IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2001

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

NIPPON PAPER INDUSTRIES CO., LTD.;
JUJO PAPER CO., INC.; and HIRINORI ICHIDA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. 3231 and 15 U.S.C. 1. The United States filed a timely notice of appeal on September 13, 1996, from a final judgment entered on September 3, 1996. See 28 U.S.C. 3731; Fed. R. App. P. 4(b). This Court has jurisdiction pursuant to 28 U.S.C. 3731.

STATEMENT OF ISSUES

1. Whether the Sherman Act, 15 U.S.C. 1-7, when enforced criminally, reaches conduct undertaken entirely outside of the United States when that conduct produces a direct, substantial, and reasonably foreseeable effect on United States import or domestic commerce.

2. Whether the Indictment sufficiently alleges overt acts undertaken by defendants' coconspirators within the United States in furtherance of the averred conspiracy.

STATEMENT OF THE CASE

A. Course of Proceedings

On December 13, 1995, a grand jury sitting in Boston indicted Jujo Paper Co., Ltd. ("Jujo"), and its successor entity, Nippon Paper Industries Co., Ltd. ("NPI"), for conspiring with others not named in the Indictment to increase the price of thermal facsimile ("fax") paper sold to customers in the United States in violation of section 1 of the Sherman Act, 15 U.S.C. 1. Indictment ¶¶ 1-2 (Appendix ("App.") 18-19).[1] NPI unsuccessfully moved to quash service of process. Subsequently, it moved to dismiss the Indictment for lack of personal jurisdiction and for failure to state an offense. The district court (Tauro, C.J.) heard argument on these motions during a status conference held on July 24, 1996. On September 3, 1996, the court entered an order dismissing the Indictment for failure to state an offense. The United States appealed.

B. Statement of Facts

1. Defendant Jujo, a Japanese corporation that had its headquarters and principal place of business in Japan, manufactured fax paper which it sold for import into North America. In 1993, Jujo merged with another Japanese corporation to form NPI, also a Japanese corporation with its headquarters and principal place of business in Japan. Because Jujo no longer exists, yet existed during the period of the alleged conspiracy as NPI's predecessor entity, both are collectively

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[1]The Indictment, in a separate count, charged other defendants with violating the Sherman Act through a different conspiracy. See Indictment ¶¶ 13-24 (App. 23-27). On March 14, 1996, Chief Judge Tauro transferred the trials relating to this count to the United States District Court for the Eastern District of Wisconsin.

referred to as NPI.

The Indictment charges NPI with "engag[ing] in a combination and conspiracy" with unnamed coconspirators to increase the price of fax paper sold to United States customers in violation of section 1 of the Sherman Act, 15 U.S.C. 1. Indictment ¶ 2 (App. 18-19). The conspiracy originated, the Indictment explains, in meetings held in Japan in early 1990 during which NPI and other fax paper manufacturers "agreed to increase the prices for fax paper to be sold into North America." Id. ¶ 7(b) (App. 20). Although the manufacturers specifically intended to raise prices within the United States, they did so without engaging in any conduct within our borders, a result they accomplished by employing as intermediaries unaffiliated trading houses. The manufacturers sold the fax paper, in Japan, to the trading houses. Operating both in Japan and in the United States, the trading houses in turn arranged for shipment and sale to ultimate customers located in the United States and elsewhere. See id. ¶ 9 (App. 21-22).

Successful effectuation of the conspiracy required ensuring that the trading houses charged inflated prices to U.S. customers, an objective the structure of fax paper transactions facilitated. The manufacturers not only "raised their prices" to the trading houses "for fax paper to be imported into North America," id. ¶ 7(c) (App. 20), but also "sold discrete quantities of fax paper to the trading houses in Japan, for specific customers in North America, on condition that such quantities be sold to customers at specified prices," id. ¶ 9 (App. 21), and directed the trading houses "to implement price increases to fax paper customers" located in the United States and elsewhere, id. ¶ 7(d) (App. 20). Through effectively setting the price to customers located in the United States in this manner, and by "monitor[ing] the trading houses' transactions with the North American customers," the manufacturers "ensure[d] that the agreed upon prices were

charged." Id. ¶ 9 (App. 21).

The trading houses, however, were not mere innocent conduits. Specifically identified by the Indictment as "co-conspirator[s]," id. ¶ 7(d) (App. 20), they undertook numerous acts within the United States to further the scheme, including "ship[ment of] substantial quantities of fax paper manufactured in Japan into the United States for sales to customers." Id. ¶ 11 (App. 22). Thus, although the Indictment discloses no overt act undertaken by the fax paper manufacturers, including NPI, in furtherance of the conspiracy within the United States, the Indictment alleges such conduct by the coconspirator trading houses.

During the period of the conspiracy, NPI sold approximately $6.1 million of fax paper for import into North America. Id. ¶ 4 (App. 19). Consequently, regardless of the trading houses' complicity, the conspiracy "had a direct, substantial and reasonably foreseeable effect on [the] import and domestic commerce" of the United States. Id. ¶ 12 (App. 22).

2. NPI responded to the Indictment by filing several motions to dismiss arguing, among other things,[2] that the court lacked personal jurisdiction and that the Indictment failed to state an offense. In support of the latter, NPI conceded that the Sherman Act, when enforced civilly, reaches wholly extraterritorial conduct that produces certain effects in the United States. It nonetheless argued that the Act does not criminalize "conduct undertaken wholly outside the territory of the United States." NPI Motion to Dismiss at 2 (App. 30-31). Based on this premise, as well as its assertion that the Indictment failed to aver conduct undertaken by a conspirator within the United States in furtherance of the alleged scheme, NPI argued that "the [I]ndictment

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[2]NPI also asserted that it could not be held criminally liable for the acts of its predecessor entity, Jujo. The district court, dismissing the Indictment on other grounds, denied that motion as moot (Addendum ("Add.") 1).

fail[ed] to allege an essential element of a criminal violation of the Sherman Act -- anti-competitive conduct occurring within the territory of the United States." NPI Reply Br. at 10 (App. 74).

3. The district court rejected NPI's personal jurisdiction challenge but granted its motion to dismiss for failure to state an offense. Personal jurisdiction over NPI, the court held, properly could be maintained based on NPI's "continuous and systemic" contacts with the United States as a whole. United States v. Nippon Paper Indus. Co. ("Op."), No. 95-10388-JLT, at 10-14 (D. Mass. Sept. 3, 1996) (Addendum ("Add.") 11-15).[3] Specifically, the court relied on NPI's operation of two offices in Seattle, Washington through which NPI arranges for the purchase and export to Japan of some $310 million worth of goods annually, on NPI's twenty percent stake in an American company with approximately $350 million in annual revenues, and on NPI officers' and directors' "routine[] travel to the United States to conduct business." Id. at 13-14 (Add. 14-15).

Turning to NPI's motion to dismiss for failure to state an offense, the court rejected the view, advanced by the United States, that the Indictment avers conspiratorial conduct undertaken within this nation. The court incorrectly understood the government's position to hinge solely on the theory that the Indictment alleged a distinct "vertical" conspiracy between NPI and its trading houses to fix the price at which the trading houses sold fax paper to ultimate customers in America. See Op. at 14-18 (Add. 15-19). The court found the Indictment bereft of such allegations, despite the express averment that "Japanese manufacturers sold discrete quantities of fax paper to the trading houses in Japan, for specific customers in North America, on condition

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[3]The district court's decision is reported at 1996 WL 528426 (D. Mass. Sept. 3, 1996).

that such quantities be sold to the customers at specified prices." Indictment ¶ 9 (App. 21) (emphasis added).

Having construed the Indictment to allege a price-fixing conspiracy involving no in-U.S. overt act, the court next considered NPI's argument that the Sherman Act does not criminalize conspiratorial conduct undertaken wholly abroad. Inexplicably ignoring section 7 of the Sherman Act, 15 U.S.C. 6a, in which Congress confirmed that the Act reaches wholly extraterritorial conduct, the court focused on section 1 as originally enacted. Even so, the court conceded that the Supreme Court -- construing operative language governing both section 1's "civil and criminal applications," Op. at 19 (Add. 20) -- declared it "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." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993). The court nonetheless refused to "equat[e] the Sherman Act's civil and criminal" reach. Op. at 19 (Add. 20).

First, citing United States v. Bowman, 260 U.S. 94 (1922), the court asserted that the general presumption against extraterritorial application of federal statutes "carries even more weight when applied to criminal statutes." Op. at 20 (Add. 21). Thus, the court reasoned, civil precedents finding this presumption overcome with respect to the Sherman Act, such as Hartford, are "not controlling" -- even when, as here, they construe the very same language germane to the Act's criminal application. Id. Second, the court cited United States v. United States Gypsum Co., 438 U.S. 422 (1978), in which the Court imposed a mens rea requirement for Sherman Act prosecutions, for the proposition that "the substantive language of section 1 of the Sherman Act requires different treatment in civil and criminal contexts." Op. at 20 (Add. 21).

Having found it permissible to construe language governing the Sherman Act's

extraterritorial operation more narrowly in the criminal context, the court reasoned that restricting the Act's criminal coverage to schemes involving at least one overt act undertaken within the United States was necessary in order to "maintain[]" the "traditional distinction between the elements of civil and criminal charges." Op. at 21 (Add. 22). Specifically, "because the Sherman Act is silent on the issue, imputation of extraterritorial application of its provisions would present," the court thought, "serious questions about notice to foreign corporate defendants as to the criminality of its conduct." Id. at 22 (Add. 23). Finally the court believed that an 1890 statement by Senator Sherman during the floor debates leading to the Sherman Act's passage "belies any suggestion that, in passing the Sherman Act, Congress believed that it was reaching wholly extraterritorial conduct." Id.

SUMMARY OF ARGUMENT

The Indictment charges that NPI conspired with competitors in Japan to fix fax paper prices expressly for the purpose of raising prices to American consumers. This scheme, the Indictment further charges, caused "a direct, substantial, and reasonably foreseeable effect on [the] import and domestic commerce" of the United States. Indictment ¶ 12 (App. 22). Under the district court's decision, those United States consumers injured by this per se Sherman Act violation may sue NPI and its co-conspirators for treble damages, but the sovereign whose laws NPI violated, the United States, is powerless to impose on NPI a criminal fine. This unprecedented result not only confounds common sense, but flies in the face of controlling decisions prescribing the Sherman Act's reach and frustrates clear congressional intent to subject foreign price-fixing cartels that inflict economic harm in the United States to appropriate government enforcement action.

The Sherman Act embraces agreements in unreasonable restraint of "trade or commerce . . . with foreign nations." 15 U.S.C. 1. This jurisdictional language, which governs both the Act's civil and criminal application, long has been construed to reach wholly foreign conduct producing an actual intended effect within the United States, and the Supreme Court has authoritatively construed it to have this reach. See Hartford, 509 U.S. at 796-97 nn.22, 24. No case has held or implied that section 1's jurisdictional language carries a narrower meaning in criminal Sherman Act cases, and such a result is precluded by established principles of statutory interpretation.

Recognizing this, the United States, for virtually a century, has understood the Sherman Act to criminalize wholly foreign conduct producing certain effects in the United States. Consistent with the United States' views, Congress in 1982 added section 7 to the Act, 15 U.S.C. 6a, to clarify that "wholly foreign transactions" fall within the Sherman Act's reach if the conduct produces in the United States "a direct, substantial, and reasonably foreseeable effect." H.R. Rep. No. 686, 97th Cong., 2d Sess. 9-10, reprinted in 1982 U.S.C.C.A.N. 2487, 2494-95. The statutory language draws no distinction between the Act's civil and criminal applications, and relevant legislative history suggests none. Indeed, Congress intended section 7 to codify the principle "that it is the situs of the effects as opposed to the [location of] conduct, that determines whether United States antitrust law applies," id. at 5, reprinted in 1982 U.S.C.C.A.N. at 2490, and specifically expected that "[a]ny major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction," id. at 13, reprinted in 1982 U.S.C.C.A.N. at 2498.

Under either the "well established" understanding of the Sherman Act's reach as explicated

in Hartford, or the plain meaning of section 7, the Indictment charged a cognizable Sherman Act offense. The district court, in reaching a contrary conclusion, mystifyingly ignored section 7, offering instead a number of reasons for refusing to apply the well-established judicial construction of section 1 in criminal actions. Even here, however, the district court's analysis went awry. Neither the presumption against extraterritoriality, the rule of lenity, nor the rule applied in United States v. United States Gypsum Co., 438 U.S. 422 (1978), permit, as the district court thought, a different construction of "trade and commerce . . . with foreign nations," 15 U.S.C. 1, or for that matter section 7, in criminal and civil actions.

The district court also resorted to policy arguments to justify its newly-minted rule, but the cited concern with providing potential violators of the Sherman Act sufficient notice of its criminal reach is wholly unfounded. The price-fixing scheme charged undoubtedly is unlawful per se, and the "effects" test applicable under either the judicially-supplied construction of section 1 or the text of section 7 provide ample notice of which price-fixing conspiracies entered into abroad the Sherman Act condemns. Notice concerns are particularly misplaced in this case, in which NPI conspired to fix prices with the express intent of raising prices within the United States. Moreover, accepting the district court's view of the Sherman Act's criminal reach would produce bizarre distinctions that Congress plainly could not have intended and improperly impair the government's ability to combat "price-fixing cartels and monopolies that operate [wholly] abroad" that inflict on American consumers significant economic harm. S. Rep. No. 388, 103d Cong., 2d Sess. 2 (1994).

Finally, although not necessary to state a cognizable Sherman Act offense, the Indictment sufficiently alleges coconspirator conduct undertaken within the United States in furtherance of

the conspiracy charged. The trading houses engaged in the shipment of fax paper to, and its sale within, the United States. Because the Indictment specifically identifies the trading houses as "co-conspirators," the only reasonable construction of the Indictment is that the trading houses engaged in these activities to further the conspiracy's objective of raising the prices charged American consumers. The district court, holding the Indictment insufficient, demanded allegations that a trading house conducted its sales here pursuant to a resale price maintenance agreement with NPI. But conspiratorial activity within the United States need not be pursuant to a resale price maintenance agreement; in any event, the Indictment plainly alleges resale price maintenance. Thus, even under its erroneous view of the Sherman Act's criminal reach, the court erred in holding the Indictment to fail to state an offense.

ARGUMENT

I. STANDARD OF REVIEW

Whether the Sherman Act, when enforced criminally, reaches conspiratorial conduct undertaken wholly abroad presents a question of statutory construction, see, e.g., EEOC v. Arabian American Oil Co., 499 U.S. 244, 247 (1991), and thus is reviewed de novo, see, e.g., United States v. Ecker, 78 F.3d 726, 728 (1st Cir. 1996).

Whether the Indictment adequately alleges an overt act within the United States in furtherance of the averred conspiracy presents a question pertaining to the Indictment's sufficiency. It is thus a question of law, reviewable de novo. See United States v. Miller, 771 F.2d 1219, 1226 (9th Cir. 1985). "On review of an order dismissing an indictment, the indictment is to be tested not by the truth of its allegations but `by its sufficiency to charge an offense' . . .

since the allegations contained in the indictment must be taken as true." United States v. Mann, 517 F.2d 259, 266 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976) (quoting United States v. Sampson, 371 U.S. 75, 78-79 (1962)); see also United States v. National Dairy Products Corp., 372 U.S. 29, 33 n.2 (1963).

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE SHERMAN ACT WHEN ENFORCED CRIMINALLY FAILS TO REACH WHOLLY FOREIGN CONDUCT THAT PRODUCES THE REQUISITE EFFECTS IN THE UNITED STATES

Based on its erroneous belief, see infra pp.33-39, that the Indictment failed to allege an overt act committed within the United States in furtherance of the charged conspiracy, the district court addressed whether the Sherman Act criminalizes conspiratorial conduct undertaken entirely abroad. In answering in the negative, the court improperly refused to apply long-standing precedent holding the Sherman Act to reach wholly foreign conduct producing an intended substantial effect within the United States, and erroneously failed to invoke Sherman Act section 7, which expressly declares the Sherman Act to embrace wholly foreign conduct that produces in the United States a "direct, substantial, and reasonably foreseeable effect." 15 U.S.C. 6a. The district court's truncation of the Sherman Act's criminal reach, consequently, must be reversed.

A. The Indictment As Construed By The District Court States A Cognizable Sherman Act Offense

1. The Sherman Act criminalizes conspiracies in unreasonable restraint of "trade or commerce . . . with foreign nations." 15 U.S.C. 1. "[I]t is well established," the Supreme Court explained in Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), that this language embraces "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Id. at 796. Citing approvingly Judge Learned Hand's opinion in

United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945), in which the court (sitting as a designated court of last resort for the Supreme Court), found foreign corporations liable for conspiratorial conduct undertaken wholly abroad because of actual intended effects within the United States, see id. at 443-44, the Court unequivocally endorsed "the general understanding" that Congress intended the Sherman Act to have this reach. See Hartford, 509 U.S. at 796-97 & nn.22, 24.

The district court erroneously found the Indictment to allege conspiratorial conduct undertaken entirely abroad; even so construed, however, the Indictment states an offense falling within the court's jurisdiction under the Hartford/Alcoa test.[4] NPI and its competitors, the Indictment explains, conspired to fix prices. Such price-fixing conspiracies long have been held per se Sherman Act violations subject to criminal prosecution. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-13 (1940). The conspirators specifically sought to increase prices in the United States, see Indictment ¶ 7(b) (App. 20), and their activities caused a

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[4]The district court framed the issue as whether a criminal Sherman Act offense requires proof of an in-U.S. overt act. This is a question of "prescriptive jurisdiction" -- that is, whether Congress exercised its authority to reach particular conduct. See Gary B. Born, International Civil Litigation in United States Courts 1-2 (3d ed. 1996). The Supreme Court has stated, however, that the extent of the Act's application to foreign conduct presents a question bearing on both the court's prescriptive and subject-matter jurisdiction. See Hartford, 509 U.S. at 795-96 & n.22. Indeed, Congress, in enacting amendments to the Sherman Act specifying its applicability to wholly foreign conduct, understood the question of the Act's extraterritorial operation to present one of "subject matter jurisdiction." H.R. Rep. No. 686, supra, at 13, reprinted in 1982 U.S.C.C.A.N. at 2498.

Consistent with Congress' conceptualization of the issue, and the Supreme Court's view that prescriptive and subject-matter jurisdiction, when foreign conduct is involved, are coextensive under the Act, see Hartford 509 U.S. at 796 n.22, we generally refer to the question of the Sherman Act's criminal application to wholly foreign conduct as pertaining to the court's jurisdiction. See, e.g., Papst Motoren GmbH & Co. v. Kanematsu-Goshu (U.S.A.) Inc., 629 F. Supp. 864, 868 (S.D.N.Y. 1986).

"substantial" effect in the United States, see id. ¶ 12 (App. 22). Because the Sherman Act reaches "foreign conduct producing a substantial intended effect in the United States," Hartford, 509 U.S. at 797 n.24, no more was required to state a cognizable Sherman Act criminal offense.

2. Any doubts as to this conclusion are put to rest by 1982 amendments to the Sherman Act in which Congress, seeking "to more clearly establish when antitrust liability attaches to international business activities," H.R. Rep. No. 686, 97th Cong., 2d Sess. 7, reprinted in 1982 U.S.C.C.A.N. 2487, 2492, specifically spoke to the meaning of "trade or commerce . . . with foreign nations," 15 U.S.C. 1. Section 7 of the Sherman Act, passed as section 402 of the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"), Pub. L. 97-290, 96 Stat. 1246, declares the Act to reach "conduct involving trade or commerce . . . with foreign nations" as long as "such conduct has a direct, substantial, and reasonably foreseeable effect" on United States domestic or import commerce. 15 U.S.C. 6a(1)(A).[5]

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[5]Section 7 provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> > (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
> >
> > > (A) on trade or commerce which is not 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 sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1) (B), then sections 1 to 7 of this title shall apply to such conduct

The text of section 7, which draws no distinction between civil and criminal actions, makes plain that the Sherman Act's application to conduct governed by that section hinges entirely on such conduct's effects. This is unsurprising for, as legislative history confirms, Congress specifically intended to enshrine in the Act the principle, consistently articulated "[s]ince Judge Learned Hand's opinion in United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945)," that "it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies." H.R. Rep. No. 686, supra, at 5, reprinted in 1982 U.S.C.C.A.N. at 2490-91. Congress, moreover, specifically intended section 7 to govern the Sherman Act's application to conspiracies to fix prices on sales consummated entirely abroad. See H.R. Rep. No. 686, supra, at 9-10, reprinted in 1982 U.S.C.C.A.N. at 2494-95 ("It is thus clear that wholly foreign transactions . . . are covered by the amendment . . . ."); see also U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations § 3.121, at 14-16 & Ill. Ex. B (Apr. 1995) ("1995 Guidelines") (Add. 14-15).[6]

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only for injury to export business in the United States.

15 U.S.C. 6a.

[6]Section 7 applies to all conduct involving "trade or commerce . . . with foreign nations" except "import trade or import commerce." 15 U.S.C. 6a. As applied to the importation of goods into the United States, "conduct involving" "import trade or import commerce" comprises transactions completed within the United States. Congress excluded these transactions from § 7, which applies to wholly foreign transactions that nonetheless affect imports. See H.R. Rep. No. 686, supra, at 9-10, reprinted in 1982 U.S.C.C.A.N. at 9-10 (explaining that § 7 governs the Sherman Act's application to "wholly foreign transactions," "i.e., transactions within, between or among other nations" such as "[a] transaction between two foreign firms" consummated abroad); 15 U.S.C. 6a(1)(A) (declaring conduct governed by § 7 to fall within the Sherman Act if it produces a "direct, substantial, and reasonably foreseeable effect" on "import trade or import commerce").

The Indictment states a cognizable Sherman Act offense under a straight-forward application of section 7. The Indictment, according to the district court, alleges price fixing on transactions completed entirely abroad. See Op. at 18 (Add. 19). This triggers section 7, and under its test, the district court had jurisdiction over the Indictment as long as the averred conspiracy caused "direct, substantial and reasonably foreseeable" effects in the United States. 15 U.S.C. 6a(1)(A). The Indictment specifically makes this allegation. See Indictment ¶ 12 (App. 22).

B. There Is No Basis For Truncating The Sherman Act's Jurisdictional Reach In Criminal Actions

The district court, in holding the Indictment to fail to state a cognizable Sherman Act offense, applied neither the construction of "trade and commerce . . . with foreign nations," 15 U.S.C. 1, supplied by consistent judicial interpretation of section 1 nor the "direct, substantial, and reasonably foreseeable" standard provided by section 7. Rather, completely ignoring section 7, the court focused solely on whether the authoritative judicial construction of section 1 governed

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Section 7 consequently applies to price fixing by competitors on transactions consummated entirely abroad that affects imports into the United States; for instance, price fixing on wholly foreign transactions that raises the wholesale price to nonconspirator intermediaries who arrange for shipment and sale of goods within the United States at still higher prices. See 1995 Guidelines, supra, § 3.121, at 14-16 & Ill. Ex. B (Add. 31-32) (explaining that § 7 applies "in cases in which a cartel . . . reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary"). This is precisely the conduct the district court construed the Indictment to charge.

Whether § 7 applies, however, makes no difference to the outcome of this appeal. If the Indictment, as construed by the district court, describes "conduct involving" "import trade or import commerce," it states a cognizable Sherman Act offense under the Hartford/Alcoa test, which would then apply. See H.R. Rep. No. 686, supra, at 9, reprinted in 1982 U.S.C.C.A.N. at 2494 (explaining that prior judicial construction of the Act continues to control the Sherman Act's application to import transactions excepted from § 7); see also Hartford, 509 U.S. at 796-97 & n.23.

in criminal as well as civil actions. Offering a number of reasons for refusing to "equat[e] the Sherman Act's civil and criminal application," Op. at 19 (Add. 20), the court answered in the negative. The district court, however, advanced no valid reason for construing Sherman Act section 1's jurisdictional language to carry a different meaning in criminal prosecutions than in civil actions. There is, moreover, no justification for the court's unexplained failure to apply -- much less even mention -- Sherman Act section 7.[7] And the court's articulated rationale provides no justification for reading into section 7's jurisdictional test an in-U.S. conduct requirement for criminal Sherman Act prosecutions that Congress expressly disclaimed.

1. The district court initially grounded its departure from Hartford's authoritative construction of "trade and commerce . . . with foreign nations," 15 U.S.C. 1, in the presumption against extraterritorial application of federal statutes. See, e.g., EEOC v. Arabian American Oil Co. (Aramco), 499 U.S. 244 (1991). The district court conceded, as it must, that to the extent that presumption applies to the construction of this language in civil Sherman Act cases, the Hartford Court, in unequivocally endorsing the view that Congress intended "the Sherman Act

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[7]NPI argued below that § 7 comprised an "extraneous statutory provision[]" because Congress' sole purpose in enacting the FTAIA was "to confirm that conduct relating to most export and foreign commerce is excluded from the scope of the Sherman Act." NPI Reply Br. at 7 (App. 71) (emphasis omitted). This argument flies in the face of both statutory language and legislative history. As explained above, § 7's jurisdictional test, which turns solely on the effects of challenged conduct, applies not just to export transactions but to wholly foreign transactions. Congress could not have been more clear in this regard. As for the purpose of § 7, it assuredly was not "to confirm that conduct relating to most export and foreign commerce is excluded from the scope of the Sherman Act," NPI Reply Br. at 7 (App. 71) (emphasis in original), but rather to clarify that such conduct falls within the Sherman Act's reach when it produces "a direct, substantial and reasonably foreseeable effect" in the United States. H.R. Rep. No. 686, supra, at 9-10, reprinted in 1982 U.S.C.C.A.N. at 2494-95; see also Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920, 923 (E.D.N.Y. 1985) (explaining that Congress in enacting the FTAIA sought "to clarify the test for determination of United States anti-trust jurisdiction in international commerce").

[to] cover foreign conduct producing a substantial intended effect in the United States," 509 U.S. at 796-97 nn.22, 24, found it overcome. The court nonetheless held that, "because the presumption [against extraterritoriality] carries even more weight when applied to criminal statutes," Op. at 20 (Add. 21), the "well established" understanding that Congress intended the Sherman Act to embrace wholly foreign conduct producing actual effects in the United States, Hartford, 509 U.S. at 796 & n.22, is inapplicable when construing the very same statutory language in a criminal setting.

The district court's reasoning is deeply flawed. The Supreme Court has rejected the notion that the "authoritative meaning [of] statutory language" ordinarily may differ depending on whether the statute is construed "in a civil setting [or] a criminal prosecution." United States v. Thompson/Center Arms Co., 504 U.S. 505, 518-19 n.10 (1992) (plurality opinion) (internal quotations omitted).[8] Because the Sherman Act's jurisdictional language has been authoritatively construed to reach wholly foreign conduct in civil actions, it cannot, consistent with this principle of statutory interpretation, bear a different meaning in criminal prosecutions.

In any event, the district's premise was wrong: there is no greater "presumption against extraterritoriality," Aramco, 499 U.S. at 248, for criminal statutes than for civil statutes. United States v. Bowman, 260 U.S. 94 (1922), cited by the district court, says no such thing. In Bowman, the Court simply found the presumption against extraterritoriality that it previously had

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[8]In Thompson, Justices Scalia and Thomas joined the plurality's holding that the rule of lenity applied to the construction of a tax statute in a civil setting because the statute had criminal applications. See id. at 519 (Scalia, J., concurring in the judgment). A majority of the Court, then, resoundingly rejected Justice Stevens' argument, made in dissent, that the meaning of statutory language may vary depending on whether the statute is enforced in a civil or criminal setting -- the premise of Justice Stevens' argument that the rule of lenity did not apply. See id. at 526 (Stevens, J., dissenting).

invoked in civil cases applicable when construing criminal statutes. See id. at 98. The Court neither held nor implied that Congress faces an especially heavy burden to give criminal statutes extraterritorial operation. Moreover, the Court did not have before it a statute enforceable both civilly and criminally that specifically provided for its application to conduct undertaken wholly abroad.

The district court also sought support in a comment to section 403 of the Restatement (Third) of Foreign Law.[9] But that comment, fairly read, merely restates the ordinary presumption against extraterritoriality, viz, "that 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 § 403 Rptr. nt. 8 cmt. f (1987). Compare Aramco, 499 U.S. at 248 (explaining that the presumption ordinarily is overcome by an "affirmative intention of the Congress clearly expressed" to apply an enactment to foreign conduct (internal quotations omitted)).

Thus, the presumption against extraterritoriality is no greater for criminal than for civil enactments. There is accordingly no foundation for the district court's newly-minted rule that even though sufficient indicia of congressional intent to apply the Sherman Act to wholly foreign

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[9]The comment provides in pertinent part:

> [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 § 403 Rptr. nt. 8 cmt. f (1987).

conduct has been found, such application must be limited to civil actions absent an especially clear statement from Congress that it intended the very same language to have an equivalent reach when enforced criminally. Consistent with this unsurprising conclusion, a number of courts have applied the Hartford/Alcoa test in criminal Sherman Act prosecutions. See, e.g., In re Grand Jury Investigation, 186 F. Supp. 298, 313 (D.D.C. 1960) ("The cases hold that the intent and the result of affecting United States foreign commerce by an agreement to restrain trade brings the matter within the Sherman Act." (relying on Alcoa));[10] United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957) (relying, inter alia, on Alcoa).

To be sure, none of these cases involved the Act's application to foreign firms engaged in conspiratorial conduct wholly outside of the United States, the precise situation presented in Alcoa and Hartford. Nonetheless, these courts found the Hartford/Alcoa *standard* the appropriate principle for determining the Sherman Act's extraterritorial operation in criminal actions. See also United States v. Verdugo-Urquidez, 494 U.S. 259, 279-80 & n.2 (1990) (Brennan, J., dissenting) (listing the Sherman Act as a statute under which "foreign nationals" may be held "criminally liable" for "conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country"). Indeed, no court has either held or implied that the Sherman Act's geographic reach in a criminal case is any less broad than its reach in a civil action.

Last, invoking the presumption against extraterritoriality in determining the Sherman Act's

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[10]Because a grand jury investigation cannot properly be undertaken solely to garner evidence for a civil action, see, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958), the In re Grand Jury court necessarily rendered a holding concerning the Sherman Act's criminal reach.

criminal reach is especially inappropriate because the reasons underlying that canon of construction do not apply. The presumption, the Supreme Court has explained, derives primarily from two considerations. First, it serves to "protect against unintended clashes between our laws and those of other nations which could result in international discord." Aramco, 499 U.S. at 248 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963)). Second, it is "rooted" in the "common-sense notion that Congress generally legislates with domestic concerns in mind." Smith v. United States, 507 U.S. 197, 204 n.5 (1993); see also Aramco, 449 U.S. at 248 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

These concerns are rendered inapposite by the indisputably proper assertion of Sherman Act jurisdiction over wholly foreign conduct in civil actions. Application of the Sherman Act to wholly foreign conduct in a criminal case threatens to produce a "clash" with the law of foreign nations no more than in a civil action involving the same conduct. Indeed, this concern is particularly misplaced in this case, in which the conduct charged, price fixing, is a criminal offense in Japan, the country in which it allegedly occurred. See Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade of 1947 §§ 2(9), 3, 89. Moreover, the undisputed ability of the government, or private parties, to bring a civil action pertaining to wholly foreign conduct demonstrates that the Sherman Act is not solely concerned with conduct undertaken within the United States' borders.

The district court's rationale makes even less sense when applied to Sherman Act section 7. That section, which clarifies that "commerce . . . with foreign nations," 15 U.S.C. 1, includes wholly foreign transactions producing certain effects within the United States, see 15 U.S.C. 6a(1)(A); H.R. Rep. No. 686, supra at 9-10, reprinted in 1982 U.S.C.C.A.N. at 2494-95, plainly

provides the necessary "affirmative intention of the Congress clearly expressed," Aramco, 499 U.S. at 248 (internal quotations omitted), sufficient to overcome the presumption against extraterritoriality. Under the district court's view that the presumption against extraterritoriality is stronger with respect to criminal statutes, however, it is not enough that section 7's language plainly permits, in a criminal Sherman Act prosecution, the assertion of jurisdiction over wholly foreign conduct. Rather, as NPI argued below, see NPI Reply Br. at 7 (App. 71), under such a rule Congress has the special burden to specify that statutory language most naturally read to reach wholly foreign conduct in criminal actions is indeed intended to permit such a result.

This special drafting rule -- or "super" presumption against extraterritoriality -- not only is baseless for the reasons identified above, but suffers the additional defect of impermissibly requiring Congress to engage in drafting redundancies.[11] Plainly, the "super" presumption violates the cardinal rule that a canon of statutory construction cannot "beget" statutory ambiguity where there is none. E.g., Callan v. United States, 364 U.S. 587, 596 (1961); cf. United States v. Shabani, 115 S. Ct. 382, 386 (1994) ("To require that Congress explicitly state its intention not to adopt petitioner's reading would make the rule applicable with the mere possibility of articulating

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[11]To make clear the consequences of this "super" presumption, consider the following hypothetical statutory language: "All restraints of trade or commerce among the several states or with foreign nations that cause direct, substantial, and reasonably foreseeable effects within the United States, including such effect arising from wholly foreign transactions, are hereby declared to be illegal. Violators of this provision are guilty of a felony. The United States may enforce this provision through both civil and criminal actions" (except for § 7's import commerce proviso, this hypothetical language is, essentially, how §§ 1 and 7 properly are construed together). Under the "super" presumption, this language is insufficient to permit criminal prosecution of wholly foreign transactions that produce the requisite in-U.S. effects. Rather, the "super" presumption says, although the provision most naturally is read to permit such actions, Congress effectively must write another sentence stating: "Wholly foreign transactions producing the requisite in-U.S. effects may be subject to criminal prosecution under this Act."

a narrower construction, a result supported by neither lenity nor logic." (emphasis in original; internal quotations and citation omitted)).

2. The district court also invoked the rule of lenity -- that "ambiguity concerning the ambit of criminal statutes should be resolved" in the defendant's favor, e.g., United States v. Bass, 404 U.S. 336, 347 (1971) (internal quotations omitted) -- to justify spurning Hartford's construction of section 1 in its criminal applications. See Op. at 21 (Add. 22). But the Supreme Court in United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992), specifically rejected this argument. There, it invoked the rule of lenity when construing a statute in a civil case because the statute had criminal applications. See id. at 518 (plurality opinion). The dissent argued that employment of the rule of lenity was inappropriate because the Court construed the statute in a civil and not a criminal setting. See id. at 526 (Stevens, J., dissenting). Disagreeing, the Court explained, "the rule of lenity" is "a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." Id. at 519 n.10 (plurality opinion) (emphasis added).[12] Because Sherman Act section 1's jurisdictional language has been authoritatively construed to "cover[] foreign conduct producing a substantial intended effect in the United States," Hartford, 509 U.S. at 797 n.24, the rule of lenity does not permit a different construction of the Act in Sherman Act prosecutions.

The rule of lenity similarly provides no basis for interjecting an in-U.S. conduct

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[12]As explained above, a majority of the Court endorsed the plurality's holding on this point. See supra note 8.

requirement into the effects test section 7 prescribes. The rule of lenity comes in not at the beginning, but at the end, of the process of statutory interpretation. It is "not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seize[d] every thing from which aid can be derived, it is still left with an ambiguous statute." E.g., Chapman v. United States, 500 U.S. 453, 463 (1991) (internal quotations omitted); accord Staples v. United States, 114 S. Ct. 1793, 1804 n.17 (1994); Smith v. United States, 508 U.S. 223, 239 (1993).

Section 7 exhibits no "`grievous[]' ambiguity," Staples, 114 S. Ct. at 1804 n.17. As explained above, section 7's text and legislative history leave no doubt that Congress intended its application to turn on "the situs of the effects as opposed to the [situs of the] conduct." H.R. Rep. No. 686, supra, at 5, reprinted in 1982 U.S.C.C.A.N. at 2490. The relevant statutory language on its face controls in both civil and criminal Sherman Act cases, and the legislative history suggests no distinction in the Act's extraterritorial operation depending on whether the case is civil or criminal. Had Congress intended to impose an in-U.S. conduct requirement for criminal applications of the Act and restrict the effects-only jurisdictional test to civil actions, it could easily have done so. But it did not, and to seize on Congress' failure to expressly state that language clearly governing criminal actions is, in fact, intended to apply to such actions is -- as with the "super" presumption against extraterritoriality -- impermissibly to "`resort to ingenuity to create ambiguity'" where there is none. United States v. James, 478 U.S. 597, 604 (1986) (quoting Rothschild v. United States, 179 U.S. 463, 465 (1900)); see also Shabani, 115 S. Ct. at 386. In any event, it is both plain and undisputed that section 7 imposes no in-U.S. overt act requirement for civil actions; consequently, the rule of lenity cannot be invoked to give the statute

a different meaning when enforced criminally. See Thompson/Center Arms Co., 509 U.S. at 519 n.10.

3. United States v. United States Gypsum Co., 438 U.S. 422 (1978), also relied upon by the district court, is similarly inapposite. There, the Court held that an essential element of criminal Sherman Act offense is proof of mens rea, even though mens rea need not generally be shown to establish a civil violation of the Act. See id. at 438-46 & n.21. But Gypsum simply is not, as the district court thought, see Op. at 20-21 (Add. 21-22), a license to construe the Sherman Act's jurisdictional language more narrowly in a criminal setting than it would have when enforced civilly.

Gypsum, the Supreme Court subsequently explained, simply applied the "background rule of the common law" that, because "`[t]he existence of a mens rea element is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence,'" statutory silence "on [the] point does not necessarily suggest Congress intended to dispense with a conventional mens rea element." Staples, 114 S. Ct. at 1797 (quoting Gypsum, 438 U.S. at 436). Given, among other things, the perceived undesirable consequences of construing the Sherman Act to create a strict-liability crime, see Gypsum, 438 U.S. at 438, the Court found no reason to believe that Congress, in enacting the Sherman Act, intended to dispense with the usual mens rea element and thus depart "from the traditional distinctions between the elements of a civil and criminal offense." Id. at 443 n.19.

There is, however, no similar "background rule of the common-law" permitting jurisdictional language, once authoritatively construed to have a particular meaning in a civil setting, to bear a different meaning when applied in a criminal setting. See Thompson/Center

Arms Co., 504 U.S. at 519 n.10. Indeed, in American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), the Court reasoned that, if the Sherman Act when applied civilly reached the foreign conduct there at issue, that conduct necessarily would fall within the Act's criminal reach. See id. at 357.[13] Gypsum accordingly provides no basis for reading into the Sherman Act, when enforced criminally, an in-U.S. conduct requirement.[14]

4. Of course, underlying both the rule applied in Gypsum and the rule of lenity is the concern that criminal enactments should provide "'a fair warning . . . to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" United States v. Bass, 404 U.S. 336, 348 (1971) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.)). The district court, seizing on this precept, reasoned that absent the requirement of conspiratorial conduct within the United States it imposed, prosecution of foreign conduct under the Sherman Act "would present serious questions about notice to foreign corporate defendants as to the criminality of its conduct." Op. at 22 (Add. 23). But the district court's concern is wholly misplaced.

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[13]American Banana, the Court later explained, was a case in which effects within the United States from the challenged conduct had not been shown. See Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952). And, of course, to the extent American Banana suggests that the Sherman Act has no application to foreign conduct, that aspect of the decision has been squarely repudiated. See Hartford, 509 U.S. at 795-96. The Supreme Court's premise that application of the Sherman Act to particular foreign conduct in a civil context necessarily would bring that conduct within the Act's criminal reach, however, remains unrepudiated.

[14]The district court's reasoning suggests that it understood Gypsum to have applied the rule of lenity. See Op. at 20 (Add. 21). This, however, is mistaken. See Staples, 114 S. Ct. at 1804 n.17 (explaining that the Court "ha[d] not concluded in the past that statutes silent with respect to mens rea are ambiguous"). The Court simply noted that the result it reached was "in keeping" with the rule of lenity. Gypsum, 438 U.S. at 437. In any event, as explained above, the rule of lenity provides no justification for constricting the Sherman Act's jurisdictional reach in criminal actions.

As explained above, under a straightforward application of either the Hartford/Alcoa test or Sherman Act section 7, conspiratorial conduct undertaken wholly abroad is subject to Sherman Act prosecution when that conduct produces certain effects within the United States. The conduct challenged in the Indictment, price fixing between competitors, long has been held unlawful per se and subject to criminal prosecution under the Act. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-13 (1940). A company engaging in price-fixing overseas, then, is plainly on notice that its conduct is subject to prosecution under the Sherman Act if the price fixing produces the requisite in-U.S. effects. There certainly can be no argument that the government, at the time of the conspiracy charged in this case, did not regard such conduct cognizable as a criminal violation of the Act. The United States' consistent position, dating back over 80 years, is that the Sherman Act has such reach.[15]

The district court, then, only sensibly can be understood to hold that requiring proof of an in-U.S. overt act solves notice problems inherent in a jurisdictional test that hinges on demonstrating effects. But the Sherman Act's effects tests presents no notice problem. A criminal statute need provide no more than "a reasonable degree of certainty" regarding the conduct it condemns. Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952); United

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[15]See United States v. American Tobacco Co., 221 U.S. 106, 120-21 (1911) (arguing, in a Sherman Act case, "[a] crime is committed within the jurisdiction where the act of the parties actually takes effect, although the instrumentalities may have been set in motion in another jurisdiction"); U.S. Department of Justice Antitrust Division, Antitrust Enforcement Guidelines for International Operations 9, 53-57 case L (Mar. 1, 1977) ("1977 Guidelines") (explaining that the Department will seek to include as criminal defendants cartel members that take no acts in furtherance of an unlawful conspiracy within the United States even when such defendants have "no business activities at all in the U.S."); see also U.S. Department of Justice Antitrust Division, Antitrust Enforcement Guidelines for International Operations 78-79 (Nov. 10, 1988); 1995 Guidelines, supra, at 2, 13-17 (Add. 27, 30-34).

States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 32 (1st Cir. 1989); United States v. Cinemette Corp. of Am., 687 F. Supp. 976, 979 (W.D. Pa. 1988). Section 7's "direct, substantial, and reasonably foreseeable" effects test plainly meets this standard, as does the "actual intended effects" standard supplied by judicial construction of section 1.

Indeed, any notice concerns are particularly misplaced in this particular case, in which NPI and its coconspirators, the Indictment discloses, specifically sought to raise prices in the United States and engaged in conduct of a type criminally prosecutable in Japan. Cf. United States v. Lindemann, 85 F.3d 1232, 1241 (7th Cir. 1996) (refusing to impose a mens rea requirement with respect to a criminal statute's interstate nexus and explaining "[t]his lack of a mens rea requirement . . . is in no way unfair. Defendants who use interstate wires in schemes to defraud are not involved in conduct that, other than the interstate aspect of their calls, is legitimate in nature. Thus they cannot claim unfair surprise in finding out that they were violating the law. The only surprise they experience is learning that not only were they violating state law, they were violating federal law as well." (citing United States v. Feola, 420 U.S. 671, 685 (1975))).[16]

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[16]In any event the district court's solution does not solve the asserted notice problem. Even if the government must demonstrate a conspiratorial overt act within the United States to establish a criminal Sherman Act violation, the Sherman Act's application to price fixing on wholly foreign transactions still would turn on proof of in-U.S. effects. But the mere fact that an overt act is taken within the United States in furtherance of a scheme by which conspirators, through sales overseas to nonconspirator intermediaries at fixed prices, seek to raise prices in America, does not imply that the economic impact of the price fixing within the United States is any more intended, or for that matter, direct, substantial, or foreseeable.

Consider the case in which foreign competitors, meeting in San Francisco, agree to seek to raise prices in the United States through fixing the price at which they sell the relevant goods, in Europe, to intermediary importers. Through further meetings in San Francisco, they secure the services of American importers who, not knowing of the conspiracy, purchase goods from them in Rotterdam for importation into the United States. Had the relevant meetings occurred in Zurich instead of San Francisco, the economic effect of the conspiratorial conduct would have been

5. The district court also relied on legislative history of the Sherman Act as enacted in 1890 that, it claimed, "belies any suggestion that, in passing the Sherman Act, Congress believed that it was reaching wholly extraterritorial conduct." Op. at 22 (Add. 23). But the cited passage cannot carry such weight. In discussing a version of the Act ultimately rejected, Senator George asserted that if a conspiracy was entered into abroad, it would be "without the terms of the law." 21 Cong. Rec. 1765 (1890), reprinted in 1 Earl W. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 95 (1978). Senator Sherman's response, relied upon by the district court, agreed only that, in such circumstances, it would not be possible to prosecute such a conspiracy criminally if all the conspirators remained outside the United States -- circumstances in which, of course, personal jurisdiction over the defendants would not exist. See 21 Cong. Rec. 2455 (1890) (explaining 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" (emphasis added)), reprinted in 1 Kintner, supra, at 126. Senator Sherman did not say that such a conspiracy failed to constitute a violation of the Act, civil or criminal. To the contrary, he specifically indicated that a conspiracy entered into abroad could constitute an "unlawful combination." Id. The personal jurisdiction problem, he thought, could be solved by attaching property "brought within the United States" "in pursuance of" the "unlawful" scheme. Id.

More importantly, whatever dim light the floor debate between Senators Sherman and George sheds on congressional intent in 1890 is of no moment. Since 1945, the Act has been judicially construed to cover wholly foreign conduct, see Alcoa, 148 F.2d at 444, and the Supreme Court has definitively rejected the argument that Congress did not intend the Act to

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precisely the same.

have such reach. See Hartford, 509 U.S. at 795-97 & nn.22, 24. The district court was not free to revisit the question of whether the Sherman Act applies to wholly foreign conduct. Moreover, as explained above, Sherman Act section 7 governs the conduct the court construed the Indictment to charge, and that section's plain language and legislative history leave no doubt that Congress specifically intended the Sherman Act to reach wholly foreign conduct producing the requisite in-U.S. effects.

The George/Sherman colloquy similarly shows no clear congressional intent to distinguish between the Act's civil and criminal extraterritorial operation.[17] But even if it did, Congress has since amended the Act in ways inconsistent with the distinction drawn by the district court. In enacting Sherman Act section 7 Congress, as explained above, specifically endorsed the judicial interpretation of section 1 establishing the principle that "the situs of the effects as opposed to the conduct . . . determines whether United States antitrust law applies." H.R. Rep. No. 686, supra, at 5, reprinted in 1982 U.S.C.C.A.N. at 2490. Congress nowhere implied that it expected a different jurisdictional test to govern section 1's criminal applications, and it drew no such civil/criminal distinction in the language of section 7, which codified this judicial gloss on "commerce . . . with foreign nations," 15 U.S.C. 1.

It thus would be incongruous to construe section 1's jurisdictional language, in a criminal action, not to reach wholly foreign conduct when such a result plainly is impermissible under

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[17]Senator Sherman broadly stated: "I do not see what harm a foreigner can do us if neither his person nor his property is here. He may combine or conspire to his heart's content if none of his co-conspirators are here or his property is not here." 21 Cong. Rec. 2455 (1890), reprinted in 1 Kintner, supra, at 126. To the extent this delphic passage, which applies equally to civil and criminal liability under the Act, might be taken to imply that Congress did not intend to reach wholly foreign transactions at all, the authoritative judicial construction of the Act, not to mention the text of § 7, are controlling and to the contrary.

section 7. This is all the more so when it is recognized that Congress expected the Act to reach any conduct excepted from section 7's coverage at least to the same extent the Act, if section 7 governed such conduct, would apply. See H.R. Rep. No. 686, supra, at 9-10, reprinted in 1982 U.S.C.C.A.N. at 2494-95.

6. Finally, to restrict the Sherman Act, when enforced criminally, to schemes involving overt acts undertaken within the United States produces results that Congress plainly could not have intended. Neither the district court nor NPI contests the propriety of a court applying the Sherman Act to wholly extraterritorial conduct in a civil Sherman Act case. Yet, if the concern with permitting criminal prosecution of such conduct is the severity of criminal sanctions, the distinction in the Sherman Act's reach manufactured by the district court makes little sense. A private party may sue a foreign corporation, for wholly foreign conduct, in a civil action for treble damages. See, e.g., Hartford, 509 U.S. at 770, 795-96. In such circumstances, the potential liability may amount to hundreds of millions of dollars. In a criminal action against a corporation, the government typically seeks a fine for which the statutory maximum, absent proof of gain or loss from the conspiratorial conduct, is $10 million. See 15 U.S.C. 1. It strains credulity to believe that Congress intended to prohibit the government from seeking to impose a criminal fine on a firm participating in a foreign price-fixing cartel when the same conduct might subject the defendant to the treble damages action sword.

Of course, for various reasons, private treble damages actions might not always be brought. But in such circumstances, it makes even less sense to believe that Congress intended to immunize from criminal prosecution under the Sherman Act conspiracies implemented wholly abroad that were intended to produce and did in fact produce significant economic harm within

the United States. Price-fixing cartels established by foreign firms may inflict such harm whether or not implemented through acts undertaken within this nation. Yet according to the district court, the government's power to seek criminal sanctions, and thereby deter such conduct, depends on whether the conspirators' agents in the United States joined the conspiracy, or whether the conspiracy was formed here. These are not distinctions consonant with the Sherman Act's central purpose of preserving the welfare of American consumers, see, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."), and there is no reason to suppose Congress intended them.[18]

To the contrary, the Congress that enacted section 7 specifically expected that "[a]ny major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction." H.R. Rep. No. 686, supra, at 13, reprinted in 1982 U.S.C.C.A.N. at 2498. It also expected the "Department of Justice" to "continue [its] vigilance concerning cartel activity and to use [its] enforcement powers appropriately." Id. Congress made this statement fully aware of the United States' long-standing view that appropriate use of its enforcement powers includes criminal prosecution of wholly

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[18]Cf. Alcoa, 148 F.2d at 444 (explaining that applying the Sherman Act to wholly foreign conduct producing an actual intended effect within the United States fell within the principle established in United States v. Pacific & Arctic Ry., 228 U.S. 87 (1913); although in that criminal case "the persons held liable had sent agents into the United States to perform part of the agreement," an agent, Judge Hand explained, is "merely an animate means of executing his principal's purpose[]" and "for the purpose of this case" "does not differ from an inanimate means").

extraterritorial conduct.[19] Had Congress intended to disapprove this sort of employment of the Sherman Act against international cartels, it surely would have said so. To the contrary, Congress' tacit approval is demonstrated by its call for continued Justice Department vigilance against international cartel activity in recognition that, in an increasingly interdependent world economy, such cartels -- whether or not they operate on American soil -- may cause significant harm to American economic life.[20]

Accordingly, the district court's restriction of criminal Sherman Act enforcement to schemes involving a conspiratorial overt act committed within the United States is entirely without foundation, and must be reversed.

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[19]See 1977 Guidelines, supra, at 9, 53-57 case L; American Tobacco Co., 221 U.S. 106, 120-21 (1911) (arguing, in a Sherman Act case, "[a] crime is committed within the jurisdiction where the act of the parties actually takes effect, although the instrumentalities may have been set in motion in another jurisdiction"). The House Report accompanying the FTAIA demonstrates Congress' familiarity with the Department's 1977 Guidelines. See H.R. Rep. No. 686, supra, at 5, reprinted in 1982 U.S.C.C.A.N. at 2490.

[20]See H.R. No. 686, supra, at 6, 13, reprinted in 1982 U.S.C.C.A.N. at 2491, 2498. Congress' view has not changed. In 1994, it enacted the International Antitrust Enforcement Assistance Act, 15 U.S.C. 6201-6212, in order to augment the United States' ability to combat "price-fixing cartels and monopolies that operate [in whole or in part] abroad." H.R. Rep. No. 772, 103d Cong., 2d Sess. 11 (1994); accord S. Rep. No. 388, 103d Cong., 2d Sess. 2 (1994). Congress, the legislative history of the statute shows, believed that such cartels are subject to criminal prosecution. See H.R. Rep. No. 772, supra, at 11 (approving the Justice Department's "efforts to investigate and prosecute violations of U.S. antitrust law in the international marketplace"); id. at 17 (recognizing that "the most serious antitrust violation -- such as cartel activities -- are criminal in nature); S. Rep. No. 388, supra, at 2 (explaining that a purpose of the Act is to facilitate investigation and prosecutions (emphasis added)).

III. THE DISTRICT COURT INCORRECTLY CONSTRUED THE INDICTMENT NOT TO ALLEGE OVERT ACTS UNDERTAKEN IN FURTHERANCE OF THE CONSPIRACY WITHIN THE UNITED STATES

Neither the district court nor NPI contested that the Indictment would charge a cognizable Sherman Act offense if it included allegations of a conspiratorial overt act within the United States, and for good reason.[21] Because the overt act of one conspirator taken in furtherance of a conspiracy may be attributed to other conspirators, see United States v. Kissel, 218 U.S. 601, 608 (1910) (Sherman Act prosecution); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-54 (1940) (same); see also Pinkerton v. United States, 328 U.S. 640, 646-48 (1946), it is well established that "[a]ny conspiratorial act occurring outside the United States is within United States jurisdiction if an overt act in furtherance of the conspiracy occurs in this country." United States v. Endicott, 803 F.2d 506, 514 (9th Cir. 1986); see also Ford v. United States, 273 U.S. 593, 619-24 (1927); United States v. Inco Bank & Trust Corp., 845 F.2d 919, 920 & n.4 (11th Cir. 1988); United States v. Winter, 509 F.2d 975, 980-83 (5th Cir.), cert. denied, 423 U.S. 825 (1975).[22]

According to the district court, the Indictment failed to allege an overt act in furtherance of the conspiracy charged within the United States. But the Indictment, fairly construed, alleged such conduct. Accordingly, even under the district court's erroneous restriction of the Sherman

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[21]At the hearing on the motion to dismiss, NPI expressly conceded this. See Hearing Tr. 16 (App. 92).

[22]Of course, to be cognizable under the Sherman Act, foreign conduct must produce some effect within the United States. But if it does, and if a conspiracy based abroad includes in-U.S. conduct undertaken in furtherance of it, conspiratorial acts undertaken outside of the United States may be reached "without resort to any theory of extraterritorial jurisdiction." Inco Bank, 845 F.2d at 920 n.4.

Act's criminal reach to schemes involving an in-U.S. overt act, the Indictment states a Sherman Act offense.

A. The Indictment Provides Sufficient Notice That The United States Will Seek To Prove In-U.S. Conspiratorial Conduct

1. Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment "shall be a plain, concise and definite written statement of the essential facts construing the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment is legally sufficient if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Barker Steel Co., 985 F.2d 1123, 1126 (1st Cir. 1993).

An indictment, to serve these functions, "does not have to be detailed or evidentiary." United States v. Tedesco, 441 F. Supp. 1336, 1340 (M.D. Pa. 1977). "A distinction is to be drawn between an indictment which fails to set forth the essential facts necessary to apprise a defendant of the crime charged and one which, though it specifies the necessary facts, fails to specify the theory upon which those facts will be proved at trial or the evidence upon which the proof will rest." United States v. Markee, 425 F.2d 1043, 1047 (9th Cir.), cert. denied, 400 U.S. 847 (1970). Thus, an indictment that "fairly identifies and describes the offense" is not insufficient because "in hindsight [it] could have been more complete." United States v. Allard, 864 F.2d 248, 250 (1st Cir. 1989). "All parts of the indictment," moreover, "must be considered in determining its sufficiency." United States v. A.P. Woodson Co., 198 F. Supp. 579, 580 (D.D.C. 1961).

2. According to the district court's erroneous rule, an overt act undertaken by a coconspirator in furtherance of the conspiracy within the United States is an essential element of a criminal Sherman Act offense.[23] Thus, the district court implicitly held, at trial the government must prove that at least one conspirator took an act within the United States with "knowledge of, and an intent to further, the [averred conspiracy's] objective[]." United States v. Johnson, 952 F.2d 565, 581 (1st Cir. 1991), cert. denied, 506 U.S. 816 (1992). Under the above principles, of course, the Indictment may be far more conclusory; it need only provide sufficient notice that the government would seek to prove in-U.S. conspiratorial conduct. Cf. United States v. Wilshire Oil Co., 427 F.2d 969, 972-73 & nn.6-7 (10th Cir.) (rejecting claim that a Sherman Act indictment was insufficient for failure expressly to aver that a company "knowingly joined the conspiracy" charged when the company was specifically identified as a defendant), cert. denied, 400 U.S. 829 (1970).

3. The Indictment here plainly provided such notice to NPI. The Indictment specifically identifies the trading houses as "co-conspirator[s]" to the price-fixing conspiracy initiated by the manufacturers. Indictment ¶ 7(d) (App. 20). From this allegation alone, an averment that the trading houses knowingly participated in conspiracy can be inferred. See United States v. Hajecate, 683 F.2d 894, 897 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983); Wilshire Oil Co., 427 F.2d at 972-73 & nn.6-7. Moreover, the Indictment identifies a number of activities the "co-conspirator trading houses" engaged in within the United States that furthered the conspiracy's object of "increas[ing the] prices of fax paper sold throughout North America."

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[23]A criminal Sherman Act offense, the Supreme Court has explained, requires no allegation or proof of an overt act; the conspiracy itself violates the law. See Nash v. United States, 229 U.S. 373, 378 (1913).

Indictment ¶¶ 7(c), 3 (App. 20, 19). Specifically, having purchased "discrete quantities of fax paper" from the manufacturers "for specific customers in North America, on condition that such quantities be sold to the customers at specified prices," id. ¶ 9 (App. 21), the trading houses both shipped fax paper to, and sold it within, the United States, see id. (App. 21-22); see also id. ¶ 7(e) (App. 20).

Finally, because the Indictment specifically identifies the trading houses as parties to an agreement "the substantial term of which was to increase prices of fax paper sold throughout North America," id. ¶ 3 (App. 19), the only reasonable inference that can be drawn from the Indictment is that the trading houses undertook such shipments and sales with knowledge of, and with an intent to further, the conspiracy alleged. See Wilshire Oil Co., 427 F.2d at 972-73. Fairly read, then, the Indictment adequately alleges conspiratorial conduct undertaken in the United States in furtherance of the conspiracy charged.

B. The District Court Wrongly Required The Government To Allege The Evidentiary Details Of A Separate Vertical Resale Price Maintenance Conspiracy

Just as with its unjustified constriction of the Sherman Act's criminal reach, the district court in construing the Indictment failed to undertake the proper inquiry. The court erroneously understood the government's view of why the Indictment adequately charged in-U.S. conduct to hinge solely on the Indictment sufficiently alleging that "Japanese trading companies and their American subsidiaries joined Jujo in the conspiracy by entering into a vertical agreement to fix the resale price of fax paper in the United States." Op. at 14 (Add. 15). Having so narrowed its focus, the court proceeded to ask whether the Indictment alleged such a separate vertical conspiracy between Jujo and the trading houses, see id. at 16 (Add. 17), and found the Indictment

wanting. See id. at 16-18 (Add. 17-19). The district court's reasoning, however, was flawed at each turn.

1. The court went off track in its critical, initial supposition that the government, to demonstrate conspiratorial conduct within the United States, must allege and prove that Jujo and its trading houses engaged in a separate and distinct resale price maintenance conspiracy.[24] For the trading houses to be "co-conspirators," however, they merely had to take actions with the purpose of furthering the agreement underlying the conspiracy charged. Cf. United States v. Townsend, 924 F.2d 1385, 1390 (7th Cir. 1991) (explaining that "to join a conspiracy" is "to join an agreement"); United States v. Morrow, 39 F.3d 1228, 1234 (1st Cir. 1994) (same), cert. denied, 115 S. Ct. 1421 (1995).

The agreement the trading houses allegedly joined, the Indictment discloses, was the agreement initiated by the manufacturers "to increase prices o[n] fax paper sold throughout North America." Indictment ¶ 3 (App. 19). The essence of this agreement was to achieve a particular economic result: higher prices to American consumers. The Indictment discloses no limitation on the means through which the agreement's objective was to be achieved. Thus, the trading houses could further the conspiracy's object merely by shipping into the United States fax paper they purchased from the manufacturers, and selling it to customers at inflated prices. Whether the prices the trading houses charged American consumers were fixed with a particular manufacturer through a resale price maintenance agreement or reflected the trading houses' voluntary decision

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[24]Resale price maintenance is an agreement between the seller of a good (typically a manufacturer) and the buyer (typically a dealer) that the buyer's resale of the item will be at a price set by the agreement. See, e.g., Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726, 735 (1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

to follow the manufacturers' suggestions as to price is of no moment. Both would be in furtherance of the conspiracy as long as the trading houses did so knowing of the conspiracy and with the intent to further its objective. Although the trading houses' shipment and sale of goods within the United States at prices of their own choosing might ordinarily be lawful, "it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962).[25]

The district court thus plainly erred in narrowing its focus on whether the Indictment properly alleged a distinct resale price maintenance conspiracy. The Indictment, as explained above, fairly is construed to allege that trading houses undertook shipment to, and sale of fax paper within, the United States in furtherance of the conspiracy charged, and that is all that is required to aver in-U.S. conspiratorial conduct.

2. Of course, resale price maintenance undertaken with the requisite purpose also would suffice to demonstrate in-U.S. conspiratorial conduct. The district court, as explained above, looked for allegations "that an express agreement was entered into between Jujo and the trading houses" to fix prices vertically, and found none. Op. at 16-18 (Add. 17-19).

The district court read the Indictment too stingily. The Indictment specifically states: "The Japanese manufacturers sold discrete quantities of fax paper to the trading houses in Japan,

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[25]The court implied that to prove in-U.S. conspiratorial conduct, the government must show that one of NPI's trading houses engaged in an overt act within the United States in furtherance of the conspiracy. See Op. at 14, 16-18 (Add. 15, 17-19). This is incorrect. Because the overt act of one conspirator taken in furtherance of a scheme may be attributed to other conspirators, see supra p.33, proof of such conspiratorial conduct by a trading house employed by any manufacturer involved in the scheme could suffice.

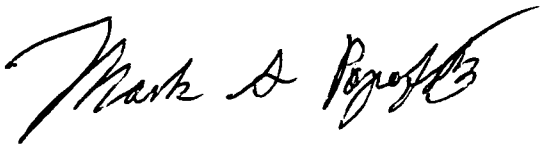
for specific customers in North America, on condition that such quantities be sold to the customers at specified prices." Indictment ¶ 9 (App. 21) (emphasis added). There is no reasonable construction of "on condition" other than that the trading houses agreed to charge the "specified prices," and this is precisely the sort of "allegation that an express [resale price maintenance] agreement was entered into" for which the district court searched. Op. at 16 (Add. 17). The district court dismissed this averment, claiming it only implied that "Jujo undertook to direct the trading houses to sell fax paper at a specified price and to monitor whether the trading houses were complying with this directive." Op. at 18 (Add. 19). But the Indictment, in explaining that sales to trading houses were made "on condition" that "specified prices" would be charged, plainly alleges an express agreement on resale prices.

To the extent the district court found the Indictment insufficient because it failed to disclose the evidence through which the government would demonstrate conditioned sales -- or, for that matter, the evidence through which the government would show that the trading houses became "co-conspirators," Indictment ¶ 7(d) (App. 20), and undertook the in-U.S. conduct alleged in order to further the conspiracy's object -- the court impermissibly required "specific[ation] of the theory on which those facts will proved at trial [and] the evidence upon which the proof will rest." Markee, 425 F.2d at 1047; see also Wilshire Oil Co., 427 F.2d at 972-73; Tedesco, 441 F. Supp. at 1340-41 (upholding a Sherman Act indictment that charged defendants with "conspir[ing] . . . to fix . . . the price[]" of coal during a certain time period in a particular location but that did not specify the facts upon which proof of the conspiracy's existence would be based); A.P. Woodson, 198 F. Supp. at 581 (same).

CONCLUSION

The district court's Order dismissing the Indictment should be reversed, and the case remanded for trial.

Respectfully submitted.



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October 16, 1996

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 1996, I caused a copy of the foregoing BRIEF FOR APPELLANT UNITED STATES OF AMERICA to be served upon the following counsel in this matter by Federal Express:

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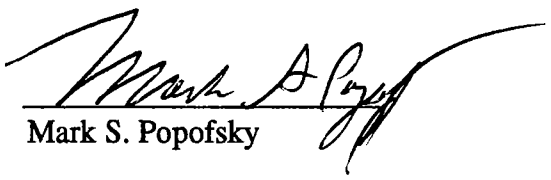

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ADDENDUM

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	*	
	*	
v.	*	CR. No. 95-10388-JLT
	*	
NIPPON PAPER INDUSTRIES CO., LTD.; JUJO PAPER CO., INC.; and HIRINORI ICHIDA; Defendants.	*	

ORDER

September 3, 1996

TAURO, Ch.J.,

For the reasons stated in the accompanying memorandum, the court orders as follows:

1. Nippon Paper Industries Co., Ltd.'s ("Nippon") Motion [29] to Dismiss Count One Of The Indictment For Lack Of Personal Jurisdiction is DENIED;

2. Nippon's Motion [66] To Dismiss Count I Of The Indictment For Failure To State An Offense Under 15 U.S.C. § 1 is ALLOWED and the Indictment is hereby DISMISSED as to Nippon and Jujo Paper Co., Inc.; and

3. Nippon's Motion [64] To Dismiss Count I Of The Indictment For Failure To State An Offense is DENIED as moot.

IT IS SO ORDERED.

United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	*	
	*	
v.	*	CR. No. 95-10388-JLT
	*	
NIPPON PAPER INDUSTRIES CO., LTD.; JUJO PAPER CO., INC.; and HIRINORI ICHIDA; Defendants.	*	

DOCKETED

MEMORANDUM

September 3, 1996

TAURO, Ch.J.,

The United States brings this criminal action against Nippon Paper Industries Co., Inc. ("Nippon"), alleging that its predecessor, Jujo Paper Co., Inc. ("Jujo"), conspired in 1990 to fix prices of jumbo roll thermal facsimile paper ("fax paper") sold in the United States, in violation of section 1 of the Sherman Act, 15 U.S.C.A. § 1 (West Supp. 1996). Presently before the court are Nippon's motions to dismiss on three alternative grounds: (1) lack of personal jurisdiction over Nippon, (2) failure of the indictment to state an offense under section 1 of the Sherman Act, and (3) failure of the indictment to adequately plead successor liability.

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I.

BACKGROUND[1]

Nippon is a Japanese corporation with its principle place of business in Tokyo, Japan. Nippon was formed in 1993 as a result of a merger between Jujo and Sanyo Kokusaku Co., Ltd., both Japanese corporations with their principal places of business in Japan.

In 1990, Jujo manufactured fax paper at mills located in Japan. Jujo did not engage in direct export sales but, rather, sold its fax paper in Japan to Japanese trading houses. With regard to fax paper manufactured by Jujo that ultimately reached customers in the United States, Jujo's sales were limited to two Japanese trading companies, Japan Pulp & Paper Co., Ltd. ("JPP") and Mitsui & Co., Ltd. ("Mitsui"). JPP and Mitsui exported the fax paper to their respective subsidiaries in the United States and those subsidiaries engaged in direct sales to customers in the United States.

The government maintains that the conspiracy originated at meetings held in Japan in early 1990, during which Jujo and other Japanese manufacturers of fax paper "agreed to increase prices for fax paper to be imported in North America." Indictment ¶ 7(b). Although the indictment does not specify which alleged

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[1] In outlining its background, the court accepts the government's characterization of the case as a conspiracy involving horizontal and vertical relationships. As explained in detail below, the parties dispute whether the indictment adequately pleads the theories of the conspiracy advanced by the government in its memorandum opposing Nippon's motion for failure to state a claim under section 1 of the Sherman Act.

co-conspirators attended these meetings, the government conceded at argument on this motion that none of the Japanese trade houses nor their American subsidiaries participated in these meetings.

To effectuate this conspiracy, Jujo and the other manufacturers "raised their prices for fax paper" charged to the Japanese trading houses. The government further contends that Mitsui and JPP, and their American subsidiaries, became co-conspirators by agreeing to sell fax paper in North America at the newly raised price.

II.

DISCUSSION

A. Personal Jurisdiction

Congress, by way of the Federal Rules of Criminal Procedure, has provided for nationwide service of process of criminal summons. Fed. R. Crim. P. 4(d)(2). Service of process on a corporation may be effected within the territorial limits of the United States by:

> delivering a copy [of the summons] to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at is principal place of business elsewhere in the United States.

Fed. R. Crim. P. 9(c)(1).

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 offices in Seattle. In January 1996, service of a copy of the criminal summons was made on Richard

Parker, a partner of O'Melveny & Myers, who had been active in the law firms representation of Nippon throughout the grand jury investigation leading to the present indictment. Subsequently, in-hand service of the criminal summons on Seiichi Masuko was executed by a United States Marshal at Nippon's Seattle office.[2]

The government contends that the court has jurisdiction over Nippon merely because a summons was served on Seiichi Masuko within the territorial boundaries of the United States pursuant to Rule 4. Alternatively, the government maintains that, because Nippon has sufficient contacts with the United States, service pursuant to Rule 4 gives this court jurisdiction over Nippon.

1. Review of jurisdictional principles

"Personal jurisdiction implicates the power of a court over a defendant." Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 143 (1st Cir. 1995). Historically, the presence of a defendant within the boundaries of the sovereign served as a prerequisite to its courts exercising jurisdiction over him. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Once presence existed, the manner in which such presence was procured did not alter the power of the court over that person. See, e.g., Frisbie v. Collins, 342 U.S. 519, 522 (1952) (jurisdiction existed over criminal defendant brought within border of sovereign by forcible abduction); Chandler v. United

[2] Nippon previously challenged the propriety of the service of process. On March 13, 1996, Chief Magistrate Judge Alexander denied Nippon's motion to quash. Nippon does not here challenge that decision.

States, 171 F.2d 921, 933 (1st Cir. 1948) (court may not refuse jurisdiction where fugitive is brought before it regardless of the means used to bring him within its territorial jurisdiction), cert. denied, 336 U.S. 918 (1949).

With the advent of personal service of process, the scope of a sovereign's power expanded to include, under certain conditions, persons not present in its territory. International Shoe, 326 U.S. at 316. Exercise of jurisdiction over persons not found within the sovereign's borders was held to be consistent with due process if the defendant has "certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Id. The modern doctrine of personal jurisdiction, thus, involves two distinct and independent bases for exercise of a sovereign's power: (1) physical presence of the person within the territorial boundaries of the sovereign, and (2) sufficient contacts with the sovereign to justify reaching him extraterritorially.

With respect to the latter basis for jurisdiction, the First Circuit has developed the doctrines of general and specific jurisdiction. United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp., 960 F.2d 1080, 1088 (1st Cir. 1992). A court has general jurisdiction over a person "when the litigation is not directly based on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systemic activity, unrelated to the suit, in the

forum state." Id. If general jurisdiction is lacking, a court determines whether it possesses specific jurisdiction by examining (1) the relatedness of the defendant's forum-state activities and the claim underlying the litigation, (2) the deliberateness of the defendant's contacts with the forum-state, and (3) the reasonableness of the exercise of jurisdiction in light of various Gestalt factors. Pritzker v. Yari, 42 F.3d 53, 60-61 (1st Cir. 1994), cert. denied, -- U.S. --, 115 S. Ct. 1959 (1995).

Turning to adjudication of federal claims in federal courts, two factors must be examined: (1) the territorial limits on service of process defined by Congress, and (2) the constitutional constraints on Congress' definition of those limits. See, e.g., S.E.C. v. Unifund Sal, 910 F.2d 1028, 1033 (2nd Cir. 1990). Courts have recognized that Congress may provide for nationwide service of process. Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987), cert. denied, 485 U.S. 1007 (1988). In providing for nationwide service, Congress defines the territorial jurisdiction of the federal courts as encompassing the entire nation. Id. at 671-72. As such, the Due Process Clause of the Fifth Amendment does not require that a defendant have sufficient contacts with the state in which the district court sits for there to be jurisdiction. Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 n.3 (1st Cir. 1984); Debreceni v. Bru-Jell Leasing Corp., 710 F. Supp. 15, 20-1 (D. Mass. 1989).

With these principles in mind, the court turns to the issues raised by the parties: (1) whether Congress can authorize federal courts to exercise jurisdiction over an alien corporation, without regard to the contacts of that corporation to the United States, (2) whether service under Rule 4 authorizes a federal district court to exercise personal jurisdiction over an alien corporation, regardless of the substantiality of the contacts of that corporation with the state in which the district court sits, and (3) whether Nippon has sufficient contacts with the United States to warrant exercise of jurisdiction over it.

2. Jurisdiction by virtue of service in the United States

The government contends that service under Rules 4 and 9, standing alone, is sufficient to create jurisdiction over Nippon. In advancing this position, the government argues by analogy from cases concerning the presence of individual criminal defendants. The Supreme Court explained in Frisbee:

> The Court has never departed from the rule announced in Ker v. Illinois, 119 U.S. 436 [1886] that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now present to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional safeguards."

342 U.S. at 533 (emphasis added). As Frisbee implies, minimum contacts considerations do not apply to individuals who are served process within the territorial limits of the sovereign. Burnham v. Superior Court of California, 495 U.S. 604, 622 (1990)

(plurality opinion) (Scalia, J.); Johnson Creative Arts, 743 F.2d at 950 n.3. And so, the government contends, service on an agent within the territory of the United States establishes the presence of an alien corporation.

The principal problem with the government's analogy lies with the concept of corporate presence. Corporations are legal constructions and their presence is, in some sense, fixed to the situs of their incorporation. Where nationwide service is applied to an American corporation this does not present a problem, insofar as jurisdiction can be acquired by service in its state of incorporation. But, process on an alien corporation at its place of incorporation would, of course, take place beyond the territorial limits of the United States.

Moreover, the government's suggestion that service on an officer of an alien corporation within the United States functions as the surrogate for the presence of the alien corporation leads to incongruous results. Consider service of process on the president of an alien corporation who merely happens to be vacationing in Florida, or changing airplanes at an American airport in route to a foreign destination. Is the corporation really "present" in the United States under such happenstance? As Judge Hand recognized, one cannot "impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes." Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2nd Cir. 1930). The vacationing foreign corporation president is likely not acting to serve his

employer's purposes. Indeed, it was the problem of corporate presence that led the Supreme Court to articulate the minimum contacts test in International Shoe. International Shoe, 326 U.S. at 315-19. See also Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017, 1020-23 (2nd Cir. 1978) (explaining rise and fall of the corporate presence theory in the context of states' efforts to reach foreign corporations).

Further, contrary to the government's contention, the minimum contacts test is not limited to cases involving extraterritorial service on a corporation. In International Shoe, an agent of the corporate defendant had been served within the forum-state, pursuant to a state statute authorizing in-state service of process on agents of foreign corporations. International Shoe, 326 U.S. at 311. As such, the issue before the Court involved the limits imposed by due process on a sovereign's efforts to obtain in personam jurisdiction over a foreign corporation by in-state service on one of its agents. In holding that the sovereign only obtains personal jurisdiction where there are sufficient contacts, the Court implicitly found that the mere act of service on the agent did not render the corporation "present" in the state.

For these reasons, this court holds that the mere service of process on an agent or officer of an alien corporation within the United States does not without more establish the jurisdiction of a federal court over an alien corporation. Rather, as this court has previously decided in the context of a civil matter, service

of such process is only effective to create in personam jurisdiction where a defendant has sufficient contacts with the United States. See Debreceni, 710 F. Supp. at 20-21 (where federal statute provides for nationwide service of process for a federal claim, the Constitution merely requires minimum contacts with the United States).

3. Nationwide service in criminal antitrust actions

Though Congress may bestow on a federal district court personal jurisdiction over an alien corporation without regard to the contacts between the district and the defendant, the question remains whether Congress has done so in this case. Nippon contends that the court should not construe Rules 4 and 9 of the Federal Rules of Criminal Procedure as providing federal district courts with jurisdiction on the sole basis of national contacts in criminal antitrust actions. Nippon advances two alternative arguments in support of this contention.

First, Nippon maintains that section 12 of the Clayton Act, 15 U.S.C.A. § 22 (West 1973), is the exclusive provision for nationwide service in antitrust cases. Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C.A. § 22. Because prosecution in this district allegedly does not satisfy section 12's venue provision, Nippon avers that this court cannot exercise jurisdiction.

It is not clear, however, that section 12 of the Clayton Act applies to criminal prosecutions under the Sherman Act. See United States v. National Malleable & Steel Castings Co., 6 F.2d 40, 43 (N.D. Ohio) (1924)(section 12 of the Clayton Act applies only to civil suits). Moreover, even if section 12 applies to criminal actions, the cases interpreting section 12 demonstrate that it was intended to supplement rather than supplant general federal venue and service of process statutes and rules. See, e.g., Board of County Comm'rs of Custer County v. Wilshire Oil Co. of Texas, 523 F.2d 125, 129-30 (10th Cir. 1975). Accordingly, the court concludes that service under Rules 4 and 9 may be relied on in federal antitrust prosecutions.

Second, Nippon contends that jurisdiction on the basis of national contacts is permitted only when the provision authorizing nationwide service also limits venue to a federal district in which the alien corporation can be found.[3] Any other reading, Nippon suggests, would violate due process. Nippon cites no authority for this novel proposition and the court has found none. The reason for this absence of precedent is found in the Constitution itself, which imposes specific limits on the place of a criminal prosecution. Article III, section 2 requires that trial of crimes shall be held in the state where the crime was committed. The Sixth Amendment provides that criminal

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[3] Fed. R. Crim. P. 18 limits venue to a district in which the offense was committed. For purposes of its motion to dismiss for lack of personal jurisdiction, Nippon does not challenge the government's allegation that co-conspirators committed overt acts in Massachusetts in furtherance of the conspiracy.

defendants are entitled to trial "by an impartial jury of the State and district wherein the crime shall have been committed." In light of the Constitution's venue and vicinage provisions, this court will not devine a generalized due process right requiring an additional nexus between a criminal defendant and a federal judicial district.[4] See generally O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 114 S. Ct. 2048, 2054 (1994)(expression of one thing implies exclusion of others).

Moreover, the proposition advanced by Nippon has been rejected by the Supreme Court. In United States v. Union Pacific R.R., 98 U.S. (8 Otto) 569, 603-04 (1878), the Court held that Congress could make a court in Washington, D.C. the exclusive forum for certain claims arising under federal law. If Congress can establish one court within the United States to here all claims without regard to a defendant's contacts to that place, it inescapably follows that Congress can designate any place within the United States as an appropriate forum for federal claims.

Accordingly, this court concludes that the absence of a provision in the Federal Rules of Criminal Procedure linking the venue of a criminal action to contacts with the defendant, does not mandate a reading of Rule 4 as limiting personal jurisdiction

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[4] The court notes that some courts have suggested that due process may protect against abusive selection of a venue by the federal government. See Petition of Provoo, 17 F.R.D. 183 (D. Md.), aff'd, 350 U.S. 857 (1955). There is, however, no suggestion in this case that the prosecution has acted in bad faith in selecting the present forum.

to federal districts with which the defendant has sufficient contacts.

4. Nippon's contacts with the United States

Disposition of the present motion depends, then, on whether Nippon has sufficient contacts with the United States to fall within the court's general or specific jurisdiction.

Since its inception in 1993, Nippon has maintained two offices in Seattle, Washington that Jujo previously operated. These offices are staffed by eight employees. One of these offices engages in market research and quality inspections, as well as arranging for the annual transportation to Japan of over $270 million worth of newsprint, publishing paper, and wood chips purchased by Nippon in the United States. Nippon's other Seattle office negotiates contracts for and purchases annually approximately $40 million in logs and lumber from suppliers in the United States for export to Nippon's production facilities in Japan. The Seattle offices maintain bank accounts in the United States through which Nippon pays for purchases of materials exported to Japan, employee salaries, and office expenses.

Additionally, Nippon owns twenty percent of North Pacific Paper Corporation, Inc. ("NORPAC"), a paper manufacturing corporation located in Longview, Washington. NORPAC generates annual revenues of approximately $350 million.

Finally, Nippon officers and directors routinely travel to the United States to conduct business with its suppliers in the

United States, to oversee operations of NORPAC, to attend industry conferences, and to negotiate technological agreements.

In light of these contacts, the court concludes that Nippon has engaged in continuous and systemic activity in the United States. Accordingly, the court possesses general personal jurisdiction over Nippon.

B. Extraterritorial Application of Section 1 of the Sherman Act

The court now turns to Nippon's motion to dismiss the indictment for failure to state an action under section 1 of the Sherman Act. Nippon maintains that the indictment charges Nippon, as Jujo's successor, with entering into a horizontal agreement with Japanese manufacturers to fix prices, with selling fax paper to Japanese trading houses in Japan at that price, and directing the Japanese trading houses to resale the fax paper at certain prices. On this characterization of the indictment, the criminal conduct alleged occurred wholly in Japan and was wholly committed by Japanese manufacturers of fax paper. Nippon contends the criminal provisions of the Sherman Act do not apply to conduct wholly occurring outside the United States.

The government responds in two ways. First, it maintains that the indictment alleges that the Japanese trading companies and their American subsidiaries joined Jujo in the conspiracy by entering into a vertical agreement to fix the resale price of fax paper in the United States. As such, the government suggests that Nippon's characterization of the indictment as attempting to reach acts solely occurring outside the United States goes awry.

Alternatively, the government contends that the criminal provisions of the Sherman Act can reach wholly foreign acts where the intent and effect of those acts is to affect commerce in the United States.

To resolve this motion, then, the court must address two questions: (1) whether the government has sufficiently pled its claim that a vertical agreement existed between Jujo and the trading houses; and (2) if not, whether the Sherman Act reaches the alleged horizontal agreement between Jujo and the other Japanese manufacturers of fax paper.

1. Adequacy of pleading the vertical agreement

An indictment must contain essential facts constituting an offense charged and must set forth every essential element of an alleged offense. Fed. R. Crim. Pro. Rule 7(c)(1). See, e.g., United States v. McDonough, 959 F.2d 1137, 1140 (1st Cir. 1992). The essential elements of a Sherman Act indictment are the time, place, manner, means, and effect of an alleged violation. United States v. Tedesco, 441 F.Supp. 1336, 1339 (M.D. Pa. 1977).

In Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), the Supreme Court propounded the evidentiary requirements of proving a vertical agreement to fix resale prices. Compliance by a distributor with a manufacturer's unilateral directive to resell its product at a certain price does not constitute an agreement to conspire on the part of the distributor. Id. at 764. The evidence regarding the action of the distributor, therefore, must be of a nature that excludes the possibility the

manufacturer and distributor were acting independently. Id. at 764. Indeed, the evidence must demonstrate that the manufacturer and distributor "'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Id. So, for example, neither the fact that a manufacturer has directed a retailer to sell at a certain price and the distributor complies with that direction, nor the fact that the retailer exchanges sales information with the manufacturer, support an inference of a vertical price-fixing scheme. Id. at 762-64.

Monsanto's articulation of what conduct may permissibly give rise to an inference of an agreement is germane to whether the indictment adequately describes the existence of a conspiracy between the trading houses and Jujo. In making that determination, the court looks for either an allegation that an express agreement was entered into between Jujo and the trading houses, or a description of alleged conduct from which the reader could infer such an agreement. For the reasons that follow, the court concludes that the indictment fails to adequately plead the existence, manner, and means of a vertical price fixing agreement between Jujo and the Japanese trading companies.

As an initial matter, the court observes that the indictment does adequately aver that, at meetings in early 1990, Jujo and co-conspirators explicitly agreed to price increases in fax paper. Indictment ¶ 7(b). The government concedes, however, that it is not proceeding under the theory that the Japanese trading companies attended the meetings at which this alleged

explicit agreement was formed. Transcript of July 29, 1996 Hearing at 23.

Apart from the specific allegation that an agreement was reached at the early 1990 meetings, there is no other language in the indictment indicating that a subsequent vertical agreement arose between Jujo and the Japanese trading houses. In paragraphs 7(d) and 7(e), the indictment states 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." This completes the indictment's characterization of the means and method of the conspiracy. Neither direction by Jujo to the trading houses nor communication by Jujo to determine compliance with that direction, imply the existence of a vertical agreement between Jujo and the trading houses.

Examining the indictment's description of the effects of the alleged conspiracy yields even less indication that a vertical agreement is alleged. Paragraph 9 of the indictment reads: "[t]he Japanese manufacturers sold discrete quantities of fax paper to the trading houses in Japan, for specific customers in North America, on condition that such quantities be sold to customers at specified prices." It continues: "[t]he Japanese manufacturers . . . monitored the trading houses' transactions with the North American customers to ensure that the agreed upon

prices were charged." Again, these averments merely suggest that, to ensure the success of its horizontal agreement, Jujo undertook to direct the trading houses to sell fax paper at a specified price and to monitor whether the trading houses were complying with this directive. Neither of these allegations serve as an averment that the trading houses entered into a price fixing agreement with Jujo.

In sum, except for the naked characterization of the trading houses as co-conspirators, the indictment merely alleges: (1) that Jujo directed the trading houses, (2) that Jujo communicated with the trading houses, and (3) that the trading houses served as the distributive link between Jujo and purchasers of fax paper in the United States. This court concludes that such allegations, singly or in combination, do not satisfy the government's burden of pleading with requisite particularity the existence of a vertical agreement.

2. The horizontal agreement

Because the government has failed to plead a vertical agreement to join the conspiracy by the trading houses, this case does not involve overt acts by co-conspirators occurring in the United States. The government contends, nonetheless, that the Sherman Act encompasses the wholly extraterritorial conduct described in the alleged horizontal agreement between Jujo and the other Japanese manufacturers of fax paper. This presents a question of first impression regarding the extraterritorial reach of the criminal provisions of the Sherman Act. See Restatement

(Third) of Foreign Relations Law § 403, note 8 (1986) ("No case is known of criminal prosecution in the Unites States for an economic offense (not involving fraud) carried out by an alien wholly outside the United State.").[5]

Section 1 of the Sherman Act provides:

> 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.

15 U.S.C.A. § 1. This section serves as the substantive language for both civil and criminal application of the antitrust laws. According to the government this essentially ends the matter, for "it is well established that [the civil sanctions of] the Sherman Act appl[y] to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795 (1993). The court, however, disagrees with that suggested equating of the Sherman Act's civil and criminal application.

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[5] The government cites two criminal cases as applying the Sherman Act to foreign conduct: United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957) and In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 313 (D.D.C. 1960). Both of these cases, however, specifically premise their holding on the fact that co-conspirators committed overt acts in the United States. Oldham, 152 F. Supp. at 821 ("the only commerce sought to be regulated is the importation and sale of wire nails on the West Coast of the United States"); Shipping Industry, 186 F. Supp. at 314 ("American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), does not preclude Sherman Act jurisdiction over agreements in restraint of trade carried out, at least in part, within the United States."). Indeed, Oldham makes "clear that there is no attempt here to regulate Japanese commerce as such, or to indict Japanese firms or Japanese nationals." Oldham, 152 F. Supp. at 821.

As a general matter, there is a strong presumption against extraterritorial application of federal statutes, absent a clear expression by Congress to the contrary. E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991). As noted above, courts have held that this presumption has been overcome in the case of civil application of the federal antitrust laws. Hartford, 509 U.S. at 795. Nonetheless, because the presumption carries even more weight when applied to criminal statutes, United States v. Bowman, 260 U.S. 94, 97-98 (1922), the line of cases permitting extraterritorial reach in civil actions is not controlling. And, indeed, commentators have generally recognized this distinction when explaining the extraterritorial reach of the antitrust laws:

> The principles governing [extraterritorial application of civil laws] apply to criminal as well as civil litigation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as 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 § 403, cmt. f (1986).

Moreover, courts have recognized that the substantive language of section 1 of the Sherman Act requires different treatment in civil and criminal contexts. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 439-43 (1978) ("Gypsum"). In Gypsum, the Supreme Court confronted the issue of whether criminal responsiblity under the Sherman Act

should be based on strict liability, as it had been held in civil cases, or whether some intent element should be attributed to it as the traditional canons of statutory interpretation would suggest. Id. at 436. The Court reasoned that the ambiguities inherent in the fact intensive nature of an antitrust prosecution counseled against imposing criminal liability absent a demonstration of intent to violate the law. Id. at 440-42. Additionally, the Court recognized that Congress adopted the language of the Sherman Act "fully aware of the traditional distinction between the elements of civil and criminal offenses and apparently did not intend to do away with them." Id. at 443 n.19.

Here, the court faces a choice between competing interpretative principles similar to the one posed in Gypsum. As did the Court in Gypsum, this court concludes that the traditional distinction between the elements of civil and criminal charges must be maintained.

This conclusion finds support in policies underlying antitrust and criminal law. On the civil side, antitrust enforcement benefits from a certain degree of interpretive flexibility. Appalachian Coals v. United States, 288 U.S. 344, 359-60 (1933). That flexibility enables the government to use the antitrust laws as an effective means for regulating business practices. Cf. Gypsum, 438 U.S. at 442. But, as Nippon observes, such flexibility is antithetical to the principles of predictability and fairness that undergird the criminal law. Id.

at 441-42. See also 2 Areeda and Hovenkamp, Antitrust Law § 311 32-33 (rev. ed. 1995). And, because the Sherman Act is silent on the issue, imputation of extraterritorial application of its provisions would present serious questions about notice to foreign corporate defendants as to the criminality of its conduct. Cf. Balthazar v. Superior Court of the Commonwealth of Massachusetts, 428 F. Supp. 425, 433 (D. Mass. 1977) ("criminal liability should only attach to clearly delineated transgressions"), aff'd, 573 F.2d 698 (1st Cir. 1978).

In addition, the legislative history belies any suggestion that, in passing the Sherman Act, Congress believed that it was reaching wholly extraterritorial conduct. In response to concerns that potential antitrust violators could evade the proscriptions of the Sherman Act by forming their agreement outside the United States, Senator Sherman explained:

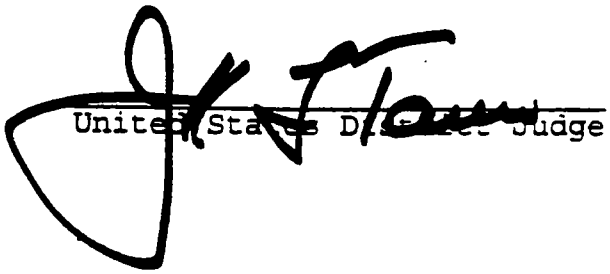
> It is true that if a crime is committed outside of the United States it can not be punished in the United States. But if an unlawful combination is made outside of the United States and in pursuance of it property is brought within the United States such property is subject to our laws. It may be seized. A civil remedy by attachment could be had. Any person interested in the United States could be made a party.
>
> Either a foreigner or a native may escape "the criminal part of the law," as he says, 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.

21 Cong. Rec. 2461, reprinted in Earl W. Kintner, ed., The Legislative History of Federal Antitrust Laws and Related Statutes, Part I, The Antitrust Laws, vol. 1. p. 126 (1978).

For all these reasons, the court concludes 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.

The indictment against Nippon and Jujo will be dismissed.[6]

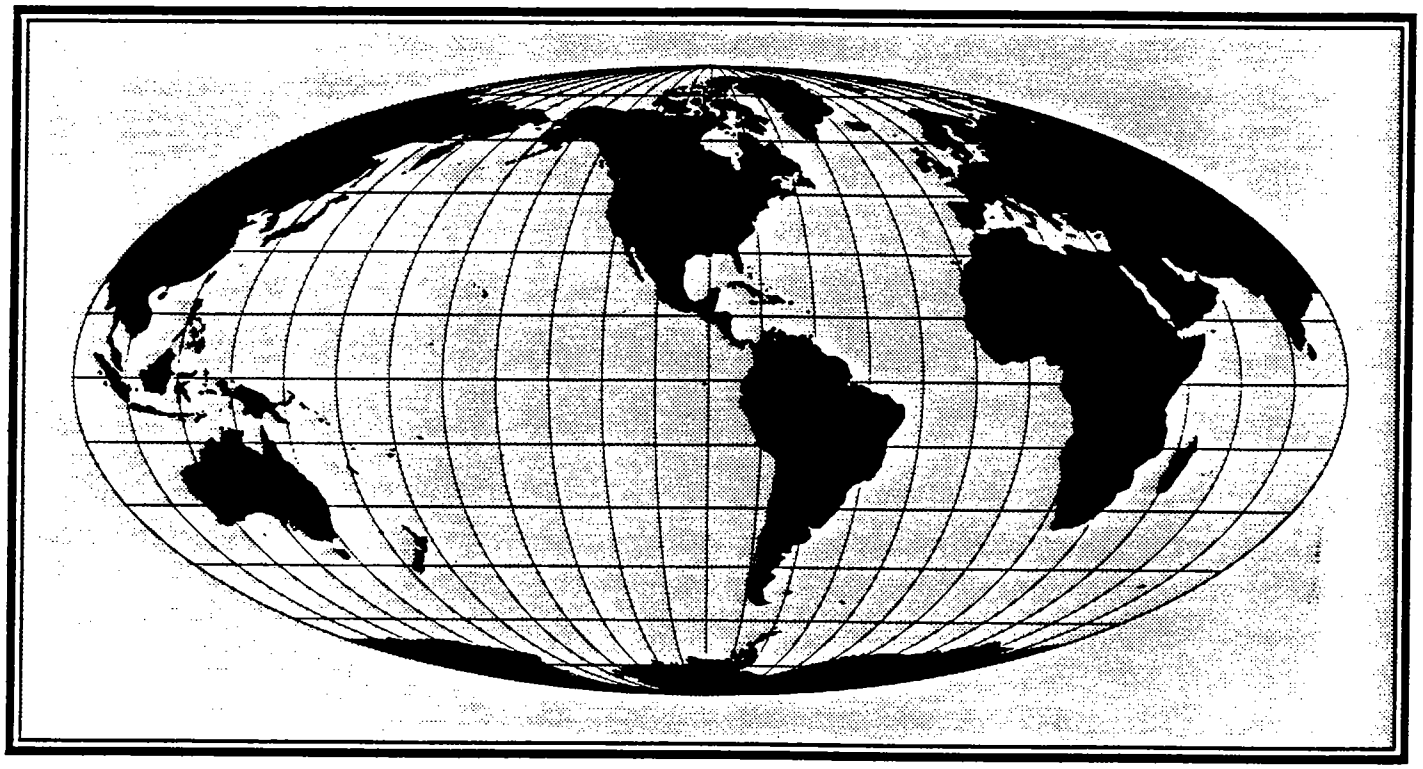
An order will issue.



United States District Judge

[6] Because Jujo no longer exists, the court considers Nippon's motion for dismissal as made on behalf of both defendants named in Count I of the Indictment. Accordingly, dismissal of the indictment will enter as to both Nippon and Jujo.

Antitrust Enforcement Guidelines for International Operations



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and the
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1. INTRODUCTION

For more than a century, the U.S. antitrust laws have stood as the ultimate protector of the competitive process that underlies our free market economy. Through this process, which enhances consumer choice and promotes competitive prices, society as a whole benefits from the best possible allocation of resources.

Although the federal antitrust laws have always applied to foreign commerce, that application is particularly important today. Throughout the world, the importance of antitrust law as a means to ensure open and free markets, protect consumers, and prevent conduct that impedes competition is becoming more apparent. The Department of Justice ("the Department") and the Federal Trade Commission ("the Commission" or "FTC") (when referred to collectively, "the Agencies"), as the federal agencies charged with the responsibility of enforcing the antitrust laws, thus have made it a high priority to enforce the antitrust laws with respect to international operations and to cooperate wherever appropriate with foreign authorities regarding such enforcement. In furtherance of this priority, the Agencies have revised and updated the Department's 1988 Antitrust Enforcement Guidelines for International Operations, which are hereby withdrawn.[1]

The 1995 Antitrust Enforcement Guidelines for International Operations (hereinafter "Guidelines") are intended to provide antitrust guidance to businesses engaged in international operations on questions that relate specifically to the Agencies' international enforcement policy.[2] They do not, therefore, provide a complete statement of the Agencies' general enforcement policies. The topics covered include the Agencies' subject matter jurisdiction over conduct and entities outside the United States and the considerations, issues, policies, and processes that govern their decision to exercise that jurisdiction; comity; mutual assistance in international antitrust enforcement; and the effects of foreign governmental involvement on the antitrust liability of private entities. In addition, the Guidelines discuss the relationship between antitrust and international trade initiatives. Finally, to illustrate how these principles may operate in certain contexts, the Guidelines include a number of examples.

As is the case with all guidelines, users should rely on qualified counsel to assist them in evaluating the antitrust risk associated with any contemplated transaction or activity. No set of guidelines can possibly indicate how the Agencies will assess the particular facts of every case. Persons seeking more specific advance statements of enforcement intentions with respect to the

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[1] The U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property (1995), the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992), and the Statements of Antitrust Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, Jointly Issued by the U.S. Department of Justice and Federal Trade Commission (1994), are not qualified, modified, or otherwise amended by the issuance of these Guidelines.

[2] Readers should separately evaluate the risk of private litigation by competitors, consumers and suppliers, as well as the risk of enforcement by state prosecutors under state and federal antitrust laws.

matters treated in these Guidelines should use the Department's Business Review procedure,[3] the Commission's Advisory Opinion procedure,[4] or one of the more specific procedures described below for particular types of transactions.

2. ANTITRUST LAWS ENFORCED BY THE AGENCIES

Foreign commerce cases can involve almost any provision of the antitrust laws. The Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further non-antitrust goals. Once jurisdictional requirements, comity, and doctrines of foreign governmental involvement have been considered and satisfied, the same substantive rules apply to all cases.

The following is a brief summary of the laws enforced by the Agencies that are likely to have the greatest significance for international transactions.

2.1 Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1, sets forth the basic antitrust prohibition against contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States or with foreign nations." Section 2 of the Act, 15 U.S.C. § 2, prohibits monopolization, attempts to monopolize, and conspiracies to monopolize "any part of trade or commerce among the several States or with foreign nations." Section 6a of the Sherman Act, 15 U.S.C. § 6a, defines the jurisdictional reach of the Act with respect to non-import foreign commerce.

Violations of the Sherman Act may be prosecuted as civil or criminal offenses. Conduct that the Department prosecutes criminally is limited to traditional *per se* offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging or other cartel activities that would also be violations of the law in many countries. Criminal violations of the Act are punishable by fines and imprisonment. The Sherman Act provides that corporate defendants may be fined up to $10 million, other defendants may be fined up to $350,000, and individuals may be sentenced to up to 3 years imprisonment.[5] The Department has sole responsibility for the criminal enforcement of the Sherman Act. In a civil proceeding, the Department may obtain injunctive relief against prohibited practices. It may also obtain treble damages if the U.S. government is the purchaser of affected goods or services.[6] Private plaintiffs may also obtain injunctive and treble damage relief

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[3] 28 C.F.R. § 50.6 (1994).

[4] 16 C.F.R. §§ 1.1-1.4 (1994).

[5] Defendants may be fined up to twice the gross pecuniary gain or loss caused by their offense in lieu of the Sherman Act fines, pursuant to 18 U.S.C. § 3571(d) (1988 & Supp. 1993). In addition, the U.S. Sentencing Commission Guidelines provide further information about possible criminal sanctions for individual antitrust defendants in § 2R1.1 and for organizational defendants in Chapter 8.

[6] *See* 15 U.S.C. § 4 (1988) (injunctive relief); 15 U.S.C. § 15(a) (1988 & Supp. 1993) (damages).

for violations of the Sherman Act.[7] Before the Commission, conduct that violates the Sherman Act may be challenged pursuant to the Commission's power under Section 5 of the Federal Trade Commission Act, described below.

2.2 Clayton Act

The Clayton Act, 15 U.S.C. § 12 *et seq.*, expands on the general prohibitions of the Sherman Act and addresses anticompetitive problems in their incipiency.[8] Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits any merger or acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[9] Section 15 of the Clayton Act empowers the Attorney General, and Section 13(b) of the FTC Act empowers the Commission, to seek a court order enjoining consummation of a merger that would violate Section 7. In addition, the Commission may seek a cease and desist order in an administrative proceeding against a merger under Section 11 of the Clayton Act, Section 5 of the FTC Act, or both. Private parties may also seek injunctive relief under 15 U.S.C. § 26.

Section 3 of the Clayton Act prohibits any person engaged in commerce from conditioning the lease or sale of goods or commodities upon the purchaser's agreement not to use the products of a competitor, if the effect may be "to substantially lessen competition or to tend to create a monopoly in any line of commerce."[10] In evaluating transactions, the trend of recent authority is to use the same analysis employed in the evaluation of tying under Section 1 of the Sherman Act to assess a defendant's liability under Section 3 of the Clayton Act.[11] Section 2 of the Clayton Act, known as the Robinson-Patman Act,[12] prohibits price discrimination in certain circumstances. In practice, the Commission has exercised primary enforcement responsibility for this provision.

2.3 Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act ("FTC Act") declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting

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[7] *See* 15 U.S.C. §§ 16, 26 (1988).

[8] Under the Clayton Act, "commerce" includes "trade or commerce among the several States and with foreign nations." "Persons" include corporations or associations existing under or authorized either by the laws of the United States or any of its states or territories, or by the laws of any foreign country. 15 U.S.C. § 12 (1988 & Supp. 1993).

[9] 15 U.S.C. § 18 (1988). The asset acquisition clause applies to "person[s] subject to the jurisdiction of the Federal Trade Commission" under the Clayton Act.

[10] 15 U.S.C. § 14 (1988).

[11] *See, e.g.*, Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1352 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988).

[12] 15 U.S.C. §§ 13-13b, 21a (1988). The Robinson-Patman Act applies only to purchases involving commodities "for use, consumption, or resale within the United States." *Id.* at § 13. It has been construed not to apply to sales for export. *See, e.g.*, General Chem., Inc. v. Exxon Chem. Co., 625 F.2d 1231, 1234 (5th Cir. 1980). Intervening domestic sales, however, would be subject to the Act. *See* Raul Int'l Corp. v. Sealed Power Corp., 586 F. Supp. 349, 351–55 (D.N.J. 1984).

the terms of a 1986 recommendation, the United States agency with responsibility for a particular case notifies a member country whenever an antitrust enforcement action may affect important interests of that country or its nationals.[50] Examples of potentially notifiable actions include requests for documents located outside the United States, attempts to obtain information from potential witnesses located outside the United States, and cases or investigations with significant foreign conduct or involvement of foreign persons.

3. THRESHOLD INTERNATIONAL ENFORCEMENT ISSUES

3.1 Jurisdiction

Just as the acts of U.S. citizens in a foreign nation ordinarily are subject to the law of the country in which they occur, the acts of foreign citizens in the United States ordinarily are subject to U.S. law. The reach of the U.S. antitrust laws is not limited, however, to conduct and transactions that occur within the boundaries of the United States. Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.

Under the Sherman Act and the FTC Act, there are two principal tests for subject matter jurisdiction in foreign commerce cases. With respect to foreign import commerce, the Supreme Court has recently stated in *Hartford Fire Insurance Co. v. California* 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."[51] There has been no such authoritative ruling on the scope of the FTC Act, but both Acts apply to commerce "with foreign nations" and the Commission has held that terms used by both Acts should be construed together.[52] Second, with respect to foreign commerce other than imports, the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") applies to foreign conduct that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce. [53]

Business Practices Affecting International Trade, OECD Doc. No. C(86)44 (Final) (May 21, 1986). The Recommendation also calls for countries to consult with each other in appropriate situations, with the aim of promoting enforcement cooperation and minimizing differences that may arise.

[50] The OECD has 25 member countries and the European Commission takes part in its work. The OECD's membership includes many of the most advanced market economies in the world. The OECD also has several observer nations, which have made rapid progress toward open market economies. The Agencies follow recommended OECD practices with respect to all member countries.

[51] 113 S. Ct. 2891, 2909 (1993). In a world in which economic transactions observe no boundaries, international recognition of the "effects doctrine" of jurisdiction has become more widespread. In the context of import trade, the "implementation" test adopted in the European Court of Justice usually produces the same outcome as the "effects" test employed in the United States. *See* Cases 89/85, etc., Ahlstrom v. Commission, *supra* at note 26. The merger laws of the European Union, Canada, Germany, France, Australia, and the Czech and Slovak Republics, among others, take a similar approach.

[52] In re Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 598, 609 (1988).

[53] 15 U.S.C. § 6a (1988) (Sherman Act) and § 45(a)(3) (1988) (FTC Act).

3.11 Jurisdiction Over Conduct Involving Import Commerce

Imports into the United States by definition affect the U.S. domestic market directly, and will, therefore, almost invariably satisfy the intent part of the *Hartford Fire* test. Whether they in fact produce the requisite substantial effects will depend on the facts of each case.

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ILLUSTRATIVE EXAMPLE A[54]

Situation: A, B, C, and D are foreign companies that produce a product in various foreign countries. None has any U.S. production, nor any U.S. subsidiaries. They organize a cartel for the purpose of raising the price for the product in question. Collectively, the cartel members make substantial sales into the United States, both in absolute terms and relative to total U.S. consumption.

Discussion: These facts present the straightforward case of cartel participants selling products directly into the United States. In this situation, the transaction is unambiguously an import into the U.S. market, and the sale is not complete until the goods reach the United States. Thus, U.S. subject matter jurisdiction is clear under the general principles of antitrust law expressed most recently in *Hartford Fire*. The facts presented here demonstrate actual and intended participation in U.S. commerce.[55] The separate question of personal jurisdiction under the facts presented here would be analyzed using the principles discussed *infra* in Section 4.1.

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3.12 Jurisdiction Over Conduct Involving Other Foreign Commerce

With respect to foreign commerce other than imports, the jurisdictional limits of the Sherman Act and the FTC Act are delineated in the FTAIA. The FTAIA amended the Sherman Act to provide that it:

> shall not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect:
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on

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[54] The examples incorporated into the text are intended solely to illustrate how the Agencies would apply the principles articulated in the Guidelines in differing fact situations. In each case, of course, the ultimate outcome of the analysis, *i.e.* whether or not a violation of the antitrust laws has occurred, would depend on the specific facts and circumstances of the case. These examples, therefore, do not address many of the factual and economic questions the Agencies would ask in analyzing particular conduct or transactions under the antitrust laws. Therefore, certain hypothetical situations presented here may, when fully analyzed, not violate any provision of the antitrust laws.

[55] *See infra* at Section 3.12.

export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; [56]

(2) such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section.

The FTAIA uses slightly different statutory language for the FTC Act,[57] but produces the same jurisdictional outcomes.

3.121 Jurisdiction in Cases Under Subsection 1(A) of the FTAIA

To the extent that conduct in foreign countries does not "involve" import commerce but does have an "effect" on either import transactions or commerce within the United States, the Agencies apply the "direct, substantial, and reasonably foreseeable" standard of the FTAIA. That standard is applied, for example, in cases in which a cartel of foreign enterprises, or a foreign monopolist, reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary, as well as in cases in which foreign vertical restrictions or intellectual property licensing arrangements have an anticompetitive effect on U.S. commerce.

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ILLUSTRATIVE EXAMPLE B

Situation: As in Illustrative Example A, the foreign cartel produces a product in several foreign countries. None of its members has any U.S. production, nor do any of them have U.S. subsidiaries. They organize a cartel for the purpose of raising the price for the product in question. Rather than selling directly into the United States, however, the cartel sells to an intermediary outside the United States, which they know will resell the product in the United States. The intermediary is not part of the cartel.

Discussion: The jurisdictional analysis would change slightly from the one presented in Example A, because not only is the conduct being challenged entered into by cartelists in a foreign country, but it is also initially implemented through a sale made in a foreign country. Despite the different test, however, the outcome on these facts would in all likelihood remain the same. The fact that the illegal conduct occurs prior to the import would trigger the application of the FTAIA. The Agencies would have to determine whether the challenged conduct had "direct, substantial and reasonably foreseeable effects" on U.S. domestic or import commerce. Furthermore, since "the essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself--rather than the overt acts performed in furtherance of it,"[58] the Agencies would focus on the potential harm that

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[56] If the Sherman Act applies to such conduct only because of the operation of paragraph (1)(B), then that Act shall apply to such conduct only for injury to export business in the United States. 15 U.S.C. § 6a (1988).

[57] *See* 15 U.S.C. § 45(a)(3) (1988).

[58] Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330-31 (1991).

would ensue if the conspiracy were successful, not on whether the actual conduct in furtherance of the conspiracy had in fact the prohibited effect upon interstate or foreign commerce.

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ILLUSTRATIVE EXAMPLE C

Situation: Variant (1): Widgets are manufactured in both the United States and various other countries around the world. The non-U.S. manufacturers meet privately outside the United States and agree among themselves to raise prices to specified levels. Their agreement clearly indicates that sales in or into the United States are not within the scope of the agreement, and thus that each participant is free independently to set its prices for the U.S. market. Over time, the cartel members begin to sell excess production into the United States. These sales have the effect of stabilizing the cartel for the foreign markets. In the U.S. market, these "excess" sales are priced at levels below those that would have prevailed in the U.S. market but for the cartel, but there is no evidence that the prices are predatory. As a result of these events, several U.S. widget manufacturers curtail their production, overall domestic output falls, and remaining manufacturers fail to invest in new or improved capacity.

Variant (2): Assume now that the cartel agreement specifically provides that cartel members will set agreed prices for the U.S. market at levels designed to soak up excess quantities that arise as a result of price increases in foreign markets. The U.S. price level is set at periodic meetings where each participant indicates how much it must off-load in this way. Thus, the cartel members sell goods in the U.S. market at fixed prices that undercut prevailing U.S. price levels, with consequences similar to those in Variant 1.

Discussion: Variant (1): The jurisdictional issue is whether the predictable economic consequences of the original cartel agreement and the independent sales into the United States are sufficient to support jurisdiction. The mere fact that the existence of U.S. sales or the level of U.S. prices may ultimately be affected by the cartel agreement is not enough for either *Hartford Fire* jurisdiction or the FTAIA.[59] Furthermore, in the absence of an agreement with respect to the U.S. market, sales into the U.S. market at non-predatory levels do not raise antitrust concerns.[60]

Variant (2): The critical element of a foreign price-fixing agreement with direct, intended effects in the United States is now present. The fact that the cartel believes its U.S. prices are "reasonable," or that it may be exerting downward pressure on U.S. price levels, does not exonerate

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[59] If the Agencies lack jurisdiction under the FTAIA to challenge the cartel, the facts of this example would nonetheless lend themselves well to cooperative enforcement action among antitrust agencies. Virtually every country with an antitrust law prohibits horizontal cartels and the Agencies would willingly cooperate with foreign authorities taking direct action against the cartel in the countries where the agreement has raised the price of widgets to the extent such cooperation is allowed under U.S. law and any agreement executed pursuant to U.S. law with foreign agencies or governments.

[60] *Cf.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

it.[61] Variant 2 presents a case where the Agencies would need clear evidence of the prohibited agreement before they would consider moving forward. They would be particularly cautious if the apparent effects in the U.S. market appeared to be beneficial to consumers.

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3.122 Jurisdiction in Cases Under Subsection 1(B) of the FTAIA

Two categories of "export cases" fall within the FTAIA's jurisdictional test. First, the Agencies may, in appropriate cases, take enforcement action against anticompetitive conduct, wherever occurring, that restrains U.S. exports, if (1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States, and (2) the U.S. courts can obtain jurisdiction over persons or corporations engaged in such conduct.[62] As Section 3.2 below explains more fully, if the conduct is unlawful under the importing country's antitrust laws as well, the Agencies are also prepared to work with that country's authorities if they are better situated to remedy the conduct, and if they are prepared to take action that will address the U.S. concerns, pursuant to their antitrust laws.

Second, the Agencies may in appropriate cases take enforcement action against conduct by U.S. exporters that has a direct, substantial, and reasonably foreseeable effect on trade or commerce within the United States, or on import trade or commerce. This can arise in two principal ways. First, if U.S. supply and demand were not particularly elastic, an agreement among U.S. firms accounting for a substantial share of the relevant market, regarding the level of their exports, could reduce supply and raise prices in the United States.[63] Second, conduct ostensibly export-related could affect the price of products sold or resold in the United States. This kind of effect could occur if, for example, U.S. firms fixed the price of an input used to manufacture a product overseas for ultimate resale in the United States.

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ILLUSTRATIVE EXAMPLE D

Situation: Companies E and F are the only producers of product Q in country Epsilon, one of the biggest markets for sales of Q in the world. E and F together account for 99 percent of the sales of product Q in Epsilon.[64] In order to prevent a competing U.S. producer from entering the market

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[61] *Cf.* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[62] *See* U.S. Department of Justice Press Release dated April 3, 1992 (announcing enforcement policy that would permit the Department to challenge foreign business conduct that harms U.S. exports when the conduct would have violated U.S. antitrust laws if it occurred in the United States).

[63] One would need to show more than indirect price effects resulting from legitimate export efforts to support an antitrust challenge. *See* ETC Guidelines, *supra* at note 34, 50 Fed. Reg. at 1791.

[64] That E and F together have an overwhelmingly dominant share in Epsilon may or may not, depending on the market conditions for Q, satisfy the requirement of "substantial effect on U.S. exports" as required by the FTAIA. Foreclosure of

in Epsilon, E and F agree that neither one of them will purchase or distribute the U.S. product, and that they will take "all feasible" measures to keep the U.S. company out of their market. Without specifically discussing what other measures they will take to carry out this plan, E and F meet with their distributors and, through a variety of threats and inducements, obtain agreement of all of the distributors not to carry the U.S. product. There are no commercially feasible substitute distribution channels available to the U.S. producer. Because of the actions of E and F, the U.S. producer cannot find any distributors to carry its product and is unable to make any sales in Epsilon.

Discussion: The agreement between E and F not to purchase or distribute the U.S. product would clearly have a direct and reasonably foreseeable effect on U.S. export commerce, since it is aimed at a U.S. exporter. The substantiality of the effects on U.S. exports would depend on the significance of E and F as purchasers and distributors of Q, although on these facts the virtually total foreclosure from Epsilon would almost certainly qualify as a substantial effect for jurisdictional purposes. However, *if* the Agencies believe that they may encounter difficulties in establishing personal jurisdiction or in obtaining effective relief, the case may be one in which the Agencies would seek to resolve their concerns by working with other authorities who are examining the transaction.

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ILLUSTRATIVE EXAMPLE E

Situation: Companies P, Q, R, and S, organized under the laws of country Alpha, all manufacture and distribute construction equipment. Much of that equipment is protected by patents in the various countries where it is sold, including Alpha. The companies all belong to a private trade association, which develops industry standards that are often (although not always) adopted by Alpha's regulatory authorities. Feeling threatened by competition from the United States, the companies agree at a trade association meeting (1) to refuse to adopt any U.S. company technology as an industry standard, and (2) to boycott the distribution of U.S. construction equipment. The U.S. companies have taken all necessary steps to protect their intellectual property under the law of Alpha.

Discussion: In this example, the collective activity impedes U.S. companies in two ways: their technology is boycotted (even if U.S. companies are willing to license their intellectual property) and they are foreclosed from access to distribution channels. The jurisdictional question is whether these actions create a direct, substantial, and reasonably foreseeable effect on the exports of U.S. companies. The mere fact that only the market of Alpha appears to be foreclosed is not enough to defeat such an effect. Only if exclusion from Alpha as a quantitative measure were so ***de minimis*** in terms of actual volume of trade that there would not be a substantial effect on U.S. export

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exports to a single country, such as Epsilon, may satisfy the statutory threshold if that country's market accounts for a significant part of the export opportunities for U.S. firms.

commerce would jurisdiction be lacking. Given that this example involves construction equipment, a generally highly priced capital good, the exclusion from Alpha would probably satisfy the substantiality requirement for FTAIA jurisdiction. This arrangement appears to have been created with particular reference to competition from the United States, which indicates that the effects on U.S. exports are both direct and foreseeable.

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3.13 Jurisdiction When U.S. Government Finances or Purchases

The Agencies may, in appropriate cases, take enforcement action when the U.S. Government is a purchaser, or substantially funds the purchase, of goods or services for consumption or use abroad. Cases in which the effect of anticompetitive conduct with respect to the sale of these goods or services falls primarily on U.S. taxpayers may qualify for redress under the federal antitrust laws.[65] As a general matter, the Agencies consider there to be a sufficient effect on U.S. commerce to support the assertion of jurisdiction if, as a result of its payment or financing, the U.S. Government bears more than half the cost of the transaction. For purposes of this determination, the Agencies apply the standards used in certifying export conduct under the ETC Act of 1982, 15 U.S.C. §§ 4011–21(1982).[66]

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ILLUSTRATIVE EXAMPLE F

Situation: A combination of U.S. firms and local firms in country Beta create a U.S.-based joint venture for the purpose of building a major pollution control facility for Beta's Environmental Control Agency ("BECA"). The venture has received preferential funding from the U.S. Government, which has the effect of making the present value of expected future repayment of the principal and interest on the loan less than half its face value. Once the venture has begun work,

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[65] *Cf.* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 208 (1968) ("[A]lthough the fertilizer shipments were consigned to Korea and although in most cases Korea formally let the contracts, American participation was the overwhelmingly dominant feature. The burden of noncompetitive pricing fell, not on any foreign purchaser, but on the American taxpayer. The United States was, in essence, furnishing fertilizer to Korea. . . . The foreign elements in the transaction were, by comparison, insignificant."); United States v. Standard Tallow Corp., 1988-1 Trade Cas. (CCH) ¶ 67,913 (S.D.N.Y. 1988) (consent decree) (barring suppliers from fixing prices or rigging bids for the sale of tallow financed in whole or in part through grants or loans by the U.S. Government); United States v. Anthracite Export Ass'n, 1970 Trade Cas. (CCH) ¶ 73,348 (M.D. Pa. 1970) (consent decree) (barring price-fixing, bid-rigging, and market allocation in Army foreign aid program).

[66] *See* ETC Guidelines, *supra* at note 34, 50 Fed. Reg. at 1799-1800. The requisite U.S. Government involvement could include the actual purchase of goods by the U.S. Government for shipment abroad, a U.S. Government grant to a foreign government that is specifically earmarked for the transaction, or a U.S. Government loan specifically earmarked for the transaction that is made on such generous terms that it amounts to a grant. U.S. Government interests would not be considered to be sufficiently implicated with respect to a transaction that is funded by an international agency, or a transaction in which the foreign government received non-earmarked funds from the United States as part of a general government-to-government aid program.