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## Defining Jurisdictional Limits in International Antitrust: Should the EEC Adopt the Timberlane Approach?

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# Defining Jurisdictional Limits in International Antitrust: Should the EEC Adopt the Timberlane Approach?

Eric L. Gilioli

## **Abstract**

The far reach of United States antitrust laws has been a source of considerable irritation to many allies of the United States. There is a proceeding by the Commission of the European Communities against International Business Machines Corporation (IBM). IBM has argued that the Commission must use a balancing test of state interests when deciding the case. However, this would involve changing the EEC's methods of evaluating its jurisdiction over conduct abroad. This Comment discusses whether such a change is desirable by 1) examining the principle as it evolved in the United States, 2) the EEC's current practice in such matters and 3) the pertinent rules of international law.

DEFINING JURISDICTIONAL LIMITS IN INTERNATIONAL  
ANTITRUST: SHOULD THE EEC ADOPT  
THE *TIMBERLANE* APPROACH?

INTRODUCTION

The application of United States antitrust laws to conduct by foreigners abroad has been politely described as a "cause for concern amongst friends of America."<sup>1</sup> The far reach of United States antitrust laws has, in fact, been a source of considerable irritation to many allies of the United States.<sup>2</sup> United States courts have utilized a "poorly defined"<sup>3</sup> standard to bring foreign conduct within the purview of United States antitrust laws.<sup>4</sup> On numerous occasions they have affected sensitive foreign interests.<sup>5</sup> The result has been a plethora of government protests<sup>6</sup> and foreign statutes directed at curbing United States antitrust enforcement efforts that extend abroad.<sup>7</sup>

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1. Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1 (1979). See *Extraterritoriality: Conflict and Overlap in National and International Regulation*, 1980 AM. SOC'Y INT'L L. PROC. 30, 36 (remarks by R.W. Burchill).

2. See *infra* notes 62-88 and accompanying text.

3. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 611 (9th Cir. 1976).

4. United States courts have traditionally taken jurisdiction over foreign conduct which has an effect on United States competition. See *infra* notes 39-88 and accompanying text. The "effects" doctrine has been frequently criticized by writers on public international law. See, e.g., F.A. MANN, *STUDIES IN INTERNATIONAL LAW* 89-94 (1973); Jennings, *General Course on Principles of International Law*, 121 RECUEIL DES COURS 323, 519-20 (1967); Verzijl, *The Controversy Regarding the So-Called Extraterritorial Effect of the American Antitrust Laws*, 8 NETH. INT'L L. REV. 3 (1961).

5. See, e.g., *United States v. Watchmakers of Switz. Information Center, Inc.* 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965) (United States antitrust efforts were directed at Swiss government supported arrangements that maintained Swiss dominance of the world watch market); *In re Uranium Antitrust Litig.*, 473 F. Supp. 382 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980) (the agreement in question was supported by numerous foreign governments in order to preserve domestic uranium production following the 1964 United States uranium purchasing embargo).

6. For a sampling of government protests against United States antitrust enforcement actions see INT'L L. ASS'N, 1964 REPORT OF THE FIFTY-FIRST CONFERENCE 565-88 (1965) [hereinafter cited as *ILA FIFTY-FIRST CONF. REP.*].

7. See, e.g., Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 Austl. Acts 1125, *amended by* 1976 Austl. Acts 1743; Uranium Information Security Regulations, 1978 CAN. CONS. RECS. ch. 366; Law of July 16, 1980, 1980 Journal Officiel de la République Française 1799, 1980 Recueil Dalloz-Sirey, *Législation* 285; Protection of Trading

As a consequence of these foreign objections, United States courts have recently been developing jurisdictional principles that include an evaluation of foreign interests.<sup>8</sup> Whether or not these principles succeed at reducing international friction, it is significant that United States courts are reexamining the legal theories on which they base jurisdiction in international antitrust matters. As more nations enforce their antitrust laws in cases having a foreign element, the potential for international conflict increases. Only by adopting more precise and generally accepted jurisdictional principles can antitrust enforcement be conducted harmoniously in the international sphere.<sup>9</sup>

Of great interest in this context is a proceeding by the Commission of the European Communities<sup>10</sup> against International Business Machines Corporation (IBM).<sup>11</sup> The Commission has alleged that

Interests Act, 1980, ch. 11 (U.K.). For a discussion of United States antitrust enforcement efforts abroad and of foreign "blocking" statutes, see Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877 (1982). For a discussion of the British "blocking" statute, see Note, *The Protection of Trading Interests Act of 1980—Britain's Latest Weapon in the Fight Against United States Antitrust Laws*, 4 FORDHAM INT'L L.J. 341 (1980-81).

8. See *infra* notes 89-122 and accompanying text.

9. The call for a convention on international antitrust jurisdictional principles has frequently been voiced. See, e.g., Timberg, *An International Antitrust Convention: A Proposal to Harmonize Conflicting National Policies Towards the Multi-National Corporation*, 8 J. INT'L L. & ECON. 157 (1973).

10. The EEC's competition rules are contained in Articles 85-90 of the Treaty of Rome. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (unofficial English translation), 1973 Gr. Brit. T.S. No. 1 (Part II) (Cmd. 5179-II) (official English version). The Commission of the European Communities may investigate and terminate infringements of Articles 85 and 86. Regulation 17, art. 3, 5 J.O. COMM. EUR. 204, 205-06, 1 COMMON MKT. REP. (CCH) ¶ 2401, ¶ 2422 (Feb. 6, 1962). The Commission may fine "undertakings" for violations of Articles 85 and 86. *Id.* art. 15. Decisions by the Commission may be appealed to the Court of Justice of the European Communities and the Court may cancel, reduce or increase fines imposed by the Commission. *Id.* art. 17.

11. The case against International Business Machines Corporation (IBM) has been discussed in an order and in an opinion of the Court of Justice of the European Communities. Following receipt of the Commission's Statement of Objections dated December 19, 1980, IBM sought an injunction on the Commission's proceedings and a declaration that the Statement of Objections was invalid. The Court of Justice denied the injunction on the grounds that IBM had failed to show "serious and irreversible harm." *IBM v. Commission of the Eur. Communities*, \_\_\_ E. Comm. Ct. J. Rep. \_\_\_, 32 Common Mkt. L.R. 93, 99 (1981) (order denying preliminary injunction). The request that the Court of Justice find the Statement of Objections improper was rejected as premature. The Court held that it could not review the Commission's actions until the Commission had issued a formal decision. *IBM v. Commission of the Eur. Communities*, \_\_\_ E. Comm. Ct. J. Rep. \_\_\_, 32 Common Mkt. L.R. 635, 662 (1981).

IBM violated Article 86 of the Treaty of Rome<sup>12</sup> by abusing its "dominant position" in European computer markets.<sup>13</sup> IBM has challenged the Commission's jurisdiction over the case based on principles of international law.<sup>14</sup> IBM argues that the Commission may not exercise jurisdiction in this case because the allegedly unlawful conduct was pursued primarily outside of the European Economic Community (EEC) and in the United States.<sup>15</sup>

IBM has, in the terminology of international law, questioned the EEC's legislative or prescriptive jurisdiction. Such jurisdiction is an aspect of sovereignty and relates to the power to make binding decisions or rules.<sup>16</sup> Prescriptive jurisdiction is distinguished from

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12. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11, 48-49 (unofficial English translation). The official English version of Article 86 reads as follows:

ARTICLE 86

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

1973 Gr. Brit. T.S. No. 1 (Part II) (Cmd. 5179-II).

For an analysis of Article 86, see Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, 3 *FORDHAM INT'L FORUM* 1 (1979-80).

13. The Commission has asserted that IBM has a dominant position in the EEC's computer market, particularly in the market for software compatible with the IBM 360 and 370 computer systems. IBM has allegedly abused its dominant position to the detriment of "plug compatible" manufacturers who sell products specifically designed to be compatible with IBM's computers. IBM's alleged abuses consist in: (1) selling its software along with its hardware without offering the products for separate sale ("bundling"); (2) refusing to predisclose changes in the interface, the link between hardware and software, until the first customer shipment has been made; and (3) refusing to sell valuable software unless that software is used with an IBM control processing unit. \_\_\_ E. Comm. Ct. J. Rep. \_\_\_, 32 *Common Mkt. L.R.* 635, 637 (1981).

14. \_\_\_ E. Comm. Ct. J. Rep. \_\_\_, 32 *Common Mkt. L.R.* 635, 638-39 (1981).

15. *Id.*

16. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 298 (3d ed. 1979).

enforcement jurisdiction which is defined as the power to take actions to enforce validly prescribed rules or laws.<sup>17</sup>

IBM has argued that the Commission must accept what IBM considers a principle of customary international law<sup>18</sup> requiring "[s]tates to refrain from adopting measures in application of their competition law if such measures would affect the interests of a foreign State to a substantial extent and if those interests outweigh the interests of the State proposing to take the measures."<sup>19</sup> According to IBM, the initiation and continuance of the Commission's administrative procedures constitute acts which, without a prior balancing of state interests, violate United States sovereignty and the rule of non-interference in the internal affairs of other states.<sup>20</sup>

The balancing of state interests approach in international anti-trust matters was developed and is gaining acceptance in the United States.<sup>21</sup> This approach is largely the result of numerous conflicts stemming from the application of United States antitrust laws to foreign conduct<sup>22</sup> but is also the product of a new view of international jurisdiction. Increasing economic interdependence and the rise of multinationals have, according to some commentators in the United States, rendered traditional territorial limitations to jurisdiction obsolete.<sup>23</sup> The argument that the balancing of state interests should replace territorial considerations as the appropriate test

17. *Id.* The American Law Institute has proposed a third type of jurisdiction, adjudicatory jurisdiction, which establishes minimum international standards for asserting personal jurisdiction. The most recent draft Restatement of the Foreign Relations Law of the United States has also made a significant and probably controversial change in the traditional distinction between prescriptive and enforcement jurisdiction by including United States antitrust discovery orders in the prescriptive category, terming such orders "a second exercise of jurisdiction to prescribe." *RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 413 comment f (Tent. Draft No. 2, 1981).

18. *See infra* notes 181-84 and accompanying text.

19. \_\_\_ E. Comm. Ct. J. Rep. \_\_\_, 32 *Common Mkt. L.R.* 635, 643 (1981).

20. *Id.*

21. *See infra* notes 89-122 and accompanying text.

22. *See infra* notes 62-88 and accompanying text.

23. *See, e.g.,* Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 *RECUEIL DES COURS* 311, 324-25 (1979); *see also* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 *AM. J. INT'L L.* 280 (1982). The belief that territorial principles are becoming anachronistic is also reflected in the new draft Restatement: "Inevitably, the rules themselves have changed, reflecting transformations in global communications, in the level and variety of transnational activity, and in perceptions of the way states interact with one another." *RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* 92 (Tent. Draft No. 2, 1981) (footnote omitted).

for jurisdiction has long been made in the United States.<sup>24</sup> Similar views have been cautiously advanced by some European commentators.<sup>25</sup>

Accepting such a balancing of state interests approach in the IBM case would involve changing the EEC's methods of evaluating its jurisdiction over conduct abroad.<sup>26</sup> Whether such a change is desirable remains an open question; resolving it requires examining the principle as it evolved in the United States, the EEC's current practice in such matters and the pertinent rules of international law.

### I. UNITED STATES PRACTICE AND THE DEVELOPMENT OF NEW JURISDICTIONAL RULES

The Sherman<sup>27</sup> and Clayton<sup>28</sup> Acts create three types of actions for violations of federal antitrust laws. Two are the prerogative of the federal government: the government may bring a criminal action, possibly resulting in fines or imprisonment,<sup>29</sup> or may bring a civil action aimed at enjoining or otherwise preventing the antitrust infringements.<sup>30</sup> The Clayton Act creates a third action for persons injured by antitrust violations and contemplates a recovery three times the value of the injury sustained plus reasonable attorney's fees.<sup>31</sup> The Sherman and Clayton Acts criminalize antitrust infringements and the primary purpose of the civil actions is that of added enforcement.<sup>32</sup>

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24. See K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 301-08, 309 app. (1958).

25. See F.A. MANN, *STUDIES IN INTERNATIONAL LAW* 37 (1973); I. BROWNIE, *supra* note 16, at 298.

26. See *infra* notes 89-122 and accompanying text.

27. 15 U.S.C. §§ 1-7 (1976).

28. 15 U.S.C. §§ 12-27 (1976).

29. 15 U.S.C. §§ 1-2 (1976).

30. 15 U.S.C. § 4 (1976).

31. 15 U.S.C. § 15 (1976).

32. "The purpose of relief in [a government civil antitrust action] is 'so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (citing *United States v. Gypsum Co.*, 340 U.S. 76, 88 (1950)). See also *United States v. Union Pac. R.R.*, 226 U.S. 470, 476-77 (1913) (object of government civil actions is to decree the end of unlawful combinations and conspiracies). Individuals bringing treble damage suits are frequently referred to as "private attorney generals." While the private action is also designed to compensate victims of antitrust violations, the legislative purpose in creating a treble damage

Although they may be enforced by civil actions, the antitrust laws are not private but public in nature.<sup>33</sup> The distinction between private and public law is important when a court is presented with a claim having a foreign element. In matters of private law, such as tort, the existence of foreign conduct may result in the application of a foreign law.<sup>34</sup> The application of public laws to

action was to provide extra enforcement of the antitrust laws. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

33. Private Law:

As used in contradistinction to public law, the term means all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals.

BLACK'S LAW DICTIONARY 1076 (rev. 5th ed. 1979).

Public Law:

That branch or department of law which is concerned with the state in its political or sovereign capacity, including constitutional and administrative law, and with the definition, regulation, and enforcement of rights in cases where the state is regarded as the subject of the right or object of the duty,—including criminal law and criminal procedure . . . .

BLACK'S LAW DICTIONARY 1106-07 (rev. 5th ed. 1979).

It is generally accepted that even civil antitrust actions serve to enforce public laws and that their jurisdictional scope is limited, as are criminal cases, by territorial principles. *See* I. BROWNLIE, *supra* note 16, at 300-01; D.P. O'CONNELL, *INTERNATIONAL LAW* 821 (2d ed. 1970); J.G. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 271-72 (8th ed. 1977); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 *BRIT. Y.B. INT'L L.* 146, 147-48 (1957); Verzijl, *The Controversy Regarding the So-Called Extraterritorial Effect of the American Antitrust Laws*, 8 *NETH. INT'L L. REV.* 3, 4 (1961). *But cf.* Akehurst, *Jurisdiction in International Law*, 46 *BRIT. Y.B. INT'L L.* 145, 190-92 (1972-73) (makes exception for treble damage actions).

34. The rules of conflict of laws provide means for ascertaining applicable law and resolving conflicts. "The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution." *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 1 (1971). Some of the principles used in determining applicable law are listed in § 6 of the Restatement. *Id.* § 6. Conflict of laws rules are generally inapplicable to criminal matters. *Id.* § 2 comment c. Criminal law is an area

in which jurisdictional notions have performed most of the work elsewhere left to choice-of-law rules. The crucial determination in the application of criminal laws is whether the court has jurisdiction; if it has, it applies its own criminal law. Although this does not exclude interpretive problems of the territorial scope of criminal law (e.g., did the legislature intend to prohibit acts done elsewhere?) which resemble choice-of-law questions, the court does not concern itself with the distinct question whether it should apply foreign law.

R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* 52 (3d ed. 1981).



foreign conduct, however, raises the issue whether the enforcing nation has the power to extend its laws beyond its territory.<sup>35</sup>

In United States antitrust jurisprudence, questions of prescriptive jurisdiction are incorporated in the analysis of subject matter jurisdiction.<sup>36</sup> When all or part of the conduct alleged to violate the Sherman or Clayton Acts takes place outside of the United States, the issue becomes whether the Acts can reach such foreign conduct.<sup>37</sup> Whether United States antitrust laws can apply to conduct abroad is a matter of congressional intent and of international law.<sup>38</sup>

### A. Genesis of the "Effects" Doctrine

In the first Supreme Court antitrust case involving foreign conduct, *American Banana Co. v. United Fruit Co.*,<sup>39</sup> a New Jersey corporation allegedly engaged in conduct, with the aid of government officials in Panama and Costa Rica, designed to close plaintiff's Panamanian banana plantation, thereby eliminating plaintiff as a competitor in the United States market.<sup>40</sup> Justice Holmes dismissed the case, expressing his surprise at the argument that the Sherman Act should apply to conduct outside of the United States.<sup>41</sup>

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35. The application of a nation's public laws beyond its borders is limited by international law. International law posits the existence of states having the right to be the almost exclusive source of public law within their territories. The extension of one nation's public laws into the territory of another will violate international law unless it conforms to accepted international practices. See *infra* notes 168-95 and accompanying text. This is recognized by authorities on conflict of laws:

Internationally, independent sovereigns may look upon crime as in substantial measure an offense against the political sovereign rather than as an occasion for corrective treatment of wrongdoers and protection of the public generally from antisocial acts. This premise is reflected in the procedural situation; the state moves as one injured party to protect its own interests. The moving state may not wish to entrust the vindication of its interests to courts of another sovereign; by the same token, the other sovereign may feel the inappropriateness and potential embarrassment of opening its courts to foreign penal actions.

A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* 793 (1965).

36. See *infra* notes 39-122 and accompanying text.

37. The fact that subject matter jurisdiction is at issue in cases involving foreign conduct is a recognition of the public nature of all types of United States antitrust actions. See *infra* notes 39-122 and accompanying text.

38. See *infra* notes 39-61 and accompanying text.

39. 213 U.S. 347 (1909).

40. *Id.* at 354-55.

41. *Id.* at 355.

He believed that such an assertion of jurisdiction "would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."<sup>42</sup> Furthermore, Holmes found no evidence of a legislative intent to reach conduct outside of the United States and concluded that "what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."<sup>43</sup>

Justice Holmes admitted only three exceptions to this rather strict territorial view of legislative jurisdiction. He stated that nations were permitted to prescribe laws regulating foreign conduct by their nationals, piracy on the high seas, and conduct engaged in abroad by foreigners affecting important national interests or governmental processes.<sup>44</sup>

The jurisdictional statements in *American Banana* have subsequently been ignored, distinguished or reinterpreted in antitrust cases. In *United States v. Pacific & Arctic Railway & Navigation*<sup>45</sup> defendants were indicted for combining and conspiring to eliminate competition in the business of transportation of freight and passengers between various ports in the United States and areas in Alaska and British Columbia.<sup>46</sup> When defendants argued that the Sherman Act could not apply to conduct which had taken place in British Columbia, the Court retorted that "to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept."<sup>47</sup>

The Supreme Court distinguished *American Banana* in *United States v. Sisal Sales Corp.*,<sup>48</sup> in which defendants were charged with conspiring to restrain the importation and sale of sisal from Mexico into the United States.<sup>49</sup> Defendants allegedly formed a Mexican corporation, whose purpose was to be the sole purchaser of sisal from Mexican producers, and the Sisal Sales Co., whose pur-

42. *Id.* at 356 (citations omitted).

43. *Id.* at 357.

44. *Id.* at 356. These categories are recognized as valid bases for prescriptive jurisdiction under international law. See *infra* notes 184-86 and accompanying text.

45. 228 U.S. 87 (1913).

46. *Id.* at 88-89.

47. *Id.* at 106. The result here is probably consistent with the objective territorial principle discussed *infra* notes 193-203 and accompanying text.

48. 274 U.S. 268 (1927).

49. *Id.* at 271-72.

pose was to be the sole sisal importer in the United States. Justice McReynolds found that since the restraints involved conduct within the United States, rather than exclusively foreign conduct, as in *American Banana*, the Court had proper jurisdiction.<sup>50</sup>

While the Court in *Sisal Sales* distinguished *American Banana* on the basis that part of the relevant conduct occurred within the United States, the Second Circuit stated a much broader proposition in *United States v. Aluminum Co. of America*<sup>51</sup> (*Alcoa*). The federal government brought a civil action charging Alcoa and sixty-two other defendants with monopolization of interstate and foreign commerce in the manufacture and sale of "virgin" aluminum ingot.<sup>52</sup> The circuit court held that Aluminum "Limited," a Canadian aluminum producer with which Alcoa shared stockholders and directors, was part of a wider cartel called "Alliance."<sup>53</sup> "Alliance," a Swiss corporation, had been formed following a 1931 agreement among French, German, Swiss and British corporations in addition to "Limited."<sup>54</sup> The purpose of the 1931 agreement, and of a subsequent agreement in 1936, was to fix the proportion of world sales that each had achieved in 1931 and to reduce competition for world market share among them.<sup>55</sup> Although the agreement did not include provisions as to imports into the United States, "when that question arose during its preparation, as it did, all the shareholders agreed that such imports should be included in the quotas."<sup>56</sup>

In deciding whether the cartel came within the reach of the Sherman Act, Judge Hand inferred congressional intent to reach the cartel. He did so when he stated that the laws of the United States extend up to the point that they reach "the limitations customarily observed by nations upon the exercise of their powers."<sup>57</sup> Distinguishing *American Banana* as a case in which the conduct had no consequences within the United States,<sup>58</sup> Judge Hand stated that

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50. *Id.* at 276. The result here is also probably consistent with the objective territorial principle discussed *infra* notes 193-203 and accompanying text.

51. 148 F.2d 416 (2d Cir. 1945).

52. *Id.* at 421.

53. *Id.* at 441.

54. *Id.* at 442.

55. *Id.* at 441-43.

56. *Id.* at 443.

57. *Id.*

58. *Id.* This statement seems inconsistent with the facts in *American Banana*. Defendant's actions most definitely had an effect on American competition because defendant's

“it is settled law . . . that 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; and these liabilities other states will ordinarily recognize.”<sup>59</sup>

Judge Hand then went on to formulate what has come to be known as the “effects” test. Citing *Pacific & Arctic Railway* and *Sisal Sales*, he stated that the Sherman Act would apply to any conduct as long as that conduct was intended to have and actually had an effect on United States exports or imports.<sup>60</sup>

alleged conduct was undertaken in order to eliminate plaintiff as a competitor in United States banana markets.

59. *Id.* (citations omitted). Judge Hand based this proposition on three cases. In the first case, *Strassheim v. Daily*, 221 U.S. 280 (1911), the defendant was indicted in Michigan on charges of bribing a public official and obtaining public money under false pretenses. Without setting foot in Michigan until after the crime, the defendant entered into a contract with a Michigan State prison and bribed the warden to accept used equipment rather than contractually promised new machinery. Michigan authorities discovered the scheme, convicted the warden and asked the State of Illinois to extradite the defendant. The Illinois District Judge issued a writ of *habeas corpus* on grounds that the defendant had not committed a crime in Michigan and could not, therefore, be extradited. Justice Holmes reversed, stating that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.” 221 U.S. at 285 (citations omitted). On its face this appears to be a formulation of the “protective principle” because the criminal conduct took place entirely outside of Michigan and the case involved bribery of a public official. For a discussion of the “protective principle,” see *infra* notes 184-88 and accompanying text. The case is, however, interpreted as an exercise of jurisdiction under the objective territorial principle because the fraud was committed in Michigan by defendant’s agent, thereby permitting the court to impute the agent’s conduct to defendant. See generally Note, *High Seas Narcotics Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of International Jurisdiction*, 50 *FORDHAM L. REV.* 688 (1982).

A different notion was used in the second case, *Lamar v. United States*, 240 U.S. 60 (1916). In *Lamar* the defendant committed fraud by impersonating a United States Congressman in a telephone conversation with a person in New York. Justice Holmes held that “[t]he personation was by telephone to a person in New York (Southern District) and it might be found that the speaker also was in the Southern District; but if not, at all events the personation took effect there.” *Id.* at 65-66 (citation omitted). The last case cited by Judge Hand was *Ford v. United States*, 273 U.S. 593 (1927). The defendants in *Ford* were convicted of conspiracy to violate the National Prohibition Act. The Court found that some defendants smuggled alcoholic substances into the United States from a boat outside United States territorial waters. The fact that some defendants remained outside the United States at all times did not bar prosecution, according to the Court, because all were part of a conspiracy to violate United States laws and overt acts by certain members took place within the United States. *Id.* at 620-21. Because conduct occurred partly inside and partly outside the United States this case can be categorized among cases employing the objective territorial principle. See *supra* notes 193-203 and accompanying text.

60. 148 F.2d at 444.

While *Alcoa* continued the earlier trend of expanding United States jurisdiction in antitrust matters, it marked a radical departure from the analysis used in prior cases. *American Banana, Pacific & Arctic Railway*, and *Sisal Sales* all concentrated on the location of the conduct in order to decide whether United States law was applicable. *Alcoa* shifted the focus from the location of the conduct to the location of the effect. Although Judge Hand believed that "other states will ordinarily recognize"<sup>61</sup> court judgments based on this principle, subsequent history of the "effects" doctrine suggests otherwise.

### B. The "Effects" Doctrine Under Fire

During the 1940's and 1950's the United States government targeted a number of international combinations whose purpose was to divide the world into zones dominated by particular cartel members.<sup>62</sup> By bringing these cases, the Department of Justice incurred the wrath of numerous foreign governments which perceived the American antitrust enforcement actions as violations of their sovereignty.

In *United States v. National Lead Co.*,<sup>63</sup> the Justice Department successfully challenged a cartel comprising the National Lead Company, DuPont, and other titanium pigment and compounds manufacturers in Britain, Germany, France, Canada, Japan and Italy.<sup>64</sup> Addressing the issue of subject matter jurisdiction, the district court confidently asserted that "[n]o citation of authority is any longer necessary to support the proposition that a combination of competitors, which by agreement divides the world into exclusive trade areas, and suppresses all competition among the members of the combination, offends the Sherman Act."<sup>65</sup>

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61. *Id.* at 443.

62. These are known as the international cartel cases and include: *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947); *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949), *modified*, 115 F. Supp. 835 (D.N.J. 1953); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950); *United States v. Imperial Chem. Indus. Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), *decree*, 105 F. Supp. 215 (S.D.N.Y. 1952); *United States v. Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955).

63. 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

64. *Id.* at 533.

65. *Id.* at 523.

A similar case causing greater international controversy, *United States v. General Electric Co.*,<sup>66</sup> involved General Electric, Philips (of Holland), and a number of companies from various countries including Britain, France, Italy, Hungary, Japan and Mexico.<sup>67</sup> Philips was charged with unlawfully restraining the importation to and exportation from the United States of incandescent electric lamps and machinery, and conspiring with General Electric to help the latter maintain its monopoly position in the United States market for incandescent electric lamps.<sup>68</sup> Philips argued that because the agreements were not unlawful in Holland, and because Philips had simply agreed not to compete in the United States, its conduct was beyond the reach of the Sherman Act.<sup>69</sup>

The court found the *Alcoa* intent requirement satisfied by the fact that Philips knew or should have known of the Sherman Act and of the effect that its agreement with General Electric had on competition in the United States.<sup>70</sup> The court then found deleterious effects on competition in the United States because Philips agreed to refrain from using its United States patents and "lent itself to the General Electric plan of throttling potential sources of foreign lamp parts."<sup>71</sup> The court's decree resulted in a diplomatic protest against what the Dutch government considered a violation of international law and of its sovereign rights, because, in its view, the United States had assigned itself the right to prohibit certain kinds of conduct on Dutch soil.<sup>72</sup>

The view that United States courts had exceeded their jurisdiction was reiterated by British courts following the decree in *United States v. Imperial Chemical Industries*.<sup>73</sup> A district court judge found that through the conclusion of numerous agreements among United States and foreign manufacturers of chemicals and explosives, an international cartel had been created to divide the world into separate competition zones.<sup>74</sup> The principal defendants were

66. 82 F. Supp. 753 (D.N.J. 1949), *modified*, 115 F. Supp. 835 (D.N.J. 1953).

67. *Id.* at 828.

68. *Id.* at 884.

69. *Id.* at 890.

70. *Id.* at 891.

71. *Id.*

72. Netherlands government protest against proposed decree in General Electric case (May 3, 1951), *reprinted in* L. EBB, *REGULATION AND PROTECTION OF INTERNATIONAL BUSINESS: CASES, COMMENTS AND MATERIALS* 571-73 (1964).

73. 100 F. Supp. 504 (S.D.N.Y. 1951), *decree*, 105 F. Supp. 215 (S.D.N.Y. 1952).

74. 105 F. Supp. at 220.

DuPont and Imperial Chemical Industries (ICI), a British corporation. Having found that the purposes of the cartel had been furthered by an exchange of patents between ICI and DuPont in 1946, the district court ordered the cancellation of the agreement and required that certain British nylon patents held by ICI be reconveyed to DuPont with the provision that a new agreement could be executed if it granted a non-exclusive license that provided for royalty payments and removed all contractual barriers to exportation.<sup>75</sup>

When the district court judge issued this decree, he was aware that ICI had granted irrevocable and exclusive rights to make yarn and nylon polymer to British Nylon Spinners, Ltd. (BNS), a British company in which ICI had a 50% stock interest. Following the judge's order that ICI transfer its British patents back to DuPont, BNS brought a suit in England to enjoin ICI from doing so and asked for a decree of specific performance on the agreement between ICI and BNS.<sup>76</sup> The British court was presented with a United States court order that required a British corporation to break a contract regarding British patents made in England with a second British corporation. Judge Evershed, of the Court of Appeals, found that

in this case there is raised a somewhat serious question whether the order, in the form that it takes, does not assert an extra-territorial jurisdiction which the courts of this country cannot recognise, notwithstanding any such comity. Applied conversely, I conceive that the American courts would likewise be slow (to say the least) to recognise an assertion on the part of the British courts of jurisdiction extending, in effect, to the business affairs of persons and corporations in the United States.<sup>77</sup>

The reach of United States enforcement efforts was also the object of Swiss protests following *United States v. Watchmakers of Switzerland Information Center, Inc.*<sup>78</sup> Unlike the international

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75. *Id.* at 231-32.

76. The injunction was granted in *British Nylon Spinners, Ltd. v Imperial Chem. Indus., Ltd.* [1952] 2 All E.R. 780 (C.A). The decree for specific performance was granted in *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.* [1954] 3 All E.R. 88 (Ch.).

77. [1952] 2 All E.R. at 782. While the American court order (an exercise of enforcement jurisdiction) sparked the controversy, Judge Evershed's statement seems to apply, at least in part, to prescriptive jurisdiction as well.

78. 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

cartel cases, which involved corporations from many different nations, all the defendants and most of the co-conspirators in *Swiss Watchmakers* were from either the United States or Switzerland.<sup>79</sup> The primary object of a 1931 convention comprising Swiss watch manufacturers and some of their subsidiaries in the United States was to maintain and bolster Swiss dominance of the world watch trade.<sup>80</sup> With the active support of the Swiss government,<sup>81</sup> Swiss watchmakers agreed to manufacture watches only in Switzerland, to refuse to export watchmaking machinery or watch parts, and otherwise regulate the sale and export of watches from Switzerland.<sup>82</sup> The court described various attempts by Swiss watchmakers to enforce the terms of the convention on subsidiaries in the United States and a number of episodes in which Swiss watchmakers refused to sell watch parts and watchmaking equipment to United States watchmakers.<sup>83</sup>

The district court held that it had subject matter jurisdiction because the Swiss restrictions on United States imports had a "substantial and material effect" on United States commerce.<sup>84</sup> It found that while the Swiss government had supported the conduct of Swiss watchmakers, it had not actually required such conduct and that, therefore, no issue relating to foreign compulsion or sovereignty was involved.<sup>85</sup> This was done notwithstanding the submission of a Swiss *amicus curiae* brief declaring that

[n]ot only does the present action constitute a direct attack upon the legislation and policy of the Swiss Confederation; it further seeks to regulate conditions in Switzerland and to limit the control which the Swiss Confederation may exercise over its own watch industry. Surely, the anti-trust laws should not be applied in such a way and these laws cannot be so applied. It has always

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79. 1963 Trade Cas. (CCH) at 77,416.

80. *Id.*

81. *Id.* at 77,428-32. The Court outlined Swiss legislation enacted between 1931 and 1954 designed to stabilize prices and regulate the export of watchmaking machinery. *Id.* The Court found that at least some of the legislation was adopted by request of Swiss watchmaking organizations. *Id.* at 77,428.

82. *Id.* at 77,426.

83. *Id.* at 77,432-35.

84. *Id.* at 77,457.

85. *Id.* at 77,456-57. Compulsion by a foreign government may provide a defense in United States antitrust actions. See B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 148-69 (1979).



been held that the anti-trust laws do not apply to acts done in the territory of a foreign sovereign in furtherance of that sovereign's law and policy . . . .<sup>86</sup>

In spite of these protests, Judge Cashin issued a decree that required extensive changes in Swiss watch marketing practices.<sup>87</sup> Although modified as a result of pressure from the State Department, the final decree still ordered Swiss watchmakers to abandon the 1931 convention as well as all practices that restrained Swiss exports to the United States.<sup>88</sup>

### C. *Towards a Solution?*

The fact that numerous Europeans protested the far reach of United States judicial actions did not go unnoticed in the United States.<sup>89</sup> As early as 1958, Kingman Brewster proposed a more flexible approach to the exercise of United States jurisdiction in antitrust matters that would incorporate an evaluation of any foreign interests involved.<sup>90</sup> The Restatement (Second) of the Foreign Relations Law of the United States uses a similar type of analysis requiring a balancing of state interests as a limitation on enforcement jurisdiction.<sup>91</sup> This approach was explicitly derived from

86. *Amicus Curiae* Brief for the Swiss Confederation, *extracted in* ILA FIFTY-FIRST CONF. REP., *supra* note 6, at 575.

87. *United States v. Watchmakers of Switz. Information Center, Inc.*, No. Civ. 96-170 (S.D.N.Y. Jan. 22, 1964).

88. 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965). For a comparison of the two decrees, see INT'L L. ASS'N, 1966 REPORT OF THE FIFTY-SECOND CONFERENCE 67-74 (1967).

89. Ignoring the protests would have been difficult. For a compilation of official protests, see ILA FIFTY-FIRST CONF. REP., *supra* note 6, at 562-88.

90. Brewster's approach is frequently referred to as a "jurisdictional rule of reason." See K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 301-08 (1958).

91.

#### Limitations on Exercise of Enforcement Jurisdiction

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct on the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

conflict of laws principles and adopted in view of the protests against the overextension of United States judicial measures abroad. To the reporter of section 40:

The parallel between conflict of laws doctrine and the present Section is clear. In both cases the question is not one of lack of jurisdiction but of the desirability of exercising power in a hardship situation (from the standpoint of the person concerned) or of international difficulty or tension (from the standpoint of the states concerned).<sup>92</sup>

Regarding prescriptive jurisdiction, however, the second Restatement adopts the traditional bases for jurisdiction in international matters<sup>93</sup> and includes the "effects" doctrine among territorial principles.<sup>94</sup>

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). [hereinafter cited as FOR. RELS. LAW]. Disagreement exists as to what constitutes enforcement. Most American commentators would probably agree that the police of one nation cannot unilaterally decide to conduct operations on foreign soil. *Cf. id.* § 44 (discusses limits to enforcement actions in foreign territory). In common law countries *in personam* discovery orders would certainly not be compared to police actions (the revised Restatement doesn't even consider them enforcement actions, *see supra* note 17) but the opposite view apparently predominates in Europe.

It is indisputable that the American court could not make a discovery order and have it executed abroad. This would be the exercise of police power in the territory of another State. The indirect way to accomplish its purposes is to issue such an order and oblige an enterprise before the court to go abroad and produce documents located there. This is nothing but an attempt to achieve indirectly what would be contrary to international law if attempted directly.

Riedweg, *The Extra-territorial Application of Restrictive Trade Legislation-Jurisdiction and International Law*, ILA FIFTY-FIRST CONF. REP., *supra* note 6, 357, at 403.

92. FOR. RELS. LAW, *supra* note 91, § 40 reporters' note 2.

93. *Id.* § 10. Section 10 sets out territory, nationality, the protection of certain state interests and the protection of certain universal interests as bases for jurisdiction. *Id.*

94. Section 18 of the second Restatement reads:

Jurisdiction to Prescribe with Respect to Effect within Territory

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

*Id.* § 18.

The jurisdictional principles developed by the second Restatement in 1965 were not immediately accepted by United States courts.<sup>95</sup> A number of courts limited their analysis of jurisdiction to the "effects" doctrine and focused on whether a substantial or direct effect existed in a given case.<sup>96</sup> Other courts began moving toward Restatement and conflict of laws concepts but altered the second Restatement principles in doing so.<sup>97</sup> The Circuit Court for the District of Columbia announced a radical test for jurisdiction in international antitrust cases: "surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports."<sup>98</sup>

In a holding that revolutionized the analysis of subject matter jurisdiction in antitrust questions, the Ninth Circuit formulated a

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The European Advisory Committee on the Draft Restatement Relating to Jurisdiction questioned the categorization of the "effects" doctrine as territorial. It seemed clear to the Committee that any doctrine permitting the assertion of jurisdiction to conduct entirely outside that nation could not possibly be called territorial. This was so because territorial nations traditionally required all or at least part of the proscribed conduct to take place within the territory of the nation asserting jurisdiction. The fact that the conduct in question might affect the territory could not provide an adequate basis for jurisdiction under the territorial principle. Excerpts from the Report of the European Advisory Committee on the Draft Restatement Relating to Jurisdiction, in ILA FIFTY-FIRST CONF. REP. *supra* note 6, at 537-43.

95. This was partially so because *Swiss Watchmakers* marked the end of vigorous Department of Justice enforcement of antitrust laws in the international sphere. Even after Restatement principles were adopted, however, courts modified the analysis by calling for a balancing of interests when examining prescriptive as well as enforcement jurisdiction. The Restatement Second would permit a United States court to exercise prescriptive jurisdiction over foreign conduct, assuming an effect in the United States. In such a situation, according to the Restatement Second, both the United States and a foreign country would have prescriptive jurisdiction over the conduct in question: the United States would have jurisdiction by way of the "effects" doctrine, while the foreign country would have jurisdiction by way of the territorial principle. In the absence of foreign requirements to the contrary, the United States court would be free to engage in enforcement action, including discovery orders and final decrees requiring conduct abroad. In the event that foreign laws forbid the actions ordered by a United States court, the Restatement requires that the United States court balance the factors in § 40, so as to decide what weight to give that foreign law.

96. See, e.g., *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586 (E.D. Pa. 1974); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

97. *Joseph Muller Corp., Zurich v. Soci t  Anonyme de Gerance et D'Armement*, 451 F.2d 727 (2d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

98. 404 F.2d at 815.

new test for establishing the limits of the Sherman Act in 1976. The court, in *Timberlane Lumber Co. v. Bank of America*,<sup>99</sup> discussed the conflicts engendered by use of the "effects" doctrine and cited some of its foreign critics.<sup>100</sup> The court found the doctrine lacking in that it failed to consider the interests of other nations or to take into account the relationship between the parties and the prescribing nation.<sup>101</sup> The court explicitly sought to adopt a conflict of laws approach in the analysis of international jurisdiction in order to develop, in Brewster's words, a "jurisdictional rule of reason."<sup>102</sup>

The court established a three step analysis to determine if a United States court has subject matter jurisdiction. A court must ask itself: (1) whether the alleged restraint affects or is intended to affect the foreign commerce of the United States; (2) whether the restraint is of a type and magnitude as to be cognizable as a violation of the Sherman Act; and (3) whether as a matter of international comity and fairness, the United States court should exercise its jurisdiction.<sup>103</sup> The third tier can be answered only by balancing a set of factors similar to those set out in section 40 of the second Restatement.<sup>104</sup> The balancing process, previously relevant only to enforcement jurisdiction, has now become essential in the analysis of prescriptive jurisdiction.

With slight modifications, the *Timberlane* test has been adopted by the Third Circuit. In *Mannington Mills, Inc. v. Congo-*

99. 549 F.2d 597 (9th Cir. 1976).

100. *Id.* at 610.

101. *Id.* at 611-12.

102. *Id.* at 613 (citing K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 446 (1958)).

103. *Id.* at 615.

104.

[T]he elements to be weighed include

[(1)] the degree of conflict with foreign law or policy,

[(2)] the nationality or allegiance of the parties and the locations or principal places of business of corporations,

[(3)] the extent to which enforcement by either state can be expected to achieve compliance,

[(4)] the relative significance of effects on the United States as compared with those elsewhere,

[(5)] the extent to which there is explicit purpose to harm or affect American commerce,

[(6)] the foreseeability of such effect, and

[(7)] the relative importance to the violations charged of conduct within the

United States as compared with conduct abroad.

*Id.* at 614. Compare *supra* note 94 (second Restatement factors).

*leum Corp.*,<sup>105</sup> an appeal from a dismissal for lack of subject matter jurisdiction, the court found that the plaintiff had sufficiently alleged an antitrust violation affecting United States foreign commerce.<sup>106</sup> The court thus concluded it had proper subject matter jurisdiction and proceeded to the balancing stage, not to decide whether it had subject matter jurisdiction, but only to resolve whether it should exercise jurisdiction.<sup>107</sup> Slightly different factors were used in the balancing process than those presented in *Timberlane*, but the analysis remained essentially the same.<sup>108</sup>

The *Timberlane* approach is not only being accepted by more courts<sup>109</sup> but may well be adopted by the American Law Institute in a forthcoming edition of the Restatement of Foreign Relations Law of the United States.<sup>110</sup> Section 402 of the current draft includes the previously listed bases for prescriptive jurisdiction, including the "effects" doctrine,<sup>111</sup> but requires the use of a balancing approach to temper the exercise of jurisdiction in all cases having a

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105. 595 F.2d 1287 (3d Cir. 1979).

106. *Id.* at 1292.

107. *Id.* at 1294.

108. The factors to be considered include:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and 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. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
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;
10. Whether a treaty with the affected nations has addressed the issue.

*Id.* at 1297-98 (footnote omitted).

109. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,288 (E.D. Pa.); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979). But see *National Bank of Can. v. Interbank Card Ass'n*, 1980-81 Trade Cas. (CCH) ¶ 63,836 (2d Cir. 1981) (rejecting the *Timberlane* approach in favor of the "effects" doctrine).

110. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 2, 1981).

111. *Id.* § 402(1)(c).

foreign element.<sup>112</sup> The American Law Institute, following *Timberlane's* lead, thus appears to be moving away from the position of the second Restatement which required the use of a balancing test only at the enforcement stage.

The draft Restatement includes a special section illustrating the application of United States antitrust laws within the framework provided by the preceding sections on prescriptive jurisdiction.<sup>113</sup> This section appears to retreat from the requirement that a balancing of factors is necessary any time foreign conduct is involved. Apparently, use of the "effects" doctrine is presumptively reasonable when the principal purpose of foreign conduct is to affect United States commerce and it actually has such an effect.<sup>114</sup> The balancing test is only required "with respect to any other agreement or conduct in restraint of United States trade if such agreement or conduct has substantial effect on the commerce of the United States."<sup>115</sup>

The basic purpose of the *Timberlane* and draft Restatement approaches, that of eliminating or at least reducing international conflict, has not yet been achieved. *In re Uranium Antitrust Litiga-*

112. *Id.* § 403(2). This section reads:

Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;

(b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or 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 in question;

(e) the importance of regulation to the international political, legal or economic system;

(f) the extent to which such 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;

(h) the likelihood of conflict with regulation by other states.

*Id.*

113. *Id.* § 415.

114. *Id.* § 415(2).

115. *Id.* § 415(3).

tion<sup>116</sup> (*Uranium*) not only suggests that United States courts may not be equipped to evaluate foreign interests,<sup>117</sup> but that the era of international protests over the application of United States laws to foreign conduct has yet to end.

In 1976, Westinghouse initiated *Uranium* by suing seventeen domestic and twelve foreign corporations claiming that they had participated in an arrangement to fix world uranium prices.<sup>118</sup> Following the default of nine of the foreign defendants, the governments of Australia, Canada, South Africa and the United Kingdom each filed *amicus curiae* briefs with the Seventh Circuit challenging the court's jurisdiction.<sup>119</sup> In language reminiscent of the protests surrounding *Swiss Watchmakers*, the Canadian government stated in its brief that it "considered it contrary to her sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or taken in implementation of Canadian government policy."<sup>120</sup> The Seventh Circuit found, notwithstanding the fact that the district court judge never so much as mentioned *Timberlane*, that the district court had not "abused its discretion" in proceeding with the case and thereby

116. 473 F. Supp. 382 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980).

117. This was recognized by Judge Marshall in the *Uranium* case. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979). See B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 44 (Supp. 1980); Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INT'L LAW. 645, 651 (1979).

118. 473 F. Supp. at 384-85. The history of the uranium litigation is quite complex and no court has yet set out comprehensive findings of fact. It appears that in response to a United States uranium import ban, a number of uranium producing countries encouraged uranium producers to stabilize the price of uranium. *Gulf Oil Corp. v. Gulf Can., Ltd.*, 111 D.L.R.3d 74, 77 (Can. 1980). Uranium prices increased from \$6 per pound in the 1960's to about \$40 per pound in the late 1970's. *Id.* This increase led Westinghouse to breach a number of uranium supply contracts it had with utility companies. Numerous utilities brought suit against Westinghouse and thirteen actions were consolidated in the Federal District Court for the Eastern District of Virginia. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 405 F. Supp. 316 (J.P.M.D.L. 1975). Westinghouse has asserted a defense of impracticability and has argued that the sharp price increases are due to a uranium producer cartel. See generally Comment, *The International Uranium Cartel: Suit Litigation and Legal Implications*, 14 TEX. INT'L L.J. 59, 64-87 (1979). Westinghouse then brought a separate suit in Chicago against uranium producers. 473 F. Supp. 382.

119. 617 F.2d at 1253. The circuit court made only sparing reference to the objections raised in the *amicus* briefs. *Id.* at 1253-56.

120. Canadian *amicus* brief, excerpted in *Gulf Oil Corp. v. Gulf Can., Ltd.*, 111 D.L.R.3d 74, 87 (Can. 1980).

complied with the analysis set forth in *Timberlane*.<sup>121</sup> When United States courts later sought Canadian judicial cooperation for discovery in Canada, the requests were flatly denied.<sup>122</sup>

#### D. *The Trend Towards Non-Territorial Principles of Jurisdiction*

In the seven decades since *American Banana*, the United States has inched away from territorial principles in matters of international antitrust. Initially, United States courts required conduct within the United States in order to distinguish *American Banana*, but *Alcoa* opened the door to any case in which, even if all the relevant conduct occurred abroad, an effect was felt within the United States. Paradoxically, criticisms of the "effects" doctrine have pushed United States courts even farther away from traditional territorial principles. The analysis in *Timberlane* and the draft Restatement concentrates much more on the balancing of interests than on the location of conduct or the location of effect. Should the influence of conflict of laws principles continue, even the "effects" doctrine could eventually be abandoned in favor of a pure conflict of laws interest analysis.<sup>123</sup>

## II. PRACTICE OF THE EUROPEAN COMMUNITIES

Articles 85 and 86 of the Treaty of Rome<sup>124</sup> are the most important provisions of the EEC's competition law.<sup>125</sup> Each article contains jurisdictional requirements that differentiate antitrust violations that take place entirely within one EEC member state from those that involve trade between EEC countries.<sup>126</sup> Article 85 is

121. 617 F.2d at 1255-56.

122. See *Gulf Oil Corp. v. Gulf Can., Ltd.*, 111 D.L.R.3d 74 (Can. 1980). Canadian and British courts previously rejected discovery requests stemming from the Virginia action. See *Re Westinghouse Elec. Corp.*, 78 D.L.R.3d 3 (Ont. H. Ct. J. 1977); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 All E.R. 434 (H.L.). See generally Note, *Potential Havens from American Jurisdiction and Discovery Laws in International Antitrust Enforcement*, 33 U. FLA. L. REV. 240, 256-66 (1981) (discusses Canadian and British reactions to the *Uranium* litigation).

123. See *infra* note 218 and accompanying text.

124. Treaty Establishing the European Economic Community, March 25, 1957, arts. 85, 86, 298 U.N.T.S. 11, 47-49 (unofficial English translation), 1973 Gr. Brit. T.S. No. 1 (Part II) (Cmd. 5179-II) (official English version).

125. B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 413 (1979).

126. The fact that an antitrust violation takes place completely within one EEC country will not, however, necessarily preclude a Commission proceeding. See, e.g., *Vereeniging van*



directed at agreements and concerted practices "which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market."<sup>127</sup> Article 86 prohibits any abuse by enterprises having a dominant position within the Common Market "in so far as it may affect trade between Member States."<sup>128</sup> These jurisdictional standards, by requiring an effect on trade between EEC members, embody a type of "effects" test.<sup>129</sup> The EEC used this jurisdictional standard even in cases in which conduct occurred outside the EEC. From the very start, however, the EEC encountered resistance to such a broad jurisdictional test on the international plane.

Following Commission proceedings in *Commission of the European Communities v. Imperial Chemical Industries, Ltd.*<sup>130</sup> (*Dyestuffs*), six EEC, one British and three Swiss dyestuffs manufacturers were fined for violating Article 85.<sup>131</sup> The Commission found a conspiracy to fix the price of dyestuffs sold within the Common Market and declared that its decision would apply to all defendants involved.<sup>132</sup> It rather boldly stated that as long as there was an effect on EEC trade there was "no need to examine whether the undertakings which are the cause of these restrictions of competition have their seat within or outside the Community."<sup>133</sup> The Commission decided, however, to notify the foreign defendants of

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*Cementhandelaren v. Commission des Communautés européennes*, 1972 C.J. Comm. E. Rec. 977, 992, 12 Common Mkt. L.R. 7, 22 (an agreement which was limited to the Netherlands came within article 85 because it rendered penetration of Dutch markets more difficult).

127. Treaty Establishing the European Economic Community, March 25, 1957, art. 85, 298 U.N.T.S. 11, 47-48 (unofficial English translation), 1973 Gr. Brit. T.S. No. 1 (Part II) (Cmd. 5179-II) (official English version).

128. *Id.* art. 86. See *supra* note 12.

129. This "effect," however, is not what provides jurisdiction on an international level but is what differentiates EEC jurisdiction from that of member states. The requirement that the antitrust violation affect trade between member states is similar to the Sherman Act requirement that an antitrust violation restrain or monopolize "trade or commerce among the several States." 15 U.S.C. §§ 1, 2 (1976). See B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 443-54 (1979).

130. 12 J.O. COMM. EUR. (No. L 195) 11, 8 Common Mkt. L.R. D23 (1969), *aff'd*, 1972 C.J. Comm. E. Rec. 619, 11 Common Mkt. L.R. 557.

131. 12 J.O. COMM. EUR. (No. L 195) at 17, 8 Common Mkt. L.R. at D34. The United Kingdom was not yet part of the EEC in 1969. The other defendants were from Germany, France, and Italy. *Id.*

132. 12 J.O. COMM. EUR. (No. L 195) at 16, 8 Common Mkt. L.R. at D33-34.

133. 12 J.O. COMM. EUR. (No. L 195) at 16, 8 Common Mkt. L.R. at D33.

its decision by communicating it to subsidiaries within the Common Market completely controlled by the foreign parents.<sup>134</sup>

The British response was immediate. In an *aide mémoire* to the Commission, the government of the United Kingdom expressed its opinion that the EEC's apparent adoption of the "effects" doctrine conflicted with the principles of public international law.<sup>135</sup> It further commented that notification through a subsidiary was also "open to objection" as a violation of the jurisdictional limits imposed by international law.<sup>136</sup>

British fears that the EEC was adopting the "effects" doctrine were enhanced by a pronouncement on the matter by the Court of Justice. Although no non-EEC company was a defendant in *Béguelin Import Co. v. S.A.G.L. Import Export*,<sup>137</sup> the Court of Justice stated that Article 85 was applicable to foreign defendants and that "[t]he fact that one of the undertakings participating in the agreement is situated in a non-member country is no obstacle to the application of that provision, so long as the agreement produces its effects in the territory of the Common Market."<sup>138</sup>

The Court addressed the matter directly when *Dyestuffs* reached it on appeal from the Commission.<sup>139</sup> In support of defendant Imperial Chemical Industries, Ltd. (ICI), Professor Jennings of the University of Cambridge wrote a brief contending that application of EEC law to the defendant violated international law because ICI had not engaged in conduct within the EEC.<sup>140</sup> The Commission responded by arguing that conduct had taken place within the EEC through ICI's subsidiaries.<sup>141</sup> As an alternative argument the Commission stated that its assertion of jurisdiction was consonant with international law either through the "effects" doctrine or the protective principle.<sup>142</sup> Avoiding arguments about

134. 12 J.O. COMM. EUR. (No. L 195) at 17, 8 Common Mkt. L.R. at D35.

135. 1967 BRIT. PRAC. INT'L L. 58.

136. *Id.* at 59. Unfortunately this point was not developed in the *aide mémoire*.

137. 1971 C.J. Comm. E. Rec. 949, 11 Common Mkt. L.R. 81.

138. 1971 C.J. Comm. E. Rec. at 959, 11 Common Mkt. L.R. at 95.

139. *Imperial Chem. Indus., Ltd. v. Commission des Communautés européennes*, 1972 C.J. Comm. E. Rec. 619, 11 Common Mkt. L.R. 557.

140. 1972 C.J. Comm. E. Rec. at 624-27, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) at 8004-07.

141. 1972 C.J. Comm. E. Rec. at 627-30, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) at 8007-09.

142. *Id.* This is a rare instance of an argument favoring the expansion of antitrust jurisdiction through use of the protective principle.

international law, the Court accepted the Commission's position that ICI had engaged in conduct in the EEC via its subsidiaries.<sup>143</sup> Although recognizing that parent and subsidiary companies are legally distinct entities, the Court imputed the subsidiary's conduct to the parent, and thereby found conduct by the foreign parent within the EEC.<sup>144</sup>

The Court of Justice faced a similar argument based on international law in *Europemballage Corp. v. Commission of the European Communities*.<sup>145</sup> Continental Can, a New York corporation, formed Europemballage, a Delaware corporation with an office in Brussels. The subsidiary engaged in various corporate acquisitions in Europe and both parent and subsidiary were soon the object of Article 86 proceedings by the Commission. Following a Commission holding against them,<sup>146</sup> the defendants appealed to the Court of Justice on numerous grounds including lack of jurisdiction under international law.<sup>147</sup> The Court reversed the Commission's decision on other grounds, but found that the Commission had jurisdiction over Continental Can because the subsidiary's acts could be attributed to the parent.<sup>148</sup>

In another case involving a defendant from the United States, *Istituto Chemioterapico Italiano S.p.A. v. Commission of the European Communities*,<sup>149</sup> the Court of Justice used a somewhat different approach. Commercial Solvents, a Maryland corporation, purchased an Italian chemicals manufacturer and both were eventually charged with abuse of dominant position.<sup>150</sup> Commercial Solvents argued that the EEC had unlawfully exercised jurisdiction over its conduct in the United States.<sup>151</sup> The Court re-

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143. 1972 C.J. Comm. E. Rec. at 665-67, 11 Common Mkt. L.R. at 628-30. In doing so, the Court rejected the point of view presented by the Advocate General. The Advocate General strongly favored adoption of the "effects" doctrine. 1972 C.J. Comm. E. Rec. at 694-703, 11 Common Mkt. L.R. at 593-608.

144. 1972 C.J. Comm. E. Rec. at 666, 11 Common Mkt. L.R. at 629.

145. 1973 E. Comm. Ct. J. Rep. 215, 12 Common Mkt. L.R. 199.

146. *Commission of the Eur. Communities v. Europemballage Corp.*, 15 J.O. COMM. EUR. (No. L 7) 25, 39, 11 Common Mkt. L.R. D11, D35 (1971), *rev'd on other grounds*, 1973 E. Comm. Ct. J. Rep. 215, 12 Common Mkt. L.R. 199.

147. 1973 E. Comm. Ct. J. Rep. at 222, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) at 8284.

148. 1973 E. Comm. Ct. J. Rep. at 241-42, 12 Common Mkt. L.R. at 221-22.

149. 1974 E. Comm. Ct. J. Rep. 223, 13 Common Mkt. L.R. 309.

150. 1974 E. Comm. Ct. J. Rep. at 226-27, 13 Common Mkt. L.R. at 312-14.

151. 1974 E. Comm. Ct. J. Rep. at 231-32, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 8806-07.

sponded that the companies had engaged in "obviously united action" and that for the purposes of this proceeding they "must be deemed an economic unit and . . . are jointly and severally responsible for the conduct complained of."<sup>152</sup>

The Commission has repeatedly used the "single economic unit" approach in later cases.<sup>153</sup> It has become the established rule in EEC proceedings involving conduct outside the Community by non-EEC corporations with subsidiaries within the EEC.<sup>154</sup> What remains unclear is whether the Court of Justice would adopt the "effects" doctrine in the event that a non-EEC corporate defendant did not have subsidiaries within the Community.<sup>155</sup>

The Commission has made rather cautious use of the "effects" doctrine, but none of these decisions has ever reached the Court of Justice.<sup>156</sup> In *Re the Franco-Japanese Ballbearings Agreement*,<sup>157</sup>

152. 1974 E. Comm. Ct. J. Rep. at 254, 13 Common Mkt. L.R. at 344.

153. See Commission of the Eur. Communities v. Johnson & Johnson, 23 O.J. EUR. COMM. (No. L 377) 16, 26, 31 Common Mkt. L.R. 287, 302-03 (1980); Liptons Cash Registers & Business Equip., Ltd. v. Hugin Kassaregister AB, 21 O.J. EUR. COMM. (No. L 22) 23, 34, 21 Common Mkt. L.R. D19, D33 (1977); Commission of the Eur. Communities v. Hoffmann-La Roche, 19 O.J. EUR. COMM. (No. L 223) 27, 37, 18 Common Mkt. L.R. D25, D42 (1976), *aff'd*, 1979 E. Comm. Ct. J. Rep. 461, 26 Common Mkt. L.R. 211; Commission of the Eur. Communities v. United Brands Co., 19 O.J. EUR. COMM. (No. L 95) 1, 11, 17 Common Mkt. L.R. D28, D46 (1975), *aff'd*, 1978 E. Comm. Ct. J. Rep. 207, 21 Common Mkt. L.R. 429.

154. See Harding, *Jurisdiction in EEC Competition: Some Recent Developments*, 11 J. WORLD TRADE L. 423, 425-37 (1977); Norton, *The European Court of Justice Judgment in United Brands: Extraterritorial Jurisdiction and Abuse of Dominant Position*, 8 DEN. J. INT'L L. & POL'Y 379, 388-95, 413-14 (1979); see also B. BARACK, *THE APPLICATION OF THE COMPETITION RULES (ANTITRUST LAW) OF THE EUROPEAN ECONOMIC COMMUNITY TO ENTERPRISES AND ARRANGEMENTS EXTERNAL TO THE COMMON MARKET* 40-73 (1981).

155. Although the Court of Justice has indicated its willingness to adopt the "effects" doctrine in two cases, there were no foreign defendants and no jurisdictional issue was raised in either case. The first case was *Béguelin Import Co. v. S.A.G.L. Import Export*, 1971 C.J. Comm. E. Rec. 949, 11 Common Mkt. L.R. 557. See *supra* text accompanying note 138. The second case, *B.N.O. Walrave v. Association Union Cycliste Internationale*, 1974 E. Comm. Ct. J. Rep. 1405, 15 Common Mkt. L.R. 320, involved discrimination based upon nationality in sports teams. The Court stated that "[t]he rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community." 1974 E. Comm. Ct. J. Rep. at 1421, 15 Common Mkt. L.R. at 335.

156. In *Dyestuffs*, the Commission used the "effects" doctrine but the Court of Justice used the parent/subsidiary principle. The Commission's practice contrasts with strong public statements indicating acceptance of the "effects" doctrine. See, e.g., COMMISSION OF THE EUR. COMMUNITIES, *ELEVENTH REPORT ON COMPETITION POLICY* 36-39 (1982); INT'L L. ASS'N, *1972 REPORT OF THE FIFTY-FIFTH CONFERENCE* 116-19 (1974) (remarks by E. Zimmerman).

157. 17 O.J. EUR. COMM. (No. L 343) 19, 15 Common Mkt. L.R. D8 (1974).

the Commission declared that an agreement between Japanese and French ballbearing manufacturers was intended to raise the price of French ballbearings and violated Article 85.<sup>158</sup> The Commission, however, imposed no sanctions.

The Commission used a similar approach in *Re the French and Taiwanese Mushroom Packers*.<sup>159</sup> The Commission found that five French corporations had agreed with a Taiwanese export association to fix the price of mushrooms in Germany.<sup>160</sup> Although it fined the French producers and ordered all parties to terminate the agreement, the Commission declined to fine the Taiwanese export association.<sup>161</sup> It did so on the grounds that the association could not have had notice of a Commission announcement warning Japanese corporations that it had adopted the "effects" doctrine.<sup>162</sup> The Commission refrained from imposing sanctions in a recent case in which a British corporation violated Community antitrust laws two years before the United Kingdom's accession into the EEC.<sup>163</sup>

Only once has the Commission fined a non-EEC corporation without subsidiaries in the EEC. In *Commission of the European Communities v. Members of the Genuine Vegetable Parchment Association*,<sup>164</sup> the Commission found that only four Community nations had firms manufacturing vegetable parchment and that none exported parchment to EEC countries in which competitors were based.<sup>165</sup> A Finnish company was also part of the agreement and had rights over the Danish vegetable parchment market.<sup>166</sup> The Commission fined a French and four German corporations as well as the Finnish company.<sup>167</sup> The Finnish company did not raise the jurisdictional issue and the case was not appealed.

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158. 17 O.J. EUR. COMM. (No. L 343) at 26, 15 Common Mkt. L.R. at D18-D19.

159. 18 O.J. EUR. COMM. (No. L 29) 26, 15 Common Mkt. L.R. D83 (1975).

160. 18 O.J. EUR. COMM. (No. L 29) at 29, 15 Common Mkt. L.R. at D90.

161. 18 O.J. EUR. COMM. (No. L 29) at 30, 15 Common Mkt. L.R. at D92.

162. 18 O.J. EUR. COMM. (No. L 29) at 29, 15 Common Mkt. L.R. at D90. In the announcement, the Commission explicitly embraced the "effects" doctrine. 15 J.O. COMM. EUR. (No. C 111) 13 (1972).

163. *Commission of the Eur. Communities v. Associated Lead Mfrs.* 22 O.J. EUR. COMM. (No. L 21) 16, 24 Common Mkt. L.R. 464 (1978).

164. 21 O.J. EUR. COMM. (No. L 70) 54, 21 Common Mkt. L.R. 534 (1977).

165. 21 O.J. EUR. COMM. (No. L 70) at 55, 21 Common Mkt. L.R. at 537-38.

166. 21 O.J. EUR. COMM. (No. L 70) at 60, 21 Common Mkt. L.R. at 544-45.

167. 21 O.J. EUR. COMM. (No. L 70) at 65, 21 Common Mkt. L.R. at 552. The Finnish company was fined 15,000 European Units of Account. *Id.* On the day the Commission issued this decision, one Unit of Account was equal to U.S. \$ 1.20238. 20 O.J. EUR. COMM. (No. C 312) 1 (1977).

While the Commission may be tempted by the "effects" doctrine, the Court of Justice has shown its preference for other principles. By ignoring the separate corporate personalities of parent and wholly-owned subsidiaries, the Commission and Court reach foreign companies that engage in practices violative of EEC antitrust norms through subsidiaries within the Community. By thus locating conduct within the EEC, the Commission and Court are reemphasizing traditional territorial principles.

If a trend can be identified in the EEC's first decade of anti-trust enforcement in the international field, it is a shift away from the "effects" doctrine. In this respect, the EEC's practice contrasts with that in the United States. Although courts in the United States are using concepts increasingly remote from territorial principles, the EEC has developed and utilized principles which permit vigorous enforcement of Articles 85 and 86, and yet remain territorial. In so doing, the EEC has probably developed principles more consistent with the doctrines of public international law.

### III. JURISDICTIONAL LIMITS UNDER INTERNATIONAL LAW

International law is generally defined as the set of binding rules that governs the conduct and interrelationship of sovereign states and of other entities having international personality.<sup>168</sup> States are the primary subjects of international law, and the "sovereignty and equality of states represent the basic constitutional doctrine of the law of nations."<sup>169</sup> Two of the principal corollaries of the sovereignty and equality of states are "(1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; [and] (2) a duty of non-intervention in the area of exclusive jurisdiction of other states."<sup>170</sup>

Sovereignty, jurisdiction and territory are thus closely related notions. Sovereignty, an essential ingredient of statehood, involves freedom from external control.<sup>171</sup> Jurisdiction, a more positive

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168. See G. SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 3 (6th ed. 1979); J.G. STARKE, *supra* note 33, at 1; G. VON GLAHN, LAW AMONG NATIONS 3 (4th ed. 1981).

169. I. BROWNLIE, *supra* note 16, at 287.

170. *Id.*

171. See D.P. O'CONNELL, *supra* note 33, at 284; G. SCHWARZENBERGER, *supra* note 168, at 52.

concept, involves a state's power to make and enforce laws.<sup>172</sup> Territory is what defines the scope of jurisdiction.<sup>173</sup>

One of the primary functions of international law is the legal protection of statehood "through the creation of limitations on the degree to which one State can legally encroach on the territorial, demographic or jurisdictional sphere of another."<sup>174</sup> A fundamental distinction, however, is drawn between matters of private and public law. The rules of private international law permit a court to take jurisdiction over civil matters notwithstanding that relevant conduct may have occurred in a foreign country.<sup>175</sup> The application of public law to conduct by foreigners abroad is, instead, generally deemed a violation of international law unless based on accepted jurisdictional principles.<sup>176</sup>

The underlying reasons for the different treatment of foreign conduct in matters of public and private law are that public laws prohibit what are considered to be public rather than private injuries and are generally enforced by governmental agencies. The potential for international conflict is greater in public than in private law cases because public laws reflect a sovereign's notions of *ordre public* and are enforced by the sovereign itself.<sup>177</sup> Furthermore, no issue regarding the application of foreign law arises since one sovereign's enforcement entities are usually neither empowered to enforce nor interested in enforcing the public laws of another country.<sup>178</sup> Finally, the application of a nation's public laws to conduct in another country amounts to imposing public order legislation in the territory of another state, thereby violating the latter's right, sanctioned by international law, to be the *prima facie* exclusive source of law within its own territory.<sup>179</sup>

Antitrust legislation is generally considered public law, and the application of antitrust laws to foreign conduct is limited to the same extent as more traditional public laws such as criminal

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172. See I. BROWNLIE, *supra* note 16, at 198; D.P. O'CONNELL, *supra* note 33, at 599.

173. See D.P. O'CONNELL, *supra* note 33, at 599; G. SCHWARZENBERGER, *supra* note 168, at 72; J.G. STARKE, *supra* note 33, at 262.

174. Fitzmaurice, *The General Principles of International Law*, 92 RECUEIL DES COURS 5, 166 (1957).

175. See *supra* note 34; *infra* note 218.

176. See I. BROWNLIE, *supra* note 16, at 298-300. See also *supra* notes 32-35 and accompanying text.

177. See Jennings, *supra* note 4, at 519.

178. See K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 339 (1958).

179. See I. BROWNLIE, *supra* note 16, at 298; Fitzmaurice, *supra* note 174, at 167.

laws.<sup>180</sup> Defining the limitations that international law places on a nation's prescriptive jurisdiction in public matters is not a simple task. The inquiry must begin with an examination of the sources of international law.

The most authoritative statement of the sources of international law is Article 38 of the Statute of the International Court of Justice.<sup>181</sup> It states that the Court must base its decisions on treaties, international customary law, the general principles of law recognized by the civilized nations and, lastly, the judicial decisions and teachings of individuals highly regarded in the legal field.<sup>182</sup> No countries have concluded treaties permitting one nation to apply its antitrust laws to conduct in a second nation.<sup>183</sup> Much has been written, however, about pertinent customary international law and a 1935 study conducted at Harvard University resulted in the highly regarded Draft Convention on Jurisdiction with Respect to Crime.<sup>184</sup>

The Harvard study begins its examination of criminal jurisdiction by noting that the right to validly prescribe penal laws is based on five general principles.<sup>185</sup> They consist in: (1) the territorial principle, which confers jurisdiction when criminal conduct occurs within the prescribing nation's territory; (2) the nationality principle, which permits a sovereign to criminalize conduct by its citizens regardless of where the conduct takes place; (3) the protective principle, which provides jurisdiction when national interests have been injured by completely foreign conduct; (4) the universality principle, which applies to such crimes as piracy and provides jurisdiction to any sovereign that captures the criminal; and (5) the passive personality principle, which provides jurisdiction over conduct by a foreigner causing injury to a citizen of the prescribing nation while that citizen is in a foreign country.<sup>186</sup>

The territorial and nationality principles are the most widely accepted bases for jurisdiction.<sup>187</sup> The most relevant to antitrust

180. *See supra* note 32.

181. I.C.J. STAT., art. 38.

182. *Id.*

183. There are some international guidelines and agreements for consultation and cooperation in international antitrust matters. *See, e.g.*, B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 779-92, 808-15 (1979).

184. 29 AM. J. INT'L L. 439 (Supp. 1935) [hereinafter cited as Harv. Research].

185. *Id.* at 445.

186. *Id.*

187. *Id.*



matters are the territorial and protective principles.<sup>188</sup> The territorial principle permits the exercise of jurisdiction over a crime even when the crime was not entirely committed within the prescribing nation's territory. Article 3 of the Draft Convention on Jurisdiction with Respect to Crime reads:

A State has jurisdiction with respect to any crime committed in whole or in part within its territory.

This jurisdiction extends to

(a) Any participation outside its territory in a crime committed in whole or in part within its territory; and

(b) Any attempt outside its territory to commit a crime in whole or in part within its territory.<sup>189</sup>

The comment to Article 3 notes that the territorial principle has expanded to include crimes committed only in part within the territory of the nation asserting jurisdiction.<sup>190</sup> The enlargement of the territorial principle was necessary because "with the increasing facility of communication and transportation, the opportunities for committing crimes whose constituent elements take place in more than one State have grown apace."<sup>191</sup>

From this expansion, two derivative territorial principles have developed. The subjective territorial principle establishes jurisdiction over crimes commenced within a state but completed abroad.<sup>192</sup> The objective territorial principle provides jurisdiction over a crime begun outside a state "but consummated within its territory."<sup>193</sup>

Much of the controversy regarding the use of the objective territorial principle stems from the fact that the Harvard Draft Convention does not specify exactly what must occur in the territory of the prescribing nation in order for it to assume jurisdiction over all of the conduct in question. The comment on the objective territorial principle includes, for the most part, cases in which *acts*

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188. Territory is the jurisdictional basis generally used in antitrust cases. The protective principle is relevant only to the extent that the "effects" doctrine is considered protective rather than territorial. For a rare example of the application of the nationality principle in antitrust matters, see *Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

189. Harv. Research, *supra* note 184, at 439.

190. *Id.* at 484.

191. *Id.*

192. *Id.*

193. *Id.*

considered to be constituent elements of a crime occurred in two states and which permitted the state suffering the effects to exercise jurisdiction.<sup>194</sup> The comment notes, however, that use of effects alone as the criterion for jurisdiction can lead to troublesome results as in the case in which a German court convicted a Frenchman of sedition for shouting "*Vive la France*" near the German border "on the ground that the cry was heard in Germany and hence took effect there as a crime."<sup>195</sup>

Only one case on point has been decided by the Permanent Court of International Justice. In the "*Lotus*" case,<sup>196</sup> a French ship, the *Lotus*, sank a Turkish ship, the *Boz-Kourt*, on the high seas killing eight Turkish nationals. Upon the ship's arrival in Turkey, Lieutenant Demons, captain of the *Lotus*, and the rescued captain of the Turkish ship were arrested and charged with manslaughter.<sup>197</sup> Ignoring French protests, a Turkish court convicted the Frenchman and sentenced him to pay a fine and serve eighty days in prison.<sup>198</sup>

The French government challenged Turkey's assertion of jurisdiction on the grounds that the crime, being one of omission, occurred on a French ship and that, therefore, French penal laws applied.<sup>199</sup> In holding that the assertion of Turkish penal laws conformed with international law, the Court stated:

The offence for which Lieutenant Demons appears to have been prosecuted was an act—of negligence or imprudence—having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much so that their separation renders the

194. *Id.* at 488-94. The comment includes a variety of cases in which jurisdiction was asserted notwithstanding the fact that the crime originated in a different country. The comment provides few indications as to what the essential requisites are for asserting jurisdiction based on this principle. Either conduct or adverse effect is apparently a minimal requirement, but questions such as whether the conduct must be criminal in both jurisdictions are left unanswered.

195. *Id.* at 494 (citing Judgment of Dec. 23, 1889, Reichsgericht, W. Ger., 20 Entscheidungen des Reichsgerichts in Strafsachen 146). This is an instance in which "the objective principle is pressed to a point at which its application is distinguished with difficulty from the application of the 'principle of protection.'" *Id.*

196. Case of the S.S. "*Lotus*" (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 9 (Judgment of Sept. 7).

197. *Id.* at 10-11.

198. *Id.* at 10-12.

199. *Id.* at 7.

offense non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.<sup>200</sup>

Commentators in the United States have frequently cited the "*Lotus*" case for the proposition that the *Alcoa* "effects" doctrine is consistent with the objective territorial principle and with international law.<sup>201</sup> Commentators elsewhere have concentrated, instead, on the location of the constituent elements of an antitrust offense and have preferred conduct rather than effects within a territory as the proper basis for the objective territorial principle.<sup>202</sup> This has been particularly evident in five conferences of the International Law Association (I.L.A.) in which the jurisdictional limits of antitrust legislation have been a major topic of discussion.<sup>203</sup>

In 1972, the I.L.A. adopted the Resolution on the Extraterritorial Application of Restrictive Trade Legislation.<sup>204</sup> The Resolution represents a stalemate between United States and traditional European views on what is required for the assertion of jurisdiction

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200. *Id.* at 30-31.

201. See, e.g., K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 295-301 (1958); B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 32-33 (1979); Jones, *Extraterritoriality in U.S. Antitrust: An International "Hot Potato,"* 11 *INT'L LAW.* 415, 421-22 (1977); Shenefield, *The Perspective of the U.S. Department of Justice*, in *PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS* 12 (J. Griffin ed. 1979).

202. See, e.g., Riedweg, *The Extra-territorial Application of Restrictive Trade Legislation-Jurisdiction and International Law*, *ILA FIFTY-FIRST CONF. REP.*, *supra* note 6, at 374-79; Jennings, *The Limits of State Jurisdiction*, 32 *NORDISK TIDSSKRIFT FOR INTERNATIONAL RET* 209, 214-16 (1962); Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 *J. INT'L L. & ECON.* 273, 285-88 (1979); Triggs, *Extraterritorial Reach of United States Antitrust Legislation: The International Law Implications of the Westinghouse Allegations of a Uranium Producers' Cartel*, 12 *MELB. U.L. REV.* 250, 252-57 (1979). See also *supra* notes 4, 62-88 and accompanying text.

203. See *ILA FIFTY-FIRST CONF. REP.*, *supra* note 6, at 304-592; *INT'L L. ASS'N, 1966 REPORT OF THE FIFTY-SECOND CONFERENCE* 26-142 (1967); *INT'L L. ASS'N, 1968 REPORT OF THE FIFTY-THIRD CONFERENCE* 337-404 (1969); *INT'L L. ASS'N, 1970 REPORT OF THE FIFTY-FOURTH CONFERENCE* 151-246 (1971); *INT'L L. ASS'N, 1972 REPORT OF THE FIFTY-FIFTH CONFERENCE* 107-75 (1974) [hereinafter cited as *ILA FIFTY-FIFTH CONF. REP.*].

204. *ILA FIFTY-FIFTH CONF. REP.*, *supra* note 203, at 138-40.

under the objective territorial principle. Article 3 of the Resolution requires that conduct which is a constituent element of the offense occur within the territory of the prescribing state.<sup>205</sup> Article 5, instead, is a variation on section 18(b) of the Restatement (Second) of Foreign Relations Law of the United States.<sup>206</sup> It was adopted by the I.L.A. only after the Committee on the Extraterritorial Application of Restrictive Trade Legislation had proposed eliminating the "effects" doctrine by declaring it contrary to international law.<sup>207</sup> The "effects" doctrine was thus partially resurrected by the I.L.A.<sup>208</sup>

The I.L.A. also adopted a third jurisdictional theory in response to the *Dyestuffs* decision by the Court of Justice of the European Communities.<sup>209</sup> Article 4 of the Resolution states that

205. *Id.* at 139. Article 3 reads:

(1) A State has jurisdiction to prescribe rules governing the conduct of an alien outside its territory provided—

(a) part of the conduct being a constituent element of the offence occurs within the territory and

(b) acts or omissions occurring outside the territory are constituent elements of the same offence.

(2) Whereas municipal law is the sole authority for the purpose of ascertaining the constituent elements of a particular offence, international law retains a residual but overriding authority to specify what is or is not capable of being a constituent element for the purpose of determining jurisdictional competence.

*Id.*

206. *Id.* Article 5 reads:

A State has jurisdiction to prescribe rules of law governing conduct that occurs outside its territory and causes an effect within its territory if:

(a) The conduct and its effect are constituent elements of activity to which the rule applies,

(b) the effect within the territory is substantial and

(c) it occurs as a direct and primarily intended result of the conduct outside the territory.

*Id.* Compare *supra* note 94.

207. *Id.* at 170. The Committee had proposed adoption of the following article: International law, as evidenced by the general practice of States to date, does not permit a State to assume or exercise prescriptive jurisdiction over the conduct of an alien which occurs within the territory of another State or States solely on the basis that such conduct produces "effects" or repercussions within its territory.

*Id.*

208. Article 5 represented the middle choice between three statements of the proper jurisdictional rule. The Committee opted for the version abolishing the "effects" doctrine. *Id.* The third option read: "A State has jurisdiction to prescribe rules of law governing conduct occurring wholly outside its territory if such conduct produces effects within the territory which the State reprehends." INT'L L. ASS'N, 1970 REPORT ON THE FIFTY-FOURTH CONFERENCE 234 (1971).

209. See ILA FIFTY-FIFTH CONF. REP., *supra* note 203, at 107-10.

"[a] State has jurisdiction to prescribe rules governing conduct originating outside its territory if and in so far as such conduct is implemented within its territory by any natural or legal person whose conduct can be attributed to the author of the conduct performed abroad."<sup>210</sup>

The authors of the article's comment considered Article 4 an application of the territorial principle of jurisdiction.<sup>211</sup> They stressed, however, that when applied to parent/subsidiary relationships, a close tie between the two had to be found before imputing the actions of one to the other.<sup>212</sup> "The test in each case is whether the parent company is so directly and intimately connected with the conduct of the subsidiary that it is proper to regard the conduct of the subsidiary as that of the parent company as well."<sup>213</sup>

Some commentators have lamented the disregard demonstrated for the legal separation of parent and subsidiary,<sup>214</sup> but the EEC's approach is much less controversial, as evidenced by the I.L.A.'s quick approval, than is the "effects" doctrine and is probably more consistent with international law. The EEC approach is not significantly different from the typical assertion of jurisdiction based on the objective territorial principle in which constituent elements of a crime have taken place in two nations. What makes the parent/subsidiary notion different is that the conduct is not only engaged in across national borders but also involves conduct by separate corporate persons. The EEC has simply chosen to ignore the separate personality when the subsidiary is controlled by the parent. A subsidiary's acts are thus either imputable to the parent or, as in the EEC's more recent formulation, are not distinguishable from those of the parent.<sup>215</sup>

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210. *Id.* at 139.

211. *Id.* at 171-72.

212. *Id.* at 172.

213. *Id.*

214. See Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INT'L LAW. 645, 649 (1979); Mann, *The Dyestuffs Case in the Court of Justice of the European Communities*, 22 INT'L & COMP. L.Q. 35, 48-50 (1973).

215. Agency and conspiracy notions as means for obtaining subject matter jurisdiction have been used in the criminal context and were approved by the Harvard Draft Convention under the heading of "participation." Harv. Research, *supra* note 184, art. 3(a). The comment on the objective territorial principle also includes a number of cases in which courts have deemed an individual to have committed a crime in a state when the crime was committed there by the individual's agents. *Id.* at 488-90.

The EEC's recent experience with the objective territorial principle reveals that jurisdictional tests which depend on the location of the unlawful conduct still meet with greater international approval than do theories based on the location of effects. The response to the *Dyestuffs* and *Uranium* cases indicates that, although public law offenses are becoming more complex and international, most nations remain jealous of their reserved domains and fight to preserve their integrity. Territorial limitations to jurisdiction remain the rule in modern criminal procedure,<sup>216</sup> and jurisdictional concepts in public law matters that abandon territorial principles do not conform with international law.

#### IV. IN DEFENSE OF TERRITORIAL PRINCIPLES

Whatever decision the Commission may reach with respect to the jurisdictional questions being raised by IBM, both the balancing

216. Traditional jurisdictional principles, not conflict of laws concepts, are set out in domestic and foreign penal codes. The New York State Criminal Procedure Law permits jurisdiction based on the territorial and protective principles. N.Y. CRIM. PROC. LAW § 20.20 (McKinney 1981); see *People v. Puig*, 85 Misc.2d 228, 378 N.Y.S.2d 925 (Sup. Ct. 1976). The California Penal Code grants state courts jurisdiction over crimes committed entirely within state territory, CAL. PENAL CODE § 777 (West 1970), to crimes committed only in part within state territory, *id.* § 778(a), and to crimes committed within state territory by agents of a foreign participant, *id.* §§ 778, 778(b). The Model Penal Code relies primarily on territorial notions. MODEL PENAL CODE § 1.03 (Proposed Official Draft 1962). *But see id.* § 1.03(f) (permits jurisdiction over conduct outside the State when "the conduct bears a reasonable relation to a legitimate interest of the State").

For a sampling of foreign statutes, see BORGERLIC STRAFFELOV (Criminal Code) §§ 6-10 (O. Krabbe & C. Rasting eds. 1947) (Den.); CODE DE PROCEDURE PÉNALE arts. 689-96 (22e ed. Petits Codes Dalloz 1980-81) (Fr.); STRAFPROZESSORDNUNG art. 7 (T. Kleinknecht ed. 1981) (W. Ger.); INDIA PEN. CODE §§ 1-4 (R. Ranchhoddas & D. Thakore 24th ed. 1967); CODICE PENALE arts. 6-10 (Hoepli ed. 1963) (Italy); BÜNTETŐ JOGSZABÁLYOK (Criminal Code) §§ 4-7 (1965) (Hung.); ALMINDELIG BORGERLIC STRAFFELOV (Penal Code) arts. 12-14 (Grøndahl & Sóns ed. 1929) (Nor.); PAK. PEN. CODE §§ 1-4 (R. Nelson & A. Halim eds. 1971); LEY DE ENJUICIAMIENTO CRIMINAL arts. 14-18 (Reus ed. 1967) (Spain).

Sovereignty is at issue when crimes are committed across state or national lines. See generally Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 796-824 (1955) (the jurisdictional reach of each state is limited by the law of nations and is implied in the full faith and credit clause). No issue of sovereignty arises, however, when deciding venue questions in federal cases in which a crime was committed across judicial district lines. Yet, the United States Constitution mandates that the trial of all federal crimes (except cases of impeachment) be held in the state in which the crime was committed. U.S. CONST. art. III, § 2, para. 3. The right of trial by jury includes the right to be tried in the state and federal judicial district in which the crime was committed. U.S. CONST. amend. VI. The Federal Rules of Criminal Procedure require trial in the district in which the crime was committed as a matter of venue. FED. R. CRIM. P. 18. A federal court may take jurisdiction over any crime begun, continued or completed in its district. 18 U.S.C. § 3237(a) (1976).

test and the EEC's current approach will undergo scrutiny. This will hopefully lead to a further clarification of the EEC's jurisdictional analysis and will result in the first foreign judicial examination of the balancing test.

An elaboration of the EEC's current practice would be, in this author's opinion, the most favorable result. Such conclusion is based on the belief that the EEC's practice is more consistent with international law than is the balancing test. This is so chiefly because the latter shifts the focus of the analysis from the location of the conduct to factors such as the degree of conflict with foreign law or policy, the availability of a remedy abroad, or possible effect upon foreign relations.<sup>217</sup> A similar change has occurred in choice of law questions in the United States where the balancing of interests is generally perceived as the more modern view.<sup>218</sup>

While territorial considerations may be anachronistic in choice of law problems, they are fundamental in the field of public international law.<sup>219</sup> Territory is, of course, a principal ingredient in the modern conception of statehood.<sup>220</sup> The division of the world into territorial domains is the premise upon which international law has developed; the protection of territory has been one of its primary functions.<sup>221</sup>

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217. See *supra* notes 104, 108.

218. The first Restatement of Conflict of Laws used territorial and nationality principles in defining the extent of a state's legislative jurisdiction. The primary source of legislative jurisdiction was territory. *RESTATEMENT OF CONFLICT OF LAWS* § 55 (1934). Nationality and "effects" also provided bases for legislative jurisdiction. *Id.* §§ 63, 65. Personal rather than subject matter jurisdiction is the focus of the second Restatement. All references to legislative jurisdiction have been dropped in the second Restatement and the underlying issue is whether a court's decision to apply its own law is "reasonable in the light of the relationship of the state and of other states to the person, thing, or occurrence involved." *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 9 (1969). Current formulations of conflict of laws shift the focus even further from territoriality. When deciding which law should be applied in a given circumstance, a court using interest analysis begins by inquiring "into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies." R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* 217 (3d ed. 1981). Interest analysis, which favors application of the forum's law, requires choosing the law of the state having the greatest interest in the application of its policy. *Id.*

219. See *supra* notes 168-79 and accompanying text.

220. See I. BROWNLIE, *supra* note 16, at 109; D.P. O'CONNELL, *supra* note 33, at 284; J.G. STARKE, *supra* note 33, at 107-08.

221. This view is shared both by conservative thinkers such as Fitzmaurice, see *supra* note 174 and accompanying text, and by non-conservatives, see, e.g., I. BROWNLIE, *supra* note 16, at 291-93. The equality of states and the doctrine of non-interference are also highly

The balancing test includes an evaluation of government interests but does not focus on the principle of sovereignty,<sup>222</sup> one of the most fundamental concepts of international law.<sup>223</sup> An analysis that stems from the notion of sovereign equality must emphasize the principle of non-intervention;<sup>224</sup> a restrictive rather than expansive view of jurisdiction is therefore mandated by international law.

A territorial principle requiring that all elements of a public law offense occur within the prescribing nation would, of course, insure judicial non-interference. Such a strict construction, however, has never been adopted<sup>225</sup> and more flexible territorial concepts have become customary international law.<sup>226</sup> As pointed out in the comment to the Draft Convention on Jurisdiction with Respect to Crime, territorial rules of jurisdiction have adapted to the times as evidenced by the development and acceptance of the subjective and objective territorial principles.<sup>227</sup>

A number of refinements of the objective territorial principle indicate that territoriality is still a viable jurisdiction concept in public law matters. At least three subcategories within the objective territorial principle can be identified. The first involves cases in which conduct comprising the elements of an offense occurs in more than one country. This subcategory permits all nations in which such constituent elements are committed to take jurisdiction over the entire offense. Both the authors of the Harvard study and the I.L.A. have accepted this notion.<sup>228</sup>

A second subcategory, derived from criminal conspiracy and agency concepts, permits the exercise of jurisdiction over conduct by a foreign participant when others have committed an offense within the prescribing nation's territory. Early EEC cases and the I.L.A. have adapted this principle to situations in which a foreign

valued among commentators from developing countries. See, e.g., R. C. HINGORANI, *MODERN INTERNATIONAL LAW* 105-09 (1979).

222. See *supra* notes 99-115 and accompanying text.

223. I. BROWNLIE, *supra* note 16, at 287.

224. See *supra* notes 168-76 and accompanying text.

225. The oldest jurisdictional principle is nationality. Territorial jurisdiction has become most important with the rise of the modern state but has never eliminated nationality as a basis for jurisdiction. See Keeton, *Extraterritoriality in International and Comparative Law*, 72 *RECUEIL DES COURS* 283, 287-88 (1948).

226. See *supra* notes 184-93 and accompanying text.

227. See *supra* notes 190-93 and accompanying text.

228. See *supra* notes 193-95, 205 and accompanying text.



parent violates a nation's competition rules through conduct abroad which is implemented locally by subsidiaries.<sup>229</sup>

The third subcategory permits the exercise of jurisdiction when an effect is felt but no conduct takes place within the prescribing nation's territory. In the classic formulation of this subcategory, an individual standing on one side of a border fires a pistol and kills a person on the other side. As in "*Lotus*," the inseparability of the act and its effect provides both nations involved with the right to prosecute.<sup>230</sup>

Since this last subcategory does not involve conduct within the prescribing nation's territory,<sup>231</sup> it is the easiest territorial principle to abuse. Indeed, when misused, jurisdiction based on effects "becomes no longer a fulfilment, but a reversal, of the principle of territoriality."<sup>232</sup> Application of this jurisdictional basis to anti-trust is difficult because an anti-trust effect

is a far cry from the effect within the territory of the state which occurs when a murder is committed by shooting across the state border, or when there is an illegal importation of goods by one who remains across the border, or when there is a fraud perpetrated within the state by a telephone call from across the border.<sup>233</sup>

Respect for sovereignty and the rule of non-interference requires that this subcategory be limited to effects "analogous to the arrival of a bullet from across the border."<sup>234</sup>

### CONCLUSION

Neither the balancing test nor the *Alcoa* "effects" doctrine can be considered refinements or subcategories of the objective territorial principle. The focus of the balancing test is simply not on territory and the "effects" doctrine is a distortion of the principles

229. See *supra* notes 139-48, 209-15 and accompanying text.

230. See *supra* note 200 and accompanying text.

231. Some commentators have explained the exercise of jurisdiction in such circumstances by using notions of "constructive presence" within the prescribing nation's territory. See D.P. O'CONNELL, *supra* note 33, at 826-27; see also Harv. Research, *supra* note 184, at 489-90 (discussing *Simpson v. State*, 92 Ga. 41, 17 S.E. 984 (1893)).

232. Jennings, *supra* note 4, at 519.

233. Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558, 564-65 (1967).

234. D.P. O'CONNELL, *supra* note 33, at 826. See Jennings, *supra* note 4, at 521.

announced in the "*Lotus*" case. As long as sovereign states insist on retaining nearly exclusive power over their domains, respect for sovereignty will require ascertaining the location of the unlawful conduct. Since it is unlikely that states will be prepared to relinquish such sovereignty in the near future, territory must remain the primary basis for jurisdiction for public law. Increasing economic integration and interdependence are not reasons for ignoring the doctrine of non-interference. The fact that courts are increasingly involved in international cases is a compelling reason for adopting clearer jurisdictional principles consistent with the doctrine of sovereign equality. The development of the objective territorial principle was a step in this direction; the EEC now has the opportunity of further refining this jurisdictional principle.

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