup>178</sup> They contend that “the recent ascendancy of CIL to the status of federal common law is the result of a combination of troubling developments, including mistaken interpretations of history, doctrinal bootstrapping by the *Restatement (Third) of Foreign Relations Law*, and academic fiat.”<sup>179</sup>

The implication of this argument is that courts cannot restrict the Sherman Act’s reach without indicating the source of the restriction. The sole Congressional enactment on the Sherman Act’s foreign scope, the Foreign Trade and Antitrust Improvements Act (FTAIA), provides that the Sherman Act is inapplicable to “conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations.”<sup>180</sup> By its terms, the FTAIA covers only export trade and provides no guidance with respect to non-export trade, such as trade in imports or domestic trade.<sup>181</sup> But it essentially codifies the *Alcoa* test as the inquiry to apply to antitrust claims regarding American export commerce. Notably, the FTAIA contains no comity analysis.<sup>182</sup> The FTAIA’s existence as the sole

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178. Bradley & Goldsmith, *supra* note 176, at 821.

179. *Id.*

180. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290 § 402, 96 Stat. 1233, 1246 (codified at various sections of 15 U.S.C. §§ 6a, 45(a) (1994)).

181. *See id.*

182. The idea that Congress has not given the courts power to halt antitrust enforcement based on comity and that this power does not come from elsewhere—including CIL—may be gaining ground. *See, e.g.,* United States v. Time Warner, Inc., No. MISC.A. 94-338(HHG), 1997 WL 118413, at \*6 (D.D.C. Jan. 22, 1997) (dismissing an attempt, based in part on the FTAIA and in part on comity concerns, to thwart extraterritorial discovery by the Justice Department in a price-fixing investigation, and stating that “[t]he Executive Branch . . . is charged with determining whether the importance of antitrust enforcement outweighs any relevant foreign policy concerns”). It should be noted, however, that the FTAIA’s legislative history contains an explicit statement by Congress expressing no view whether a court with subject-matter jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. *See* H.R. REP. NO. 97-686, at 13 (1982) (“If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court[’s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction.”). The Supreme Court took explicit note of this Congressional statement in *Hartford Fire*, 509 U.S. 764, 798 (1993).

statutory authorization on the subject suggests that a comity analysis is inappropriate.

Professors Bradley and Goldsmith note that while “[t]he courts have already endorsed the modern position that CIL has the status of federal common law, . . . they have not yet embraced some of the implications of this claim.”<sup>183</sup> Although Professors Bradley and Goldsmith did not mention the Sherman Act specifically, the *Hartford Fire* court treated the Restatement (and therefore, CIL) as legal authority while assuming, without concluding, that the end result of its application was required.<sup>184</sup> The positivist critique points to the difficulty inherent in restricting statutory law on the grounds of relatively undefined principles.

Customary international law poses two types of constitutional dilemmas in the Sherman Act context. First, CIL would dip a judicial hand into foreign relations and the complex, agency-governed application of federal antitrust laws. Fundamentally, this poses a problem of institutional competence—one that the Constitution may already have resolved.<sup>185</sup> But the application of CIL to Sherman Act extraterritoriality also creates a second, counter-majoritarian dilemma. Specifically, it would allow CIL to restrict the reach implied by the Sherman Act and the FTAIA, statutes enacted by elected representatives. Additionally, CIL’s jurisdictional limits, whether they reside in the “old CIL,” reflecting a set of traditional understandings among nations that governed their relations, or the new normative, human rights-oriented CIL, have not been subjected to a vote. In the Cold War’s aftermath, competition among nations has shifted from military power to economic power.<sup>186</sup> The American judiciary should hesitate to restrict laws that enhance the nation’s ability to enforce its consumers’ interests in this new arena of international competition, especially when courts cannot point to a positive source for the basis on which they are doing so.

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183. Bradley and Goldsmith, *supra* note 176, at 874.

184. See *Hartford Fire*, 509 U.S. at 799 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW §§ 415 cmt. j, 403 cmt. e (1987)); see also *id.* at 813-21 (Scalia, J., dissenting).

185. See, e.g., Chung, *supra* note 10, at 397 n. 218 (citing *Laker Airways Ltd. v. Saberra*, 731 F.2d 909 (D.C. Cir. 1984) as supporting the theory that “the courts are not the proper forum to balance the myriad global concerns implicated in international antitrust disputes”); cf. Dam, *supra* note 10, at 317-23 (expressing concern that without comity, the judicial branch would affect foreign relations by allowing private antitrust actions to proceed).

186. See Kevin Phillips, *Troops Must Come Home to Win the Economic War*, L.A. TIMES, Mar. 4, 1990, at 3 (prominent Republican advisor discussing the challenge of shifting from a global military competition to an economic one).

In sum, CIL, as a source of restraint on the Sherman Act, appears questionable because of CIL's inherent lack of authority in the *Erie* sense and the renewed focus on economics as a field of competition among nations. To the extent that CIL has been described as a set of understandings "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation,"<sup>187</sup> CIL seems all the less legitimate given the increasing interdependence of national economies and the shift in focus among states from military to economic competition. Additionally, given both *Hartford Fire* and the Boeing incident, there appears to be an erosion of any consensus on CIL's stance on the non-extraterritorial application of antitrust law among sovereign states. After all, it is unlikely that the U.S. Supreme Court was unaware of the possibility that American antitrust law could significantly impact foreign interests, even in the absence of a direct conflict of American and foreign laws. Similarly, the European Commission's willingness to interfere with the Boeing/McDonnell Douglas merger demonstrates that foreign antitrust enforcers have also decided that any consensus behind comity has eroded.

## VI. CONCLUSION

If the interests of the United States and other nations were nearly identical, and if there were an international consensus as to its regulation and extraterritorial scope, the interests of both the United States and other nations could be served by a doctrine that encourages courts to restrain the exercise of antitrust jurisdiction in response to comity concerns. But the dispute between Boeing and the European Commission suggests that there is no such international consensus. Additionally, to the extent that national interests diverge and antitrust policy can and will be used to further those interests, it is not clear when, if ever, there will be a true international consensus. As the Second Circuit acknowledged when it addressed arguments that comity should compel courts to withhold jurisdiction in financial market regulation actions, nations with interests that differ from those of the United States can become havens for those who seek to simultaneously exploit American markets and avoid U.S. regulations. Judge Selya's awareness of this danger in *Nippon Paper Industries* suggests that the lower courts may begin to be swayed by concerns

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187. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

that counsel in favor of exercising extraterritorial jurisdiction, particularly given the fact that *Hartford Fire* has confined comity to a limited role.

Increased extraterritorial application of U.S. antitrust laws may not be an adequate response to the need for cooperation in international relations. However, there are several countervailing points favoring extraterritoriality. First, international cooperation can still take place, but it will be against a backdrop of U.S. courts that are prepared to apply U.S. law extraterritorially after a simple “whipsaw” comity inquiry. Second, the extraterritorial application of American antitrust standards could actually spur international negotiations, although such negotiations will not be instantaneous. If courts continue to limit or abandon comity concerns in deciding whether to apply U.S. antitrust law extraterritorially, they will supply an additional benefit: it should be easier for businesspeople and regulators to predict whether conduct is governed by U.S. law. Finally, to the extent that comity concerns are incompatible with other features of U.S. law (such as extraterritorial financial market regulation and the need for an ascertainable source of law after *Erie*), a judicial approach that limits or abandons comity analysis better comports with established principles.