

# Competing for Jurisdiction

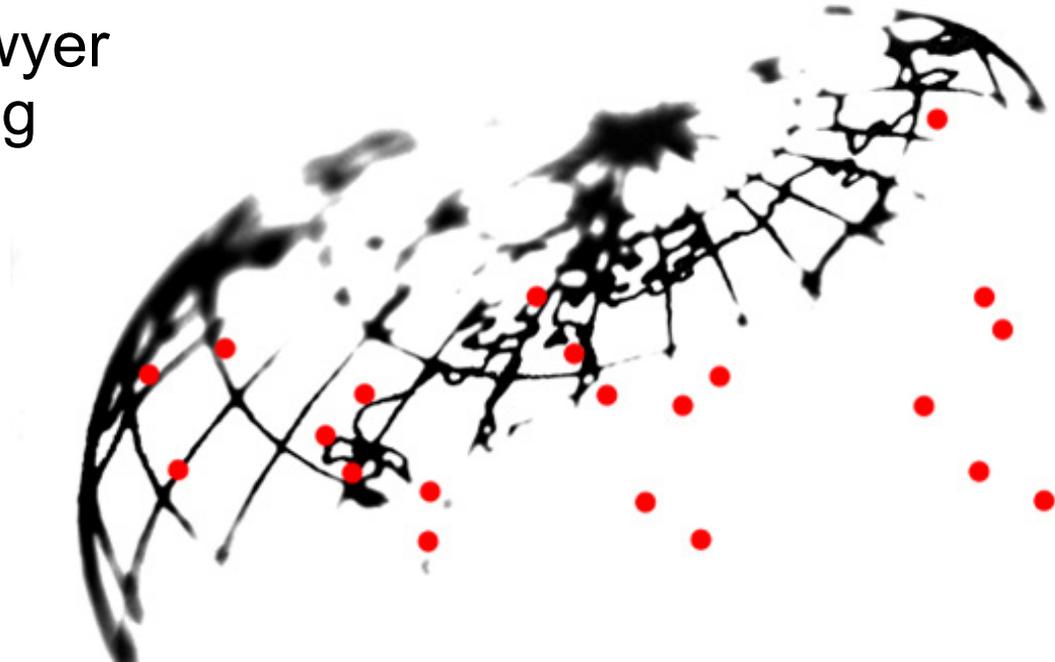
The Extraterritorial Application of Competition Laws

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# Trends

## Trends I

- *United States v Aluminum Co. of America [Alcoa], 148 F 2d 416, 444 (CA2 1945)*
  - “...it is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders...” Hand, J.
- *Imperial Chemical Industries Ltd v Commission [Dyestuffs], Case 48/69*
  - “By making use of its power to control its subsidiaries established in the community, the applicant was able to ensure that its decision was implemented on that market.” European Court of Justice

## Trends II

- Article 2-2 MRFTA [Korea] [2004]
  - “The Act shall apply even to activities carried out overseas when they are deemed to have an influence on the domestic market.”
- Article 33 Competition Act [Singapore] [2004]
  - “Notwithstanding that (a) an agreement [...] has been entered into outside Singapore; [...] (c) any undertaking abusing the dominant position referred to [...] is outside Singapore; (d) an anticipated merger will be carried into effect outside Singapore; [...] this Part shall apply...”
- Article 2 Anti-Monopoly Law [PRC] [2007]
  - “中华人民共和国境外的垄断行为，对境内市场竞争产生排除、限制影响的，适用本法。” [This Law is applicable to... conduct outside the territory... that has the effect of eliminating or restricting competition within the territory...]

# International Law

# Public International Law Principles

- Territorial principle: Objective/subjective territoriality
  - Cf. EU Implementation Doctrine
- Nationality principle
- Passive nationality/personality principle
  - Cf. *Dominicus Americana Bohio v. Gulf & Western Industries, Inc*, 473 F Supp 680 (SDNY 1979)
- Protective/security principle
- Universality principle
- Crimes under international law

# Public International Law and Domestic or EC Law I

- *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, Case C-286/90
  - “...it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, Article 6... must be interpreted, and its scope limited, in the light of the relevant rules of... international law...” European Court of Justice
- *Hartford Fire Insur v California*, 509 US 764 (1993)
  - “Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.” Scalia J.

# Public International Law and Domestic or EC Law II

- Article 81 EC Treaty
  - “The following shall be prohibited...: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market...”
- Advocate-General Darmon (Wood Pulp) [1988]
  - “...it is unclear whether the concept of effect provided for in Article [81]... in order to establish the *existence* of an infringement... is identical to that required by Community law, and accepted by international law, in order to *determine whether there is jurisdiction* over undertakings established outside the Community.”

# EC Law

# Dyestuffs I

- The Commission:
  - “the rules on competition... are... applicable to all restrictions... which produce, within the Common Market, the effects prohibited by Article [81]; it is unnecessary to examine whether the undertakings... have their registered offices inside or outside the Community...”
- Aide-mémoire to the Commission [UK Government 1969]
  - The UK has “consistently objected to the assumption of extra-territorial jurisdiction... by the...authorities of a foreign state when that jurisdiction is based upon... the ‘effects doctrine’ – that is... [that] jurisdiction may be justified because of... economic ‘effects’...”
  - “...substantive jurisdiction in anti-trust matters should only be taken on the basis of either (a) the territorial principle, or (b) the nationality principle.”

## Dyestuffs II

- Advocate-General Mayras [2 May 1972]:
  - “There is no denying that Article [81] is based only on the criterion of adverse effects...”
    - “...a *direct and immediate* restriction on competition... on the Community market.”
    - “...the effect of the conduct must be *reasonably foreseeable*...”
    - “...the effect produced on the territory must be *substantial*.”

## Dyestuffs III

- European Court of Justice and the economic entity doctrine:
  - “...the actions for which the fine at issue has been imposed constitute *practices carried on directly within the common market* .”
  - “By making use of its power to control its subsidiaries established in the community, the applicant was able to ensure that *its decision was implemented on that market* .”
  - “... the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the *unity of their conduct on the market*...”

# Wood Pulp I

- The Commission:
  - “Article [81]... applies to restrictive practices... even if the undertakings... which are parties to the... practices are established... outside the Community... The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was... not only *substantial* but *intended*, and was the primary and *direct* result of the agreements and practices.”

## Wood Pulp II

- Advocate-General Darmon [25 May 1988]:
  - “The wording of Article [81]... offers... support for the proposition that Community competition law is applicable... whenever anti-competitive effects have been produced within the territory...”
  - “...it is necessary to ascertain whether or not such a criterion is in conformity with the requirements and the practice of international law.”
  - Citing the Permanent Court of International Justice in *Lotus*: “Article [81]... prohibits any agreements... which have as their effect ‘the prevention, restriction or distortion of competition...’. Is not such an effect necessarily a constituent element of the offence?”
  - “...there is no rule of international law... against the criterion of... direct, substantial and foreseeable effect... I would... propose that... it be adopted as a criterion for the jurisdiction of the Community.”

## Wood Pulp III

- A. Ahlström Osakeyhtiö and others v Commission, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85
  - “...where... producers concert on the prices to be charged... in the Community and put that concertation into effect by selling at prices which are... coordinated, they are taking part in concertation... within the meaning of Article [81]...”
  - “...an infringement of Article [81]... consists of conduct made up of two elements, the formation of the agreement... and the implementation thereof...”
  - “The producers in this case implemented their pricing agreement within the common market... Accordingly the Community's jurisdiction to apply its competition rules... is covered by the territoriality principle...”

# Gencor v Commission (Case T-102/96) I

- Arguments of the Commission:
  - “The Commission submits that there are two fundamental bases founding its competence. The first is the principle of nationality, on the basis of which it has jurisdiction... over the activities of Lonrho, a company incorporated under the laws of a Member State. The second is the principle of territoriality.”
  - “...the Commission ... observed that the agreement at issue was implemented within the common market... The Commission's competence therefore derives from the classic rules of international jurisdiction, a conclusion which is reinforced by the fact that LPD's worldwide sales are carried out through Western Metal Sales, a Belgian subsidiary of Lonrho...”

## Gencor v Commission II

- Findings of the CFI:
  - “...two questions must be examined. It must be ascertained first whether the Regulation covers concentrations such as the one at issue and then, if it does, whether its application to concentrations of that kind is contrary to public international law...”
  - “...The implementation of the proposed concentration would have led to the merger not only of the parties’... mining and production operations in South Africa but also of their marketing operations... in the Community where Implats and LPD achieved significant sales.”
  - “Application of the Regulation is justified under public international law when it is *foreseeable* that a proposed concentration will have an *immediate* and *substantial* effect in the Community.”

# US Law in Brief

## US Position in Brief I

- *United States v Aluminum Co. of America [Alcoa], 148 F 2d 416, 444 (CA2 1945)*
  - “...it is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders...” Hand, J.
- Foreign Trade Antitrust Improvements Act, 1982
  - “Sections 1 to 7... shall not apply to conduct involving trade or commerce ... with foreign nations unless— (1) such conduct has a direct, substantial, and reasonably foreseeable effect... on [US commerce; or on US exporters]; and (2) such effect gives rise to a claim under the provisions of sections 1 to 7...”

## US Position in Brief II

- *Hartford Fire Insur v California*, 509 US 764 (1993)
  - “Although the proposition was perhaps not always free from doubt,... it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the [US].”
- *Metro Industries v Sammi Corporation*, 82 F 3d 839 (9th Cir 1996)
  - “...application of the per se rule is not appropriate where the conduct in question occurred in another country.”
  - “...the potential illegality of actions occurring outside the [US] requires an inquiry into the impact on commerce in the [US], regardless of the inherently suspect appearance of the foreign activities.”

## US Position in Brief III

- *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155 (2004)
  - “The price-fixing conduct significantly and adversely affects both customers outside the [US] and customers within the [US], but the adverse foreign effect is independent of any adverse domestic effect. In these circumstances, we find that the FTAIA exception does not apply (and thus the Sherman Act does not apply). . . .”
- Cf. *In re Monosodium Glutamate Antitrust Litigation*, [2005] WL 2810682 (D Minn 2005)

# Conflict

## Jurisdictional conflict

- UK Protection of Trading Interests Act 1980
  - Section 5: Judgments for multiple damages (“a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained”) are unenforceable
  - Section 6: Where a foreign court has given judgment for multiple damages against a qualifying defendant (a UK citizen or company, a person carrying on business in the UK) and damages have been paid, the defendant is entitled to bring an action to recover that portion of the damages as would exceed the part attributable to compensation

# Comity

## Comity I

- Cooperation Agreement between the EC and Japan [2003]
  - Competition authorities to notify each other of enforcement activities affecting important interests of the other party
  - Competition authorities to render assistance to each other in enforcement activities
  - Where the competition authorities of both parties are pursuing enforcement activities with regard to related matters, they are to consider coordination
  - If the competition authority of one party believes anticompetitive activities carried out in the territory of the other adversely affect its interests, it may request that the other authority initiate enforcement activities

## Comity II

- Korea
  - Memorandum of Understanding on Cooperation between the KFTC and DG Comp (European Commission) [October 2004]
  - Negotiations for the conclusion of a formal cooperation agreement between the EU and the Republic of Korea [on-going]
- China
  - November 2003, DG Comp agreed with the Chinese Government to establish the EU-China Competition Policy Dialogue
  - Terms of Reference signed 6 May 2004 by MOFCOM and DG Comp

**End**

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