The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches

Roger P. Alford
Notre Dame Law School, ralford@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship

Part of the Antitrust and Trade Regulation Commons, International Law Commons, and the International Trade Law Commons

Recommended Citation
Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/410

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches

ROGER P. ALFORD*

I. INTRODUCTION

Few subjects in international law raise such incorrigible conflicts of interest as the exercise of extraterritorial jurisdiction in the antitrust context. As one commentator asked with respect to a U.S. court's assertion of jurisdiction over British defendants, "[h]ow could American law, how could an American judgment applying American law possibly vary the rights and obligations created by an English contract to be performed outside the United States?"1 Indeed, international law is based on the notion that a state occupies a definite territory, within which it normally exercises exclusive jurisdiction.2

Yet this traditional doctrine of "territorial jurisdiction" has slowly given way to more and more assertions of "extraterritorial jurisdiction" and international law has reluctantly recognized such encroachments. Most significantly, the past forty to fifty years have evidenced a remarkable willingness by courts, especially courts in the United States, to assert jurisdiction over foreign defendants when their foreign conduct produces adverse effects upon domestic commerce. Proponents argue that such extraterritorial jurisdiction is necessary for a state effectively to regulate the anticompetitive activities of foreign undertakings. Opponents counter that a liberal understanding of ter-

---

* J.D. New York University; L.L.M. Edinburgh University. This article was originally presented as a Master's Thesis at Edinburgh University. The author is currently working as Legal Assistant to the Honorable Richard C. Allison, Iran-United States Claims Tribunal, The Hague, Netherlands.

territoriality can easily address such concerns without sacrificing fidelity to the fundamental principles of international law, among them the principle of sovereign equality of states.

In broad strokes, this divergence of perspectives represents the respective views of the United States and the European Community regarding the extraterritorial application of antitrust laws. This Article compares the differing approaches of the United States and the European Community as they wrestle with the question of how to regulate foreign anticompetitive activity. More specifically, this Article highlights the distinctive features of the U.S. "effects doctrine" and the European Community's "implementation approach" and analyzes the differences that exist between the two systems. Only the U.S. doctrine openly provides for the consideration of international comity concerns, but both approaches have been used liberally to assert jurisdiction over foreign defendants. Part II of this Article provides a background to the subject by briefly outlining the traditional bases of prescriptive jurisdiction. Parts III and IV delineate the evolutions of the U.S. approach and the European Community approach to extraterritorial jurisdiction in the antitrust context. Part V compares and contrasts the two approaches and offers some modest estimations as to their respective strengths and weaknesses, including the validity of the distinctions they create. Part VI concludes by offering an interim solution to the problem of conflicting or concurrent competition enforcement: bilateral competition enforcement cooperation agreements such as that recently signed by the United States and the European Community.

II. BASES OF PRESCRIPTIVE JURISDICTION

A state generally may assert jurisdiction over conduct which occurs within its territory and, in certain circumstances, over conduct occurring outside its territory. The former constitutes jurisdiction based on "territoriality," whereas the latter is described as "extraterritorial jurisdiction." The "territoriality principle" is the most basic and pervasive principle underlying the exercise of prescriptive jurisdiction. Under the territoriality principle a state may exercise jurisdiction over transactions, persons, or things within its territory regardless of the nationality of the perpetrators of such conduct. Such territorial


4. See generally Codification of International Law under the Auspices of the Harvard Law
jurisdiction comports with the general maxim that "a state is competent to deal with any offence committed within its territory"\textsuperscript{5} and may prescribe laws applicable to "resources and persons within [its] own territory."\textsuperscript{6} Such territorial jurisdiction has been applied and extended to include subjective and objective territorial jurisdiction. The former permits a state to assert jurisdiction over acts that originated within its territory, even though they may have been completed abroad; the latter permits a state to exercise "jurisdiction over a foreign national where a consummating act within the [s]tate's territory was a constituent element of a crime committed abroad."\textsuperscript{7}

This most fundamental basis of jurisdiction—territoriality—does not, however, delimit the application of other proper bases of so-called "extraterritorial jurisdiction." As the Permanent Court of International Justice posited it in the \textit{Lotus Case},\textsuperscript{8} every state remains free to adopt principles of extraterritorial jurisdiction that it regards as best and most suitable, provided such jurisdiction does not overstep the limits of international law:

Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.\textsuperscript{9}

\textsuperscript{5} Brierly, supra note 2, at 299.


\textsuperscript{8} S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10.

\textsuperscript{9} Id. at 19. Unfortunately, international decisions have rarely commented upon the precise contours of these limitations. Judge Jessup, in his separate opinion in \textit{Barcelona Traction}, raised the issue as to the international law limits mentioned in the \textit{Lotus Case}. Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 166-67 (Feb. 5) (Jessup, J., separate opinion). His findings, however, were inconclusive as to the "effects doctrine." He suggested that although at least six countries have accepted an effects doctrine of the kind found in \textit{Alcoa}, such rules, while valid for interstate commerce within the United States, may be improper when placing a burden on international commerce. Id. See infra notes 39-46 and accompanying text for a discussion of the \textit{Alcoa} case.
Accordingly, international law permits numerous other bases of extraterritorial jurisdiction. For example, under the "nationality principle" a state may pass legislation concerning the conduct of its nationals, whether natural or legal persons, regardless of whether their activities occurred at home or abroad. Similarly, under the "protective principle" a state may assert jurisdiction over crimes by foreign nationals in a foreign territory where there is a reasonable connection between the act and a state's legitimate interests in protecting its own national security. Closely related to this is the "effects doctrine" which will be discussed at length below. In essence, the effects doctrine holds that a state can assert jurisdiction over conduct outside its borders where such conduct has the intended effect of causing a substantial adverse impact within the state's territory. There is considerable debate as to whether a naked or unmodified effects doctrine is a proper basis of extraterritorial jurisdiction. Another basis of jurisdiction is the "universality principle" which posits that a state may assert jurisdiction over perpetrators of acts which are deemed so heinous that the perpetrator is an "enemy of humanity." The most controversial basis for jurisdiction is the "passive personality" principle. It provides that a state has jurisdiction over criminals committing offenses against its own nationals.

10. See 1 Restatement (Third), supra note 3, § 402(2) (declaring that a state has jurisdiction to prescribe laws with respect to "activities, interests, status, or relations of its nationals outside as well as within its territory"). See generally Harvard Research, supra note 4, at 519-39 (discussing the "nationality principle").

11. See Israel v. Eichmann, 36 I.L.R. 5, 50-57 (1968) (Israel argued that its vital interests were affected by Adolf Eichmann's crimes and that under the protective principle Israel had the right to punish those crimes). Examples of such activity include counterfeiting a state's currency or attacking its diplomats. See Walter Van Gerven, EC Jurisdiction in Antitrust Matters: The Wood Pulp Judgment, 1989 Fordham Corp. L. Inst. 451, 453 (Barry E. Hawk ed., 1990). See generally Harvard Research, supra note 4, at 543-61 (discussing the "protective principle").

12. See infra notes 39-55 and accompanying text.

13. See Matter of Extradition of Demjanjuk, 612 F. Supp. 544, 556 (N.D. Ohio 1985) (jurisdiction based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people such that any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses), aff'd, 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982); Eichmann, 36 I.L.R. at 26 (stating that crimes which "struck at the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself" and that jurisdiction is therefore universal); Jeffrey M. Blum & Ralph G. Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 60-62 (1981) (asserting that perpetrators of such acts are hostis humani generis: enemies of all humanity).
regardless of the nationality of the criminal or the locus of the offense.\textsuperscript{14}

In the context of applying antitrust laws extraterritorially, two of these bases of jurisdiction are of particular significance: namely, the territoriality principle and the "effects doctrine."\textsuperscript{15} Few problems arise when a state asserts jurisdiction on the territoriality principle.\textsuperscript{16} It is the extraterritorial assertion of jurisdiction that creates the greatest difficulties. Thus, the problem of "extraterritorial jurisdiction" refers to the "general problem of conflicting claims by nation-states seeking to apply their laws and implement their policies" to regulate extraterritorial conduct "in a way which may undermine and conflict with the laws and policies of a foreign government."\textsuperscript{17} Generally speaking, courts in the United States have exercised extraterritorial jurisdiction on the basis of the effects doctrine.\textsuperscript{18} The European Community, in keeping with Continental skepticism toward the effects doctrine, has attempted instead to fashion jurisdictional rules that comport with the territorial principle.\textsuperscript{19} These two approaches will be discussed in turn.

Before proceeding further, it is worth mentioning one final consideration that frequently arises. In recent years, some courts have not ended the jurisdictional inquiry after a simple finding that jurisdiction is properly based on one or more of the extraterritorial principles discussed above. Rather, in order to show due respect for international comity,\textsuperscript{20} these courts have developed a secondary "jurisdictional rule

\textsuperscript{14} Catherine C. Fisher, U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?, 18 Vand. J. Trans. L. 915, 930 (1985). See United States v. Yunis, 681 F. Supp. 896, 901-02 (1988), aff'd, 924 F.2d 1086 (1991) (court, while recognizing that passive personality is the most controversial of five identified sources of extraterritorial jurisdiction, found that "the international community recognizes its legitimacy" and approved of its use as "a basis for asserting jurisdiction over hostage takers" in the Convention against the Taking of Hostages); 1 Restatement (Third), supra note 3, § 402 cmt. g (passive personality principle has been "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality"); Harvard Research, supra note 4, at 578-80. It would appear that the international community's willingness to embrace the passive personality principle is in direct proportion to the gravity of the offense and to the inability of states effectively to combat such crimes through other jurisdictional bases.

\textsuperscript{15} See infra section III (discussing the evolution of the "effects" doctrine in U.S. jurisprudence).

\textsuperscript{16} 1 Restatement (Third), supra note 3, § 402 cmt. c.


\textsuperscript{18} See infra section III.

\textsuperscript{19} See infra section IV.

\textsuperscript{20} The U.S. Supreme Court has defined international comity as "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
of reason." The jurisdictional rule of reason balances, on the one hand, the interests of a state in regulating foreign activity that has adverse consequences on its nationals and, on the other hand, the legitimate interests of other states that perceive such extraterritorial regulation to be a threat to their territorial sovereignty. Thus, in *Barcelona Traction* Judge Fitzmaurice's separate opinion urged municipal courts to show discretion in exercising extraterritorial jurisdiction in the interests of international comity. He noted that international law does not impose rigid rules on states delimiting spheres of national jurisdiction in such matters as antitrust legislation. Nevertheless, he reasoned that international law does presume the existence of limits and obligates every state to "exercise moderation and restraint as to the extent of its jurisdiction" in cases having a foreign element so as "to avoid undue encroachment on a jurisdiction more properly appertaining to," or exercised by, another state. As we shall see, the U.S. approach has fully incorporated such comity concerns into its jurisdictional analysis, while the European Community has, in practice, shown great reluctance to recognize, much less utilize, such a concept.

III. EVOLUTION OF THE U.S. APPROACH

"No single field of law has raised so intense and pervasive a volley of extraterritoriality conflicts as . . . U.S. antitrust law." The effects doctrine has reached its apex in the American antitrust context. Not surprisingly, it is also in this context that the debate over the proper limits of extraterritorial jurisdiction has been at its most strident and vitriolic.

The two U.S. antitrust provisions that most frequently give rise to extraterritorial jurisdiction are sections 1 and 2 of the Sherman Act. Section 1 declares illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several [s]tates, citizens." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). See *Laker Airways*, 731 F.2d at 937 ("[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability."). *1 Restatement (Third)*, supra note 3, § 403 cmt. a (comity is a term understood as not merely an act of discretion and courtesy but as reflecting a sense of obligations among states).

21. See infra notes 56-60 and accompanying text.
23. Id.
24. Id.
or with foreign nations.” Section 2 makes it a felony for any person to “monopolize . . . or combine or conspire . . . to monopolize any part of the trade or commerce among the several [s]tates, or with foreign nations.” These provisions are enforced through private treble damage actions and injunctive relief in federal courts pursuant to, respectively, sections 4 and 16 of the Clayton Act. References in the Sherman Act to trade “with foreign nations” suggest that it was intended to regulate certain foreign conduct that restrains or monopolizes trade within the United States. Determining precisely what falls within the scope of such regulation of foreign activity, however, requires guidance from the courts.

A. Judicial Contributions: From American Banana to Laker Airways

The first important case addressing the issue of the extraterritorial application of U.S. antitrust law was American Banana Co. v. United Fruit Co. In American Banana, the American Banana Company brought suit against the United Fruit Company for allegedly conspiring with the Costa Rican militia to monopolize production and exportation of bananas from Central America to the United States. Justice Holmes, writing for the Court, adopted a highly restrictive approach to extraterritoriality, noting that all of the allegedly wrongful acts had occurred outside the United States. Justice Holmes noted that the “general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” Thus, the Court interpreted U.S. antitrust law “as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.” The clear inference of American Banana was that U.S. antitrust laws could not be applied to conduct occurring outside the United States.

Such a narrow definition of extraterritorial jurisdiction was short-lived. In United States v. Sisal Sales Corp., U.S. companies allegedly

27. Id. § 2.
28. Id. §§ 15(a), 26.
30. See id. at 354-55.
31. Id. at 355.
32. Id.
34. 274 U.S. 268 (1927).
conspired with Mexican firms to monopolize import trade of sisal, a plant used to make rope. The Supreme Court held that U.S. courts had jurisdiction over the alleged conspiracy and that the Sherman Act applied to such conduct.\textsuperscript{35} It attempted to distinguish \textit{American Banana} by noting that a few of the agreements in the sisal conspiracy took place in the United States and that the conspiracy was funded by U.S. banks.\textsuperscript{36} “Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein.”\textsuperscript{37} Yet the Court in dictum arguably departed from \textit{American Banana} by stressing the fact that the conspiracy “brought about forbidden results within the United States.”\textsuperscript{38}

The decisive step heralding the beginning of the modern “effects doctrine” in U.S. antitrust jurisdiction came in 1945 with Judge Learned Hand’s landmark decision in \textit{United States v. Aluminum Co. of America (“Alcoa”).}\textsuperscript{39} In \textit{Alcoa}, foreign defendants were accused of violating the Sherman Act by setting up and executing an international aluminum cartel abroad.\textsuperscript{40} In regard to the limitations customarily observed by nations upon the exercise of their powers, Judge Hand held that:

\begin{quote}
We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. . . . On the other hand, . . . 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 . . . .\textsuperscript{41}
\end{quote}

Notably, such an “effects doctrine” does not apply to conduct that may have unintended repercussions in the United States\textsuperscript{42} nor to agreements intended to affect U.S. trade but which in fact have no such effect.\textsuperscript{43} It does, however, apply to agreements which have the

\begin{itemize}
\item \textsuperscript{35} Id. at 274.
\item \textsuperscript{36} Id. at 275-76.
\item \textsuperscript{37} Id. at 276.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} 148 F.2d 416 (2d Cir. 1945).
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id. at 443.
\item \textsuperscript{42} See id. (explaining that Congress did not intend Sherman Act to cover agreements made beyond U.S. borders which were not intended to affect imports but which nevertheless have domestic repercussions).
\item \textsuperscript{43} Id. (“[W]e shall assume that the [Sherman] Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them.”).
\end{itemize}
intended effect of adversely impacting U.S. commerce. Applying this standard, the Second Circuit found that the Canadian defendants specifically intended to affect imports into the United States and that such imports were in fact affected. Accordingly, jurisdiction over the cartel was considered proper. Thus, Alcoa effectively permits “jurisdiction when U.S. interests [are] perceptibly at stake, and it [does] not give way in the face of even weighty foreign interests.”

The Alcoa “effects doctrine” rapidly gained acceptance in the United States. But Alcoa generally was met with disapproval from abroad. It was frequently criticized by foreign governments and scholars for its failure to consider international comity concerns and the potential interference with foreign sovereignty interests. As Lord Wilberforce observed in a celebrated case involving a U.S. antitrust investigation into activities of British companies, “the attempt to


45. Alcoa, 148 F.2d at 444.


extend the grand jury investigation extraterritorially into the activities of the [British] RTZ companies was an infringement of United Kingdom sovereignty.” Similarly, Professor Mann concluded that “from the point of view of public international law the Alcoa decision cannot be justified . . . . The ‘effect’ within the meaning of the Alcoa ruling does not amount to an essential or constituent part of the restraint of trade, but is an indirect and remote repercussion of a restraint carried out, completed and, in the legally relevant sense, exhausted in the foreign country.”

Such perceived “Yankee ‘jurisdictional jingoism’ has created widespread resentment” and prompted several states to retaliate by adopting “blocking statutes” limiting the extraterritorial reach of American antitrust legislation within their jurisdiction.

To temper the harsh results created by the Alcoa judgment, several Courts of Appeals have modified the “effects doctrine” by incorporating a “jurisdictional rule of reason” in order to show due regard, in the interests of international comity, to the foreign sovereignty interests of third countries. Such a jurisdictional rule of reason does not delineate the outer limits of permissive jurisdiction, but rather establishes the appropriate contours of proper jurisdiction. That is, the search is not for “minimum acceptability but rather for maximum rationality.”

49. Rio Tinto Zinc v. Westinghouse Elec. Corp. [1978] 1 All E.R. (H.L.) 434, 447. Lord Wilberforce went on to note that “[i]t is axiomatic that in anti-trust matters the policy of one state may be to defend what is the policy of another state to attack.” Id. at 448. See also British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd. [1952] 2 All E.R. 780, 782 (U.S. district court restraining order against a British company is an inappropriate assertion of extraterritorial jurisdiction); Kahn-Freund, supra note 1, at 67.

50. F. A. Mann, The Doctrine of Jurisdiction in International Law, in III Recueil des Cours 9, 104 (1964-1).

51. Sandage, supra note 44, at 1698. During parliamentary debate on the British blocking statute, The Protection of Trading Interests Bill, John Nott M.P. referred to the American approach as the “pernicious extra-territorial effects doctrine.” A. Kapranos Huntley, The Protection of Trading Interests Act 1980: Some Jurisdictional Aspects of Enforcement of Antitrust Laws, 30 Int’l & Comp. L.Q. 213, 224 (1981). The comments by Charles Fletcher-Cooke M.P. were even more vitriolic. Regarding the effects doctrine, he stated, “[o]nce a court system gets an ideology into its mind to such a degree of fanaticism as one can find in the United States it is no surprise, however deplorable it may be, that it becomes a matter for imperialism overseas.” Id.


53. Andreas F. Lowenfeld, Public Law in the International Arena: Conflicts of Laws,
argue that "a strict territorial test, while it may minimize [foreign] conflicts, is insufficiently responsive to legitimate national economic interests." Conversely, a naked or unmodified effects doctrine fails to respect legitimate sovereignty interests abroad and magnifies and encourages conflicts in an ever more interdependent international economic arena.\footnote{54}

The first antitrust case to incorporate this jurisdictional rule of reason was \textit{Timberlane Lumber Co. v. Bank of America}.
\footnote{56} In \textit{Timberlane}, the Ninth Circuit set forth a three-part test to determine whether, in the interests of international comity, a court should exercise jurisdiction: (1) whether the alleged restraint has some "actual or intended . . . [effect] on American foreign commerce;" (2) whether "the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws;" and (3) "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."\footnote{57}

Following \textit{Timberlane}, the Third Circuit also adopted a jurisdictional rule of reason in \textit{Mannington Mills}.
\footnote{58} The court in \textit{Mannington Mills} asked first whether jurisdiction exists. Having found that it did, the Court then considered whether such jurisdiction should be exercised in light of the individual interests and policies of the foreign nations and the United States' legitimate interest in regulating anticompetitive activity.
\footnote{59} In balancing these competing interests, the court identified ten relevant factors:

\begin{itemize}
\item Id.
\item 549 F.2d 597 (9th Cir. 1976), cert. denied, 472 U.S. 1032 (1985).
\item Id. at 613. The court listed seven factors to be considered in evaluating the comity issues presented by the third question:
\begin{itemize}
\item [1] the degree of conflict with foreign law or policy;
\item [2] the nationality or allegiance of the parties and the locations or principal places of business of corporations;
\item [3] the extent to which enforcement by either state can be expected to achieve compliance;
\item [4] the relative significance of effects on the United States as compared with those elsewhere;
\item [5] the extent to which there is explicit purpose to harm or affect American commerce;
\item [6] the foreseeability of such effect; and
\item [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.
\end{itemize}
\item Id. at 614.
\item Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).
\item See id. at 1298.
(1) Degree of conflict with foreign law or policy; (2) Nationality of the parties; (3) Relative importance of the alleged violation of conduct [in the United States] compared to that abroad; (4) Availability of a remedy abroad including the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) 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 . . . if relief is granted; (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 circumstances; and (10) Whether a treaty with the affected nation has addressed the issue.60

Such a jurisdictional rule of reason initially received a warm reception by scholars61 and was adopted by several Courts of Appeals. Yet, despite the prevalence of the jurisdictional balancing test, U.S. courts in virtually every case found the balance tipped in favor of asserting jurisdiction over the foreign entity except where the court found no cognizable adverse impact on U.S. competition interests whatsoever.62

However desirable a balancing approach may be to the extraterritorial application of antitrust laws, the present formulations of such an approach have been subject to significant criticisms. Most importantly, the D.C. Circuit rejected the balancing approach in Laker Airways.63 Laker Airways rejected the jurisdictional rule of reason approach because it considered U.S. courts ill-equipped to determine whether the vital national interests of the United States or those of other nations should predominate.64 The court emphasized that polit-

60. Id. at 1297-98 (citation omitted).
61. See Atwood & Brewster, supra note 44, § 6.11; Lowenfeld, supra note 53, at 407-11.
62. See, e.g., National Bank of Canada v. Interbank Card Assoc., 666 F.2d 6, 8-9 (2d Cir. 1981) ("decreased profitability of Canadian merchants is not a proper concern of the United States"); Montreal Trading, Ltd. v. Amax Indus., Inc., 661 F.2d 864, 869-70 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982) (utilizing Timberlane approach to deny extraterritorial application of U.S. antitrust laws); Dominicus Americana Bohio, 473 F. Supp. at 687-88 ("[P]roper standard is a balancing test that weighs the impact of the foreign conduct on United States commerce against the potential international repercussions of asserting jurisdiction."). See also Mitsui, 671 F.2d at 884-85 (finding comity relevant but not part of the jurisdictional test).
63. Laker Airways, 731 F.2d at 950-52.
64. See id. at 949-50 (balancing "generally incorporate[s] purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing.").
ical decisions balancing domestic and foreign interests were the pre-
rogative of the executive branch, not the courts.65 Such criticism
echoes the Supreme Court's admonition that while questions implicat-
ing foreign policy determinations are not completely beyond the scope
of judicial cognizance, courts should be reluctant to review these mat-
ters because "resolution of such issues frequently turn[s] on standards
that . . . involve the exercise of a discretion demonstrably committed
to the executive or the legislature."66 Moreover, Laker Airways found
that the balancing approach suffered from both practical and theoreti-
cal weaknesses: practically, it requires protracted discovery and
requests for submissions by political branches; theoretically, the court
noted that international law does not preclude concurrent jurisdic-
tion or require one jurisdiction to be "more reasonable" than the
other.67

The jurisdictional rule of reason has also been criticized by scholars
as vague and unworkable. Even the Restatement (Third) on Foreign
Relations Law, which adopts a balancing approach, concedes that
under the balancing approach "[n]o priority or other significance is
implied in the order in which the factors are listed. Not all consider-
ations have the same importance in all situations; the weight to be
given to any particular factor or group of factors depends on the cir-
cumstances."68 Such an imprecise formulation of the relevant stan-
dards, many argue, not only increases the likelihood that a
jurisdictional rule of reason will not develop coherently and consist-
ently,69 but it also legitimizes virtually any reformulation of the rele-
vant factors so as to permit courts to assert jurisdiction.70 Put simply,
some argue that judicial interest balancing "is both inappropriate and
unworkable because it involves courts in weighing sensitive political

also Turner, supra note 54, at 233 ("[T]here are serious doubts that courts are an appropriate
forum for evaluating conflicting national and foreign interests on a case-by-case basis.").
65. Laker Airways, 731 F.2d at 955; Turner, supra note 54, at 244.
67. See Laker Airways, 731 F.2d at 950-52. See also Wood Pulp, 1988 E.C.R. at 5223
(discussing Laker Airways).
68. 1 Restatement (Third), supra note 3, § 403 cmt. b.
69. Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection
to articulate values used to legitimize jurisdiction weakens "the development of a more rational
system of international norms.").
70. See id. (interest analysis "will usually reflect an understandable bias in favor of the
forum's policy"). See also Michael Akehurst, Jurisdiction in International Law, 46 Brit. Y.B.
Int'l L. 145, 185-86 (1972) (discussing tendency to apply domestic law in choice of law
determinations).
and diplomatic concerns traditionally considered nonjusticiiable."

While the jurisdictional rule of reason is an imperfect instrument for balancing foreign sovereignty interests, the harsh criticism it has received is unjustified. By applying the standards of nonjusticiability, one may conclude that a comity analysis is a subject properly before the courts. First, impingement on foreign relations does not ipso facto render the matter nonjusticiiable. As the Supreme Court has noted:

[It] is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminat- ing analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

The question, then, is whether the court's undertaking of an independent resolution is possible "without expressing a lack of respect due coordinate branches of government." Seen in this light, a court determining whether it should assert jurisdiction with due regard for international comity does not involve a "policy determination of a kind clearly for nonjudicial discretion." In its bare essentials, the inquiry is a judicial, not political, function.

Second, while the jurisdictional rule of reason offers only imprecise formulations of the relevant criteria, the matter is not nonjusticiiable because of a "lack of judicially discoverable and manageable standards for resolving" the controversy. The common thread running through this balancing approach is "reasonableness." While the cri-

71. Sandage, supra note 44, at 1700.
72. Relevant indicia of a nonjusticiiable question include:
   [1] [W]hether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] the impossibility of a court's undertaking independent resolution without expressing lack of respect due to coordinate branches of government; [3] a lack of judicially discoverable and manageable standards for resolving the controversy; and [4] embarrassment of our government abroad, or grave disturbance at home.

74. Id. at 217.
77. See infra text accompanying notes 117-26; Fox, supra note 46, at 50.
teria employed in the jurisdictional rule of reason may require clarification, their purpose is simply to achieve the most reasonable result in a particular case—a rather mundane and commonplace judicial standard that is both discoverable and manageable.

Third, the practical difficulties, noted in *Laker Airways*, of courts procuring discovery abroad in the antitrust context differ in degree rather than kind from that of other complex international litigation. Difficulties have persistently arisen from efforts to secure evidence located in one state for use in a legal proceeding in another state. The United States has been increasingly liberal . . . in permitting domestic litigants to obtain evidence abroad,” leading other states to resist such action on the ground that it infringes their perceived sovereign interests. As one treatise put it, “unilateral extraterritorial U.S. discovery efforts have produced some of the most contentious disputes that have arisen in international civil litigation.” Such practical difficulties led states to seek a resolution by adopting the Hague Evidence Convention, which provides a framework for gathering evidence in one contracting state for use in the courts of another contract state.

Finally, *Laker Airways*’ contention that “there is no evidence that interest balancing represents a rule of international law” is in tension with Judge Fitzmaurice’s separate opinion in *Barcelona Traction* that international law obligates every state to “exercise moderation and restraint as to the extent of its jurisdiction . . . in cases having a foreign element” so as to avoid undue encroachment on a jurisdiction


79. 1 Restatement (Third), supra note 3, ch. 7, subch. A, Introductory Note. See supra notes 51-52 and accompanying text.

80. Born & Westin, supra note 33, at 261.


82. *Laker Airways*, 731 F.2d at 950.
properly exercised by another state. One wonders how a court exercises moderation and restraint absent some balancing of interests to determine whether jurisdiction is properly exercised.

In sum, 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. Thus, in the United States, courts generally will inquire first into whether jurisdiction may be invoked under the effects doctrine and second whether jurisdiction should be invoked in light of international comity concerns. We turn now to legislative measures which, while clarifying the content of the effects doctrine, have somewhat obscured its relationship to the comity analysis.

B. Legislative Contributions: The Foreign Trade Antitrust Improvements Act of 1982

Given that the courts were unable to agree on the appropriate extraterritorial reach of the U.S. antitrust laws, it was hoped that a legislative solution might be able to simplify the matter. To that end, Congress adopted the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which established a uniform test for determining the extraterritorial reach of the Sherman Act. The FTAIA modified the jurisdictional reach of the Sherman Act to make it inapplicable to transactions involving foreign commerce (other than import trade or commerce) unless there is a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, or export commerce engaged in by domestic undertakings.

While the FTAIA significantly modifies the effects doctrine within

83. Barcelona Traction, 1970 I.C.J. at 105 (Fitzmaurice, J., separate opinion).
86. The precise wording of the Act provides:

Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions [of this Act] other than this section.

If [this Act] appl[ies] to such conduct only because of the operation of paragraph
U.S. antitrust law, one of the most important aspects of the Act is what it does not cover. The FTAIA expressly does not apply to conduct involving import trade or commerce. Thus, on its face, the "direct, substantial, and reasonably foreseeable" test of the FTAIA does not apply "to the types of activity by foreign firms . . . that are most likely to create international tensions; for example . . . [transnational] export cartels from foreign nations into the United States." Second, the FTAIA provides, "in effect, that foreign consumers and competitors injured by [anticompetitive activity] in foreign nations cannot invoke U.S. antitrust laws." This comports with the Supreme Court's decision in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.* where the Court stated that "[r]espondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies." Likewise, in the first case decided under the FTAIA, the U.S. district court in *Eurim-Pharm GmbH v. Pfizer, Inc.* dismissed, for lack of subject matter jurisdiction and for failure to state a cause of action, a treble damage action by German distributor Eurim-Pharm against American Pfizer and its European subsidiaries based on Pfizer's method of distribution in the European market. The court noted that Congress clearly "intended to exempt from United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad." Significantly, this limitation cur-
tails the scope of extraterritorial jurisdiction beyond that traditionally required by international law.\textsuperscript{92} Under the nationality principle, international law clearly recognizes the right of the United States to assert jurisdiction over American enterprises located abroad. However, by virtue of the FTAIA the United States chose not to exercise that right, presumably because U.S. antitrust laws were not intended to promote world competition or to regulate foreign markets, but rather to protect against anticompetitive activities adversely affecting the domestic market.

It is also unclear whether the FTAIA’s "direct, substantial, and reasonably foreseeable" test supersedes the \textit{Timberlane/Mannington Mills} test or incorporates a "jurisdictional rule of reason." The legislative history of the FTAIA indicates that the Act was not intended to have any effect on a court's ability to employ notions of international comity.\textsuperscript{93} Accordingly, courts have continued to apply the \textit{Timberlane/Mannington Mills} balancing approach since enactment of the FTAIA,\textsuperscript{94} and the Justice Department in its own enforcement proceedings performs a secondary comity analysis only after jurisdiction has been established under the "direct, substantial, and reasonably foreseeable" effects test.\textsuperscript{95}

On the other hand, the Ninth Circuit, which handed down the \textit{Timberlane} decision, applied the jurisdictional test of the FTAIA in \textit{McGlinchy}, noting that "prior to the enactment of [the FTAIA], the extraterritorial reach of the antitrust laws was governed in this Circuit by [the \textit{Timberlane} test]."\textsuperscript{96} Thus, \textit{McGlinchy} suggests that \textit{Timberlane} was limited in some respect by enactment of the FTAIA. In a similar manner, Professor Hawk has argued:

A sensitive application of the direct, substantial, and reasonably foreseeable (anticompetitive) effect test affords an implicit recognition of foreign interests through a critical and skeptical examination whether the Sherman Act policy

\begin{itemize}
  \item \textsuperscript{92} See 1 Restatement (Third), supra note 3, § 415 cmt. c; Fox, supra note 46, at 70-71.
  \item \textsuperscript{95} See Antitrust Enforcement Guidelines for International Operations, 55 ATRR Special Supp. § 5 (Nov. 17, 1988) [hereinafter Guidelines].
  \item \textsuperscript{96} \textit{McGlinchy}, 845 F.2d at 813-14 n.8.
\end{itemize}
objectives would be furthered by exercise of jurisdiction. The recent willingness of courts to dismiss antitrust claims before trial indicates that the effect test provides a useful, albeit imperfect vehicle to minimize conflicts with foreign nations.97

Notwithstanding, it is doubtful whether the "direct, substantial, and reasonably foreseeable" test of the FTAIA effectively serves, as Professor Hawk suggests, as an alternative to the traditional comity analysis. For one thing, the FTAIA's test focuses exclusively on finding a sufficiently close nexus with the United States to justify the assertion of jurisdiction. Nowhere does it consider the legitimate foreign sovereignty interests of another country that may have concurrent jurisdiction. As one commentator put it, "the nature and intensity of the United States' interest in regulating extraterritorial conduct cannot alone determine the proper limits on extraterritorial jurisdiction."98 This is precisely what the Ninth Circuit emphasized in Timberlane: although a country may have jurisdiction whenever a sufficient number of connecting factors are present, Timberlane recognized that a state should nevertheless refuse to exercise jurisdiction if the regulatory interests it is pursuing are outweighed by the interests of one or more foreign states likely to be seriously injured by the assertion of such jurisdiction.99 It is clear that the direct, substantial, and reasonably foreseeable effect test considers only questions of jurisdictional nexus, without reference to international comity. This may explain the Ninth Circuit's dictum in McGlinchy that, in adopting the FTAIA, "Congress did not change the ability of the courts to exercise principles of international comity."100

Thus, there is now a two-tiered test for the extraterritorial application of U.S. antitrust laws. First, there is a statutory standard for determining whether there is a "direct, substantial, and reasonably foreseeable" effect on United States commerce such that jurisdiction is permissible. Grafted on to this is the second-tier, a common law analysis of whether, in light of international comity concerns, jurisdiction should be exercised under the instant facts.

100. McGlinchy, 845 F.2d at 814 n.8 (citing House Rep. 686, supra note 93).
C. Executive Contributions: The Justice Department's Antitrust Enforcement Guidelines for International Operations

The Justice Department's 1988 Antitrust Enforcement Guidelines for International Operations endorsed the "direct, substantial, and reasonably foreseeable effect" test to use in antitrust enforcement proceedings against anticompetitive conduct adversely affecting mergers, acquisitions, and import commerce. This test comports with the Justice Department's goal of protecting U.S. consumers from restraints that raise prices or limit consumers' choice of imported and domestic products. The Justice Department also has shown some sensitivity to comity concerns in its enforcement of antitrust laws. Section 5 of the Guidelines states that "in determining whether it would be reasonable to assert jurisdiction or to seek particular remedies in a given case, the Department considers whether significant interests of any foreign sovereign would be affected and asserts jurisdiction only when the Department concludes that it would be reasonable to do so." Thus, the Justice Department's approach appears, at least until recently, to be wholly consistent with traditional U.S. jurisprudence on the subject: asserting jurisdiction through a moderate effects test which incorporates concerns for international comity.

In an unexpected development, however, the Justice Department on April 3, 1992 announced that it will enforce its antitrust laws on the basis of harm to United States exports, irrespective of whether there is direct harm to U.S. consumers. The Justice Department was careful to note that this new policy in "no way affects existing

101. See Guidelines, supra note 95, § 4, at S-21.
103. Guidelines, supra note 95, § 5.
104. See Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports: Statement of Antitrust Enforcement Policy, April 3, 1992 (unpublished manuscript on file with author) [hereinafter Export Enforcement Policy]. The new policy states in relevant part:

The Department of Justice will, in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States 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.

Id.
laws or established principles of personal jurisdiction” and that it would continue to consider “principles of international comity when making antitrust enforcement decisions that may significantly affect another government’s legitimate interests.”

The Justice Department maintains that its new policy is consistent with existing law and specifically with the express terms of the FTAIA. As noted earlier, the FTAIA states that the Sherman Act “shall not apply to conduct involving trade or commerce . . . with foreign nations unless . . . such conduct has a direct, substantial and reasonably foreseeable effect . . . on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.” But the Justice Department fails to mention that courts interpreting the FTAIA have uniformly concluded that for an export injury claim to be cognizable, there must be evidence of harm to U.S. consumers. Thus, in McGlinchy, the Ninth Circuit affirmed the dismissal of a claim alleging antitrust violations resulting from an exclusive distribution agreement in Southeast Asia of products exported from the United States. The court found that even if plaintiffs’ allegations were true, the only injury was to the exporters and to customers located in Southeast Asia, and that would not satisfy the requirements of the FTAIA. Likewise, in Eurim-Pharm GmbH v. Pfizer, Inc., the court, interpreting the FTAIA, found that Congress “intended to exempt from United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad.”

105. Id.

106. Antitrust Enforcement Policy, supra note 102, at 2. The Justice Department also argues that its new policy comports with the Supreme Court’s dictum in Zenith Radio Corp. v. Hazeltine Research, Inc. that “[o]nce Zenith demonstrated that its exports from the United States had been restrained by [foreign patent] pool activities, the treble-damage liability of the domestic company participating in the conspiracy was beyond question.” Id. See Hazeltine Research, 395 U.S. at 113-14 n.8. See also Mitsui, 671 F.2d at 883 (“A restraint that directly or substantially affects the flow of commerce into or out of the United States is within the scope of the Sherman Act.”) (emphasis added). But in Hazeltine Research, the Supreme Court did not indicate whether this conclusion was based on a finding of harm to U.S. consumers. Nor did the Supreme Court indicate whether it asserted jurisdiction over the domestic producer based on the territoriality principle, the nationality principle, or the effects doctrine. Thus, it is unclear whether the Supreme Court would recognize an approach which asserts jurisdiction based on the effects doctrine absent a showing of harm to U.S. consumers.


108. McGlinchy, 845 F.2d at 805, 815.

109. See id. at 815 (holding that appellants’ claims relate only to foreign commerce without requisite domestic anticompetitive effect).

110. Eurim-Pharm GmbH, 593 F. Supp. at 1106. See also Liamuiga Tours, 617 F. Supp. at
The new policy is significant in that it establishes the Justice Department's willingness to enforce U.S. antitrust laws extraterritorially not only on the traditional ground of adverse impact to U.S. consumers, but also under the dubious rationale that antitrust laws are concerned with protecting domestic producers. It is axiomatic that antitrust laws are enacted for "the protection of competition, not competitors," and it is difficult to find a proper rationale for regulating foreign anticompetitive activity absent evidence of direct or indirect harm to U.S. consumers. One may surmise that a possible rationale for the new policy is the protection of competition generally, whether in the United States or abroad. Attorney General William P. Barr, in his comments on the new policy, stated that "[o]ur antitrust laws are designed to preserve and foster competition, and in today's global economy competition is international." But this rationale contradicts the Supreme Court's view, noted earlier, that "American antitrust laws do not regulate the competitive conditions of other nations' economies." Thus, enforcing the Sherman Act on the basis of harm to export commerce may serve as a means to protect American competitors under the guise of enhancing international competition. Predictably, U.S. trading partners have protested this interpretation of the Sherman Act as exceeding the jurisdictional limits imposed by international law.

This new policy has profound implications for the extraterritorial application of U.S. antitrust laws. Under this approach, the effects test no longer requires a showing of direct, substantial, and reasonably foreseeable effect on U.S. commerce. Rather, a mere showing of direct, substantial, and reasonably foreseeable effect on U.S. export trade is sufficient. Clearly, the jurisdictional nexus is easier to satisfy under such a test, for the universe of extraterritorial activities affecting U.S. exports is manifestly broader than that of conduct harming

---

924-25 (no jurisdiction will lie if anticompetitive effect is felt solely in the foreign market and the effect on U.S. commerce is beneficial or neutral).


112. See Department of Justice Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws, April 3, 1992 (unpublished manuscript on file with author) [hereinafter Restraints on U.S. Exports].


114. Japan in particular has argued that such a policy may exceed the traditional bases of international jurisdiction. See Washington Stands Firm on Anti-Trust Decision, Fin. Times, April 16, 1992, at 7.
U.S. consumers. Moreover, enforcing the Sherman Act on the basis of harm to U.S. exports will give rise to greater instances of concurrent jurisdiction—with the United States having a secondary interest. As James Rill, Assistant Attorney General noted, "[i]n most cases conduct that harms our exporters also harms foreign consumers, and may be actionable under the other country's antitrust laws." A typical example is a foreign cartel directed at the foreign country's market. Such a cartel will directly and primarily harm those consumers purchasing in the market, while only indirectly and secondarily harming U.S. exporters seeking entry or enhanced activity in that market. Both the foreign antitrust authorities and, under the new policy, the United States will have jurisdiction to enforce their respective antitrust laws against the anticompetitive activity.

Thus, the role of comity will be especially important in this context to ensure that due regard is given to the legitimate interests of the foreign antitrust authorities in their primary role of fostering competition within their borders. In sum, from the international perspective, the United States has taken two steps forward by reformulating and improving the effects test with a requisite showing of direct, substantial, and reasonably foreseeable effect, but it recently has taken one step back by unnecessarily expanding what falls within its jurisdictional purview by enforcing the Sherman Act on the basis of harm to U.S. exports absent harm to U.S. consumers.

D. Scholarly Contributions: The Restatement (Third) of Foreign Relations Law

No discussion of the extraterritorial application of United States antitrust law would be complete without discussing the recent revisions incorporated in the Restatement (Third) of Foreign Relations Law (the "Restatement"). While a restatement is not a formal source of law, it generally seeks to state the law already in existence and, as such, has an impact on judicial and diplomatic practice rarely matched by any other nonbinding pronouncements. The fundamental thread running through the framework of the Restatement on extraterritorial jurisdictional issues is that of "reasonableness." As noted by the Restatement reporters: "[t]erritoriality and nationality remain the principal bases of jurisdiction to prescribe,

115. Restraints on U.S. Exports, supra note 112, at 3.
117. Fox, supra note 46, at 65.
but in determining their meaning rigid concepts have been replaced by broader criteria embracing principles of reasonableness and fairness to accommodate overlapping or conflicting interests of states, and affected private interests. 118

Of particular relevance for our purposes are Sections 402 and 403 (containing the general provisions on the assertion of extraterritorial jurisdiction) and Section 415 (which specifically addresses the extraterritorial assertion of jurisdiction in the context of antitrust law). 119 Section 402, in addition to adopting the territoriality, nationality, and protective principles, specifically endorses the effects doctrine: "a state has jurisdiction to prescribe law with respect to . . . (1)(c) conduct outside its territory that has or is intended to have substantial effect within its territory . . . ." 120 Thus, the Restatement provides a basis for jurisdiction where there is an actual effect or an intended but thwarted effect within a territory. 121

Section 403 limits Section 402 by imposing restrictions on jurisdiction where the assertion of such jurisdiction is unreasonable. What is deemed "reasonable" must be determined in light of the eight criteria set forth in Section 403(2). 122 Moreover, where the assertion of jurisdiction is reasonable, but conflicts with the legitimate exercise of jurisd-

118. 1 Restatement (Third), supra note 3, part IV, ch. 1, subch. A, Introductory Note.
119. Id. §§ 402, 403 & 415.
120. Id. § 402(1)(c). Section 402 provides:

Subject to Section 403, a state has jurisdiction to prescribe law with respect to
(1)(a) conduct that, wholly or in substantial part, takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory that has or is intended to have substantial effect within its territory;
(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

121. Id. § 402 cmt. d.
122. Id. § 403. Section 403 provides:

(1) Even when one of the bases for jurisdiction under Section 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
(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
diction by another state, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction and defer where the other state's interest is clearly greater.123

Finally, the Restatement contains a special provision relevant to extraterritorial application of antitrust laws. Section 415 applies the general principles of Sections 402 and 403 to regulation by the United States of anticompetitive conduct occurring abroad.124 Again, the exercise of extraterritorial jurisdiction must be reasonable. Section 415 considers the exercise of jurisdiction in the antitrust context to be reasonable if: (1) the agreement is made in the United States, or carried out in significant measure there; or (2) a principal purpose of the conduct or agreement is to interfere with the United States commerce and it has "some effect" on United States commerce; or (3) the intent is unclear but the agreement or conduct has substantial effect on United States commerce.125 Thus, jurisdiction may be based on territoriality or the effects doctrine. In the latter case, jurisdiction is based

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 may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Id. 123. Id. § 403(3).
124. Id. § 415 cmt. a.
125. Id. § 415. Section 415 provides:

(1) Any agreement in restraint of United States trade that is made in the United States, and any conduct or agreement in restraint of such trade that is carried out in significant measure in the United States, are subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct.

(2) Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is
on a combination of intent and effect: where the principal purpose is to interfere with United States commerce, the effect need not be substantial, but must not be insignificant; where there is no principal purpose to interfere or the intent is unclear, the effect must be "substantial."\textsuperscript{126}

The Restatement and the FTAIA, therefore, appear to approach the extraterritorial application of United States antitrust law from a similar perspective. As Professor Fox has noted, "[t]here is . . . no essential conflict between the Restatement and the [FTAIA] statute."\textsuperscript{127} The only significant difference is that, in the case of anticompetitive activity affecting domestic or export commerce (not import commerce) the FTAIA requires only evidence of a direct, substantial, and reasonably foreseeable effect, whereas the Restatement Section 415(2) would consider whether the agreement had as a principle purpose the interference with United States commerce and whether it had some effect on that commerce.\textsuperscript{128} What is noteworthy, however, is the Restatement's explicit recognition and treatment of international comity concerns in Section 403 and the FTAIA drafters' conscious decision to leave such comity concerns to the courts.\textsuperscript{129} This reflects the Restatement's attempt to codify the dominant trends of U.S. antitrust law in their totality by including not only the legislatively modified effects test but also the judicially created notions of international comity.

In sum, U.S. courts have reached a consensus on the appropriate test for the extraterritorial assertion of U.S. antitrust laws: in addition to the territorial principle, the direct, substantial, and reasonably foreseeable effect doctrine provides a basis for asserting jurisdiction in the absence of overriding comity concerns. The importance, however, to be given these comity concerns and the precise criteria to be uti-

\begin{itemize}
\item to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.
\item Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.
\end{itemize}

Id.\textsuperscript{126} Id. § 415 cmt. a; Fox, supra note 46, at 70.
\textsuperscript{127} Fox, supra note 46, at 71. See also 1 Restatement (Third), supra note 3, § 415 Reporter's Note 8 ("It appears that [FTAIA] amendments are not inconsistent with Subsection (3) of this section . . . .").
\textsuperscript{128} See 1 Restatement (Third), supra note 3, § 415 reporters' note 8.
\textsuperscript{129} Compare 1 Restatement (Third), supra note 3, § 403(3) with House Rep. 686, supra note 93, at 13, reprinted in 1982 U.S.C.C.A.N. at 2498 (Act not intended to have any effect on a court's ability to employ notions of comity).
lized in analyzing these competing interests are less defined and are subject to debate and disagreement in the various courts of appeals.

IV. EVOLUTION OF THE EUROPEAN COMMUNITY APPROACH

Articles 85 and 86 of the EEC Treaty, establishing the basic rules on EC competition law, do not contain an explicit rule of jurisdiction defining their sphere of application. Article 85 prohibits "any agreements between enterprises, any decisions by associations . . . [and] 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." Article 86 provides that "action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited." Some have argued that the substantive rule of article 85—that a restrictive practice have as its "object or result the prevention, restriction or distortion of competition within the Common Market"—implies an approach to jurisdiction which focuses on the effects of a restrictive agreement. Others argue that such an interpretation would be reading too much into the language of the Treaty and that the territoriality principle alone provides a sufficient basis to assert jurisdiction. This section will begin by analyzing the European Commission's approach and will then consider how the European Court of Justice has addressed the issue.

131. EEC Treaty, supra note 130, art. 85.
132. Id. art. 86.
133. Id. art. 85.
134. See Wood Pulp, 1988 E.C.R. at 5215 ("[T]he vast majority of academic writers take the view that it is neither the nationality nor the geographical location of the undertaking but the location of the anti-competitive effect which constitutes the criterion for the application of Community competition law.") (citation omitted); Van Gerven, supra note 11, at 459.
135. See Wood Pulp, 1988 E.C.R. at 5206 (United Kingdom argued that the territoriality principle permits jurisdiction to be asserted over foreign undertakings having subsidiaries or agents within the Community).
136. Under the Community competition procedure, the Commission is effectively the tribunal of first inquiry in that it makes the initial investigation and decision as to the compatibility with articles 85 and 86 of an agreement or activity. See EEC Treaty, supra note 130, arts. 85 & 86. Commission decisions may be appealed to the recently instituted European Court of First Instance. Because this court was only recently created, however, it has yet to render a decision on extraterritorial application of competition laws, thus explaining the noticeable absence of any discussion of this court in the overview that follows. Finally, decisions by the Court of First Instance may be appealed to the European Court of Justice.
A. Contribution of the European Commission

The Commission has from the inception of EC competition law asserted Community jurisdiction on the basis of anticompetitive effects. In *Grosfillex*, the first decision under the competition rules, the Commission reasoned that the "territorial scope of [the competition laws] is determined neither by the domicile of the enterprises nor by . . . where the agreement is concluded or carried out. On the contrary, the sole and decisive criterion is whether an agreement . . . affects competition within the Common Market or is designed to have this effect." Citing *Grosfillex*, the Commission 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." The Commission was even more explicit in *Aniline Dyes Cartel*, 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)." Most recently, the Commission's decision in *Wood Pulp*, later affirmed by the Court of Justice under different reasoning, stated that:

Prior to the creation of the Court of First Instance, Commission decisions were appealable directly to the European Court of Justice.


The contract concluded between the undertakings . . . has the aim of granting . . . an exclusive concession of the sale of its article for a territory situated outside the Common Market. The object of the contract is thus not to prevent, restrict or distort competition within the Common Market. However . . . [w]e should . . . examine whether the contract does not have the effect . . . of preventing, restricting or distorting competition within the Common Market within the meaning of [a]rticle 85 (1).

139. Commission of the European Communities, Eleventh Report on Competition Policy 36, ¶ 35 (1981) [hereinafter Eleventh Report]. See also Commission of the European Communities, Fourteenth Report on Competition Policy 59, ¶ 60 (1984) (Commission's decision in *Eastern Aluminium* and *Wood Pulp* "reflects 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');* ICI v. Commission ("Dyestuffs"), 1972 E.C.R. 619, 629 (Commission argues that jurisdiction of the Community is justified by reason of economic effects that claimant's conduct has produced in the Common Market; this accords with the previous practice of the Commission from its decisions in, *inter alia*, *Grosfillex*).

Article 85 of the EEC Treaty applies to restrictive practices which may affect trade between member-states even if the undertakings and associations which are parties to the restrictive practices are established or have their headquar-
ters outside the Community, and even if the restrictive prac-
tices in question also affect markets outside the EEC.141

Accordingly, jurisdiction was held to be proper because the effect of the agreements on the Common Market was substantial and intended, and was the primary and direct result of such practices.142 Thus, the Commission has accepted a modified and moderately narrower U.S. effects doctrine, limiting jurisdiction to instances of internal effects within the Common Market.

As for international comity concerns, the Commission has, at least on one occasion, expressed a willingness to utilize a balancing approach reminiscent of the Timberlane/Mannington Mills approach in U.S. antitrust law. In Eastern Aluminium, the Commission, while recognizing that there is no prohibitive rule of international law which prevents the application of Community law to defendants situated outside the Community, nevertheless acknowledged that EC undertakings might be required to act in a way contrary to the requirements of its domestic laws or that the application of Community law might adversely affect important sovereignty interests of a third country.143 Thus, the Commission implicitly recognized that there may be cases where comity interests outweigh the EC's fundamental interest against distorted competition.144 It also suggests that the Commission is aware that the finding of relevant effects within the Common Market is not necessarily the final step in the assertion of prescriptive jurisdiction.145 Nevertheless, the Commission has never

142. See id.
144. See Eastern Aluminium, 1985 O.J. (L 92) at 48, where the Commission held that: The exercise of jurisdiction . . . 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 . . . ."
145. Kurt Stockmann, Foreign Application of European Antitrust Laws, 1985 Fordham Corp. L. Inst. 251, 266 (Barry E. Hawk ed., 1986). Similarly, in the Eleventh Report on Competition Policy, the Commission stated that it was willing to consider the truly important and harmful effects on foreign states in its determination of whether the assertion of
actually undertaken such a balancing approach.

B. Contribution of the European Court of Justice

The Court of Justice has only rarely addressed the issue of the extraterritorial application of EC competition law. In one of the earliest decisions on the matter, the Court in *Beguelin* stated in dictum that "[t]he fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of [article 85] since the agreement is operative on the territory of the common market."146 Standing alone, this may suggest that the Court will look to where the agreement is operating to determine whether it may assert jurisdiction over the undertakings. However, in *Beguelin* some of the parties to the agreement were established within the Community, and thus the Court based jurisdiction on the territorial principle. The decision, moreover, appears to treat the "effects" of the conduct as synonymous with the "results" of the prohibited activities.147 Accordingly, most observers have concluded that the *Beguelin* judgment provides insufficient authority to conclude that the Court has accepted the "effects doctrine."148

Such a conclusion is bolstered by the Court's decision in *Dyestuffs*, where it specifically declined to adopt the effects doctrine as suggested by Advocate General Mayras,149 and instead asserted jurisdiction on the basis of territoriality. Specifically, the Court asserted jurisdiction over the foreign undertakings by arguing that the subsidiary compa-
nies located within the EC were in fact part of the same "economic entity" as the parent companies located abroad. The Court in essence went beyond the facade of the separate legal personalities of parent and subsidiary companies and pierced the corporate veil so as to treat the parent and subsidiary as a single economic entity. It then imputed the conduct of the subsidiary established within the Community to the parent company located outside the Community.\footnote{150}

Surprisingly, in adopting the economic entity doctrine, the Court did not even consider the effects doctrine, although the decision under review was based on it,\footnote{151} the parties had argued before the Court at length on the merits of the effects doctrine, and the Advocate General explicitly encouraged the Court to adopt the doctrine.\footnote{152} As Professor Mann aptly noted, "the Court succeeded in avoiding the decision of a great problem of international law argued before it, refrained from any pronouncement upon them or upon any question of international law, and travelled its own independent and unexpected road."\footnote{153}

The so-called "economic entity" doctrine established in *Dyestuffs* can hardly be seen as a satisfactory or final ruling on the matter of extraterritorial jurisdiction of EC competition law. First, the decision fails to respect the independent legal personalities of the companies concerned and finds parental control over subsidiaries on remarkably little evidence. More importantly, the doctrine provides no basis for asserting jurisdiction over foreign undertakings that have no subsidiaries established within the Community. The conduct of such entities is strictly beyond the reach of the Community institutions under the economic entity doctrine. Thus, *Dyestuffs* deferred to another day the difficult question of how to assert jurisdiction over a company that has no legal nexus with an undertaking within the Community. That question was finally addressed in *Wood Pulp*.\footnote{154}

The Court's decision in *Wood Pulp*, without a doubt, constitutes the most important decision to date on the extraterritorial application of EC competition law. In *Wood Pulp*, numerous wood pulp producers and two wood pulp producer associations, all having their registered offices outside the Community, allegedly infringed article 85 of the EEC Treaty.\footnote{155} They allegedly did so through the establishment

\footnote{150} See *Dyestuffs*, 1972 E.C.R. at 661-63.
\footnote{151} *Aniline Dyes Cartel*, 3 C.M.L.R. at D33.
\footnote{152} *Dyestuffs*, 1972 E.C.R. at 630, 693-96.
\footnote{153} Mann, supra note 148, at 112.
\footnote{154} *Wood Pulp*, 1988 E.C.R. at 5193.
\footnote{155} Id. at 5197-98.
of a horizontal price-fixing agreement implemented by means of set prices charged to Community customers, price recommendations by the wood pulp associations, and exchange of individualized price data.\textsuperscript{156}

The Commission's earlier decision in \textit{Wood Pulp} had adopted the "effects doctrine," concluding that the effect of the agreements and practices on prices was not only substantial but intended and was the primary and direct result of such agreements and practices.\textsuperscript{157} The applicants argued that the Commission's decision was "incompatible with public international law on the grounds that the application of the competition rules in this case was founded exclusively on the economic repercussions within the common market of conduct restricting competition which was adopted outside the Community."\textsuperscript{158} The United Kingdom expressed the strongest opposition to the "effects doctrine." It encouraged the Court to assert jurisdiction by extending the economic entity doctrine of \textit{Dyestuffs} to "cases in which an undertaking established outside the Community employs an agent within the Community."\textsuperscript{159} In such instances, "jurisdiction exercised . . . is not extraterritorial [but] fully consistent with the territorial principle as explained in the jurisprudence of the Court."\textsuperscript{160}

Advocate General Darmon reasoned that article 85 "offers general support for the proposition that Community competition law is applicable, by its very essence, whenever anti-competitive effects have been produced within the territory of the Community."\textsuperscript{161} He distinguished \textit{Dyestuffs} and \textit{Beguelin} by noting that, because the Court of Justice was able to resolve those jurisdictional questions on more narrow grounds, nothing could be made either positively or negatively of the Court's failure to speak clearly on the legitimacy of the effects doctrine.\textsuperscript{162} Then, after concluding that the effects doctrine was in conformity with the requirements and practice of international law,

\begin{footnotes}
\item[156] Id. at 5196-97.
\item[157] See supra notes 141-42 and accompanying text. The Commission was ambiguous in its written submissions to the Court of Justice, stating that the basis of jurisdiction was not the "effects doctrine" but was based on the implementation of the agreement affecting competition directly, intentionally and appreciably within the Community. \textit{Wood Pulp}, 1988 E.C.R. at 5211-13.
\item[159] Id. at 5206.
\item[160] Van Gerven, supra note 11, at 463-64 (quoting United Kingdom Written Observations, pt. 18).
\item[162] Id. at 5216; Dieter G. F. Lange & John B. Sandage, The Wood Pulp Decision and Its Implication for the Scope of EC Competition Law, 26 Common Mkt. L. Rev. 137, 151 (1989).
\end{footnotes}
he encouraged the Court to adopt an approach which asserted jurisdiction on the basis of the direct and immediate, reasonably foreseeable and substantial effect of extraterritorial anticompetitive conduct. Adopting any approach short of this would, in his opinion, "disarm" the Community when faced with anticompetitive conduct the initiative and responsibility for which was assumed exclusively by undertakings outside the Common Market.

The Court of Justice rejected Advocate General Darmon's invitation to adopt the effects doctrine. It first noted that the foreign undertakings, while receiving their main sources of supply of wood pulp outside the Community, nevertheless sell directly to purchasers established in the Community and engage in price competition with such Community customers. Therefore, these individual undertakings compete within the territory of the Common Market. Furthermore, by taking part in concertation on prices to be charged to Community customers and putting that concertation into effect by selling at coordinated prices, they are taking part in concertation that has the object and effect of restricting competition in violation of article 85.

Only after concluding that the Commission failed to make a correct assessment of the territorial scope of article 85 did the Court of Justice examine whether asserting jurisdiction in this case would be incompatible with public international law on the ground that such jurisdiction was asserted exclusively because of adverse economic repercussions within the Community of conduct occurring abroad. The Court first noted that any infringement of article 85 consists of conduct made up of two elements: the formation of the agreement and its implementation. If the decisive element was where the agreement was formed, undertakings could easily evade prohibitions. Therefore, the Court argued that the decisive element is where the agreement is implemented. Applying this principle, the Court found that the undertakings implemented the agreement within the Common Market by making contracts with purchasers within the Community. Finally, the Court declined to examine whether the non-interference principle exists in international law and dismissed without elaboration any considerations of international comity.

Before commenting on Wood Pulp further, it may be appropriate

164. Id. at 5226.
165. Id. at 5242-43.
166. Id. at 5243.
167. Id. at 5244. Under the non-interference principle, where two states each have sufficient jurisdiction to justify application and enforcement of their respective rules, and the effect of
briefly to mention its impact in subsequent decisions. Since the Court of Justice's decision in *Wood Pulp*, the Commission has handed down at least two decisions ordering termination of restrictive practices and fining undertakings situated outside the Community for infringement of article 85. In *PVC*, which concerned an agreement by producers supplying bulk thermoplastic PVC in the Community to fix prices and set target quotas, the Commission concluded that """"[i]n so far as the agreements were implemented inside the Community, the applicability of Article 85 (1) of the EEC Treaty to a Norwegian producer is not precluded by the free trade agreement between the European Economic Community and Norway."""" 168 Thus, the Commission clearly attempted to abide by the jurisdictional limits imposed by the implementation approach of *Wood Pulp*. However, in *LdPE*, which concerned an agreement of producers supplying bulk thermoplastic low-density polyethylene to fix target prices and target quotas and operate collusive arrangements, the Commission surprisingly exceeded the limits imposed by *Wood Pulp* by asserting jurisdiction, in at least one instance, on a straightforward """"effects doctrine."""" 169 Citing *Wood Pulp*, the Commission first employed the implementation approach to assert jurisdiction over the Austrian, Finnish, and Norwegian wood pulp producers because their agreements were implemented inside the Community. 170 But in the case of Repsol, a Spanish undertaking whose alleged unlawful activities occurred solely in Spain, the Commission took a different approach. It argued that the fact that Repsol's participation in an unlawful cartel related to the period before Spain's accession to the Community did not exclude article 85. Rather, the Commission reasoned that """"[t]o the extent that its involvement in the cartel affected competition within the Community, EEC competition rules applied to Repsol."""

which would be to subject a person to contradictory orders, each state has a duty to exercise its jurisdiction with moderation. Id.

168. Decision 89/190, PVC, 1989 O.J. (L 74) 1, 14 (emphasis added). See also Decision 89/191, LdPE, 1989 O.J. (L 74) 21, 35. On appeal, the Court of First Instance in *PVC* never reached the jurisdictional question, finding instead that the Commission's decision was non-existent due to particularly serious and manifest defects in the measure. See Joined Cases T-79/89 etc., BASF v. Commission (""""PVC""""), 4 C.M.L.R. 357, paras. 99-102 (1992).


170. Id. (Even though the wood pulp producers' production facilities and headquarters were outside the Community, """"[t]he Community is an important market for all these producers and accounts for a quarter to a half of their total LdPE business."""").

171. Id. (emphasis added).
could not utilize this argument with Repsol because Repsol had implemented its agreement solely in Spain prior to Spain's accession to the Community. Thus, the Commission singled out Repsol and asserted jurisdiction over it solely on the basis of the "effects doctrine." 172

The Commission's action bodes ill for the future of the implementation approach. It suggests that there will continue to arise a class of anticompetitive activities that adversely impact the Common Market, but that are beyond the reach of Wood Pulp's implementation approach. Examples of such activities include, inter alia: extraterritorial export boycotts (refusals to buy), refusals to sell to Community purchasers, and extraterritorial agreements to restrict output such as in LDPE where certain parties are manufacturing products outside the Community in the hopes of raising prices within the Community.

Some have attempted to stretch the Wood Pulp implementation approach to include not merely positive conduct within the Community, but also omissions, such as foreign undertakings agreeing not to export into the Common Market. 173 As one commentator put it, "the [Court's] notion of implementation may include both a positive act (e.g., conclusion of a sale contract within EEC territory) or an omission (e.g., unlawful refusal by two or more foreign undertakings or a foreign dominant firm to supply a preexisting distributor within the EEC)." 174 Such an extension would, in application, render the implementation approach virtually indistinguishable from the "effects doctrine." The Court had utilized the implementation approach to assert jurisdiction over the wood pulp producers on the basis of the territorial principle, 175 reasoning that the producers implemented their pricing agreement within the Common Market through agents within the Community who made contracts with purchasers within the Community. It would be an unprecedented stretch of the objective territoriality principle to include foreign undertakings' omissions, as such

172. The Court of First Instance is currently hearing LDPE on appeal. Hopefully, the Court will shed more light on the Community's approach to the extraterritorial application of its competition laws.


175. Wood Pulp, 1988 E.C.R. at 5243 ("[P]roducers . . . implemented their pricing agreement within the common market . . . . 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.").
failures to act (i.e., refusal to sell to purchasers within the Community) would not be in any manner physically pursued or conducted within the Common Market. Stated differently, the 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.

The Court's cursory treatment of international comity in its jurisdictional inquiry also gives cause for concern. Besides Wood Pulp, the Court has alluded to international comity concerns on only one previous occasion. In IBM v. Commission, the Commission had initiated proceedings against IBM, alleging abuse of a dominant position in violation of article 86, because IBM did not supply sufficient information about its data-processing equipment to enable EC competitors to offer associated interconnected equipment. In its appeal, IBM argued, inter alia, that the Commission failed to consider principles of international comity between nations before it initiated proceedings or rendered a decision. The Court, however, reasoned that the Commission had yet to render a decision within the meaning of article 173 and therefore IBM was not yet subjected to any adverse legal consequences. Its complaint was therefore inadmissible. Significantly, the Court noted in dictum that it was unnecessary to consider the "special circumstances" of comity between nations at an early stage such as envisaged by IBM because such circumstances would not thereby render the complaint admissible. In other words, the Court, while not addressing the comity argument directly, indicated that comity should not be considered as a jurisdictional threshold inquiry. One may infer that the Court was rejecting what in U.S. parlance is described as the second prong of the jurisdictional rule of reason: determining whether jurisdiction should be exercised by bal-

176. Id. at 5217; Haight, supra note 7, at 640. See generally Bellamy & Child, supra note 7, at 21.
178. Id. at 2648.
179. Id. at 2655.
180. Id.
ancing the foreign nation's sovereignty interests against the Community's interest in regulating anticompetitive activity.

The Court's decision in *Wood Pulp* supports such an inference. In *Wood Pulp*, the Court stated simply:

As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in 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 has already been rejected.\(^{181}\)

The suggestion is that if the Court may assert jurisdiction under the territoriality approach, it must assert jurisdiction. Stated differently, asking whether the Court *should* assert jurisdiction is the same as asking whether it *may* assert jurisdiction. Thus, the Court has no discretion to refuse jurisdiction for the sake of competing concerns such as foreign sovereignty interests or international comity. In so doing, the Court of Justice in one sentence appears to wholly reject a doctrine that U.S. courts have been wrestling with for over fifteen years.

V. COMPARATIVE ANALYSIS

As a general proposition, the United States proclaims a broad grant of jurisdictional authority over extraterritorial activities but curtails such authority through comity-based limitations applied at the discretion of the courts. Since *Alcoa*, the United States has asserted its right to exercise jurisdiction to the farthest possible limits permitted by international law\(^{182}\) over foreign defendants whose anticompetitive activities affect U.S. commerce. In response to criticisms from abroad, however, it has sought to impose discretionary limits upon such extraterritorial reach by building in safeguards to protect foreign sovereignty interests through a jurisdictional rule of reason, thereby mitigating some of the ill will engendered by a naked or unmodified effects doctrine. Thus, the U.S. approach essentially grants courts the *right* to assert jurisdiction as broadly as international law permits, but then gives them the *discretion* to refuse to exercise this right in the interest of international comity.

The European Community, by contrast, approaches the matter from a completely different angle. The European Court of Justice

---

182. And some would say beyond the limits of international law. See supra text accompanying notes 48-52.
starts first from the premise that the territoriality principle is the best, if not the only, permissible means to assert jurisdiction over foreign defendants whose anticompetitive behavior harms the Common Market. It has, however, eschewed a strict definition of territoriality and has reinterpreted the objective territoriality principle to meet current needs of regulating foreign anticompetitive activities. This was done first through the “economic entity” approach of Dyestuffs and then through the “implementation approach” of Wood Pulp. Both the U.S. “broad but discretionary” approach and the European Community “ever growing territoriality” approach raise significant, but very different, problems.

While the theoretical rationale of the implementation approach is distinct from the effects doctrine, there are striking similarities as to their practical consequences. That is, though achieved by different theoretical means, the practical result of the implementation approach and the effects doctrine will usually be the same: the court will assert jurisdiction over the foreign defendants. While the link to the territory with the implementation approach is the locus of the offending act and the link with the effects doctrine is the locus of the resulting injury, in practice the vast majority of claims will be jurisdictionally cognizable under either approach. It is true that in certain relatively uncommon circumstances (e.g., export boycotts) the effects doctrine casts its net wider than the implementation approach to embrace cases involving purely foreign conduct. But in the vast majority of cases, the same anticompetitive activity will give rise to jurisdiction under both the effects doctrine and the implementation approach.

This point can be seen most clearly by applying the reasoning of Wood Pulp to the facts of Alcoa, the initial and perhaps the broadest statement of the effects doctrine. Recall that in Alcoa, a Canadian company along with a group of British, French, German, and Swiss corporations formed an aluminum cartel called the “Alliance” which imposed a production quota on its members regarding the amount of aluminum which could be produced and subsequently imported into,  

183. From an evidentiary standpoint, the two approaches are distinct. Plaintiffs under the implementation approach are required to show some activity within the Common Market on which to predicate jurisdiction, whereas plaintiffs under the effects doctrine must proffer evidence of actual adverse effects on U.S. commerce. Thus, Wood Pulp is reminiscent of the early U.S. decision of Sisal Sales, in that the emphasis is on the fact that the agreement was “made effective by acts done” within the territory of the Common Market. See Sisal Sales, 274 U.S. at 276. Accordingly, the evidentiary focus will be on finding some activity, however attenuated, within the territory to justify asserting jurisdiction.
inter alia, the United States. Any member producing more than the specified quota was to pay a royalty to be divided among the cartel members according to their interests in the Alliance.

Applying the rationale put forth in Wood Pulp, the Community could assert jurisdiction over members of the aluminum cartel only if its members "implemented" their quota system within the Common Market. It is submitted that the Community, using the implementation approach, could assert jurisdiction over the foreign defendants to the cartel on the basis of the facts in Alcoa. An agreement is "implemented" in the Community when it concerns the price, quantity, or quality of a product sold by a non-EC seller to a buyer in the Community. The agreement would be implemented within the Community in the sense that its members would produce and subsequently import a specific quantity of aluminum below what they would otherwise have produced and imported under normal market conditions. It is thus a straightforward example of a cartel agreeing to collectively restrict output of a product sold in a particular market in the hopes of increasing demand and raising prices in that market. Using the language of objective territoriality, the "consummating act within the state's territory" would be the importation of aluminum in the territory pursuant to the production quota provisions of the cartel agreement. Under the implementation approach, such importation is no less an act within the territory than a domestic monopoly restricting its production output in order to increase demand and thereby raise prices in the market. Thus, quoting the Court of Justice in Wood Pulp, one could say of the aluminum cartel that "[t]he producers in this case implemented their [quota] agreement within the common market. It is immaterial in that respect whether or not they had

184. While the cartel agreement was silent as to whether imports into the United States were included in the quota system, the Court found that, in forming the cartel, all members of the Alliance agreed that such imports should be included in the quotas. Alcoa, 148 F.2d at 443.
185. Id. at 442-43.
186. See Lange & Sandage, supra note 162, at 161.
187. One may argue that a production quota of products subsequently imported into the United States is more of an omission, falling outside the objective territoriality approach, than a positive act falling within its ambit. Though not beyond peradventure, a quota arguably is better characterized as an affirmative act implemented within the territory, thus permitting jurisdiction under Wood Pulp. If one focuses on the positive act of selling a certain agreed-upon quantity of aluminum in the territory, rather than on the omission of failing to sell an additional quantity of aluminum according to market demands, the conduct is more accurately characterized as a consummating act within the territory rather than an omission or failure to act. The matter would be different if the quota agreement called for no sales in the territory because in that case the agreement would in no way be implemented within the territory.
recourse to subsidiaries, agents, sub-agents, or branches within the
Community in order to make their contacts with purchasers within
the Community." In sum, even under the facts of Alcoa, the case
which most dismayed Continental skeptics, the implementation
approach would permit the assertion of jurisdiction over the foreign
defendants.

Applying the facts of Alcoa to the Wood Pulp approach illustrates
that the U.S. effects doctrine and the European implementation
approach are increasingly developing along parallel lines. 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 EC and U.S. antitrust laws vis-à-vis
foreign defendants.

Given this convergence, one wonders why the resistance to the
effects doctrine persists while there has been virtually no challenge to
the validity, under international law, of a liberal objective territorial-
ity approach. This is particularly the case where the European Com-
munity's implementation approach may exceed the extraterritorial
reach of the United States' approach of "direct, substantial, and rea-
sonably foreseeable" effects. It is clear under Wood Pulp that the
European Community may assert jurisdiction over conduct occurring
within the Common Market provided it restricts competition to an
appreciable extent. "Appreciable" connotes in this context not
"considerable" but rather "perceptible" or "noticeable." By con-
trast, after enactment of the FTAIA, U.S. courts do not have jurisdic-
tion under the Sherman Act unless there is a direct, substantial, and
reasonably foreseeable anticompetitive effect on U.S. commerce.
Thus, anticompetitive conduct which is noticeable but not substantial
could, within the European Community, give rise to jurisdiction over
foreign defendants, while not giving rise to jurisdiction in the U.S.
under the "direct, substantial, and reasonably foreseeable" effects test.

189. Id. at 5243-44. See also Beguelin, 1971 E.C.R. at 960 (in order to come within the
prohibition imposed by art. 85, the agreement must affect trade between Member States and
free play of competition to an appreciable extent); Bellamy & Child, supra note 143, at 122.
190. See Panel Discussion on Application of Competition Law to Foreign Conduct, 1985
Fordham Corp. L. Inst. 311, 322 (Barry E. Hawk ed., 1986) (statement of Prof. Lowenfeld);
Stockmann, supra note 145, at 262 n.54A.
1071, 1077 (S.D.N.Y. 1988).
Moreover, unlike the U.S. effects doctrine, foreign undertakings may offend EC competition laws solely on the basis of intent to restrain trade in the Common Market, even absent a showing of adverse economic repercussions on the EC market.\textsuperscript{192} Thus, as one commentator noted in discussing the implementation approach of \textit{Wood Pulp}, "the criteria of substantial, direct and foreseeable effects might provide both for greater clarity and for narrower limits to the jurisdiction of states."\textsuperscript{193}

The Community's failure to incorporate any notions of comity in its jurisdictional inquiry exacerbates these concerns. Thus, conduct implemented in the EC which is intended to restrict EC competition or which perceptibly affects EC competition will give rise to jurisdiction irrespective of its adverse impact on foreign sovereignty interests. The Court's failure to give any serious discussion to international comity is perplexing, given that it has assumed such importance in the jurisdictional rule of reason analysis gaining favor in the United States and has been endorsed by leading international scholars including the Restatement on Foreign Relations commentators and the International Chamber of Commerce's Committee on Extraterritorial Application of National Laws.\textsuperscript{194} As Professor Van Gerven put it in his comments on \textit{Wood Pulp}, it is regrettable that "the Court did not take the opportunity to endorse the general principle of comity . . . [thereby] drawing attention to the necessity to exercise jurisdiction reasonably and supporting the practice . . . [of] the Commission of consulting with public authorities of other States."\textsuperscript{195}

The Court in \textit{Wood Pulp}, following the arguments of the United Kingdom, has made every attempt to confine prescriptive jurisdiction in EC competition law to a showing of objective territoriality. But the territoriality principle cannot last long as a stand-alone principle as national economies become increasingly interdependent and as more businesses become multinational.\textsuperscript{196} As Professor Brownlie noted,

\begin{itemize}
\item \textsuperscript{192} See Société Technique Minière v. Maschinenbau Ulm GmbH (Case 56/65), 166 E.C.R. 235, 5 C.M.L.R. 357 (1966), involving the interpretation of the "capable of effecting trade between member-States" provision of art. 85(1) of the EEC Treaty. The Court of Justice determined that "the agreement in question should . . . allow one to expect, with a sufficient degree of probability, that it would exercise a direct or indirect, actual or potential, effect on the eddies of trade between member-States." 5 C.M.L.R. at 375 (emphasis added).
\item \textsuperscript{194} Lange & Sandage, supra note 162, at 156 n.83.
\item \textsuperscript{195} Van Gerven, supra note 11, at 483.
\item \textsuperscript{196} Rosenthal & Knighton, supra note 17, at 4.
\end{itemize}
"the territorial theory, while remaining the best foundation for the law, fails to provide ready-made solutions for some modern jurisdictional conflicts." 197 The principle will have to be either supplemented with other bases of jurisdiction, or so reworked that it loses its original identity. The Community appears to be opting for the latter approach.

As for the United States, the most serious challenge to its approach is simply that a liberal effects doctrine does not comply with international law. As Professor Mann put it bluntly, "from the point of view of public international law the Alcoa decision cannot . . . be justified." 198 Since the time of Alcoa, however, three factors may have tempered concerns that the effects doctrine violates international law. First, the effects doctrine itself has been modified to require direct, substantial, and foreseeable results. Thus, the FTAIA's reformulation of the effects doctrine greatly reduces the risk of inappropriate extraterritorial assertions of jurisdiction. The requirement that the effects be direct, substantial and foreseeable ensures that a reasonable link exists between the domestic territory and the conduct occurring abroad, and avoids jurisdiction based on incidental or inadvertent effects on United States commerce. 199 Second, the incorporation of a comity analysis further ensures that international law is given greater respect. Coupled with the reformulation of the effects doctrine, concerns for international infringements are lessened considerably by the incorporation of a comity analysis. 200 Finally, as discussed above, the contours of what constitutes the proper bases of prescriptive jurisdiction under international law are themselves changing. Just as the passive personality theory has been recently used to challenge heretofore nonexistent threats to international security such as international terrorism, 201 the effects doctrine has increasingly been recognized as a legitimate method to respond to the shrinking nature of international business relations, the level and variety of transnational activities, and the anticompetitive activities that arise therefrom. 202

198. Mann, supra note 50, at 104.
199. Rishikesh, supra note 6, at 36-37.
200. Whether the imposition of discretionary limits upon such jurisdiction, standing alone, transforms the effects doctrine into an internationally legally permissible approach is open to debate. It is certainly the case that the criteria utilized to balance foreign sovereignty interests easily lend themselves to manipulation to justify the assertion of jurisdiction. See supra text accompanying notes 68-70.
201. See Yunis, 681 F. Supp. at 901-02; 1 Restatement (Third), supra note 3, § 402 cmt. g.
202. See 1 Restatement (Third), supra note 3, part IV, ch. 1, subch. A, Introductory Note (international rules of prescriptive jurisdiction are themselves changing, "reflecting
In short, many view the strict territoriality principle as ill-equipped to regulate anticompetitive international business activities, and hence believe international law must change to meet current demands. There can be little doubt that the territoriality principle, as it is traditionally understood, cannot fulfill the demands of regulating international anticompetitive behavior. The question, then, is whether courts will reformulate, as the Court of Justice did in Wood Pulp, the territoriality principle to meet these ever growing demands, or whether courts generally will take the larger leap of adopting an effects doctrine, thereby enhancing its recognition in international law as an accepted basis for asserting extraterritorial jurisdiction.

This brings up one final point of comparison—their respective treatment of international comity. The European Court of Justice's treatment of international comity suggests that it has overlooked the very purpose and utility of the rules regarding prescriptive jurisdiction. The purpose is not simply to determine which state may exercise jurisdiction, for instances of concurrent jurisdiction are common enough that the propriety of asserting jurisdiction is, in recent decades, rarely challenged in the absolute sense. Rather, challenges to extraterritorial jurisdiction more commonly are raised in the relative sense: whether jurisdiction ought to be exercised by state A rather than state B. Put this way, the crucial issue is determining whether one state has the better claim to jurisdiction than the other. Thus, the two most fundamental questions to be answered are when a state may exercise jurisdiction and when that state ought to exercise jurisdiction. The European Court of Justice has thus far addressed only the first question. One may infer from IBM that the Court of Justice considers a comity analysis to be subsequent to adverse legal consequences, rather than preconditional in determining jurisdiction. Most disturbing, the Court appeared to at least partially collapse these two distinct questions when it stated in Wood Pulp that an objection based upon comity principles "amounts to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and . . . that argument

 transformations in global communications, in the level and variety of transnational activity, and in perceptions of the way states interact with one another.").


204. Bowett, supra note 203, at 14.

has already been rejected.\textsuperscript{206}

The U.S. approach to comity may be challenged not so much for its failure to give proper recognition to the principles of comity, but for its application of the doctrine. As noted above, the present formulations of such an approach have been subject to significant criticisms.\textsuperscript{207} Some have suggested that a judicial balancing approach is inappropriate because: (1) courts are ill-equipped to balance national interests against the legitimate sovereign interests of other nations; (2) it requires protracted discovery and requests for submissions by political branches; and (3) it fails to prioritize the factors to be considered in undergoing the balancing approach such that courts will apply uniform weight to a particular factor under all circumstances.\textsuperscript{208} Without greater guidance and clear parameters, American-style judicial balancing may be perceived as illegitimate because it gives courts free reign to entertain and weigh ill-defined criteria and because it often operates simply as a means of "assert[ing] . . . the primacy of United States interests in the guise of applying an international jurisdictional rule of reason."\textsuperscript{209}

VI. A POSSIBLE SOLUTION: COMPETITION ENFORCEMENT COOPERATION AGREEMENTS

Where there is conflicting or concurrent jurisdiction in competition enforcement, the best approach is arguably through diplomatic cooperation and intergovernmental coordination between competition enforcement authorities so as to minimize extraterritorial conflicts.\textsuperscript{210} The most concrete manifestation of this approach is the adoption of competition cooperation agreements coordinating the activities of the respective enforcement authorities.\textsuperscript{211}

\textsuperscript{206} Wood Pulp, 1988 E.C.R. at 5244.
\textsuperscript{207} See supra text accompanying notes 61-71.
\textsuperscript{208} See id.
\textsuperscript{211} See Bastiaan Van der Esch, Some Aspects of "Extra-Territorial" Infringement of EEC Competition Rules, 1985 Fordham Corp. L. Inst. 285, 295-96 (1986). While this discussion is limited to a bilateral agreement, there is nothing to suggest that a similar multilateral agreement for cooperation and coordination of competition enforcement could not be adopted. See EEC/US: Competition Pact Aims for New Level of Cooperation, European Report (External Relations), No. 1706, Sept. 25, 1991, at 2 (on file with author) (U.S.-EC agreement
The need for intergovernmental competition cooperation agreements stems from four interrelated problems: (1) the potential for concurrent and conflicting jurisdiction caused by the increasing interdependence of national markets, the creation of world markets, and the "internationalization" of mergers and acquisitions;212 (2) the exercise of overbroad extraterritorial jurisdiction by enforcement authorities, especially in the United States, which often unnecessarily undercuts the sovereignty interests of foreign authorities;213 (3) the reluctance of governmental enforcement authorities to defer to sister enforcement authorities the opportunity to make enforcement decisions where the former's interests, though substantial, are secondary;214 and (4) the rendering of internationally unaccommodating decisions by enforcement agencies, who by paying merely lip service to comity, have exercised their enforcement discretion.215

In response, "representatives of competition authorities around the world have called [in recent years] for more international cooperation in antitrust enforcement."216 Significantly, such an agreement has recently been adopted in the bilateral US-EC Competition Laws Cooperation Agreement (the "Co-operation Agreement") signed on September 23, 1991.217 This "historic" Co-operation Agreement was described by Sir Leon Brittan, EC Commissioner for Competition, as "an important first step in placing our relations with the U.S. authorities in the antitrust field on a formal footing" which will "help each
could encourage discussions over a possible future multilateral antitrust agreement); Griffin, supra note 210, at 305-06 (arguing that "the best long-term solutions are multilateral agreements" on antitrust enforcement); Norton, supra note 210, at 596 (discussing "revival of multilateral endeavors to codify . . . international principles respecting antitrust matters."). But see U.S. Lawyers Predict Negative Impact on Business Sector From New U.S.-EC Accord, 8 Int'l Trade Rep. (BNA) No. 39, at 1446 (Oct. 2, 1991) (Commission officials rejecting the notion that the U.S.-EC agreement would serve as a basis for a multilateral agreement) [hereinafter Lawyers Predict Negative Impact].


214. Id.

215. See id.


side to take the other's interests into account in a timely way in cases
with an international dimension." The U.S. counterpart, Attorney
General William P. Barr, noted that "increasing integration of our
economies and the emergence of an international business environ-
ment make cooperation between our governments in the area of anti-
trust enforcement absolutely essential. Th[is] agreement ... grows
out of a shared commitment to antitrust enforcement as a cornerstone
of our market economies."219

The genesis for this Co-operation Agreement was a speech by Sir
Leon Brittan on February 8, 1990 at Cambridge University.220 As he
put it:

I personally favour ... a treaty between the European Com-

cunity and the United States. It would provide for consul-
tations, exchanges of non-confidential information, mutual
assistance, and best endeavours to cooperate in enforcement
where policies coincide and to resolve dispute where they do
not. ... [W]herever possible, only one party should exercise
jurisdiction over the same set of facts. To make that possi-
ble, a party with jurisdiction should be ready not to exercise
it in certain defined circumstances, while the other party, in
its exercise of jurisdiction, should agree to take full account
of the interests and views of its partner.221

Thus, Commissioner Brittan envisaged an agreement which would
actually involve antitrust enforcement authorities undertaking to
decide "which side of the Atlantic would have the responsibility for
competition-related review of a particular transaction ... [implicat-
ing] both American and European interests."222 In the wake of this
speech and a similar one in New York in March 1990,223 a flurry of

218. EEC/US: Range and Content of the Agreement on the Application of the Antitrust
Cooperation—Statement by Sir Leon Brittan, Europe, No. 5574 (new series), Sept. 25, 1991, at
9 (on file with author) [hereinafter Range and Content of the Agreement]. See U.S.,
Commission Sign Antitrust Cooperation Accord, 8 Int'l Trade Rep. (BNA) No. 38, at 1407
(Sept. 25, 1991) [hereinafter Antitrust Cooperation Accord].


220. Sir Leon Brittan, Jurisdictional Issues in EEC Competition Law, Hersch Lauterpacht
Memorial Lecture, Cambridge University (Feb. 8, 1990), in Sir Leon Brittan, Competition
Policy and Merger Control in the Single European Market 1-21 (1991) [hereinafter Brittan
Lecture].

221. Id. at 20-21.

222. Edward F. Glynn, International Agreements to Allocate Jurisdiction Over Mergers,

223. See Sir Leon Brittan, Competition Policy in the European Community: The New
Merger Regulation, Address before the EC Chamber of Commerce, in New York (Mar. 26,
1990) (on file with author).
bilateral negotiations culminated in the Co-operation Agreement signed on September 23, 1991, a feat of diplomatic cooperation accomplished at a speed that surprised both Commissioner Brittan and Federal Trade Commission Chairman Janet Steiger.\(^{224}\)

In fact, the Co-operation Agreement not only far exceeds the scope of existing cooperation agreements,\(^{225}\) it goes well beyond the aspirations set forth in the Brittan Lecture. The Co-operation Agreement, in addition to providing for the exchange of information and consultation\(^{226}\) analogous to provisions in existing cooperation agreements, also establishes a framework within which the parties agree to coordinate their enforcement activities regarding the anticompetitive activities that affect the interests of both parties. In considering whether to coordinate their activities, the parties shall consider, \textit{inter alia}, whether such coordination will result in increased efficiency, will enable the collection of the necessary information for enforcement proceedings, will facilitate the realization of enforcement objectives, and will reduce the costs incurred by persons subject to the enforcement activities.\(^{227}\)

Moreover, in one of the most innovative provisions, article V provides for "positive comity"\(^{228}\) allowing one party to notify the other party and request that party to initiate enforcement action where the notifying party believes anticompetitive activities adverse to its important interests are occurring in the territory of the other party. The notified party, while not required to initiate enforcement proceedings, must advise the notifying party of its decision whether or not to initiate enforcement activities and of the outcome of any such proceedings.\(^{229}\) This provision led one Commission official to describe the Co-operation Agreement as different from earlier bilateral coopera-

\(^{224}\) See Antitrust Cooperation Accord, supra note 218.


\(^{226}\) See Co-operation Agreement, supra note 217, art. III.

\(^{227}\) Id. art. IV.

\(^{228}\) See Lawyers Predict Negative Impact, supra note 211, at 1445 (Commission officials stating that the Agreement "breaks new ground in introducing concept of 'positive comity'").

\(^{229}\) See Co-operation Agreement, supra note 217, art. V.
tion agreements because it is "more positive in approach" with its emphasis on cooperation and comity.\(^{230}\)

Finally, and most importantly, the Co-operation Agreement adopts a comity analysis to be used where one party's enforcement activities may adversely affect important interests of the other party. Article VI provides that "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 investigation or proceeding."\(^{231}\) The Co-operation Agreement sets forth several factors to be considered in the comity analysis including, \textit{inter alia}: (i) "the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;" (ii) the intent of the participants in the anticompetitive activities "to affect consumers, suppliers, or competitors within the enforcing Party's territory;" (iii) "the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;" (iv) whether reasonable expectations "would be furthered or defeated by the enforcement activities;" (v) "the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies;" and (vi) "the extent to which enforcement activities of the other Party . . . [are] affected."\(^{232}\) These factors thus incorporate, in an international cooperation agreement, a comity analysis similar to criteria set forth in established case law on the subject.\(^{233}\) The Co-operation Agreement is effective immediately and is subject to review in two years with a view to identifying additional areas in which the parties could cooperate.\(^{234}\)

Thus, there is now in existence a "jurisdictional rule of reason" approach for all enforcement proceedings initiated by the United States or the European Community affecting the significant economic interests of the other party. Most important, the agreement signals a willingness by two of the world's most powerful trading partners to cooperate closely together to minimize jurisdictional conflicts and maximize effective enforcement against international anticompetitive activities.\(^{235}\) As such, the Co-operation Agreement represents a

\(^{230}\) See Lawyers Predict Negative Impact, supra note 211, at 1446.
\(^{231}\) Co-operation Agreement, supra note 217, art. VI.
\(^{232}\) See id. art. VI.
\(^{233}\) See Glynn, supra note 222, at 46; supra text accompanying notes 56-60.
\(^{234}\) See Co-operation Agreement, supra note 217, art. XI.
\(^{235}\) The impact of the Co-operation Agreement should be both immediate and substantial.
"solid antitrust front" against anticompetitive conduct adversely implicating U.S. or European interests.

Multilateral or bilateral agreements of the kind signed by the United States and the European Community provide a reasonable and balanced solution for minimizing conflicts that arise from the extraterritorial application of antitrust laws. Indeed, one commentator was particularly prescient in 1985 in remarking that "[i]n an ideal world, the principle of mutual respect would require nations to enter into express treaties before asserting jurisdiction over the activities of each other's citizens." The Co-operation Agreement represents a positive step on the road toward this "ideal world" of mutual respect. It undoubtedly signals closer ties of cooperative antitrust enforcement between the United States and the European Community, and thereby enhances the mutual respect for each party's interest in regulating foreign anticompetitive activity without unduly imposing on the other's legitimate sovereignty interests. As such, the Co-operation Agreement marks, in the words of Assistant Attorney General James F. Rill, "an important step toward minimizing disputes over extraterritorial application of the antitrust law."

This is not to say, however, that intergovernmental cooperation agreements are a panacea for avoiding all extraterritorial conflicts. Specifically, such agreements cannot resolve the problems arising from private suits in U.S. courts because the U.S. government cannot legally control private treble-damage actions. Thus, while competition cooperation agreements are useful for alleviating conflicts arising from government enforcement of antitrust laws, courts will continue to play a vital role in minimizing international conflicts arising from private suits seeking to apply antitrust laws extraterritorially.

VII. CONCLUSION

Much of the debate on the so-called extraterritorial application of laws is in reality about the fate of extraterritorially induced infringement of competition laws. Subject to due respect for foreign sover-
eignty interests, the fate of such extraterritorial infringements should not be materially different from the fate of wholly internal infringements.\textsuperscript{240} It is for this reason that the "implementation" approach will not be the final word from the European Community on the extraterritorial application of its competition laws. Just as the "economic entity" approach in \textit{Dyestuffs} gave way in the face of foreign infringements beyond its logical reach, the "implementation approach" of \textit{Wood Pulp} will necessarily give way to a broader extraterritorial scope as soon as an export boycott or similar infringement beyond the logical reach of the implementation approach is considered by the European Court of Justice. Moreover, the "direct, substantial and foreseeable" effects doctrine of the U.S. will continue to grow in usage and acceptance such that international law will (if it has not already)\textsuperscript{241} recognize it as a permissible basis for prescriptive jurisdiction. Finally, comity analysis will continue to play an increasing role in the jurisdictional inquiry as an aid to determining whether foreign sovereignty interests have been given adequate solicitude.

Where there is conflicting or concurrent jurisdiction in competition enforcement, the best solution, at least for government-initiated enforcement proceedings, arguably lies in international cooperation agreements seeking to coordinate activities and avoid enforcement conflicts. Thus, in cases involving U.S. interests in the European Community or European activities in the United States, there now exists a legal basis for applying principles of comity to determine the appropriateness of exercising jurisdiction in competition cases. While such an agreement provides little solace to other trading partners, it does indicate a positive step in the direction of respect for international comity and, more importantly, conflict avoidance in instances of extraterritorial application of antitrust laws.

\textsuperscript{240} Van der Esch, supra note 211, at 298.

\textsuperscript{241} See Meessen, supra note 99, at 798-801 (arguing that effects doctrine comports with customary international law provided that the state asserting jurisdiction has "reasonably close contact" with the foreign activities to be regulated); Barry E. Hawk, United States, Common Market and International Antitrust: A Comparative Guide 16 (Supp. 1983) ("[G]enerally ... public international law today does not preclude reliance on an effects doctrine ... ."). Cf. M. Sornarajah, The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise, 31 Int'l & Comp. L.Q. 127, 136 (1982) ("[T]he effects doctrine of jurisdiction ... does not accord with international law rules relating to jurisdiction.").