

# APPENDIX

## EXTRATERRITORIAL ENFORCEMENT OF ANTITRUST LAWS AGAINST FOREIGN FIRMS

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Although substantial litigation exists concerning the issue of whether the United States should exercise jurisdiction in antitrust cases against foreign firms, the courts have rarely explored the issue of enforcement of judgments in these cases. United States law affords to the judiciary a broad range of acceptable mechanisms for the enforcement of antitrust judgments by the United States against foreign firms. Section 431 of the Restatement (Revised) of Foreign Relations Law of the United States provides that a state may employ judicial measures to induce or compel compliance or punish noncompliance with its laws or regulations, provided those laws or regulations are based on jurisdiction to prescribe.<sup>1</sup> Comment *b* to section 431 lists the following illustrative judicial enforcement measures: fines, imprisonment, seizure of goods by the customs service, and freezing of assets.<sup>2</sup>

Discovery requests, particularly requests for documents, have produced most of the published opinions concerning enforcement jurisdiction of U.S. courts in antitrust cases.<sup>3</sup> These cases illustrate the types of sanctions which U.S. courts have been willing to impose. For example, in *In re Westinghouse Electric Corp. Uranium Contracts Litigation*,<sup>4</sup> the district court held a Delaware corporation, which had its corporate office in Canada, in contempt for failing to produce documents located in its Canadian office. The order imposed a fine of \$10,000 per day for each day that the company failed to comply, and also authorized that if the fine was not paid, a U.S. marshal should seize corporate property in Utah in sufficient value to satisfy the fine. The Tenth Circuit reversed the contempt order,<sup>5</sup> however, because it determined that the company had made diligent efforts to produce the requested materials. Nevertheless, at least one appellate decision, not involving the antitrust laws,

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1. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 431 (Tent. Draft No. 6, 1985).

2. *Id.* § 431 comment b.

3. For a general discussion of extraterritorial discovery orders, see Note, *Beyond the Rhetoric of Comparative Interest Balancing: An Alternative Approach to Extraterritorial Discovery Conflicts*, LAW & CONTEMP. PROBS., Summer 1987, at 95.

4. 563 F.2d 992, 994, 997-99 (10th Cir. 1977).

5. *Id.* at 999.

upheld the imposition of a fine on a foreign bank for noncompliance with a discovery order relating to documents located abroad.<sup>6</sup>

In another case dealing with the Uranium cartel, a district court grappled with the preliminary question of whether to exercise its enforcement jurisdiction and compel the production of documents.<sup>7</sup> The court determined that where it had jurisdiction over the persons in control of the requested documents, it had the power to compel production.<sup>8</sup> A violation of the court's discovery order presumably would have subjected the foreign entities to the types of sanction described previously.

No reported cases exist which have imposed other enforcement measures, such as injunctions barring the importation of goods from a foreign cartel or firm. One commentator, observing the absence of such injunctions, stated that such "an importation ban would serve the two major principles of antitrust relief: to make the remedy as effective as possible . . . and to deprive defendants of the fruits of their antitrust violations. . . ."<sup>9</sup> The author noted further that "injunctive relief barring importation of any 'price fixed' goods can be readily enforced against private and government cartelists, though such measures may be counterproductive in certain situations."<sup>10</sup> Enforcement could be effected against foreign antitrust violators through a court's contempt powers over any entity that imported or distributed the good subject to the injunction.

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6. *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

7. *See In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979).

8. *Id.* at 1154-55. For a more recent case relying upon the balancing factors listed in section 40 of the 1965 version of the *Restatement (Second) of Foreign Relations Law of the United States*, see *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 126 (8th Cir. 1986) (court did not specify the sanctions which may be applicable for noncompliance with a judgment), *cert. granted*, 106 S. Ct. 2888 (1986).

9. Note, *The Applicability of Antitrust Laws to International Cartels Involving Foreign Governments*, 91 *YALE L.J.* 765, 775 n.41 (1982).

10. *Id.* at 769.

