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The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation

Spencer Weber Waller*

“As a moth is drawn to the light, so is a litigant drawn to the United States”**

I. Introduction

This is the year that antitrust went international. It is also the year that antitrust entered the popular consciousness. Now I'm not talking about the *Microsoft* litigation in the United States¹ or the *G.E./Honeywell* decision in the European Union,² but I am talking about two major motion pictures and a Broadway musical that all deal with antitrust.

First, at the beginning of 2000, there was the film called *AntiTrust*³ starring Tim Robbins as a sort of Bill Gates like character which taught us that stealing other people's intellectual property and then having them killed is, indeed, a violation of a number of our laws. Then there was *Zoolander*⁴ starring Ben Stiller, which posited

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** *Smith Kline & French Ltd and Others v. Bloch*, [1984] E.C.C. 103 (C.A.) (Lord Denning).

¹ See *Information on the United States v. Microsoft Settlement*, available at <http://www.usdoj.gov/atr/cases/ms-settle.htm> [hereinafter *Microsoft Settlement*] (last visited Feb. 15, 2002).

² *The Commission Prohibits GE's Acquisition of Honeywell*, IP/01/939, July 3, 2001, available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=%20gt&doc=IP/01/939|0|RAPID&lg=EN (last visited Feb. 15, 2002).

³ *ANTI TRUST* (MGM 2001).

⁴ *ZOOLANDER* (Paramount Pictures 2001).

the existence of a centuries old international cartel of fashion manufacturers who sought to assassinate world leaders who opposed their agenda of free trade and lax child labor laws. There is even a Broadway musical about a company that privatizes, monopolizes, and then gets legislation requiring the use of their pay toilets in New York City.⁵

Beyond offering you these antitrust tidbits about pop culture, this essay discusses jurisdiction and standing. It deals with the reach of U.S. laws over conduct abroad that affects our market. This is a topic that has been with us since the *Alcoa* decision in 1945.⁶ It was the topic that Kingman Brewster wrote about in the first edition of *Antitrust in American Business Abroad* in 1958, the work that I am privileged to be responsible for preparing and updating the new edition.⁷

I want to discuss three aspects of the issue of extraterritoriality. The simple answer is our laws apply beyond our borders. Most other countries are coming to this view as well. But the real question is what are the limits.

First, there is the question of jurisdiction over so-called "import commerce" – conduct abroad that was intended to and/or substantially affects the U.S. market and what role comity should play as a limitation on so-called "effects" jurisdiction. Most observers thought we had put these issues to bed with our Supreme Court's decision in *Hartford Fire*.⁸ But, it turns out that the lower courts are keeping the flame of international comity alive, if just barely.

The second, and more important, question is the interpretation of what started out as a little-known, and remains, a badly-written statute from 1982 called the Foreign Trade Antitrust Improvements Act ("FTAIA").⁹ This is a statute that deals with all international antitrust cases, except the *Hartford Fire* situation dealing with import commerce.

This has been where the real action has been in past years, probably because of the consequences of *Hartford Fire*. The courts

⁵ URINETOWN, at <http://www.urinetown.com/flash/index.html> (last visited Feb. 15, 2002).

⁶ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

⁷ See generally JAMES R. ATWOOD, KINGMAN BREWSTER, & SPENCER WEBER WALLER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (3d ed. 1997 & annual supp.).

⁸ *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993).

⁹ 15 U.S.C. § 6A (2001).

do not understand the FTAIA. Almost all of the opinions are simply wrong or they reach the right result for the wrong reason. As a result, the courts are botching the Congressional purpose underlying the statute and misconstruing the proper role of antitrust in foreign commerce cases, particularly global cartel cases.

Finally, I will briefly discuss how the FTAIA may be dwarfed by three developments which will truly make the United States the candle drawing further litigants inexorably toward its flame as part of the growth of private rights of action worldwide.

II. United States Antitrust Jurisdiction Over Import Commerce

Take the classic paradigm of competitors colluding as to price, production, territories, or any of the other varieties of *per se* unlawful conduct that would normally land one in jail and having to pay a whopping fine. Now assume that all the acts of the conspiracy take place not in Cleveland, New York, and Chicago, but in some combination of Geneva, Switzerland, Tokyo, Japan, and Lima, Peru. What changes?

We start in 1945 with the Second Circuit speaking on behalf of the Supreme Court in *Alcoa* (the Supreme Court could not muster a quorum). *Alcoa* taught us that if the defendants intended their acts to affect the U.S. market, and they indeed affect our market, then the conduct was punishable under U.S. antitrust law.¹⁰ The court must still have personal jurisdiction over the defendant, but the conduct was subject to our law. What happened between 1945 and the mid-1970's was that the U.S. courts virtually ignored the intent requirement of *Alcoa* and they so devalued the amount and nature of the effect on the U.S. market that eventually anything more than a de minimis effect on the U.S. market established U.S. subject matter jurisdiction.¹¹ At one point, a commentator noted that there were 249 straight foreign commerce actions in the U.S. courts, none of which were dismissed for lack of effects.¹²

This angered both our enemies, but more importantly it angered our friends. The reaction of foreign governments,

¹⁰ *Aluminum Co. of Am.*, 148 F.2d at 416.

¹¹ *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

¹² WILBUR FUGATE, *FOREIGN COMMERCE AND THE U.S. ANTITRUST LAW* 498-543, app. B (2d ed. 1973).

particularly those that were otherwise friendly to the United States, such as the United Kingdom in particular, created the sense that the overall interests of the United States were not being well served by this all-out assault on anticompetitive behavior anywhere in worldwide commerce using our antitrust laws. Many people, including the late Kingman Brewster, began to argue that the U.S. should adopt what Brewster called a broad "jurisdictional rule of reason."¹³

This is a terrible phrase but a pretty good idea. The gist of it is that there should be no subject matter jurisdiction unless there is a substantial intended effect on the United States, and that the U.S. interest is not out-weighted by the interests of the foreign parties and the foreign countries affected by the exercise by our jurisdiction. Versions of this test were adopted by the Ninth Circuit in *Timberlane*,¹⁴ the Third Circuit in *Mannington Mills*,¹⁵ but not in all of the circuits. In particular, the Seventh Circuit and the D.C. Circuit emphatically rejected the *Timberlane* test.¹⁶

It appeared that comity as a meaningful constraint on the exercise of effects jurisdiction was the wave of the future until the U.S. Supreme Court's 5-4 decision in *Hartford Fire*. *Hartford Fire* was the Supreme Court's first opinion concerning the effect of comity on whether the United States had subject matter jurisdiction, also described as jurisdiction to prescribe, over anticompetitive conduct outside our borders. The Supreme Court held that our antitrust laws applied to an agreement by British insurers and re-insurers to change the nature of certain insurance coverage and boycott those that opposed it. The Court reintroduced the element of intent. The foreign conduct must be intended to affect our market in order to be subject to our law.¹⁷ *Hartford Fire* also held that the effect of the foreign anticompetitive conduct must be direct, substantial, and reasonably foreseeable.¹⁸

¹³ KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 301-08 (1958).

¹⁴ *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

¹⁵ *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

¹⁶ *See In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980); *see also Laker Airways, Ltd. v. Sabena World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (rejecting comity balancing of interests test as judicially unworkable).

¹⁷ *Hartford Fire Ins. Co.*, 509 U.S. at 796.

¹⁸ *Id.*

The Court then less successfully dealt with the issue of comity. Our antitrust laws made unlawful what was permitted, and to a large extent encouraged, in England by the regulation of their reinsurance market. The Supreme Court ultimately held that once you have an intended, direct, substantial, and reasonably foreseeable effect on the U.S., the courts should not consider international comity, unless the foreign policy and the U.S. policy pose a "true conflict," meaning that if you comply with one you violate the other.¹⁹ What you compel in England must be illegal in the United States or vice-versa. In *Hartford Fire*, the defendants were not compelled to act as they did, and hence comity should not be considered once jurisdiction to prescribe was found.

In so holding, the majority destroyed a very useful concept. They equated international comity with a doctrine of foreign sovereign compulsion.²⁰ Unless one forces you to do something subject to penalty of law abroad, this will not constitute the kind of comity that a U.S. court will recognize as a basis to decline to exercise jurisdiction. This appeared to pretty much kill off the concept of comity in either government cases or in private cases for two reasons.²¹ First, there is very little in the world that is flat out compelled by other governments. Other governments rarely do that to their own businesses. Second, the U.S. antitrust enforcement agencies, the Antitrust Division of the Justice Department and the Federal Trade Commission, have stated that they will consider comity, but only as a matter of prosecutorial discretion. Once the case enters the courts, the agencies take the position that comity is mostly about the conduct of our foreign affairs and if the United States government has considered the relevant factors and decided nonetheless to proceed, then it is not a court's business to say otherwise.²²

This, however, has never been tested in litigation. My view is that the government is probably wrong, but that in the real world, a district court would have to be supremely sure of itself to come to a

¹⁹ *Id.* at 798-99.

²⁰ See generally Spencer Weber Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW POL'Y INT'L BUS. 747 (1982).

²¹ See generally Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563 (1999).

²² See U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.2 (1995).

different conclusion on the merits of a comity claim than our executive branch.

The narrow view of comity as limited to true conflicts applies to both private civil cases as in *Hartford Fire* and has been adopted for criminal cases as well in the *Nippon Paper* case of the First Circuit.²³ *Hartford Fire* thus laid the ground work for the Clinton administration's rather spectacularly successful cartel prosecution program in the late 1990's with cases like ADM, vitamins, graphic electrodes, and many other record breaking enforcement actions.

But then, something funny happened. Sometimes you have the lower courts engaged in what law professors have called gorilla warfare, where you have a rule that the Supreme Court enunciates that just doesn't take for some reason.²⁴ In this area, certain lower courts often behave as if *Hartford Fire* does not exist. The Ninth Circuit, in a case called *Metro Industries v. Sammi Corp.*, simply says *Timberlane* is the standard that should be followed and pretended that *Hartford Fire* did not happen.²⁵ Similarly, in the Southern District of New York, one judge routinely dismisses cases on the grounds of comity finding so-called true conflicts in a way that suggests he never read *Hartford Fire*. While Senior Judge Charles Haight has been reversed by the Second Circuit on this issue, he finds other ways of dismissing the cases.²⁶

We have a situation where the Supreme Court is clear (regardless of whether they are right) and yet comity continues to be used as a factor in the lower courts to throw out cases in a way that may make sense, but is not in accordance with the Supreme Court's holding in *Hartford Fire*.

²³ *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

²⁴ William L. Reynolds & Spencer Weber Waller, *Legal Process and the Past of Antitrust*, 47 SMU L. REV. 1811, 1816 (1995) (describing failure of ruling from legal process perspective when lower courts engage in process of guerilla warfare to undermine binding precedent).

²⁵ *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), *cert. denied*, 519 U.S. 868 (1996).

²⁶ *See, e.g., Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464 (S.D.N.Y. 1997), *rev'd*, 157 F.3d 922 (2d Cir. 1998), *dismissed on remand on sovereign immunity grounds*, 2001-1 Trade Cas. (CCH) ¶ 73,228 (S.D.N.Y. 2001). *See also Trugman-Nash, Inc. v. New Zealand Dairy Board*, 954 F. Supp. 733 (S.D.N.Y. 1997).

III. Jurisdiction Over Exports and Everything Else

The more interesting and perhaps more important issue is the interpretation of the terribly worded Foreign Trade Antitrust Improvements Act (“FTAIA”).²⁷ When you unscramble all the double and triple negatives, the language of the statute tells us a couple of things. First, it did not codify the standard for jurisdiction over import commerce. Jurisdiction over import commerce, and the role of comity if any, is not covered by a statute. That is why the debate over the meaning of *Hartford Fire* is important. It is federal common law that the Supreme Court could change. *Hartford Fire* was a 5 to 4 decision. One vote changes the law of the land and obviously the lower courts give it life in all these interesting factual settings.

A. The Foreign Trade Antitrust Improvements Act

The FTAIA principally deals with jurisdiction over export conduct. The principal animating force behind the FTAIA was a fear in the late 1970’s and early 1980’s that our antitrust laws were a significant deterrent of export activity.²⁸ The argument was that the

²⁷ 15 U.S.C. § 6A (2001) states:

This Act [15 U.S.C.S. §§ 1 et seq.] 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 this Act [15 U.S.C.S. §§ 1 et seq.], other than this section.

If this Act [15 U.S.C.S. §§ 1 et seq.] applies to such conduct only because of the operation of paragraph (1)(B), then this Act [15 U.S.C.S. §§ 1 et seq.] shall apply to such conduct only for injury to export business in the United States.

²⁸ See generally Spencer Weber Waller, *The Failure of the Export Trading Company Program*, 17 N.C. J. INT’L L. & COM. REG. 239 (1992).

United States and our balance of trade and export competitiveness (read our trade balance with Japan) was being hurt because of the perception that our antitrust laws were chilling export conduct in a way that was not the case in other countries (again think Japan).

Congress wanted to make clear a very simple proposition – U.S. firms can engage in anti-competitive conduct that injures foreign markets and foreign buyers. We do not care because either it is good for us, it is none of our business, or at a minimum it is somebody else's business. Such conduct should not be illegal under our law and to the extent it is illegal in another country, that is for someone else to decide. Firms may have to get advice about the foreign antitrust ramifications of their conduct, but not about the U.S. antitrust laws.

Picture two firms that wish to collude and fix price solely as to export conduct. Also assume that there are no spill-over effects in our market and they are not exchanging information that has any possibility of hurting the U.S. market. If they are solely injuring foreign buyers outside our market and there is no effects on the U.S. markets or U.S. exporters, they may proceed as a matter of U.S. antitrust law just because they feel like it. At the same time Congress passed the FTAIA as to jurisdiction, they also passed a statute called the Exporting Trading Company Act, which was designed to let firms receive certification in advance by the government that such conduct would not be illegal.²⁹

Under the FTAIA, antitrust claims involving exports from the U.S., or solely foreign commerce (neither U.S. domestic commerce nor imports into the U.S.) are not subject to U.S. jurisdiction, unless there is a direct, substantial, and reasonably foreseeable effect on U.S. markets or a similar effect on the export opportunities of a U.S. exporter.

Congress also required that these effects must give rise to “a claim” under the antitrust laws,³⁰ clarifying that the necessary effect on the U.S. or its export opportunities must be an anticompetitive one. In so doing, Congress created an ambiguity that has given rise to a series of interesting cases. The direct, substantial, and reasonably foreseeable effect on the U.S. must give rise to “a” claim under the antitrust laws. There are seven recent cases as to whether “a” means “a” or “a” means “the.”³¹ These courts are wrestling with the question

²⁹ See generally Waller, *supra* note 28.

³⁰ 15 U.S.C. § 6(a)(2) (2001).

³¹ This actually gives some legitimacy to all those questions when President Clinton was trying to parse the meaning of the word “is” during the impeachment

of who is the proper plaintiff in cases where it's pretty clear there is the requisite effect on the U.S. market.

B. Whose Claim Matters?

The real issue is, does the *plaintiff's* claim have to arise from the anti-competitive effect in the U.S., or is it enough that there is such an effect in the U.S., even if the claim is being litigated by someone outside our market. The first question is whether the defendant's action have to give rise to an anti-competitive effect in the U.S. While Congress could have meant any substantial effect, pro or anti-competitive, they probably meant that the effect had to be an anti-competitive effect to give rise to "a" claim.

The second question is: does the required anti-competitive effects have to give rise to the particular plaintiff's claim. While I think the answer should be no – that is the controversy.

The best illustration is the *Heeremac* case in the Fifth Circuit.³² *Heeremac* dealt with several Scandinavian firms in a worldwide conspiracy involving giant marine barges used to haul and install a 40,000 ton oil rig. It is a textbook conspiracy in the sense that there are seven barges of this sort in the entire world, and they are owned by a tiny handful of companies. This is a clear global market. Moreover, some of these platforms are in the Gulf of Mexico and the oil drilled is imported into the United States. There is thus a direct, substantial, and reasonable foreseeable effect on the United States. The hard question is who gets to sue in the United States. In the *Heeremac* case, the plaintiff is a Norwegian company that is only affected in its North Sea operations. Although it is a world market, and there are all kinds of implications for the United States, the particular plaintiff only overpaid for those barges for its drillings in the North Sea.

The majority stated:

[T]he commerce that gives rise to the action here -- the contracting for heavy lift barge services in the North Sea -- was not United States commerce *with* foreign nation but commerce *between* or *among* foreign nations. . . . Therefore, we doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by

controversy.

³² Den Norske Stats Oljeselskap AS v. Heeremac VOF, 241 F.3d 420 (5th Cir. 2001).

the federal courts under the Sherman Act.³³

In terms of interpreting the statute, the majority believes that the effect on United States commerce – in this case the higher prices paid by the U.S. companies for heavy lift services in the Gulf of Mexico – must give rise to the claim that the plaintiff asserts against the defendants. In order to sue, the plaintiff's injury must stem from the effect of higher prices for heavy lift services in the Gulf of Mexico. Under the Fifth Circuit decision the Scandinavian companies can not sue for the injuries they have suffered in Scandinavia.

The dissent authored by Judge Higgenbottom proceeds quite differently. He states:

The plaintiff here is a foreign company, true enough, but it was injured by the same acts of defendants that injured American plaintiffs whose right to seek recovery of their losses the district court has recognized in this litigation. With the Foreign Trade Antitrust Improvements Act Congress set out to insulate U.S. business from its antitrust laws for certain business conducted outside this country. Its central purpose was to assist U.S. business in competing abroad.³⁴

Judge Higginbotham was not persuaded that Congress intended to close the door to a foreign company injured by the same illegal conduct when the illegal conduct produces the required domestic effects.

Although this is a little technical, there is a lot at stake when you have any kind of a global antitrust violation. Who gets to sue in U.S. court? It is a matter of crucial importance because of what is available when you sue in U.S. courts that you can not get even if you are able to even sue anywhere else. There are treble damages, but that is just the start: extensive discovery, jury trials, class actions, contingent fees, and even potentially punitive damages; all the other things that makes U.S. litigation so controversial around the world.

This same basic issue over the interpretation of the FTAIA has arisen in a number of cases. The first is *Kruman v. Christie's International PLC*.³⁵ This is the auction house price fixing case that

³³ *Heeremac*, 241 F.3d at 426.

³⁴ *Id.* at 431.

³⁵ 129 F. Supp. 2d 620 (S.D.N.Y. 2001), *aff'd in part and vacated in part by* No. 01-7309, 2002 WL 398290 (2d Cir. Mar. 13, 2002).

has been extensively featured in the media. On the government side, there has already been guilty pleas from the two principal international auction houses over the fixing of buyer and seller commissions, and the separate conviction of the former chairman of Sotheby's.³⁶ In the private case, the plaintiffs were buyers in auctions outside the United States. Basically, they either bought or sold items at the London auctions of Christies and Sothebys. In some cases, the goods that were being sold were displayed in the U.S. prior to sale. This case has a number of U.S. links that perhaps make it an easier case than *Heeremac*. Nonetheless, the district court in the Southern District of New York held, and it's hard to disagree in general, that unless the court is to impute to Congress an intention to establish an antitrust regime to cover the world, the answer must be NO – you can not let these people sue. This may be right in the abstract, but it is wrong to conclude that the precise conduct that injured the plaintiffs occurred only abroad. That is the weakness of the decision in *Christie's* that resulted in reversal on appeal.

In the private litigation in *Microsoft*, there is an allegation of monopolization of worldwide markets for software for computer operating systems. Microsoft obviously has been found liable in the U.S. government case.³⁷ In the private treble damage class action, an action was brought on behalf of all purchasers globally: direct purchasers, indirect purchasers, U.S. purchasers, and foreign purchasers. The indirect purchasers were dismissed on the basis of *Illinois Brick*³⁸ and the foreign purchasers were all dismissed on the basis that while there was an effect on the United States market, that effect did not give rise to the foreign plaintiff's claims.³⁹

In *IRI v. A.C. Neilsen*,⁴⁰ the court approached the critical issue as a matter of standing. The court concluded that even if there is jurisdiction, a plaintiff who has a claim, but not a claim relating to

³⁶ Returning to the theme of antitrust as pop culture, it has been reported that Sigourney Weaver attended the government trial against Richard Taubman, the ex-chairman of Sotheby's, for the purpose of playing the role of Diana Brooks, the former president of Sotheby's, who pled guilty and cooperated with the government, in an upcoming HBO film.

³⁷ See *Microsoft Settlement*, *supra* note 1.

³⁸ *Ill. Brick Co. v. Ill.*, 431 U.S. 720 (1977) (with minor exceptions limiting private treble actions under the federal antitrust laws to entities which purchased directly from the defendants).

³⁹ *In re Microsoft Corp.*, 127 F. Supp. 2d 702 (D. Md. 2001).

⁴⁰ 127 F. Supp. 2d 411 (S.D.N.Y. 2000).

effects on the U.S. market, would not have standing under U.S. law. There are such strong effects on the U.S. export business of a U.S. exporter that this decision is clearly wrong, but not of great precedential value.

The court basically said if anything bad happened, it happened to the foreign subsidiaries of the plaintiff. This is a different issue in the antitrust law, and one of the few times where the *Copperweld* doctrine is likely to help a plaintiff.⁴¹ The *Copperweld* decision holds that, for antitrust purposes, companies and their subsidiaries that they control are one entity, not two entity so to the extent an integrated company's operations are harmed, the plaintiff has been harmed. Thus, the plaintiff has standing in that case. This case is also on appeal.

Another interesting case in this area is on appeal in the Seventh Circuit. The *Copper Antitrust Litigation*⁴² was argued in September 2000 before a very distinguished panel that included Judge Diane Wood. Judge Wood has special expertise in international antitrust and is the principal author of the most recent international antitrust guidelines of the government, which include discussion of jurisdiction over foreign commerce.⁴³ *Copper Antitrust Litigation* involved an old fashioned corner of a commodities market. Most, but not all, of the copper was traded on the London metals exchange. However, some of the contracts were traded in New York, the copper was physically warehoused in the United States, and prices in the U.S. rose. The plaintiff is a German company who was injured both in London and in the United States. The district court simply got this case wrong factually and the odds are that the Seventh Circuit is going to re-instate the litigation.

IV. The Brave New World of International Antitrust Litigation

That completes my tour of the chaotic state of jurisdiction and standing. Let me give you a brief glimpse into the future. Sooner or later the interpretation of the murky language of the FTAIA will be definitively settled, but there are other even broader frontier issues to be decided. If you look at the *Christies* opinion, you can get a

⁴¹ *Copperweld Corp. v. Independence Sheet & Tube Corp.*, 467 U.S. 752 (1984).

⁴² *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875 (W.D. Wisc. 2000).

⁴³ See *supra* note 22.

glimpse of the future. The future is a series of attempts to litigate claims on behalf of worldwide classes of purchasers in the United States. For the plaintiffs, the FTAIA is just one of a number of potential theories that are being tested. One such theory is to sue on behalf of anyone anywhere who is injured by an over-charge, monopolization, or other antitrust violation, because there is a customary international law of antitrust.⁴⁴ Closely related to this theory is bringing similar allegations under the Alien Tort Claims Act, based on characterizing the economic injury as a human rights violation. There is language, however, buried deep in the *Christies* opinion and the *Microsoft* opinion discussing these theories and criticizing them as bordering on frivolous.⁴⁵

It almost does not matter whether these theories win acceptance in the United States. I do not think these theories are ever going to be the basis of a recovery in the United States in the near future, but the growth of antitrust regimes worldwide and at the true international level suggest they are not frivolous. The lawyers who use these innovative theories also are ready to create and develop a network of private rights of action and lawyers to execute these cases around the world on behalf of purchasers outside the United States. The number of countries that have private rights of action are growing and include more than just the member states of the E.U. Depending on the nature of the conspiracy, you can have between twenty and thirty private rights of action pending in those countries. Maybe there are not treble damages, maybe discovery is not going to be as broad in the United States, but there are ways to coordinate these actions to simulate what it would be like to sue on behalf of everybody in the U.S.

Finally, there is the possibility of using the supplemental jurisdiction of federal courts to try foreign private rights of action in U.S. courts applying foreign law.⁴⁶ In the end, whether these cases are brought here or abroad, we are back to the idea, that U.S. antitrust laws, and their core of a vigorous private rights of action, are the flame that draws the world to our court.

⁴⁴ I have argued elsewhere that there is in fact a different kind of customary international law of antitrust. See Spencer Weber Waller, *The Common Law of International Antitrust*, 34 NEW ENG. L. REV. 163 (1999).

⁴⁵ *Kruman*, 129 F. Supp. 2d at 628; *Microsoft*, 127 F. Supp. 2d at 717.

⁴⁶ See 28 U.S.C. § 1367 (2001).
