Preserving Per Se


"[W]e do not have two versions of antitrust law, one for international transactions and one for domestic: to the extent the law applies at all, it applies in a nondiscriminatory fashion."\(^1\)

In 1995, the Department of Justice indicted Nippon Paper Industries of Japan for conspiring with other Japanese firms to fix prices on thermal fax paper sold in the United States, in violation of section 1 of the Sherman Anti-Trust Act.\(^2\) In 1997, the First Circuit upheld the indictment,\(^3\) becoming the first court to extend the jurisdictional reach of the Sherman Act to a criminal conspiracy formed solely among foreign firms.\(^4\)

Yet the First Circuit decision and its subsequent implementation by the district court did not create a jurisdictional threshold that, once crossed, sets the typical antitrust prosecution in motion. To the contrary, *Nippon Paper* established a new element of the substantive offense—proof of "substantial effects"—that applies solely in international prosecutions. Not only does the new doctrine produce different substantive requirements for domestic and foreigners, it also undermines a half-century of case law holding that, once a particular restraint of trade is deemed illegal "per se"—as it was in

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2. 15 U.S.C. § 1 (1994) ("Every contract... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").
4. See *Nippon Paper,* 109 F.3d at 4 (describing "a criminal prosecution for solely extraterritorial conduct" as "uncharted terrain"). The alleged conspiracy did not merely include foreign firms but was formed abroad, at a meeting in Japan.
this case—effects need not be proven to convict.

After providing a brief background of the "per se rule," this Case Note outlines how courts have undermined the rule through their reluctance to subject foreigners to its forceful presumptions. The Case Note argues that the rule should be applied consistently against all defendants. One way to do this is to separate jurisdiction from substance, thereby allowing courts to make the jurisdictional determination of effects using presumptions that both comport with the rule’s emphasis on efficiency and follow naturally from per se doctrine.

I

The First Circuit based its decision in *Nippon Paper* on *Hartford Fire Insurance v. California,* a civil antitrust action in which the Supreme Court held that the Sherman Act applied abroad, provided “foreign conduct ... meant to produce and did in fact produce some substantial effect in the United States.” The First Circuit extended the jurisdictional authority further, holding that *Hartford Fire* applied in the criminal context. At trial, the district court put the question to the jury; but rather than separate the jurisdictional inquiry from the merits, the court included the *jurisdictional* effects requirement in its charge on the elements of the *substantive* offense. In July of 1998, the trial ended with a hung jury.

*Nippon Paper* creates a conflict within criminal antitrust doctrine by requiring that effects be proven to find a substantive “per se” violation of the Sherman Act. The case was the first wholly foreign criminal antitrust action prosecuted under the per se rule, one of the two substantive frameworks used to decide antitrust cases. Under the other framework, the rule of reason, the circumstances justifying the restraint are balanced against the restraint’s anticompetitive effects. The per se rule, however, precludes consideration of either the effects of the restraint or the reasons for it. The per se rule is potent because negative effects are *presumed.* Moreover, it is

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6. Id. at 796. While one might argue that the jurisdictional language in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) must also be examined, the FTAIA does not apply to import commerce. See 15 U.S.C. § 6a (1994); see also *Hartford Fire,* 509 U.S. at 796 n.23 (declining to place weight on language in the FTAIA); *Nippon Paper,* 109 F.3d at 4 (same).
7. See *Nippon Paper,* 109 F.3d at 9 (holding that “the Sherman Act applies to wholly foreign [criminal] conduct which has an intended and substantial effect in the United States”).
8. See Record at 2127, 2138, 2199, *Nippon Paper* (Cr. No. 95-10388-NG). The judge listed a “number of different ways” to find substantial effects, including whether the volume of commerce or the share of the market was substantially affected by the conspiracy and whether competition in the entire market was substantially lessened by the conspiracy. See id. at 2199.
9. See, e.g., Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) (defining considerations under the rule of reason).
10. See infra text accompanying note 31.
efficient because that presumption "avoids the necessity for an incredibly complicated and prolonged economic investigation." As such, criminal antitrust prosecutions typically target only per se offenses.2

For more than fifty years, the Supreme Court has held that price-fixing agreements like that in Nippon Paper are per se illegal, relieving the government of its burden to prove their effects.3 The Court, however, also has indicated that using presumptions to find elements of the crime may be unconstitutional.4 Hence the significance of the Nippon Paper charge: By importing the jurisdictional effects requirement into the elements of the substantive offense, the court dispossessed the per se rule of its powerful presumptions.

II

Courts justified undermining the per se rule for foreigners based on comity principles.5 The notion that it is somehow unfair to subject foreigners to U.S. law—even absent a conflict of laws—makes courts reluctant to use the per se presumptions against them. Nippon Paper provides one of two bad ways to reach the same bad result.

One way courts have eroded the per se rule for foreigners has been to try to preserve it through nonuse. Recognizing that an effects requirement is inconsistent with the per se presumptions, courts before Nippon Paper refused to apply the rule to foreign criminal conspiracies. Instead, they explicitly adopted the rule of reason for offenses that, but for the foreign defendant, would have been prosecuted under the per se framework.6 The result is an asymmetric doctrine: Foreigners are tried under the far more forgiving rule of reason for the same offense that subjects U.S. parties to the per se rule.7

The First Circuit, by contrast, broke new ground in deciding that Nippon Paper would be prosecuted under the per se standard, not the rule of

12. See DEP'T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 2 (1995) [hereinafter GUIDELINES] ("Conduct that the Department prosecutes criminally is limited to traditional per se offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging . . . ").
14. See Francis v. Franklin, 471 U.S. 307, 313 (1985) (holding unconstitutional presumptions related to elements where these presumptions may be understood by the jury as mandatory, conclusive, or requiring rebuttal); Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (same).
15. Cf. Nippon Paper, 109 F.3d at 8 ("[C]omity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.").
16. See, e.g., Metro Indus. v. Sammi Corp., 82 F.3d 839, 843 (9th Cir. 1996) ("Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, per se analysis is not appropriate.").
reason.\textsuperscript{18} The court even recognized the per se presumptions, stating that, "‘conduct regarded as per se illegal’" has "‘unquestionably anticompetitive effects.’"\textsuperscript{19} The district court, however, precluded the use of those presumptions by including effects as an essential element, thereby requiring the government to prove the conspiracy’s impact. \textit{Nippon Paper}’s doctrine thus is not only asymmetric, but internally inconsistent. A per-se-plus-effects test for only foreigners raises the burden of proof for their conviction. Moreover, a per se rule that requires proof of effects is not a per se rule at all; it is a rule of reason and should be acknowledged as such.\textsuperscript{20}

Either way, the presence of a foreign defendant does not justify weakening the per se rule. Every indictment of a non-U.S. party follows an executive branch decision that "the importance of antitrust enforcement outweighs any relevant foreign policy concerns."\textsuperscript{21} Once that decision is made, courts should not undermine it by trying foreigners under weaker rules. The importance of enforcement particularly outweighs comity concerns in cases such as \textit{Nippon Paper}, where foreigners specifically conspire to harm American consumers.\textsuperscript{22} Indeed, the Sherman Act’s substantive requirement of intent ensures that those convicted knowingly conspire to restrain U.S. trade. \textit{Hartford Fire} also holds that comity is not a factor absent a conflict between domestic and foreign law.\textsuperscript{23} The First Circuit recognized that \textit{Hartford Fire} "stunted"\textsuperscript{24} the comity doctrine.

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\item \textsuperscript{18} See \textit{Nippon Paper}, 109 F.3d at 7 (holding that "the instant case falls within [the per se] rubric" and treating it as such).
\item \textsuperscript{19} Id. (quoting United States v. United States Gypsum Co., 438 U.S. 422, 440 (1978)).
\item \textsuperscript{20} The Department of Justice has stated that, although effects may be relevant ex ante to establish jurisdiction, on the merits "the standards themselves operate in a non-discriminatory fashion." Wood, \textit{supra} note 1, at *4. Yet a per se standard that adds a substantive element to the offense for foreign offenders only is anything but nondiscriminatory.
\item \textsuperscript{21} GUIDELINES, \textit{supra} note 12, at 15; cf idL ("The Department does not believe it is the role of the courts to second-guess the executive branch’s judgment as to the proper role of comity concerns under these circumstances.").
\item \textsuperscript{22} See 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 273c4, at 395 (1997) (opposing extra comity considerations in cases like \textit{Hartford Fire}, where “foreign insurers, selling a product in the United States, conspired... to exclude... American firms from the market—an alleged agreement whose only intended effect would be felt in the United States”). In \textit{Nippon Paper}, the government claimed the conspirators specifically fixed a price, in U.S. dollars ($20), for sales in the North American market.
\item \textsuperscript{23} See 509 U.S. 764, 798-99 (1993) (noting that the “only substantial question is whether there is in fact a true conflict between domestic and foreign law” and, finding no conflict, holding that “[w]e have no need... to address other considerations... on grounds of international comity” (internal citation and quotation marks omitted)). \textit{But cf. id.} at 812-13 (Scalia, J., dissenting) (arguing that courts must also consider whether Congress has asserted regulatory power over the foreign conduct); Timberlane Lumber v. Bank of America, 549 F.2d 597, 613-14 (9th Cir. 1976) (creating a test balancing effects with comity, allowing jurisdiction to be denied even upon finding effects to be present); \textit{1 SPENSER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 6:10, at 28-29 & nn.4-10} (3d ed. 1997) (noting \textit{Timberlane’s} acceptance before \textit{Hartford Fire}).
\item \textsuperscript{24} \textit{Nippon Paper}, 109 F.3d at 8 ("[Comity’s] growth in the antitrust sphere has been stunted by \textit{Hartford Fire}, in which the Court suggested that comity concerns... defeat... jurisdiction
Once courts make the decision to go forward, they should do so symmetrically. That means either abandoning the per se rule entirely or using it consistently. The First Circuit rightfully was unwilling to discard the per se standard; it produces enormous efficiencies, especially for practices like price-fixing, repeatedly found to harm competition. The district court could have preserved the rule by separating the jurisdictional effects question from the part of the inquiry to which the per se rule actually applies—the substantive offense of conspiracy to restrain trade. The two inquiries may, and should, be separated, especially since jurisdiction is a matter of law. Determining jurisdiction may require findings of fact, but courts should set the conditions on how those facts will be applied. Juries could then assist in the legal determination without importing substantial effects into the merits.

III

Continued use of the per se rule in international criminal antitrust demands that effects be removed from the elements of the offense. This would allow courts to use the per se presumptions against all defendants, rather than creating a new substantive doctrine for foreigners. Once the

only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act . . . “). 25. While courts recently have been willing to sacrifice the per se rule’s efficiencies and use the rule of reason to uphold typical per se agreements with significant procompetitive effects, see, e.g., Northwest Wholesale Stationers v. Pacific Stationery & Printing, 472 U.S. 284, 295 (1985); Broadcast Music v. Columbia Broad. Sys., 441 U.S. 1, 8-10 (1979), a similar sacrifice is not justified in the international context, see supra notes 21-24 and accompanying text.

26. As the court held in Gough v. Rossmoor Corp.: The jurisdictional issue under the Sherman Act is distinct from the substantive issue... The jurisdictional question... is whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress... The substantive issue, on the other hand, is whether defendants participated in anticompetitive conduct of the kind encompassed within the statutory terms “restraint of trade”... When the issue is whether jurisdiction exists, the focus is upon... whether the defendant’s conduct—unreasonably restrictive of competition or not—has a sufficient impact on interstate commerce.... 487 F.2d 373, 375-76 (9th Cir. 1973) (internal citations omitted).

27. See Zenith Radio Corp. v. Matsushita Elec. Indus., 494 F. Supp 1161, 1176 (E.D. Pa. 1980) (relying upon the “conventional understanding that subject matter jurisdictional determinations, even where factual findings are involved, are for the court”).

28. Areeda and Hovenkamp argue that, as a matter of law, jurisdiction should be decided by juries applying facts to judge-made presumptions, consistent with the way antitrust law generally functions. See 2 AREEDA & HOVENKAMP, supra note 22, § 321b-c (rev. ed. 1995). Another benefit of the per se rule is “business certainty.” Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332, 344 (1982). Creating standards under which juries would apply facts to decide the jurisdictional question would provide more guidance than leaving the determination to individual juries that, without any such frameworks, would likely reach different verdicts.

29. Removing effects as an element of the offense would allow the government to use presumptions to prove them. See Sandstrom v. Montana, 442 U.S. 510, 523 (1979). Not every fact in criminal antitrust cases must be proven beyond a reasonable doubt. For example, venue only
jurisdictional threshold is crossed, there should be only one antitrust law.

A two-part test separating jurisdiction from substance would retain the jurisdictional inquiry into effects for foreigners while ensuring that all offenders are treated equally on the merits. Establishing an inference or a presumption of effects, either from anticompetitive behavior or market share, seems one of the best ways to preserve the basic rationale underlying the per se rule. A presumption of effects in a jurisdictional inquiry distinct from the merits follows logically from per se doctrine because “there are certain agreements which . . . because of their pernicious effect on competition, . . . are conclusively presumed to be . . . illegal without elaborate inquiry as to the precise harm they have caused . . . .” In other words, activities classified as illegal per se are only those presumed to have a “pernicious effect on competition.”

The Court has dealt most extensively with the jurisdictional effects requirement in cases involving intrastate commerce. In those cases, the need be proved by a preponderance of the evidence because it is not a “true element[]” of the crime, but rather “merely a fact.” U.S. Court of Appeals for the Sixth Circuit, Pattern Instructions, in FEDERAL JUDICIAL CENTER, MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL PATTERN INSTRUCTIONS § 3.07 cmt., at 6-75 (1991) [hereinafter Pattern Instructions]; see EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.03, at 61 (Supp. 1998). None of the pattern jury instructions I have found include jurisdiction as an essential element of a section 1 offense. See, e.g., id. § 51A.15 (including only two elements that need be proved beyond a reasonable doubt: (1) that the conspiracy was formed and (2) that the defendant intended to join the agreement—an instruction cited by the Supreme Court as the kind “generally given in similar antitrust cases.” United States v. United States Gypsum Co., 438 U.S. 422, 463 (1978)).

30. I do not distinguish between inferences and presumptions. However, a permissive inference of effects may be more attractive, both because it is less forceful and because the Court has indicated that an essential element of the offense may be proved through such an inference. Cf. Francis v. Franklin, 471 U.S. 307, 314 (1985) (“A permissive inference suggests to the jury a possible conclusion to be drawn if it finds that the defendant proves certain predicate facts, but does not require the jury to draw that conclusion. . . . Such inferences do not necessarily implicate the concerns of Sandstrom [i.e., prohibiting use of presumptions for essential elements].”). Thus, even if effects remain an essential element, a permissive inference might still be applicable.

This issue clearly merits more consideration. Another option might be requiring that effects be proven by a preponderance of the evidence. The emphasis on the probability of effects seems more aligned with a more-likely-than-not test than with a reasonable doubt standard. See, e.g., Posters 'N' Things v. United States, 511 U.S. 513, 523 (1994) (“[A]ction undertaken with knowledge of its probable consequences . . . can be a sufficient predicate for a finding of criminal liability under the antitrust laws.”) (quoting Gypsum, 438 U.S. at 444)). Preponderance is already used in antitrust prosecutions for nonessential elements, such as venue. See Pattern Instructions, supra note 29.

31. Catalano, Inc. v. Target Sales, 446 U.S. 643, 646 n.9 (1980) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)); cf Summit Health v. Pinhas, 500 U.S. 322, 331 (1991) (“In cases involving horizontal agreements to fix prices, . . . we have based jurisdiction on a general conclusion that the . . . agreement 'almost surely' had a marketwide impact and therefore an effect on interstate commerce.”) (internal citation omitted)).

32. The substantial effects requirement for jurisdiction typically applies to both intrastate as well as foreign conspiracies, since neither are literally within interstate commerce. See, e.g., McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241 (1980) (holding that the law extends “beyond activities actually in interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially affect interstate commerce”).
Court indeed has relied on the per se presumptions to find effects. In *Burke v. Ford*, the Court held: “[T]erritorial divisions almost invariably reduce competition . . . . Thus, the [intrastate] market division inevitably affected interstate commerce.”33 From a presumption about the probable anticompetitive effects of a conspiracy outside interstate commerce came a conclusion that actual effects on interstate commerce were “inevitable.” Later construing that case, the Court held that the conspiracy “substantially affected interstate commerce because as a matter of practical economics that division could be expected to reduce significantly the magnitude of purchases made.”34 “Practical economics” is important because practical economics underlie the entire per se doctrine. The per se presumptions are based on the notion that those agreements considered illegal per se are such that practical economics dictates that pernicious effects follow. Just as the Court has held that practical economics renders unnecessary an inquiry into effects, it also has indicated that the same standard allows a presumption of effects when such effects must be proved.

This presumption may be too hard on some foreign firms. It does not make sense to haul into U.S. court and charge firms that have exported little or nothing to the United States with conspiracy to restrain U.S. trade. Aside from the fact that the Department of Justice will not waste its time prosecuting them, such cases could be filtered out if effects are only presumable provided the defendant has sufficient business in interstate commerce. The Court has used this method. In fact, under this type of inquiry, the Court has presumed substantial effects even more quickly than the “anticompetitive effects” that automatically follow a per se offense:

[P]etitioners [may] demonstrate a substantial effect on interstate commerce generated by respondents’ brokerage activity. Petitioners need not make the more particularized showing of an effect . . . . caused by the alleged conspiracy . . . . If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases.35

With substantial business in interstate commerce, effects are presumed if the conspiracy is proved. One court justified applying this standard because, “in a price-fixing case, . . . the government does not have ‘the burden of ascertaining from day to day . . . economic conditions.’”36

35. McLain, 444 U.S. at 242-43.
36. See United States v. Hayter Oil, 51 F.3d 1265, 1273 (6th Cir. 1995) (holding that the relevant inquiry is the general volume of commerce, not those transactions specifically targeted by
Consistent with the per se rule’s rejection of detailed case-by-case review, general market share is far more easily ascertainable than are the specific effects of a conspiracy. Such an inquiry also satisfies comity concerns by ensuring a nexus with U.S. commerce sufficient to presume that a conspiracy would have some effect. Indeed, the Nippon Paper concurrence presumed effects from general activity: “NPI sold $6.1 million of fax paper into the United States.... NPI’s price increases thus affected a not insignificant share of the United States market.” Notably, market participation has nothing to do with the substantive violation of section 1 of the Sherman Act. That substantial effects still may be found from such participation supports removing them from the elements of the offense.

According to the Department of Justice, “once you’re in the door... the same substantive rules apply to all cases.... [T]he framework for analysis will not shift just because a case has international elements.” Nippon Paper did shift that framework. A better way to advance international criminal antitrust enforcement is to decide the jurisdictional question by presuming substantial effects from the defendant’s general market participation. Thereafter, as in any other per se prosecution, the anti-competitive effects of the conspiracy are assumed for the purposes of the substantive inquiry. Such a two-part test not only respects comity principles by ensuring that the foreign defendant is significantly involved in U.S. commerce, but it precludes the need for detailed inquiry into the conspiracy’s specific effects—an inquiry that the per se doctrine explicitly rejects. By separating the jurisdictional question, the decision on the merits remains the same for all parties, while the jurisdictional standard is met through a presumptive framework that preserves doctrinal consistency by reasoning from the same principles that underlie the per se rule.

—Abbe Gluck

38. A more stringent application of the presumption would return to the standard enunciated in United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945), one of the earliest cases on the Sherman Act’s extraterritorial reach. Under Alcoa, if the Government proved intent, the burden shifted to the defendant to prove the expected effect did not occur. See id. at 444. Burden-shifting was appropriate because, once “the parties took the trouble specifically” to enter into the conspiracy, “there is reason to suppose that they expected that it would have some effect.” Id. This is just practical economics in another form. Notably, burden-shifting occurs in other areas of antitrust law. See, e.g., Hayter Oil, 51 F.3d at 1270-71 (shifting the burden to the defendant to prove the conspiracy was abandoned once the government proved it existed).