

# ANTITRUST AND THE DRAFT HAGUE JUDGMENTS CONVENTION

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## I. INTRODUCTION

Other countries have long resisted the extraterritorial application of U.S. antitrust law. Several have passed blocking statutes to hinder the discovery of evidence that might be useful in such cases.<sup>1</sup> The United Kingdom has provided, by legislation, that U.S. antitrust judgments are not enforceable in British courts, and both Australia and Canada have given their Attorneys General authority to declare such judgments unenforceable or to reduce the amounts that will be enforced.<sup>2</sup> Even when countries have not specifically provided for the non-enforcement of U.S. antitrust judgments, it is commonly assumed that such judgments would not be enforced because of what Professor Lowenfeld has referred to as the “public law taboo.”<sup>3</sup> At first glance, then, it seems odd to find that the Hague Judgments Convention, in its current draft (“Draft Convention”), applies to antitrust cases.<sup>4</sup>

The explanation lies in the fact that the Draft Convention sets forth rules not just for the recognition and enforcement of judgments, but also for the exercise of personal jurisdiction, prohibiting the exercise

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1. Australia, Belgium, Canada, France, Germany, the Netherlands, Norway, Sweden, South Africa, and the United Kingdom have all enacted blocking legislation. For a listing of these statutes and the extraterritorial applications of U.S. law in response to which they were passed, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 reporters' note 4 (1987). For a collection of blocking statutes in English, see A.V. LOWE, EXTRATERRITORIAL JURISDICTION 79-143 (1983).

2. Protection of Trading Interests Act, 1980, c. 11, § 5 (Eng.); Foreign Proceedings (Excess of Jurisdiction) Act, 1984, § 9 (Austl.); Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985), amended by ch. 28, 1996 S.C. 8(1) (Can).

3. Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 322-24 (1979-II).

4. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, available at <http://www.hcch.net/e/conventions/draft36e.html> (visited Aug. 14, 2000) [hereinafter Draft Convention]. It is also worth recalling that an earlier effort to negotiate a judgments convention between the United States and the United Kingdom failed, in part, because of British opposition to recognizing U.S. antitrust judgments. See P.M. North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219, 231 (1979).

of jurisdiction in some cases,<sup>5</sup> requiring it in others,<sup>6</sup> and neither prohibiting nor requiring it in the rest.<sup>7</sup> It takes no great insight to see that the reason Australia, Canada, most members of the European Union, and other parties to the Hague negotiations sought to bring antitrust within the Convention was not primarily to provide for the enforcement of those judgments, but to limit the jurisdiction of U.S. courts in antitrust cases.<sup>8</sup>

Putting to one side the fact that the United States is unlikely to accept such limitations,<sup>9</sup> this Article argues that the Draft Convention's attempt to limit personal jurisdiction in antitrust cases is ill advised for two reasons. First, the personal-jurisdiction limitations in the current draft are unlikely to provide an effective constraint on the extraterritorial application of U.S. antitrust law. Second, a better long-term strategy for the countries that have so long resisted the extraterritorial application of U.S. antitrust law would be to require the reciprocal enforcement of antitrust judgments without stringent limitations on personal jurisdiction. Currently, the United States has a much greater ability than other countries to project its antitrust law extraterritorially simply because of its size, which not only makes it easier for the United States to obtain jurisdiction over an antitrust defendant, but also makes it more likely that the defendant will have assets within the United States against which a judgment may be enforced. Providing for the reciprocal enforcement of antitrust judgments would give smaller countries<sup>10</sup> an equal ability to apply their antitrust laws extraterritorially, thus

5. Draft Convention, *supra* note 4, art. 18.

6. *Id.* arts. 3-16.

7. *Id.* art. 17.

8. The United Kingdom proposed, and the United States supported, excluding antitrust explicitly from the scope of the Draft Convention, but this proposal was soundly defeated. Interview with Jeffrey D. Kovar, Assistant Legal Advisor for Private International Law, in S.F., Cal. (Sept. 12, 2000) [hereinafter Kovar Interview].

9. The United States has notified the Hague Conference that the Draft Convention "stands no chance of being accepted in the United States." Letter from Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, to J.H.A. van Loon, Secretary General, Hague Conference on Private International Law, at 3 (Feb. 22, 2000) (on file with the author). Opposition from the antitrust bar in the United States is among the many reasons cited by the United States. *Id.* at 7-8. Since, as argued below, the limitations on personal jurisdiction in the Draft Convention would be unlikely to have much impact on antitrust cases, such opposition may be misguided. *See infra* notes 72-86 and accompanying text.

10. The relevant measure of size in this context is the extent to which foreign companies do business with and have assets in a given country, because it is those factors on which the assertion of personal jurisdiction and the enforceability of judgments turn. Thus, a country like the People's Republic of China would be considered "smaller" than the United States for the purposes of this

helping to level the playing field for negotiations on substantive antitrust policy. Of course, this argument assumes that smaller countries have antitrust laws and will sometimes wish to apply them extraterritorially, but both assumptions seem warranted.<sup>11</sup>

Part II of this Article briefly describes current law with respect to personal jurisdiction in antitrust cases and the enforcement of foreign antitrust judgments. Part III examines the provisions of the Draft Convention to see how it would change these rules. Finally, Part IV examines three possibilities from the perspective of a smaller country: (1) maintaining the status quo, under which there are no limitations on personal jurisdiction beyond those in national law and antitrust judgments from one country are not enforceable in another; (2) providing for the enforcement of antitrust judgments, but limiting personal jurisdiction in antitrust cases, as the Draft Convention unsuccessfully attempts to do; and (3) providing for the enforcement of antitrust judgments, but permitting personal jurisdiction on the basis of effects within the forum. The first of these is less than ideal from a smaller country's perspective because it would maintain the advantage the United States currently enjoys in antitrust enforcement. The second is also unsatisfactory because, while it would reduce the U.S. advantage in antitrust enforcement, it would also result in the under-enforcement of antitrust rules. The best strategy for a smaller country is the third option: allow for personal jurisdiction on the basis of effects in antitrust cases and provide for the reciprocal enforcement of the resulting judgments. This would both avoid the under-enforcement of antitrust rules and eliminate the current U.S. advantage in antitrust enforcement.

## II. PERSONAL JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN ANTITRUST CASES

In the antitrust context, commentators have spilt much ink on the subject of prescriptive or legislative jurisdiction.<sup>12</sup> The questions of personal jurisdiction and the enforcement of judgments have received

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analysis despite the fact that it is about the same size geographically and far outstrips the United States in terms of population.

11. See *infra* notes 87-99 and accompanying text. Outside the United States, antitrust law is generally called competition law. In this Article, those terms will be used interchangeably.

12. For the author's views, see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L. REV. 101 (1998).

less attention.<sup>13</sup> Yet, these issues obviously affect the ability of a country to make the extraterritorial application of its law effective. If a court cannot establish personal jurisdiction over a foreign defendant, it will have no occasion to apply its law extraterritorially. If a court cannot enforce its judgments abroad, the effectiveness of a judgment will depend on the availability of assets within the jurisdiction of the court.

#### A. *Personal Jurisdiction*

Under the Due Process Clause of the Fifth Amendment, a federal court may not exercise personal jurisdiction over a foreign defendant unless that defendant has “certain minimum contacts with the forum such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>14</sup> In applying this standard, the Supreme Court has insisted upon the need for some act “by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>15</sup>

Traditionally, U.S. courts have looked to the defendant’s contacts with the forum state to determine whether the exercise of personal

13. See generally WILBER L. FUGATE, FOREIGN COMMERCE AND THE ANITRUST LAWS §§ 3.1-3.10 (5th ed. 1996); SPENCER WEBER WALLER ET AL., ANITRUST AND AMERICAN BUSINESS ABROAD §§ 5.1-5.16 (3d ed. 1997).

14. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Even in the absence of “minimum contacts,” a defendant’s temporary physical presence in the forum may be used to give a court “transient” or “tag” jurisdiction. See generally *Burnham v. Superior Court*, 495 U.S. 604 (1990). While this basis for jurisdiction has been used against individual defendants in antitrust cases, see, e.g., *United States v. N.V. Nederlandsche*, 1974-2 Trade Cas. (CCH) ¶ 75,434, at 98,463 (S.D.N.Y. 1974), efforts to establish transient jurisdiction over a corporation by service of process on an agent in the forum have been rejected. See, e.g., *United States v. Nippon Paper Indus. Co.*, 944 F. Supp. 55, 60 (D. Mass. 1996), *rev’d on other grounds*, 109 F.3d 1 (1st Cir. 1997).

15. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Even if the defendant has minimum contacts with the forum, the Due Process Clause additionally requires that the exercise of personal jurisdiction be reasonable in light of the burden on the defendant, the interests of the plaintiff, and the interests of the forum state. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987). However, *Asahi* suggests that the interests of the plaintiff and the forum state may outweigh even a serious burden on a foreign defendant. See *id.* at 114. In an antitrust suit by a U.S. plaintiff, the interests of the plaintiff in obtaining relief and the interests of the United States in applying its antitrust laws are likely to outweigh any burden on a foreign defendant. Courts applying *Asahi* have routinely found the exercise of personal jurisdiction to be reasonable in antitrust cases where the “minimum contacts” requirement was met. See, e.g., *United Phosphorus, Ltd. v. Angus Chem. Co.*, 43 F. Supp. 2d 902, 915 (N.D. Ill. 1999); *Dee-K Enter., Inc. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1148 (E.D. Va. 1997).

jurisdiction would be proper.<sup>16</sup> In antitrust cases against foreign defendants, however, courts increasingly determine personal jurisdiction by looking to the defendants' contacts with the United States as a whole.<sup>17</sup> Although some of the early cases doubted whether there was statutory authorization for exercising personal jurisdiction based on national contacts,<sup>18</sup> a number of more recent cases have relied on the combination of rule 4(k)(1)(D) of the Federal Rules of Civil Procedure and section 12 of the Clayton Act. Rule 4(k)(1)(D) provides that "[s]ervice of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant . . . when authorized by a statute of the United States." Section 12 of the Clayton Act provides that:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.<sup>19</sup>

Several courts have read section 12's service provision as authorizing nationwide service of process and thus as statutory authorization to exercise personal jurisdiction based on national contacts.<sup>20</sup> Recently, however, the D.C. Circuit has held that section 12's provision for service may be used only when section 12 is also used to establish venue, which requires that the defendant be an inhabitant of, be found in, or

16. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 105 (1987) ("a federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits to determine whether a defendant is amenable to service, a prerequisite to its exercise of personal jurisdiction").

17. See, e.g., *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1414-15 (9th Cir. 1989); *United Phosphorus*, 43 F. Supp. 2d at 911; *Dee-K Enter.*, 982 F. Supp. at 1145 n.15; *Paper Sys. Inc. v. Mitsubishi Corp.*, 967 F. Supp. 364, 369 (E.D. Wis. 1997); *Miller Pipeline Corp. v. British Gas*, 901 F. Supp. 1416, 1420-21 (S.D. Ind. 1995). See generally Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589 (1992); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983); Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981).

18. See, e.g., *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414, 418-19 (E.D. Pa. 1979); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 664 (D.N.H. 1977).

19. 15 U.S.C. § 22 (1994).

20. See, e.g., *Go-Video*, 885 F.2d at 1414-15; *United Phosphorus*, 43 F. Supp. 2d at 911; *Dee-K Enter.*, 982 F. Supp. at 1145 n.15; *Miller Pipeline*, 901 F. Supp. at 1420-21.

transact business in the judicial district where the suit is brought.<sup>21</sup> If section 12's service provision is subject to the geographical limitations of its venue provision, then it does not provide for nationwide service of process and arguably may not be read as statutory authorization for a national contacts approach to personal jurisdiction, as one district court has reluctantly concluded.<sup>22</sup> Whether aggregating national contacts in order to exercise personal jurisdiction is constitutional has twice been noted and left unanswered by the Supreme Court.<sup>23</sup> There is some force to the argument that requiring local contacts is unnecessary when the defendant is from a foreign country because federalism concerns are absent, and it is typically no more burdensome for a foreign corporation to defend itself in one state than in another. Indeed, the lower federal courts that have considered the issue have concluded that using national contacts does not violate the Due Process Clause.<sup>24</sup>

A foreign corporation's U.S. contacts (whether evaluated on a state-by-state or nationwide basis) can give rise to two kinds of jurisdiction: general or specific.<sup>25</sup> If the foreign corporation has "continuous and

21. *GTE New Media Serv., Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1350-51 (D.C. Cir. 2000). The circuit conflict over the interpretation of section 12 also has important implications for venue and service of process. In general, those courts that have exercised jurisdiction on the basis of national contacts have also allowed antitrust plaintiffs to establish venue under the general alien venue provision, which allows an alien to be sued in any district, *see* 28 U.S.C. § 1391(d) (1994) ("An alien may be sued in any district"), and to rely on section 12 for nationwide service of process. *See, e.g., Go-Video*, 885 F.2d at 1413; *Dee-K Enter.*, 982 F. Supp. at 1148-49; *Paper Sys.*, 967 F. Supp. at 366-69; *Miller Pipeline*, 901 F. Supp. at 1420. The end result is that a foreign corporation with minimum contacts with the United States may be sued in any judicial district.

In *GTE*, the D.C. Circuit held that a plaintiff who wishes to use section 12 for service of process must also establish venue under that provision. 199 F.3d at 1350-51. A plaintiff relying on the general alien venue statute to establish venue would then have to rely on the long-arm statute of the forum state to obtain service of process. *See* FED. R. Civ. P. 4(k)(1)(A). The end result is that a foreign corporation may only be sued where it has some sort of local contacts, either contacts with the judicial district in which the suit is brought sufficient to satisfy the venue provision of section 12 or contacts with the forum state sufficient to allow for service of process under the relevant state long-arm statute.

22. *See In re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26 (D.D.C. 2000).

23. *See Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n\* (1987).

24. *See Go-Video*, 885 F.2d at 1415-17; *Dee-K Enter.*, 982 F. Supp. at 1145 n.15; *Paper Sys.*, 967 F. Supp. at 369; *Miller Pipeline*, 901 F. Supp. at 1421-23; *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 663-64 (D.N.H. 1977).

25. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 & nn.8-9 (1984); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-64 (1966).

systematic” business contacts with the forum, the court will have “general jurisdiction” to hear any claim against the defendant, even if that claim is not related to the defendant’s contacts with the forum.<sup>26</sup> If the foreign corporation’s contacts with the forum are more limited but the claims against it arise out of those contacts, the court will have “specific jurisdiction” to hear only claims arising from those contacts.<sup>27</sup>

General jurisdiction plays an important role in many international antitrust cases for the simple reason that in many cases the gravamen of the complaint is that the foreign defendant *refused* to do business in the United States. This is typically true in cases involving illegal boycotts,<sup>28</sup> and in some cases involving cartels.<sup>29</sup> In such cases, the cause of action does not arise from the defendant’s contacts with the forum but rather from its lack of contacts with the forum, which means that personal jurisdiction must generally be based on the defendant’s unrelated, “continuous and systematic” business contacts with the forum. Similarly, in price-fixing cases where the defendants have not sold their products directly into the United States, courts have relied on general jurisdiction due to the absence of contacts with the United States out of which the claim arose.<sup>30</sup>

There are two somewhat controversial theories of specific jurisdiction that are worth mentioning at this point because they can sometimes substitute for general jurisdiction in cases where a foreign

26. *Helicopteros*, 466 U.S. at 416; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952). In the antitrust context, the question is frequently put in terms of whether the defendant “transacts business” in the forum, a phrase drawn from the venue provision of the Clayton Act. *See* 15 U.S.C. § 22 (1994). The Supreme Court has interpreted this phrase as requiring that a foreign defendant transact business within the district of a “substantial character.” *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 807 (1948); *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 373 (1927).

27. A single contact with the forum may be sufficient if the cause of action arises from it. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

28. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

29. *See, e.g., United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

30. *See, e.g., United States v. Nippon Paper Indus. Co.*, 944 F. Supp. 55, 62 (D. Mass. 1996), *reversed on other grounds*, 109 F.3d 1 (1st Cir. 1997). In such cases, the U.S. buyers might also be precluded from bringing an action for damages by the indirect-purchaser rule. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). However, U.S. buyers may avoid *Illinois Brick* by showing that the direct purchasers were part of the price-fixing conspiracy or that the sellers owned or controlled the direct purchasers. *See Dee-K Enter., Inc. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1151-55 (E.D. Va. 1997). The indirect-purchaser rule would also not bar the U.S. buyers from bringing an action for injunctive relief, *see Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998), and would not prevent the United States from bringing suit, assuming that the court had personal jurisdiction over the defendants.

defendant lacks sufficient contacts with the forum to support general jurisdiction: an “effects theory” of personal jurisdiction<sup>31</sup> and a “conspiracy theory” of personal jurisdiction. The *Restatement (Second) of Conflicts* states that jurisdiction may be exercised on the basis of effects in the forum of conduct that occur elsewhere.<sup>32</sup> In *Calder v. Jones*, the Supreme Court held that it was constitutional for a California court to exercise specific jurisdiction in a libel suit “based on the ‘effects’ of [the defendants’] Florida conduct in California.”<sup>33</sup> Whether the same is true in antitrust cases is an important question.<sup>34</sup> Prior to *Calder*, the courts were divided on the issue, with some holding that the tortious effects within the forum resulting from anticompetitive conduct outside the forum could be used to establish personal jurisdiction,<sup>35</sup> and others holding that they could not.<sup>36</sup> Since *Calder*, however, the few

31. International lawyers in the United States tend to think of effects as a basis for prescriptive jurisdiction rather than judicial jurisdiction. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1) (1987) (listing effects within a country’s territory as a basis for jurisdiction to prescribe). The effects principle is particularly well-established in antitrust cases. See, e.g., *Hartford Fire Ins.*, 509 U.S. at 795-96; *Alcoa*, 148 F.2d at 443.

32. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 37 & 50 (1971); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(2)(j) (1987) (stating that “a state’s exercise of jurisdiction to adjudicate . . . is reasonable if . . . the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state”).

33. *Calder v. Jones*, 465 U.S. 783, 789 (1984). In *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), the Supreme Court had previously held that an effects theory would not support the exercise of personal jurisdiction over a non-resident husband in a divorce and child-custody dispute, but the Court expressly distinguished that situation from those involving wrongful activity outside a state causing injury within the state such as “commercial activity affecting state residents.” *Id.* at 96.

34. For arguments in favor of an effects theory of personal jurisdiction in antitrust cases, see Daniel J. Capra, *Selecting an Appropriate Federal Court in an International Antitrust Case: Personal Jurisdiction and Venue*, 9 FORDHAM INT’L L.J. 401, 422-24 (1986); Herbert Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 IOWA L. REV. 485, 493-96 (1982).

35. See, e.g., *A.L. Black v. Acme Mkts, Inc.*, 564 F.2d 681, 683-86 (5th Cir. 1977) (stating that “[d]elictual conduct violative of the antitrust laws may be treated analogously to tortious conduct” for personal jurisdiction and holding that effects within the forum plus unrelated purchases from the forum were sufficient for personal jurisdiction); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 668 (D.N.H. 1977) (noting that alleged violations of antitrust laws “were directly aimed at the plaintiff in New Hampshire”); *Pac. Tobacco Corp. v. Am. Tobacco Co.*, 338 F. Supp. 842, 845 (D. Ore. 1972) (“[A] person choosing to embark upon a course of conduct with predictably injurious consequences to persons in a distant state should have no legitimate objection to defending his conduct in the courts of that state.”).

36. *Sportmart, Inc. v. Frisch*, 537 F. Supp. 1254, 1259 (N.D. Ill. 1982) (“The fact that Sportmart may have suffered injury here, without more, will not support the exercise of personal

courts to have considered the issue have held that effects may be used to establish jurisdiction in an antitrust case so long as the anticompetitive conduct is intentionally targeted at the forum.<sup>37</sup>

In cases involving antitrust conspiracies, courts have also permitted the exercise of personal jurisdiction over a foreign defendant based on the in-forum activities of its co-conspirators, even though the foreign defendant had “no real contact with the forum state and no direct business relations tied to the forum state.”<sup>38</sup> The conspiracy theory of

jurisdiction or create venue in an antitrust case such as the one at bar.”); *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co. (America)*, 499 F. Supp. 829, 840-41 (D. Ore. 1980) (rejecting “target theory” of jurisdiction); *Weinstein v. Norman M. Morris Corp.*, 432 F. Supp. 337, 345 (E.D. Mich. 1977) (“The allegation of conspiratorial activities having tortious consequences in this district is not sufficient as a basis for jurisdiction in the absence of any other contacts.”); *I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023, 1025 (D. Minn. 1976) (rejecting argument that tortious injury within a state satisfies Due Process Clause); *West Va. v. Morton Int’l, Inc.*, 264 F. Supp. 689, 696 (D. Minn. 1967) (rejecting “target theory” of jurisdiction).

37. *See Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 719 (5th Cir 1999), *cert. denied*, 121 S. Ct. 275 (2000) (stating “[t]he allegation that Telmex shut down these lines in order to harm a Texas business whose services were legal in Mexico suffices to confer personal jurisdiction over Telmex for the injuries suffered in Texas”); *Insultherm, Inc. v. Tank Insulation Int’l, Inc.*, 909 F. Supp. 465, 469 (S.D. Tex. 1995), *rev’d on other grounds*, 104 F.3d 83 (5th Cir. 1997) (“[B]ecause Thermacon’s actions were aimed at Texas and it knew the brunt of its actions would be felt by TII in Texas, Thermacon should reasonably have anticipated being haled into court in Texas to answer for its conduct.”); *Eskofot A/S v. E.I. Du Pont de Nemours & Co.*, 872 F. Supp. 81, 87 (S.D.N.Y. 1995) (“[P]ersonal jurisdiction may be asserted by courts where a foreign corporation, through an act performed elsewhere, causes an effect in the United States.”); *County of Stanislaus v. Pacific Gas & Elec. Co.*, 1995 WL 819149, at \*5 (E.D. Cal. 1995) (“The foreseeable forum effects of A & S’s foreign acts satisfy the purposeful availment requirement.”); *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 585-86 (Fla. 2000) (*per curiam*), *cert. denied*, 121 S. Ct. 58 (2000) (finding the nexus between defendant and retail price of fax paper in Florida sufficient to assert personal jurisdiction in price-fixing suit under Florida Deceptive and Unfair Trade Practices Act despite no sales by defendant in Florida); *see also Santana Prods., Inc. v. Bobrick Washroom Equip.*, 14 F. Supp. 2d 710, 716-17 (M.D. Pa. 1998) (holding that “[d]ue process requires that in order to exercise specific personal jurisdiction based upon tortious conduct outside the forum state that causes injury within the forum state, the defendant must actually target the forum state” and that defendant’s tortious conduct was not so targeted); *Karsten Manuf. Corp. v. United States Golf Ass’n*, 728 F. Supp. 1429, 1433-34 (D. Ariz. 1990) (holding that “the purposeful availment requirement may be satisfied if the defendant intentionally directed his activities into the forum” but that defendant did not do so). *But see Sea-Roy Corp. v. Parts R Part, Inc.*, 1996 WL 557857, at \*4 (M.D.N.C. 1996) (“The fact that [Plaintiffs] may have suffered injury here, without more, will not support the exercise of personal jurisdiction or create venue in an antitrust case.” (quoting *Sportmart*, 537 F. Supp. at 1259)).

38. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 43 F. Supp. 2d 904, 912 (N.D. Ill. 1999); *see also In re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26, 32-33 (D.D.C. 2000); *Santana Prods.*, 14 F. Supp. 2d at 718. Here, one must distinguish between using a co-conspirator’s activities to establish personal jurisdiction, which the courts have permitted, and using those activities to satisfy section

jurisdiction generally requires a plaintiff to: “(1) make a prima facie factual showing of a conspiracy . . . ; (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) show that the defendant’s co-conspirator committed a tortious act pursuant to the conspiracy in the forum.”<sup>39</sup>

In sum, antitrust cases frequently present factual situations in which the cause of action does not arise out of any direct contact between the defendant and the forum. U.S. courts have tended to exercise general jurisdiction based on the defendant’s unrelated “continuous and systematic” business contacts with the forum. They have also exercised specific jurisdiction based either on the effects within the forum of the defendant’s conduct elsewhere or on the conduct of the defendant’s co-conspirators within the forum.

### B. Enforcement of Judgments

The current law concerning the enforcement of foreign antitrust judgments is easier to describe: such judgments are commonly assumed to be unenforceable outside of the jurisdiction that rendered them.<sup>40</sup> It is well established that courts will not enforce foreign “penal” law,<sup>41</sup> and antitrust law (or at least U.S. antitrust law) is often assumed

12 of the Clayton Act’s “transacting business” requirement for venue purposes, which the courts have tended to disapprove. *See, e.g.*, *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491 (9th Cir. 1979); *Bertha Bldg. Corp. v. Nat’l Theatres Corp.*, 248 F.2d 833, 836 (2d Cir. 1957); *see also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (doubting validity of co-conspirator theory of venue).

39. *United Phosphorus*, 43 F. Supp. at 912 (applying Illinois law). *See generally* Ann Althouse, *The Use of Conspiracy Theory to Establish in Personam Jurisdiction: A Due Process Analysis*, 52 *FORDHAM L. REV.* 234 (1983).

40. *See, e.g.*, *Capital Currency Exch., N.V. v. Nat’l Westminster Bank, PLC*, 155 F.3d 603, 609 (2d Cir. 1998), *cert. denied*, 526 U.S. 1067 (1999) (noting English courts will not enforce the Sherman Act.); *Laker Airways Ltd. v. Pan Am. World Airways*, 568 F. Supp. 811, 817 (D.D.C. 1983) (“British courts could not and would not enforce the American antitrust laws.”); *British Airways Board v. Laker Airways Ltd.*, [1985] App. Cas. 58, 79 (appeal taken from Eng.) (“The Clayton Act, which creates the civil remedy with threefold damages for criminal offences under the Sherman Act is, under English rules of conflict of laws, purely territorial in its application.”); *British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd.*, [1955] Ch. 37, 45 (1954) (Danckwerts, J.) (“The judge was applying an enactment of Congress, which has no application to the United Kingdom, of course . . .”).

41. *See* *Huntington v. Attrill*, 146 U.S. 657 (1892); *Huntington v. Attrill*, [1893] App. Cas. 150 (P.C. 1892). A report of the International Law Association in 1988 concluded that there was a “unanimous practice in the courts of the States examined of refusing to enforce, even indirectly, foreign penal laws.” *International Committee on Transnational Recognition and Enforcement of Foreign Public Laws*, INT’L LAW ASS’N, REPORT OF THE 63D CONFERENCE 753 (1988) [hereinafter *ILA Report*].

to be penal.<sup>42</sup> Alternatively, some commentators have asserted that there is a prohibition against enforcing foreign “public” law,<sup>43</sup> which would include antitrust law.<sup>44</sup>

Beyond these rules, developed by common law courts or as interpretations of various civil law codes, a few countries (in reaction to the extraterritorial application of U.S. antitrust law) have provided by legislation that foreign antitrust judgments are not enforceable. In the United Kingdom, section 5 of the Protection of Trading Interests Act provides that judgments for multiple damages and any other antitrust judgment specified by an order of the British Secretary of State are not enforceable either under British legislation providing for the enforce-

42. See, e.g., 1 DICEY & MORRIS ON THE CONFLICT OF LAWS 101 n.26 (Lawrence Collins ed., 12th ed. 1993) (“an action for treble damages under U.S. anti-trust law may be an action for a penalty”); Otto Kahn-Freund, *English Contracts and American Antitrust Law: The Nylon Patent Case*, 18 MOD. L. REV. 65, 69 (1955) (“The jurisdiction of the Federal Courts under the Anti-Trust laws is a penal jurisdiction, no matter whether it is exercised in criminal or in equitable proceedings.”); *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir.), *vacated on other grounds*, 460 U.S. 1007 (1982) (“Since it is a well-established principle of international law that ‘[t]he Courts of no country execute the penal laws of another,’ . . . we have little doubt that the Indonesian courts would quite properly refuse to entertain plaintiffs’ Sherman Act claim.”).

The assumption is not well-founded, for under the definitions of “penal law” set forth by the U.S. Supreme Court and the Privy Council in the two *Huntington* decisions, a judgment is not “penal” unless the plaintiff has sought recovery on behalf of the state, as in a *qui tam* suit. See *Huntington*, 146 U.S. at 673-74; *Huntington*, [1893] App. Cas. at 157-58. For further discussion of the point, see F.A. Mann, *The International Enforcement of Public Rights*, 19 N.Y.U. J. INT’L L. & POL. 603, 614-15 (1987).

43. In common-law countries, this prohibition is based on a combination of the rule against enforcing foreign penal law and the rule against enforcing foreign tax law, see, e.g., *British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979); *United States v. Harden*, 41 D.L.R. 721 (Can. 1963); *Gov’t of India v. Taylor*, [1955] App. Cas. 491 (appeal taken from Eng.), rules that were quite distinct historically. *Dicey & Morris* states that “the prohibitions on the enforcement of penal and revenue laws are examples of a wider principle that a state cannot enforce its public laws or its political or prerogative rights,” 1 DICEY & MORRIS, *supra* note 42, at 103, and some courts have followed them in this respect. See, e.g., *U.S. v. Inkleby*, [1989] Q.B. 255, 264 (Eng. C.A.).

Civil law countries also generally prohibit the enforcement of foreign public law. See *ILA Report*, *supra* note 41, at 730 (“The general approach of German courts has been one of non-applicability of foreign public law beyond the respective national borders.”); *id.* at 736 (“The basic attitude in Norway is that foreign public law claims will not be adjudicated upon as such or enforced in other ways unless a statute or treaty so provides.”); *id.* at 741 (“Public law rules are said not to be enforced by a Swedish Court.”). *But see* Swiss Federal Statute on Private International Law, art. 13 (“A foreign provision is not inapplicable for the sole reason that it is characterized as public law.”), translated in 37 AM. J. COMP. L. 193 (1989).

44. 1 DICEY & MORRIS, *supra* note 42, at 107 (“The public laws involved would include . . . anti-trust legislation.”). *Cf.* Lowenfeld, *supra* note 3, at 325 (questioning whether foreign antitrust law should be denied enforcement under a “public law tabu”).

ment of foreign judgments or at common law.<sup>45</sup> Australia and Canada have similar legislation permitting their Attorneys General to declare an antitrust judgment unenforceable or reduce the amount of the judgment for purposes of enforcement.<sup>46</sup> Thus, a U.S. antitrust plaintiff who wins a judgment against a foreign defendant must look to the defendant's assets within the United States to satisfy that judgment.

### III. THE DRAFT HAGUE JUDGMENTS CONVENTION

European countries have long provided for the enforcement of foreign judgments by treaty under the Brussels<sup>47</sup> and Lugano<sup>48</sup> Conventions. The United States, on the other hand, is not a party to any treaty providing for the reciprocal enforcement of foreign judgments. In 1992, the United States proposed negotiations for a multilateral judgments convention under the auspices of the Hague Conference on Private International Law.<sup>49</sup> The Draft Convention is the result of those negotiations.

Like the Brussels and Lugano Conventions, the Draft Convention not only provides for the enforcement of foreign judgments, but also sets forth rules for the exercise of personal jurisdiction by the courts of one signatory country over habitual residents of another.<sup>50</sup> The current draft contemplates what is called a "mixed convention."<sup>51</sup> It contains: (1) a "white list" of bases on which the courts of signatory nations will be required to take personal jurisdiction;<sup>52</sup> (2) a "black list" of bases on

45. Protection of Trading Interests Act, 1980, c. 11, § 5.

46. Foreign Proceedings (Excess of Jurisdiction) Act, 1984, § 9 (Austl.); Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985), amended by ch. 28, 1996 S.C. 8(1) (Can.).

47. The Brussels Convention applies between Members of the European Union. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, *reprinted in* 8 I.L.M. 229 (1969). The Brussels Convention has been amended since 1968, and the revised text may be found at 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention].

48. The Lugano Convention applies between members of the European Union and the European Free Trade Association (Austria, Finland, Iceland, Norway, Sweden, and Switzerland). *See* Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 1, O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (1989).

49. *See generally* Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998) (providing background on the origins of the Convention).

50. *See* Draft Convention, *supra* note 4, art. 2.

51. *See* Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17, 25-28 (1998).

52. *See* Draft Convention, *supra* note 4, arts. 3-16.

which the courts of signatory nations will be prohibited from taking personal jurisdiction;<sup>53</sup> and (3) a “gray area” which will allow signatory nations to assert personal jurisdiction on bases that are neither prohibited nor required,<sup>54</sup> but which will not require other signatory nations to enforce those judgments.<sup>55</sup>

The Draft Convention’s scope is limited to “civil and commercial matters,” with “revenue, customs, [and] administrative matters” being specifically excluded.<sup>56</sup> The phrase “civil and commercial matters” by itself would have left the Draft Convention’s applicability to antitrust cases ambiguous,<sup>57</sup> but a provision in Article 10 of the Draft Convention makes clear that it does apply to antitrust. Article 10(1) sets forth the required bases for jurisdiction in tort cases, allowing the plaintiff to bring an action in the courts of the country: (a) “in which the act or omission that caused the injury occurred,” or (b) “in which the injury arose” so long as the injury in that country was reasonably foreseeable.<sup>58</sup> Article 10(2) then goes on to provide that (b)—jurisdiction where the injury arose—“shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolization, or conspiracy to inflict economic loss.”<sup>59</sup> The immediate purpose of Article 10(2) was to take effects off the “white list” of required bases for personal jurisdiction in antitrust cases (discussed in greater detail below), but another result of this exclusion is to confirm by implication that the

53. *Id.* art. 18.

54. *Id.* art. 17.

55. *Id.* art. 24. Other signatory nations are also not required to enforce judgments in which jurisdiction is based on Articles 14, 15, and 16 of the white list. *See id.* art. 25(1).

56. *Id.* art. 1(1).

57. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 471, cmt. f (1987) (noting that the United States and Great Britain interpret the words “civil and commercial” in the Hague Service Convention as meaning any proceeding that is not criminal but that German practice appears to exclude matters involving the enforcement of “public law”). *But see* Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty ¶ 44, 1993 O.J. (C 39) 6, 11 (stating the view of the European Commission that “competition judgments are already governed by [the Brussels] Convention where they are handed down in cases of a civil and commercial nature.”) [hereinafter Cooperation Notice].

58. Draft Convention, *supra* note 4, art. 10(1). Allowing a defendant to be sued in tort either where the act that caused the injury occurred or where the injury arose is consistent with the European Court of Justice’s interpretation of the Brussels Convention. *See* Case 21/76, *Handelswekerij G.J. Bier B.V. v. Mines de Potasse d’Alsace S.A.*, 1976 E.C.R. 1735, 1749. *See generally* Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 *BROOK. J. INT’L L.* 125 (1998) (discussing tort jurisdiction and the Hague Judgments Convention).

59. Draft Convention, *supra* note 4, art. 10(2).

Draft Convention *does* apply to antitrust cases; otherwise, Article 10(2) would have been unnecessary.<sup>60</sup> The Draft Convention applies, moreover, not just to antitrust suits filed by private parties but also to civil suits<sup>61</sup> filed by the government, for Article 1(3) provides that “[a] dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.”<sup>62</sup>

At first glance, the inclusion of antitrust in the Draft Convention would appear to be a step towards greater antitrust enforcement. Article 25 requires the enforcement of foreign judgments based on most of the grounds of personal jurisdiction on the white list,<sup>63</sup> subject to a limited number of defenses set forth in Article 28.<sup>64</sup> Treble damages would probably not be recoverable, because Article 33(1) would allow the country in which enforcement is requested to refuse enforcement of non-compensatory damages. However, the enforcement of at least single damages would be required.<sup>65</sup> The Draft Convention would thus break the “public law taboo” with respect to antitrust judgments and would, for example, require the United Kingdom to repeal section 5 of the Protection of Trading Interests Act,

60. This conclusion is confirmed by the drafting history of the Convention. As noted above, the United Kingdom and the United States wanted to exclude antitrust from the scope of the Draft Convention but this proposal was defeated. See *supra* note 8. Article 10(2) was subsequently proposed by Australia and approved with only the United States voting against. Kovar Interview, *supra* note 8.

61. Criminal antitrust prosecutions would not be affected by the Draft Convention since it applies only to those antitrust cases that may be considered “civil and commercial.” See Draft Convention, *supra* note 4, art. 1(1).

62. *Id.* art. 1(3). The European Commission’s extraterritorial application of E.C. competition law, see, e.g., Case 89/85, *In re Wood Pulp Cartel*, 1988 E.C.R. 5193, would not be limited by the Draft Convention, because the European Union would not be party to the Convention. The application of E.C. competition law in the national courts of member countries, as well as the application of the national competition laws of member countries, would be subject to the Draft Convention’s limitations on personal jurisdiction. For further discussion of the enforcement of E.C. competition law by national courts, see *infra* notes 90-94 and accompanying text.

63. See Draft Convention, *supra* note 4, art. 25(1) (“A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognized or enforced under this Chapter.”). Article 25 does not require enforcement of judgments where jurisdiction is grounded on Articles 14, 15, or 16—dealing with multiple defendants, counterclaims, and third-party claims, respectively—despite the fact that these bases of jurisdiction are on the “white list.” *Id.* art. 25.

64. *Id.* art. 28.

65. See *id.* art. 33(1) (“In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognized at least to the extent that similar or comparable damages could have been awarded in the State addressed.”).

Australia to repeal section 9 of the Foreign Proceedings (Excess of Jurisdiction) Act, and Canada to repeal section 8(1) of the Foreign Extraterritorial Measures Act.<sup>66</sup> A foreign corporation would no longer be able to avoid an antitrust judgment by keeping its assets outside the jurisdiction of the court rendering the judgment.

However, if the Draft Convention is really a step toward greater international antitrust enforcement, why was the inclusion of antitrust within the Draft Convention favored by many of the countries that have traditionally opposed the extraterritorial application of antitrust law and opposed by the United States, which has traditionally supported the extraterritorial application of antitrust law?<sup>67</sup> The answer lies in the Draft Convention's limitations on personal jurisdiction, which attempt to limit the extraterritorial application of U.S. antitrust law.

To see how the Draft Convention would affect antitrust suits, one should first turn to the "black list" of prohibited bases of jurisdiction contained in Article 18(2).<sup>68</sup> Article 18(2)(e), in particular, states that the courts of signatory nations shall not exercise personal jurisdiction solely on the basis of "the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities."<sup>69</sup> U.S. courts would therefore be unable to exercise general jurisdiction based on "continuous and systematic"<sup>70</sup> business contacts unrelated to the claim. They would be limited to exercising some form of specific jurisdiction based on the contacts with the forum out of which the claim arose. However, in many antitrust cases there are no contacts with the forum from which the claim arises.

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66. See *supra* notes 45-46 and accompanying text.

67. See *supra* notes 8 & 60.

68. Draft Convention, *supra* note 4, art. 18(2). In addition to a "black list," Article 18(1) contains a "black area": a more general rule prohibiting the exercise of personal jurisdiction "if there is no substantial connection between that State and the dispute." It is important to note, however, that the focus in Article 18(1) is not on the connection between the State exercising jurisdiction and the defendant but on the connection between that State and *the dispute*. *Id.* In any case where there were sufficient effects in the United States for U.S. antitrust laws to be applicable under *Hartford Fire Ins. v. California*, 509 U.S. 764, 795-96 (1993), it would be nearly impossible to argue that there was not a sufficient connection between the United States and the dispute, even if a particular defendant had no contacts with the United States.

69. Draft Convention, *supra* note 4, art. 18(2)(e). "Transient" or "tag" jurisdiction is also black-listed, see *id.* art. 18(2)(f), although this basis for personal jurisdiction does not seem to have played much of a role in civil antitrust enforcement. See *supra* note 14 and accompanying text.

70. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

Indeed, in some cases, the gist of the complaint is a *refusal* to do business with the United States.<sup>71</sup>

In practice, however, the prohibition of general jurisdiction is unlikely to restrain the extraterritorial application of U.S. antitrust law. Article 18(2) says that jurisdiction shall not be exercised “on the basis *solely* of” one of the bases of jurisdiction on the “black list.”<sup>72</sup> Thus, a U.S. court would be free to use general jurisdiction to satisfy the Due Process Clause and some other basis of personal jurisdiction on the “white list” or in the “gray area” to satisfy the Draft Convention. Three possibilities immediately leap to mind.

First, a U.S. court might rely on Article 10(1)'s provision for personal jurisdiction in tort cases. Of course, Article 10(2) provides that effects jurisdiction is not on the “white list” in antitrust cases, but an antitrust plaintiff may still bring suit in the courts of a State “in which the act *or omission* that caused the injury occurred.”<sup>73</sup> The plaintiff might argue that a failure to sell to or buy from the United States was an “omission” within the United States under Article 10(1)(a). Interpretation of the Draft Convention in this way would require U.S. courts to exercise personal jurisdiction in such a case, and any resulting antitrust judgment would be enforceable in the courts of other signatory countries.<sup>74</sup> Although it is possible that a U.S. court might accept this interpretation of Article 10(1)(a), it seems unlikely that the courts of other signatories would do so because such an interpretation seems contrary to the purpose of Article 10(2).<sup>75</sup> Thus, even if Article 10(1)(a) might provide a basis for U.S. courts to exercise personal jurisdiction in some antitrust cases, it is unlikely that the resulting judgments would be enforced abroad.

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71. *See supra* notes 28-30 and accompanying text.

72. Draft Convention, *supra* note 4, art. 18(2) (emphasis added).

73. *Id.* art. 10(1)(a) (emphasis added).

74. *See id.* art. 25(1) (“A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognized or enforced under this Chapter.”).

75. Under the Brussels Convention, differences in national court interpretations may be resolved by the European Court of Justice. *See* Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 29 I.L.M. 1439 (1990). The Draft Convention contains no similar mechanism for settling differences in interpretation. Thus, short of bringing a suit before the International Court of Justice for breach of the Convention, there would be no way for the United States to require other signatories to abide by its interpretation of the Convention and no way for the other signatories to require the United States to abide by theirs.

A second possibility for satisfying the Draft Convention would be to use effects within the United States as a basis for specific jurisdiction. Although Article 10(2) takes effects jurisdiction off the “white list” in antitrust cases, it does not prohibit the exercise of personal jurisdiction based on effects if consistent with national law. This leaves effects jurisdiction in Article 17’s “gray area” of jurisdictional bases that are neither required nor prohibited by the Draft Convention.<sup>76</sup> The current trend in U.S. courts is to allow effects within the United States to establish personal jurisdiction in antitrust cases.<sup>77</sup> Because effects jurisdiction is within the Draft Convention’s “gray area,” however, the resulting judgment would not be enforceable in the courts of other signatory countries.

A third possibility presents itself in cases with multiple defendants. Article 14, for example, allows a plaintiff suing a defendant in the courts of the defendant’s habitual residence to sue non-resident defendants if (1) the claims against the resident and non-resident defendants “are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments”;<sup>78</sup> and (2) there is a “substantial connection” between the forum “and the dispute” with each non-resident defendant.<sup>79</sup> In a case involving a conspiracy or other agreement in restraint of trade with both U.S. and foreign defendants,<sup>80</sup> therefore, jurisdiction could be asserted under Article 14.<sup>81</sup> There would probably be a “substantial connection between [the United States] and the dispute involving [the foreign defendants]”<sup>82</sup> because of the substantial effects in the United States.<sup>83</sup> However, it is not clear that Article 14(1)(a)’s requirement of a “serious risk of inconsistent judgments”<sup>84</sup> would be met. In the absence of the U.S.

76. See Draft Convention, *supra* note 4, art. 17 (“Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.”).

77. See *supra* notes 31-37 and accompanying text.

78. Draft Convention, *supra* note 4, art. 14(1)(a).

79. *Id.* art. 14(1)(b).

80. See, e.g., *United Phosphorus, Ltd. v. Angus Chem. Co.*, 43 F. Supp. 2d 904 (N.D. Ill. 1999) (exercising personal jurisdiction over foreign drug manufacturers on the basis of conspiracy to affect drug prices in Illinois).

81. In cases not involving a conspiracy in restraint of trade, exercising personal jurisdiction over a foreign defendant based simply on the forum’s connection with “the dispute” under Article 14 would likely violate the Due Process Clause.

82. Draft Convention, *supra* note 4, art. 14(1)(b).

83. See *supra* note 68.

84. Draft Convention, *supra* note 4, art. 14(1)(a).

suit, the foreign conspirators would probably face no liability at all, and it is not clear that this should be considered an “inconsistent judgment.” In any event, even if jurisdiction over the foreign co-conspirators were proper under Article 14, enforcement of the resulting judgment would not be required under the Draft Convention. Article 25, which sets forth the obligation to enforce judgments from the courts of other signatories, extends only to judgments based on Articles 3 through 13, omitting Articles 14 to 16 despite their presence on the “white list.”<sup>85</sup>

Finally, it is worth noting that the Draft Convention would not require the United States to evaluate its contacts with foreign antitrust defendants on a state-by-state basis, rather than a nationwide basis.<sup>86</sup> The word “State,” as used in the Draft Convention, refers not to the constituent states of the United States, but rather to the nation-states that would be parties to the Convention. Thus, a federal court in California, for example, would be entitled under the Draft Convention to exercise personal jurisdiction over a foreign defendant based on the effects of its conduct in the United States as a whole, even if there were no effects in California.

In sum, the net effect of the Draft Convention on antitrust cases would probably be very limited. U.S. courts would still be able to exercise personal jurisdiction over foreign corporations in antitrust cases, and, in general, the resulting judgments would still be unenforceable abroad. Further revisions to the Draft Convention could significantly alter the status quo, however. To limit the extraterritorial application of U.S. antitrust law (and achieve the apparent goal of most non-U.S. members of the Hague Conference), effects jurisdiction in antitrust cases could be added to Article 18(2)’s “black list.” Alternatively, Article 10(2) could be dropped, putting effects jurisdiction in antitrust cases on the “white list” and rendering such judgments enforceable under the Draft Convention. Part IV of this Article will compare these options to the status quo from the perspective of a smaller country.

#### IV. STRATEGIES FOR SMALLER COUNTRIES

A country’s effectiveness in applying its antitrust law extraterritorially depends on its ability to obtain jurisdiction over the defendants and its ability to enforce any resulting judgment against the defendants’ assets.

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85. *See id.* art. 25(1).

86. *See supra* notes 16-24 and accompanying text.

In both of these areas, the United States enjoys a distinct advantage by virtue of its size. A foreign defendant is likely to have more contacts with the United States on which personal jurisdiction might be based and more assets in the United States against which a judgment might be enforced than is the case with a smaller country. The relatively greater ability of the United States to engage in extraterritorial anti-trust enforcement provides one possible explanation for why the United States has long favored the extraterritorial application of anti-trust law, while other countries have been more resistant.

Only the European Union has a similar potential to apply its antitrust law extraterritorially, again by virtue of its size. When imposing fines for violations of Articles 81 and 82 of the E.C. Treaty,<sup>87</sup> the European Commission is not bound like a court by rules of personal jurisdiction, and fines levied by the Commission are enforceable throughout the European Union in its members' national courts.<sup>88</sup> Indeed, since the 1980s, the European Union has begun to apply its competition law extraterritorially in ways that mirror the United States.<sup>89</sup>

The Commission has also sought to encourage private enforcement of E.C. competition law in national courts,<sup>90</sup> noting that its own "administrative resources . . . are necessarily limited and cannot be used to deal with all the cases brought to its attention"<sup>91</sup> and that "[c]ompanies are more likely to avoid infringements of the Community competition rules if they risk having to pay damages."<sup>92</sup> A Commission survey revealed that by the end of 1994, the courts of several member states were permitting private plaintiffs to recover damages for viola-

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87. Consolidated Version of the Treaty Establishing the European Community, arts. 81 & 82, 1997 O.J. (C 340) 173, 208-09. Prior to 1997, Articles 81 and 82 were numbered Articles 85 and 86, respectively.

88. *Id.* art. 256, 1997 O.J. (C 340) at 282 (formerly art. 192).

89. *See, e.g.*, Case 89/85, *In re Wood Pulp Cartel*, 1988 E.C.R. 5193 (applying Article 85 of the Treaty of Rome extraterritorially on the basis of effects). In the context of merger regulation, the European Commission has also asserted jurisdiction over the merger of foreign companies, most famously Boeing and McDonnell Douglas. *See* Commission Decision 97/816/EC of 30 July 1997, 1997 O.J. (L 336) 16 (finding merger compatible with the common market).

90. The European Court of Justice has repeatedly held that Articles 81 and 82 have direct effect and produce individual rights that national courts must protect. *See, e.g.*, Case 234/89, *Delimitis v. Henninger Bräu*, 1991 E.C.R. I-935; Case 127/73, *Belgische Radio en Televisie v. Société Belge des Auteurs Compositeurs et Éditeurs*, 1974 E.C.R. 5, 313.

91. *See* Cooperation Notice, *supra* note 57, ¶ 13, 1993 O.J. (C 39) at 7.

92. *Id.* ¶ 16, 1993 O.J. (C 39) at 7. The Commission itself has no authority to award such damages. *See id.*

tions of Articles 81 and 82.<sup>93</sup> Here, however, limitations of size begin to intrude. The European Commission takes the view that national court judgments enforcing Articles 81 and 82 are enforceable throughout the European Union under the Brussels Convention.<sup>94</sup> However, national rules on personal jurisdiction limit national courts in such cases. A German court could not use a foreign defendant's contacts with France to establish personal jurisdiction in a private suit for damages in the same way that a federal court in New York could use a defendant's contacts with California.

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93. See generally *The Application of Articles 85 & 86 of the EC Treaty by National Courts in the Member States*, available at <http://europa.eu.int/comm/competition/antitrust/legislation/natintro/en/maintoc.html> (last visited Aug. 14, 2000). More specifically, the report on France noted three cases in which the Paris Court of Appeal had awarded damages for infringement of EC competition rules. See *Compliance by Firms with Articles 85 and 86*, available at <http://europa.eu.int/comm/competition/antitrust/legislation/natfr/en/frp4.html#t1> (last visited Aug. 14, 2000). In the United Kingdom, "There is strong, but not final and binding, authority . . . that damages are recoverable for breach of Articles 85 and 86." See *Damages for Infringement of Articles 85 and 86*, available at <http://europa.eu.int/comm/competition/antitrust/legislation/natuk/en/ukp16.html#t1> (last visited Aug. 14, 2000); see also *Garden Cottage Foods Ltd. v. Milk Mktg. Bd.*, [1984] 1 A.C. 130 (H.L. 1983). The report on Germany stated: "Articles 85 and 86 are recognized as a *Schutznorm* (protective rules), within the meaning of § 823(2) BGB. Thus, the person violating the competition rules is obliged to compensate the victim for the damage arising therefrom." See *Claims for Compensation in Tort*, available at <http://europa.eu.int/comm/competition/antitrust/legislation/natde/en/dep21.html#t1> (last visited Aug. 14, 2000); see also *id.* at n.158 (citing cases in German courts). The report on the Netherlands is to the same effect. See *Powers of National Courts*, available at <http://europa.eu.int/comm/competition/antitrust/legislation/natnl/en/nlp36.html#t1> (last visited Aug. 14, 2000) ("Dutch law acknowledges the *Schutznorm* doctrine. Articles 85 and 86 clearly serve to protect private parties against distortions of competition, so that a breach of one of those Articles may give rise to a claim for damages.").

94. Cooperation Notice, *supra* note 57, ¶ 44, 1993 O.J. (C 39) at 11 ("It should be noted that, in the Commission's view, competition judgments are already governed by this Convention where they are handed down in cases of a civil and commercial nature."); see Brussels Convention, *supra* note 47. The same would presumably be true of judgments for damages under the national competition laws of the member states.

Judgments or fines resulting from the administrative enforcement of Articles 81 and 82 by national competition authorities (or from the administrative enforcement of their national competition laws), by contrast, would probably not fall within the scope of the Brussels Convention. See Cooperation Notice, *supra* note 57, ¶ 44, 1993 O.J. (C 39) at 11 (stating that the European Commission would study the possibility of extending the Brussels Convention to competition cases assigned to administrative courts). Cf. *Case 814/79, The Netherlands v. Rüffer*, 1980 E.C.R. 3807 (holding that judgment in favor of public authority acting in the exercise of its governmental powers is excluded from the Brussels Convention); *Case 29/76, L.T.U. Lufttransportunternehmen GmbH v. Eurocontrol*, 1976 E.C.R. 1541 (holding the same). In eight out of the 15 member states of the European Union, administrative authorities can directly apply Articles 81 and 82. See *Application of Articles 85-86 in the Member States*, available at <http://europa.eu.int/comm/competition/antitrust/tablen.html> (last visited Aug. 14, 2000).

Of course, interest in antitrust enforcement extends beyond the United States and the European Union and has risen noticeably in the past decade. Prior to 1990, only twenty-eight countries had some form of antitrust or competition law.<sup>95</sup> Today more than eighty countries have such laws and at least twenty more are in the process of drafting them.<sup>96</sup> One might reasonably expect that at least some of these countries would want to apply their antitrust laws extraterritorially to anticompetitive conduct that causes effects within their territories, as the United States and European Union have done, if only because the countries in which such conduct occurs have little incentive to prevent it.<sup>97</sup> Because the resources available for public enforcement of antitrust law are limited, one also might reasonably expect at least some of these countries to encourage private suits for damages, as both the United States and the European Union have done.<sup>98</sup> Malta, however, probably cannot effectively apply its antitrust law to foreign conduct that harms its consumers because relatively few potential antitrust defendants would be susceptible to personal jurisdiction in Malta and have enough assets there to satisfy a judgment.<sup>99</sup>

So long as these obstacles to extraterritorial antitrust enforcement remain, the only way in which smaller countries can level the playing field is to limit the ability of bigger countries like the United States to regulate extraterritorially. They have previously attempted to accomplish this through blocking statutes<sup>100</sup> and are currently trying to

95. See Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105, 109 n.15 (1998) (listing Argentina, Australia, Austria, Canada, Chile, Colombia, Denmark, France, Gabon, Germany, Greece, Guatemala, India, Israel, Japan, Kenya, Luxembourg, the Netherlands, New Zealand, Pakistan, Philippines, South Africa, South Korea, Spain, Sri Lanka, Thailand, the United Kingdom, and the United States).

96. International Competition Policy Advisory Committee Final Report 33 & n.1 (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited Aug. 14, 2000); see also Palim, *supra* note 95, at 109 & n.15; Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 HARV. INT'L L.J. 579 (2000) (discussing competition laws recently adopted in Indonesia and South Africa).

97. Most countries' antitrust laws do not reach export trade. See Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law—The Case for Modest Linkages of Law and Limits to Parochial State Action*, 19 WORLD COMP. 5, 17 (Dec. 1995). For further discussion, see *infra* notes 104-13 and accompanying text.

98. See *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151 (1987) ("the Clayton Act . . . bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate . . ."); Cooperation Notice, *supra* note 57, ¶¶ 13 & 16, 1993 O.J. (C 39) at 7; *supra* notes 90-94 and accompanying text.

99. Malta adopted an antitrust law in 1994. Palim, *supra* note 95, at 109 n.15.

100. See *supra* note 1 and accompanying text.

achieve the same goal through the Draft Convention's limitations on personal jurisdiction. Another way for smaller countries to level the playing field, however, would be to enhance their own abilities to regulate anticompetitive conduct extraterritorially by enhancing their abilities to assert jurisdiction and to enforce judgments in antitrust cases on an equal basis with the United States.

In this part of the Article, three different strategies are considered from the perspective of a smaller country: (1) maintaining the status quo, under which there are no limitations on personal jurisdiction beyond those in national law, and antitrust judgments from one country are not enforceable in another; (2) providing for the enforcement of antitrust judgments but limiting personal jurisdiction in antitrust cases, as the Draft Convention unsuccessfully attempts to do; and (3) providing for the enforcement of antitrust judgments, but permitting personal jurisdiction on the basis of effects within the forum.

A. *Non-Enforcement of Antitrust Judgments Without Limits on Personal Jurisdiction*

The first option would be to maintain the status quo, under which there are no limits on personal jurisdiction beyond those in national law, and antitrust judgments rendered in one country are not enforceable in another. This is basically what the Draft Convention does because, as explained above, in most cases U.S. courts will be able to use a basis for personal jurisdiction on the Draft Convention's "white list" or within its "gray area" as a substitute for the general jurisdiction prohibited by the Draft Convention.<sup>101</sup> Such judgments will not be enforceable abroad, however, because jurisdiction will not typically be exercised on a basis provided in Articles 3 through 13, and it is only to judgments rendered on one of these bases that the Draft Convention's enforcement obligation extends.<sup>102</sup> A more straightforward way of accomplishing the same end would be simply to exclude antitrust from the scope of the Draft Convention completely, as initially favored by the United Kingdom and the United States.<sup>103</sup>

From the perspective of a smaller country, the disadvantage of maintaining the status quo is that it does nothing to eliminate the

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101. See *supra* notes 73-85 and accompanying text.

102. Draft Convention, *supra* note 4, art. 25(1) ("A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognized or enforced under this Chapter."); *supra* note 85 and accompanying text.

103. See *supra* note 8.

advantage the United States currently enjoys in the extraterritorial application of antitrust law by virtue of its size. Because U.S. courts exercise general jurisdiction based on contacts unrelated to a cause of action and because a foreign company is likely to have more contacts with the United States (especially if those contacts are assessed on a nationwide basis) than with a smaller country, U.S. courts will be able to exercise personal jurisdiction over foreign defendants in antitrust cases more often than courts in smaller countries. Similarly, because of the size of the United States, a foreign company is more likely to have assets in the United States against which an antitrust judgment can be enforced than it is to have assets in a smaller country.

B. *Enforcement of Antitrust Judgments with Limits on Personal Jurisdiction*

Although the current Draft Convention does not provide effective limits on personal jurisdiction in antitrust cases, it would be relatively easy to amend the Draft Convention to do so simply by adding effects jurisdiction in antitrust cases to Article 18(2)'s "black list" and perhaps by clarifying that the word "omission" in Article 18(1) does not include a failure to buy from or sell to the State exercising jurisdiction. The principal advantage of such a convention from the perspective of a smaller country is that it would eliminate the U.S. advantage in the extraterritorial application of antitrust law. Neither U.S. courts, nor those of other countries, would be able to exercise personal jurisdiction in antitrust cases based on contacts unrelated to the antitrust claim or based on effects or omissions within the forum. Courts in each country would generally be able to exercise personal jurisdiction only when there was some anticompetitive conduct within the country from which the antitrust claim arose.

The problem with such a convention is that it would result in the systematic under-enforcement of antitrust laws—both U.S. and foreign—because it would disable the countries with the greatest incentive to regulate anticompetitive conduct from doing so.<sup>104</sup> Anticompetitive conduct results in a transfer of wealth from consumers to producers. If the consumers are located in one country and the producers in another, it is only the consumers' country that has an incentive to regulate the anticompetitive activity. The producers' country has an incentive to permit it because this anticompetitive activity results in the

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104. See Dodge, *supra* note 12, at 153-58.

transfer of wealth to its nationals.<sup>105</sup> It is for this reason that antitrust law in the United States and abroad typically exempts anticompetitive conduct that causes no effects at home.<sup>106</sup> In the absence of some international agency charged with antitrust enforcement, the only way to prevent harmful anticompetitive conduct is to allow any nation that feels the effects of such conduct to regulate it.<sup>107</sup>

“Positive comity,” which allows a nation that feels the effects of anticompetitive conduct to request enforcement action by the country where the conduct occurs,<sup>108</sup> does not offer a solution to this problem for two reasons. First, because of exemptions in domestic law for export cartels and other anticompetitive conduct that does not cause domestic effects,<sup>109</sup> anticompetitive conduct that causes effects abroad may not be illegal in the country where it occurs.<sup>110</sup> Second, even if the anticompetitive conduct is illegal in the country where it occurs, the positive comity provisions in agreements between the United States

105. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1510-24 (1998) (comparing regulation that maximizes global welfare to regulation that maximizes national welfare); Fox & Ordovery, *supra* note 97, at 15 (“sales at supra-competitive prices that extract surplus from foreign consumers and transfer it into the profits of home firms are seen as a positive contribution”). Even if there are some domestic consumers, it will be in the interests of a country to permit anticompetitive conduct if the gains to domestic producers (at the expense of foreign consumers) are greater than the losses to domestic consumers. See Dodge, *supra* note 12, at 156-58.

106. See, e.g., Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a & 45(a) (3) (1994) (exempting export commerce that does not cause effects in the United States from the Sherman Act and FTC Act); Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-66 (1994) (exempting export cartels); Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-4016 (1994); Case 174/84, *Bulk Oil v. Sun Int'l Ltd.*, 1986 E.C.R. 559, 589 (holding that Article 85 of the Treaty of Rome does not apply to anticompetitive conduct that causes effects outside the European Union); see also Fox & Ordovery, *supra* note 97, at 17 (“Almost all nations either have export exemptions from their cartel laws, or their law expressly does not reach outbound trade.”).

107. See Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47, 55 (1993) (“The effects doctrine . . . provides a basis for prescriptive jurisdiction that is exactly congruent with the economic consequences of the conduct, and thus prevents externalization.”).

108. See, e.g., Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, 39 I.L.M. 1070 (1998) [hereinafter E.C.-U.S. Positive Comity Agreement]. The United States has similar provisions in its antitrust cooperation agreements with Brazil, Canada, Israel, and Japan.

109. See *supra* note 106 and accompanying text.

110. See The E.C.-U.S. Positive Comity Agreement, *supra* note 108, art. I(1)(b) (limiting the agreement to situations in which “[t]he activities in question are impermissible under the competition laws of the Party in the territory of which the activities are occurring”).

and other countries do not require the country in which the conduct occurs to take action.<sup>111</sup> Unless the country where the anticompetitive conduct occurs is also suffering harm, it will have little incentive to act.<sup>112</sup> Thus, although the U.S. Department of Justice continues to trumpet “positive comity” as a success, as of April 2000, it had made only one formal “positive comity” request.<sup>113</sup>

In short, prohibiting courts from exercising personal jurisdiction in antitrust cases, either based on contacts unrelated to the antitrust claim or based on effects, would certainly limit the extraterritorial application of antitrust law, but it would also result in the under-enforcement of antitrust law by disabling the only countries with an incentive to prevent antitrust violations from doing so. Only countries that are not parties to the Convention and supra-national enforcement agencies like the European Commission would be able to regulate extraterritorially on the basis of effects. A regime in which the European Commission could apply its competition law extraterritorially, and the United States could not, might at first glance seem appealing to members of the European Union, but one must recognize that the Commission itself has expressed the view that national court enforcement of E.C. competition law is important to make that law effective.<sup>114</sup> Furthermore, the United States would probably not accept limitations on its ability to regulate extraterritorially without corresponding limitations on the European Commission’s jurisdiction.

### C. *Enforcement of Antitrust Judgments with Effects as a Basis for Personal Jurisdiction*

A final option would be to provide for the enforcement of foreign antitrust judgments but permit the use of effects as a basis for personal jurisdiction in antitrust cases. In the current Draft Convention, this

111. See, e.g., *id.* art. III.

112. See James R. Atwood, *Positive Comity—Is It a Positive Step?*, 1992 FORDHAM CORP. L. INST. 79, 87 (Barry Hawk ed., 1993) (“It is not realistic to expect one government to prosecute its citizens solely for the benefit of another. It is no accident that this has not happened in the past, and it is unlikely to happen in the future.”).

113. See Statement of Joel I. Klein, Ass’t Attorney General, Antitrust Div., U.S. Dep’t of Justice, before the Comm. on the Judiciary U.S. House of Representatives (Apr. 12, 2000), at <http://www.usdoj.gov/atr/public/testimony/4536.htm> (“Our one formal positive comity experience to date—the referral to the European Commission of possible anticompetitive conduct by several European airlines with respect to computer reservation systems—has thus far been successful.”).

114. See *supra* notes 90-94 and accompanying text.

could be accomplished simply by striking Article 10(2), which would restore jurisdiction over an antitrust case at the place where the injury arose to the "white list"<sup>115</sup> and require enforcement of any resulting judgment.<sup>116</sup>

Like the option discussed in the preceding section, this option would eliminate the current U.S. advantage in extraterritorial antitrust enforcement. With general jurisdiction still on the "black list,"<sup>117</sup> the United States would be unable to take advantage of its size to aggregate contacts unrelated to the antitrust claim to establish personal jurisdiction over the defendant. The United States would be able to exercise personal jurisdiction and apply its law extraterritorially to foreign conduct that caused effects in the United States, but only on the same basis as other nations. The number of cases in which the United States could exercise personal jurisdiction over foreign defendants would still be greater than the number for any smaller country, but it would be proportionate to the size of the United States, and not, as currently, disproportionately large in relation to its size.<sup>118</sup>

Even more significant in reducing the current U.S. advantage would be the enforceability of antitrust judgments provided by such a convention. At the moment, the United States has relatively less need for foreign enforcement to make its antitrust law effective than smaller countries do, because of the greater availability of assets in the United States. With the reciprocal enforcement of antitrust judgments assured by a convention, the assets available for enforcing U.S. judgments would, of course, increase to include the defendant's assets in any country party to the convention. However, these same assets would be available to satisfy antitrust judgments from any other country that was party to the convention. A French judgment in a private suit for damages against a U.S. company for violating Article 82 would be enforceable against the U.S. company's assets in the United States.<sup>119</sup> In short, with respect to both jurisdiction and enforcement, the size

115. See Draft Convention, *supra* note 4, art. 10(1).

116. See *id.* art. 25(1).

117. See *id.* art. 18(2)(f).

118. The current disproportion results from the ability of U.S. courts to exercise general jurisdiction based on continuous and systematic business contacts. First, the United States appears to be alone in exercising such jurisdiction. Second, the larger the country, the more likely a foreign defendant is to have continuous and systematic business contacts with it.

119. Government enforcement of competition law is typically considered an administrative matter in civil-law countries. To level the playing field with respect to government enforcement of antitrust law, therefore, the Draft Convention should also be changed to apply to antitrust judgments obtained in administrative proceedings. This is what the European Commission

advantage of the United States would be stripped away. Other parties to the convention would enjoy the same ability to exercise personal jurisdiction and enforce their judgments in antitrust cases as the United States.

This would likely affect the dynamics of international antitrust enforcement in two basic ways. First, countries other than the United States would find that, for the first time, they could pursue policies of aggressive extraterritorial antitrust enforcement. Some of these countries might then decide to do so, just as the European Union—the only other antitrust enforcer that currently comes close to the size advantages of the United States—has begun to do. Second, the United States would find that it was increasingly on the receiving end of other countries' exercise of extraterritorial antitrust jurisdiction. This might lead to increased support in the United States for negotiating limitations on extraterritorial antitrust jurisdiction or for bringing antitrust within the jurisdiction of an international organization like the WTO, neither of which the United States has any incentive to do when it is virtually the only big fish in the extraterritorial antitrust pond.<sup>120</sup> In the United States, the European Commission's review of the Boeing-McDonnell Douglas merger has led to increased interest in multilateral approaches to antitrust enforcement.<sup>121</sup> More instances in which the United States was subject to other countries' extraterritorial jurisdiction would likely increase this trend.

## V. CONCLUSION

Antitrust is an area in which countries have typically refused to help each other's courts enforce the law, refusing to enforce foreign judgments and even attempting to thwart litigation through blocking statutes. The result has been not just a general limitation on the effectiveness of national antitrust law, but also an advantage for the United States in applying its antitrust law extraterritorially because of

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recommended with respect to the Brussels Convention in 1993. See Cooperation Notice, *supra* note 57, ¶ 44, 1993 O.J. (C 39), at 11.

120. See Dodge, *supra* note 12, at 166-67 (noting that countries that have often been subject to the extraterritorial application of antitrust law have pushed for a more comprehensive international antitrust agreement while the United States has generally resisted).

121. See, e.g., Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. 233 (2000); Eleanor M. Fox, *Antitrust Regulation Across National Borders: The United States of Boeing versus the European Union of Airbus*, 16(1) BROOKINGS REV. 30 (1998); Russell J. Weintraub, *Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27 (1999). But see A. Douglas Melamed, *International Antitrust in an Age of International Deregulation*, 6 GEO. MASON L. REV. 437 (1998).

its size, which makes it easier for the United States to obtain personal jurisdiction over foreign defendants and more likely that those defendants will have assets in the United States against which antitrust judgments may be enforced.

Including antitrust in the Hague Judgments Convention has the potential to make both U.S. and foreign antitrust law more effective. The attempt in the current Draft Convention to limit personal jurisdiction in antitrust cases is misguided. First, the personal jurisdiction limitations in the Draft Convention will likely have little impact on the status quo. U.S. courts will be able to substitute a basis for personal jurisdiction on the “white list” or in the “gray area” for the “black-listed” general jurisdiction.<sup>122</sup> Second, stringent limitations on personal jurisdiction in antitrust cases, although they would reduce the current U.S. advantage in extraterritorial antitrust enforcement, would also result in the under-enforcement of antitrust law. Countries must maintain their ability to regulate extraterritorially based on effects within the forum, because it is only the country that feels the effects of anticompetitive conduct that has an incentive to regulate it.<sup>123</sup>

The best alternative for all the parties to the Hague Judgments Convention negotiations is to provide for personal jurisdiction on the basis of effects and make the resulting judgments enforceable by striking Article 10(2) from the Draft Convention. Each country would then have an equal ability to exercise personal jurisdiction on the basis of effects within the forum<sup>124</sup> and an equal ability to look to the assets of the defendant in any signatory country for satisfaction of a judgment. The result would be a regime for the extraterritorial enforcement of antitrust law that is both effective and fair.

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122. See *supra* notes 72-85 and accompanying text.

123. See *supra* notes 104-113 and accompanying text.

124. General jurisdiction would remain on Article 18(2)'s “black list,” removing any advantage the United States might gain from its ability to aggregate a defendant's unrelated business contacts.