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NOTE

EXTRATERRITORIAL APPLICATION OF THE FEDERAL ANTITRUST LAWS: EXPANDING THEIR CRIMINAL REACH UNDER *NIPPON PAPER*¹

I. INTRODUCTION

As the global economy expands into the twenty-first century, both international trade and restraints on trade are growing exponentially. As the value and scope of international trade increases, the subsequent advantages and disadvantages begin to disregard national boundaries in this shrinking world.² Multinational corporations have become commonplace and foreign industries have increasing influence in the marketplaces of other countries. We 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.³ "However, extraterritoriality—a country's assertion of jurisdiction over activities occurring outside its borders—is often controversial because every such exercise of jurisdiction infringes on another country's sovereignty to some degree."⁴

United States courts have seen fit to expand their jurisdictional reach into civil antitrust actions predicated on wholly foreign conduct.⁵ However, the U.S. courts have never previously explored the jurisdictional reach that is appropriate for criminal actions based on wholly foreign conduct.⁶ In *Nippon Paper II*, the U.S. Court of Appeals for the First Circuit examined what may form the basis for a criminal prosecution under Section One of the Sherman Antitrust Act for wholly extraterritorial conduct.⁷ The First Circuit in *Nippon Paper II* rejected the arguments that resulted in a dismissal ordered by the United States District

1. *U.S. v. Nippon Paper Indus. Co., Ltd. (Nippon Paper II)*, 109 F.3d 1 (1st Cir. 1997), cert. denied, 118 S.Ct. 685 (1998)(No. 96-1987).

2. *Chua Han Mow v. United States*, 730 F.2d 1308 (9th Cir. 1984) cert. denied, 470 U.S. 1031 (1985) (applying a criminal statute to conduct occurring in Malaysia involving drugs intended for distribution in the United States) cited in *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), cert. denied, 118 S.Ct. 685 (1998) (No. 96-1987).

3. *Nippon Paper II*, 109 F.3d at 8.

4. Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka & Yokota, and "Footnote 15" Scenarios*, 46 RUTGERS L. REV. 821 (1994).

5. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2nd Cir. 1945) (*Alcoa*).

6. *Nippon Paper II*, 109 F.3d at 4.

7. *Id.* at 1.

Court for the District of Massachusetts in *Nippon Paper I*,⁸ and held that activities committed abroad which have substantial and intended effects within the United States may form the basis for criminal prosecution under Section One of the Sherman Act.⁹

This note will discuss the First Circuit's treatment of the statutory construction of the Sherman Act, the "substantial and intended effect" standard, and the doctrine of international comity. Section II will examine the *Nippon Paper II* decision, which addresses the jurisdictional reach of the United States in criminal antitrust prosecutions. Section III examines the legal background of cases that led to the extrapolation of the doctrine that formed the basis for the *Nippon Paper II* decision. Finally, Section IV provides a legal analysis of the *Nippon Paper II* decision in light of United States law and international concerns, and concludes that the *Nippon Paper II* decision marks a significant growth of United States power in the protection of foreign trade which impacts the United States.

II. THE CASE

A. Procedural History

Nippon Paper Industries Company, Ltd. (Nippon Paper) is a Japanese corporation based in Tokyo that manufactures facsimile paper, popularly known as "fax paper."¹⁰ Nippon Paper was formed in 1993 as a result of a merger between Jujo Paper Co., Inc. (Jujo)¹¹ and Sanyo Kokusaku Co, Ltd., both Japanese corporations that had their principal places of business in Japan.¹²

In 1990, Jujo manufactured fax paper at mills located within Japan.¹³ Jujo did not engage in direct export sales, but instead sold its fax paper in Japan to unaffiliated trading houses.¹⁴ Jujo's sales were limited to two

8. 944 F. Supp. 55 (D.Mass. 1996) (*Nippon Paper I*), *rev'd* 109 F.3d 1 (1st Cir. 1997).

9. *Nippon Paper II*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987).

10. *Nippon Paper I*, 944 F. Supp. at 58.

11. *Nippon Paper II*, 109 F.3d at 1. Jujo was named a codefendant in the grand jury investigation. However, between the alleged conspiracy agreement and the District Court's decision in 1995, Nippon Paper was created as a corporation included Jujo, and the government alleged that it had assumed Jujo's assets and liabilities. Because the issue of successor liability was not raised before the Court of Appeals, the court decided to treat Nippon Paper as the sole defendant and as if it, and not Jujo, were alleged to have committed the acts.

12. *U.S. v. Nippon Paper Indus. Co. Ltd.*, 944 F. Supp. 55, 58 (D.Mass. 1996).

13. *Id.*

14. *Id.*

Japanese trading companies, Japan Pulp & Paper Co., Ltd. (JPP) and Mitsui & Co., Ltd. (Mitsui).¹⁵ Both JPP and Mitsui exported the fax paper to their respective subsidiaries in the United States and those subsidiaries in turn engaged in direct sales to customers within the United States.¹⁶

The alleged conspiracy originated at meetings that were held in Japan in the early part of 1990. Jujo and other Japanese manufacturers of fax paper agreed to increase prices for fax paper to be imported in North America.¹⁷ The government's indictment failed to specify which co-conspirators attended these meetings but conceded that none of the Japanese trade houses nor their American subsidiaries participated in these meetings.¹⁸ The extent of the conspiracy arrangement was that Jujo and the other manufacturers raised their prices for fax paper charged to the Japanese trading houses.¹⁹ Thus, the U.S. Government also contended that JPP and Mitsui became conspirators by agreeing to sell the fax paper in North America with the newly raised price.²⁰ The indictment also alleged that in order to ensure the success of the conspiracy, Nippon Paper monitored the paper trail and confirmed that the prices charged to the final consumers were at the inflated price it had arranged.²¹ In 1990 alone, Nippon Paper sold thermal fax paper worth approximately \$6,100,000 for eventual import into the United States.²² In December of 1995, another Boston grand jury indicted U.S. and Japanese corporations and individuals for participating in price-fixing conspiracies. Jujo Paper Co. Ltd. and Nippon Paper Industries Co. Ltd., both of Tokyo, Japan, were charged with participating in a 1990 conspiracy to fix the price of fax paper sold in North America.²³ That same investigation had already resulted in several individual and corporate guilty pleas, with fines totaling more than

15. *Id.*

16. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 944 F. Supp. 55, 58 (D.Mass. 1996).

17. *Id.* citing Indictment at 7(b). Mitsubishi Paper Mills and New Oji Paper Co. had pleaded guilty in September of 1995 and were fined a total of \$3.55 million. John Gibeaut, *Sherman Goes Abroad: Landmark Decision Oks International Antitrust Prosecution*, 83-JUL A.B.A. J. 42 (1997).

18. *Nippon Paper I*, 944 F. Supp. at 58.

19. *Id.*

20. *Id.*

21. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (No. 96-1987).

22. *Id.*

23. *Id.* Appleton Paper Inc. of Appleton, Wisconsin, its Vice President of Research and Development, Jerry Wallace, and Hirinori Ichida, an executive of Mitsubishi Paper Mills Ltd., of Tokyo, Japan, were also charged with participating in a 1991 conspiracy to fix the price of fax paper sold to customers in North America. *Id.*

\$10 million, by the time that *Nippon Paper I* was heard in the United States District Court for the District of Massachusetts.²⁴ On January 4, 1996, service by certified mail of a criminal summons was made upon Seiichi Masuko, the general manager of the larger of the two Nippon Paper offices in Seattle, Washington.²⁵ In January, 1996, service of a copy of the criminal summons was made on Richard Parker, a partner at the firm of O'Melveny & Myers, who had been active in the law firm's representation of Nippon Paper throughout the grand jury investigation leading to the indictment.²⁶ Subsequently, in-hand service of the criminal summons for Seiichi Masuko was executed by a United States Marshal at Nippon's Seattle office.²⁷

On April 24, 1996, a Boston federal grand jury had already returned two separate indictments charging three Japanese fax paper executives with price fixing in connection with the Department of Justice's investigation into the \$120 million a year thermal fax paper market.²⁸

B. *Summary of the Court's Reasoning*

1. Nippon Paper I

The U.S. District Court granted Nippon Paper's motion to dismiss for failure to state a prosecutable offense under Section One of the Sherman Act.²⁹ The court examined two major issues: personal jurisdiction on the foreign defendants and the extraterritorial application of Section One of the Sherman Act.³⁰ The court focused its analysis of the extraterritorial application of the Sherman Act on two questions: one, whether the gov-

24. *Id.* In September of 1995, Mitsubishi Paper Mills and New Oji Paper Co. agreed to plead guilty and settle price fixing charges. Mitsubishi Paper Mills agreed to pay \$1.8 million and New Oji Paper agreed to pay \$1.75 million in criminal fines. *Id.*

25. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 944 F. Supp. 55, 58 (D.Mass. 1996).

26. *Id.*

27. *Id.*

28. Yoshihiro Kuachi and Noburu Kurushima were charged in a one-count felony indictment with conspiracy to fix the price of thermal fax paper sold to a major customer, Rittenhouse, Inc. *Three Japanese Executive Indicted as Justice Department Continues Its Probe in Price Fixing in the Fax Paper Industry*, FDCH, April 24, 1996, available on LEXIS, NEWS Library, CURNWS File. According to the charges, Kurushima, an executive with Mitsubishi Paper Mills, and Kuachi, an executive with Kanzaki Paper Manufacturing Co. Ltd., met in Japan in 1991 and agreed not to discount the price of fax paper sold to Rittenhouse. As a result, Rittenhouse purchased fax paper at higher prices. *Id.* In a separate indictment, Koichi Tano, an executive with Kanzaki Paper Manufacturing Co. Ltd., was charged with participating in a price fixing agreement from July 1991 until at least February 1992. *Id.*

29. *See id.* at 55.

30. *See id.*

ernment sufficiently pled its claim that a vertical agreement existed between Jujo and the trading houses; and, two, if not, whether the Sherman Act reached the alleged horizontal agreement between Jujo and the other Japanese manufacturers of fax paper.³¹ The court concluded that the government did not sufficiently allege the existence of a vertical agreement and thus, the government would have to prove the existence of a horizontal conspiracy.³² The court placed great weight on the presumption against extraterritorial application of federal statutes, absent a clear expression by Congress to the contrary.³³ The court acknowledged that the Supreme Court had found that the presumption had been overcome in the civil application of the federal antitrust laws,³⁴ but asserted that the presumption carried greater weight when applied to criminal statutes.³⁵ It thus concluded that the line of cases controlling the extraterritorial reach in civil actions was not controlling and the issue was open as a matter of first impression.³⁶

The District Court relied on the case of *United States v. United States Gypsum Company*³⁷ to declare that the language of Section One of the Sherman Act required different treatment in civil and criminal contexts. By extending the *Gypsum* decision, the court concluded that criminal provisions of Section One were held to a greater standard than the civil provisions and that the criminal provisions of the Sherman Act do not apply to conspiratorial conduct in which none of the overt acts of the conspiracy take place in the United States.³⁸

31. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 944 F. Supp. 55, 63 (D. Mass. 1996).

32. *See id.* at 63-64. The court found that the only potential allegation of a vertical conspiracy dealt with the early 1990 meetings and claimed that Jujo directed the co-conspirator trading houses to implement price increases to fax paper customers in North America and participated in telephone conversations and otherwise contacted each other to maintain continued adherence to their conspiratorial agreement. *Id.* citing Indictment @ 7(d) & 7(e).

33. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), cited in *U.S. v. Nippon Paper Indus. Co., Ltd.*, 944 F. Supp. 55, 65 (D. Mass. 1996).

34. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795 (1993), cited in *U.S. v. Nippon Paper Indus. Co., Ltd.*, 944 F. Supp. 55, 65 (D. Mass. 1996).

35. *U.S. v. Bowman*, 260 U.S. 94, 97-98 (1922), cited in *U.S. v. Nippon Paper Indus. Co., Ltd.*, 944 F. Supp. 55, 65 (D. Mass. 1996).

36. *Nippon Paper I*, 944 F. Supp. at 65. The *Nippon Paper I* court stressed the principle that the interpretative flexibility in civil antitrust cases was antithetical to principles of criminal law and permitting the criminal provisions of the Sherman Act to have extraterritorial effect would present serious questions about notice to foreign corporate defendants as to the criminality of its conduct; Michael H. Byowitz, et al., *International Antitrust*, 31 INT'L LAW. 413 (1997).

37. 438 U.S. 422 (1978) (*Gypsum*).

38. *Nippon Paper I*, 944 F. Supp. at 66.

2. Nippon Paper II

The bulk of the defendants' argument was that Section One of the Sherman Act should be measured differently in the criminal context than in the civil line of cases that preceded the court's decision.³⁹ In both criminal and civil cases, the claim that Section One applies to extraterritorial actions is based on the same section of the same statute: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."⁴⁰ The First Circuit did admit that "[w]ords may sometimes be chameleons, possessing different shades of meaning in different contexts."⁴¹ However, the Court also declared that "[c]ommon sense is usually a good barometer of statutory meaning" and that common sense suggested 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.⁴² This common sense approach taken together with the "basic canon of statutory construction,"⁴³ led the court to conclude it was necessary to read the language of the statute in a manner consistent with the prior Supreme Court interpretation in *Hartford Fire Insurance Company v. California*.⁴⁴ The court concluded that unless there were some special circumstances apparent in the case, it would have to follow the lead of the *Hartford Fire* court, which found that the wording of the statute evidenced Congress' intent to apply the Sherman Act extraterritorially in civil actions.⁴⁵

39. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 6 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987).

40. *Nippon Paper II*, 109 F.3d at 4, *quoting* 15 U.S.C. § 1. The remainder of Section One provides the penalties available and states that "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1.

41. *Hanover Ins. Co. v. United States*, 880 F.2d 1504, 1504 (1st Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990), *cited in U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987).

42. *Nippon Paper II*, 109 F.3d at 4.

43. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) ("It is a fundamental interpretative principle that identical words or terms used in different parts of the same act are intended to have the same meaning.")

44. 509 U.S. 764 (1993).

45. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 6 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987).

Nippon Paper and its amicus, the Government of Japan, urged that special circumstances were apparent for reading the statute differently in the criminal context.⁴⁶ The First Circuit decided that only five of Nippon Paper's theories deserved discussion and did not comment on the other theories.⁴⁷ The arguments that the Court deemed worthy for discussion included lack of precedent, difference in strength of presumption, the Restatement, the Rule of Lenity, and concerns of international comity.

1. Lack of Precedent. Nippon Paper stressed that this was a matter of first impression and this was the first criminal case in which the United States sought to extend Section One to wholly foreign conduct.⁴⁸ The Court accepted this argument but declared it was "not impressed" and that this factor was greater proof of the increasingly global nature of our economy rather than Nippon Paper's interpretation that Section One simply could not cover wholly foreign conduct in the criminal context.⁴⁹ Due to other reasons (such as comity concerns), it has not been standard practice for U.S. antitrust enforcers to seek criminal charges. However, that is not a basis for concluding that the U.S. officials do not have sufficient power to seek those punishments. Precisely because there was no precedent stating whether Section One could cover extraterritorial conduct in the criminal context, it was a basis for the court to declare its opinion. While Nippon Paper's assertions are understandable, it runs somewhat contrary to the principles established by precedent and common sense.

2. Difference in Strength of Presumption. Both Nippon Paper and the *Nippon Paper I* court stressed that the presumption against extraterritoriality operates with greater force in criminal litigation rather than civil.⁵⁰ The First Circuit rejected this argument by concluding that a pre-

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. See *United States v. Bowman*, 260 U.S. 94 (1922). The *Bowman* Court discussing a charged conspiracy to defraud, warned that if the criminal law "is to be extended to include those [crimes] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." *Id.* at 98. See also *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). The *Gypsum* Court held that criminal intent generally is required to convict under the Sherman Act. *Id.* at 443. However, the *Gypsum* Court also made it clear that intent need not be shown to prosecute criminally "conduct regarded as per se illegal because of its unquestionably anticompetitive effects." *Id.* at 440. Thus, the Nippon Paper defendants could be convicted of participation in the alleged price-fixing conspiracies without any specific demonstration of criminal intent to violate the antitrust laws.

sumption against extraterritorially is not any different or more resilient in criminal cases than in civil cases.⁵¹

Nippon Paper argued that the presumption should be given greater deference in a criminal case. Our judicial system draws a distinct line between criminal and civil actions. Each has different rules of procedure and different burdens of proof. The basic assumption is that criminal punishments are inherently more grave and thus should be applied with more scrutiny than civil sanctions. The same principle could easily be expanded to address the presumption against extraterritoriality. In the same way that the U.S. is more concerned about the deprivations associated with criminal punishments, it should also be more concerned with enforcing those same deprivations on foreign citizens who are answerable to their own domestic laws.

While it was an error for the First Circuit to dismiss Nippon Paper's argument so quickly, that does not mean it would have been proper to find for Nippon Paper in the case at hand. Even if the presumption against extraterritorial application was more carefully scrutinized in the criminal case against Nippon Paper than it would have been in a civil action, the U.S. antitrust enforcers would have overcome that presumption. The presumption would have been deflated by addressing Nippon Paper executives' willful decision to violate the U.S. antitrust statutes.

3. The Restatement. Nippon Paper and the *Nippon Paper I* court also claimed that the Restatement (Third) of Foreign Relations Law supports a distinction between civil and criminal cases on the issue of extraterritoriality.⁵² The First Circuit once again stated that this merely reinforces the traditional presumption of extraterritoriality and provides no helpful distinction between criminal and civil cases.⁵³ This decision was proper for the First Circuit to decree. On this issue, the provisions of the Restatement simply had collected the historical presumption and expounded that as their own position. The Restatement is persuasive but is not precedent. Even if the court had found that the Restatement stated a different distinction than the traditional presumption, it would have been free to disregard such a distinction and decide against the Restatement's

51. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 6 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987).

52. "[I]n the case of regulatory statutes that may give rise to both civil and criminal liability, such as the United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 (1987).

53. *Nippon Paper II*, 109 F.3d at 7.

provisions. As discussed in the last point, the distinction between criminal and civil could be accepted in general and would be found to be inapplicable to the *Nippon Paper II* scenario.

4. The Rule of Lenity. *Nippon Paper* also asserted the rule of lenity, which provides that, in the course of interpreting statutes in criminal cases, a court should resolve ambiguities affecting a statute's scope in the defendant's favor.⁵⁴ The First Circuit conditioned the use of the rule of lenity to cases where a statutory ambiguity exists and dismissed that notion in the *Nippon Paper II* case.⁵⁵ The court concluded that since the Supreme Court declared it was well established that Section One of the Sherman Act applies to wholly foreign conduct,⁵⁶ they were foreclosed from trying to assert any ambiguity relative to the extraterritorial application of Section One and thus, the rule of lenity played no part in the *Nippon Paper II* case.⁵⁷ Once again, even if the court had believed that there was some ambiguity in the statute, it could not feasibility presume it so ambiguous as to invoke the rule of lenity and preclude the government from acting in the criminal field. Although the court could well believe that there was sufficient ambiguity to impose a higher burden on the government in criminal cases, the ambiguity would not have been sufficient to find the government impotent to assert any criminal provisions of an otherwise perfectly enforceable statute.

5. Concerns of International Comity.⁵⁸ The First Circuit explained away comity concerns as "more an aspiration than a fixed rule, more a matter of grace than a matter of obligation."⁵⁹ The First Circuit also relied upon the suggestion of the Supreme Court in *Hartford Fire* 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 impossi-

54. *Id.* See also *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Crandon v. United States*, 494 U.S. 152, 158 (1990); *United States v. Gibbens*, 25 F.3d 28, 35 (1st Cir. 1994), *United States v. Ferryman*, 897 F.2d 584, 591 (1st Cir. 1990).

55. *Nippon Paper II*, 109 F.3d at 7-8.

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

57. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 8 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987).

58. International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. See Harold F. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 n.1 (1982).

59. *Nippon Paper II*, 109 F.3d at 8.

ble.”⁶⁰ The First Circuit further stated that the conduct with which Nippon Paper was charged was illegal under both Japanese and American law, thereby “alleviating any founded concern about NPI [Nippon Paper International] being whipsawed between separate sovereigns.”⁶¹

Comity concerns are central to the political dimensions created by this case. They provide the strongest reasons for moving this case out of the judiciary and letting the more foreign-oriented bodies such as the Legislative and Executive Branches handle this delicate matter. Comity concerns are expressed in full in Section B of the Analysis Section of this Note.

C. Judge Lynch's Concurring Opinion

The backbone of Judge Lynch's concurring opinion is his evaluation of international law in accordance with the Restatement (Third) of the Foreign Relations Law of the United States [hereinafter Restatement]. He decided to accept this approach after concluding that “United States courts have treated the Restatement as an illuminating outline of central principles of international law.”⁶² Judge Lynch relied heavily on Sections 402⁶³ and 403⁶⁴ for the articulation of general principles and Section

60. *Id.* See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993). See also Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 281, 306-07 (1993).

61. *Nippon Paper II*, 109 F.3d at 8.

62. *Id.* at 11. See also *Hartford Fire Ins. Co. v. California*, 509 U.S. at 799 (citing Restatement); *Hartford Fire Ins. Co. v. California*, 509 U.S. at 818 (Scalia, J., dissenting) (“I shall rely on the Restatement (Third) of Foreign Relations Law for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles . . . and in the decisions of other federal courts. . . .”); *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1047-48 (2d Cir. 1996).

63. Restatement Section 402(1)(c) states that “Subject to § 403, ‘a state has jurisdiction to prescribe law to’ conduct outside its territory that has or is intended to have substantial effect within its territory.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

64. Restatement Section 403(1) states that “even when Section 402 has been satisfied, jurisdiction may not be exercised if it is ‘unreasonable’”. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987). Section 403(2) lists factors to be evaluated in determining if jurisdiction is reasonable:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between the state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the

415⁶⁵ for the application of those general principles to find the “Jurisdiction to Regulate Anti-Competitive Activities.”⁶⁶

Judge Lynch accepted the application of the Restatement’s principles and concluded that the exercise of jurisdiction was reasonable in *Nippon Paper II*, if approached with a step-by-step analysis of the requirements of Section 403 and 415.⁶⁷ First, Judge Lynch reasoned that because “raising prices in the United States and Canada was not only a purpose of the alleged conspiracy, it was the purpose” of the conspiracy, the actions satisfied Section 415’s “principal purpose” requirement.⁶⁸ Secondly, the requirement of “some effect” on U.S. markets was amply satisfied.⁶⁹

After concluding that Section 415’s requirements were satisfied, Judge Lynch assessed the reasonableness analysis concurrent with Section 403.⁷⁰ He determined that the same factors from the Section 415 analysis weighed heavily on the Section 403 analysis.⁷¹ In addition, Judge Lynch compared the relative interests of both the Japanese and U.S. governments and concluded that American interests were greater.⁷² The latter’s

regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

Id. at § 403(2). Section 403(3) is not applicable here. *See id.* at § 403(3) comment e.

65. “Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States and the agreement or conduct has some effect on that commerce.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 415(2) (1987). Comment a to Section 415 states that the reasonableness principles articulated in Section 403 must still be satisfied. *See id.* at comment a.

66. *Nippon Paper II*, 109 F.3d at 11.

67. *Id.* at 12.

68. *Id.*

69. *Id.* The indictment alleged that Nippon Paper sold over six million dollars of fax paper in the United States during 1990. In that same period, total sales of fax paper overall were roughly \$100 million. Thus, Judge Lynch concluded that Nippon Paper’s price increases affected a significant share of the United States market. *Id.*

70. *Id.*

71. *Id.*

72. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 12 (1st Cir. 1997), *cert. de-*

interest in protecting American consumers from price conspiracies was deemed greater than the former's interest in prosecuting the conspirators. Of particular importance was the fact that the alleged antitrust violations were focused wholly on the North American market and had no direct, adverse effects on Japanese consumers. Those factors were crucial in Judge Lynch's comparison of the relative interests of the respective governments. Thus, Japan would probably not enforce their own laws. Another factor that Judge Lynch considered in his Section 403 analysis was that the effects on the United States market were "foreseeable and direct,"⁷³ and not subject to varying interpretations. Also, Judge Lynch determined that it was reasonable to assume that Nippon Paper was probably aware of the antitrust regulation in the international system, and their justified expectations were not hurt by the regulation.⁷⁴ The only factors that Judge Lynch said weighed against U.S. jurisdiction at all was that "the situs of the conduct was Japan and the principals were Japanese corporations."⁷⁵ However, he concluded that "[t]his alone does not tip the balance against jurisdiction."⁷⁶

III. LEGAL BACKGROUND

The *Nippon Paper II* court was not the first court to consider the issues that extraterritoriality can bring into play when combined with antitrust rules and regulations. While the issue of criminal sanctions was a matter of first impression, the Supreme Court had already established a line of cases discussing extraterritoriality in civil cases. This line of cases was neither recent nor excessively challenged over the years.

The earliest Supreme Court case to examine the role of extraterritoriality in the application of federal antitrust laws was *American Banana Company v. United Fruit Company*.⁷⁷ The Court there considered the ap-

nied, 118 S.Ct. 685 (1998) (96-1987). Since only North American markets were targeted, Japan would have no interest in protecting Japanese consumers since they would be unaffected by this conspiracy. *Id.*

73. *Id.*

74. *Id.* Judge Lynch agreed that criminal prosecution may have come as a surprise to Nippon Paper. However, Nippon Paper should have known that civil antitrust liability could include treble damages. A corporation found guilty of a criminal violation of Section One is subject to a fine not exceeding \$10 million. See 15 U.S.C. § 2. Treble damages obviously do not include a similar cap. 109 F.3d at 12 n. 11.

75. *Nippon Paper II*, 109 F.3d at 12.

76. *Id.* at 13.

77. 213 U.S. 347 (1909). Both the plaintiff and the defendant were U.S. corporations engaged in the banana trade in Central America. For several years prior to the formation of the plaintiff corporation, the defendant had been engaged in the practice of purchasing the property and businesses of competitors for the express purpose of prevent-

plication of the Sherman Antitrust Act on a civil action that occurred wholly in Central America and had no discernible impact on imports into the United States. Justice Holmes determined that the "general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."⁷⁸ He stated that, in cases of doubt, a statute should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."⁷⁹ Holmes also noted that if the courts were to act, it would result in "interference with the authority of another sovereign" which would be "contrary to the comity of nations, which the other state concerned justly might resent."⁸⁰ Thus, the holding of the court was that the defendant's actions abroad were not proscribed by the Sherman Act.

Although the federal courts recognized the precedent established in *American Banana*, they had begun to address the extraterritoriality issue differently in *United States v. Aluminum Company of America*.⁸¹ In *Alcoa*, the Second Circuit, sitting as a court of last resort,⁸² considered a civil action brought under Section One of the Sherman Antitrust Act. The action was brought against a Canadian corporation for acts committed entirely abroad that produced substantial anti-competitive effects within the United States.⁸³ Judge Learned Hand read the *American Banana* deci-

ing competition and to control and monopolize the banana trade. *Id.* at 354. The predecessor to the plaintiff had begun to build a railway (which was his only means of export). Due to the inducement of the defendant, the Costa Rican government interfered with the construction of the railway. In the middle of the construction in the November of 1903, Panama revolted and became an independent republic. In June of 1904, the plaintiff purchased the predecessor and began to operate under the laws of Panama. In July of 1904, the Costa Rican government, under the defendant's inducement, seized part of the plaintiff's banana plantation and stopped construction of the railway. As a result of the defendant's acts, the plaintiff was deprived of the use of the plantation and the railway and subsequently injured. *Id.*

78. *Id.* at 356.

79. *Id.* at 357.

80. *Id.* at 356.

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

82. Thus, the decision carries almost Supreme Court stature since the Supreme Court, lacking a quorum of six qualified judges, had certified the case to the Second Circuit as a special statutory court. 46 RUTGERS L. REV. 821, 828 (1994). See 15 U.S.C. § 29 (authorizing designation of a court of appeals as a court of last resort for certain anti-trust actions). See also Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka & Yokota, and "Footnote 159" Scenarios*, 46 RUTGERS L. REV. 821 (1994).

83. The allegation was that the defendant, Alcoa, was monopolizing interstate and foreign commerce, particularly in the manufacture and sale of "virgin" aluminum ingot. 148 F.2d at 422. The crux of the monopolization argument is that Alcoa entered into an exclusive contract with the only holder of the patent necessary to smelt the aluminum un-

sion narrowly and decided that the case should be narrowly tailored "for conduct which has no consequences within the United States."⁸⁴ But Judge Hand expanded the court's role into extraterritoriality and declared that "a sovereign ordinarily can impose liability for conduct outside its borders that produces consequences within them."⁸⁵ This premise provided the basis of Judge Hand's controversial "effects" test. This test would allow application of the Sherman Act to conduct occurring outside of the United States where there is both (1) an intent to affect, and (2) an actual effect on U.S. commerce, regardless of whether the conduct was undertaken by foreign nationals.⁸⁶ He acknowledged that comity considerations demanded the refusal to apply Section One actions where there was no effect within the United States (as in the *American Banana* scenario).

Judge Hand addressed the consideration that the statute, when properly interpreted, did proscribe extraterritorial acts which were "intended to affect imports [to the United States] and did affect them."⁸⁷ Thus the *Alcoa* court held that the presumption against extraterritoriality had been overcome and the Sherman Act had been violated.⁸⁸ Particularly relevant to this holding is the interpretation of Judge Learned Hand's controversial "effects" test established in *Alcoa*. This test established that the Sherman Act may be applied to conduct outside the United States where there is both an intent to affect and an actual effect on U.S. commerce even if such conduct is undertaken by foreign nationals.⁸⁹ Controversy surrounded the *Alcoa* test from the start and many commentators have criticized it as being inconsistent with international law and insensitive to international comity principles.⁹⁰

Any confusion and tension that the decisions in *American Banana* and *Alcoa* spawned, however, were cleared up with the Supreme Court's most recent decision exploring the extent of the Sherman Act's extraterritorial reach. In *Hartford Fire Insurance Company v. California*,⁹¹ the Court upheld the central holding of the *Alcoa* decision and permitted the

til 1909. *Id.* After 1909, it was alleged that Alcoa purchased and sold several power companies with covenants binding the power companies not to sell or let power to anyone else for the manufacture of aluminum. *Id.*

84. *Id.* at 443.

85. *Id.*

86. *Id.* at 444.

87. *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 444 (1945).

88. *See id.* at 444-45.

89. *Id.* at 444.

90. *See* Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka & Yokota, and "Footnote 159" Scenarios*, 46 RUTGERS L. REV. 821, 829 (1994).

91. 509 U.S. 764 (1993).

Section One claim to proceed despite the fact that the alleged antitrust actions occurred entirely on foreign soil.⁹² While the Court noted the disagreement between *American Banana* and *Alcoa*, the Court declared that it was “well established by now 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.”⁹³

The situation before the *Hartford Fire* court was complicated by the fact that the British reinsurers’ activity may have been perfectly legal under British law. The court announced that such conduct did not by itself bar application of United States antitrust laws. But, the Court declined to consider whether it would have been barred since the reinsurers did not contend that the British law required them to act in a fashion that was prohibited by the law of the United States.⁹⁴ The *Hartford Fire* court refused to place any weight on the Foreign Trade Antitrust Improvement Acts of 1982 (FTAIA).⁹⁵ While the *Hartford Fire* decision was barely a majority decision (5-4), the four dissenting Justices expressed complete agreement with the majority’s views on extraterritoriality.⁹⁶

The *Hartford Fire* court did briefly discuss the concerns of international comity (which would become the focus of the *Nippon Paper* controversy). First, the Court declared that “[n]o conflict exists . . . where a person subject to regulation by two states can comply with the laws of

92. The plaintiffs argued that the defendant insurance companies violated the Sherman Act by engaging in various conspiracies to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States by forcing primary insurers (insurers who sell insurance directly to consumers) to change the terms of their standard CGL insurance policies to conform with the policies the defendant insurers wanted to sell. *Id.* at 769-71.

93. *Id.* at 796.

94. *Id.* at 797.

95. 15 U.S.C. § 6a (1994). The FTAIA Section 6a deals with conduct involving trade and commerce with foreign nations. It reads that “[s]ections 1 to 7 of [Title 15 - Commerce and Trade] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—(1) such conduct had a direct, substantial, and reasonably foreseeable effect—(A) on trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of section 1 to 7 of this title, other than this section.” *Id.* The *Hartford* Court stated that the FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy. The Court arrived at these conclusions by examining the legislative history and the explicit wording of section 6a(1)(A) which declares that unless “such conduct had a direct, substantial, and reasonably foreseeable effect” on domestic and import commerce. *Hartford* at 796 n. 23.

96. *See* 509 U.S. at 814 (Scalia, J., dissenting).

both."⁹⁷ However, this statement is not particularly helpful since the Court merely quoted the wording of the Restatement and failed to discuss the issue any further. Thus, the case provides no guidelines or directions for future analysis. Second, because the British insurers had not argued that British law required them to act in a fashion contrary to United States law, the Court concluded that it did not have to consider whether there was any conflict with British law.⁹⁸ Thus, the court's brief discussion of international comity leads to the conclusion that the court "has no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."⁹⁹

Hartford Fire represents the current thinking of the Supreme Court on the extraterritorial application of domestic antitrust laws in the civil context. The Court explicitly stated that the Sherman Antitrust Act was meant to apply to foreign conduct that both intended to and did in fact produce a substantial effect in the United States. The issue of whether criminal and civil penalties are sufficiently divergent to warrant distinct applications of the law is a point that the defendants relied on heavily. That issue and its credibility were explored and rejected by the *Nippon Paper II* court, and the analysis section of this paper will do the same.

Thus, the chain of case law, from *American Banana* to *Hartford Fire*, discussing the extraterritorial application of federal antitrust laws in civil actions, seems conclusive in determining that prosecutions for wholly foreign conduct are predicated upon whether there is an intended and substantial effect in the United States that permits the case to come within the jurisdictional reach of Section One of the Sherman Antitrust Act.¹⁰⁰

The *Nippon Paper* decisions were a matter of first impression. Unlike the earlier line of cases that explored the jurisdictional reach of American courts in civil antitrust actions, the *Nippon Paper* courts faced a criminal prosecution for solely extraterritorial conduct rather than the tried and tested civil actions.¹⁰¹

97. *Id.* at 799.

98. *Id.*

99. *Id.*

100. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987).

101. *Id.*

IV. ANALYSIS

In *Nippon Paper II*, the First Circuit held that there was no difference between the civil and criminal provisions of Section One of the Sherman Antitrust Laws. Thus, the First Circuit has declared that courts should follow two guidelines for deciding cases on this issue. First, the court should follow the line of cases permitting application of the civil provisions of the federal antitrust laws for wholly extraterritorial conduct. Second, the courts should apply the criminal provisions of the antitrust laws in similar civil circumstances. In doing so, the First Circuit has made application of U.S. laws consistent with one another. However, it has also pushed the boundaries of international comity. By allowing application of criminal provisions of Section One to conduct which was intended to effect American interests but occurred wholly on foreign soil, the United States has vastly expanded its power in the global marketplace without consideration of the sovereignty of other nations. Should the U.S. have criminal jurisdiction over defendants for actions that occur wholly on foreign soil and under the umbrella of laws of another sovereign state, without respect for international comity?

A. *A Holding in Harmony with Precedent and Expectation*

When the District Court dismissed the indictment against Nippon Paper and held that Section One did not give prosecutors the authority to bring criminal antitrust charges extraterritorially when there was no clear U.S. nexus, it was a surprising decision. It was a shock to scholars and attorneys within the antitrust field who had expected that the Sherman Act was applied to all cases of foreign conduct with an intended effect in the U.S.¹⁰² Prior to the *Nippon Paper I* case, an understanding existed within the antitrust community that there was no distinction between civil and criminal cases.¹⁰³ It had been the standard to evaluate conduct occurring outside of the United States on the basis of whether the acts have “a foreseeable, intentional, direct, and substantial effect on U.S. commerce.”¹⁰⁴ Practitioners expected that *Nippon Paper II* would allow criminal prosecutions for wholly foreign conduct since the same practitioners had been pursuing allegations of anti-competitive conspiracies by foreign companies based on the “substantial impact on U.S. commerce”

102. Dominic Bencivenga, *Criminal Antitrust Upset: Ruling Limits Pursuit of Foreign Conspiracies*. N.Y.L.J. 5 (Sept. 19, 1996)

103. *Id.*

104. *Id.* quoting Sidney S. Rosdeitcher, an antitrust partner at Paul, Weiss, Rifkind, Wharton & Garrison.

standard.¹⁰⁵

In order to follow the line of precedent, Judge Selya, writing for the majority in *Nippon Paper II*, gave sufficient legal basis to parallel the *Nippon Paper* case with the holdings of *Alcoa* and *Hartford Fire*.¹⁰⁶ By following the basic principles of statutory construction, the First Circuit was able to conclude that there was no distinction between the criminal and civil provisions in the language of Section One.¹⁰⁷ The Court used the solid base of the statutory construction argument to dismiss the opposing contentions of the defendants without much hesitation. The court admitted that it could uphold the dismissal if there were sufficient "special circumstances" presented in the case at hand.¹⁰⁸ While four of the asserted arguments of *Nippon Paper* were weak at best and properly disposed of by the Court,¹⁰⁹ the fifth argument, that of international comity, was too easily dismissed by the First Circuit. The fifth argument deserves more attention before a decision to impose United States law on foreign activities is finalized.

B. *A Holding in Conflict with International Comity*

The First Circuit was quick to devalue the importance of international comity in *Nippon Paper II* by dismissing it as "more an aspiration than a fixed rule, more a matter of grace than a matter of obligation."¹¹⁰ The Court relied upon the notion that, with the growth of international commerce, a foreign decision has more impact on the domestic marketplace.¹¹¹ Thus, the Court used the excuse of a constantly intertwining global marketplace to downplay the importance of international comity. However, the exact opposite conclusion, that international comity is of growing importance due to the shift in the world markets, could be reached from the same reasoning. In fact, when *Nippon Paper* filed for

105. *See id.*

106. *See generally U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987).

107. *See id.* at 4-6.

108. *Id.* at 6.

109. *Id.* The "lack of precedent," "difference in strength of presumption," and "rule of lenity" arguments were either improper in the *Nippon Paper* case or lacked any probative worth. *See generally id.* at 6-8. The "Restatement" argument was amply rebuked and used to support the majority's holding and Judge Lynch's concurring opinion. *Id.* at 9-13.

110. *Id.* at 8.

111. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 8 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998) (96-1987). "We 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." *Id.*

certiorari to the Supreme Court, it was supported by the Japanese government, which contended that prosecution in the United States would be an affront to Japanese sovereignty.¹¹² Nippon Paper's argument against the First Circuit's decision, which was supported by the Japanese government, declared that "the decision violated international sovereignty and could spark retaliatory action."¹¹³

Regardless of the decisions and interpretations that the courts of the United States may make regarding the importance of international comity in deciding the *Nippon Paper* case, foreign governments regard international comity as an important consideration.¹¹⁴ This viewpoint held by foreign governments makes the *Nippon Paper* case and any subsequent decisions have political dimensions that the judicial system is not prepared to handle. Foreign relations are better handled by the legislative and executive bodies, which are more experienced in such matters.

Nippon Paper will have political repercussions independent of the legal system. International comity is an important component of a state's political sovereignty. It is imprudent for the United States, through its judicial system, to enforce its own domestic laws without consideration for the rules and laws that govern other sovereign states. The world is a collection of individual states that may be intertwined by markets, but there is no homogenous law that governs all of those states identically. The purpose of international comity is to respect an individual state's own choice of government and sovereignty. The various United States courts that ignore those concerns completely ignore the right of foreign states to govern their own citizens and themselves.

One potential source of America's fervent desire to enforce domestic antitrust laws is the growing protectionism that pervades the Antitrust Di-

112. Bob Drummond, *Supreme Court Expedites Dispute Over Phone Rates*, THE COMMERCIAL APPEAL, Jan. 13, 1998, at B7, available in LEXIS, News Library, CURNWS File. In the statement that the Japanese government submitted to the Supreme Court, the Japanese government was explicit in stating that the extraterritorial application on the U.S. antitrust law violated international law. They argued that "[i]n accordance with international law, anti-competitive activities occurring within Japanese territory and committed by Japanese corporations fall within the scope of Japanese jurisdiction and are regulated by Japanese legislation." *U.S. Supreme Court Rejects Nippon Paper's Appeal*, JIJI PRESS TICKER SERVICE, Jan. 13, 1998, available in LEXIS, News Library, CURNWS File.

113. Mark Suzman, *Go-ahead for Criminal Cases*, FINANCIAL TIMES, Jan. 13, 1998, available in LEXIS, News Library, CURNWS File.

114. The Japanese government said in its statement [to the U.S. Supreme Court supporting Nippon Paper's petition] that it has "a substantial interest in this case because of the principles of international law and sovereignty that it implicates." *U.S. Supreme Court Rejects Nippon Paper's Appeal*, JIJI PRESS TICKER SERVICE, Jan. 13, 1998, available in LEXIS, News Library, CURNWS File.

vision of the Department of Justice and international antitrust enforcement in general.¹¹⁵ The Assistant Attorney General of the Antitrust Division has stated that “as markets increasingly become global in nature, vigorous antitrust enforcement will help to ensure that American businesses will have the necessary incentives and ability to compete successfully on a global scale.”¹¹⁶ He stressed that “antitrust enforcement is vital to America’s economic health” because “American consumers and businesses benefit from a free market economy with antitrust enforcement.”¹¹⁷ The protectionist views of the Antitrust Division are more clearly seen when he explained that a challenge “from globalization is the need to ensure that our jurisdiction is sufficient to protect U.S. consumers against anti-competitive actions by foreign companies,” and also that “anti-competitive activity . . . increasingly takes place in the international marketplace to the detriment of U.S. consumers and businesses.”¹¹⁸ Despite a lengthy discussion about cooperation with foreign antitrust officials, the general focus of the statement by the Antitrust Division is the importance of using U.S. antitrust laws to protect U.S. consumers.¹¹⁹ This position may seem harmless enough but has severe political consequences when it asserts United States domestic laws without concern for the sovereignty of other nations.

One of the central concerns with the Antitrust Division’s position is that it dismisses some aspects of the free market system while holding on to others. The belief that the “American consumers benefit from a free market economy with antitrust enforcement”¹²⁰ is debatable at best. As many economists will assert, regulation throws off the balance of the free market system. One position of economic thought holds that “[w]hile the extraterritorial application of sound law may have a therapeutic effect on global markets, the same cannot be said for antitrust statutes. In the first place, antitrust laws are typically ineffective because they are based on faulty economics and anachronistic notions of competitive behavior. Also, like any form of government intervention, antitrust legislation distorts the market’s asset allocation mechanisms and creates inefficiencies.”¹²¹ The

115. “Discredited by economic reality, international antitrust enforcement is now the lethal weapon of protectionists.” Teresa Wyszomierski, *Lessons of the Boeing Merger*, JOURNAL OF COMMERCE, July 29, 1997, at 8A.

116. *Prepared Statement of Joel I. Klein, Assistant Attorney General Antitrust Division Before the House Committee on the Judiciary*, Federal News Service, Nov. 5, 1997, available in LEXIS, News Library, CURNWS File.

117. *Id.*

118. *Id.*

119. *See id.*

120. *Id.*

121. Teresa Wyszomierski, *Lessons of the Boeing Merger*, JOURNAL OF COM-

problem is that by using antitrust statutes in a protectionist manner, "they are retarding global market efficiency while instigating serious and protracted trade wars."¹²² The notion of a viable free market with heavy governmental regulation is anathema to the principles of a free market system. There is no basis for believing that globalization of the economy will have a negative impact on the consumer. Though Nippon Paper was engaged in price-fixing, Japanese domestic laws also condemned the practice. Foreign nations have domestic laws that prohibit the practice.

Experience has demonstrated that mergers and consolidation have often had beneficial or negligible impacts on consumers.¹²³ This is not to say that Nippon Paper's actions should be condoned. It is merely that the Japanese government had the primary duty of disciplining the company, and not the United States, since Nippon Paper is a corporation created and acting wholly in Japan, not within the U.S. It is a recognizable state interest to seek to enforce its own laws. It is a direct interference with state sovereignty for a foreign state to apply its laws without opportunity for the domestic state to institute its own legal protections first. The U.S. government has a role in enforcing its own antitrust provisions. However, that role is secondary in this case and should not have been invoked until after Japan had decided not to pursue the issue through its own internal antitrust system first.

In addition, the First Circuit was quick to accept the dicta of the *Hartford Fire* court which suggested that comity concerns would only operate to defeat the exercise of jurisdiction 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.¹²⁴ The Court then applied the *Hartford Fire* reasoning to the case at hand and found that Nippon Paper's activities were illegal under both Japanese and American laws, thereby dismissing any concern about Nippon Paper being subjected to the will of two opposing sovereign states.¹²⁵

MERCE, July 29, 1997, at 8A. The purpose of this article is to illustrate how the Sherman Antitrust Act has become the "protectionist weapon of choice in the global arena." *Id.*

122. *Id.*

123. "Over a century of American experience shows that few, if any, industries were made less competitive by mergers. In fact, in industry after industry that has seen consolidation—oil services, cosmetics, disk drives, office products—prices remained flat or even dropped." *Id.* While this position is controversial and debatable, it demonstrates that consolidation is not universally deleterious.

124. *Nippon Paper II*, 109 F.3d at 8; see also *Hartford Fire Insur. Co. v. California*, 509 U.S. 764, 798-99 (1993).

125. *Id.*

While the First Circuit's decision that comity is not a saving grace in the *Nippon Paper* case was a proper one, the decision to ignore comity could potentially have severe repercussions. Comity is assuredly an important concern. It alone is outweighed by the rights of consumers to assert their rights, regardless of the antitrust violator's extraterritorial location. Comity is a factor that should be applied in tandem with other factors. Comity alone provides a weak basis for ignoring the rights of consumers. In the case of *Nippon Paper*, there were no additional compelling concerns and comity was left to be asserted by itself. Without additional compelling factors, it was assuredly proper for the First Circuit to decide that comity alone could not act to save *Nippon Paper*.

However, as a consequence of downplaying the importance of comity, the instant case sets a dangerous precedent for those more complex cases that may follow. The holding of the *Nippon Paper II* case could easily be used to draw a presumption in favor of disregarding comity in later cases. This result may be inevitable due to the First Circuit's decision to minimize the importance of comity in the *Nippon Paper II* case.¹²⁶ If the court had properly addressed the role of comity as a factor to be considered when relevant, the potential for future harm would be minimized.

Comity concerns are a factor to be considered in analyzing any case involving international antitrust issues. Comity is a factor that should be considered in tandem with any other factors that are relevant in the particular case. Comity concerns alone should be insufficient to invalidate an antitrust measure. It is only when comity concerns are present alongside other questionable factors that an antitrust statute should be disregarded. Comity is factor that carries great weight but that weight is dependent upon other factors to meet the burden of proving improper international interference with trade. The *Nippon Paper* scenario involved other factors that proceeded to meet the necessary burden but the Court failed to discuss those factors and their role in deciding the case as they did. In a manner, the *Nippon Paper* court applied a comity test but failed to explain it as such and merely presented their result.

As international trade and commerce become more intertwined, decisions of international comity will become more important as isolationism becomes a less viable option. Sovereign states desire to have jurisdiction over their own citizens. The doctrine of international comity is not about legal decisions or precedent. Rather, it is a political question dealing with a state's own right of sovereignty. It is a political question for international bodies to decide. It is not the proper place for domestic courts to

126. *See id.*

decide that a domestic law is proper over foreign subjects. The world is growing more interdependent, but we are not yet citizens of the world and it is improper to ignore other states' sovereignty by prosecuting foreign citizens under our own domestic laws. Contrary to the suggestions of the dicta of the *Nippon Paper II*, comity is a more a matter of obligation than a matter of grace.¹²⁷

C. *Later Cases Citing to Nippon Paper II*

Cases decided after the *Nippon Paper II* decision have not addressed the fundamental issue of jurisdictional reach for criminal violations of the antitrust laws for wholly foreign conduct. Instead, the later cases that have cited to the *Nippon Paper II* decision have focused on a range of issues from statutory construction,¹²⁸ the appropriate standard of appellate review,¹²⁹ the boundaries of international comity,¹³⁰ and even on the rule of lenity.¹³¹

V. CONCLUSION

The First Circuit has extended the jurisdictional reach of the United States courts to punish wholly extraterritorial conduct for criminal violations of the U.S. antitrust laws. In doing so, this aligns the courts with the line of reasoning that created the same jurisdictional reach for civil violations. On January 12, 1998, the Supreme Court denied certiorari in *Nippon Paper II*.¹³² However, this case is far from over and gone; it still must be tried again and decisions will surely be appealed.

Undoubtably other situations will arise where the line is more vague and the requirements of two different jurisdictions will cause companies to find a middle ground between the laws of the two separate sovereigns.

127. *But cf. Nippon Paper II*, 109 F.3d at 8 (where the court instructs that comity is more a matter of grace than of obligation).

128. *See In the Matter of: 203 N. Lasalle Street Partnership*, 1997 WL 602640 at *15 (7th Cir. Ill.) (Sept. 29, 1997) (citing *Nippon Paper II* for the "basic principle of statutory construction.")

129. *See U.S. v. Stokes*, 124 F.3d 39, 42 (1997) (citing *Nippon Paper II* for the use of plenary review after the dismissal of an indictment on constitutional grounds raising a pure question of law).

130. *See Filetech S.A.R.L. v. France Telecom*, 1997 WL 576005 at *11 (S.D.N.Y. 1997) (citing *Nippon Paper II* for the boundaries on the doctrine of international comity).

131. *See U.S. v. Bowen*, 1997 WL 577662 (1st Cir. Me.) (1997) (citing *Nippon Paper II*'s collection of cases for the proposition that "the rule of lenity commands that in cases of *genuine* ambiguities affecting a criminal statute's scope be resolved in the defendant's favor" [emphasis added]).

132. *U.S. v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, *cert. denied*, 118 S.Ct. 685 (1998) (No. 96-1987).

Considering the current protectionist attitude of United States antitrust enforcers, it is possible they will not back down even when foreign governments cause businesses to act in ways contrary to the benefit of the American economy. These regulators have been granted a weapon that will assuredly be stretched to the point where the very courts that have sanctioned its use will have to mandate its limitations. The Supreme Court's denial of certiorari leaves the First Circuit's decision in effect.¹³³ This will result in the United States having the power to assess criminal charges for violations, which, consequently, shall greatly expand the United States' power to shape the global marketplace. The "stigma [which] accompanies a criminal conviction, especially when one envisions a Japanese executive sitting in prison for three years or being barred from entering the United States"¹³⁴ is greater than mere assessments of civil fines on large, faceless corporations. The U.S. government has added a new weapon to its arsenal and it will likely have a significant effect on the process of international law and the balance of international trade.¹³⁵

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133. This only means that prosecutors can proceed with the trial. Even if convicted, Nippon Paper could still appeal and renew its previous objection to United States jurisdiction at that time. Precisely due to the prospect for a post-conviction appeal, the Justice Department urged the court to reject consideration of Nippon Paper's pretrial petition. Genevieve Buck, *Justices Decline to Hear Case*, CHICAGO TRIBUNE, Jan. 13, 1998, at Business, pg 1., available in LEXIS, News Library, CURNWS File.

134. John Gibeaut. *Sherman Goes Abroad: Landmark Decision Oks International Antitrust Prosecution*. 83 A.B.A. J. 42, 43 (1997).

135. As this article was going to press, a note was published in 33 WAKE FOREST L. REV. 189 that also addressed the *Nippon Paper II* decision. These two articles present varying interpretations of the impact and ramifications of the *Nippon Paper II* decision.