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INTERNATIONAL LITIGATION: THE U.S. JURISDICTION TO PRESCRIBE AND THE DOCTRINE OF FORUM NON CONVENIENS

ALLAN I. MENDELSOHN*

I. INTRODUCTION

SINCE THE 1945 decision by Judge Learned Hand in United States v. Aluminum Co. of America1 (colloquially known as the "Alcoa" case), it has become well-established law that the Sherman Antitrust Act—legislation that was adopted over 100 years ago—applies to and prohibits conduct in foreign countries if that conduct has an illegal "effect" in the United States.2 The very important issue today is the extent to which the Sherman Act and other U.S. legislation applies to conduct in foreign countries and the circumstances in which it can be applied. This issue is of substantial importance, especially because recent United States Supreme Court decisions do not clearly define the exact reach and limits of U.S. jurisdiction on the international scene. In the United States, this jurisdiction is now known as the "jurisdiction to prescribe"—in contrast to the jurisdiction that we all know as the jurisdiction to adjudicate.3

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1 United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416 (2d Cir. 1945).
3 See Restatement (Third) of Foreign Relations Law §§ 402–16.
In the *Alcoa* case, a group of foreign companies (including a company owned by Alcoa, but incorporated in Canada) agreed on quotas to restrict worldwide aluminum production and distribution, including in the United States.\(^4\) The U.S. government brought a criminal action against the companies, and the parties were found guilty of violating section 1 of the Sherman Act by conspiring to restrict importation of aluminum into the United States.\(^5\)

The number of important similar cases, both civil and criminal, that have been brought under the Sherman Act since the 1945 *Alcoa* decision would be difficult to count. Only the U.S. government brings criminal actions under the Sherman Act.\(^6\) Private litigants, on the other hand, bring civil actions and seek to collect treble damages if a violation is found.\(^7\) It is not at all unusual for the U.S. government to bring a criminal action, for the offending parties to either plead or be found guilty, and then for private parties to bring civil suits seeking treble damages. The cost of engaging in conduct that violates the U.S. antitrust laws is thus so substantial as to discourage all but the most dedicated (or elusive) from engaging in such conduct.

**II. POST-ALCOA ANTITRUST DECISIONS**

A discussion of post-*Alcoa* cases must include not only the interplay between the U.S. and U.K. governments in the quite famous *Laker*\(^8\) cases, but also the most recent antitrust cases that were brought, apparently jointly, by the United States and the European Commission ("EC") against British Airways ("BA"), Virgin Atlantic Airlines, Lufthansa, Korean Airways, and other international air carriers for fixing cargo and certain passenger rates on North Atlantic and Pacific travel. Though a late starter, the EC is now very enthusiastic, and in various ways is even more enthusiastic than the United States about its jurisdiction to prescribe, in which the EC applies its competition law, particularly Articles 81 and 82 of the Treaty of Rome, to conduct, wherever

4 Alcoa, 148 F.2d at 422–23.
5 Id. at 445.
8 See infra part II A.
it may occur, that has an anti-competitive effect within the European community states.\(^9\)

But before getting to these most recent cases, three very important antitrust cases must be considered. All three—two of which reached the Supreme Court—have been of critical significance in helping to determine the limits of U.S. jurisdiction to prescribe.

The first of these is the so-called *Laker*\(^{10}\) case, which involved Freddy Laker, an Englishman who was the first entrepreneur to establish a truly transatlantic low-cost air carrier.\(^{11}\) Though his airline closed after less than five years of operations, Laker left a trail of some of the most important litigation in the U.S. courts.\(^{12}\) The second case is the so-called insurance antitrust case that was litigated in the early 1990s and decided by the United States Supreme Court in 1993—*Hartford Fire Insurance Co. v. California*.\(^{13}\) The third case is the 2004 Supreme Court decision in *F. Hoffmann-La Roche Ltd. v. Empagran*.\(^{14}\) Each of these cases has been of unique importance in American and international law.

A. **THE LAKER LITIGATION**

Freddie Laker, later to be knighted by Queen Elizabeth on the recommendation of Margaret Thatcher and known as “Sir Freddie,” started his airline service to the United States in September 1977 and shut it down in February 1982.\(^{15}\) It was a successful “discount” service that reached a level of some forty weekly scheduled transatlantic flights.\(^{16}\) Some say that he was forced to shut down because he had overextended himself.\(^{17}\) Sir


\(^{12}\) See infra notes part II A.

\(^{13}\) 509 U.S. 764 (1993).


\(^{15}\) See ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 121–36 (3d ed. 1993) for a more extensive discussion of all the Laker litigation. The author uses Professor Lowenfeld’s casebook in teaching his Georgetown Law School course on International Conflicts of Law and wishes to express his appreciation to Professor Lowenfeld for the excellence and timeliness of his casebook.


\(^{17}\) LOWENFELD, supra note 15, at 122.
Freddie, however, claimed that his shutdown was because of an antitrust conspiracy by BA and others (including Pan Am, TWA, and other major International Air Transport Association carriers) that included predatory price-cutting and other illegal conduct. The case, which Sir Freddie originally filed in the U.S. federal district court in Washington, D.C. seeking treble damages under the Sherman Act, turned out to be a marathon of international litigation.

Very shortly after Laker’s Washington, D.C. filing, BA brought an action in London seeking a declaration of “non-liability” to Laker and an injunction preventing Laker from continuing his suit in Washington. After all, so BA argued, both airlines were British carriers, and there was simply no reason for a dispute between them to be litigated in a U.S. court. The London court agreed and ordered Laker to discontinue his suit in Washington. Laker then immediately appealed the London decision. Within days of that appeal, however, Judge Greene in the Washington, D.C. federal district court enjoined Pan Am, TWA, and the other defendant airlines from joining BA’s London suit and ordered a full hearing.

Meanwhile, the British Government issued an order preventing BA from complying with any discovery or other order of the federal court in Washington, D.C. and from providing any documents or other evidence to the plaintiffs there. On appeal from the lower court in London, the London appeals court issued a permanent injunction preventing Laker from pursuing the Washington, D.C. action. At the same time, however, the U.S. Court of Appeals affirmed Judge Greene. The appellate court concluded that the “prescriptive jurisdiction of the United States antitrust laws unequivocally holds that the antitrust laws

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20 Id. at 122.
21 Id.
22 Id.
23 Id. at 123.
25 LOWENFELD, supra note 15, at 123.
27 Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 956 (D.C. Cir. 1984). Judge Kenneth Starr dissented from the decision, stating that it would “be viewed by many of our friends and allies as a rather parochial American outlook.” Id. at 956, 958.
should be applied,” and that the case should move forward not- 
withstanding what was happening in London.  

At that point, no one was prepared to predict who would 
blink. But in a scholarly and exhaustively well-reasoned de-
cision, Sir Kenneth Diplock, of the U.K. House of Lords, con-
cluded that, even though both Laker and BA were British 
carriers, the U.S. courts nevertheless had jurisdiction over both 
the parties and the subject matter. Lord Diplock stated that it 
would be improper for an English court to enjoin Sir Freddie 
from pursuing a remedy for an alleged antitrust violation in the 
only court where such a remedy is available. And thus, one of 
the most fascinating and serious international legal confronta-
tions came to a close—but not without definitively: (1) affirming 
the applicability of the U.S. antitrust laws in a modern interna-
tional context, (2) affirming the willingness of U.S. courts to 
provide a remedy for a foreign plaintiff no different than would 
be provided to a U.S. plaintiff, and (3) possibly discouraging le-
gal practices that have come to be known as anti-suit injunctions 
or parallel litigation. 

B. Hartford Fire Insurance v. California: 
The Insurance AntiTrust Case

The second critical case concerning U.S. jurisdiction to pre-
scribe was a civil suit brought under the Sherman Act by the 
Attorneys General of nineteen states and by numerous private 
parties. The suit charged that several American and foreign 
insurance companies, and especially a number of underwriters 
at Lloyd’s of London, had unlawfully agreed to certain new rules 
that had the effect of making various forms of insurance and 
reinsurance unavailable in the U.S. market. These new rules, 
the plaintiffs argued, eliminated so-called “occurrence-based 
coverage” and allowed only “claims-made coverage.” This 
change became very important in the context of the asbestos 

28 Id. 
29 British Airways Bd. v. Laker Airways Ltd., [1985] A.C. 58, 59-60 (H.L.) (ap-
peal taken from Eng.) (U.K.). 
30 Id. at 80, 93-95. 
32 Id. at 769, 795. 
33 Id. at 771, 795, 810.
claims in the United States and also the recurring litigation involving underground chemical pollution.\(^{34}\)

Under occurrence-based coverage, it made no difference when the damage occurred, so long as it occurred when the policy was in effect, for example, when the asbestos was installed or when the underground chemical pollution originally occurred.\(^{35}\) In other words, insurers could almost never close their books on a policy even though the policy was written only for a limited period of time.\(^{36}\) Under claims-made coverage, if the policy was for a specific time period, a claim would have to be made within that period or be barred forever.\(^{37}\)

The American plaintiffs argued, and the Lloyd's of London defendants did not dispute, that the problems for the U.S. market all resulted from the fact that it was the London-based companies that had formulated the new policy and had agreed not to reinsure any U.S. insurance companies except for claims-made coverage.\(^{38}\) The London defendants argued, on the other hand, that what they had agreed to was perfectly legal in the United Kingdom and in full compliance with a regime of regulation that had been approved by the British Parliament.\(^{39}\) In short, the defendants argued, if the conduct was legal where conceived and adopted, it should not be subject to the extraterritorial reach of U.S. law.\(^{40}\)

After some six years of litigation, the United States Supreme Court ultimately held that so long as British law did not require the British underwriters to act as they did, there was no conflict between British law and U.S. antitrust law.\(^{41}\) Therefore, U.S. antitrust law could legally be applied to the conduct of the British underwriters.\(^{42}\) In other words, if the law of the foreign country where the action was taken did not require the action to be taken, then there was no true conflict of laws, and thus the U.S. antitrust laws could apply if the action—even if legal where


\(^{35}\) See Hartford, 509 U.S. at 771.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id. at 773–78.

\(^{39}\) Id. at 797–99.

\(^{40}\) Id.

\(^{41}\) Id. at 799.

\(^{42}\) See id. at 797–99.
taken—resulted in unlawful effects in the United States.\footnote{See id. at 799.} This is perhaps the furthest extension of the prescriptive jurisdiction of the United States approved by the United States Supreme Court.

C. \textit{F. Hoffmann-La Roche Ltd. v. Empagran}

\textit{F. Hoffman – La Roche} happens to be one of the most recent, as well as one of the most fascinating, antitrust cases raising the issue of the reach of the U.S. prescriptive jurisdiction. Beginning in 1989 and continuing for some ten years, a group of foreign drug manufacturers, led by F. Hoffmann-La Roche Ltd. of Switzerland and BASF of Germany, entered into worldwide market sharing and price-fixing arrangements for the sale of various vitamins used as nutritional supplements.\footnote{Press Release, U.S. Dep’t of Justice, F. Hoffmann-La Roche and BASP Agree to Pay Record Fines for Participating in International Vitamin Cartel (May 20, 1999), http://www.usdoj.gov/opa/pr/1999/May/196at.htm.} Although no U.S. company was involved in the conspiracy, the foreign companies all supplied U.S. companies and otherwise did business in the United States.\footnote{David Barboza, \textit{Six Big Vitamin Makers Are Said to Agree to Pay $1.1 Billion to Settle Pricing Lawsuit}, N.Y. Times, Sept. 8, 1999, at C2.}

In May 1999, the U.S. Department of Justice announced that F. Hoffmann-La Roche Ltd. and BASF had pleaded guilty to a worldwide criminal conspiracy and had agreed to pay fines of $500 million and $225 million, respectively.\footnote{Press Release, U.S. Dep’t of Justice, supra note 44.} Other foreign firms later pleaded guilty and paid substantial fines.\footnote{See, e.g., Barboza, supra note 45, at C2; Press Release, U.S. Dep’t of Justice, Canadian Vitamin Company Agrees to Plead Guilty for Role in International Vitamin Cartel (Sept. 29, 1999), http://justice.gov/atr/public/press_releases/1999/3726.htm.} Significantly, on this occasion the EC also later weighed in, fining F. Hoffmann-La Roche Ltd. and seven other companies $855 million for participating in the conspiracy.\footnote{James Kanter, \textit{A Crackdown on Cartels by European Regulators}, N.Y. Times, Dec. 26, 2005, at C3.} Shortly thereafter, private U.S. lawyers began to file civil suits seeking treble damages.\footnote{Brenda Sandburg, \textit{Culture Shock: Chinese Companies are Learning Some Painful Lessons About the American Way of Litigation}, Corp. Couns., Nov. 2006, at 63.} Most of these cases—which did not include any foreign plaintiffs—were settled with payments in excess of $1 billion.\footnote{Barboza, supra note 45, at C2.}
Court in 2004 was whether U.S. antitrust laws provided a remedy for foreign plaintiffs who were damaged by the unlawful conspiracy but whose purchases from the conspirators involved delivery of the vitamins outside the United States.\textsuperscript{51}

In a lengthy and well-reasoned decision, Supreme Court Justice Stephen Breyer concluded that the U.S. antitrust laws were not intended to apply to foreign conduct that caused damage to foreigners abroad.\textsuperscript{52} If foreign countries wished to protect their citizens and provide them a remedy against anti-competitive conduct, it was up to them to do so; it was not for the United States to do so in the absence of such a remedy in the foreign country.\textsuperscript{53} Justice Breyer also pointed out that several foreign countries had filed amicus briefs in the case, arguing that to apply the treble damage remedy of the Sherman Act would unjustifiably allow the citizens of these foreign countries "to bypass their own less generous remedial schemes."\textsuperscript{54} Justice Breyer then laid down what could be very important law for future prescriptive jurisdiction cases in the United States: "[I]f America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."\textsuperscript{55}

III. THE U.S. DOCTRINE OF FORUM NON CONVENIENS

Two other areas of U.S. prescriptive jurisdiction—securities law and maritime law—will be considered in this Article to show the similarities and differences in the ways that the United States applies its prescriptive jurisdiction in these areas. But before doing so, it would be useful to focus on another very important emerging area of U.S. law that in fact suggests an unusually interesting trend in the development of U.S. law and practice on the international scene. This is an area in which, as in \textit{F. Hoffmann-La Roche}, it seems that the United States is becoming increasingly reluctant to open its courts and to grant its generous remedies to foreign plaintiffs.

The public is well aware of the many international aviation crashes that have occurred in recent years and of the tragic

\textsuperscript{52} Id. at 164.
\textsuperscript{53} Id. at 165.
\textsuperscript{54} Id. at 167.
\textsuperscript{55} Id. at 167–69.
events that accompany these disasters. What we rarely, if ever, focus on, however, is the litigation that is brought after the tragedy by the victims’ survivors. In almost all of these cases, the plaintiffs bring their suits in the United States.\textsuperscript{56} For example, a case was recently brought in the U.S. federal district court in Miami, Florida by the survivors of the 160 victims of a crash that occurred in Venezuela in August 2005.\textsuperscript{57} All 160 victims were foreign citizens, the airline was of foreign (Colombian) registry that did not operate or do business in the United States, and the accident occurred on a trip between two foreign points.\textsuperscript{58} In short, there was almost no connection between any aspect of the accident and the United States (except for an individual who lived in Florida and who helped to arrange for the airline to provide the flights between the two foreign points).\textsuperscript{59}

The role played by the Florida resident was very minor. Even if it had been major, it would have been appropriate to—as was done—file a motion promptly in the Miami court for a transfer based on the doctrine of forum non conveniens. This is a common-law doctrine that has been developing in the United States for at least the past fifty years and that permits a court to transfer a case to another court when it concludes that certain public and private interest factors weigh in favor of such a transfer.\textsuperscript{60} The doctrine of forum non conveniens should be used in every aviation crash case when foreign victims or their survivors sue in U.S. courts.\textsuperscript{61}

There is almost no aviation crash today that does not involve victims of multiple nationalities, including U.S. nationals.\textsuperscript{62} Under forum non conveniens, the issue of liability—that is, who was responsible for the crash: the airline, the pilots, air traffic control, the airline manufacturer, etc.—would be determined

\textsuperscript{56} See \textit{e.g.}, Lueck v. Sundstrand Corp., 236 F.3d 1137 (9th Cir. 2001).


\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).


by the U.S. court. Once liability has been largely determined (or if it is admitted or stipulated to by the participating defendants in the case), then under forum non conveniens, every foreign plaintiff should be transferred to his or her domicile court for determination by that court—not by the U.S. court—of the damages he or she is entitled to receive.

It is no secret why foreign plaintiffs prefer to sue in the United States. There are basically two reasons. First, they can find excellent lawyers, highly experienced in aviation tort law, who will handle their cases on a contingency fee basis. This means that the lawyers will charge nothing to take and handle the case and will receive their fees only on the basis of a percentage of whatever they recover. Second, it is well known that recoveries in the United States, for a number of reasons, are much more generous than they are anywhere else in the world.

It seems, however, that for many of the same reasons Justice Breyer did not want to export U.S. law or engage in "legal imperialism" in F. Hoffmann-La Roche, U.S. courts handling aviation disaster cases today likewise believe that foreigners should be compensated under the laws of their domiciles rather than under the laws of the United States. If under the laws of their domiciles they receive only, say, twenty-five percent of what they would receive in the United States, or if they are required to pay a lawyer even to take their case because there is no contingency fee system in their domiciles, the United States, in the words of Justice Breyer, should not "try to impose [the U.S. system] in an act of legal imperialism."

In both the antitrust and the aviation contexts, foreign plaintiffs are trying to use the U.S. system and U.S. approaches to litigation. It is questionable whether the United States should permit this. It would be better if plaintiffs, as foreign citizens, work to prevail on their governments to pass laws and adopt approaches to litigation that are more similar to those of the United States or, in any event, that are more consistent with the

63 Recent Developments, supra note 61, at 46.
64 Id.
65 The Foreign Plaintiff, supra note 61, at 111.
66 Id.
69 F. Hoffmann-La Roche, 542 U.S. at 168.
interests of plaintiffs in those countries and in these types of cases.\textsuperscript{70}

The Florida case is the first case anywhere in the world to raise the issue whether under the Montreal Convention,\textsuperscript{71} adopted in 1999 largely to replace the 1929 Warsaw Convention,\textsuperscript{72} a U.S. court can apply the doctrine of forum non conveniens to transfer cases to the courts where the foreign plaintiffs live.\textsuperscript{73} Recently, the federal district court in Miami handed down its decision, holding that the 1999 Montreal Convention allows U.S. courts to apply the forum non conveniens doctrine and directing the foreign plaintiffs to their domicile courts in Martinique.\textsuperscript{74}

IV. SECURITIES LAW AND MARITIME LAW

No article on the prescriptive jurisdiction of the United States can be complete without at least touching on the subjects of securities law and maritime law. U.S. securities law is full of cases where U.S. courts have allowed the Securities and Exchange Act of 1934 to apply to transactions with a foreign twist.\textsuperscript{75} U.S. maritime law, perhaps in recognition of the long history of international maritime law, seems reluctant to extend the application

\textsuperscript{70} It was recently reported that French President Nicolas Sarkozy had publicly suggested that the EC consider adopting a form of class action lawsuit not unlike that commonly used by plaintiffs in the United States for antitrust and securities fraud litigation. See Caroline Byrne & Cary O'Reilly, \textit{Sarkozy, U.S. Lawyers Shift Class-Action Suits to Europe}, N.Y. SUN, July 25, 2007, available at http://www.nysun.com/article/59069.


\textsuperscript{74} In her decision, Judge Ungaro comprehensively examined all the debates that took place at the 1999 diplomatic conference in connection with the issue of forum non conveniens and concluded that the conference's legislative history established that the doctrine was available as a procedural tool for use by U.S. courts. \textit{Id.} She then ordered the parties to brief the issue whether, in the particular circumstances of the case, forum non conveniens should be granted and the 160 plaintiffs directed to their domicile courts in Martinique. \textit{Id.} Following the submission of briefs on this issue, Judge Ungaro, on November 9, 2007, issued an order dismissing the case on forum non conveniens grounds and directing the plaintiffs to the courts in Martinique. \textit{See id.} ¶ 15,764. Judge Ungaro's decision is now on appeal before the Eleventh Circuit U.S. Court of Appeals (Case No. 07-15828).

\textsuperscript{75} \textit{See, e.g.}, Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968).
of U.S. law for almost any purpose—except the limited (and exceedingly difficult to understand) areas that were involved in the Supreme Court's recent decision in *Spector v. Norwegian Cruise Line Ltd.*

Almost all the cases arising in securities law are litigated under section 10(b) of the 1934 Securities and Exchange Act. This section makes it unlawful for any person through "any means or instrumentality of interstate commerce... to use [in the purchase or sale of any security] any manipulative or deceptive device or contrivance in contravention of such rules and regulations [as the Securities and Exchange Commission ("SEC")] may prescribe... in the public interest or for the protection of investors." It is clear that this is a very broad statute that would seem to have almost universal application.

For the most part, and given the history of dozens of cases that have involved securities fraud, including the famous 1972 decision in *Leasco Data Processing Equipment Corp. v. Maxwell,* (in which Chief Judge Henry Friendly held against Robert Maxwell, a well-known British citizen), it may fairly be said that U.S. securities law will be applied to the following types of cases:

1. Cases in which the losses were incurred by U.S. residents, wherever the unlawful acts occurred;
2. Cases in which the losses were incurred by U.S. citizens abroad, but only if the unlawful acts occurred mostly in the United States; and
3. Cases in which the losses were incurred by foreigners outside the United States, but only if the unlawful acts occurred in the United States and were the direct cause of the harm.

Perhaps the best line of cases illustrating the problems in this area are those that arose out of the collapse in the late 1960s of the quite famous Bernard Cornfeld group of companies. These companies were known colloquially and alternatively as

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78 See generally Carlos L. Israels, *Banks and Federal Securities Regulation*, 85 BANK.
80 468 F.2d 1326, 1344 (2d Cir. 1972).
81 See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968).
84 See, e.g., *Bersch v. Drexel Firestone*, Inc., 519 F.2d 974 (2d Cir. 1975); *IIT v. Vencap Ltd.*, 519 F.2d 1001 (2d Cir. 1975).
the Investors Overseas Services ("IOS") Fund, the Cornfeld Fund, or the Fund of Funds.\textsuperscript{85} The companies had perfected the American style of selling mutual funds, but sold only to customers outside the United States and thus were not subject to SEC jurisdiction.\textsuperscript{86} As it would happen, some of the shares ended up in the hands of twenty-two U.S. citizens residing in the United States.\textsuperscript{87} When the stock collapsed, a class action suit was brought on behalf of the twenty-two citizens and on behalf of all purchasers, wherever located.\textsuperscript{88}

In \textit{Bersch v. Drexel Firestone, Inc.}, the court found in favor of the twenty-two U.S. citizens but dismissed the cases brought by the foreigners, because the unlawful acts did not occur mostly in the United States.\textsuperscript{89} In the companion case of \textit{IIT v. Vencap, Ltd.}, the court concluded that a foreign corporation was entitled to bring suit against another foreign corporation because planning of the operation and legal drafting of the major documents occurred in New York.\textsuperscript{90} Indeed, Judge Friendly went so far as to conclude, "[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."\textsuperscript{91}

It is hard to be certain about the extent to which foreigners, who buy their securities abroad, can sue in the United States. If one predicts on the basis of the \textit{F. Hoffmann-La Roche} decision, all foreigners may be excluded. But if securities law is treated differently than antitrust law, as at least one judge has recently concluded,\textsuperscript{92} then the mere fact that the fraudulent security devices were created in the United States may open U.S. courts to suits by foreigners who bought those securities abroad.\textsuperscript{93}

Now, this Article will address maritime law, which is relatively easy. Many years ago, the National Labor Relations Board ("NLRB") brought suit in order to allow U.S. unions to organize

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{85} LOWENFELD, \textit{supra} note 15, at 105.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} See \textit{Bersch}, 519 F.2d at 987, 991, 1001.
\item \textsuperscript{90} See \textit{IIT v. Vencap, Ltd.}, 519 F.2d 1001, 1018 (2d Cir. 1975); LOWENFELD, \textit{supra} note 15, at 107.
\item \textsuperscript{91} \textit{IIT}, 519 F.2d at 1017.
\item \textsuperscript{92} \textit{In re Royal Ahold N.V. Sec. & ERISA Litig.}, 351 F. Supp. 2d 334, 356 n.10 (2004).
\item \textsuperscript{93} See also the extended discussion of the securities cases in LOWENFELD, \textit{supra} note 15, at 76–111.
\end{itemize}
\end{footnotesize}
the all-foreign crews aboard shiplines that regularly plied the U.S. trades and that were owned in whole or large part by U.S. owners, but which flew foreign flags—then of Panama, Liberia and Honduras. These vessels came to be known as "flags of convenience." The owners "flagged-out," so it was called, primarily to avoid taxes and to be able to hire foreign crews free from any modern day labor law requirements.

The history that followed can be summed up quickly. The district court found for the NLRB, but the court of appeals reversed. When the case went to the Supreme Court in 1963, the Court decided that no matter the vessels’ U.S. ownership or trade routes to and from the U.S., the law of the flag governed in maritime law. The Court also held that the NLRB had no jurisdiction under the National Labor Relations Act to interfere in any way with the internal affairs of the vessels, including of course the labor relations of the foreign crews aboard the vessels.

In most other areas of maritime law, U.S. courts have been equally reluctant to extend the thrust of what otherwise might be looked upon as U.S. prescriptive jurisdiction. For example, in cases involving the 1920 Jones Act and its provision that "[a]ny seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law," U.S. courts have almost uniformly held that the Jones Act does not apply to foreign seamen on foreign flag vessels, no matter where the seaman signed on or where the injury occurred.

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98 McCulloch, 372 U.S. at 12.
99 Id. at 20–22.
100 Id.
But in the more recent *Spector v. Norwegian Cruise Lines Ltd.* decision, the United States Supreme Court seems to have concluded—though by a very divided court that handed down four separate opinions—that the law of the flag is not totally exclusive. At least some of the provisions in the recently enacted Americans with Disabilities Act ("ADA") should be applied to foreign flag cruise vessels. The plaintiffs in *Spector* alleged that these vessels denied them access to certain public places on board the ships and discriminated against them in the assignment of cabins by assessing surcharges. A plurality of the Court held that easily achievable remedies like eliminating surcharges were valid, while other remedies like eliminating structural raised barriers (that were presumptively allowed under the international Safety of Life at Sea or "SOLAS" Convention) were not. Three members of the Court dissented on grounds that, as there was no clear statement of coverage in the ADA, it could not be said that Congress intended the ADA to apply to foreign flag vessels. In any event, this case provides a very good idea of how controversial these issues can be. But at least one thing can be said for the *Spector* decision: it was a decision that not only protected U.S. citizens but also citizens who were disabled and who had contracted for their cruises and boarded the vessels in the United States.

V. VERY RECENT EVENTS

In concluding this Article, a brief mention should be made of two major cases that have occurred only within the past several months. Both happen directly to involve the EC.

A. THE AIRLINE PRICE FIXING CASES

In February 2006, EC inspectors raided the European offices of several major European and Asian airlines to search for evidence as to whether they were conspiring to fix transatlantic air freight rates. At the same time as these raids were occurring

103 545 U.S. 119 (2005) (plurality opinion).
104 *Id.*
105 *Id.* at 125.
106 *Id.* at 133, 134.
107 See *id.* at 138–39.
108 *Id.* at 149 (Scalia, J., dissenting).
in Europe, FBI agents in the United States were raiding the offices of KLM, Air France, and other airlines in Chicago and elsewhere, seeking similar evidence of a price fixing conspiracy. The EC announced that it "has reason to believe that the companies concerned may have violated (a European Union) treaty, which prohibits practices such as price fixing." The Justice Department made a similar announcement. On August 1, 2007, BA and Korean Air Lines pleaded guilty in the United States to charges that they had conspired to fix prices for passenger and cargo flights. Each agreed to pay a criminal fine of $300 million to the U.S. government. In addition, BA agreed to pay a $247 million fine to the U.K. Office of Fair Trading.

Investigators from the U.S. Justice Department said that there were three separate conspiracies—one overarching worldwide cargo rate conspiracy, a second conspiracy involving only BA and Virgin Atlantic on passenger fuel surcharges, and a third involving U.S.-Korean rates. Although Virgin Atlantic and Lufthansa were deeply involved in the illegal conduct, they were granted amnesty because they were the first to report the illegal activity and had cooperated in the investigation. A number of other international airlines are still under investigation. Meanwhile, on March 11, 2008, European investigators carried out another series of raids or "surprise inspections" on this occasion targeting Lufthansa, Air France-KLM, and perhaps others over suspicions that the carriers had participated in other cartel price fixing activities involving passenger flights between Europe and Japan.

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110 Izumi & Neely, supra note 109; Lawsky & Pelofsky, supra note 109.
111 Lawsky & Pelofsky, supra note 109.
112 Id.
114 Id.
116 Compart, supra note 115.
117 Id.
118 Id.
119 Steve McGrath and Carolyn Hanson, EU Investigates Possible Price Fixing by Airlines, WALL ST. J., Mar. 12, 2008, at A22; see also New Round of EC Collusion Raids
As was to be expected, private antitrust lawyers in the United States have in the meantime filed numerous treble damage civil suits against all the airlines suspected to have been involved in the criminal conspiracy. All of these suits are pending, though it was reported some months ago that Lufthansa had agreed to pay $85 million to settle the suits that were brought against it. At the same time, BA and Virgin have both stated they are not willing to pay any civil damages for the time being. It has since been reported, however, that in mid-February 2008, B.A. and Virgin agreed to pay an amount in excess of $200 million to settle the treble damage private anti trust suits that were brought against them in the U.S. federal district court for their illegal agreement to fix fuel surcharges.

B. The Microsoft Case

As recently as September 17, 2007, Europe's second highest court, known as the European Court of First Instance ("CFI"), affirmed a decision of the EC, holding that Microsoft had abused its dominant market position in Europe and fining Microsoft $689 million. In Microsoft Corp. v. Commission, Microsoft was found to have abused its dominant market position by engaging in the practice of what is generally referred to as "bundling," designed to lockout competitors. This past February 26, 2008, moreover, the EC imposed a fine on Microsoft of $1.3 billion, the "largest fine [the EC] has ever im-


121 Compart, supra note 115.

122 Id.

123 Adrian Schofield, BA, Virgin Agree to $200 US Million Payout in Class Action Suit, Aviation Daily, Feb. 19, 2008, at 2; Settlement on Airline Price Fixing, N.Y. Times, Feb. 16, 2008, at C04. The airlines agreed to pay some $59 million to U.S. passengers and almost $145 million for passengers in the U.K. 2 Airlines Settle Suit on Fuel Fees, INT'L HERALD TRIB., Feb. 16, 2008, at 11. Meanwhile, investigations are continuing in other countries, and it has yet to be determined whether the EC will be assessing its own fines in addition to the fines already assessed by other governmental authorities.


126 See id.
posed on a company.”127 This latest fine is reportedly to penalize Microsoft for failing to comply with the earlier EC orders to terminate its allegedly unfair competitive practices.128

Looking at these Microsoft decisions in the context of the EC’s investigatory efforts in the airline price fixing cases just discussed, there are three significant (if tentative) conclusions that scholars of this area of the law are already drawing from the decisions.

First, the decisions demonstrate an increasing dedication on the part of European regulators and reviewing courts to engage in much the same kind of extraterritorial assertions of regulatory jurisdiction as have been common in the United States since the 1945 Alcoa decision.129 While there have been other similar cases handled and decided by the EC in recent years—especially the General Electric and Honeywell merger case that the EC found to be illegal in July 2001130—none of them carry nearly the message as the more recent Microsoft and airline price fixing cases.

Second, because the U.S. Justice Department in 2001 had more or less approved the very same Microsoft conduct as Europe was now finding illegal under the EC’s broad concept of what is “abuse of a dominant [market] position,”131 it appears that Europe may now actually be one-upping the United States in its zeal to protect and enhance competition within the European Union, if not throughout the world. It is certainly interesting that, when U.S. Justice Department authorities were asked for their views on the earlier Microsoft decision, the Assistant Attorney General for Antitrust criticized it and suggested that “rather than helping consumers, [the decision] may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition.”132 This statement seems to imply that the EC’s objective in its antitrust enforce-

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128 Id.
129 LOWENFELD, supra note 15.
ment efforts is primarily to protect corporate competitors, while the objective of the U.S. Justice Department is to protect consumers.

Finally, the airline price fixing investigation and the Microsoft decision both suggest that Europe is growing increasingly active in the area of asserting its prescriptive jurisdiction. At the same time, the *F. Hoffmann-La Roche* decision and the increasing use by U.S. courts of the doctrine of forum non conveniens both seem to suggest that the United States is moving largely in the opposite direction. Perhaps the law on both sides of the ocean may one day meet at some midpoint.