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# POSTSCRIPT

## The Extraterritorial Application of Antitrust Laws: A Postscript on *Hartford Fire Insurance Co.* *v. California*

ROGER P. ALFORD\*

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Last year in the pages of this journal I published an article comparing the United States and the European Union (E.U.) approaches to the extraterritorial application of antitrust laws.<sup>1</sup> In discussing the U.S. approach, I predicted that "while the jurisdictional rule of reason has its weaknesses, it will remain a lasting fixture on the legal landscape precisely because it represents the only genuine, though inexact, attempt by courts to fashion a jurisdictional test which incorporates the legitimate sovereignty interests of foreign nations."<sup>2</sup> Thus, it was with disappointment that I, along with other proponents of a jurisdictional rule of reason, received the Supreme Court's decision in *Hartford Fire Insurance Co. v.*

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1. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 *Va. J. Int'l L.* 1 (1992).

2. *Id.* at 16. For a discussion of the evolution of the United States approach to the extraterritorial application of antitrust laws, an approach which previously incorporated the jurisdictional rule of reason, see *id.* at 6-27; *infra* notes 4-18 and accompanying text.

*California*,<sup>3</sup> a case which narrowly construes international comity and eschews the balancing of foreign sovereignty interests save perhaps in instances of conflicting state commands.

Confident that there will be numerous articles sedulously analyzing this decision, I intend here simply to offer a brief critique and comparison of the United States and European Union approaches to the extraterritorial application of antitrust laws now that *Hartford Fire* is the law of the land in the United States. Stated positively, the thesis of this Postscript is that there is now a convergence of views between the United States and European Union as to whether international comity may be invoked to restrain the unfettered extraterritorial application of antitrust laws. Stated negatively, this Postscript argues that the United States has followed the European Union in adopting an approach that fails to accord due respect to legitimate foreign sovereignty interests except in the (unusual) instance of a "true conflict" between foreign and domestic laws.

## I. THE UNITED STATES APPROACH PRIOR TO *HARTFORD FIRE*

As discussed in my previous article,<sup>4</sup> the United States has long asserted its right to exercise prescriptive jurisdiction over foreign defendants whose anticompetitive activities have the *intended effect* of causing a substantially adverse impact on U.S. commerce.<sup>5</sup> As Judge Learned Hand wrote in *Alcoa*, "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."<sup>6</sup> The United States Supreme Court later adopted this approach,<sup>7</sup> and the "effects doctrine," as it is known,

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3. 113 S. Ct. 2891 (1993).

4. Alford, *supra* note 1, at 6-27.

5. The seminal decision in *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945), began this trend.

6. *Id.* at 443.

7. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."); cf. *Cont. Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) ("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."); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (In a trademark infringement case, there is no "blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country . . . are often decisive.").

is now the primary basis for prescriptive jurisdiction by U.S. courts over foreign antitrust defendants.

While the effects doctrine gained acceptance in the United States, it aroused criticism abroad for its failure to respect principles of international comity. Some governments charged that the extraterritorial application of antitrust laws violates public international law, and objected to U.S. jurisdictional assertions on those grounds.<sup>8</sup> Several states retaliated against this perceived encroachment by adopting "blocking statutes" limiting the extraterritorial reach of U.S. antitrust laws.<sup>9</sup>

In response to these protests, several of the federal circuits sought to temper the harsh results of *Alcoa* by balancing the interests of the United States in regulating anticompetitive activity against the legitimate sovereignty interests of other nations. As propounded by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*,<sup>10</sup> this balancing approach attempts to determine "whether the interests of, and links to, the United States . . . are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."<sup>11</sup> Under this so-called "jurisdictional rule of reason," whether the exercise of extraterritorial jurisdiction is considered reasonable must be determined by evaluating several factors, including (1) the degree of conflict with foreign law or policy, (2) the nationality of the parties, (3) the relative importance of the alleged violation in the United States compared to that abroad, (4) the availability of a remedy abroad, (5) the existence of intent to harm or affect American commerce and its foreseeability, (6) the possible effect upon foreign relations if the court exercises jurisdiction and grants relief, (7) whether a party will be forced to perform an act illegal in either country or be under conflicting requirements, (8) whether the court can make its order effective, (9) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circum-

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8. See Gary B. Born, A Reappraisal of the Extraterritorial Reach of U.S. Law, 24 Law & Pol'y Int'l Bus. 1, 32-33 (1992).

9. See, e.g., Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985) (Can.); Law No. 80-538, J.O. 1797 (1980), amending Law No. 68-678, J.O. 1799 (1968) (France); Protection of Trading Interests Act, ch. 11 (1980) (U.K.); see also Alford, *supra* note 1, at 9-10; P.C.F. Pettit & C.J.D. Styles, The International Response to the Extraterritorial Application of United States Antitrust Laws, 37 Bus. Law. 697, 707-14 (1982) (describing statutes of various nations).

10. 549 F.2d 597 (9th Cir. 1976).

11. *Id.* at 613.

stances, and (10) whether a treaty with the affected nation has addressed the issue.<sup>12</sup>

The jurisdictional rule of reason received widespread support and was adopted by several of the federal courts of appeals.<sup>13</sup> The relative importance of the various comity concerns, and the criteria for applying them, however, lacked precise definition and evoked considerable debate and disagreement among the circuits.<sup>14</sup> The rule of reason also came under fire because U.S. courts almost invariably found the balance tipped in favor of jurisdiction—lending credibility to the charge that U.S. courts weighing nebulous criteria will simply assert the primacy of U.S. interests under the guise of the neutral rule of reason.<sup>15</sup>

Because courts were unable to agree on the appropriate extra-territorial reach of the U.S. antitrust laws, Congress in 1982 enacted the Foreign Trade Antitrust Improvements Act (FTAIA).<sup>16</sup> Under the FTAIA, the Sherman Act may be applied extraterritorially to conduct that has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, or

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12. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (citations omitted); see also *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976) (providing a shorter list of factors to be considered). This approach is also reflected in Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987 & Supp. 1993) [hereinafter Restatement (Third)], which also provides a number of factors for determining whether a court's exercise of jurisdiction is "unreasonable."

13. See, e.g., *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884-85 (5th Cir. 1982), vacated, 460 U.S. 1007 (1983), prior holding reaffirmed 704 F.2d 785 (5th Cir. 1983) (applying interest balancing to conclude that the District Court erred in dismissing the suit); *Montreal Trading, Ltd. v. Amax Indus., Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982) (adopting and following the *Timberlane* analysis). But see *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 950-52 (D.C. Cir. 1984) (rejecting balancing approach because courts are ill-equipped to determine whether vital national interests of United States or those of other nations should predominate).

14. Alford, *supra* note 1, at 26-27.

15. See, e.g., *In re Ins. Antitrust Litig.*, 938 F.2d 919, 931-34 (9th Cir. 1991) (employing the balancing test to hold that international comity does not require U.S. courts to abstain from exercising jurisdiction over British reinsurers in an antitrust case), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993); *Montreal Trading*, 661 F.2d at 869-70 (dismissing a suit because any effects on U.S. commerce were "insubstantial" and "speculative," and were outweighed by comity concerns); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 687-88 (S.D.N.Y. 1979) (acknowledging a balancing test as the "proper test," but holding that the record was insufficient to allow a review of the relevant factors); see also Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 *Am. J. Comp. L.* 579, 589-90 (1983) (asserting that courts applying the balancing test usually ignore or "give short shrift" to foreign national interests).

16. 15 U.S.C. §§ 6(a), 45(a)(3) (1988). For a discussion of the coverage of the FTAIA, see Alford, *supra* note 1, at 16-19.

on export commerce undertaken by domestic concerns.<sup>17</sup> Courts, however, did not interpret this codification of the effects doctrine as curtailing their ability to apply principles of international comity. Even after the enactment of the FTAIA, therefore, courts continued to apply the jurisdictional rule of reason in addition to determining whether jurisdiction was permissible under the "direct, substantial, and reasonably foreseeable" effects test.<sup>18</sup>

Thus, prior to *Hartford Fire* there was, in effect, a two-tiered test for the extraterritorial application of U.S. antitrust laws. First, the FTAIA provided a statutory standard, based on the degree of impact on U.S. commerce, for determining when jurisdiction *could* be asserted by U.S. courts. Second, the common law, in light of international comity concerns, set the rule of reason as the measure of when jurisdiction *should* be exercised over foreign defendants. The loosely defined jurisdictional rule of reason was thus grafted by the courts onto the statutory framework. Confusion resulting from this hybrid analysis left the extraterritorial application of U.S. antitrust laws in need of clarification.

## II. THE *HARTFORD FIRE* APPROACH

In *Hartford Fire*, nineteen U.S. states and numerous private plaintiffs alleged, *inter alia*, a conspiracy among certain London reinsurers to coerce primary insurers in the United States to offer commercial general liability insurance coverage to consumers only if certain changes advantageous to the reinsurers were made in the insurance forms. The plaintiffs claimed that failure to make such

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17. 15 U.S.C. § 6(a) (1988).

18. See, e.g., *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813-15, 814 n.8 (9th Cir. 1988) (applying 15 U.S.C. § 6(a) (1988), but stating that "in passing the [FTAIA], Congress did not change the ability of the courts to exercise principles of international comity"); *O.N.E. Shipping, Ltd. v. Flora Mercante Grancolombina, S.A.*, 830 F.2d 449, 451-54 (2d Cir. 1987), cert. denied, 488 U.S. 923 (1988) (dismissing antitrust case under the act of state doctrine); *Transnor (Bermuda) Ltd. v. BP N. Am. Petroleum*, 738 F. Supp. 1472, 1477-78 (S.D.N.Y. 1990) (citing and applying the *Timberlane* factors). In addition, the Justice Department continues to perform a comity analysis in its own enforcement proceedings after it determines that jurisdiction has been established. See United States Department of Justice Antitrust Enforcement Guidelines for International Operations, Part I, § 5, reprinted in 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, at S-22 to S-23 (Spec. Supp. 1988); see also *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990). However, the degree of deference given to comity in such enforcement proceedings appears limited. Interview with Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 8 Antitrust 8, 9 (1993) ("I cannot define with precision when we would not file a case solely because of comity considerations. I would hope that where conduct is aimed at, and has a substantial impact in, the United States, only in the most unusual situations would we actually stay enforcement of U.S. antitrust laws.").

changes would result in the reinsurers' boycotting those insurance forms and withholding reinsurance coverage from the primary insurers, a violation of section 1 of the Sherman Act.<sup>19</sup>

The District Court dismissed the claims against the foreign defendants, invoking international comity and applying the Ninth Circuit's decision in *Timberlane*.<sup>20</sup> The Ninth Circuit reversed, holding that under its *Timberlane* balancing approach, the principle of international comity was no bar to exercising jurisdiction.<sup>21</sup> While recognizing that the application of U.S. antitrust laws to the London reinsurers would lead to significant conflict with English law and policy, the Court of Appeals nevertheless concluded that under its *Timberlane* analysis other factors, including the London reinsurers' express purpose to affect United States commerce and the substantial nature of the effect produced, outweighed the conflict and required the exercise of jurisdiction.<sup>22</sup>

The Supreme Court granted certiorari to consider, *inter alia*, "whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct."<sup>23</sup> In announcing its 5-4 decision,<sup>24</sup> the Court noted at the outset that the District Court undoubtedly had jurisdiction over these claims under the effects doctrine, as was apparently conceded by the London reinsurers.<sup>25</sup> As the Court noted, "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 substantial effect in the United States."<sup>26</sup> Applying the effects doctrine, the Court ruled that the jurisdictional requirement was satisfied; the reinsurers allegedly conspired to affect the mar-

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19. *Hartford Fire*, 113 S. Ct. at 2897-99.

20. *In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 487-90 (N.D. Cal. 1989), rev'd, 938 F.2d 919 (9th Cir. 1991), aff'd in part, rev'd in part sub nom. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993).

21. *In re Ins. Antitrust Litig.*, 938 F.2d 919, 931-34 (9th Cir. 1991), aff'd in part, rev'd in part sub nom. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993).

22. *In re Ins. Antitrust Litig.*, 938 F.2d at 933-34.

23. *Hartford Fire*, 113 S. Ct. at 2908.

24. Justice Souter delivered the opinion of the Court on this issue, joined by Chief Justice Rehnquist and Justices White, Blackmun, and Stevens. *Id.* at 2908-11. Justice Scalia filed a dissenting opinion on the issue, in which Justices O'Connor, Kennedy, and Thomas joined. *Id.* at 2917-22 (Scalia, J., dissenting).

25. See *id.* at 2910 n.24.

26. *Id.* at 2909 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986)); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 444 (2d Cir. 1945); Restatement (Third), *supra* note 12, § 415 and reporters' note 3 (1987).

ket for insurance in the United States, and their conduct in fact produced a substantial effect.

As for the comity question, the Court noted that when Congress enacted the FTAIA, it expressed no view on the question of whether a court should ever decline to exercise jurisdiction on grounds of international comity. The Court, too, avoided that question, "for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct . . . international comity would not counsel against exercising jurisdiction in the circumstances alleged here."<sup>27</sup>

Under the Court's international comity analysis, "the only substantial question in this case is whether 'there is in fact a true conflict between domestic and foreign law.'"<sup>28</sup> The London reinsurers, as well as the British government appearing as *amicus curiae*, asserted that applying the Sherman Act to the London reinsurers' conduct would conflict significantly with British law, under which Parliament has established a comprehensive regulatory regime for the London reinsurance market. The Court, however, held that merely to assert that the reinsurers' conduct was consistent with British law and policy

is not to state a conflict. "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. . . . No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both."<sup>29</sup>

Because the London reinsurers did not argue that British law *required* them to act in some fashion prohibited by United States law, or claim that their compliance with the laws of both countries was otherwise impossible, the Court found no conflict with British law.

As for other international comity considerations, the Court held that it had "no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdic-

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27. *Hartford Fire*, 113 S. Ct. at 2910.

28. *Id.* (quoting *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part, dissenting in part)). For a discussion of the majority opinion in *Aérospatiale*, see *infra* notes 46-49 and accompanying text.

29. *Id.* at 2910 (quoting Restatement (Third), *supra* note 12, § 415 cmt. j, § 403 cmt. e).



tion on grounds of international comity."<sup>30</sup> Accordingly, it held that "the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged."<sup>31</sup>

### III. CRITIQUE

The United States approach as articulated in *Hartford Fire* sharply diverges from the previous state of the law. Stated succinctly, *Hartford Fire* holds (1) that the Sherman Act applies to foreign conduct intended to produce, and in fact producing, some substantial effect in the United States, and (2) that principles of international comity may preclude a court from exercising jurisdiction in such a case, if at all, only where the laws of a foreign sovereign and the commands of the Sherman Act diverge beyond the point of reconciliation.

The Court's holding raises several important issues. First, the Supreme Court has unequivocally affirmed the effects doctrine; indeed, *Hartford Fire* represents one of the clearest endorsements ever by the Supreme Court of the propriety of its use as a basis for prescriptive jurisdiction. The legal source of the holding, however, remains somewhat obscure. Although alluding to the FTAIA elsewhere, the Court surprisingly did not utilize the FTAIA's "direct, substantial, and reasonably foreseeable" language, despite the fact that the FTAIA arguably governed.<sup>32</sup> The Court's test for Sherman Act applicability, referring to foreign "conduct that was meant to produce and did in fact produce some substantial effect in the United States,"<sup>33</sup> departs from the statutory language to encompass conduct whose effects are intended and substantial, even if not direct or reasonably foreseeable.

Second, the Court declined to speak to the weight of comity considerations in cases covered by the Sherman Act. A court must

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30. *Id.* at 2911.

31. *Id.* at 2895.

32. The Court ruled that the London reinsurers engaged in conduct affecting the United States market for insurance, and therefore domestic commerce, see *id.* at 2909, but did not decide how the FTAIA would apply in the case. The Court did note, however, that, assuming the standard of the FTAIA affected the case, and assuming that the standard announced a departure from law in effect prior to the statute, the conduct alleged would satisfy the FTAIA's effects test. See *supra* notes 16-18 and accompanying text. Moreover, in asking whether Congress, in enacting the FTAIA, intended to permit a court to decline jurisdiction on grounds of international comity, the Court noted that Congress had been silent on the issue. *Hartford Fire*, 113 S. Ct. at 2910; see *Ins. Antitrust Litig.*, 938 F.2d at 932.

33. *Hartford Fire*, 113 S. Ct. at 2909.

first determine whether it has statutory jurisdiction over the Sherman Act claims,<sup>34</sup> and only then consider whether to "decline to exercise such jurisdiction on grounds of international comity" if "there is in fact a true conflict between domestic and foreign law." <sup>35</sup> The Court denied such a conflict and held that international comity did not "counsel against exercising jurisdiction in the circumstances alleged here." <sup>36</sup> The Court thus adhered to a bifurcated analysis, inquiring first into statutory jurisdiction and then into considerations of comity (even if only to foreclose the question in the instant case).

Thus, lower courts addressing this issue should continue to utilize a two-tiered approach, considering both statutory jurisdiction and considerations of comity. Where international comity, as defined by the Court, would not counsel against exercising jurisdiction, *Hartford Fire* requires the court to exercise jurisdiction whenever the statutory jurisdictional requirements obtain. However, in instances presenting a "true conflict," *Hartford Fire* provides little guidance as to how much deference, if any, should be accorded to the principle of international comity.<sup>37</sup>

Perhaps the most significant aspect of *Hartford Fire* is that the Court interpreted international comity quite narrowly, finding that the "only substantial question" to consider in introducing comity considerations is whether "there is in fact a true conflict between domestic and foreign law." <sup>38</sup> This analysis requires a determina-

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34. Id. at 2909.

35. Id. at 2910. In his dissent, Justice Scalia strongly criticized the Court's approach in this regard. "It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should 'decline to exercise . . . jurisdiction,' rather than whether the Sherman Act covers this conduct, is simply misdirected." Id. at 2921 (Scalia, J., dissenting) (citation omitted).

36. Id. at 2910.

37. This is not to say that the Court should have included such dicta, but only that it leaves the question unanswered by the Court. As a result, courts will likely rely on previous lower court rulings concluding that, in adopting the FTAIA, "Congress did not change the ability of the courts to exercise principles of international comity." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814 n.8; see also *O.N.E. Shipping, Ltd. v. Flora Mercante Grancolombina, S.A.*, 830 F.2d 449, 451-54 (2d Cir. 1987), cert. denied, 488 U.S. 923 (1988) (act of state doctrine required dismissal of antitrust claim); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 946 n.137 (D.C. Cir. 1984) (FTAIA does not alter "the ability of the courts to exercise comity."); *Transnor (Bermuda) Ltd. v. BP N. Am. Petroleum*, 738 F. Supp. 1472, 1477-78 (S.D.N.Y. 1990) (applying the *Timberlane* factors). The legislative history of the FTAIA indicates that the Act was not intended to have any effect on a court's ability to employ the principle of international comity. H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2498 (FTAIA has "no effect on the courts' ability to employ notions of comity.").

38. *Hartford Fire*, 113 S. Ct. at 2910.

tion by the court as to whether the court has subject-matter jurisdiction.<sup>39</sup> Under this approach, a court arguably need not consider any other question in assessing whether international comity might preclude the exercise of jurisdiction. If this is the case, then no matter how strong the defendant's connections may be to another jurisdiction or how attenuated they may be to the United States; no matter how important the regulation of such activity may be to the foreign state or how insignificant it may be to the United States; and no matter how adverse the effects may be upon foreign relations if jurisdiction is exercised, the court must exercise jurisdiction if there is a substantial and intended<sup>40</sup> effect on U.S. commerce, at least when there is no *actual* conflict between domestic and foreign law. In so holding, the Supreme Court rejected the arguments of the United States, appearing as *amicus curiae*, that a conflict with foreign law may be found where "the defendants could not have avoided engaging in the disputed conduct without frustrating clearly articulated policies of the foreign government."<sup>41</sup>

The Court's "true conflict" approach is also in tension with its previous pronouncements on international comity. In its classical definition of the doctrine,<sup>42</sup> the Court stated that international comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens."<sup>43</sup> In *Lauritzen v. Larsen*,<sup>44</sup> a case involving a personal injury claim under the Jones Act brought by a Danish seaman against a Danish shipowner for acts occurring in Cuban waters, the Court emphasized that the case posed a potential conflict between U.S. and Danish law. "That allowance of an additional remedy under our Jones Act would sharply conflict with the *policy* and *letter* of Danish law is plain."<sup>45</sup> Significantly, the

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39. *Id.* at 2909 nn.22, 24.

40. *Id.* at 2909.

41. Brief for the United States as Amicus Curiae Supporting Respondents at 28, *Hartford Fire*, 113 S. Ct. 2891 (1993) (No. 91-1111).

42. *Hilton v. Guyot*, 159 U.S. 113 (1895).

43. *Id.* at 164.

44. 345 U.S. 571 (1953).

45. *Id.* at 575 (emphasis added); cf. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (National Labor Relations Act does not apply on ships, flying the Honduran flag and staffed by a foreign crewmembers, owned by a foreign subsidiary of a U.S. corporation, because Honduran law prescribed that a local union had to represent the seamen); *Cont. Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-06 (1962) (antitrust action alleging exclusion from the Canadian market allowed, as the validity of Canadian government actions were not being questioned); *Romero v. Int'l*

defendant in *Lauritzen* did not encounter a *Hartford Fire* "true conflict"; i.e., the defendant was not compelled by Danish law to take action in violation of U.S. law, nor was compliance with both sets of laws impossible. Rather, U.S. law provided a Jones Act remedy for "any seaman who shall suffer personal injury in the course of his employment," whereas Danish law provided a comprehensive, state-operated compensation system for sailors on Danish ships.<sup>46</sup> To avoid such a conflict, the Court reasoned that customary international law and considerations of international comity have "the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities to rules designed to foster amicable and workable commercial relations."<sup>47</sup> Accordingly, the Court attempted to avoid or resolve the "conflicts" between the competing laws and policies by ascertaining and valuing points of contact between the transaction and the states whose competing laws were involved.<sup>48</sup> In so doing, the Court held that the Jones Act did not apply.<sup>49</sup>

Similarly, in *Société Nationale Industrielle Aérospatiale v. United States District Court*,<sup>50</sup> a case involving the extraterritorial reach of U.S. discovery laws under the Hague Evidence Convention,<sup>51</sup> the Court ruled that comity required courts to balance "the respective interests of the foreign nation and the requesting nation," scrutinizing "in each case . . . the particular facts, the sovereign interests, and the likelihood that resort [to the Hague Evidence Convention] will prove effective."<sup>52</sup> The Court counseled that "American courts should therefore take care to demonstrate due respect for

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Terminal Operating Co., 358 U.S. 354, 381-84 (1959) (applying *Lauritzen* to hold that a Spanish citizen could not recover in a Jones Act suit against a Spanish company for injuries suffered in American waters).

46. *Lauritzen*, 345 U.S. at 573 n.1, 575-76. Justice Scalia cited this passage in *Lauritzen* in his dissent in *Hartford Fire*: "The petitioners here, like the defendant in *Lauritzen*, were not compelled by any foreign law to take their allegedly wrongful actions, but that no more precludes a conflict-of-laws analysis here than it did there." *Hartford Fire*, 113 S. Ct. at 2922 (Scalia, J., dissenting) (citations omitted).

47. *Lauritzen*, 345 U.S. at 581-82.

48. *Id.* at 582-93 (setting forth and applying "several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim." *Id.* at 583.).

49. *Id.* at 592-93.

50. 482 U.S. 522 (1987).

51. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241 [hereinafter *Hague Evidence Convention*].

52. *Aérospatiale*, 482 U.S. at 544.

any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."<sup>53</sup> Thus, in its previous rulings on international comity, the Court has utilized comity to balance competing interests of the United States and other foreign nations and has not limited its inquiry to a showing of an actual conflict between domestic and foreign law. As Justice Scalia argued in his dissent in *Hartford Fire*, the Court's "true conflict" approach is a "breathtakingly broad proposition, which contradicts the many cases discussed earlier, [and] will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries."<sup>54</sup>

Finally, given that the Court found no conflict to exist, *Hartford Fire* provides no guidance as to whether courts should utilize a balancing approach in instances of "truly" conflicting domestic and foreign laws. Though *Hartford Fire* is not instructive, *Lauritzen* and *Aéropatiale* suggest that lower courts should evaluate the interests of the foreign state and the United States, consider all relevant factors, and defer to the other state if that state's interest is greater.<sup>55</sup> Moreover, in determining preference between conflicting exercises of jurisdiction, preference will likely be given to the state where the allegedly unlawful act was done, because a

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53. *Id.*; see also Born, *supra* note 8, at 49 (stating that under *Aéropatiale*, courts must "balance 'the respective [sovereign] interests of the foreign nation and the requesting nation,' hardship suffered by private parties, the need for the requested materials and other factors").

The nature of the concerns that guide a comity analysis is suggested by the Restatement of Foreign Relations Law of the United States . . . . While we recognize that § 437 of the Restatement may not represent a consensus of international views on the scope of the district court's power to order foreign discovery in the face of objections by foreign states, these factors are relevant to any comity analysis: (1) the importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

*Aéropatiale*, 482 U.S. at 544 n.28.

54. *Hartford Fire*, 113 S. Ct. at 2922 (Scalia, J., dissenting).

55. See *Lauritzen*, 345 U.S. at 582-93; *Aéropatiale*, 482 U.S. at 543-46; see also Restatement (Third), *supra* note 12, § 403(3) (providing that when "the prescriptions by the two states are in conflict . . . a state should defer to the other state if that state's interest is clearly greater").

state should not prohibit a person to do abroad what the territorial state requires.<sup>56</sup>

In conclusion, by holding that international comity is not relevant except in instances of an actual conflict, *Hartford Fire* portends the return of an era reminiscent of the early days of *Alcoa*—bringing “the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries.”<sup>57</sup> Provided there is a sufficiently close nexus with the United States to justify the assertion of jurisdiction, *Hartford Fire* evidences little concern for, or consideration of, the fundamental sovereignty interests of another country that may have concurrent jurisdiction. Thus, what may be called a “comity-as-conflict” approach ensures unnecessary conflict, and may once again evoke the charge of “Yankee ‘jurisdictional jingoism.’”<sup>58</sup>

#### IV. COMPARATIVE ANALYSIS

One of the primary theses of the previous article was that the United States and European Union approaches to the extraterritorial application of antitrust laws are increasingly developing along parallel lines. As a general proposition the United States, prior to *Hartford Fire*, proclaimed a broad grant of jurisdictional authority over extraterritorial activities under the effects doctrine, but curtailed that authority through comity-based limitations. The European Court of Justice, under the “implementation approach” announced in *Ahlström v. Commission* (“*Wood Pulp*”),<sup>59</sup> asserted jurisdiction on the basis of objective territoriality, inquiring as to where the allegedly unlawful agreement was implemented and interpreting quite broadly what constituted a consummating act within the Union.<sup>60</sup> Thus, I argued that

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56. Restatement (Third), supra note 12, § 441 cmt. a says that “a state may not, absent unusual circumstances, require a person, even one of its nationals, to do abroad what the territorial state prohibits.” This is known as the “foreign sovereign compulsion” doctrine. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (finding that for one jurisdiction to treat a private party of another jurisdiction as if it were on of its own, “not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent”).

57. *Hartford Fire*, 113 S. Ct. at 2922 (Scalia, J., dissenting).

58. See John B. Sandage, *Forum Non Conveniens* and the Extraterritorial Application of United States Antitrust Law, 94 Yale L.J. 1693, 1698 (1985).

59. Case 89/85, *Ahlström v. Comm’n*, 1988 E.C.R. 519, 4 C.M.L.R. 901 (1988) [hereinafter *Wood Pulp*]; see also Alford, supra note 1, at 31-37 (describing and analyzing the *Wood Pulp* decision).

60. The *Wood Pulp* court explained:

The effects doctrine is continually being narrowed and qualified to require a showing of stronger jurisdictional nexus through direct, substantial, and reasonably foreseeable effects, while the objective territoriality approach is being reformulated and expanded to encompass certain activities that would fall well outside its traditional ambit. The result is a convergence of application of [E.U.] and U.S. antitrust laws vis-à-vis foreign defendants.”<sup>61</sup>

*Hartford Fire* nearly completes this convergence in matters of comity: juxtaposed, *Hartford Fire* and *Wood Pulp* present a striking similarity in their approach to international comity in the extraterritorial application of antitrust laws. *Wood Pulp* concluded that a requirement of comity would “amount [t]o calling in question the [Union’s] jurisdiction to apply its competition rules . . . and . . . [that] that argument has already been rejected.”<sup>62</sup> As to the defendants’ argument that the Union should exercise its jurisdiction with moderation where persons are subject to contradictory state commands, *Wood Pulp* deferred inquiry, since the occasion for considering such a rule was not present. “There is not, in this case, any contradiction between the conduct required by the United States and that required by the [Union] since the Webb-Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded.”<sup>63</sup>

Thus, under both approaches, a “true conflict” exists only when there are mutually exclusive state obligations that make compliance with both impossible. In *Wood Pulp* the Court of Justice ruled that no conflict existed because the Webb-Pomerene Act,<sup>64</sup> which exempts export cartels from the application of United States

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The decisive factor is . . . the place where [the agreement to fix prices] is implemented.

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.

Id. at 5243; see also Alford, *supra* note 1, at 37-38 (stating that, although the European Court believes that the territoriality principle is the best way to assert jurisdiction over foreign “antitrust” defendants, *Wood Pulp* represents the Court’s abandonment of a strict definition of “territoriality” in favor of an objective territorial approach reinterpreted in light of the goal of controlling foreign anticompetitive practices).

61. Alford, *supra* note 1, at 40.

62. *Wood Pulp*, 1988 E.C.R. at 5244.

63. Id.

64. 15 U.S.C. §§ 61-66 (1988).

antitrust laws, does not “require such cartels to be concluded” in violation of E.U. competition laws.<sup>65</sup> Similarly, the Supreme Court held in *Hartford Fire* that the British Restrictive Trade Practice (Services) Order, which exempts certain insurance services from the application of British antitrust laws, does not “require[ ] them to act in some fashion prohibited by the law of the United States.”<sup>66</sup> Thus, under *Wood Pulp* and *Hartford Fire*, international comity is roughly coextensive with the doctrine of foreign sovereign compulsion.<sup>67</sup>

Because under both *Hartford Fire* and *Wood Pulp* the only possible bar to jurisdiction over a foreign antitrust defendant occurs when the defendant is subjected to conflicting laws, other foreign sovereignty concerns, no matter how profound or persuasive, become irrelevant. This symmetry, at one level, should minimize conflict between the United States and the European Union as to the regard properly accorded by courts to the interests of a foreign sovereign. Neither the United States nor the European Union, in adopting analogously restrictive comity approaches, can complain when its laws and policies are not given greater deference. But if this convergence renders a certain theoretical consistency, or reduces conflict by force of functional similarity and a common attitude, it will do so only at the expense of adequate solicitude to the principle of international comity.

The narrow definition of a conflict of laws adduced in *Wood Pulp* and *Hartford Fire* ensures that comity will almost never be a factor in the extraterritorial application of antitrust laws; in the vast majority of antitrust cases, the conflict is between one state *encouraging* or *permitting* certain behavior and another state *prohibiting* that same behavior. For example, many countries, including the United States, exempt anticompetitive export cartels from domestic antitrust laws in order to encourage increasing market shares worldwide.<sup>68</sup> Governments may encourage cooperation among

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65. *Wood Pulp*, 1988 E.C.R. at 5244 (emphasis added).

66. *Hartford Fire*, 113 S. Ct. at 2911.

67. See Restatement (Third), *supra* note 12, § 441 cmt. a. Under § 403(3), when two states have jurisdiction to prescribe contradictory commands, certain principles of preference generally prevail. Section 441 on foreign state compulsion applies the principles of section 403(3) “to protect persons caught between such conflicting commands.” *Id.*

68. Pettit & Styles, *supra* note 9, at 699 (listing the United States, the United Kingdom, Canada, Germany, Japan, and Australia); see also 15 U.S.C. §§ 61-66 (1988) (codification of the Webb-Pomerene Act, the pertinent U.S. law).



competitors to set prices for certain precious commodities,<sup>69</sup> or even direct competitors to implement government trading policies under threat of sanction.<sup>70</sup> Under the "true conflict" approach, however, courts must ignore competing or inconsistent regulatory policies exempting, encouraging, or guiding specific behavior. In short, if comity becomes a consideration only when one state *prohibits* what another state affirmatively *requires*, comity as a check on the extraterritorial application of antitrust laws will rarely be a factor. Given that both jurisdictions have eschewed a balancing approach, it is increasingly likely that the practical result under both approaches will be the same: courts will assert jurisdiction over foreign defendants.

Finally, the narrow definition of international comity is in tension with the U.S.-E.U. competition laws co-operation agreement ("Co-operation Agreement").<sup>71</sup> On the one hand, both the Supreme Court and the European Court of Justice have disavowed any notion of comity save in instances of foreign sovereign compulsion; on the other hand, the European Commission and the Justice Department have adopted, with great ceremony, the Co-operation Agreement, with its explicit incorporation of a comity analysis when either party's enforcement activities adversely affect the other party's sovereign interests.<sup>72</sup> Under article VI of the Co-operation Agreement, "each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an

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69. Cf. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1254 (7th Cir. 1980) (foreign governments were "actively and admittedly sympathetic to the economic determinism" of defendant foreign uranium producers); *United States v. General Elec. Co.*, 82 F. Supp. 753, 890 (D.N.J. 1949) ("[T]he industrial climate of Europe was that of cartelized operation often with government participation."); John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 *Fordham L. Rev.* 350, 354 (1983) (noting that the United States' preference for vigorous competition collides with foreign "regulatory regimes").

70. See *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 310, 315 (3d Cir. 1983) (rejecting sovereign compulsion defense of Japanese companies and their subsidiaries despite diplomatic note confirming that the challenged conduct was taken pursuant to Japanese trading policy and at the direction of the Japanese Ministry of International Trade and Industry ("MITI")), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

71. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, Sept. 23, 1991, 30 *I.L.M.* 1487 [hereinafter *Co-operation Agreement*].

72. See Alford, *supra* note 1, at 44-49.

investigation or proceeding.”<sup>73</sup> The Co-operation Agreement then sets forth several factors to be considered in the comity analysis—precisely the same factors used under the U.S. jurisdictional rule of reason.<sup>74</sup> For government-initiated enforcement proceedings, then, there is careful consideration of international comity concerns; for private-party actions, by contrast, the balancing of foreign sovereignty interests has been sharply curtailed by the Supreme Court’s ruling in *Hartford Fire*.

## V. CONCLUSION

For now, *Hartford Fire* has largely settled the nettlesome question of how much deference U.S. courts should give to the legitimate foreign sovereignty interests of other nations when applying U.S. antitrust laws extraterritorially. It has ensured that the fate of extraterritorial infringements will not be different from the fate of wholly internal infringements, except in the rare instance where a foreign defendant is subjected to an actual conflict between foreign and domestic state commands. Thus, far from being a lasting fixture on the legal landscape, the jurisdictional rule of reason has now been repudiated, or at least reduced to the simple question of whether “‘there is in fact a true conflict between domestic and foreign law.’”<sup>75</sup> Only then, if at all, will courts undertake a comity analysis balancing the foreign sovereignty interests.

Because the *Hartford Fire* approach to international comity is essentially the same as that reached by the Court of Justice in *Wood Pulp*, there is now, more than ever, a convergence in the application of E.U. and U.S. antitrust laws vis-à-vis foreign defendants. That is, in the vast majority of cases, the same conduct will result in the exercise of jurisdiction whether analyzed under *Wood Pulp*’s implementation approach or *Hartford Fire*’s effects doctrine. Nevertheless, it is regrettable that neither jurisdiction has established a flexible approach to the extraterritorial application of antitrust laws so that courts might avoid, in the interest of international comity, undue encroachments on the foreign sovereignty interests of other nations.

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73. Co-operation Agreement, *supra* note 71, art. VI.

74. Examples of these factors include, among others, the degree of conflict with foreign law, the nationalities of the parties, and the relative importance of the alleged violation in the United States as compared to abroad. See *id.*; *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613-14 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); Restatement (Third), *supra* note 12, § 403(2).

75. *Hartford Fire*, 113 S. Ct. at 2910.

One possible solution would be for Congress to amend the Sherman Act to incorporate a jurisdictional rule of reason. Congress has, in recent years, introduced several initiatives incorporating a comity-based balancing approach when applying antitrust laws extraterritorially; they have met with little success.<sup>76</sup> Nevertheless, the confluence of a Supreme Court decision insensitive to international comity concerns and the adoption of the Co-operation Agreement specifically incorporating a balancing approach may suggest that the time is ripe for a statutory jurisdictional rule of reason.<sup>77</sup>

A solution might also be found in recent initiatives to codify, in a multilateral convention, the extraterritorial reach of antitrust laws in light of international comity considerations. The many endeavors to harmonize antitrust laws suggest at least that *Hartford Fire* and *Wood Pulp* are swimming against a rising tide of cooperation in international antitrust enforcement.<sup>78</sup> Such cooperation may

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76. See, e.g., S. 50, 101st Cong., 1st Sess. (1989); S. 572, 100th Cong., 1st Sess. (1987); S. 397, 99th Cong., 2d Sess. (1986); see also Eleanor M. Fox, *Extraterritoriality and Antitrust—Is "Reasonableness" the Answer?*, 1986 Fordham Corp. L. Inst. 49, 75-81 (1987). Under S. 397, in any action involving trade with a foreign nation, the court shall dismiss the case

whenever it determines that the exercise of jurisdiction would be unreasonable primarily on the basis of the following factors: (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect United States consumers or competitors; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; and (6) the degree of conflict with foreign law or articulated foreign economic policies.

S. 397, *supra*. S. 397 passed the Judiciary Committee but failed to reach the floor of the Senate during the 99th Congress. Both the American Bar Association and the Justice Department have expressed support for a statutory jurisdictional rule of reason. Fox, *supra*, at 77, 79.

77. Such legislation could mirror article VI of the Co-operation Agreement. See Co-operation Agreement, *supra* note 71, art. VI; Alford, *supra* note 1, at 48.

78. A number of bilateral agreements have endorsed an approach incorporating a rule of reason in the extraterritorial application of antitrust laws. See Co-operation Agreement, *supra* note 71, art. VI; Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, U.S.-Can., 23 I.L.M. 275, 278-79 (1984); Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Aust., 34 U.S.T. 389, 392-93; Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956, 1958-59 (entered into force Sept. 11, 1976). As for a multilateral convention on international antitrust enforcement and the need for interest balancing when applying antitrust laws extraterritorially, see Int'l Antitrust Code Working Group, Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (July

now be needed, for, as Judge Fitzmaurice admonished in *Barcelona Traction*, international law obligates every state to “exercise moderation and restraint as to the extent of [its] jurisdiction[,]” so as to “avoid undue encroachment on a jurisdiction more properly appertaining to . . . another State.”<sup>79</sup>

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10, 1993), reprinted in 65 Antitrust & Trade Reg. Rep. (BNA) (Spec. Supp. 1993); Am. Bar Ass'n, Report of the Special Committee on International Antitrust: A World Antitrust Code (1991); Inst. of Int'l Law, Nineteenth Commission on the Extraterritorial Jurisdiction of States, Revised Draft Resolution, art. 4 (1990), reprinted in 65 Y.B. Inst. Int'l L. 148, 149 (1993) (“[E]xtraterritorial jurisdiction . . . shall be exercised with due regard to the principles of reasonableness and non-interference with the internal affairs of other States. Reasonableness consists, *inter alia*, in the balancing of interests of the States concerned.”); 1986 Recommendations of the Council of the Organization for Economic Cooperation and Development (“OECD”) Concerning Cooperation between Members and Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C(86) 44 (1986), reprinted in 25 I.L.M. 1629 (1986).

79. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 105 (Fitzmaurice, J., separate opinion).

