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Joseph P. Griffin

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INTRODUCTION

The Incompatibility of International Accommodation and Private Attorneys General

*by Joseph P. Griffin**

Harmonization of conflicting national laws and supranational enforcement of internationally agreed upon norms are the most frequently mentioned long-term solutions to the present international disputes concerning enforcement of the U.S. antitrust laws. The articles by Mrs. Korah and Mr. Sauermilch in this issue of the *Journal* are sobering reminders of the considerable difficulties that arise even after nations have agreed on norms and enforcement procedures. In the very different contexts of the free movements of goods within the European Common Market and Article XIX of the General Agreement on Tariffs and Trade, the authors note the importance of pragmatism, flexibility, and accommodation in the successful operation of supranational organizations. The article by Prof. Matsushita and Mr. Repeta is an illuminating case study of the accommodation reached by Japan and the United States regarding exports of Japanese automobiles to the United States. This accommodation was accomplished despite the lack of an international consensus on the basis for jurisdiction in antitrust cases, substantive antitrust standards, and the parameters of the foreign sovereign compulsion defense. The authors emphasize that one of the principal reasons for this accommodation is the existence of what the authors describe as "fearsome creatures." The same creatures have been characterized as "rogue elephants" by the Deputy Secretary of the United Kingdom's Department of Trade.¹ These "fearsome rogue elephants" are private antitrust plaintiffs.

* Partner, Wald, Harkrader & Ross, Washington, D.C. and London; Chairman, Committee on International Aspects of Antitrust Law of ABA's Section of International Law; Adjunct Professor, Georgetown University Law Center; Diploma in Law, Oxford University; J.D., Georgetown; B.A., University of Virginia.

¹ Remarks on "Nationality and Extraterritorial Jurisdiction: U.S. Law Abroad" by W.M. Knighton, before the International Law Institute of Georgetown University Law Center (Aug. 13, 1981).

In a number of recent U.S. antitrust cases the executive branch of the U.S. Government averted or minimized a confrontation with foreign governments over enforcement of the U.S. antitrust laws only to see the accommodation endangered or destroyed by private treble damage actions. For example, after a lengthy investigation and many consultations with foreign governments, the Department of Justice decided that the best way to resolve the uranium cartel controversy was to issue a complaint against a single U.S. firm — Gulf Oil Company.² Subsequently, private treble damage suits were filed by several U.S. firms that enraged at least four of the closest allies of the United States: Australia, Canada, France, and the United Kingdom.³ In response, each of those countries enacted some type of “blocking,” “anti-enforcement,” or “clawback” statute,⁴ and the Commonwealth Law Ministers called for nonrecognition of U.S. antitrust treble damage judgments.⁵ Similarly, despite the clear presence of prescriptive jurisdiction under U.S. law and *prima facie* evidence of an antitrust violation, the Department of Justice took no action against OPEC or its member nations for their oil price fixing and supply restricting activities. Nevertheless, a private plaintiff initiated a treble damage action which the courts eventually dismissed.⁶ The impact on U.S. foreign policy and the U.S. economy had OPEC retaliated against the United States in the event such private suits had been successfully prosecuted is difficult to overestimate.

The carefully choreographed minuet by the Japanese and U.S. Governments regarding exports to Japanese automobiles was intended to minimize the likelihood of a successful private challenge to the “unilateral” action by the Japanese Government. The Governments clearly

² United States v. Gulf Oil Corp., [1970-79 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,078, at 53,722 (W.D. Pa. June 2, 1978). See also Confirmation Hearings on John H. Shenefield, Nominee, Associate Attorney General Before the Senate Comm. on the Judiciary, 96th Cong., 1st & 2d Sess. (1979-80).

³ See *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980), *aff'g in part* 473 F. Supp. 382 (N.D. Ill. 1979). See also *In re Westinghouse Electric Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977); *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (Sup. Ct. 1979) *cert. denied*, 444 U.S. 911 (1980); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 All E.R. 434. For background see PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffin ed. 1979); *Pikna, The Uranium Cartel Saga*, 12 Case W. Res. J. Int'l L. 591 (1980).

⁴ See *e.g.*, Protection of Trading Interests Act of 1980, ch. 11; Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979, No. 13, Austl. Acts P., 1979; Uranium Information Security Regulations, Can. Stat. O. & Regs. ch. 366 (1977); French Law No. 80-538 (1980), reprinted in *Toms, French Response to the Extraterritorial Application of the United States Antitrust Laws*, 15 INT'L LAW. 585, 609 (English trans. at 611) (1981).

⁵ Communique of the Meeting of Commonwealth Law Ministers, Barbados, 29 April to 2 May, 1980.

⁶ *Int'l Assn. of Machinists v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981).

hoped to avoid the near brush with antitrust disaster that occurred in the *Consumers Union* case⁷ which involved "voluntary" Japanese restraints of steel exports.

Foreign governments assert that it is very difficult to avoid confrontations with the United States over antitrust enforcement when the U.S. Government is unable to guarantee that a particular international accommodation will not be ignored by a private plaintiff, especially when that plaintiff may prosecute successfully a lawsuit in the United States that will jeopardize substantial foreign interests and U.S. foreign relations.⁸

There are several possible solutions to this problem. The Attorney General or the President could be given the power to terminate a private action if it endangered significant national interests. Treble damages could be reduced to single damages or eliminated in foreign commerce cases. Private plaintiffs could be given a right of action against the U.S. Government in cases where they had been injured but where foreign policy considerations were deemed to be sufficient to preclude a private suit. Such solutions probably are not yet politically feasible. The suspicion of governmental claims of overriding national interest and the concept of private attorneys general are deeply rooted in American politics. Hopefully, as international economic interdependence increases and citizens as well as legislators become more aware of the issues, the United States will be able to reevaluate the concept of private treble damage suits in foreign commerce cases and find a solution that is fair to injured Americans while it preserves often fragile international accommodations.

⁷ *Consumers Union v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd sub. nom. Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

⁸ *See, e.g.*, Comments of Assistant Attorney General William F. Baxter and Kingman Brewster, Jr. in *Current Issues in International Antitrust*: Sept. 29, 1981 A Panel Discussion (J. Griffin ed. 1981).

