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EC and U.S. Extraterritoriality: Activism and Cooperation

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Joseph P. Griffin

Abstract

Recent pronouncements of the courts and policymakers of the European Community and the United States underscore converging trends and standards in antitrust enforcement. Economic regulators on both sides of the Atlantic seek more vigorous enforcement abroad in order to make their antitrust laws meaningful and effective at home. Yet this movement toward extraterritorial enforcement often leads to conflict among trading partners and uncertainty for transnational commerce. Renewed efforts are needed to develop a uniform approach to antitrust law that reflects the interests and respects the policies of both the EC and the United States. Otherwise, regulators may find themselves undercutting the competitiveness of the very economies they seek to promote.

EC AND U.S. EXTRATERRITORIALITY: ACTIVISM AND COOPERATION*

*Joseph P. Griffin***

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INTRODUCTION

After a period of relative calm, the debate over the circumstances in which one nation may assert jurisdiction over activity by persons outside its territory that has anticompetitive consequences inside its territory — extraterritoriality — has been rein-

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vigorated. New top antitrust enforcers have been named in the European Community ("EC") and the United States, and the U.S. Supreme Court has issued its first pronouncement on the issue in 30 years. This paper will analyze recent developments in extraterritoriality jurisprudence and offer advice on how to cope with this increasingly complex area.

I. DEVELOPMENTS IN THE EC

A. Articles 85(1) and 86

Articles 85(1)¹ and 86² of the Treaty Establishing the European Economic Community prohibit certain conduct that has an anticompetitive effect "within the Common Market" and may affect trade between Member States. Unlike the U.S. antitrust laws, these provisions do not contain language asserting jurisdiction over commerce "with foreign nations."³

The requirement in articles 85(1) and 86 that the challenged conduct "may affect trade between Member States" has been satisfied where the effect is direct or indirect, actual or potential.⁴ Such an effect, however, must be "appreciable," which appears to mean more than "de minimis" or "perceptible," but

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85(1), 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 11, 47-48 [hereinafter Treaty]. Article 85(1) provides in relevant part that:

The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition *within the Common Market*. . . .

Id. (emphasis added).

2. Treaty, *supra* note 1, art. 86, 298 U.N.T.S. at 48-49. Article 86 provides in relevant part that:

Any abuse by one or more enterprises of a dominant position *within the Common Market* or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States.

Id. (emphasis added).

3. 15 U.S.C. §§ 1-2 (1988 & Supp. IV 1992). Sections 1 and 2 of the Sherman Antitrust Act prohibit practices in interstate commerce and in trade or commerce "with foreign nations." *Id.* Section 5 of the Federal Trade Commission Act, which deals with unfair methods of competition, employs the phrase "in commerce." 15 U.S.C. § 45(a)(1) (1988 & Supp. IV 1992).

4. *Société Technique Minière v. Maschinenbau Ulm GmbH*, Case 56/65, [1966] E.C.R. 235, 249, [1966] 5 C.M.L.R. 357, 375; *Coöperatieve Stremsel-en Kleurselfabriek v. Commission*, Case 61/80, [1981] E.C.R. 851, 867, [1982] 1 C.M.L.R. 240, 257.

less than "substantial."⁵

The European Court of Justice's most recent pronouncement on extraterritoriality is its 1988 *Re Wood Pulp Cartel: A. Ahlström Osakeyhtiö v. EC Commission*⁶ ("Wood Pulp") decision. In that case, non-EC producers of wood pulp were sued by the Commission of the European Communities (the "Commission") for various restrictive practices that were alleged to have restrained trade within the Common Market.⁷ A number of the producers had no subsidiaries or branches in the Common Market and one, Pulp, Paper and Paperboard Export Association of the United States, formerly Kraft Export Association ("KEA"), was a U.S. Webb-Pomerene export association.⁸ These defendants argued that there was no jurisdiction over them because they were located outside the Common Market.⁹ They also argued that the application of the EC's competition rules to them would be a breach of the public international law duty of non-interference.¹⁰ KEA maintained that a Webb-Pomerene association reflected the U.S. Government's policy of promoting exports and exempting exporters from the U.S. antitrust laws.¹¹ The Court of Justice disagreed. The Court held that under Community law, jurisdiction exists over the firms outside the Community, if they "implement" a price-fixing agreement reached outside the Community by selling to purchasers within the Community.¹² The Court also rejected the defendant's "non-interference" argument, because the Webb-Pomerene Act merely exempts export cartels from U.S. antitrust laws; it does not require anticompetitive activity within the Common Market.¹³ Moreover, U.S. anti-

5. *Völk v. Vervaecke*, Case 5/69, [1969] E.C.R. 295, 302, [1969] 8 C.M.L.R. 273, 282; EC Commission, Notice on Agreements of Minor Importance, O.J. C 231/2 (1986); see 2 BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE Ch. 7, at D2 (2d ed. 1992).

6. *Re Wood Pulp Cartel: A. Ahlström Oy v. EC Commission*, Joined Cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901 [hereinafter *Wood Pulp*].

7. *Id.*, [1988] 4 C.M.L.R. at 938.

8. *Id.* at 5241, [1988] 4 C.M.L.R. at 940. A Webb-Pomerene association is an association formed for the sole purpose of export trade and may benefit from antitrust exemptions. 15 U.S.C. §§ 61-65 (1988).

9. *Id.*, [1988] 4 C.M.L.R. at 939.

10. *Id.*, [1988] 4 C.M.L.R. at 940.

11. *Id.*, [1988] 4 C.M.L.R. at 940.

12. *Id.* at 5243, [1988] 4 C.M.L.R. at 941.

13. *Id.* at 5244, [1988] 4 C.M.L.R. at 941-42.

trust authorities had been informed of the proceedings at an early stage, and did not object to them.¹⁴ According to the Court, the "decisive factor" was the place where the challenged conduct was implemented, not the place where its effect was felt:

The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.

Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.¹⁵

EC officials have not hesitated to attack conduct outside the EC that restricts imports into the Common Market if there is a potential, appreciable effect on trade between Member States.¹⁶ Since *Wood Pulp*, the Commission has used the "implemented within the EC" concept to assert jurisdiction over a Norwegian producer of PVC that allegedly participated in a price fixing cartel.¹⁷ In another decision challenging an agreement to fix prices and set quotas by suppliers of low-density polyethylene, the Commission again utilized the Court's "implementation" approach to assert jurisdiction over cartel members located outside the Common Market. One member of the cartel, however, was a Spanish company, whose activities took place in Spain before Spain had become a member of the EC. The Commission asserted jurisdiction over that company "[t]o the extent that its involvement in the cartel affected competition within the Community."¹⁸

On the other hand, restraints related to EC exports to non-EC countries are unlikely to be challenged unless it is probable that the goods or services involved will be re-exported to the EC and subsequently will be involved in trade between Member

14. *Id.*

15. *Id.* at 5243; [1988] 4 C.M.L.R. at 941.

16. *See, e.g.*, Aluminum Imports from E. Europe, O.J. L 92/1, 47-48 (1985), [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,658; EMI Records v. CBS United Kingdom Ltd., Case 51/75, [1976] E.C.R. 811, 848, [1976] 2 C.M.L.R. 235, 266-67.

17. Re the PVC Cartel: The Community v. Atochem SA, O.J. L 74/1, 14 (1989), [1990] 4 C.M.L.R. 345, 370.

18. Re the LdPE Cartel: The Community v. Atochem SA, O.J. L 74/21, 35 (1989), [1990] 4 C.M.L.R. 382, 409-10.

States.¹⁹

B. *International Comity*

The EC adheres to the 1986 OECD Recommendation that Member States exercise moderation and restraint in the extraterritorial application of their competition laws, by recognizing "the need . . . to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of cooperation in the field of restrictive business practices."²⁰ However, when the EC asserted jurisdiction over a cartel of EC and non-EC aluminum producers who allegedly agreed to regulate imports into the EC, the Commission held that comity did not militate in favor of declining the exercise of jurisdiction because the application of Community law:

does not require any of the undertakings concerned to act in any way contrary to the requirements of their domestic laws, nor would the application of Community law adversely affect important interests of a non-member State. Such an interest would have to be so important as to prevail over the fundamental interest of the Community that competition within the common market is not distorted. . . .²¹

The Court of Justice has said little about international comity. In the *IBM v. Commission*²² case ("*IBM*"), the then-Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice, reportedly requested that the Commission not impose certain remedial measures on IBM because they would "constitute a 'quasi-confiscatorial' action that would be highly unfavorable to the U.S. trade position."²³ In its appeal of the Commission's decision, IBM argued that the Commission

19. *Bulk Oil v. Sun Int'l Ltd.*, Case 174/84, [1986] E.C.R. 559, 589, [1986] 2 C.M.L.R. 732, 762; *Distillers Co.*, O.J. L 50/16 (1978); [Jan. 1976-Feb. 1978 Transfer Binder — New Developments] Common Mkt. Rep. (CCH) ¶ 10,011.

20. Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. No. C (86) 44 (Final) (May 21, 1986) [hereinafter OECD Recommendation], reprinted in Joseph P. Griffin, *U.S. International Antitrust Enforcement: A Practical Guide to the Justice Department Guidelines*, 53 C.P.S. (BNA), at B-801 (1989), at Worksheet 8, and 25 I.L.M. 1629 (1986).

21. *Aluminum Imports from E. Europe*, O.J. L 92/1, 48 (1985), [Jan. 1982-June 1985 Transfer Binder — New Developments] Common Mkt. Rep. (CCH) ¶ 10,658.

22. *IBM v. Commission*, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635.

23. William M. Carley, *Critics See Impropriety in European Lobbying by Antitrust Chief*, WALL ST. J., Mar. 31, 1982, at A1.

erred when it failed to consider international comity before it initiated proceedings or rendered a decision.²⁴ The Court rejected that argument and indicated that it was unnecessary to consider international comity before a decision was rendered and that the Commission had not rendered a decision within the meaning of Article 173.²⁵

It appears that the Commission believes that international comity is a matter of prosecutorial discretion, including consultation within the College of Commissioners,²⁶ and not a legal prerequisite to the exercise of jurisdiction. The Court's decision in *Wood Pulp* devotes the following single sentence to international comity:

As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling into question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument already has been rejected.²⁷

The above quoted cryptic sentence in *Wood Pulp* may indicate that the Court agrees that international comity is an issue within the Commission's discretion, at least in facts similar to *Wood Pulp*, i.e., the challenged conduct was not required by foreign law²⁸ and the remedy does not require the entities to act in any

24. *IBM*, [1981] E.C.R. at 2650 ¶4, [1981] 3 C.M.L.R. at 658.

25. *Id.* at 2655, [1981] 3 C.M.L.R. at 662.

26. THE RT. HON. SIR LEON BRITTON, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET 16-17 (1991).

[T]he Commission as a collegiate body does not have to consult another department or branch of government to ascertain the likely impact of a proposed course of action on the Community's external relations. A Commission decision on competition policy reflects the totality of the Commission's views and policies. My colleague in charge of external relations sits near me in Commission when decisions are taken and his department talks to mine.

Id.

27. *Wood Pulp*, Joined Cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, 5244, [1988] 4 C.M.L.R. 901, 942.

28. Franco-Japanese Ballbearings Agreement, Comm. No. 29, 1974, O.J. L 343/19, 23 (1974), [1975] 1 C.M.L.R. D8, D14-D15. In the *Franco-Japanese Ballbearings* decision, the Commission similarly held that measures resulting from agreements or concerted practices between Japanese firms that were merely authorized by the Japanese authorities under Japanese law (as opposed to measures that were imposed on Japanese firms by the Japanese authorities or measures taken in pursuance of trade agreements between the Community and Japan) could be subject to Article 85 because the firms

way contrary to the requirements of their local laws.²⁹ Additionally, in 1991, Sir Leon Brittan, then the Commissioner in charge of Competitive Policy, stated that the EC Commission "does consider itself obliged to have regard to comity when exercising its jurisdiction in competition cases with a foreign element."³⁰

C. Regulation of Mergers and Joint Ventures

On December 21, 1989, the EC Council of Ministers unanimously adopted the Commission's proposal for a Regulation on "Control of Concentrations Between Undertakings" ("Merger Regulation").³¹ With the passage of the Merger Regulation, after sixteen years of debate, the Member States granted the Commission broad new powers designed to make the Commission, in most cases, the sole authority within the EC to review and approve large mergers, acquisitions and joint ventures, including those involving foreign companies.³² The Merger Regulation establishes a clear distinction between transactions of "Community dimension," for which the Commission has responsibility, and smaller combinations, over which Member State authorities may apply national legislation.³³

The Merger Regulation took effect on September 21, 1990, and applies to all industries except those governed by merger

would be free to enter into the agreements or engage in the concerted practices. *Id.* COMMISSION THIRD REPORT ON COMPETITION POLICY ¶ 20 (1974).

29. Council Regulation No. 4056/86, O.J. L 378/4, 8-9 (1986), 2 Common Mkt. Rep. (CCH) ¶ 2821K. Article 9 of Regulation No. 4056/86 on Maritime Transport provides that if the application of the Regulation to restrictive practices conflicts with "provisions laid down by law, regulation or administrative action" of third countries, the Commission "shall, at the earliest opportunity," enter into consultations and negotiations aimed at reconciling the conflicting interests. *Id.*; see Helmut W.R. Kreis, *EC Competition Law and Maritime Transport*, 37 ANTITRUST BULL. 481 (1992).

30. BRITTAN, *supra* note 26, at 16.

31. Council Regulation No. 4064/89, O.J. L 395/1 (1989), amended by O.J. L 257/15 (1990). See Barry E. Hawk, *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, 59 ANTITRUST L.J. 195 (1990); Symposium, *EEC Merger Regulation Procedure: A Practical View*, 1990 FORDHAM CORP. L. INST. 353 (Barry E. Hawk ed., 1991); Frank L. Fine, *The Substantive Test of the EEC Merger Control Regulation: The First Two Years*, 61 ANTITRUST L.J. 699 (1993); H. Colin Overbury, *Politics or Policy? The Demystification of EC Merger Control*, in 1992 FORDHAM CORP. L. INST. 557 (Barry E. Hawk ed., 1993); DAMIEN NEVEN ET AL., *MERGER IN DAYLIGHT: THE ECONOMICS AND POLITICS OF EUROPEAN MERGER CONTROL* (1993).

32. Council Regulation No. 4064/89, O.J. L 395/1 (1989), amended by O.J. L 257/13 (1990).

33. *Id.*, art. 21, O.J. L 395/1, at 11 (1989).

provisions of the Coal and Steel Treaty.³⁴ Under the Regulation, the Commission has the sole power to review business combinations — including complete or partial mergers, takeovers, certain joint ventures and the purchase of minority controlling interests — when the financial thresholds of a “Community dimension” are met.³⁵ The financial thresholds are calculated according to the value of products sold and services provided in the EC;³⁶ physical presence in the EC is not required. Thus, the Regulation also reaches transactions involving companies with no facilities within the Common Market, as long as their worldwide and EC sales meet the required financial thresholds.

Any transaction with a Community dimension must be reported promptly to the Commission.³⁷ After notifying the Commission, the transaction is effectively suspended for three weeks following notification, even where it has no adverse competition implications.³⁸ The suspension can be continued by the Commission thereafter to ensure the effectiveness of a potential decision prohibiting the concentration. If an adverse decision is made, the Commission can include an order for divestiture in an appropriate case.³⁹

The Merger Regulation is silent on the issue of whether the Commission has extraterritorial enforcement jurisdiction. For example, would the Commission attempt to require a non-EC entity to divest itself of a company it had acquired outside the EC because of perceived anticompetitive effects within the EC? Some Commission officials appear to have little doubt that it would. Relying on *Wood Pulp* they have contended that:

If two extra-Community undertakings merge, one might argue that inevitably their concentration will be ‘implemented’ in the EC with respect to consumers located therein. One might equally argue that it has direct, substantial and

34. Treaty Establishing the European Coal and Steel Community, Art. 65 and 66 (Apr. 18, 1951), 261 U.N.T.S. 140, 194-204 [hereinafter ECSC Treaty]. For concentrations in the EC steel industry which fell both under the EC Regulation and the ECSC, see *Usinor Sacilor/ASD*, O.J. C 193/34 (1991), and *Péchiney/Usinor-Sacilor*, O.J. C 175/18 (1991).

35. Council Regulation No. 4064/89, art. 3, O.J. L 395/1, at 4 (1989), amended by O.J. L 257/13 (1990).

36. *Id.* art. 1, O.J. L 395/1, at 3 (1989).

37. *Id.* art. 4, O.J. L 395/1, at 4 (1989).

38. *Id.* art. 7, O.J. L 395/1, at 6 (1989).

39. *Id.* art. 7, O.J. L 395/1, at 6 (1989).

reasonably foreseeable effects in the Community. For the purpose of merger control, therefore, the difference between 'implemented' and 'effect' is largely a question of semantics and is unimportant.

The Regulation therefore gives the Commission jurisdiction to prohibit concentrations in situations in which they are concluded in third countries but create or strengthen a dominant position within the Community. In *Tetra Pak/Alfa-Laval* (M37) for example, the Commission opened proceedings but subsequently approved the takeover by a Swiss company of a Swedish undertaking. There is no doubt that if a dominant position was found in the Community the Commission would have prohibited the concentration.⁴⁰

In proceedings under the Merger Regulation, the Commission may attempt to take international comity into account by limiting remedies to EC territory.⁴¹

D. *Recent Enforcement Policy*

In one of his first speeches as the Commissioner in charge of competition policy, Karel Van Miert told a London audience in May 1993 that:

Companies and especially multinational ones increasingly operate at world level and there needs to be an adequate Community response. Its thrust is twofold. It needs to ensure both:

- (i) that anticompetitive practices outside the EC do not destroy companies and competitiveness inside the EC or exploit Community consumers, and
- (ii) that anti-competitive practices in third markets do not prevent EC companies having access to these markets (for example, closed distribution systems) and thwart trade liberalisation.

The Commission has a range of instruments ranging from the unilateral application of its own rules, through bilateral and regional arrangements, to multilateral arrangements. The Commission will not hesitate to use its powers where necessary to preserve undistorted competition inside the EC and market access outside where genuine cases are brought to its attention. It goes without saying that a close coordination be-

40. CHRISTOPHER JONES & ENRIQUE GONZALEZ-DIAZ, *THE EEC MERGER REGULATION* 90 (1992).

41. *Id.*; JOHN COOK & CHRIS KERSE, *EEC MERGER CONTROL* 9 (1991).

tween trade and competition policies is necessary to ensure success.⁴²

Mr. Van Miert's statement indicates that the Commission will continue, as it has since the 1960's, to espouse a broad notion of jurisdiction based on effects⁴³ despite the fact that the Court of Justice declined in *Wood Pulp* and earlier decisions to endorse the "effects" approach to jurisdiction.⁴⁴

II. DEVELOPMENTS IN THE U.S.

A. Sections 1 & 2 of the Sherman Act

In the 1945 *United States v. Aluminum Co. of America*⁴⁵ ("Alcoa") decision, the U.S. Court of Appeals for the Second Circuit, acting for the Supreme Court,⁴⁶ announced an "effects" test of

42. Karel Van Miert, *Analysis and Guidelines on Competitive Policy*, Address Before the Royal Institute of Int'l Affairs, London 5 (May 11, 1993) (on file with author).

43. See, e.g., COMMISSION ELEVENTH REPORT ON COMPETITION POLICY ¶ 35 (1981). The Commission, citing its 1964 *Grosfillex*, [1964] 3 C.M.L.R. 237, decision, stated in its Eleventh Report on Competition Policy that "[t]he Commission was one of the first antitrust authorities to have applied the internal effect theory to foreign companies." *Id.* The Commission was even more explicit in *Aniline Dyes Cartel*, O.J. L 195/11 (1969), [1969] 8 C.M.L.R. D23, stating that "[t]his decision is applicable to all the undertakings which took part in the concerted practices, whether they are established within or outside the Common Market. . . . The competition rules of the Treaty are, consequently, applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85(1)." In re *Aniline Dyes Cartel*, O.J. L 195/11 (1969), [1969] 8 C.M.L.R. D23, D33; see COMMISSION FOURTEENTH REPORT ON COMPETITION POLICY ¶ 60 (1984) (Commission's decisions in *Eastern Aluminum* and *Wood Pulp* "reflect [] the policy, which is essential in view of the realities of modern world trade, that all undertakings doing business within the EEC must respect the rules of competition in the same way, regardless of their place of establishment ('effects doctrine')"); *Eastern Aluminum*, O.J. L 92/1 (1984), [1987] 3 C.M.L.R. 813, *Wood Pulp*, O.J. L 85/1 (1984), [1985] 3 C.M.L.R. 474; see also *ICI v. Commission* [hereinafter *Dyestuffs*], Case 48/69, [1972] E.C.R. 619, 629, [1972] 11 C.M.L.R. 557 (Commission argues that jurisdiction of the Community is justified by reason of economic effects that claimant's conduct produced in the Common Market).

44. See, e.g., *Dyestuffs*, [1972] E.C.R. at 693-96, [1972] 11 C.M.L.R. at 603-08 (declining to adopt formulation of effects doctrine suggested by Advocate General Mayras). Mr. Mayras posited three conditions for applying the effects doctrine: (1) an agreement or practice must create a direct and immediate restriction of competition in the Community; (2) the effect must be reasonably foreseeable; and (3) the effect must be substantial. *Id.* at 693-96, [1972] 11 C.M.L.R. at 603-08.

45. 148 F.2d 416 (2d Cir. 1945).

46. See *JAMES R. ATWOOD & KINGMAN BREWSTER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD* § 6.05, at 147 (2d ed. 1981) (stating that Supreme Court could not achieve quorum because too many Justices were disqualified).

jurisdiction under the U.S. antitrust laws.⁴⁷ According to Judge Learned Hand, the United States has jurisdiction over wholly foreign conduct, as well as other conduct, if that conduct has an effect within the United States that was intended.⁴⁸ In its 1962 decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,⁴⁹ the U.S. Supreme Court upheld U.S. jurisdiction over a U.S. company's Canadian subsidiary, which had restrained the export sales of another American company. The Court held that "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."⁵⁰

In its 1976 *Timberlane Lumber Co. v. Bank of America*⁵¹ decision, the U.S. Court of Appeals for the Ninth Circuit held that the "effects" test of jurisdiction enunciated in *Alcoa* is "by itself incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country."⁵² The Ninth Circuit adopted a "jurisdictional rule of reason"⁵³ that involves evaluating and balancing numerous relevant factors.⁵⁴ The Third, Fifth, and Tenth Circuits accepted the *Timberlane* mode of analysis,⁵⁵ while the D.C. and Seventh Circuits questioned its

47. *Alcoa*, 148 F.2d at 444.

48. *Id.* at 443-44.

49. 370 U.S. 690 (1962).

50. *Id.* at 704.

51. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) [hereinafter *Timberlane I*], *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) [hereinafter *Timberlane II*], *cert. denied*, 472 U.S. 1032 (1985).

52. *Timberlane I*, 549 F.2d at 611-12.

53. See ANTITRUST AND AMERICAN BUSINESS ABROAD, *supra* note 46, at 446. Kingman Brewster is generally credited with coining the phrase "jurisdictional rule of reason." *Id.*

54. *Timberlane I*, 549 F.2d at 614. The *Timberlane I* factors are:

[T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id.

55. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884-85 (5th Cir.

validity.⁵⁶ In 1987, the *Restatement (Third) of Foreign Relations Law of the United States* ("Restatement (Third)") adopted a *Timberlane*-like approach.⁵⁷

The 1982 Foreign Trade Antitrust Improvements Act ("FTAIA") amended the Sherman⁵⁸ and the Federal Trade Commission⁵⁹ Acts to provide that challenged conduct in export commerce or wholly foreign conduct must have a "direct, substantial, and reasonably foreseeable" effect⁶⁰ on United States domestic commerce or on the trade of a person engaged in export commerce. Congress took a neutral stance toward the

1982), *cert. denied*, 464 U.S. 961 (1983); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

56. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-49 (D.C. Cir. 1984) (finding *Timberlane* factors "are not useful in resolving the controversy"); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255 (7th Cir. 1980) (failing to apply *Timberlane* test did not constitute abuse of discretion).

57. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) [hereinafter RESTATEMENT (THIRD)]. The *Restatement* notes that "all relevant factors" may be considered but specifically lists eight factors relevant to a jurisdictional analysis:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state might have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

Id.; see also RESTATEMENT (THIRD), at § 415.

58. 15 U.S.C. § 6a (1988).

59. 15 U.S.C. § 45(a)(3) (1988 & Supp. IV 1992).

60. H.R. REP. NO. 686, 97th Cong., 2d Sess. 9 (1982). The legislative history of the FTAIA indicates that Congress intended "reasonably foreseeable" to be an objective practical standard: "The test is whether the effects would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown." *Id.*

Ninth Circuit's "jurisdictional rule of reason" mode of analysis in the legislative history of the FTAIA.⁶¹ Until its June 1993 decision in *Hartford Fire Insurance Co. v. California*,⁶² the U.S. Supreme Court had not taken any position on the *Timberlane* mode of analysis.

B. *International Comity*

In 1988, the Attorneys General from several states and many private plaintiffs brought antitrust suits against American and English insurance companies, contending that they violated the Sherman Act by agreeing to alter certain terms of insurance coverage and agreeing not to offer certain other types of insurance coverage.⁶³ Included among the defendants were a number of London-based reinsurers, who, according to plaintiffs, agreed to: (1) restrict the terms on which reinsurance would be written and refuse to reinsure certain risks; (2) write all North American casualty reinsurance agreements with a pollution exclusion; and (3) boycott retrocessional reinsurance agreements that included certain North American property risks, unless the original insurance contained certain exclusions.⁶⁴ The British defendants moved to dismiss the complaint as to them, on the ground that the Sherman Act should not apply to conduct entirely outside the United States, by non-Americans, that was lawful where it occurred.⁶⁵

Relying on the FTAIA, the district court held that the British defendants' challenged foreign conduct was subject to jurisdiction under the FTAIA because plaintiffs adequately alleged that:

[A] decision not to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States has a direct effect on the availability of primary insurance in the United States.⁶⁶

Applying the three-part test laid down by the Ninth Circuit

61. *Id.*

62. ___U.S.___, 113 S. Ct. 2891 (1993).

63. In re Insurance Antitrust Litigation, 723 F. Supp. 464, 468, 470-71 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd in relevant part and rev'd in part*, *Hartford Fire Insurance Co. v. California*, ___U.S.___, 113 S. Ct. 2891 (1993).

64. 723 F. Supp. at 484-85.

65. *Id.* at 484.

66. *Id.* at 486.

in *Timberlane II*,⁶⁷ the district court concluded that, upon consideration of the international comity factor of the test, extraterritorial jurisdiction should not be asserted.⁶⁸ On plaintiffs' appeal, a Ninth Circuit panel affirmed the district court's holding that the alleged effects in the United States were sufficient under the FTAIA, but reversed the district court's ruling that international comity required a dismissal.⁶⁹

The Supreme Court granted *certiorari* to determine whether "the court of appeals properly assess[ed] the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?"⁷⁰ The British, Canadian, and U.S. Governments filed *amicus curiae* briefs.

Justice David H. Souter's analysis for the 5-4 majority, which included the retiring Justice Byron R. White, begins by noting that the British defendants conceded that there was jurisdiction under the Sherman Act as a result of their London-based, challenged conduct.⁷¹ The defendants, however, contended that the district court should have declined to exercise jurisdiction under the principles of international comity.⁷² Justice Souter also noted that because the issue of jurisdiction arose in the context of a motion to dismiss, the plaintiffs' allegations that the British defendants participated in conduct that was intended to and did produce a substantial effect in the U.S. insurance market must be assumed to be true.⁷³ According to Justice Souter, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some

67. *Timberlane II*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985). Under the tripartite *Timberlane II* inquiry, a court examines:

(1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness.

Id. at 1382 (citing *Timberlane I*, 549 F.2d 597, 613 (9th Cir. 1976)).

68. *In re Insurance Antitrust Litigation*, 723 F. Supp. at 490.

69. *In re Insurance Antitrust Litigation*, 938 F.2d at 932-34.

70. *Hartford Fire Insurance Co. v. California*, ___ U.S. ___, 113 S. Ct. 2891, 2900 n.9 (1993).

71. *Id.* at ___, 113 S. Ct. at 2909 n.24.

72. *Id.* at ___, 113 S. Ct. at 2909.

73. *Id.* at ___, 113 S. Ct. at 2909 n.21.

substantial effect in the United States.”⁷⁴ Moreover, when Congress enacted the FTAIA, it declined to express a view on the question whether a court with jurisdiction under the Sherman Act should abstain from exercising such jurisdiction on the grounds of international comity.⁷⁵ Justice Souter declared that the Court need not decide that question, because, even assuming an affirmative answer, “international comity would not counsel against exercising jurisdiction in the circumstances alleged here.”⁷⁶

The majority rejected the argument of the British defendants and the British Government, that a conflict between U.S. and British law arose because the challenged conduct was consistent with British law and policy, because there was no “true conflict” between U.S. and British law.⁷⁷ Relying on Section 415 of the *Restatement (Third)*, the majority held that a “true conflict” does not exist where a person subject to regulation by two nations can comply with the laws of both.⁷⁸ In this case, the London reinsurers did not argue that British law required them to act in a fashion prohibited by U.S. law, nor did they argue that their compliance with the laws of both countries was otherwise impossible.⁷⁹ Thus, according to the majority, there was no “true conflict” and, therefore, no need to consider whether the U.S. court should decline, on the basis of international comity, to exercise its jurisdiction.⁸⁰

Justice Antonin Scalia, writing for the four dissenters, argued that, under factors set forth in Section 403 of the *Restatement (Third)*, any nation having a basis for jurisdiction to prescribe a law, must refrain from exercising that jurisdiction if such an exercise of jurisdiction would be unreasonable.⁸¹ The dissent stated that

74. *Id.* at ___, 113 S. Ct. at 2909.

75. *Id.* at ___, 113 S. Ct. at 2910 (citing H.R. REP. NO. 686, 97th Cong., 2d. Sess., at 13 (1982)).

76. *Id.* at ___, 113 S. Ct. at 2910.

77. *Id.* at ___, 113 S. Ct. at 2910-11.

78. *Id.* at ___, 113 S. Ct. at 2911.

79. *Id.*

80. *Id.*; see also Brief for the United States as Amicus Curiae Supporting Respondents at 27-29, *Hartford Fire Insurance Co. v. California*, ___ U.S. ___, 113 S. Ct. 2891 (1993).

81. *Hartford Fire Insurance*, ___ U.S. at ___, 113 S. Ct. at 2921-22 (Scalia, J., dissenting); see RESTATEMENT (THIRD), *supra* note 57, § 403 (discussing *Timberlane*-like approach).

[r]arely would these factors point more clearly against application of United States law. The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. . . . I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.⁸²

Justice Scalia argued that the majority "completely mis-interpreted" the *Restatement (Third)*⁸³ and characterized the majority's holding that "no true conflict . . . exists unless compliance with United States law would constitute a violation of another country's law," as a "breathtakingly broad proposition, which contradicts the many cases discussed earlier."⁸⁴ Justice Scalia and his dissenting colleagues predicted that the majority's holding "will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other foreign countries — particularly our closest trading partners."⁸⁵

C. *Mergers and Joint Ventures*

Section 7 of the Clayton Act prohibits the direct or indirect acquisition by one person of all or any part of the stock or assets of another person "where in any line of commerce or in any activity affecting commerce in any section of the [United States], the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly."⁸⁶ Both the acquiring and acquired entities must be persons that are engaged in commerce or in any activity affecting commerce.⁸⁷ Moreover, the potential anticompetitive effects of the acquisition must be "in any section of the [United States]."⁸⁸ Thus, transactions by firms outside the United States are covered if they affect U.S. commerce. If, however, the only anticompetitive effects of the trans-

82. *Hartford Fire Insurance Co.*, ___ U.S. at ___, 113 S. Ct. at 2921 (citations omitted).

83. *Id.* at ___, 113 S. Ct. at 2922.

84. *Id.* at ___, 113 S. Ct. at 2921-22 (emphasis in original).

85. *Id.* at ___, 113 S. Ct. at 2922.

86. 15 U.S.C. § 18 (1988 & Supp. IV 1992).

87. *Id.*

88. *Id.*

action are outside of the United States, Section 7 does not apply.⁸⁹

The Hart-Scott-Rodino Act requires that parties to certain large mergers and corporate joint ventures notify the Antitrust Division of the Department of Justice and the Federal Trade Commission of their proposed transaction, and wait for stated periods of time before consummating the transaction.⁹⁰ The financial thresholds for notification apply to transactions by foreign companies outside the United States.⁹¹ However, the implementing regulations exempt the following types of transactions in certain situations: (1) acquisitions by U.S. companies of foreign assets or of voting securities of foreign entities whose U.S. assets and sales do not meet the minimum threshold requirements; (2) acquisitions by foreign companies of foreign assets or of voting securities of foreign companies not resulting in direct or indirect control over U.S. assets or corporations meeting the minimum threshold requirements or, if both parties to the acquisition are foreign, when the combined U.S. sales and combined U.S. assets are each less than U.S.\$110 million; (3) acquisitions by foreign states, governments, or agencies (other than corporations engaged in commerce); and (4) acquisitions by or from companies "controlled" by foreign governments, of assets located in, or corporations organized under the laws of, that foreign state.⁹²

The 1988 U.S. Justice Department's "Antitrust Enforcement Guidelines for International Operations" ("*International Guidelines*")⁹³ contain several illustrative cases relating to merger analysis. In particular, case four of the *International Guidelines*, analyzes the merger of two foreign firms and restates the position taken in

89. 15 U.S.C. § 18 (1988 & Supp. IV 1992).

90. 15 U.S.C. § 18(a) (1988 & Supp. IV 1992).

91. *See id.* (stating filing of premerger notification and waiting period applies to acquiring person).

92. *Id.*; *see* 16 C.F.R. §§ 801-03 (1993). *See generally* STEPHEN M. AXINN ET AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT (2d ed. 1988).

93. U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations*, in 4 Trade Reg. Rep. (CCH) ¶ 13,109, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, at S-3 [hereinafter *International Guidelines*]. *See generally* Joseph P. Griffin, *United States International Antitrust Enforcement: A Practical Guide to the Justice Department Guidelines*, in 53 C.P.S. (BNA), at B-801 (1989) (discussing insights and information relevant to *International Guidelines*); Wilbur L. Fugate, *The New Justice Department Antitrust Enforcement Guidelines for International Operations*, 29 VA. J. INT'L L. 295 (1989).

United States v. CIBA Corp.,⁹⁴ that the Justice Department will not challenge an anticompetitive merger abroad unless one or both of the entities has U.S. production facilities or substantial distribution assets in the United States.⁹⁵

Because U.S. enforcement authorities have recognized that mergers between U.S. and non-U.S. companies involve situations of concurrent jurisdiction, they have attempted to fashion structural relief in a manner that permits the merger to go forward abroad while satisfying U.S. antitrust concerns.⁹⁶ There appear to be no reported cases in which challenges under the U.S. antitrust laws have been successfully mounted against mergers between foreign firms transacting no business in the United States. U.S. enforcement authorities, however, have sued foreign firms for failing to report transactions under the Hart-Scott-Rodino Act⁹⁷ and recently for the first time sued a foreign company for failing to notify its acquisition of other foreign companies with

94. *United States v. CIBA Corp.*, 1970 Trade Cas. (CCH) ¶ 73,269 (S.D.N.Y. 1970) (consent decree) (permitting merger of two foreign firms on condition that certain U.S. assets be divested to eliminate anticompetitive effects in United States).

95. See *International Guidelines*, *supra* note 93, at ¶13,109.83, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, at S-28-29.

96. See, e.g., *Hanson plc*, 5 Trade Reg. Rep. (CCH) ¶ 23,107 (FTC Mar. 9, 1992) (consent agreement) (challenging tender offer by an English company for the shares of another English firm settled by divestment of some of their California assets); *Institut Merieux S.A.*, 5 Trade Reg. Rep. (CCH) ¶ 22,779 (FTC Aug. 6, 1990) (consent agreement) (acquisition of Canadian firm by French competitor permitted after Canadian firm agreed to lease business in Toronto for at least 25 years to an FTC-approved acquiror); *United States v. American Brands, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,276 (S.D.N.Y. 1983) (consent decree) (acquisition by U.S. stapler company of British stapler company with U.S. subsidiary permitted but U.S. company ordered to divest one of its two lines); *United States v. Merck & Co. Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,682 (S.D. Cal. 1980) (consent decree) (acquisition permitted on condition that U.S. acquired company divest a Canadian subsidiary); *United States v. Gillette Co.*, 1976-1 Trade Cas. (CCH) ¶ 60,691 (D. Mass. 1975) (consent decree) (acquisition permitted on condition that new company be created with German company to sell in United States).

97. See, e.g., *United States v. Beazer plc*, 1992-2 Trade Cas. (CCH) ¶ 69,923 (D.D.C. 1992) (consent decree) (imposing U.S.\$760,000 civil penalty for failure to notify); *United States v. Baker Hughes, Inc.*, 1990-1 Trade Cas. (CCH) ¶ 68,976 (D.D.C. 1990) (consent decree) (imposing U.S.\$275,000 civil penalty for failure to file important document with premerger notification form); *United States v. Tengelmann, WHG*, 6 Trade Reg. Rep. (CCH) ¶ 45,089 (Case 3624) (D.D.C. June 5, 1989), 1989-1 Trade Cas. (CCH) ¶ 68,623 (D.D.C. 1989) (consent decree) (imposing U.S.\$3 million civil penalty for failure to notify); *United States v. Lonrho, PLC*, 6 Trade Reg. Rep. (CCH) ¶ 45,088 (Case 3535) (D.D.C. July 13, 1988), 1988-2 Trade Cas. (CCH) ¶ 68,232 (D.D.C. 1988) (consent decree) (imposing U.S.\$122,000 civil penalty for failure to notify); *United States v. Bell Resources, Ltd.*, 1986-2 Trade Cas. (CCH) ¶ 67,321 (S.D.N.Y. 1986) (consent decree) (imposing U.S.\$450,000 penalty for failure to notify).

significant sales in the United States.⁹⁸

D. Recent Enforcement Policy

In the *International Guidelines* the U.S. Department of Justice took the position that it may assert jurisdiction under the effects doctrine when the U.S. Government pays for or finances more than half the cost of a foreign transaction.⁹⁹ According to the Department:

There is no reason to believe that in enacting the FTAIA Congress intended to immunize anticompetitive conduct with respect to sales to the U.S. Government. To do so would have been to place the burden of anticompetitive pricing squarely on the shoulders of U.S. taxpayers, something that the Department will not assume that Congress intended. Rather, the Department will assume that Congress intended to preserve for U.S. taxpayers the main benefits of competition among U.S. firms.¹⁰⁰

In late 1989, the Department of Justice announced a U.S.\$32.7 million payment to the United States by ninety nine Japanese construction companies as the result of settlement of bid-rigging charges related to construction for the U.S. Navy in Japan.¹⁰¹ The Assistant Attorney General in charge of the Antitrust Division said that "this settlement represents a major step towards the United States' goal of insuring free competition on U.S.-funded contracts regardless of where they are located."¹⁰² Subsequently, the Department of Justice obtained a pre-judgment attachment from a Japanese court freezing U.S.\$1.6 million of the assets of another alleged member of the bid-rigging cartel.¹⁰³

98. *U.S. v. Anova Holding AG*, 7 Trade Reg. Rep. (CCH) ¶ 70,383 (D.D.C. Sept. 7, 1993) (consent decree) (imposing U.S.\$414,650 civil penalty for failure to notify).

99. See *International Guidelines*, *supra* note 93, ¶ 13,109 at 20,611, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, at S-3.

100. *International Guidelines*, *supra* note 93, ¶ 13,109 at 20,611, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, at S-3; see, e.g., *United States v. Standard Tallow Corp.*, 1988-1 Trade Cas. (CCH) ¶ 67,913 (S.D.N.Y. 1988) (consent decree prohibiting suppliers of tallow from fixing prices for sales financed by U.S. government).

101. *Japanese Bid Rigging Case Settlement*, 7 Trade Reg. Rep. (CCH) ¶ 50,028 (Dec. 19, 1989).

102. *Id.*

103. *Japanese Court Freezes Assets of Firm that Didn't Settle U.S. Bid Rigging Claim*, 58 Antitrust & Trade Reg. Rep. (BNA) No. 1468, at 853 (May 31, 1990). Another alleged member of the cartel settled for U.S.\$34,000. See *Japanese Construction Company Settles*

In similar cases, ten Japanese electronics companies agreed in March 1992 to pay U.S.\$2.7 million to settle bid-rigging charges involving telecommunications contracts at U.S. military installations in Japan;¹⁰⁴ and in July 1993, twenty-seven Japanese construction firms paid more than U.S.\$1 million to settle civil claims that they rigged bids on contracts at the U.S. Naval Base at Sasebo.¹⁰⁵

In April 1992, the U.S. Justice Department rescinded a statement in a footnote to its *International Guidelines*¹⁰⁶ and announced that the Justice Department will take antitrust enforcement action against conduct occurring overseas that restrains U.S. exports, whether or not there is direct harm to U.S. consumers, where it is clear that:

- (1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States;
- (2) the conduct involves anticompetitive activities which violate the U.S. antitrust laws—in most cases, group boycotts, collusive pricing, and other exclusionary activities; and
- (3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.¹⁰⁷

This 1992 policy removed a self-imposed restriction on the Justice Department's exercise of jurisdiction under the U.S. antitrust laws¹⁰⁸ that was inconsistent with prior cases.¹⁰⁹

The recently appointed Assistant Attorney General in

U.S. Accusations of Bid Rigging Cartel, 59 Antitrust & Trade Reg. Rep. (BNA) No. 1475, at 95 (July 19, 1990).

104. *Japanese Communications Contractors Settle U.S. Price Fixing Accusations*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1554, at 269 (Feb. 27, 1992).

105. *Japanese Companies Settle U.S. Navy Bid Rigging Claims*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1629, at 311 (Aug. 26, 1993).

106. See *International Guidelines*, *supra* note 93, ¶ 13,109 at 20,611 n.159, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, at S-21 n.159.

107. *Justice Department's April 3 Statement of Enforcement Policy: Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 483 (Apr. 9, 1992); see also *Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws*, 7 Trade Reg. Rep. (CCH) ¶ 50,084 (Apr. 3, 1992).

108. See Joseph P. Griffin, *New U.S. Enforcement Policy is Assessed*, NAT'L L.J., Mar. 16, 1992, at 23.

109. See, e.g., *United States v. C. Itoh & Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. 1982); *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982).

charge of the Antitrust Division has reaffirmed this policy,¹¹⁰ and has given enforcement actions against foreign companies a high priority.¹¹¹ According to the Chief of the Antitrust Division's Foreign Commerce Section, under the Clinton Administration, the challenge for U.S. antitrust enforcement policy is:

First to promote and safeguard open and competitive global markets for the benefit of the world's consumers and producers.

And second, to make sure that our enforcement strategies and our enforcement tools are up to the job of dealing with the global marketplace.¹¹²

In October 1993 the Chairman of the Federal Trade Commission stated that:

[A]s active participants in the United States economy, foreign firms must comply with U.S. antitrust laws. It is only fair that those who wish to sell in our markets play by the same rules as domestic producers.

[W]e consider the interests of other nations when undertaking investigations involving foreign actors, in order to avoid conflicts.¹¹³

III. THE EC/U.S. ANTITRUST COOPERATION AGREEMENT

In 1990 Sir Leon Brittan suggested that a treaty "or less formal agreement" be negotiated to allocate jurisdiction between the U.S. Government and the EC Commission in transnational merger cases.¹¹⁴ Sir Leon expressed considerable concern that

110. Anne K. Bingaman, *Change and Continuity in Antitrust Enforcement*, Address Before the Fordham Corporate Law Institute, New York (Oct. 21, 1993), in 7 Trade Reg. Rep. (CCH) ¶ 50,123 (1993); Charles S. Stark, *International Antitrust — U.S. Views*, Address Before the American Bar Association, New York (Aug. 9, 1993), in 7 Trade Reg. Rep. (CCH) ¶ 50,114 (1993).

111. Anne K. Bingaman, Address Before the A.B.A. Antitrust Section, New York (Aug. 10, 1993), in 65 Antitrust & Trade Reg. Rep. (BNA) No. 1627, at 250 (Aug. 12, 1993); Rich Jaroslovsky, *Washington Wire: A Special Weekly Report From the Wall Street Journal's Capital Bureau*, WALL ST. J., July 2, 1993, at A1; Catherine Yang, *Annie Gets Her Antitrust Gun*, BUS. WK., Aug. 23, 1993, at 23.

112. Stark, *supra* note 110, 7 Trade Reg. Rep. (CCH) ¶ 50,114 at 48,940.

113. Janet D. Steiger, *Perspectives on U.S. International Enforcement*, Address Before the Fordham Corporate Law Institute, New York (Oct. 21, 1993), in 7 Trade Reg. Rep. (CCH) ¶ 50,122 at 48,976 (1993).

114. Sir Leon Brittan, *Competition Policy in the European Community: The New*

the EC Merger Regulation gave the EC significant new enforcement authority concerning large transnational mergers and joint ventures, including those of U.S. companies that have significant sales in the EC.¹¹⁵ Consequently, he believed that the chances of clashes over jurisdictional prerogatives and remedies had increased.¹¹⁶

In September, 1991, the EC Commission and the U.S. Government (the "Parties") signed an agreement regarding the application of their competition laws ("the Agreement").¹¹⁷ This Agreement was designed to promote cooperation and avoid conflicts in their antitrust enforcement activities.¹¹⁸ The Agreement is an evolutionary step from the 1986 OECD Recommendations relating to Restrictive Business Practices¹¹⁹ and the prior U.S. antitrust consultation agreements with Australia,¹²⁰ Canada¹²¹ and Germany.¹²²

Merger Regulation, Address Before the European Community Chamber of Commerce, New York, 11 (Mar. 26, 1990) (on file with author).

115. *Id.*

116. *Id.*; COMMISSION TWENTIETH REPORT ON COMPETITION POLICY ¶ 17 (1991).

117. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, *reprinted in* 30 I.L.M. 1491 (1991), 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 382 (Sept. 26, 1991) [hereinafter Agreement]. The Agreement was effective upon signing on September 23, 1991. 30 I.L.M. at 1502. See John J. Parisi, *The EC-U.S. Agreement Regarding the Application of Their Competition Laws: Another Step Towards Fostering International Cooperation in Antitrust Enforcement*, Address Before the European Trade Law Ass'n, Brussels, (Dec. 12, 1991) (on file with author); Allard D. Ham, *International Cooperation in the Antitrust Field and in Particular the Agreement Between the United States of America and the Commission of the European Communities*, 30 COMMON MKT. L. REV. 571 (1993); Joseph P. Griffin, *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business*, 24 LAW & POL'Y INT'L BUS. 1051 (1993).

118. Agreement, *supra* note 117, 30 I.L.M. at 1492.

119. See OECD Recommendation, *supra* note 20, 53 C.P.S. (BNA), at B-801, 25 I.L.M. at 1629.

120. Australia-United States: Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, T.I.A.S. No. 10,365, *reprinted in* 21 I.L.M. 702 (1982). See generally Stephen D. Ramsey, Note, *The United States-Australian Antitrust Cooperation Agreement: A Step in the Right Direction*, 24 VA. J. INT'L L. 127 (1983).

121. Canada-United States: Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, *reprinted in* 23 I.L.M. 275 (1984), 5 Trade Reg. Rep. (CCH) ¶ 50,464; see generally Gary E. Dyal, Comment, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes*, 6 NW. J. INT'L L. & BUS. 1065 (1985) (discussing extraterritorial antitrust enforcement).

122. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Re-

Enforcement officials on both sides of the Atlantic have made it clear that since the Agreement was signed, the flow of information between them has increased significantly. In the first two years, U.S. enforcers sent about sixty notifications to Brussels and received about forty from the EC Commission.¹²³ In the year prior to the Agreement, U.S. enforcers sent four notifications and received two.¹²⁴

Since the EC Merger Regulation came into force in September 1990, at least twelve transactions formally reviewed by the Commission have involved situations in which both parties were headquartered outside the EC.¹²⁵ About 10% of the pre-closing notification filings required by Hart-Scott-Rodino involve at least one company headquartered in the EC.¹²⁶ More than 20% of the transactions that have been notified under the EC Merger Regulation also have been subject to Hart-Scott-Rodino filings or, if not, nonetheless have been reviewed by U.S. antitrust authorities.¹²⁷ Four widely publicized examples of transactions re-

garding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956, T.I.A.S. No. 8291.

123. John J. Parisi, *The EC-U.S. Agreement Regarding the Application of Their Competitive Laws: An Update on What Has Been Accomplished*, Address Before the European Trade Law Association, Brussels (June 10, 1993) (on file with author).

124. Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, *The U.S.-EC Antitrust Agreement and International Cooperation in Merger Control*, Address Before the First Annual European Community Merger Control Symposium, Brussels (Oct. 13, 1992) (on file with author).

125. See Council Regulation No. 4064/89, O.J. L 395/1 (1989), amended by O.J. L 257/15 (1990); see also Ericsson/Hewlett-Packard, Case No. IV/M292 (Mar. 12, 1993), cited in O.J. C 83/5 (1993); Del Monte/Royal Foods, Case No. IV/M277 (Dec. 9, 1992), cited in O.J. C 331/13 (1992); Pepsico/General Mills, Case No. IV/M232 (Aug. 5, 1992), cited in O.J. C 228/6 (1992); Ericsson/Ascon, Case No. IV/M236 (July 8, 1992), cited in O.J. C201/26; Mondri/Frantschach, Case No. IV/M210 (May 12, 1992), cited in O.J. C 124/19; Ingersoll Rand/Dresser, Case No. IV/M121 (Dec. 18, 1991), cited in O.J. C 86/15 (1992), [1992] 4 C.M.L.R. 349; BankAmerica/Security Pacific, Case No. IV/M137 (Oct. 24, 1991), cited in O.J. C 289/14, [1991] 4 C.M.L.R. 898; Delta/Pan Am, Case No. IV/M130 (Sept. 13, 1991), cited in O.J. C 289/14 (1991), [1992] 5 C.M.L.R. M56; Kyowa/Saitama Banks, Case No. IV/M069 (Mar. 7, 1991), cited in O.J. C 66/13 (1991), [1992] 4 C.M.L.R. M105; AT&T/NCR, Case No. IV/M050 (Jan. 18, 1991), cited in O.J. C 16/20 (1991), [1992] 4 C.M.L.R. M41; Matsushita/MCA, Case No. IV/M037 (Jan. 10, 1991), cited in O.J. C 12/15 (1991), [1992] 4 C.M.L.R. M36; Mitsubishi/Union Carbide, Case No. IV/M024 (Jan. 4, 1991), cited in O.J. C 5/7 (1991), [1992] 4 C.M.L.R. M50.

126. U.S., *EC Commission Sign Antitrust Cooperation Accord*, 8 Int'l Trade Rep. (BNA) No. 38, 1407 (Sept. 25, 1991).

127. Stark, *supra* note 124, at 17; U.S.—*EC Notices Increase Since Accord; Confidentiality Concerns are Downplayed*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1554, 267 (Feb. 27, 1992).

viewed by EC and U.S. enforcers are: Gillette's bid to acquire certain parts of Wilkinson Sword,¹²⁸ the merger of Ingersoll-Rand's and Dresser's pump operations,¹²⁹ the DuPont/ICI asset swap,¹³⁰ and the investigations of Microsoft's licensing practices.¹³¹

A. "Positive Comity"

The Agreement provides that if one of the Parties believes that its "important interests" are being adversely affected by anticompetitive activities occurring within the territory of the other Party that violate that Party's competition laws, the affected Party may request that the other Party initiate enforcement activities.¹³² The Agreement, however, provides that the Party receiving such a request is not under any obligation to initiate enforcement proceedings and that the requesting Party is not precluded from undertaking its own enforcement activities.¹³³

Enforcers have referred to this provision as reflecting "positive comity" in order to distinguish it from the traditional notion of "comity," which involves concepts of moderation and restraint in enforcement.¹³⁴ This "positive comity" provision was intended to avoid the long-running dispute concerning the propriety under international law of assertions of extraterritorial juris-

128. *United States v. Gillette Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,142 (D.D.C. 1990) (consent decree); *Warner-Lambert/Gillette O.J. L 116/21* (1992).

129. *Dresser/Ingersoll Rand*, Case No. IV/M121 (Dec. 18, 1991), cited in O.J. C 86/15 (1992), [1992] 4 C.M.L.R. 349; *Divestiture Resolves Division Concerns Over Proposed Merger of Pump Operations*, 63 *Antitrust & Trade Reg. Rep.* (BNA) No. 1584, 418 (Oct. 1, 1992).

130. *DuPont de Nemours/ICI*, Case No. IV/M214 (Sept. 30, 1992) cited in O.J. C 7/13 (1993); *In Re Imperial Chemical Industries PLC*, 5 *Trade Reg. Rep.* (CCH) ¶ 23,417 (1993); 58 *Fed. Reg.* 37,944 (1993) (proposing consent agreement).

131. *FTC Closes Antitrust Probe of Microsoft; Antitrust Division Begins its Own Probe*, 65 *Antitrust & Trade Reg. Rep.* (BNA) No. 1629, 288 (Aug. 26, 1993); Louise Kehoe, *EC to Probe Antitrust Allegations Against Microsoft*, *FIN. TIMES*, Sept. 6, 1993, at 22.

132. Agreement, *supra* note 117, art. V(2), 30 *I.L.M.* at 1498, 61 *Antitrust & Trade Reg. Rep.* (BNA) No. 1534, at 383-84.

133. *Id.* art. V(4), 30 *I.L.M.* at 1498, 61 *Antitrust & Trade Reg. Rep.* (BNA) No. 1534, at 384.

134. COMMISSION, TWENTY-FIRST REPORT ON COMPETITION POLICY ¶ 64 (1992); see, e.g. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). The Member States of the Organization for Economic Cooperation and Development ("OECD"), have agreed to avoid or minimize conflicts with foreign laws, policies or interests by following an approach of "moderation and self-restraint in the interest of co-operation in the field of restrictive business practices." See OECD Recommendation, *supra* note 20, at B-801, 25 *I.L.M.* at 1630.

diction. It could be used, for example, by EC officials confronted with a buyers' cartel of U.S. purchasers fixing the purchase price of goods manufactured in the EC and exported to the United States. It might also be used by both EC and U.S. officials in an attempt to coordinate activities against anticompetitive activity conducted outside the EC and the United States. However, "positive comity" applies only when the challenged conduct violates the competition laws of the host country. Thus, export activity permitted under host state law is not covered, even if it adversely affects the important interests of the Party requesting assistance. One expert commentator has opined that the impact of "positive comity" will be marginal.

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. We should not expect the principle of positive comity . . . to impact dramatically on the proposition that laws are written and enforced to protect national interests.¹³⁵

B. Avoidance of Conflicts

The Agreement also calls on each Party to take account of the other Party's "important interests" at all stages of its enforcement activities.¹³⁶ The Agreement notes that "important interests" of a Party may exist in the absence of official involvement by that Party with the activity in question. However, "it is recognized that such interest would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities."¹³⁷ The Agreement sets forth a list of six factors,¹³⁸ in

135. James R. Atwood, *Positive Comity — Is It a Positive Step?*, in 1992 FORDHAM CORP. L. INST. 79, 87 (Barry Hawk ed., 1993).

136. Agreement, *supra* note 117, art. VI, 30 I.L.M. at 1498-99, 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 384.

137. *Id.* art. VI(1), 30 I.L.M. at 1499, 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 384.

138. *Id.* art. VI(3), 30 I.L.M. at 1499-1500, 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 384. The factors are very similar to the factors utilized by the U.S. Court of Appeals for the Ninth Circuit in the Timberlane line of cases. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-14 (9th Cir. 1976), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) *cert. denied*, 472 U.S. 1032 (1985). The factors are also similar to the Antitrust Division in its *International Guidelines*. See *International Guidelines*, *supra* note 93, ¶ 13,109 at 20,612-13 n.170, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 at S-22-23 n.170, and those suggested by the American Law

addition to any other factors that appear relevant in the specific circumstances, to be considered in evaluating the proposed enforcement activities.¹³⁹

IV. IMPLICATIONS FOR THE FUTURE

A. "Implement" vs. "Effect"

Shortly after the *Wood Pulp* decision, the former Assistant Attorney General in charge of the Antitrust Division, Charles F. Rule, contended that the *Wood Pulp* decision was, as a practical matter, "very close to, if not indistinguishable from, the so-called 'effects' test as applied by U.S. courts"¹⁴⁰ The then-Commissioner in charge of EC competition policy, Sir Leon, rejected that contention:

The learned Advocate General in the *Wood Pulp* case, Mr. Darmon, developed at length the qualifications to be attached to the notion of effects The Court did not consider the qualifications and it is in my view unreasonable to assume unqualified espousal of a doctrine in a judgment which does not mention it by name, while those who urged its adoption accepted that it should be qualified. So the Court of Justice does not endorse the effects doctrine

. . . . But the Court of Justice held the sale in the Community at a concerted price was implementation, and I find that conclusion thoroughly reasonable and appropriate, in the light of competition law's purposes and territorial scope. Nevertheless, this specific use of the word "implementation" rather than "effects" suggests to me that implementing conduct perhaps has to be direct, substantial, and foreseeable for jurisdiction to be engaged.¹⁴¹

Institute in Section 403 of its Restatement (Third) of the Foreign Relations Law of the United States. See RESTATEMENT (THIRD), *supra* note 57, at § 403.

139. Agreement, *supra* note 117, art. VI(3), 30 I.L.M. at 1499-1500, 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 384.

140. Asst. Atty. General Charles F. Rule, The Justice Department's Antitrust Enforcement Guidelines for International Operations — A Competition Policy for the 1990s, Address Before the International Trade Section and Antitrust Committee of the District of Columbia Bar, Washington, D.C. (Nov. 29, 1988) (on file with author).

141. Sir Leon Brittan, Jurisdictional Issues in EEC Competition Law, Address at Cambridge, England (Feb. 8, 1990) (on file with author); see also Walter Van Gerven, *EC Jurisdiction in Antitrust Matters: The Wood Pulp Judgment*, in 1989 *FORDHAM CORP. L. INST.* 451, 466-67 (Barry E. Hawk ed., 1990) ("[I]t is clear that the Court has . . . consciously refrained — in the *Wood Pulp* case as well as, earlier, in the *Dyestuffs* cases — from endorsing the effects doctrine.")

The practical importance to EC competition policy enforcers of the distinction between anticompetitive conduct outside the EC "implemented" in the Common Market and the "effect" of such conduct in the Common Market is limited to a few, rare situations. These select situations include concerted refusals to buy from, or export to, the EC and agreements to restrict non-EC production in order to create a scarcity outside the EC that would raise prices within the EC. It has been argued that the Court's notion of "implementation" within the EC, could include omissions within the EC such as refusals to supply. Such a result, however, would be a clear extension of existing Court decisions.¹⁴² Moreover, as one commentator has noted

[t]he objective territoriality principle traditionally permits a state to exercise jurisdiction over a foreign national where a consummating act within the state's territory was a constituent element of an agreement made abroad. With omissions, there is no "consummating act within the Community" that can justify the assertion of jurisdiction on objective territorial grounds. Thus, for the implementation approach to remain faithful to the Community's professed desire to assert jurisdiction solely on the basis of the territoriality principle, it appears necessary to exclude certain traditional antitrust violations from its jurisdictional purview.¹⁴³

In the few situations in which there is no "implementation" within the Common Market, the Commission probably would utilize the "effects" theory to challenge the conduct. In appropriate circumstances it also could invoke the "positive comity" provisions of the EC/U.S. Antitrust Agreement to seek the U.S. Government's assistance. Assistant Attorney General Bingaman has made it clear that she will utilize the *Hartford Fire Insurance* decision to vigorously enforce the effects theory of jurisdiction.¹⁴⁴

142. See, e.g., Jose Perez Santos, *The Territorial Scope of Article 85 of the EEC Treaty*, in 1989 FORDHAM CORP. L. INST. 571, 575-77 (Barry E. Hawk ed., 1990); Theofanis Christoforou & David B. Rockwell, *European Economic Community Law: The Territorial Scope of Application of EEC Antitrust Law*, 30 HARV. INT'L L.J. 195, 204 (1989).

143. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 36 (1992).

144. See Bingaman, *supra* note 110, ¶ 50,123.

B. "Appreciable" vs. "Substantial" Effect

Justice Souter noted in the majority opinion in *Hartford Fire Insurance* that the FTAIA was intended to exempt from the Sherman Act export transactions that did not injure U.S. commerce, and that it was "unclear" how the Act might apply to the conduct alleged in that case, which had been characterized below as a limitation on the *import* of insurance into the United States.¹⁴⁵ The majority held that they did not need to address that question, because, even if the FTAIA did apply, its requirement of a "direct, substantial and reasonably foreseeable effect" on U.S. commerce was "plainly me[t]."¹⁴⁶

There may be conduct that causes an "appreciable" effect sufficient to trigger EC jurisdiction, but does not have a "substantial" effect under U.S. precedents. Similarly, some conduct might cause a "reasonably foreseeable" effect under U.S. law, but would not be deemed to be "intentional" under EC law. These distinctions, however, do not appear to have hindered enforcement initiatives on either side of the Atlantic.

C. *International Comity*

The U.S. Government's *amicus* brief in *Hartford Fire Insurance* agreed with the British defendants' contention that the principles of international comity may be invoked in antitrust cases.¹⁴⁷ Moreover, although the U.S. Government stated that it prefers the analysis of international comity set forth in the *International Guidelines*, it stated that the *Timberlane* "jurisdictional rule of reason test" provides "a useful framework for analyzing comity issues."¹⁴⁸

145. *Hartford Fire Insurance Co. v. California*, __U.S.__, 113 S. Ct. 2891, 2909 n.23 (1993).

146. *Id.*

147. See Brief for the United States as Amicus Curiae Supporting Respondents at 22, *Hartford Fire Insurance Co. v. California*, __U.S.__, 113 S. Ct. 2891 (1993) (No. 91-1111) ("[w]e agree with petitioners that principles of comity may be invoked in antitrust cases. . . .").

148. *Id.* at 25. The Department of Justice and *Timberlane* factors are substantially the same, with two exceptions. The Department's *International Guidelines* omit *Timberlane's* consideration of enforcement compliance; and *Timberlane* omits the *International Guidelines'* consideration of the existence of reasonable expectations that would be furthered or defeated by the lawsuit. Compare *International Guidelines*, *supra* note 93, at 20,612-13, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1991, at S-22 with *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-14 (9th Cir. 1976), *on remand*, 574 F.

1. Actions Initiated by the U.S. Government

The U.S. Government's brief also took the position, not addressed by the Court, that "courts should not engage in any comity analysis in antitrust actions brought by the United States."¹⁴⁹ This position is a reaffirmation of a similar statement in the *International Guidelines*,¹⁵⁰ which was explained by the former Assistant Attorney General for Antitrust as follows:

[F]ederal judges should [not] assume a role as mini-diplomats every time they consider an antitrust case with an international flavor. The judicial branch is independent of foreign policy coordination; giving the judiciary unlimited discretion under the guise of "international law" or other equally amorphous notions to consider and resolve trade frictions created by antitrust suits would do more harm than good. Rather, application of objective, discrete doctrines such as the *Noerr-Pennington* doctrine and the doctrine of foreign sovereign compulsion, combined with a faithful adherence to the "direct, substantial and reasonably foreseeable" effects test, should eliminate most concern. . . . Courts, however, should never be allowed to dismiss a case on the ground of "foreign relations."¹⁵¹

Other than a general reference to the separation of powers doctrine, the *International Guidelines* cite no judicial precedent for applying one jurisdictional standard to government prosecutions and another to private suits. Nor is there any indication that higher courts would accept the argument that they are constrained from reviewing prosecutorial decisions on the basis of comity or from taking account of foreign relations considerations.¹⁵² An Article III court must construe the application of the antitrust laws to foreign commerce as Congress, not the ex-

Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

149. Brief of the United States as Amicus Curiae Supporting Respondents at 27, *Hartford Fire Insurance Co. v. California*, ___U.S.___, 113 S. Ct. 2891 (1993) (No. 91-1111).

150. See *International Guidelines*, *supra* note 93, at 13,109.10 n.167, 55 *Antitrust & Trade Reg. Rep. (BNA)* No. 1391. at S-22 n.167.

151. Asst. Atty. General Charles F. Rule, *The Justice Department's Antitrust Enforcement Guidelines for International Operations Address Before the International Trade Section and Antitrust Committee of the District of Columbia Bar*, Washington D.C. (Nov. 29, 1988) (on file with author).

152. In *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990) defendants, citing a diplomatic note from the Finn-

executive branch, deems appropriate.¹⁵³

The broad assertion of executive power fails to note that the Congress is given responsibility under the U.S. Constitution for regulating commerce with foreign nations.¹⁵⁴ The Sherman Act was passed pursuant to that constitutional authority, and nothing in that Act frees the executive branch from having to comply with its provisions. On the contrary, the Sherman Act has been held to reach conduct by U.S. government officials.¹⁵⁵ Moreover, there is nothing in the legislative history of the Act to indicate that the Congress intended different standards to apply to government prosecutions and private suits.

The ABA report on the *International Guidelines*¹⁵⁶ criticized

ish Embassy, argued the court should decline to exercise jurisdiction because of principles of international comity. The trial court rejected the argument noting:

[W]hatever the relevance of comity concerns in antitrust disputes between private parties, *see Laker Airways, Ltd. v. Sabena*, 731 F.2d 909, 938 (D.C. Cir. 1984), they are not a factor here. The State Department has considered Finland's position, and the United States has decided to go ahead with the case. It is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.

731 F. Supp. at 6 n.5. The ABA's Special Committee on International Antitrust noted that:

[I]n *Baker Hughes*, however, U.S. competition was centrally implicated and the only "comity" concern appeared to be that Finland, whose national was sued, objected to the suit. If the only concern was possible interference with U.S. relations with Finland, Judge Gesell's decision not to second guess the government was unobjectionable.

ABA SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST, REPORT OF SPECIAL COMMITTEE 158 n.38 (1991). The author of this article was a member of the ABA Special Committee.

153. *See generally* *Webster v. Doe*, 486 U.S. 592 (1988) (stating that where Congress intends to preclude judicial review of executive action, its intent must be clearly expressed). The principle of separation of powers assumes a role for each of the three branches of government, not, as the Justice Department states, only for the executive branch. Congress passes laws affecting foreign commerce. The executive administers those laws, and conducts U.S. foreign policy consistently with those laws. The courts construe that legislation and determine the legality of executive action consistent with that legislation, with the U.S. Constitution, and with standards that the courts define for themselves. International law is part of the law of the United States, except to the extent that Congress has decreed otherwise. Congress has not, in the antitrust law, abrogated international law. *See, e.g., Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, C.J.) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . .").

154. U.S. CONST. art. I, § 8.

155. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Consumers Union of the United States, Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

156. Report to the House of Delegates ABA Section of Antitrust Law and Section

the Department's position because:

There has been wide consensus for years that the courts play an important role in the law of foreign relations.¹⁵⁷ As early as 1812, the Supreme Court (Marshall, C.J.) decided whether the government of France should enjoy sovereign immunity for a claim against one of its armed national vessels.¹⁵⁸ The comity aspects of recognition of foreign judgments were involved in *Hilton v. Guyot*.¹⁵⁹ The Supreme Court applied principles of international law in *The Paquete Habana*.¹⁶⁰ More recently, of course, Congress has delegated to the courts the task of deciding when sovereign immunity should be recognized for foreign governments or their instrumentalities, pursuant to the Foreign Sovereign Immunities Act of 1976.¹⁶¹ It would be hard to argue that immunity determinations have no effect on foreign relations.¹⁶²

The ABA report also noted that the *International Guidelines'* approach was tantamount to an attempt to revive the "Bernstein letter" exception to the act of state doctrine.¹⁶³ Under that procedure, when the executive branch represented to the courts that rejection of the act of state defense would not harm American foreign policy, the courts followed that advice.¹⁶⁴ A majority of the Supreme Court expressly rejected the "Bernstein letter"

of International Trade and Practice, 57 ANTITRUST L.J. 651, 658-59 (1988), 23 INT'L LAWYER 325, 332-33 (1989) [hereinafter Task Force Report].

157. See, e.g., RESTATEMENT (THIRD), *supra* note 57, § 1, cmt. 4 (1987). The RESTATEMENT (THIRD) provides:

The special place of the judiciary in United States jurisprudence is significant for the law of foreign relations as for other United States law. Judicial review gives the courts power to invalidate actions of the political branches in foreign relations—statutes, international agreements, and executive actions—as violative of the Constitution.

Id.; see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 205-24 (1972).

158. *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812).

159. 159 U.S. 113 (1895).

160. 175 U.S. 677 (1900).

161. 28 U.S.C. § 1330 (1988), §§ 1602-11 (1988 & Supp. III 1991).

162. See, e.g., *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982). After the court entered a default judgment, the State Department suggested that the judgment be vacated in the interest of U.S. foreign relations. See 23 I.L.M. 402 (1984). Subsequently the judgment was set aside and the action was dismissed. 596 F. Supp. 386 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).

163. See Task Force Report, *supra* note 156, 57 ANTITRUST L.J., at 663, 23 INT'L LAWYER, at 336-37.

164. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954); *cf. Bernstein v. Van Heyghen Frères Société Anonyme*,

exception in *First National City Bank v. Banco Nacional de Cuba*, in 1972.¹⁶⁵ The Third Circuit revisited the doctrine in *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*¹⁶⁶ and again concluded "that the Department [of State's] legal conclusions as to the reach of the act of state doctrine are not controlling on the courts."¹⁶⁷ No court has adopted the position that executive branch lawsuits are exempt from the act of state doctrine. In *Associated Container Transp. (Australia) Ltd. v. United States*, the court decided that the invocation of the act of state defense to protect communications sought by a civil investigative demand was premature.¹⁶⁸ Nothing in the court's discussion, however, indicated that the doctrine would not apply to government-initiated litigation. Thus, although the Department may pursue the "Bernstein letter" exception by submissions to U.S. courts, it appears that the courts will decide for themselves and will not be bound by the Department's views.

2. Comity and Compulsion

Under *Hartford Fire Insurance*, a U.S. court has jurisdiction under the Sherman Act over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."¹⁶⁹ If such an effect is present, a "true conflict" between U.S. and foreign law would serve as the basis for a *consideration* of whether that conflict requires abstention from the exercise of jurisdiction. A "true conflict" only arises when the foreign law requires the defendant to act in a fashion prohibited by U.S. law, or compliance with the laws of the United States and

163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947); National Jurisdiction, 6 White-man DIGEST § 1, at 13-20.

165. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

166. 847 F.2d 1052, 1062 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990).

167. *Id.* The decision itself reinforces the premise of judicial independence. The court disagreed with the Legal Adviser's suggestion that the act of state doctrine did not apply to the award of the contract in question, on the ground that the award might not have represented a sufficiently formal expression of Nigeria's public policy. *Id.* at 406. It agreed, however, that adjudication of the case would not be embarrassing to the political branch's conduct of foreign relations, placing considerable weight on the executive's opinion on the latter point. The Supreme Court found it unnecessary to reach the "Bernstein letter" issue in affirming the Court of Appeals' judgment. *Id.* at 405.

168. *Associated Container Transp. (Australia) Ltd. v. United States*, 705 F.2d 53 (2d Cir. 1983).

169. *Hartford Fire Insurance Co. v. California*, ___U.S.___, 113 S. Ct. 2891, 2909 (1993).

the defendant's country is otherwise impossible.¹⁷⁰ The latter situation would arise, as Justice Scalia suggested in his dissent, when compliance with U.S. law would constitute a violation of foreign law.¹⁷¹ Such a situation will arise in very few cases. In the vast majority of cases litigated to date, the foreign conduct has been consistent with, permitted, encouraged, or otherwise approved by foreign law, but has not been compelled by foreign law, and compliance with U.S. law has not constituted a violation of foreign law.¹⁷²

The majority's requirement of a "true conflict" is inconsistent with prior decisions of the Court that stressed the need for a careful, particularized analysis of the interests of foreign nations,¹⁷³ and "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case."¹⁷⁴ Moreover, the requirement that the challenged conduct be compelled by foreign law appears to confuse the exercise of judicial discretion in the context of international comity with the evidence necessary to establish the affirmative defense of foreign sovereign compulsion. If the British defendants could have established that their challenged conduct was compelled by the British Government, they would have been entitled to dismissal on the basis of the defense of foreign sovereign compulsion, without any analysis of international comity.¹⁷⁵

170. *Id.* at ___, 113 S. Ct. at 2910-11.

171. *Id.* at ___, 113 S. Ct. at 2922 (Scalia, J., dissenting).

172. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 303 (3d Cir. 1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *United States v. Watchmakers of Switz. Info. Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,414, 77,456-57 (S.D.N.Y. 1962), *modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965); *see also* Don Wallace, Jr. & Joseph P. Griffin, *The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process*, 23 INT'L LAWYER 593, 596-99 (1989) (discussing some of these cases in context of foreign sovereign compulsion defense).

173. *See, e.g.*, *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 543-44 (1987) ("[T]he concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation. . . ."); *Doe v. United States*, 487 U.S. 201, 218 n.16 (1988) ("[W]e are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation").

174. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 115 (1987).

175. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) ("issue for the jury's resolution" remained because of the failure of the foreign sovereign compulsion defense); *Société Internationale v. Rogers*, 357 U.S. 197, 211-12 (1958) (noncompliance with production order excused since compliance would

In *Timberlane II*, although the challenged conduct was not compelled by the Honduran Government, the Ninth Circuit nevertheless held that there was a significant conflict between U.S. antitrust law and a Honduran law, and that conflict, unless outweighed by other factors in the comity analysis, was by itself, a sufficient reason to decline the exercise of jurisdiction.¹⁷⁶ The majority opinion leaves open the question of, absent an alleged "true conflict," whether, and if so, under what circumstances, international comity requires a U.S. court to consider abstaining from exercising jurisdiction. The Court's decision will encourage private plaintiffs, state attorneys general and U.S. Government enforcement agencies to pursue aggressively conduct outside the United States that is lawful where it occurs.

The "rogue elephant" of private treble damage suits¹⁷⁷ and private challenges to transactions reviewed but not attacked by Government enforcers¹⁷⁸ are especially troublesome because private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities that is exercised by the United States Government.¹⁷⁹ The U.S. Supreme Court's decisions concerning the "optional" nature of the Hague Evidence Convention¹⁸⁰ and the nonapplicability of

violate foreign law); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297 n.14 (D.Del. 1970) (foreign sovereign compulsion immunizes an otherwise illegal boycott).

176. *Timberlane II*, 749 F.2d 1378, 1384 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

177. *See, e.g.*, *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980). *See generally* Raymond J. Pikna Jr., *The Uranium Cartel Saga — Yellowcake and Act of State: What Will Be Their Eventual Fate?*, 12 CASE W. RES. J. INT'L L. 591 (1980) (discussing state, sovereign compulsion defenses to antitrust violations); Philip Sutherland, Comment, *Rio Tinto-Zinc Corporation v. Westinghouse Electric Corporation: Extraterritorial Jurisdiction in Antitrust Matters*, 5 MONASH U. L. REV. 76 (1978) (discussing extraterritorial application of American antitrust regulations).

178. *See, e.g.*, *Consolidated Gold Fields PLC v. Minorco SA*, 871 F.2d 252, *modified*, 890 F.2d 569 (2d Cir. 1989), *cert. dismissed*, 492 U.S. 939 (1989) (granting injunction to private party after UK and U.S. Governments had cleared transaction); F.A. Mann, *The Extremism of American Extraterritorial Jurisdiction*, 39 INT'L & COMP. L.Q. 410 (1990).

179. *See Timberlane I*, 549 F.2d 597 (9th Cir. 1976). The Ninth Circuit stated that the court's cognizance of the possible international implications of its actions "is especially required in private suits . . . for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed." *Id.* at 613.

180. *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987). For amicus briefs submitted by France, the Federal Republic of

the Hague Service Convention¹⁸¹ to state laws appointing involuntary agents for service of process have reinforced foreign skepticism concerning the willingness of U.S. courts to seek truly international solutions to difficult procedural problems. This skepticism will be strengthened by the aggressive position taken by the Court in *Hartford Fire Insurance*.

The Commission's analysis of international comity in *Aluminum Imports* is remarkably similar to the Supreme Court's "true conflict" analysis in *Hartford Fire Insurance*. Both conclude that enforcement actions should proceed, despite foreign governmental objections, unless the challenged conduct was required by foreign law or compliance with local and foreign law would be impossible.

It would be reasonable to expect that foreign governments, confronted with such aggressive behavior by enforcement authorities, courts, and private U.S. plaintiffs, will utilize "blocking" statutes,¹⁸² as well as intergovernmental negotiations,¹⁸³ to defend what they perceive to be their legitimate sovereign interests.

An official of the British Embassy in Washington has pointed out that:

One perverse result of the [*Hartford Fire Insurance*] judg-

Germany and Switzerland, see 25 I.L.M. 1519 (1986) (France); *id.* at 1539 (Federal Republic of Germany); *id.* at 1549 (Switzerland); *id.* at 1557 (U.K.).

181. *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988).

182. The Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act, reprinted in 21 I.L.M. 834 (1982). The British Parliament enacted the Protection of Trading Interests Act in 1980, reprinted in 21 I.L.M. 834 (1982). The Act prohibits enforcement by U.K. courts of certain foreign judgments and, in certain circumstances, entitles British citizens and businesses against whom foreign courts have awarded multiple damages to recover the noncompensatory element of the judgment from the plaintiff through an action in a U.K. court. *Id.*; see Canada: Foreign Extraterritorial Measures Act, 33 Elizabeth II, ch. 49 (1985), reprinted in 24 I.L.M. 794 (1985); Australia: Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3 of 1984, reprinted in 23 I.L.M. 1038 (1984); France: Law Pertaining to the Disclosure of Documents and Information of an Economic, Commercial, Industrial, Financial, or Technical Nature to Foreign Natural or Juristic Persons, C. PÉN. Law No. 80-538 (Fr.), 1980 J.O. 1799, reprinted in relevant part in *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 526 n.6 (1987).

183. *Japanese Trade Ministry to Study Plan by U.S. to Extend Reach of Antitrust Law*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, 479 (Apr. 9, 1992). After the Justice Department announced its change of policy in April 1992, Japanese Government officials announced that they believed the U.S. policy violated the General Agreement on Tariffs and Trade. *Id.*

ment may be to reduce the incentive of other foreign states to cooperate with the U.S. regulatory authorities, and in certain circumstances, to give them no option but to make use of blocking statutes.¹⁸⁴

CONCLUSION

Recent pronouncements of the courts and policymakers of the European Community and the United States underscore converging trends and standards in antitrust enforcement. Economic regulators on both sides of the Atlantic seek more vigorous enforcement abroad in order to make their antitrust laws meaningful and effective at home. Yet this movement toward extraterritorial enforcement often leads to conflict among trading partners and uncertainty for transnational commerce. Renewed efforts are needed to develop a uniform approach to antitrust law that reflects the interests and respects the policies of both the EC and the United States. Otherwise, regulators may find themselves undercutting the competitiveness of the very economies they seek to promote.

184. Edmund Hosker, Remarks at International Bar Association Meeting, New Orleans (Oct. 12, 1993) in *International Bar takes Aim at U.S. Litigation Practices*, NAT'L L.J., Nov. 1, 1993, at 17.