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# The Legality of Extraterritorial Application of Competition Law and the Need to Adopt a Unified Approach

*Thanh Phan\**

## INTRODUCTION

In 2014, three of the world's largest shipping companies, Maersk Line, Mediterranean Shipping Company, and CMA CGM, planned to create a joint venture to operate a network named "P3 Network."<sup>1</sup> The proposed network would operate on three trade lanes: Asia-Europe, Trans-Pacific, and Trans-Atlantic.<sup>2</sup> Although the headquarters of each company and the proposed joint venture were located outside Vietnamese territory, the three companies submitted a merger notification to the Vietnam Competition Authority ("VCA"), pursuant to article 20 of the Competition Law of Vietnam.<sup>3</sup> The discussion surrounding this joint venture contributed to a long-standing debate in the VCA regarding the extraterritorial application of the Competition Law of Vietnam.<sup>4</sup> The debate honed in on one primary issue: although the P3 Network was run by foreign-based companies located outside Vietnam, the companies still sought approval from the VCA.

The extraterritorial application of competition law is a controversial issue not only in Vietnam, but also in other jurisdictions<sup>5</sup>—especially now,

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\* Transnational merger investigator at the Vietnam Competition Authority, Ph.D. candidate at the University of Victoria, Law Faculty, Research Fellow at Centre for Global Studies, University of Victoria, Canada, Sessional Instructor in Politics of International Law at the University of Victoria. The author would like to send his sincere thanks to Professor Mark Gillen and Professor Victor V. Ramraj (Law Faculty, University of Victoria), Professor Fujio Kawashima (Graduate School of Law, Kobe University), Timothy T. Hughes (U.S. Federal Trade Commission), and Tran Phuong Lan (Vietnam Competition Authority) for their helpful comments on this Article. The author would also like to thank the Centre for Global Studies at the University of Victoria for the great support.

1. *CMA CGM, Maersk Line and MSC to Establish an Operational Alliance*, CMA CGM (June 18, 2013), <https://www.cma-cgm.com/news/1/cma-cgm-maersk-line-and-msc-to-establish-an-operational-alliance> [<https://perma.cc/9GES-LS6P>].

2. *Id.*

3. Luật Cảnh Tranh [Competition Law], No. 27/2004/QH11 of Dec. 3, 2004 (Viet.).

4. See discussion *infra* Part II.D.

5. See discussion *infra* Part II.

as multinational corporations (“MNCs”) have increasingly expanded their power across countries under the shadow of globalization.<sup>6</sup> As MNCs transcend countries’ geographical borders, they face a problem in determining which country’s law will apply to their cross-border transactions. Generally, the national law of a country is applicable only within that country’s territory.<sup>7</sup> The application of a country’s law, however, becomes more problematic when considering MNCs and cross-border transactions, which potentially affect multiple countries. When international cooperation surrounding these transactions is not available or too costly, some countries respond by simply applying their own competition law.<sup>8</sup> This extraterritorial application, however, can potentially harm cross-border business transactions.<sup>9</sup>

The extraterritorial application of a country’s law is the unilateral effort of a country to extend its jurisdiction to acts conducted in other countries.<sup>10</sup> Although the exercise of extraterritorial jurisdiction of competition law<sup>11</sup> is criticized<sup>12</sup> for seemingly undermining the territorial principle of international law, the exercise of this jurisdiction is necessary when countries are unable to reach an agreement regarding cross-border transactions.

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6. For example, Google bought Nokia in 2012. *Microsoft to Acquire Nokia’s Devices & Services Business, License Nokia’s Patents and Mapping Services*, MICROSOFT NEWS CTR. (Sept. 3, 2013), <https://news.microsoft.com/2013/09/03/microsoft-to-acquire-nokias-devices-services-business-license-nokias-patents-and-mapping-services/#sm.000wamleu1dzpd51pdc1m3ai3r4ao> [<https://perma.cc/WBG5-QBXB>]. Walmart acquired Jet.com in 2016. *Walmart Agrees to Acquire Jet.com, One of the Fastest Growing e-Commerce Companies in the U.S.*, WALMART (Aug. 8, 2016), <http://news.walmart.com/2016/08/08/walmart-agrees-to-acquire-jetcom-one-of-the-fastest-growing-e-commerce-companies-in-the-us> [<https://perma.cc/7DFX-V7NR>].

7. See discussion *infra* Part I.B.1.

8. See discussion *infra* Part II.

9. See discussion *infra* Part II.B, C.

10. See discussion *infra* Part I.A.

11. Rita Yi Man Li & Yi Lut Li, *The Role of Competition Law: An Asian Perspective*, 9 ASIAN SOC. SCI. 47, 47 (2013).

12. See, e.g., discussion *infra* Part II.A.1 (discussing the arguments posed by the Canadian government in the amicus brief submitted) and Part II.C (discussing the arguments posed by the Japanese government in the amicus briefs submitted).

Although many countries oppose the EACL, asserting that it violates international law,<sup>13</sup> others utilize the EACL but often in different ways.<sup>14</sup> The international approach to the EACL is not unified and fails to recognize that some countries still adopt a “double standard” for the EACL, which occurs when one country opposes the application of another country’s law within its territory but seeks to apply its own law to other countries extraterritorially.<sup>15</sup> This Article explains that the extraterritorial application of competition law by a country<sup>16</sup> to acts that occur outside its territory is not contrary to international law if that application is properly limited. The EACL should be the unilateral action of one country only when the affected countries fail to find a common solution for a cross-border competition issue. Ultimately, this Article further proposes a model that should be applied to limit the extraterritorial jurisdiction of competition law. This model would require a country to scrutinize the link between the alleged act and its country and consider the interstate interests involved before deciding to exercise its jurisdiction.

Part I of this Article discusses international law and the foundation of the extraterritorial application of law. Part II surveys the EACL approaches of four countries—Canada, the U.S., Japan, and Vietnam—and illustrates that because the limit of international law on EACL is unclear, countries impose their own limits. Finally, Part III proposes a unified approach for all countries to use when considering the extraterritorial application of competition law.

## I. THE INTERNATIONAL LAW FOUNDATION OF THE EXTRATERRITORIAL APPLICATION OF LAW

Before surveying the EACL approaches of multiple countries, it is important to understand the foundation of the EACL. This Part first discusses the definition of “extraterritorial” and the characteristics of competition law. Then, this Part discusses the relationship between jurisdiction and territory, as established by international law. Finally, this Part explains the landmark *Lotus*

13. For example, Canada and Japan made this assertion in amicus briefs submitted to U.S. courts. See discussion *infra* Part II.A.1, II.C.; Brief for Government of Japan as Amicus Curiae Supporting Respondents at 1–2, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001), 1996 U.S. 1st Cir. Briefs LEXIS 11.

14. See discussion *infra* Part II.

15. For an example of a country that employs a “double standard” see discussion *infra* Part II.C.

16. This country is normally referred to as the “country of forum.”

case, in which the International Court of Justice held that a state may exercise jurisdiction with respect to acts occurring in foreign countries.

### A. *The EACL in General*

The extraterritorial application of competition law has several aspects to consider. First, it is important to define “extraterritorial” and what it means to apply a country’s law extraterritorially. Second, understanding the EACL requires an understanding of the difference between the EACL and conflict of laws. Finally, competition law involves characteristics of both public and private law, which are important to understanding the overall approach to the EACL.

#### 1. *Defining “Extraterritorial”*

Many articles have discussed the “extraterritoriality” of the EACL. Some authors treat extraterritoriality as the internationalization of domestic law,<sup>17</sup> while others simply define extraterritoriality as “the application of domestic law to foreign conduct.”<sup>18</sup> In the scholar Herbert Hovenkamp’s discussion of antitrust law as an extraterritorial regulatory policy, he does not expressly define “extraterritorial regulatory policy,” but acknowledges the considerable power of U.S. antitrust law to control conduct abroad.<sup>19</sup> Another scholar David Gerber provides a more specific definition of EACL, calling it “unilateral jurisdictionalism [that] authorizes states to apply their own laws to conduct outside their territory under certain conditions—without the obligation to take the interests of other states into account.”<sup>20</sup> Put simply, the EACL is best defined as the unilateral effort of a country to extend its jurisdiction to acts conducted in other countries.<sup>21</sup> Even the best definitions in the literature, however, fail to address important issues related to the EACL.

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17. See, e.g., GEORGE N. ADDY, CHRIS MARGISON & RYAN DOIG, NATIONAL SOVEREIGNTY AND THE ENFORCEMENT OF COMPETITION LAW: STRIKING THE RIGHT BALANCE 1–2 (2004) (on file with *Louisiana Law Review*).

18. See, e.g., Allan E. Gotlieb, *Extraterritoriality: A Canadian Perspective*, 5 NW. J. INT’L L. & BUS. 449, 449 (1983).

19. Herbert Hovenkamp, *Antitrust as Extraterritorial Regulatory Policy*, 48 ANTITRUST BULL. 629, 629 (2003).

20. DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 5 (2010).

21. See *id.*

## 2. Distinguishing the EACL from Conflict of Laws

To avoid the conflation of the EACL and conflict of laws it is important to distinguish the two. Conflict of laws is a country's set of rules which apply when a legal issue contains a foreign element and a domestic court must decide whether to apply foreign law or cede jurisdiction to a foreign court.<sup>22</sup> Namely, conflict of laws deal with the following three questions. First, does the court of a country have jurisdiction to hear the case?<sup>23</sup> Second, which country's law should be applied to determine the outcome of the dispute?<sup>24</sup> Third, when should the court of a country recognize and enforce a foreign judgment?<sup>25</sup> Every modern legal system has its own domestic conflict of laws rules.<sup>26</sup> These domestic rules address these three questions and help countries avoid conflicts and overlapping jurisdiction in private litigation. Moreover, at the international level, many countries have conventions that provide rules to determine the jurisdiction of courts and the applicable laws in cases involving foreign elements.<sup>27</sup>

The difference between the EACL and conflict of laws hinges upon their relation to public and private law. Conflict of laws relates to private laws that regulate private relationships, while the EACL relates to public law.<sup>28</sup> Public law regulates the relationship between private persons and the state acting in its capacity as mediator of the public good.<sup>29</sup> Private law, however, regulates relationships between private parties.<sup>30</sup> This type of law covers areas such as contracts, marriage, adoption, or certain torts.<sup>31</sup> Positivists distinguish these two types of law as duty-imposing laws and power-conferring laws.<sup>32</sup> Public laws are duty-imposing laws, which

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22. ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 1 (2005).

23. MAEBH HARDING, *CONFLICT OF LAWS* 2 (5th ed. 2014).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g.*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS* (2015); Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294; Hague Convention on the Law Applicable to Products Liability, Oct. 2, 1973, 11 I.L.M. 1283.

28. Kit Barker, *Private Law: Key Encounters with Public Law*, in *PRIVATE LAW: KEY ENCOUNTERS WITH PUBLIC LAW* 3, 3–4 (Kit Barker & Darryn Jensen eds., 2013).

29. *Id.*

30. *Id.*

31. *Id.*

32. H.L.A. HART, *THE CONCEPT OF LAW* 78 (1961).

require human beings to do, or abstain from doing, certain actions.<sup>33</sup> By contrast, private laws are power-conferring laws, which “do not impose duties or obligations”<sup>34</sup> but instead “provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.”<sup>35</sup>

Private international law provides rules to determine whether a court in a cross-border case has territorial jurisdiction to recognize the power of a party in a private relationship. If the court has jurisdiction, private international law then provides rules to determine which country’s law should apply and regulate said private relationship.<sup>36</sup> Because private law concerns the rights and obligations arising from private relationships, countries normally do not fight for jurisdiction in these cases; rather, countries seek solutions to facilitate litigation and achieve just outcomes through private international law principles.<sup>37</sup> The EACL, in contrast, deals with public law which imposes duties on subjects. In cross-border cases, the EACL addresses whether a country can impose a duty on a person in a foreign territory.<sup>38</sup> Thus, countries normally argue about overlapping powers to impose a duty on a person in a certain territory.

### 3. *Public and Private Law Aspects of Competition Law*

Competition law has the characteristics of public law because competition law imposes duties on subjects, such as the duty not to abuse a dominant position, the duty not to enter into anticompetitive agreements, the duty to comply with merger notification requirements, and the duty not to engage in unfair trade practices. In most jurisdictions, the public law character of competition law is also evident in the use of criminal or administrative sanctions.<sup>39</sup> Competition laws typically provide for a public

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33. *Id.*

34. *Id.* at 27.

35. *Id.*

36. *See* HARDING, *supra* note 23.

37. In an effort to seek solutions, countries have created international conventions. *See, e.g.*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 27.

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

39. *See, e.g.*, 15 U.S.C. § 1 (2012); Competition Act, R.S.C. 1985, c C-34, §45 (Can.); *Shitekidokusen no Kinshi oyobi Kouseitorihiki no Kakuho nikansuru Houritsu*, [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade] [Antimonopoly Act], Law No. 54 of 1947, art. 89–118 (Japanese Law

mechanism, such as an administrative agency, to enforce laws and detect violations of the law. In addition, there is no choice of law rule in competition law, either under the laws of states or international conventions.<sup>40</sup> Competition laws do not provide rules allowing its courts to apply foreign competition laws or rules to choose a forum in cases involving foreign elements.<sup>41</sup> Similarly, there is no convention that governs conflict of competition law rules. Article 2(2)(h) of the Convention of 30 June 2005 on Choice of Court Agreements even states that “[t]his Convention shall not apply to . . . anti-trust (competition) matters.”<sup>42</sup>

Although competition law has many public law characteristics, competition law in some jurisdictions has private law characteristics as well. For example, in Canada and the U.S., private parties can make civil claims for damages relating to violations of competition law. However, allowing private litigation does not make competition law private law. In Canada, only three sections of the Competition Act allow a private party to bring a competition case to the Competition Tribunal.<sup>43</sup> Additionally, the private party must be granted leave under the Competition Act before making such an application to the Competition Tribunal.<sup>44</sup> The right of a private party to make this application does not preclude the right of the Competition Bureau<sup>45</sup> to proceed against the violator to protect public interest.<sup>46</sup>

Besides private rights of action provided by the three sections, the Canadian Competition Act also allows a private party to recover damages suffered as a result of offenses related to competition or to the failure of any person to comply with an order of the Tribunal or other court under the Act.<sup>47</sup> Therefore, the private litigation in this situation stems from a

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Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> [<https://perma.cc/2GWJ-C2FZ>] (Japan).

40. See Hannah L. Buxbaum & Ralf Michaels, *Jurisdiction and Choice of Law in International Antitrust Law*, in *INTERNATIONAL ANTITRUST LITIGATION: CONFLICT OF LAWS AND COORDINATION* 225 (Jürgen Basedow et al., eds. 2012), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3115&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3115&context=faculty_scholarship) [<https://perma.cc/XUC6-7337>].

41. *Id.* at 226.

42. Hague Convention on Choice of Court Agreements, *supra* note 27, at art. 2(2)(h).

43. Competition Act, R.S.C. 1985, c C-34, §§ 75–77 (Can.).

44. *Id.* § 103.1.

45. *Our Organization*, COMPETITION BUREAU OF CAN., [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00125.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00125.html) [<https://perma.cc/6Y4N-H82Q>] (last updated Nov. 5, 2015).

46. Competition Act, §§ 75–77.

47. *Id.* § 36.

public relationship between the state and the person who failed to comply with the obligation prescribed by the Competition Act. Likewise, in the United States, persons who violate the Sherman Act “shall be deemed guilty of a felony.”<sup>48</sup> Although violations of the Sherman Act may cause damage to private parties, the violations are deemed to be contrary to public interests. Therefore, the damages plaintiffs claim in competition cases arise from the violation of a public obligation imposed by competition law. The damages are private consequences of a violation of a public obligation that is not established by any agreement between the two parties, but by the law itself.

### *B. The Relation Between Territory and Jurisdiction*

According to international law principles, a country’s laws usually apply only within the country’s territory. In some instances, however, a country should extend its competition law jurisdiction to certain acts that occurred abroad. There are different situations in which an act that occurred abroad has a connection to the territory of the country of forum. Only some of these connections, however, are sufficient to trigger the EACL.

#### *1. Territorial Principle*

The territory of a country is an important element of international law in determining the sovereignty of a country. A country is obligated to respect the territory and the sovereignty of other countries.<sup>49</sup> This territorial principle is universally recognized in international law.<sup>50</sup> This principle allows a country to freely make and enforce its law against any entities, including foreign entities, operating or present in its territory.<sup>51</sup> This principle also proscribes the enforcement of a country’s legislation in another country without the reliance on a treaty.<sup>52</sup> This principle fits with

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48. 15 U.S.C. § 1 (2012).

49. JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 335 (2d ed. 2008).

50. PETER MALANCZUK & MICHAEL BARTON AKEHURST, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 75–76 (Routledge 7th rev. ed. 1997).

51. AUST, *supra* note 22, at 44.

52. *Id.* at 45.

legal positivism that asserts that “sovereignty means ultimate authority in a given territory.”<sup>53</sup>

The territorial principle, however, indicates a rigid link between law and territory, making the principle unsuitable when considering the development of technology and international trade. For example, a price-fixing cartel might be conducted in one country but have consequences in many other territories. Given the rigid link, there are several exceptions to the territorial principle which allow affected countries to exercise jurisdiction over certain acts that occurred abroad. One of these exceptions, the effects doctrine, is suitable to consider when drafting a unified approach to the EACL.

#### *a. Protective Principle*

The first exception to the territorial principle is the protective principle, which allows a country to exercise jurisdiction over a crime committed outside its territory when the crime threatens the country’s national security.<sup>54</sup> The scope of this principle is not clear, however, because national security is a broad concept—one that might relate to economic or political issues—and countries often disagree about economic or political national security issues.<sup>55</sup> Nevertheless, this protective principle should not apply to the EACL because it relates to criminal law rather than competition law.

#### *b. Universal Jurisdiction Principle*

Another exception to the territorial principle is the universal jurisdiction principle, which enables a country to claim jurisdiction over persons whose alleged crimes were committed outside the boundaries of that country, regardless of nationality, country of residence, or any other nexus with the prosecuting country.<sup>56</sup> This principle is limited to certain

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53. TURAN KAYAOĞLU, LEGAL IMPERIALISM: SOVEREIGNTY AND EXTRA TERRITORIALITY IN JAPAN, THE OTTOMAN EMPIRE, AND CHINA 192 (reprint ed. 2013).

54. United Nations, *Protective Principle*, UNTERM, <https://unterm.un.org/UNTERM/Display/Record/UNHQ/NA?OriginalId=e13007c0bcc1513785257241005cbc50> [<https://perma.cc/295E-CHJE>] (last visited Jan. 15, 2016).

55. See, e.g., Recent Development, *Protective Principle of Jurisdiction Applied to Uphold Statute Intended to Have Extraterritorial Effect*, 62 COLUM. L. REV. 371, 374–75 (1962) (criticizing a court’s finding of national security).

56. United Nations, *Universal Jurisdiction*, UNTERM, <https://unterm.un.org/UNTERM/Display/Record/UNHQ/NA?OriginalId=b0d82ed607beb0b88525701f0061aec9> [<https://perma.cc/7VFF-5DGB>] (last visited Jan. 15, 2016).

crimes, such as piracy, slavery, torture, war crimes, genocide, and other crimes against humanity under conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984<sup>57</sup> and Geneva Conventions of 1949.<sup>58</sup> Similar to the protective principle, the universal jurisdiction principle should not apply to competition law because it is used to prosecute international crimes and protect international human rights.<sup>59</sup>

*c. Active Personality Principle*

The third exception is the active personality principle. The active personality principle, also known as the nationality principle, allows a country to assert criminal jurisdiction over the conduct of its nation's citizens, even when the conduct occurred abroad.<sup>60</sup> A state is not constrained to enact laws that apply only to its citizens who commit offenses within the country; a state may also enact laws that apply to the conduct of its citizens abroad and may be enforced in the country's home courts. Such laws, however, cannot be enforced in another country unless a treaty allows for their application because of the territorial principle.<sup>61</sup>

In competition law, two scenarios might raise questions about the jurisdiction of a country over the anticompetitive business practices of its citizens abroad. The first scenario involves a foreign-based subsidiary of a national MNC. For example, a Canadian subsidiary of a U.S. MNC is accused of abuse of a dominant position in Canada. One might argue that a U.S. court should have jurisdiction in this case because the violation is conducted by a U.S. company's subsidiary, and the nationality principle allows a state to regulate activities of its citizens abroad.<sup>62</sup> However, the nationality of the foreign-based subsidiary and that of its mother company are different. The International Court of Justice ("ICJ") in the *Barcelona Traction, Light and Power, Co.* held that a company, of which the shareholders are of Belgium nationality, "having been incorporated under

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57. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

58. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

59. For critics of this principle see Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Winter 2003, at 47, 47–63.

60. United Nations, *Active Personality*, UNTERM, <http://unterm.un.org/UNTERM/Display/Record/UNHQ/NA?OriginalId=80aca4bc91d0e57c85257241006eba9e> [<https://perma.cc/7GFU-TQE3>] (last visited Jan. 15, 2016).

61. AUST, *supra* note 22, at 45.

62. *Id.*

Canadian law and having its registered office in Toronto . . . is of Canadian nationality.”<sup>63</sup> Therefore, despite the close relationship with a U.S. parent company, a Canadian subsidiary is a Canadian corporation and the active personality principle should not allow the U.S. to exercise its competition law.

A second scenario involves the regulation of anticompetitive conduct of citizens in a foreign territory. For example, the CEOs of two U.S. corporations are both Canadian citizens, and they operate a price-fixing cartel in the U.S., affecting only the U.S. market. Although the active personality principle allows a state to regulate activities of its citizens abroad, to enforce such regulation in a foreign territory is normally controversial when a similar law and enforcement mechanism exist in the foreign territory. Thus, although the two Canadian CEOs violated the Canadian Competition Act, they are not harming the Canadian market and U.S. law is available to punish their offenses. In this scenario, the active personality principle should not apply to allow Canada to assert extraterritorial jurisdiction of its competition laws.

#### *d. Passive Personality Principle*

The passive personality principle, another exception to the territorial principle, allows a country to claim jurisdiction over acts committed abroad against its own citizens by foreign citizens.<sup>64</sup> This principle appeared in the late 19th century in the criminal codes of some countries and triggered conflicts between states.<sup>65</sup> This principle is primarily applied in counterterrorism law and conventions.<sup>66</sup>

The passive personality principle may arguably allow a country to enforce its competition law against the anticompetitive business practices of foreign persons in a foreign territory that have adverse effects on the country’s citizens in a foreign territory. For example, a U.S. company might abuse its dominant position in the U.S. market and harm Canadian companies doing business in the U.S. The Canadian Competition Act<sup>67</sup> could possibly be enforced in the U.S. to protect the U.S.-based Canadian

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63. *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, 52 (Feb. 5).

64. *Passive Personality*, UNTERM, <http://unterm.un.org/UNTERM/Display/Record/UNHQ/NA?OriginalId=b0b4495bac9b98f785257241006f6956> [https://perma.cc/Y4QT-H58D] (last visited Oct. 20, 2016).

65. John G. McCarthy, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 *FORDHAM INT’L L.J.* 298, 302 (1989).

66. AUST, *supra* note 22, at 45.

67. *Id.*

companies from such violations. However, in this situation, the violation's connection to the Canadian Competition Act is weak, and U.S law is available to regulate the abusive conduct. Therefore, the passive personality principle should not apply to competition law.

*e. Effects Doctrine*

The final exception to the territorial principle is the effects doctrine. This exception is arguably the only one that should apply to competition law and should therefore be considered in drafting a unified approach to the EACL. According to the effects doctrine, a country may enforce its competition law against an anticompetitive business practice that took place completely abroad if the conduct has a substantial effect on its territory.<sup>68</sup> The effects doctrine was adopted by the International Court of Justice in the landmark *Lotus* case.<sup>69</sup> As a result of this decision in 1927, the effects doctrine has been applied by an increasing number of countries in the area of competition law despite strong opposition from many other countries.<sup>70</sup>

*2. The International Court of Justice Judgment in Lotus*

The extraterritorial principle is controversial and has been strongly opposed by many countries. In 1927, the ICJ discussed a notable conflict between France and Turkey in the *Lotus* case.<sup>71</sup> In a milestone decision concerning the EACL, the ICJ changed the international law approach to the application of national law to violations conducted abroad.<sup>72</sup>

On August 2, 1926, a collision occurred between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt* in the open sea.<sup>73</sup> The *Boz-Kourt* sank, and eight Turkish citizens died.<sup>74</sup> Lieutenant Demons, a

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68. *Id.* at 47.

69. Case of the *Lotus* (Fr. v. Turk.), Judgment, 1927 P.I.C.J. (ser. A) No.10, at 19 (Sept. 7).

70. AUST, *supra* note 22, at 47.

71. See generally *Lotus*, 1927 P.C.I.J. At that time the Court was named the Permanent Court of International Justice. See *Permanent Court of International Justice*, INT'L CT. OF JUST., <http://www.icj-cij.org/pcij/> [<https://perma.cc/4RUC-X8SS>] (last visited Oct. 20, 2016).

72. Although the ICJ's judgements are not binding precedent, they are still subsidiary means for the determination of rules of law. See Statute of the International Court of Justice, arts. 38, 59, <http://www.icj-cij.org/documents/?p1=4&p2=2> [<https://perma.cc/K96E-Z6HL>].

73. *Lotus*, 1927 P.I.C.J., at 10.

74. *Id.*

French citizen who was the watch officer on board the *Lotus*, was arrested by the Turkish police and prosecuted by the public prosecutor of Stamboul.<sup>75</sup> Demons argued that the Turkish court had no jurisdiction, but the Turkish court dismissed his objection and sentenced him to imprisonment for 80 days and a fine of 22 pounds.<sup>76</sup>

The French government protested the arrest of Demons and sought to transfer the case from Turkish courts to French courts.<sup>77</sup> The Turkish and French governments then agreed to bring the question of jurisdiction to the ICJ, previously called the “Permanent Court of International Justice.”<sup>78</sup> One of the questions the Court had to decide was whether Turkey “acted in conflict with the principles of international law.”<sup>79</sup> The French government asked the ICJ to rule that the “jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that vessel and a Turkish ship, belongs exclusively to the French Courts.”<sup>80</sup> The Turkish government simply asked the ICJ to grant jurisdiction to the Turkish courts.<sup>81</sup>

The French government argued that international law did not allow a state to take proceedings with regard to offenses committed by foreigners abroad simply by reason of the victim’s nationality when the offense was committed on board the French vessel.<sup>82</sup> On the other hand, the Turkish government argued that “no principle of international criminal law exists which would debar Turkey from exercising the jurisdiction which she clearly possesses to entertain an action for damages, [and thus] that country has jurisdiction to institute criminal proceedings.”<sup>83</sup>

The Court observed that “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”<sup>84</sup> This means that a state cannot exercise its jurisdiction outside its territory without permission of an international rule. The Court, however, went on to say, “[i]t does not . . . follow that international law prohibits a State from exercising jurisdiction in its own

75. *Id.* at 10–11.

76. *Id.* at 11.

77. *Id.*

78. *Id.* at 5.

79. *Id.*

80. *Id.* at 6.

81. *Id.* at 8.

82. *Id.* at 22.

83. *Id.* at 9.

84. *Id.* at 18.

territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.”<sup>85</sup> The ICJ then proceeded to ascertain the possible international rule that would prohibit Turkey from prosecuting Demons. It observed that:

Consequently, once it is admitted that the effects of the offence [sic] were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence [sic] was on board the French ship.<sup>86</sup>

In response to the French government’s assertion of exclusive jurisdiction over French territory, the ICJ said that:

If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence [sic] have taken place belongs, from regarding the offence [sic] as having been committed in its territory and prosecuting, accordingly, the delinquent.<sup>87</sup>

The *Lotus* judgment provides three notable points regarding the extraterritorial application of a state’s public law. First, a state can apply its law extraterritorially unless constrained by an international rule.<sup>88</sup> The ICJ’s approach contradicted the argument of countries that oppose the application, particularly the French government’s position that a state can apply its law extraterritorially only when the state cites an international rule that allows such an application.<sup>89</sup> This rule means that the extraterritorial application of a nation’s public law is a natural right of states—not a right that derives from permission of any international treaty. The ICJ emphasized that “all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction;

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85. *Id.* at 19.

86. *Id.* at 23.

87. *Id.* at 25.

88. *Id.*

89. *Id.* at 6.

within these limits, its title to exercise jurisdiction rests in its sovereignty.”<sup>90</sup>

Second, the judgment made a clear distinction between prescriptive, adjudicative, and enforcement jurisdictions over an act conducted abroad.<sup>91</sup> Prescriptive jurisdiction refers to the power to prescribe rules regulating foreign conduct.<sup>92</sup> Adjudicative jurisdiction is the power to subject foreign parties to judicial process.<sup>93</sup> Finally, enforcement jurisdiction is the jurisdiction to enforce law abroad.<sup>94</sup> Thus, according to the ICJ’s judgment, states are relatively free to make laws that regulate foreign conduct because the prescriptive jurisdiction is conducted within a country’s territory. Likewise, because the adjudicative jurisdiction is mostly exercised within the territory of the country that made the law, it is not prohibited by the *Lotus* judgment. The enforcement jurisdiction is more limited because this exercise of jurisdiction may violate the territorial principle.<sup>95</sup> Enforcement jurisdiction is allowed only if it is conducted within the territory of the country that made the law.<sup>96</sup>

However, these three jurisdictions are inseparable, and the limit placed on enforcement jurisdiction also influences the scope of the prescriptive and adjudicative jurisdictions. In competition law, without the cooperation or approval of the country where the conduct occurred, a second country could not obtain the information needed to enforce its competition laws extraterritorially. Consequently, although a country may have prescriptive and adjudicative jurisdiction within its territory, its authority to address a breach of its competition laws in a foreign country can be difficult. Therefore, the exercise of prescriptive and adjudicative jurisdictions is not unlimited.

The third notable point on the EACL made in *Lotus* relates to the effect of foreign conduct on the country whose laws were violated. This rule can be regarded as a limit set by international law on the freedom of a country to exercise jurisdiction within its territory with respect to conduct that occurred in a foreign country. According to the ICJ, “it might be observed that the effect is a factor of outstanding importance in offences [sic] such as manslaughter, which are punished precisely in consideration of their

90. *Id.* at 19.

91. Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303 (2014).

92. *Id.* at 1303–04.

93. *Id.*

94. *Id.*

95. See KAYAOĞLU, *supra* note 53, at 129. See also Case of the *Lotus* (Fr. v. Turk.), Judgment, 1927 P.I.C.J. (ser. A) No.10, at 19 (Sept. 7).

96. *Lotus*, 1927 P.I.C.J., at 19.

effects rather than of the subjective intention of the delinquent.”<sup>97</sup> From the private actor’s perspective, the ICJ’s judgment imposes an obligation on entities residing in a country to comply not only with the laws of that country, but with applicable foreign laws as well. In competition law, MNCs are likely to be aware of this obligation because their business decisions made in a particular country may have adverse effects in other countries. A MNC that fails to consider the application of the competition laws of countries affected by its business decisions might find itself subject to unpredicted foreign competition law judgments.

In summary, the ICJ ruling in *Lotus* allows a state to exercise jurisdiction with respect to acts occurring in foreign countries. Following *Lotus*, countries have applied the ICJ’s judgment differently to extend their jurisdiction to acts occurring abroad. To promote cooperative international relations between countries and to enhance the certainty of the cross-border legal environment for entities, this right must be limited.

## II. A GLOBAL SURVEY: VARIOUS APPROACHES TO THE EXTRATERRITORIAL APPLICATION OF COMPETITION LAW

The limit of international law on the EACL is uncertain. Due to this uncertainty, countries have imposed their own limits. An analysis of Canada and the United States illustrates the approaches of two predominantly common law countries and highlights the substantive differences between their approaches. An analysis of the Japanese and Vietnamese approaches to the EACL illustrates the approaches of two non-common law countries. The discussion of Japan highlights the double standard in the EACL that exists in some countries. The discussion of Vietnam serves as an example of a developing country’s approach to the EACL.

### A. *The Canadian Approach*

Canada is a country that takes a restrictive view of the territorial doctrine and is concerned about the negative effects of the EACL, especially the EACL by U.S. courts. Scholars acknowledge that the Canadian economy is especially vulnerable to the unwarranted exercise of extraterritorial jurisdiction.<sup>98</sup> In addition to problems concerning Canadian sovereignty and the security of Canadian entities, the unilateral EACL by

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97. *Id.* at 24.

98. Gotlieb, *supra* note 18, at 457.

foreign states in Canadian territory might impair certain Canadian policies, such as the immunity program.<sup>99</sup>

*1. The Opposition of Canada to the Exercise of Foreign Jurisdiction in Canadian Territory*

In response to the adverse effects of the overuse of foreign extraterritoriality, Canadian provincial legislatures have enacted several statutes to block the foreign EACL.<sup>100</sup> First, under the Ontario Business Records Protection Act, the attorney general may obtain a court order prohibiting a person from removing a business record<sup>101</sup> of any business carried on in Ontario pursuant to an order made by a foreign authority.<sup>102</sup> The taking of such a business record is legal only if it is consistent with the company's legal practice or is allowed by Ontario or Canadian law.<sup>103</sup> The Quebec Business Concerns Record Act sets out the same rule.<sup>104</sup> Ignoring the relationship between Ontario or Quebec and other Canadian provinces, this regulation serves to strengthen the territorial principle and weaken the EACL of other countries within Canadian territory. In Canada, the unilateral order of an authority in a foreign jurisdiction outside Ontario or Quebec is regarded as the exercise of jurisdiction by a foreign country, and according to the principle in *Lotus*, this type of order is likely prohibited by international law.<sup>105</sup> Therefore, Canadian law, unable to impose a duty on foreign authorities, prohibits Canadian entities from complying with a foreign authority's unilateral order for documents.

These blocking provisions are consistent with the judgment in *Lotus*. Requesting a foreign-based company to submit a document without the approval of the country of conduct is an exercise of power in the territory of another state. Such a request, therefore, is prohibited by international

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99. ADDY, MARGISON & DOIG, *supra* note 17, at 17. For more on the immunity program see *Immunity Program Under the Competition Act*, COMPETITION BUREAU OF CAN. (Aug. 4, 2009), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03155.html> [<https://perma.cc/S94Q-BULB>].

100. ADDY, MARGISON & DOIG, *supra* note 17, at 5.

101. According to section 1 of the Business Records Protection Act, business records include "any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material." Business Records Protection Act, R.S.O. 1990, c. B.19, § 1 (Can.).

102. *Id.*

103. *Id.*

104. Business Concerns Record Act, C.Q.L.R. 2011, c D-12 (Can.).

105. For more on the nature of international law see ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 1–16 (2003).

law. Moreover, the obligation not to transfer a business record, as provided by the business records legislation, is the right of Canadian-based companies to refuse EACL. Accordingly, any foreign authority that wants to legally obtain business records from Ontario or Quebec has to comply with procedures allowed by the laws of these provinces or the parliament of Canada.

The Ontario and Quebec blocking provisions are also consistent with Part III of the Competition Act of Canada providing for mutual legal assistance. These provisions enhance Canadian sovereignty in multi-jurisdictional competition cases. According to section 30.03 of the Competition Act of Canada, a foreign state that has entered into a mutual assistance agreement<sup>106</sup> can make a request for assistance pursuant to the agreement.<sup>107</sup> This section authorizes the minister of justice to handle such requests.<sup>108</sup> If the minister of justice approves the request for a search and seizure, the minister of justice shall provide the commissioner with any documents or information necessary to apply for the search warrant.<sup>109</sup>

Federal legislation also protects Canada from the potential negative effects of the EACL and helps strengthen Canadian sovereignty. For example, Section 8 of the Foreign Extraterritorial Measures Act provides that where the recognition or enforcement of a foreign tribunal's judgment in Canada has or is likely to have adverse effects on Canadian interests or sovereignty, the attorney general of Canada may "declare that the judgment shall not be recognized or enforceable in any manner in Canada" or, in the case of a money judgement, may decrease the amount owed.<sup>110</sup> In addition, section 9(1) empowers a Canadian citizen to sue and recover from a person in whose favor the abovementioned foreign judgment is given.<sup>111</sup> Thus besides allowing the attorney general to declare a foreign judgment unenforceable in Canada, the Act provides measures for the Canadian resident to recover the damages and expenses incurred related to such a judgment.<sup>112</sup> Section 9(2) allows the court to order the seizure and sale of any property in which the person against whom the judgment made under section 9(1) is rendered.<sup>113</sup>

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106. Competition Act, R.S.C. 1985, c C-34 § 30 (Can.) (defining agreement as "a treaty, convention or other international agreement to which Canada is a party that provides for mutual legal assistance in competition matters").

107. *Id.* § 30.03.

108. *Id.*

109. *Id.* § 30.05.

110. Foreign Extraterritorial Measures Act, R.S.C. 1985, c F-29, § 8 (Can.).

111. *Id.* § 9(1).

112. *Id.* § 9(2).

113. *Id.*

In addition to legislation, the Canadian government has resisted the EACL on a case-by-case basis. In *Hartford Fire Insurance v. California*,<sup>114</sup> heard by the U.S. Supreme Court in 1992, the Canadian government submitted an amicus curiae brief in support of a petitioner.<sup>115</sup> Canada was “concerned with the exercise of U.S. extraterritorial jurisdiction where it directly conflicts with the exercise of Canada’s territorial jurisdiction.”<sup>116</sup> The Canadian government first argued against the extraterritorial exercise of the Sherman Act<sup>117</sup> by asserting that “[c]ustomary international law, which has been adopted as U.S. law, precludes one state’s exercise of economic regulatory jurisdiction over acts occurring in the territory of another state where such exercise would cause a substantial conflict.”<sup>118</sup> The Canadian government then argued using the presumption against the extraterritorial jurisdiction of the Sherman Act, claiming that “[n]either the plain language nor the legislative history of the Sherman Act demonstrates a congressional intent to apply it extraterritorially so as to conflict with and undermine another sovereign’s territorial laws.”<sup>119</sup> The final argument made by the Canadian government was that the Foreign Trade Antitrust Improvements Act of 1982, which amended the Sherman Act, does not express an intent to override the territorial preference in situations of legal conflict under U.S. and international law.<sup>120</sup> This case, in addition to legislation, illustrates Canada’s opposition to the EACL in Canada.

## 2. Extraterritorial Jurisdiction of the Canadian Competition Act

Although Canada opposes the EACL in Canada, Canada sometimes wishes to apply its laws extraterritorially. The extraterritorial jurisdiction of the Canadian Competition Act, however, is not clearly stated.<sup>121</sup> Sections that define violations of the Act—for example, conspiracies

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

115. Brief for Government of Canada as Amicus Curiae Supporting Certain Petitioners, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1111, 91-1128), 1992 U.S. S. Ct. Briefs LEXIS 728.

116. *Id.* at \*4.

117. 15 U.S.C. §§ 1–2 (2012).

118. Brief for Government of Canada at 13, *Hartford*, 509 U.S. 764 (No. 91-111, 91-1128).

119. *Id.* at 23.

120. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6A (2012).

121. Competition Act, R.S.C. 1985, c C-34 (Can.).

between competitors,<sup>122</sup> bid-rigging,<sup>123</sup> deceptive marketing practices,<sup>124</sup> restrictive trade practices,<sup>125</sup> or mergers<sup>126</sup>—use words such as “person,” “every person,” “every one,” or “any person” to describe the subject of the conduct. These words refer to individuals and corporations<sup>127</sup> in general, regardless of nationality or place of residence. Without clear language or a clear statement of territorial jurisdiction, it is difficult to determine whether the Act applies to conduct that occurs outside of Canadian territory. Another provision, section 46, provides some guidance in making the determination of extraterritorial jurisdiction.

Section 46, pertaining to foreign directive, seems to relate to acts occurring outside of Canada. This section provides

[a]ny corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.<sup>128</sup>

According to the plain language of this section, the alleged person is liable under this section only if the person “carries on business in Canada,”<sup>129</sup> but the Competition Act does not define what it means to “carry on business in Canada.” Therefore, the possible interpretation of the extraterritorial application depends on the guidance defining this phrase.

If “carry on business in Canada” means having a permanent establishment in Canada, section 46 of the Competition Act does not have extraterritorial application. According to the Convention between Canada

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122. *Id.* § 45.

123. *Id.* § 47.

124. *Id.* § 74.01.

125. *Id.* §§ 74–79.

126. *Id.* § 91.

127. Interpretation Act, R.S.C. 1985, c I-21, § 35(1) (Can.).

128. Competition Act, § 46.

129. *Id.*

and the United States of America With Respect to Taxes on Income and on Capital, “the term ‘permanent establishment’ means a fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on.”<sup>130</sup> This Convention also provides that, “[t]he term ‘permanent establishment’ shall include especially: (a) A place of management; (b) A branch; (c) An office; (d) A factory; (e) A workshop; and (f) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.”<sup>131</sup>

Canadian tax law indicates that “carry on business in Canada” might have a broader meaning than having a permanent establishment in Canada. Section 253(b) of the Income Tax Act provides,

[W]here in a taxation year a person who is a non-resident person . . . solicits orders or offers anything for sale in Canada through an agent or servant, whether the contract or transaction is to be completed inside or outside Canada or partly in and partly outside Canada . . . the person shall be deemed, in respect of the activity or disposition, to have been carrying on business in Canada in the year.<sup>132</sup>

In *Maya Forestales S.A. v The Queen*, the Tax Court of Canada, commenting on this section of the Income Tax Act, observed that “it is quite clear that Parliament’s intent in creating the presumption was to subject non-resident persons to Canadian tax provided they carry out a minimum amount of commercial activity within Canada’s borders.”<sup>133</sup> The court then concluded that “the purpose of section 253 is to extend Canada’s tax jurisdiction to non-resident persons based on certain activities that they carry out within Canada’s borders.”<sup>134</sup> The tax court’s judgement in *Maya Forestales* means that a person is considered carrying on business in Canada only if that person at least conducts a commercial activity within Canadian territory. In this situation, section 46 of the Competition Act does not have extraterritorial jurisdiction. However, given the development of technology, an offer, an order, or a commercial activity might be made from a foreign country to Canadian buyers online. Therefore, with online activity, the phrase “carry on business in Canada” may be interpreted more broadly. If the phrase included business activities

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130. Convention with Respect to Taxes on Income and on Capital, Can.-U.S., art. V(1), Sept. 26, 1980, T.I.A.S. No. 11087.

131. *Id.* at art. V(2).

132. Income Tax Act, R.S.C. 1985, c L-1 (5th Supp.), § 253 (Can.).

133. *Maya Forestales S.A. v. The Queen*, 2005 T.C.C. 66, para. 34 (Can.).

134. *Id.* at para. 36.

that are conducted outside Canadian territory, but affect Canada, section 46 would have extraterritorial application.

Additionally, section 109 and section 110 on merger notification may provide a clearer rule concerning the extraterritorial application of the Competition Act. These sections require participants to a merger to submit a merger notification to the Competition Bureau if the merger meets certain criteria. Parties to mergers who had more than 400 million dollars in aggregate assets or aggregate gross revenue from sales in, from, or into Canada at a predetermined time are subject to the requirement of merger notification under the Competition Act.<sup>135</sup> Section 110 provides the transaction's size threshold for different types of mergers. The threshold relies on the aggregate value of the assets of participating parties together with their affiliates in Canada, among others.<sup>136</sup>

These regulations indicate that the Competition Act of Canada might have extraterritorial application. Under sections 109 and 110, the Act may regulate mergers conducted outside Canadian territory that affect Canada through a corporation that carries on an operating business in Canada. For example, suppose A and B are U.S. companies, and A acquires B in the U.S. A and B may have to send notification of the merger to the Canadian commissioner if the parties meet the size criteria set out in section 109 and the assets of B1, a Canadian affiliate controlled by B, exceed \$700 million.<sup>137</sup> This acquisition is conducted by U.S. companies within the territory of the U.S., and B1 is a Canadian company which does not participate in the acquisition. The acquisition has effects on the Canadian market because the decisions of B1 might be influenced by the post-merger companies. Sections 109 and 110, therefore, mean that the Competition Act to some extent might have extraterritorial application.<sup>138</sup>

The Competition Bureau, however, does not enforce the Competition Act unilaterally in cross-border merger cases. The Bureau provided in a submission to the Organization for Economic Co-operation and Development ("OECD") that the Bureau often seeks extensive cooperation with foreign competition authority in reviewing transnational

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135. Competition Act, R.S.C. 1985, c C-34, § 109(1) (Can.).

136. *Id.* §§ 110(3)–(4).

137. *See id.* §§ 110(7)–(8).

138. McMillan LLP takes the same point of view that “foreign-to-foreign mergers might be subject to substantive review wherever they occur, if competitive effects occur within Canada from the transaction.” Neil Campbell, James B. Musgrove & Mark Opashinov, *Canada, in GETTING THE DEAL THROUGH: MERGER CONTROL 2012*, at 82, 83 (John Davies ed., 2011).

mergers.<sup>139</sup> The Bureau is also willing to coordinate with foreign counterparts when a cross-border merger is likely to have adverse competitive effects in the related countries.<sup>140</sup> The Bureau asserts that consistent and coordinated remedies help avoid potential friction stemming from situations in which a remedy in one jurisdiction may not be acceptable in another and can lead to more efficient and effective resolutions than would be attained through unilateral enforcement action.<sup>141</sup>

In practice, the Canadian Competition Tribunal has discussed the extraterritorial jurisdiction of the Canadian Competition Act in *Director of Investigation and Research v. D & B Companies of Canada Ltd.* (“*D&B*”).<sup>142</sup> In *D&B*, the petitioner alleged that the respondent abused a dominant position in the supply of scanner-based market tracking services in Canada.<sup>143</sup> Although this case does not directly involve extraterritorial jurisdiction, the Tribunal mentions the issue in the discussion of the geographic dimension of the market.<sup>144</sup> The Tribunal referred to the discussion of one scholar<sup>145</sup> regarding the need to extend “the reach of the Canadian abuse of dominance provisions to assert extraterritorial jurisdiction in cases in which the ‘foreign commerce of Canada’ is adversely affected.”<sup>146</sup> Justice McKeown, writing for the Tribunal, observed,

If Parliament had simply referred in paragraph (a) [of section 79(1)] to control of a market, “market” having both product and geographic dimensions, the section could apply to situations where there were [sic] no direct connection to Canadian consumers. It could have been used for aggressive, extraterritorial application to

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139. Government of Canada, *Competition Bureau Submission to the OECD Competition Committee Roundtable on Remedies in Cross-Border Merger Cases*, COMPETITION BUREAU (Oct. 29, 2013), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03771.html> [<https://perma.cc/GPU9-8KKS>].

140. *Id.*

141. *Id.*

142. *Dir. of Investigation & Res. v. D & B Cos. of Can.*, 1995 CarswellNat 2684 (Can.) (WL).

143. *Id.*

144. *Id.* at 36.

145. R.J. Roberts, *Abuse of Dominant Position: From Bork to Bain and Back Again (But this Time with Extraterritoriality)*, in *CANADIAN COMPETITION LAW AND POLICY AT THE CENTENARY*, 337, 344–48 (R.S. Khemani & W.T. Stanbury eds., 1991).

146. *D & B Cos. of Can.*, 1995 CarswellNat 2684, at para. 36.

protect Canadian *firms* operating in other markets in which Canadian *consumers* do not buy the product.<sup>147</sup>

Justice McKeown then wrote, “I am here concerned, however, with the current wording, not the merits of the proposed reform.”<sup>148</sup> This means the Tribunal relied on the text of section 79(1)(a). Although *D&B* did not focus on the extraterritorial jurisdiction of the Canadian Competition Act, the discussion of the Tribunal expressed a point of view consistent with the territorial principle.

Although the Supreme Court of Canada has not heard any competition case concerning the question of the extraterritorial jurisdiction of the Competition Act, its approach to the extraterritorial jurisdiction of Canada reflected in criminal cases is cautious. The Court’s opinion in criminal cases suggests its potential approach to the extraterritorial jurisdiction of the Canadian Competition Act. The Supreme Court of Canada in general scrutinizes the territorial principle and the international comity while deciding the jurisdiction of Canadian courts in cross-border cases. In 2007, the Court emphasized in *R v. Hape* that Canadian law cannot be enforced in another state’s territory without the other state’s consent.<sup>149</sup> This is a strict approach to the extraterritorial jurisdiction of Canadian law. In 1985, Justice La Forest wrote in *Libman v. The Queen* that:

The territorial principle in criminal law was developed by the courts to respond to two practical considerations, first, that a country has generally little direct concern for the actions of malefactors abroad; and secondly, that other states may legitimately take umbrage if a country attempts to regulate matters taking place wholly or substantially within their territories. For these reasons the courts adopted a presumption against the application of laws beyond the realm . . . .<sup>150</sup>

The Court also acknowledged the necessity of the extraterritorial jurisdiction of law.<sup>151</sup> It observed that confining national criminal law to national territory would have provided an easy escape for international criminals.<sup>152</sup> Justice La Forest asserted that “[t]his country has a legitimate interest in prosecuting persons for activities that take place abroad but have

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147. *Id.* at para. 37.

148. *Id.*

149. *R. v. Hape*, [2007] 2 S.C.R. 292, 294 (Can.).

150. *Libman v. The Queen*, [1985] 2 S.C.R. 178, 208 (Can.).

151. *Id.*

152. *Id.*

an unlawful consequence here.”<sup>153</sup> He also laid out the substantial links principle, providing that courts should “consider the substantial links that connected the crime to that jurisdiction” when determining whether a crime should be prosecuted in a particular area.<sup>154</sup>

Thus, the opinions on the exercise of extraterritorial jurisdiction of the Canadian Supreme Court seem to be strict and consistent over time. As a general rule, Canadian laws cannot be enforced in another country’s territory, but they can have extraterritorial jurisdiction in some specific situations. The justification for the Canadian courts to exercise its jurisdiction extraterritorially is the “unlawful consequence”<sup>155</sup> or “substantial link”<sup>156</sup> between the act occurring abroad and Canada.

However, among the cross-border cases Canadian courts have heard, there is no case involving an offense by a foreigner in a foreign territory that has an adverse effect on Canada. The substantial links principle, therefore, has not brought about any controversy over the jurisdiction of a Canadian court like that of the effects doctrine in *Lotus*. Even in *Libman*, in which a significant portion of the offense involved conduct in Canada even though the victims were harmed abroad, the link between the crime and Canada was obviously substantial.<sup>157</sup>

In 1997, the Ontario Court of Appeal in *R. v. O.B.*<sup>158</sup> dealt with the question of “whether a Canadian court has jurisdiction to try the appellant for an offence [sic] committed entirely in the United States.”<sup>159</sup> In this case, the appellant was charged with “touching his granddaughter’s body for a sexual purpose” in his transport truck during a trip from Canada to the U.S.<sup>160</sup> The offense was conducted entirely in the United States territory.<sup>161</sup> Justice Abella observed that

[t]he offence [sic] was one which in every respect occurred outside Canada, albeit in a Canadian vehicle on a trip from Canada with two Canadians in it. Other than in s. 7, the *Criminal Code* does not purport to assume original jurisdiction over criminal activity in foreign territories simply because the activity was carried on by Canadians in a Canadian vehicle. There must be

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153. *Id.* at 209.

154. *Id.* at 188.

155. *Id.* at 209.

156. *Id.* at 188.

157. *Id.*

158. *R. v. B.*, 1997 CarswellOnt 1740 (Can.) (WL).

159. *Id.* at para. 1.

160. *Id.* at para. 2.

161. *Id.* at para. 3.

more than Canadian residence or vehicular ownership; there must be a significant link between Canada and the formulation, initiation, or commission of the offence. There is no such link here with respect to any part of the offence.<sup>162</sup>

Justice Abella then concluded that the Canadian court had no jurisdiction to try the appellant.<sup>163</sup> In this case, the Ontario Court of Appeal did not apply the active personality principle to grant Canadian courts jurisdiction. This decision by the appellate court suggests that the nationality of the violator alone is not a sufficient substantial link to confer jurisdiction on a Canadian court.

Canada has consistently favored a largely territorial approach to the enforcement of the Canadian Competition Act. The Supreme Court, however, has allowed extraterritorial application in criminal cases where the acts in question have substantial links to Canada.<sup>164</sup> Although “substantial links” is not well-defined, it requires more than the mere involvement of a Canadian citizen. Therefore, the extraterritorial application of the Competition Act is still uncertain; sections 109 and 110, however, provide the best support for extraterritorial application, as the Competition Bureau and courts have the power under these sections to govern mergers that take place abroad by foreign corporations if the mergers meet certain criteria.<sup>165</sup> If Canada chooses to enforce extraterritorial jurisdiction of the Competition Act in the future, it should reconsider the blocking statutes and the Foreign Extraterritorial Measures Act,<sup>166</sup> as these statutes would conflict with the Competition Act’s extraterritorial jurisdiction and create a double standard regarding the EACL in Canada.

### *B. The American Approach*

The U.S. is a country that vigorously exercises extraterritorial jurisdiction in the area of antitrust law.<sup>167</sup> However, there are divergent opinions and practices related to the extraterritorial jurisdiction of antitrust law in the United States. The divergence stems from the unclear statement of the law. This section analyzes the U.S. approach to the EACL, especially how U.S. courts limit the effects doctrine by taking into account foreign country interests, international comity, and sovereign immunity.

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162. *Id.* at para. 12.

163. *Id.* at para. 13.

164. *Libman v. The Queen*, [1985] 2 S.C.R. 178, 188 (Can.).

165. Competition Act, R.S.C. 1985, c C-34, §§ 109, 110 (Can.).

166. Foreign Extraterritorial Measures Act, R.S.C. 1985, c F-29, § 8 (Can.).

167. Competition law is called “antitrust law” in the U.S.

This section also discusses the application of foreign competition law in U.S. territory.

*1. The Territorial Principle and Presumption Against the Extraterritorial Jurisdiction of the Sherman Act*

U.S. antitrust law includes a number of statutes, with the three primary statutes being the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.<sup>168</sup> The Sherman Act proscribes collusion and monopolization.<sup>169</sup> Section 1 of the Sherman Act states that “[e]very 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.”<sup>170</sup> Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”<sup>171</sup> Likewise, the Clayton Act defines “commerce” to mean “trade or commerce among the several States and with foreign nations.”<sup>172</sup> Although this definition of “commerce” refers to trade or commerce “with foreign nations,” it is not clear whether “commerce” includes violations conducted entirely abroad by foreign individuals or entities or whether there should be at least one U.S. citizen involved in the alleged conduct. Similarly, the extent to which the Sherman Act will apply to acts conducted abroad is also unclear.

In his discussion about the extraterritorial jurisdiction of the Sherman Act, one commentator, Larry Kramer, asserted that “Congress seldom thinks about questions of extraterritoriality, which is why so few federal statutes address it.”<sup>173</sup> William Dodge takes a different approach, arguing that “acts of Congress should presumptively apply only to conduct that causes *effects* within the United States regardless of where that conduct

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168. *The Antitrust Laws*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/U3TQ-VBCB>] (last visited Oct. 20, 2016).

169. 15 U.S.C. §§ 1–2 (2012).

170. *Id.* § 1.

171. *Id.* § 2.

172. *Id.* § 12.

173. Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT’L L. 750, 757 (1995).

occurs.”<sup>174</sup> Because the intention of the Congress is unclear, the courts must fill the gap.<sup>175</sup>

The first case in which the U.S. Supreme Court addressed extraterritorial application of the Sherman Act was *American Banana Co. v. United Fruit Co.*<sup>176</sup> in 1909. In this case, both the plaintiff and defendant were U.S. corporations, but the alleged monopolization occurred in Panama and Costa Rica.<sup>177</sup> In hearing the plaintiff’s appeal, the Court observed that “the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.”<sup>178</sup> This observation implies that the *American Banana* Court presumed that the jurisdiction of the Sherman Act was confined to the territory of the U.S. The Court then concluded that

it alleges no case under the act of Congress, and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.<sup>179</sup>

Therefore, the Court’s opinion indicates that the U.S. does not apply the active personality and passive personality principles to the exercise of extraterritorial jurisdiction of American antitrust laws.

Four years after *American Banana*, the Court slightly changed its interpretation of the extraterritorial application of the Sherman Act in *U.S. v. Pacific and Arctic Railway Navigation Co.*<sup>180</sup> In this case, the defendants, which included a U.S. corporation and a Canadian corporation, engaged in a combination and conspiracy in restraint of trade and commerce with one another.<sup>181</sup> The cartel effectively eliminated and destroyed competition in the business of transporting freight and passengers between various ports in the U.S. and Canada.<sup>182</sup> The defendants contended that U.S. antitrust law did not apply because part of

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174. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 90 (1998).

175. Kramer, *supra* note 173, at 757.

176. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

177. *Id.* at 354.

178. *Id.* at 355.

179. *Id.* at 359.

180. *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87 (1913).

181. *Id.* at 88.

182. *Id.*

the transportation route was outside the U.S.,<sup>183</sup> but the Court rejected this argument.<sup>184</sup> It observed that “it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil.”<sup>185</sup> The Court then claimed jurisdiction over the foreign defendant asserting that “[i]f we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.”<sup>186</sup>

Although the Supreme Court in *Pacific and Arctic* asserted that it may not control foreign corporations operating in foreign territory, it held, in contrast to *American Banana*, that jurisdiction under the Sherman Act is not confined to U.S. territory.<sup>187</sup> Although the alleged collusion was conducted only partly within U.S. territory, the Court concluded that the conduct was entirely within the jurisdiction of the Sherman Act.<sup>188</sup> This finding suggests that jurisdiction under the Sherman Act extends to a violation of the act that is, at least in part, conducted abroad. However, in *Pacific and Arctic*, there was at least some connection to the U.S.—the foreign defendant colluded with a U.S. corporation and the business of the foreign defendant was conducted partly in the U.S. This connection might explain why the Court did not provide extensive reasons justifying its divergence from the *American Banana* approach to jurisdiction under the Sherman Act.

## 2. *The Effects Doctrine and the Extraterritorial Jurisdiction of the Sherman Act*

Although the Supreme Court in *American Banana* asserted that acts conducted abroad are outside the jurisdiction of the U.S., this interpretation has not been strictly followed by lower courts. In 1945, the Court of Appeal for the Second Circuit outlined an “effects” test for determining the extraterritorial application of the Sherman Act in *United States v. Aluminum Company of America (“Alcoa”)*.<sup>189</sup> In this case, the defendants

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183. *Id.* at 105.

184. *Id.* at 106.

185. *Id.*

186. *Id.*

187. *Id.* at 105–06.

188. *Id.*

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

entered into agreements to form cartels in 1931<sup>190</sup> and 1936,<sup>191</sup> which were alleged to have had an adverse competitive effect on the U.S. market. Judge Learned Hand, in delivering the opinion of the court, wrote that “we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it.”<sup>192</sup> Judge Hand referred to *American Banana* to illustrate that Congress did not intend to punish all whom its courts could catch for conduct that had no consequence within the United States. He then asserted that “[o]n the other hand, 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 which the state reprehends; and these liabilities other states will ordinarily recognize.”<sup>193</sup>

Judge Hand proposed two conditions to consider when determining whether an act conducted abroad falls under the jurisdiction of the Sherman Act. First, there must be an intent to affect U.S. imports.<sup>194</sup> A cartel entered into outside U.S. territory might affect U.S. trade even if the parties did not intend to do so; these effects might result indirectly through international trade. Analyzing this first condition, Judge Hand stated that the Sherman Act was enacted to cover agreements that intend to affect U.S. trade.<sup>195</sup> Second, there must be an actual effect upon imports into the United States.<sup>196</sup> Judge Hand refers to an example of cartels that were entered into with the intent to affect imports entering the U.S. but which had no actual effect upon the imports.<sup>197</sup> Following this example, Judge Hand asserted that “the [Sherman] Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them.”<sup>198</sup> Therefore, under this test, when both conditions are satisfied, a cartel conducted abroad is within the jurisdiction of the Sherman Act.

In 1982, the U.S. Congress expressed more clearly its intention to cover certain acts conducted abroad by passing the Foreign Trade Antitrust Improvements Act (“FTAIA”), which incorporates the effects test proposed by Judge Hand.<sup>199</sup> The FTAIA provides that conduct involving

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190. *Id.* at 440.

191. *Id.* at 443.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 444.

197. *Id.*

198. *Id.*

199. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6A (2012).

trade with foreign nations to which the Sherman Act applies must have a direct, substantial, and reasonably foreseeable effect on trade or commerce in the United States.<sup>200</sup> In *Kruman v. Christie's International*, the Second Circuit Court of Appeal, referring to the phrase “direct, substantial, and reasonably foreseeable effect” in the FTAIA, said that “this limit will likely prevent conduct that merely has an ancillary effect on our markets from being actionable under our antitrust laws.”<sup>201</sup>

However, the extraterritorial jurisdiction of the Sherman Act provided for under the FTAIA is broader than the approach suggested by Judge Hand in *Alcoa* because the FTAIA does not take into account the intent to affect trade, but rather focuses only on the effects. The FTAIA allows the Sherman Act to cover conduct that has a direct, substantial, and reasonably foreseeable effect on trade or commerce.<sup>202</sup> The Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) explain subsection 6A of the FTAIA in the Antitrust Enforcement Guidelines for International Operations<sup>203</sup>:

[The DOJ and FTC] apply the “direct, substantial, and reasonably foreseeable” standard of the FTAIA . . . 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.<sup>204</sup>

*Hartford Fire Insurance* was an antitrust case in which the Supreme Court applied the Sherman Act to conduct that took place completely abroad after considering Judge Hand’s test from *Alcoa*.<sup>205</sup> This case involved a number of U.S. and London-based companies.<sup>206</sup> The plaintiffs alleged that the defendants, a group of London reinsurers and brokers, colluded to coerce primary insurers in the U.S. to offer commercial general liability coverage only on a claims-made basis.<sup>207</sup> A different group of London reinsurers were charged with another conspiracy to withhold

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200. *Id.*

201. *Kruman v. Christie's Int'l PLC.*, 284 F.3d 384, 402 (2002).

202. 15 U.S.C. § 6A.

203. *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995).

204. *Id.* § 3.12.

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

206. *Id.* at 764.

207. *Id.*

reinsurance for pollution coverage.<sup>208</sup> The defendants asserted that “applying the [Sherman] Act to their conduct would conflict significantly with British law.”<sup>209</sup>

Justice Souter, delivering the opinion of the Court, found that U.S. antitrust law can be applied to conduct that is deemed legal in the state where it took place.<sup>210</sup> Justice Souter cited the lower court’s decision in *Alcoa*, saying that “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 United States.”<sup>211</sup> He observed that the alleged conduct of the foreign defendants was intended to, and did in fact, have a substantial effect on the U.S. insurance market,<sup>212</sup> satisfying the two elements of Judge Hand’s effects test from *Alcoa*. The Court further held that “[e]ven assuming that a court may decline to exercise Sherman Act jurisdiction over foreign conduct in an appropriate case, international comity would not counsel against exercising jurisdiction in the circumstances alleged here.”<sup>213</sup>

The most recent case testing the extraterritorial application of the Sherman Act is *Motorola Mobility v. AU Optronics*, in which the court considered the language from the FTAIA.<sup>214</sup> Motorola, a company that manufactured and sold cellular telephones, and its foreign subsidiaries bought liquid-crystal display (LCD) panels and incorporated them into cell phones manufactured by the parent and its subsidiaries.<sup>215</sup> Motorola alleged that several foreign manufacturers of the panels violated the Sherman Act by engaging in price-fixing.<sup>216</sup> Judge Posner analyzed the effects of the defendants’ alleged cartel on the U.S. and observed that

[o]nly about 1 percent of the panels were bought by, and delivered to, Motorola in the United States; the other 99 percent were bought by, paid for, and delivered to its foreign subsidiaries . . . . Forty-two percent of all the panels were bought by the subsidiaries and incorporated by them into products that were then shipped to Motorola in the United States for resale by Motorola (which did none of the manufacturing). Another 57 percent of the panels were

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208. *Id.* at 776.

209. *Id.* at 798.

210. *Id.* at 799.

211. *Id.* at 796.

212. *Id.*

213. *Id.* at 765.

214. 746 F.3d 842 (2014).

215. *Id.* at 843.

216. *Id.* at 843.

also bought by the subsidiaries, but were incorporated into products that were sold abroad as well . . . .<sup>217</sup>

Judge Posner then asserted that the court should ignore 57% of the panels from Motorola's claim because any claim involving those panels was clearly barred by the FTAIA because the panels were sold abroad.<sup>218</sup> Although the district court had ruled that Motorola's claim regarding 42% of the panels was barred by the FTAIA,<sup>219</sup> the Seventh Circuit required that Motorola "show that the defendants' price fixing of [these] panels that they sold abroad and that became components of cellphones imported by Motorola had 'a direct, substantial, and reasonably foreseeable effect' on commerce within the United States."<sup>220</sup> Judge Posner then contended:

The alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent. The effect of component price fixing on the price of the product of which it is a component is indirect . . . .<sup>221</sup>

The Seventh Circuit continued, stating that "[t]he effect of the alleged price fixing on that commerce in this case is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad that are alleged to have contained a price-fixed component."<sup>222</sup> Judge Posner asserted that if the defendants were overcharging, they were overcharging other foreign manufacturers.<sup>223</sup> He also cited the U.S. Supreme Court's warning "that rampant extraterritorial application of U.S. law 'creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs.'"<sup>224</sup> The Seventh Circuit then upheld the district court's ruling holding that

217. *Id.*

218. *Id.* at 844.

219. *Motorola Mobility, Inc. v. AU Optronics Corp.*, No. 09-C-6610, 2014 WL 258154, at \*10 (N.D. Ill. Jan. 23, 2014), *vacated* 746 F.3d 842 (7th Cir. 2014), *on rehearing* 773 F.3d 826 (7th Cir. 2014), *aff'd* 775 F.3d 816 (7th Cir. 2015), *cert. denied* 135 S. Ct. 2837 (2017).

220. *Motorola*, 746 F.3d at 844.

221. *Id.*

222. *Id.* at 845.

223. *Id.* at 846.

224. *Id.* (citing *F. Hoffman La-Roche Ltd. v. Empagran S.A.*, 524 U.S. 155, 164 (2004)).

[t]he FTAIA applies to Motorola's foreign injury claims because they are based on nonimport conduct involving trade with foreign nations. These claims do not fall under the FTAIA's domestic injury exception because they do not arise from any domestic effect. . . . Motorola's claims based on overseas purchases by its foreign affiliates (the Category II and III claims) are dismissed.<sup>225</sup>

The interpretations of extraterritorial jurisdiction under the Sherman Act by U.S. courts are difficult to reconcile, as the decision of the Second Circuit in *Alcoa* is contrary to the Supreme Court's decision in *American Banana*. Moreover, the two-condition effects test, introduced in *Alcoa*, is supported by other courts, including the Supreme Court in *Hartford Fire Insurance*, and reflected in the FTAIA.<sup>226</sup> This indicates that Congress and the judiciary do not intend to confine the application of the Sherman Act to the territory of the U.S. However, this support does not mean that the exercise of extraterritorial jurisdiction under the Sherman Act is unlimited. In addition to considering the intent and substantial effects of the alleged conduct on U.S. trade, the exercise of extraterritorial jurisdiction under the Sherman Act also considers international comity and the sovereign immunity of foreign countries.

### 3. Consideration of Foreign Country Interests and International Comity

Although court decisions on the extraterritorial jurisdiction of the Sherman Act have differed over time, the decisions have not undermined foreign sovereign interests or the international law principle of international comity. In *Timberlane Lumber Co. v. Bank of America*, Judge Choy delivered the opinion for the Ninth Circuit, stating that "[t]he effects test by itself is incomplete because it fails to consider other nations' interests."<sup>227</sup> He then introduced a three-part analysis. First, a court must consider the actual or intended effect on U.S. foreign commerce.<sup>228</sup> Second, a court must consider whether the effect is sufficiently significant to present a cognizable injury to the plaintiffs and therefore a civil

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225. *Motorola Mobility, Inc. v. AU Optronics Corp.*, No. 09-C-6610, 2014 WL 258154, at \*10 (N.D. Ill. Jan. 23, 2014), *vacated* 746 F.3d 842 (7th Cir. 2014), *on rehearing* 773 F.3d 826 (7th Cir. 2014), *aff'd* 775 F.3d 816 (7th Cir. 2015), *cert. denied* 135 S. Ct. 2837 (2017).

226. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6A (2012).

227. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 611–12 (9th Cir. 1976).

228. *Id.* at 613.

violation of the antitrust laws.<sup>229</sup> Third, a court must consider whether the interests of the U.S., including the magnitude of the effect on U.S. foreign commerce, are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.<sup>230</sup> This analysis is called a “balancing of interests” approach.<sup>231</sup> Besides considering the effects of the alleged act on U.S. foreign trade, as Judge Hand proposed in *Alcoa*, this approach also considers the interests of other countries in comparison with those of the U.S. in determining the extraterritorial jurisdiction of the Sherman Act.

The American Law Institute’s 1987 Restatement (Third) of Foreign Relations Law of the United States reflects the consideration of foreign interests in the extraterritorial effect of laws as well. Section 403 provides that a state may not enact laws that have an unreasonable extraterritorial effect on persons or activities.<sup>232</sup> The “unreasonableness” may relate the extent to which another state might have an interest in regulating the activity and the likelihood of conflict with regulation by another state.<sup>233</sup> The Restatement also provides that

[w]hen it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors. . . . [A] state should defer to the other state if that state’s interest is clearly greater.<sup>234</sup>

Although the 1987 Restatement provides helpful guidance, this restatement is a secondary source of law, and it reflects the opinions of the American Law Institute, a private organization not affiliated with the U.S. government or any of its agencies.<sup>235</sup> Specifically, the 1987 Restatement reflects the opinions of the American Law Institute in international law as it applies to the U.S. and domestic law impacting foreign relations.<sup>236</sup> Nevertheless, although it is “in no sense an official document of the United

229. *Id.*

230. *Id.*

231. M. Sornarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise*, 31 INT’L & COMP. L.Q. 127, 147 (1982).

232. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1) (AM. LAW INST. 1987).

233. *Id.* § 403(2).

234. *Id.* §403(3).

235. *Id.* at Foreword.

236. *Id.*

States,”<sup>237</sup> the 1987 Restatement has been cited by U.S. courts in a number of cases.<sup>238</sup>

In *F. Hoffman-La Roche Ltd. v. Empagran S. A.* in 2004, the U.S. Supreme Court rejected the application of the Sherman Act under the FTAIA’s exception because the Court ordinarily construes ambiguous statutes in a way that avoids unreasonable interference with other nations’ sovereign authority.<sup>239</sup> In this case, the defendants had entered into a cartel in a foreign territory and caused damage to the plaintiff outside U.S. territory.<sup>240</sup> The Court said that “Congress would not have intended the FTAIA’s exception to bring independently caused foreign injury within the Sherman Act’s reach.”<sup>241</sup> Justice Scalia and Justice Thomas concurred in the judgment, asserting that “statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories.”<sup>242</sup> Thus, the consideration of foreign country interests and international comity is a factor on which U.S. courts rely to limit the EACL.

#### 4. Consideration of the Sovereign Immunity Doctrine

When an act occurs in one country and has an effect on another country, a possibility exists that the party acted under the compulsion of the former country’s law or under the direction of that country’s authority. These acts should be distinguished from purely private conduct. Accordingly, U.S. courts have recognized sovereign immunity when determining jurisdiction over these acts, cognizant of the fact that claiming jurisdiction over such acts requires passing judgment on the sovereign acts of other states. This awareness is consistent with the doctrine of state immunity under customary international law and with the U.N. Convention on Jurisdictional Immunities of States and Their Property (“Convention on Jurisdictional Immunities”).<sup>243</sup> In general, this doctrine

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237. *Id.*

238. *See* *Moritimer Off Shore Serv., Ltd. v. Fed. Republic of Germ.*, 615 F.3d 97, 109 (2010); *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting).

239. *F. Hoffman-La Roche*, 542 U.S. at 164.

240. *Id.* at 159.

241. *Id.* at 173.

242. *Id.* at 176.

243. AUST, *supra* note 22, at 159–78; *see also* G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property, (Dec. 2, 2004).

prevents courts from exercising jurisdiction over another state.<sup>244</sup> Such disputes over jurisdiction can be disposed of only by the courts of the foreign state itself, by an international court or tribunal, or by diplomatic settlement.<sup>245</sup>

Sovereign immunity was first recognized in the U.S. in 1812 in the U.S. Supreme Court case *The Schooner Exchange v. McFaddon*.<sup>246</sup> Justice Marshall delivered the opinion of the Court, asserting that “[i]t seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.”<sup>247</sup> Similarly in *Underhill v. Hernandez* in 1897, Justice Fuller of the U.S. Supreme Court upheld the decision of the Second Circuit. Justice Fuller explained that “the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.”<sup>248</sup> Both courts agreed that “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”<sup>249</sup>

In antitrust law, because the Sherman Act’s prohibitions apply only to a “person” or a “corporation,” courts in the U.S. have asserted that the Act’s jurisdiction does not extend to the conduct of another state.<sup>250</sup> According to the District Court of Delaware in *InterAmerican Refining Corp. v. Texaco Maracaibo* in 1970, “[t]he Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations.”<sup>251</sup> The District Court for the Central District of California agreed with this point in *International Association of Machinists v. OPEC*.<sup>252</sup>

244. G.A. Res. 59/38, *supra* note 243, annex, art. 5.

245. AUST, *supra* note 22, at 159.

246. Int’l Ass’n of Machinists v. Org’n of Petroleum Exp. Countries, 477 F. Supp. 553, 565 (C.D. Cal. 1979).

247. *Schooner Exch. v. McFaddon*, 11 U.S. 116, 145–46 (1812).

248. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

249. *Id.*

250. *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

251. *Id.*

252. *Intern. Ass’n of Machinists v. Org’n of Petroleum Exp. Countries*, 477 F. Supp. 533, 571 (C.D. Cal. 1979).

However, a state may not enjoy sovereign immunity when the alleged act is commercial in nature. Article 10 of the Convention on Jurisdictional Immunities provides a limit on invoking immunity if a state “engages in a commercial transaction with a foreign natural or juridical person” and “differences relating to the commercial transaction fall within the jurisdiction . . . of another State.”<sup>253</sup> The same limit to sovereign immunity is provided for in the U.S. in the Foreign Sovereign Immunities Act of 1976 (“FSIA”). According to section 1605, a foreign state shall not be immune from the jurisdiction of U.S. or state courts when the “action is based [on] commercial activity carried on in the United States by [a] foreign state”; an action performed in the United States is connected to “a commercial activity of [a] foreign state elsewhere”; or an action outside the territory of the United States is connected to “a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”<sup>254</sup>

According to the FSIA, the “foreign state” includes corporations that are agents or instrumentalities of a foreign state.<sup>255</sup> Therefore, the action of a company under the direction or compulsion of a foreign state is regarded as that of the foreign state. Section 1603(d) defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act,” and adds that “[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”<sup>256</sup> Commercial contracts or transactions will, therefore, generally be regarded as commercial activities and will not be protected by sovereign immunity. In *Machinists*,<sup>257</sup> the court found that, using legislative intent, “commercial activity” includes activity within “‘a regular course of commercial conduct’ . . . the carrying on of a commercial enterprise such as a mineral extraction company, an airline, or a state trading corporation.”<sup>258</sup> There is a difference between the Convention on Jurisdictional Immunity and the FSIA, however. Article 2 of the Convention indicates that the law takes into account the purpose of a commercial transaction, while section 1603(d) of FSIA does not.<sup>259</sup>

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253. G.A. Res. 59/38, *supra* note 243.

254. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (2012).

255. *Id.* § 1603.

256. *Id.* § 1603(d).

257. *Machinists*, 477 F. Supp. at 568.

258. *Id.* at n.14.

259. G.A. Res. 59/38, *supra* note 243, at annex, art. 2 (“In determining whether a contract or transaction is a ‘commercial transaction’ . . . reference should be made primarily to the nature of the contract or transaction, but its purpose should

Despite the fact that section 1603(d) of the FSIA suggests that “commercial activity” is much broader than the “commercial transaction” as used in the Convention of Jurisdictional Immunity, U.S. courts have found that “commercial activity” should be defined narrowly.<sup>260</sup> In *Machinists*, the plaintiff commenced an action in the District Court for the Central District of California against the Organization of Petroleum Exporting Countries (“OPEC”) and its 13 member nations.<sup>261</sup> The plaintiff alleged that the defendants’ price-fixing activities violated the Sherman Act.<sup>262</sup> Additionally, the plaintiff claimed that the court’s jurisdiction was based on the FSIA.<sup>263</sup> The 13 OPEC member nations chose not to make an appearance in the action.<sup>264</sup>

Judge Hauk observed that under the theory of absolute sovereign immunity, a foreign state could not be sued without its consent.<sup>265</sup> But under the restrictive theory, foreign states and sovereignties are not immune insofar as their commercial activities are concerned.<sup>266</sup> In determining whether the activities of the OPEC members were governmental or commercial in nature, Judge Hauk examined both the FSIA and the standards recognized under international law and concluded that “the defendants’ control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations’ peoples.”<sup>267</sup> Judge Hauk also considered the views of the state of California and the federal government concerning domestic crude oil activities and concluded that “there can be little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity.”<sup>268</sup> The Central District Court of California then held that the

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also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.”).

260. *Machinists*, 477 F. Supp. at 567.

261. *Id.* at 558.

262. *Id.*

263. *Id.* at 559.

264. *Id.* at 560.

265. *Id.* at 565.

266. *Id.*

267. *Id.* at 568.

268. *Id.*

defendants' activity was immune to the FSIA because it was not "commercial activity."<sup>269</sup> The court, therefore, lacked jurisdiction.<sup>270</sup>

Limiting the protection of sovereign immunity to non-commercial activity might, however, result in some improper decisions. For example, a state may order producers in an industry to fix a minimum price for a product for the purpose of protecting employee rights. The export of the product to the U.S. could be considered a commercial activity. However, the producers have no way to resist the order of their home country's authority—their behaviors are under the compulsion of a sovereign. The exercise of extraterritorial jurisdiction of U.S. antitrust law against the price-fixing cartel in such a case would, therefore, be improper.

##### *5. Exercise of Foreign Extraterritorial Jurisdiction in the U.S.*

Unlike Canada, U.S. laws do not provide strict opposition to the exercise of foreign extraterritorial jurisdiction in the U.S. There is no statute that prevents the enforcement of foreign judgments or directions in the U.S., and there is no law, such as the Canadian Foreign Extraterritorial Measures Act, allowing a defendant to recover damages or penalties paid under a foreign court's judgment.<sup>271</sup> Rather, 28 U.S.C. § 1782 allows U.S. district courts to assist foreign and international tribunals, and litigants before such tribunals. Section 1782 provides that a district court may order its resident "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."<sup>272</sup> Section 1782 also states that a person in the U.S. is not prohibited from cooperating with foreign authority when such authority may exercise foreign jurisdiction in the U.S.<sup>273</sup> Thus U.S. law does not preclude persons within the U.S. from voluntarily giving their testimony or producing a document to a foreign or international tribunal.<sup>274</sup> However, the foreign authority in this section is limited to foreign countries with which the U.S. is at peace.<sup>275</sup>

In sum, the U.S. exercises extraterritorial jurisdiction in the area of antitrust law. The exercise of that jurisdiction includes both prescriptive and adjudicative jurisdiction. U.S. courts apply the effects doctrine to assert extraterritorial jurisdiction. The extraterritorial application of

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269. *Id.* at 569.

270. *Id.*

271. Foreign Extraterritorial Measures Act, R.S.C. 1985, c F-29, § 9(1) (Can.).

272. 28 U.S.C. § 1782 (2012).

273. *Id.* § 1782(b).

274. *Id.*

275. *Id.* § 1782, Historical and Revision Notes, Amendments (1964).

antitrust law, however, is neither unlimited nor at the discretion of the courts. Federal statutes and court decisions have set out restrictions on the application of antitrust law to conduct in foreign territories. Namely, the alleged act must have a direct, substantial, and reasonably foreseeable effect on U.S. trade or commerce; the alleged person must have intended to affect U.S. trade or commerce; and the magnitude of the effect on U.S. foreign commerce must be sufficient relative to the effect on other nations.<sup>276</sup> This limit also considers whether the alleged act is governed or remedied by foreign law. Finally, courts have refrained from exercising extraterritorial jurisdiction when the alleged act was conducted under the direction or compulsion of a foreign sovereign.

### C. The Japanese Approach

Japan is a civil law jurisdiction in which laws arise primarily from statutes rather than judicial decisions.<sup>277</sup> According to the Court Act of Japan, “[a] conclusion in a judgment of a higher instance court shall bind the lower instance courts with respect to the case concerned.”<sup>278</sup> Therefore, the judgment of a higher court in a particular case is binding on lower courts, but is not binding in general.

Japan’s main competition law, the Antimonopoly Act of Japan (“AMA”),<sup>279</sup> does not state the scope of its extraterritorial jurisdiction. However, the extraterritorial application of the AMA has been discussed by the Japan Fair Trade Commission (“JFTC”). These decisions of the JFTC were previously treated as equivalent to judgments of the district court.<sup>280</sup>

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276. See discussion *supra* Part II.B.2, 3.

277. HIROSHI ITOH & LAWRENCE W. BEER, *THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–70*, at 8 (1978).

278. Saibansho hō [Court Act], Law No. 59 of 1947, art. 4 (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> [<https://perma.cc/2GWJ-C2FZ>] (Japan).

279. Shitekidokusen no Kinshi oyobi Kouseitorihiki no Kakuho nikansuru Houritsu, [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade] [Antimonopoly Act], Law No. 54 of 1947, (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> [<https://perma.cc/2GWJ-C2FZ>] (Japan).

280. According to Article 85 of the 2005 amendment of the AMA, decisions of the JFTC were subject to the judicial review of the Tokyo High Court. Since the 2013 amendment of the AMA went into effect, decisions of the JFTC are reviewed by the Tokyo District Court. *See id.* at arts. 85, 85-2.

The AMA was enacted in 1947, and the latest amendment was passed in 2013.<sup>281</sup> The AMA has no provision that expressly states that the act covers conduct that takes place in a foreign territory, but jurisdiction over such conduct may be inferred from certain provisions. Article 2 defines private monopolization, unreasonable restraint of trade, and monopolistic situation as activities of an “enterprise.”<sup>282</sup> Similarly, article 9 states that “[n]o company may be established that would cause an excessive concentration of economic power due to share holding . . . in other companies in Japan.”<sup>283</sup> The words “enterprise” and “company” may be understood to limit the jurisdiction of the AMA to Japanese territory. However, these terms may be interpreted more broadly, which suggests that regardless of an enterprise’s or company’s nationality, the AMA governs its conduct as long as its activities have effects in Japan.

In practice, the JFTC tends to interpret the words “enterprise” and “company” broadly. In *MDS Nordion Inc.* in 1998, the JFTC applied the AMA to a foreign company’s act that occurred mostly outside Japan.<sup>284</sup> MDS Nordion, a Canadian firm, was the largest manufacturer of Molybdenum-99 in the world and possessed a 100% share of the Molybdenum-99 market in Japan.<sup>285</sup> MDS Nordion allegedly prevented its competitors from entering the Japanese market by entering into exclusive contracts, effective for ten years, with the two companies that were the sole purchasers of Molybdenum-99 in Japan.<sup>286</sup> The JFTC observed that the word “‘firm’ is defined in the AMA as ‘a person who carries on a commercial, industrial, financial or any other business.’”<sup>287</sup> It held that this definition did not exclude foreign firms.<sup>288</sup> Therefore, although MDS Nordion was a Canadian firm that did not have an office in Japan, it was included in the definition of “firm” because it had entered into long-term

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281. Press Release, Japan Fair Trade Comm’n, The Enactment of the Bill to Amend the Antimonopoly Act (Dec. 9, 2013), [http://www.jftc.go.jp/en/press\\_releases/yearly-2013/Dec/individual131209.html](http://www.jftc.go.jp/en/press_releases/yearly-2013/Dec/individual131209.html) [<https://perma.cc/46SY-G6RR>].

282. Antimonopoly Act art. 2.

283. *Id.* at art. 9.

284. Kōsei Torihiki Inikai [Japan Fair Trade Comm’n] Sept. 3, 1998, no. 16, KŌTORII DS, [http://snk.jftc.go.jp/JDS/data/pdf/H100903H10J02000016\\_/H100903H10J02000016\\_.pdf](http://snk.jftc.go.jp/JDS/data/pdf/H100903H10J02000016_/H100903H10J02000016_.pdf) [<https://perma.cc/PX9J-FLFA>] (Japan).

285. Hiroo Iwanari, Remedies, Sanctions and Judicial Review in Japan: A Brief Overview of the Antimonopoly Act Procedures (Nov. 25–27, 2004) (unpublished workshop paper), [www.jftc.go.jp/eacpf/03/iwanari\\_unctad200411.pdf](http://www.jftc.go.jp/eacpf/03/iwanari_unctad200411.pdf) [<https://perma.cc/7V3R-A79A>].

286. *Id.*

287. *Id.* at 5.

288. *Id.*

contracts with two Japanese companies and continuously shipped products to Japan.<sup>289</sup> The JFTC ultimately held that MDS Nordion's conduct was illegal under the AMA.<sup>290</sup>

In *Marine Hose* in 2008, the JFTC applied the AMA to an international cartel, conducted abroad by foreign companies, which had anticompetitive effects in Japan.<sup>291</sup> In this case, the JFTC launched an investigation in collaboration with the U.S. Department of Justice and the European Commission.<sup>292</sup> These entities investigated one Japanese company, one British company, one French company, and two Italian companies.<sup>293</sup> These companies had agreed to allocate consumers in the international market of specified Marine Hose between them.<sup>294</sup> The JFTC issued a cease-and-desist order against the companies participating in the cartel, including those foreign companies located abroad.<sup>295</sup> The companies subject to the cease-and-desist order were required to confirm that the illegal trade practices had terminated, and each company was required to conduct independent business operations that were free of illegal practices.<sup>296</sup> Although the foreign companies were not imposed with any administrative fine, their practices were found to be illegal and they were subject to the cease-and-desist order.<sup>297</sup> This case indicates that the JFTC will exercise jurisdiction over companies located abroad when the companies enter into a cartel and harm the Japanese market.

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289. Shogo Itoda, *Competition Policy of Japan and its Global Implementation*, in *COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM* 61, 63 (Clifford A. Jones & Mitsuo Matsushita eds., 2002).

290. Kōsei Torihiki Inkai [Japan Fair Trade Comm'n] Sept. 3, 1998, no. 16, KŌTORII DS, [http://snk.jftc.go.jp/JDS/data/pdf/H100903H10J02000016\\_/H100903H10J02000016\\_.pdf](http://snk.jftc.go.jp/JDS/data/pdf/H100903H10J02000016_/H100903H10J02000016_.pdf) [https://perma.cc/PX9J-FLFA] (Japan).

291. Kōsei Torihiki Inkai [Japan Fair Trade Comm'n] Feb. 20, 2008, no. 2, KŌTORII DS, [http://snk.jftc.go.jp/JDS/data/pdf/H200220H20J11000002\\_/%EF%BC%92%EF%BC%90%EF%BC%8D%EF%BC%92.pdf](http://snk.jftc.go.jp/JDS/data/pdf/H200220H20J11000002_/%EF%BC%92%EF%BC%90%EF%BC%8D%EF%BC%92.pdf) [https://perma.cc/38C8-D2LE] (Japan).

292. *Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers*, JAPAN FAIR TRADE COMMISSION (Feb. 22, 2008), [http://www.jftc.go.jp/en/pressreleases/yearly-2008/feb/individual\\_000147.html](http://www.jftc.go.jp/en/pressreleases/yearly-2008/feb/individual_000147.html) [https://perma.cc/PV2X-EXEX].

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

*Cathode Ray Tubes for Television* is the latest case in which the JFTC has applied the AMA extraterritorially.<sup>298</sup> In 2009, the JFTC issued a cease-and-desist order and a surcharge payment order against an international cartel that fixed the price of Cathode Ray Tubes (“CRTs”) imported into Japan.<sup>299</sup> Japanese CRT television manufacturers required their overseas manufacturing subsidiaries to enter into an agreement that set minimum target prices for specified CRTs.<sup>300</sup> Although the manufacturers and their subsidiaries did not sell CRTs directly to customers in Japan, CRT television sets, which included a CRT, were sold to customers in Japan.<sup>301</sup> The JFTC concluded that although the agreement was entered into outside of Japan, the AMA could be applied because competition inside Japan was substantially restrained.<sup>302</sup>

Although the JFTC seemingly adopted an effects doctrine in applying the AMA to anticompetitive conduct engaged in outside Japan, the JFTC indicated no clear limit on the exercise of this jurisdiction. In *MDS Nordion Inc.* and *Marine Hose*, the violation had a direct and substantial restraint on competition in Japan because the violators were selling directly to consumers in Japan. In contrast, in *CRT*, the effect on competition in Japan was indirect.

The *MDS Nordion Inc.*, *Marine Hose*, and *Cathode Ray Tubes* cases illustrate that the JFTC is willing to apply the AMA to anticompetitive conduct that occurs in foreign territory but has effects in Japan. The absence of any Japanese statutes or higher court judgments opposing such an extraterritorial application of the AMA by the JFTC suggests that the Congress of Japan intended the AMA to be applied extraterritorially.

In contrast to its willingness to apply the AMA to anticompetitive conduct abroad, the Japanese government does not recognize the exercise

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298. Kōsei Torihiki Iinkai [Japan Fair Trade Comm’n] May 22, 2015, no. 7, KŌTORII DS, [http://snk.jftc.go.jp/JDS/data/pdf/H270522H22J01000007\\_/150522-22\\_7.pdf](http://snk.jftc.go.jp/JDS/data/pdf/H270522H22J01000007_/150522-22_7.pdf) [<https://perma.cc/Y3T9-HYNR>] (Japan).

299. Press Release, Japan Fair Trade Comm’n, Cease-and-Desist Order and Surcharge Payment Orders against Manufacturers of Cathode Ray Tubes for Televisions (Oct. 7, 2009), <http://www.jftc.go.jp/en/pressreleases/yearly-2009/oct/individual-000037.html> [<https://perma.cc/YGJ8-AHZZ>].

300. *Id.*

301. RYUNOSUKE USHIJIMA, PRICE-FIXING CONSPIRACY ON CATHODE RAY TUBES (“CRT”) FOR TELEVISION SETS, <http://www.antitrustasia.com/sites/default/files/PriceFixingConspiracyonCRT.pdf> [<https://perma.cc/YZ5D-3UTF>] (last visited Sept. 10, 2016).

302. Takanori Abe & Kaoru Ochiai, *Japan: The JFTC Applies Antimonopoly Act Beyond Borders for the First Time*, MANAGING INTELL. PROP. (Oct. 28, 2015), <http://www.managingip.com/Article/3501783/Japan-JFTC-applies-Antimonopoly-Act-beyond-borders-for-first-time.html> [<https://perma.cc/TJ2S-ZHBK>].

of foreign competition law in Japan. On November 18, 1996, in *United States of America v. Nippon Paper Industries Co.*, the government of Japan filed a brief in the U.S. Court of Appeal for the First Circuit in which it asserted that, following principles of international law, “anticompetitive activities occurring within Japanese territory by Japanese corporations fall primarily under the scope of Japanese jurisdiction and are regulated by Japanese legislation.”<sup>303</sup> The Japanese government continued and stated that the application of U.S. antitrust law to such activities would be invalid “in the absence of a substantial link between the activities and the source of jurisdiction.”<sup>304</sup> The Japanese government also wrote that “[o]ne Nation’s unilateral adjudication or extraterritorial application of its national laws is not, however, an appropriate means of resolving international differences.”<sup>305</sup> The government of Japan then urged the court to hold that U.S. courts should not exercise jurisdiction over business activities conducted in Japan by Japanese companies.<sup>306</sup>

The government of Japan made the same argument in 2004 in *F. Hoffman-La Roche v. Empagran S.A.*<sup>307</sup> In that case, the Japanese government submitted an amicus curiae brief in support of petitioners to the Court of Appeal for the District of Columbia Circuit.<sup>308</sup> The government argued that the FTAIA sought to clarify the limits of U.S. antitrust jurisdiction in U.S. foreign commerce, not expand that jurisdiction.<sup>309</sup> The brief cited the statement of U.S. Congress that “[t]he clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets under their competition laws.”<sup>310</sup> The government of Japan asserted that nothing in the FTAIA’s legislative history suggests that it was intended to expand U.S. antitrust jurisdiction to foreign firms in foreign markets and if the

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303. Brief for Government of Japan as Amicus Curiae Supporting Respondents at 1–2, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001), 1996 U.S. 1st Cir. Briefs LEXIS 11 at \*1.

304. *Id.*

305. *Id.* at 2.

306. *Id.* at 8.

307. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

308. Brief for Government of Japan as Amicus Curiae Supporting Petitioners at 4, *F. Hoffman-La Roche v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226390.

309. *Id.* at \*4.

310. *Id.* (citing H.R. REP. NO. 97-686, at 14 (1982), as reprinted in 1982 U.S.C.C.A.N. 2487, 2499).

legislature had intended such an expansion, “there would have been a storm of criticism by foreign governments.”<sup>311</sup>

In sum, Japan’s approach to the extraterritorial application of competition law is inconsistent. The JFTC has applied the AMA extraterritorially, apparently based on an effects doctrine, but it fails to provide a clear limit on the AMA’s extraterritorial jurisdiction. The Japanese government, however, strongly opposes the extraterritorial application of foreign competition law to transactions conducted by Japanese corporations in Japan. These conflicting views indicate that Japan has a double standard when it comes to the EACL. Japan should provide a clearer analytical basis for determining the extraterritorial jurisdiction of the AMA, and one that consistently reflects the opinion of Japan toward the application of foreign jurisdiction competition law in Japan.

#### *D. The Vietnamese Approach*

In Vietnam, the National Assembly creates the law and only the Standing Committee of the National Assembly has the power to interpret the law when it is unclear.<sup>312</sup> The Judge Council of the People’s Supreme Court has the power to provide guidelines unifying the application of law to adjudication.<sup>313</sup> Therefore, the extraterritorial jurisdiction of competition law should be found in the Competition Law of Vietnam enacted by the National Assembly or in the interpretation of that law by the Standing Committee, and not in the decisions of the People’s Supreme Court.

Article 2 of the Competition Law of Vietnam expressly states that this law shall apply to “[b]usiness organizations and individuals (hereinafter referred collectively to as enterprises), including also enterprises producing, supplying products, providing public-utility services, enterprises operating in the State-monopolized sectors and domains, and foreign enterprises operating in Vietnam.”<sup>314</sup> However, the law does not define the word “operating” and the Standing Committee has not yet interpreted this term.

There are two different ideas among the legal community on the meaning of “foreign enterprises operating in Vietnam” that are subject to

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311. *Id.*

312. Luật Ban Hành Văn Bản Quy Phạm Pháp Luật [Law on Promulgation of Legislative Documents], No. 80/2015/QH13 of June 22, 2015, art. 3, para. 3 (Viet.).

313. *Id.* art. 21.

314. Luật Cảnh Tranh [Competition Law], No. 27/2004/QH11 of Dec. 3, 2004, art. 2 (Viet.).

the Competition Law.<sup>315</sup> The first is that the Competition Law can only govern acts conducted by foreign enterprises when two conditions are satisfied: first, the alleged act has taken place, or is taking place, in Vietnam; and second, the foreign enterprise must register its business in Vietnam as a foreign direct invested company, branch, or representative office.<sup>316</sup> This opinion suggests that it is impossible for Vietnamese authorities to conduct an investigation or enforce a final judgement in a foreign territory. Moreover, the exercise of Vietnamese jurisdiction over acts conducted by a foreign enterprise abroad would violate international comity.

Proponents of this first opinion argue that the Competition Law of Vietnam should state the extraterritorial jurisdiction of the Competition Law more clearly, if law makers intended that the law have extraterritorial effects.<sup>317</sup> This request for express language is supported by the express language in the Penal Code of Vietnam, enacted five years before the Competition Law. Article 6(2) of the Penal Code provides clearly that “[f]oreigners who commit offenses outside the territory of the Socialist Republic of Vietnam may be examined for penal liability according to the Penal Code of Vietnam in circumstances provided for in the international treaties, which the Socialist Republic of Vietnam has signed or acceded to.”<sup>318</sup>

The second opinion on the extraterritorial jurisdiction of the Competition Law of Vietnam is that the law should cover conduct by foreign enterprises abroad as long as such acts has effects on Vietnam.<sup>319</sup> Proponents of this opinion argue that the term “operating” is broad.<sup>320</sup> It covers a wide range of activities, including commercial purposes. According to article 3(1) of the Commercial Law of Vietnam, “commercial activity” means “[an] activity for profit-making purposes, comprising purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making

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315. PHAN CONG THANH, VIET. COMPETITION AUTH., ERIA-DP-2015-86, COMPETITION LAW ENFORCEMENT OF VIET NAM AND THE NECESSITY OF A TRANSPARENT REGIONAL COMPETITION POLICY 23–25 (2015), [http://www.eria.org/publications/discussion\\_papers/DP2015-86.html](http://www.eria.org/publications/discussion_papers/DP2015-86.html) [<https://perma.cc/9VZQ-SWGM>].

316. *Id.* at 23.

317. *Id.* at 24.

318. Bộ Luật Hình Sự [Penal Code], No. 15/1999/QH10 of Dec. 21, 1999, art. 6, para. 2 (Viet.).

319. THANH, *supra* note 315, at 24.

320. *Id.*

purposes.”<sup>321</sup> Therefore, any foreign firm doing any profit-making activity would be covered by the Competition Law, regardless of its registration in the territory where it is located. Article 3(3) of the Competition Law also defines “practices in restraint of competition” as “acts performed by enterprises to reduce, distort and prevent competition on the market, including agreements to restrict competition, abuse of a dominant position in the market, abuse of the monopoly position and economic concentration.”<sup>322</sup> This definition does not limit acts restraining competition to acts engaged in within the territorial limits of Vietnam.

These two opinions on extraterritorial jurisdiction are in conflict. Business registration in Vietnam is not necessary to determine the jurisdiction of the Competition Law because, on the one hand, according to article 4(9) of Law on Enterprise of Vietnam, a Vietnamese company is “any enterprise that is established or registered under Vietnam’s law and has its headquarter located in Vietnam.”<sup>323</sup> A foreign direct-invested company in Vietnam, consequently, is a Vietnamese enterprise, not a foreign company. On the other hand, according to article 16 of the Commercial Law of Vietnam, “[f]oreign business entities shall be liable before the law of Vietnam for all operations of their representative offices and branches in Vietnam.”<sup>324</sup> The conduct of a branch or a representative office of a foreign company is that of the foreign company and is, therefore, still regarded as conduct taken place in a foreign territory. The second opinion, therefore, contends that the phrase “operating in Vietnam” refers to the link between the alleged conduct of a foreign enterprise that takes place abroad and its effects on Vietnam. This opinion reflects the effects doctrine found in other jurisdictions.

In the early days of the Vietnamese Competition Authority, there was a widely-shared view that the Competition Law of 2004 did not apply to conduct abroad.<sup>325</sup> After nine years of growth, the VCA has become more capable of handling complicated cases, including offshore mergers.<sup>326</sup> As

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321. Luật Thương Mại [Commercial Law], No. 36/2005/QH11 of June 14, 2005, art. 3, para. 1 (Viet.).

322. Luật Cạnh Tranh [Competition Law], No. 27/2004/QH11 of Dec. 3, 2004, art. 3, para 3 (Viet.).

323. Luật Doanh Nghiệp [Law on Enterprises], No. 68/2014/QH13 of Nov. 26, 2014, art. 4, para. 9 (Viet.) (emphasis omitted).

324. Luật Thương Mại [Commercial Law], No. 36/2005/QH11 of June 14, 2005, art. 16 para. 3 (Viet.).

325. THANH, *supra* note 315, at 25.

326. VIET. COMPETITION AUTH., ANNUAL REPORT 2010, (2011) [hereinafter ANNUAL REPORT]; VIET. COMPETITION AUTH., REPORT ON ECONOMIC

a result, the second opinion has become the most prevalent. The first case involving the extraterritorial application of the Competition Law of Vietnam was the Prudential and AIA Group Limited (“AIA”) acquisition case.<sup>327</sup> In April 2010, the VCA received an application for consultation made by Prudential, based in the United Kingdom, and the American International Group Inc. (“AIG”), based in the U.S., concerning Prudential’s acquisition of AIA, a subsidiary of AIG.<sup>328</sup> At the time of application, Prudential and AIA had subsidiaries in Vietnam.<sup>329</sup> The combined market share of the subsidiaries in the life insurance market in Vietnam was 47%.<sup>330</sup> The merger was not conducted in Vietnam and the participants were not Vietnamese companies.<sup>331</sup> The merger would, however, substantially affect the Vietnamese life insurance market because the affiliates of the merging parties had a large market share in Vietnam.<sup>332</sup> Despite the fact that the merger and merger participants were located abroad, Prudential and AIG worked with the VCA on the submission of their merger notification.<sup>333</sup> The case was closed in June 2010 because the participants chose not to proceed with the merger.<sup>334</sup>

The second case involving the extraterritorial application of the Competition Law of Vietnam is the P3 case in 2014.<sup>335</sup> P3 was an alliance of three large shipping companies, Maersk Line, Mediterranean Shipping Company, and CMA CGM—the head offices of each located outside of Vietnam.<sup>336</sup> The participating companies sought to create a joint venture,

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CONCENTRATION IN VIETNAM 2014, (2015) [hereinafter REPORT ON ECONOMIC CONCENTRATION].

327. ANNUAL REPORT, *supra* note 326, at 27.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. Press Release, Prudential Plc, Termination of Agreement to Combine with AIA Group Ltd. (June 3, 2010), <http://www.prudential.co.uk/~media/Files/P/Prudential-Corp/aia-archive/termination-agreem-aia.pdf> [<https://perma.cc/6CW M-P2XR>].

335. See REPORT ON ECONOMIC CONCENTRATION, *supra* note 326, at 53.

336. For information about Maersk see *About Us*, MAERSK GROUP <http://www.maersk.com/en/the-maersk-group/about-us> [<https://perma.cc/L4PA-WJPQ>] (last visited Oct. 3, 2016). For information about CMA CGM see *About Us*, CMA CGM, <https://www.cma-cgm.com/the-group/about-us/presentation> [<https://perma.cc/8AXD-SV FV>] (last visited Oct. 3, 2016). For information about Mediterranean Shipping Company see *Contact Us*, MEDITERRANEAN SHIPPING

which would have operated the P3 Network.<sup>337</sup> The participating firms submitted a merger notification to the VCA pursuant to article 20 of the Competition Law of Vietnam, as the operation of the proposed network would affect the Vietnamese container shipping market.<sup>338</sup> This case was closed and the proposed network was abandoned when China's Ministry of Commerce, a competition authority, refused to approve the merger.<sup>339</sup>

Besides these two primary cases, there have been some offshore merger cases where the participating parties have consulted the VCA before concluding the mergers.<sup>340</sup> These cases came to an end because the combined market share of the participating parties exceeded 50% of the relevant market, making them prohibited mergers under the Competition Law of Vietnam.<sup>341</sup> This practice of merger control by the VCA suggests that the second viewpoint on the extraterritorial jurisdiction of the Competition Law of Vietnam has become the primary approach in Vietnam. The law therefore regulates not only conduct in Vietnam, but also conduct in a foreign territory that has an effect on the Vietnamese market.

The effects doctrine in Vietnam, however, is not clearly defined, as there is neither an official guideline nor a judgment stating the limits of the extraterritorial jurisdiction. In reality, the practical exercise of extraterritorial jurisdiction in Vietnam is not as aggressive as that of other countries. The exercise of extraterritorial jurisdiction relies heavily on the compliance of MNCs. Moreover, there has been no case where foreign law has been enforced with respect to conduct in Vietnam. Thus, the degree of Vietnamese government opposition to such an exercise of extraterritorial jurisdiction is unclear. Vietnam should clarify the scope of the extraterritorial application of the Competition Law of Vietnam to provide clear guidelines for foreign companies doing business in Vietnam. Such limits should aim to reduce possible conflicts between Vietnam and foreign countries in cross-border competition cases.

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Co., <https://www.msc.com/che/contact-us?showHQ=true> [<https://perma.cc/LT7G-EF3E>] (last visited Nov. 15, 2016).

337. REPORT ON ECONOMIC CONCENTRATION, *supra* note 326, at 53.

338. *Id.*

339. *The P3 Network Will Not Be Implemented Following Decision by the Ministry of Commerce (MOFCOM) in China*, MAERSK LINE (June 17, 2014), <http://www.maerskline.com/de-ch/countries/int/news/news-articles/2014/06/p3-network> [<https://perma.cc/XXJ4-BKRE>].

340. Abott acquired CFR. *See* REPORT ON ECONOMIC CONCENTRATION, *supra* note 326, at 54.

341. Luật Cảnh Tranh [Competition Law], No. 27/2004/QH11 of Dec. 3, 2004, art. 18 (Viet.).

*E. Comparing the Approaches*

An analysis of international law indicates that the extraterritorial application of competition law by a state to conduct outside its territory is not contrary to international law if that extraterritorial application is properly limited. However, a state's competition law should be applied extraterritorially only if countries fail to find a common solution for a cross-border competition issue. Before applying its competition law extraterritorially, a country should take into account the legislation, law enforcement, and national interest of other relevant countries. The effectiveness of this approach strongly depends on interstate communication given the different approaches to the EACL.

Canada consistently relies on the territorial principle in applying its competition law. Although sections 109 and 110 of the Competition Act<sup>342</sup> provide for extraterritorial jurisdiction for merger control, Canada practically confines the enforcement of the Act to its territory. Additionally, Canada has enacted statutes that resist the enforcement of foreign competition law in Canada. In contrast, the U.S. vigorously exercises extraterritorial jurisdiction in the area of competition law. U.S. antitrust law is applied to any conduct that takes place abroad and that has a direct, substantial, and reasonably foreseeable effect on U.S. trade or commerce. Courts in the U.S. must, however, consider the interests of foreign countries, international comity, and the sovereign immunity doctrine when deciding whether to apply U.S. antitrust law extraterritorially. The U.S. also does not oppose the extraterritorial application of foreign competition law in its territory. The approach to the EACL in the U.S. is thus internally consistent.

Japan, unlike the U.S., Canada, and Vietnam, is a country which has adopted a double standard toward the EACL. On the one hand, Japan applies its competition law, the AMA, to business transactions conducted in foreign territory that substantially restrain competition within Japanese territory. Japan arguably adopts the effects doctrine more aggressively than the United States does. Although the U.S. considers only direct, substantial, and reasonably foreseeable effects, Japan considers acts conducted abroad that have indirect effects on the Japanese market. On the other hand, Japan strongly opposes the application of foreign competition law to conduct in Japanese territory. Unlike the U.S. and Canada, Japan employs an internally inconsistent approach to the EACL, which might cause conflict between countries in cross-border competition cases.

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342. Competition Act, R.S.C. 1985, c C-34 (Can.).

Finally, Vietnam is a developing country that has been enforcing competition law for only ten years. Although there are two contrasting opinions on the extraterritorial jurisdiction of the Competition Law of Vietnam,<sup>343</sup> the practice of merger control indicates that Vietnam is shifting its approach to favor the extraterritorial principle when applying its competition law. The practical application of Vietnamese competition law to mergers conducted completely abroad by foreign companies suggests that the effects doctrine is not simply the privilege of a powerful country, but a doctrine that a small, developing country can effectively employ. Like the U.S., Vietnam does not oppose the application of foreign competition law to conduct that takes place in Vietnam.

### III. THE PROPOSED APPROACH TO EXTRATERRITORIAL JURISDICTION

This comparative study of the EACL highlights the disjointed approaches to extraterritorial jurisdiction. To facilitate both international and intra-national business transactions, countries should adopt a clearer model for the extraterritorial application of their competition law—one that allows countries to protect their markets while encouraging cooperation among all countries involved. This model should apply not only externally, to the extraterritorial application of a country's competition law, but also internally, to the exercise of foreign competition law to conduct in its own territory. This would eliminate the EACL double standard of some countries that extend the reach of their competition law to foreign territories but reject the application of foreign law to conduct in their own territory.

Thus this Article proposes a series of pertinent questions that a country should consider when determining the extraterritorial jurisdiction of its competition law and the application of another country's competition law in its territory. The first set of questions focuses on the conduct that occurred. First, did the person or entity conducting the business transaction intend to violate an obligation set by the country of forum? Second, how did, or how will, the transaction harm the country of forum? Third, did the person or entity engage in the transaction pursuant to the direction or compulsion of the home country?

Similar to the effects test in *Alcoa*, the first two questions are necessary to analyze the link between the transaction in question and the country that wishes to apply its law extraterritorially. In a competition case, the intent and the effects are closely related. Countries should not exercise jurisdiction over conduct abroad when the person or entity had no intent to violate the

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343. See Luật Cạnh Tranh [Competition Law], No. 27/2004/QH11 of Dec. 3, 2004, art. 18 (Viet.).

law of the country of forum, or if the conduct had no effect on the country of forum. The third question considers the doctrine of sovereign immunity, ensuring that a country does not overreach its jurisdiction and apply it to the actions of another sovereign.

The second set of questions relevant to the inquiry of extraterritorial jurisdiction relates to the procedure in the home country. First, does the home country have a similar law? Second, did the country where the business transaction occurred take any legal measure to control or sanction the transaction? Third, did the sanction or measure take into account the interest of the country of forum? Finally, did the home country try to cooperate with the country of forum when deciding the case? These questions analyze whether the country where the transaction takes place seeks to prevent such harmful conduct and whether the countries are sufficiently cooperating and considering the interest of the country of forum.

The final set of questions relates to the procedure in the country of forum. First, did the country of forum attempt to cooperate with the home country before proceeding in the case? Second, does the country of forum give the person or entity involved in the transaction the opportunity to participate in the judgment? And finally, does the country of forum take into account the interests of the home country? Like the second set of questions, these questions seek to encourage cooperation among the countries before taking any action unilaterally. Additionally, this set of questions ensures that the country of forum applies its competition law extraterritorially with transparency and using due process. Each set of questions considers key elements of extraterritorial jurisdiction, as currently applied by various countries, and ensures that the highest level of cooperation and effectiveness is met when exercising the extraterritorial application of competition law.

#### CONCLUSION

By analyzing the key attributes of the EACL and the practical approaches of different countries, this Article proposes the proper approach to the EACL that every country should adopt. This approach contains a series of pertinent questions that a country should consider when faced with an issue of EACL. This approach relies on the effects doctrine rather than other exceptions to the territorial principle. This approach also takes into account sovereign immunity as directed by international law. The exercise of extraterritorial jurisdiction does not violate international law when the exercise is confined to the effects within a country's territory and when the exercise is necessary to protect a country's interests.

