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Neale & Stephens, International Business and National Jurisdiction

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Abstract

This book differs from existing works on extraterritorial scholarship by its focus, thoughtful analysis and scholarly approach, and balanced view of the U.S. stance on extraterritorial jurisdiction.

BOOK REVIEW

INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION. By Sir Alan D. Neale and M.L. Stephens. Oxford: Clarendon Press, 1988. xix + 216 pp. ISBN 0-19-825532-2. US\$55.00.

.. Reviewed by Marsha Cope Huie*

There is no scarcity of scholarly writings on the subject of extraterritorial jurisdiction.¹ Many of these are discursive law journal articles either devoted merely to isolated points or examining the law of only one nation that seeks to assert its laws outside its own territory.

This book differs from existing works, initially, by its focus. The authors are learned in the legal systems of the United States, the United Kingdom, and the European Economic Community, and they knowledgeably examine the case-law in each jurisdiction. Dr. Stephens is a U.S. attorney schooled in England and working in London, and Sir Alan Neale is a British career civil servant who has served as Deputy Chairman of the British Monopolies and Mergers Commission (1982-1986). The book differs also by reason of its conciseness: It contains only 211 pages of text. Also, it differs from some of the other works in the field in its thoughtful analysis and scholarly approach to the subject matter. Finally, the authors manage to present a balanced, though deservedly critical, view of the U.S. stance on extraterritorial jurisdiction—"the American expansive view of jurisdiction." What they do better than others is to criticize fairly the controversial effects doctrine advocated by U.S. jurists. They succeed in reaching their main goal: To show as a practical matter that the aggressive U.S. view of jurisdiction does not work, that "[t]he game is just not worth the candle" (p. 208). The striking divergence of U.S. and foreign

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1. See, e.g., A. LOWE, *EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS* (1983); Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783 (1984); Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487 (1985).

views about U.S. enforcement of its competition laws cries for a balanced view in a readable monograph—and this is it.

This book's one shortcoming is the weakness of its proposals for resolution of the problem. With this omission of innovation, the authors, adverting to objective territoriality as the doctrinal basis for jurisdiction, regrettably open themselves to the charge that they merely plow earth already well-tilled. Such criticism, however, must in no way detract from the keenness of their analysis otherwise. The danger of a compilation of case law is that it may abandon the reader in a quagmire of facts or lose the reader in a burdensome forest of citations. In this well-crafted work, the authors manage to avoid this danger, having succeeded brilliantly in illuminating the overall significance of the cases.

The remarkable postwar expansion of multinational corporations has heightened interest in the arcane subject of extraterritorial jurisdiction. In an earlier era, when a nation's business activities did not usually extend beyond its borders, the country's control over those activities also came to a halt at its borders. More recently, however, in order to control the actions of multinational corporations, many nations have come to believe they must assert extraterritorial jurisdiction, an assertion that, unfortunately, has caused serious clashes among trading nations in a global economy. Gaps and clashes in municipal laws enable rich and powerful transnational corporations to place pertinent documentation outside the grasp of the forum court. The United States's forty-year dominance in the world economy has been partially eclipsed by Japan and other nations of the Pacific Rim. The United States is no longer in a position to dictate economic policy to foreign nations or to apply, at will, U.S. competition rules to foreign corporations operating outside the United States. Recent years have seen an escalation of international tensions caused by U.S. courts' assertion of jurisdiction over activities that, while formulated and conducted entirely abroad, have economic impact within the United States. U.S. antitrust policy is, of course, the most fecund source of case-law on extraterritoriality.

Nationality and territoriality as bases for jurisdiction under international law are not in dispute. As Chief Justice Oliver Wendell Holmes reiterated in *American Banana Co. v. United*

Fruit Co., “[a]ll legislation is *prima facie* territorial.’”² His observation was cited just last year by Advocate General Darmon before the Court of Justice of the European Communities (the “Court of Justice”) in the much-awaited *A. Ahlström Osakeyhtiö v. Commission (Wood Pulp)* decision.³ Territoriality as a basis for jurisdiction may be further divided into subjective territoriality (a state has jurisdiction over acts begun within the territory but completed elsewhere) and objective territoriality (the converse: A state has jurisdiction over acts begun elsewhere but completed within the territory).⁴ Also, there is the territorial effects theory of jurisdiction.

Under the controversial territorial effects theory of jurisdiction, which has been criticized by academicians,⁵ business

2. 213 U.S. 347, 357 (1909) (quoting *Ex parte Blain*, 12 Ch. Div. 522, 528 (1879)).

3. Case 89/85, 1988 E.C.R. ___, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,619 (opinion of Advocate General Darmon). At first blush, the Commission seems to have adopted the effects doctrine, but according to Neale and Stephens, the Commission’s wording has nothing in common with Judge Hand’s effects doctrine, because the concerns were “doing business” within the Community (p. 186 n.21).

4. See Higgins, *The Legal Bases of Jurisdiction*, in *EXTRA-TERRITORIAL APPLICATION OF LAWS & RESPONSES THERETO* 3, 5-7 (C. Olmstead ed. 1984).

5. See *Wood Pulp*, 1988 E.C.R. at ___, ¶ 14, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,617; see also *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7). Neale & Stephens state that

[t]he mainstream view in the United States . . . is that the ‘effects doctrine’ derives from the ‘objective’ territorial principle

On this issue the critic outside the United States cannot fail to be struck by the narrow base of support for the ‘effects doctrine,’ both historically and in terms of legal precedent. Although the ‘objective’ territorial principle had been known and applied by both English and American courts for at least a century in other branches of law, it had never been invoked in anti-trust cases prior to *ALCOA* (p. 167).

They remark, however, that the 1985 and 1986 drafts of the American Law Institute’s *Restatement of Foreign Relations Law of the United States (Revised)* adopt the “effects doctrine” (p. 166). For an interesting U.S. commentary on the *Restatement (Third) of Foreign Relations Law of the United States* (the “*Restatement*”), adopted after this book went to press, see Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is “Reasonableness” the Answer?*, 19 INT’L LAW & POL. 565 (1987). The *Restatement* states that “[a] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory which has or is intended to have substantial effect within its territory.” *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 402 (1988) [hereinafter *RESTATEMENT*]. The authors equate the *Restatement*’s “intent” language with a requirement of “foreseeability” (p. 167). Neale and Stephens offer a terse footnote regarding the *Restatement*: “There is a tendency for US courts to quote the *Restatement* as accepted authority on international law. It is important to remember, however, that it states an American view that is not necessarily accepted elsewhere” (p. 166 n.1).

practices effectuated entirely within state A will subject the actors to the jurisdiction of courts in state B, as long as foreseeable and substantial effects result in state B. U.S. courts have long incurred the resentment of the country's trading partners by asserting the territorial effects theory to support U.S. anti-trust laws. The authors take the position that it is wrong and ultimately not cost-beneficial for one country to assert jurisdiction over acts in another country that merely have effects within the country asserting jurisdiction (p. 46).

The high-water mark of U.S. extraterritoriality was struck in 1945 by Judge Learned Hand's adoption of the controversial effects doctrine in *United States v. Aluminum Co. of America (ALCOA)*.⁶ Dispensing with the need for examination of generally accepted principles of international law, the judge arrogated unto his court the power to enforce the Sherman Act over non-nationals for their conduct abroad that, while occurring entirely outside the borders of the United States, has, in the time-worn and oft-quoted language, "consequences within its borders which the state reprehends."⁷

In *ALCOA*, Judge Hand cited as precedent three cases⁸ that allowed him to make what the authors call a "leap of faith" from customary principles of international law to the effects doctrine (p. 45). Distinguishing the first two authorities as purely domestic cases and the third as involving some acts actually occurring within (and not merely effects upon) the United States, the authors conclude that the foundation for the

6. 148 F.2d 416 (2d Cir. 1945).

7. *Id.* at 444. Of interest is Advocate General Darmon's discussion of *ALCOA* in the recent landmark *Wood Pulp* case. See *Wood Pulp*, 1988 E.C.R. at ___, ¶¶ 33-35, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,619-20. Also, the West German Federal Court of Justice is generally thought to have embraced the effects doctrine, by having held German competition law applicable where the effect within the territory is "sufficient." Our authors, however, interpret the German language "*sich auswirken*" as adopting the objective territorial principle, in that some business conducted must "*sich auswirken*" within Germany, literally "work themselves out" within the territory (p. 186 n.21). The United Kingdom vigorously rejects the effects doctrine. See, e.g., *British Nylon Spinners, Ltd. v. Imperial Chem. Indus.*, [1954] 3 All E.R. 88, 91; *Wood Pulp*, 1988 E.C.R. at ___, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,605 (United Kingdom, intervenor, maintained that court could find jurisdiction *in casu* only under effects doctrine, which has been accepted under neither public international law nor decision of Court of Justice).

8. *ALCOA* 148 F.2d at 443 (citing *Ford v. United States*, 273 U.S. 593 (1927); *Lamar v. United States*, 240 U.S. 60 (1916); *Strassheim v. Daily*, 221 U.S. 280 (1911)).

effects doctrine is fragile at best, having been forged in the most part, ironically, from precedent delineating federal jurisdiction in interstate matters and unconcerned with cases having true transnational contacts. Perhaps it should be noted that most U.S. cases have concerned actual activity conducted within the United States and not merely the "effects" of such activity felt within the country;⁹ U.S. courts have only rarely asserted extraterritorial antitrust jurisdiction under the effects doctrine.¹⁰ The mere threat of their doing so has caused resentment to fester against their "economic imperialism." Ill-feeling has occasionally spilled over in the form of blocking and clawback statutes such as those the United Kingdom has enacted.¹¹

Under *Timberlane Lumber Co. v. Bank of America*¹² and subsequent U.S. cases, two claims are made (p. 175). First, that there must be "direct, substantial, and foreseeable" effects in order to ground jurisdiction. Secondly, the courts must em-

9. See Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 *FORDHAM L. REV.* 350 (1983) (discussing cases that have applied the "effects" test in various forms).

10. On this issue Neale and Stephens state:

It is sometimes argued that if the number of cases needing the 'effects doctrine' is small, foreign interests do not have too much to worry about. But, of course, the situation is not symmetrical; the individual case which is small in relation to the US economy may be of catastrophic importance to the defendant. Additionally, although the number of reported cases . . . is small, the number of actual complaints relying on the doctrine has been much higher. Moreover, more complaints are made than reach the courts (p. 186 n.22).

On this point there seems to be a lack of documentation. This criticism is tempered, however, by the indictment presented by Mr. Phillip Allott, Trinity College, Cambridge, of the "American *macho* academic style . . . which is an unworthy heir to the style of the High Renaissance of German university culture in the nineteenth century, itself a radical departure from the characteristically more lyrical style of French, Italian or British culture and of German culture before and since." Allott, *Making Sense of the Law (II)*, 108 *CAMBRIDGE REV.* 65, 68 (1987).

11. For discussions of various blocking statutes, see Atwood, *Blocking Statutes and Sovereign Compulsion: Recent Developments and the Proposed Restatement*, in 1985 *FORDHAM CORP. L. INST.* 327 (B. Hawk ed. 1986); Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 *STAN. J. INT'L L.* 247 (1982); Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 *LAW & CONTEMP. PROBS.* 197 (1987). These blocking statutes fall generally into two types: those avoiding the enforcement of foreign judgments and those blocking foreign discovery proceedings. The British statute clearly targets U.S. incursions. See *Protection of Trading Interests Act, 1980*, ch. 11.

12. 549 F.2d 597 (9th Cir. 1977).

ploy a balancing test of the foreign state's interests against the interests of the United States to ensure that assertion of jurisdiction is not unreasonable (p. 175). Professor Eleanor Fox is one of the most highly respected U.S. scholars who views the *Restatement (Third) of the Foreign Relations Law of the United States* (the "*Restatement*") and the jurisdictional balancing of interests as "reasonable and moderate."¹³ The authors, however, disagree (pp. 176-77).

Implicit in the *Restatement* and the *Timberlane* line of case law is that courts will use their discretion to abstain from exercising jurisdiction. But "the cases tell a different and more complex story" (p. 177), one that has often forced foreign defendants to appear before U.S. courts so that the balancing exercise offers a defense "rather than a genuine prospect of avoiding the burden of accepting US jurisdiction" (p. 178). In their examination of the case law, Neale and Stephens find only one possible exception to a U.S. court's assuming jurisdiction after a *Timberlane*-type interest analysis.¹⁴ Nor are they sanguine that legislation can relieve the excessive assumption of jurisdiction in U.S. courts, as they view the balancing test, whether legislatively defined or not, as "perverse and impractical" (p. 179). In a disappointingly terse six pages they seek a solution and propose, in chapter 10, a rule of jurisdiction under the rubric, "Is there a Better Answer?" (pp. 181-87). They retreat to a somewhat simplistic test: Was there purposive activity actually found within the state asserting jurisdiction? On this sole point, they may be fairly criticized for having adopted a mechanical solution to a seemingly intractable problem of law.

And what is the authors' view of the practical effect of the *Timberlane/Mannington Mills v. Congoleum Corp.*¹⁵ jurisdictional rule-of-reason test, believed by most in the United States to represent a retreat from the aggressive stance of *ALCOA*? Why, the U.S. interests, thrown in for the U.S. court's consideration on an ad hoc basis, almost always ground extraterrito-

13. Fox, *supra* note 5, at 601; *see also*, RESTATEMENT, *supra* note 5, § 403.

14. *See* O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 303 (1988).

15. 595 F.2d 1287 (3d Cir. 1979). The court in *Mannington* built upon *Timberlane*, "adding new factors to the balancing test which could be relevant to cases involving foreign defendants" (p. 73).

rial jurisdiction, of course. Whether the court fails to proceed for reasons of comity raises another question. U.S. courts, in using their post-*Timberlane* interest-analysis/comity approach to determine whether to assert jurisdiction over foreign business transactions occurring outside but having effects within the United States, come off as not really operating under a rule of law. They are seen rather as employing an unprincipled assertion-of-interest method under the guise of a jurisdictional rule of reason.¹⁶ The authors' suggestion: "If we want a rule of law, we should opt for principles of jurisdiction which tell us, over the widest possible range of practical situations, where we stand and to whom we are answerable" (p. 210).

The authors seek to revert to the primacy of the objective territorial principle of jurisdiction based on mutual respect of sovereigns. They do this in such a manner that this principle would be altered so that the notion of "taking effect" necessarily involves "some real happening" within the jurisdiction "and not just that actions complete in themselves in one country may have repercussions in another" (p. 209). Given one sovereign's wish for comity, that is, to achieve accord with another sovereign, this position will not result in "monolithic rejection of all other claims to jurisdiction" (p. 209). Anyway, claims asserted extraterritorially after the interest-balancing process are bound to offend. "The withdrawal of such claims offers the best hope of securing it" (p. 209). One must wonder if this is a utopian view, yet, confronted by the existence of retaliatory blocking and clawback legislation, one must take the point.

The authors would draw a sharp distinction between some real happening in the forum, such as doing business, and actions taken entirely elsewhere having repercussions within the state asserting jurisdiction. More than evidence of effects is required; the finder of fact must have found that, "in a meaningful sense," business has been conducted within the jurisdiction. Foreseeing a return to the objective territorial principle, which Neale and Stephens regard as "essentially correct," they

16. In regard to *United States v. Watchmakers of Switz. Information Center, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. Jan. 7, 1965), the authors pose a rhetorical question: "[W]hether an American court would uphold a Swiss court order requiring a branch of a Swiss bank incorporated in New York to keep secret records to which a New York litigant sought access . . ." (pp. 193-94).

“simply do not believe that this distinction once grasped is either easy for commentators to gainsay or difficult for courts to apply” (pp. 208-10). In actual fact, however, the line between (a) purposive activity within the state asserting jurisdiction and (b) mere effects therein may be ill-defined. The position of the United Kingdom in *Wood Pulp*, showing that reasonable minds can differ, reveals this flaw in this book. The United Kingdom argued that the Court of Justice could assert jurisdiction over the defendants’ anticompetitive activities only by adopting an effects doctrine.

In *Wood Pulp*, the Court of Justice, whose members would have first read or heard the Advocate General’s opinion, which cites this book,¹⁷ adopted a view of an objective territorial principle. The Court of Justice made no finding as to whether the effects doctrine is incompatible with either Community or public international law, but found, rather, that the conduct occurring outside the Community proscribed by Article 85¹⁸ (price-fixing) was implemented inside the Community. Part of the proscribed activity had occurred within the EEC. The court was able to find jurisdiction under the (objective) territoriality principle universally recognized in international law.¹⁹ It would have been fruitful to have the authors’ insight on the much-awaited *Wood Pulp* decision, but our book went to press while the court was still holding this political hot potato. Since factual evidence of “purposive activity” within the Community would, in their view, ground jurisdiction under the “objective” territorial principle, one assumes that Messrs. Neale and Stephens would not have disagreed with the decision of the Court of Justice.

The authors’ view of unitary jurisdiction over the various members of a multicorporate enterprise mirrors their general refusal to adopt mechanical solutions to seemingly intractable problems of law. In attaining jurisdiction over an arm of a multinational corporation, they reject the simplistic application

17. *A. Ahtström Osakeyhtiö v. Commission (Wood Pulp)*, Case 89/85, 1988 E.C.R. — n.34, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,619 n.34.

18. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85(1), 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 32 (official English version), 298 U.N.T.S. 11, 47-48 (1958) (unofficial English trans.).

19. See *Wood Pulp*, 1988 E.C.R. at —, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,612.

of a simple economic unit ("SEU") test. An "'economic entity'" approach, it is argued, would wrongly allow a court, having jurisdiction over one unit of the multicorporate enterprise, to ground jurisdiction over the entire enterprise (p. 210). Such a view is of particular interest in the United States. In *Copperweld Corp. v. Independence Tube Corp.*,²⁰ the U.S. Supreme Court held that a parent and its wholly-owned subsidiary comprise an SEU. This U.S. case was cited by the authors, understandably not in this context, because the issue of unitary jurisdiction was in fact not before the Court. Nonetheless, it seems that *Copperweld*, taken to its logical conclusion, compels a unitary view of jurisdiction.²¹ Instead, the authors would revert to agency principles where the subsidiary within the territory is "unable to respond to the host state's requirements of law and policy without reference to the parent company" (p. 210). In other cases, "jurisdictional problems are greatly simplified, and in most circumstances enforcement is no less effective, if jurisdiction is asserted in the first place over the company incorporated and operating within the state" (p. 210). Their rejection of a simplistic, mechanical SEU test is to be applauded.

Returning to the strict extraterritoriality issue, the authors discern differing U.S. views in the post-*ALCOA* case law. First, "[s]ome US officials no longer accept that any positive principle of jurisdiction is needed at all, 'basing their claim on the 'wide measure of discretion' afforded by the *Lotus* case" (p. 167). It follows "that international affairs typically give rise to concurrent or conflicting claims to jurisdiction" (p. 167). Second, the authors discern the "mainstream view," i.e., that the effects doctrine derives from the objective territorial principle of international law. Their main criticism of the objective territorial principle, as interpreted thus, is that jurisdiction must require some greater impact on the state than just the effects of action taken elsewhere (p. 168). For example, in the instance of price-concertation occurring entirely abroad, Neale and Stephens find no nexus satisfactory of this principle between a

20. 467 U.S. 752 (1984).

21. *See id.* In the Community, the Court of Justice seems to have taken a contrary view, rejecting the enterprise entity theory insofar as it negates the possibility of intra-enterprise conspiracy under the competition laws. *See Bodson v. Pompes Funébres (Funeral Parlors)*, Case 30/87, 1988 E.C.R. — (May 4, 1988) (full text available in French on LEXIS, Intnat library, CJCE file).

foreign restrictive agreement taken abroad and a U.S. consumer's voluntarily purchasing the product whose price has been subject to foreign price-concertation: Granted,

the idea that the willing buyer may himself produce the effects which make the overseas action criminal may not seem so paradoxical in the United States as it does outside. But it is difficult to believe that public opinion in the United States would be content for other countries to extend their jurisdiction against American interests in this way. (p. 169).

To illustrate further the undesirability of the effects doctrine, the authors postulate a boycott taken abroad with the purpose of interdicting the supply of certain goods into the United States. Despite the existence of obvious foreseeable and substantial effects, and violation of the Sherman Act, the problem would call for diplomatic rather than legal action. Thus, "[o]utside the United States it also seems to many observers that if, the 'effects doctrine' cannot practicably be invoked when goods are not supplied at all from another country, it is anomalous to invoke it against lawful decisions in other states regarding the terms and conditions of supply" (p. 170).

Another anomaly of the effects doctrine is revealed when the sovereign compulsion defense is asserted (p. 170). For example, in the case of *United States v. Watchmakers of Switzerland Information Center, Inc. (Swiss Watchmakers)*,²² if the defendants' activities had been required, a U.S. court asserting extraterritorial jurisdiction could not have proceeded. It is of interest that certain U.S. defendants in *Wood Pulp* asserted the Webb-Pomerene Act,²³ which grants immunity from U.S. antitrust laws to certain U.S. export cartels, as a defense to suit in the Community.²⁴ After our book went to press, the Court of Justice made short shrift of this argument, for Webb-Pomerene allowed, but did not compel, their actions under U.S. law.²⁵

Concerning the sovereign defense/foreign compulsion doctrine, it is the authors' view that

22. 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. Jan. 7, 1965).

23. 15 U.S.C. §§ 61-66 (1982).

24. A. Ahlström Osakeyhtiö v. Commission (Wood Pulp), Case 89/85, 1988 E.C.R. ___, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,599.

25. See *id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,604.

in general, foreign governments are puzzled rather than gratified by the suggestion that they may protect their business men by mandating their conduct. Even when their own competition law does not bar some restrictive practice, they will not necessarily want to give it a stamp of official approval. They find it strange, in any event, to be put in the position of licensing their companies to break another country's laws. (p. 172).

Furthermore, foreigners should be wary of availing themselves of the foreign compulsion defense in U.S. courts, for "[w]hatever discretion the Department of Justice may exercise, private litigants will not necessarily be deterred from starting treble damage actions with all their attendant expense and uncertainty" (p. 173). This is true, though of course the defense assertable against the government as plaintiff is similarly allowed against a private plaintiff's complaint. There it is again, nonetheless, the foreign revulsion from our domestic competition laws as applied to them.

In the final chapter, the authors address jurisdictional claims for disclosure and enforcement. As to the former, foreigners have long viewed the wide-ranging scope of U.S. discovery with both alarm and resentment. Such efforts "to bulldoze aside the inconvenient claims of the territorial sovereign" are "defective as law and inept as strategy" (pp. 194-95). It is perhaps unfortunate that the book went to press in mid-1988, on the eve of publication of the U.S. Department of Justice's long-awaited Antitrust Guidelines for International Operations,²⁶ successor to the 1977 edition.²⁷ The new Guide has a definite "Chicago" or Efficiency School flavor, and the authors' comments would have been welcome.

The authors' insights are often delightfully fresh. For example, it is noted that Americans recoil from physical imperialism while practicing the same with their law. This aggressive U.S. stance is attributed in part to the litigious nature of U.S. society, the roots of which are revealed in an enthusiasm for an excess of democracy and a reverence for the rule of law. (Americans of course, unlike the British, have a written Consti-

26. Department of Justice Guidelines, Trade Reg. Rep. (CCH) No. 24 (extra ed. Nov. 10, 1988).

27. Antitrust Guide for International Operations, 4 Trade Reg. Rep. (CCH) ¶ 13,110 (Jan. 26, 1977).

tution enshrining the rule of law.) The U.S. obeisance to legal process leads directly to a litigious nature, the conviction that every wrong has a remedy in a court of law, that "whatever is disapproved, politically or morally, must surely be actionable in some appropriate forum" (p. 207).

Thus, having begun with the source of the international controversy, the authors provide a concise yet comprehensive and thoughtful exposition of the problem. Their title is apt, for increasingly commerce is international and admitting of ever-fewer border impediments. Witness the approach of 1992 with the EEC's goal of a single, unified market. Yet, jurisdiction is territorial, confined by national boundaries. And therein lies the rub.

There being no supranational body capable of resolving extraterritorial conflict, save by consent of the affected sovereigns,²⁸ the broader question is, of course, whether existing legal systems are adequate to cope with the demands of transnational business enterprises representing vast aggregations of capital. In the opinion of this reviewer, they are not. International commerce has outgrown the traditional notions of jurisdiction based on territoriality. And, the traditional primacy of territoriality as a basis for jurisdiction having been challenged, the best hope for avoiding international tensions is a series of international treaties, alongside reformation of municipal competition laws, to conform to the exigencies of transnational business and the demands of international comity.²⁹ Another

28. Advocate General Darmon in *Wood Pulp* writes that the effects doctrine portion of the *Lotus* decision "has admittedly been criticized by academic writers but has not so far been contradicted in international case law, [which] permits the conclusion to be drawn that consideration of the location of the effects as the basis of a State's jurisdiction is in conformity with the rules of international law." *Wood Pulp*, 1988 E.C.R. at __, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,618. The Advocate General cites Paul Demaret as being in accord. *Id.*; see Demaret, *L'Extraterritorialité des Lois et les Relations Transatlantiques: Une Question de Droit ou de Diplomatie?* 1985 *CAHIERS DE DROIT EUROPÉEN* 1, 26.

29. Admittedly, there has been little success in rewriting our domestic antitrust laws. Efforts to remove the treble damages provision have thus far failed in Congress. Particular irritants to foreigners are, of course, allowing private parties standing as plaintiffs, the incentive to suit given to those private litigants by the treble damages provision, the punitive nature of those same treble damages, and the expansive and intrusive scope of our discovery procedures. There have been some changes—some bilateral treaties and two pertinent statutes ineffective to ease international friction over extraterritorial application of U.S. antitrust laws. In fact, they are insulting to importers, because they are beneficial to U.S. exporters. See, for

view not cited by the authors, but of interest for its startling character, is that of Professors Dunfee and Friedman, who wish ultimate change but advocate in the interim a *laissez-faire* approach until the point of such chaos that various sovereigns will gladly surrender some of their sovereignty to rule under mutual accords.³⁰

The authors, however, agree with neither of these views. Instead, they gracefully and persuasively advocate an application of the objective principle of territorial jurisdiction, one which is already accepted as customary international law (p. 184) and is to be preferred over the *Timberlane* "jurisdictional rule of reason" (the late Kingman Brewster's phrase), which is the same as the interest-balancing/comity approach: "[S]uch a change would in our view have many practical advantages over seeking an *ex post* mitigation of the 'effects doctrine' through a balancing process" (p. 184). The authors are of course correct in saying that each state is sovereign in prescribing and enforcing laws within its territory save by consent to derogation of its sovereignty (p. 208). Hence, a topic for inclusion for which a reviewer can make out a case is how, in what ways, and under what circumstances the sovereign may, and should wish, so to agree.

The authors' solution may belie the complexity of the problem. This reviewer does not suggest that the problems inherent in extraterritorial jurisdiction can be solved in one thin text. An articulation, however, of novel proposals for a better scheme of things would have been appreciated. Perhaps the authors should be lauded for trying to deal with the problem within established principles of international law. In es-

example, the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-4003, 4011-4021 (1982), which does not deal with the reach of U.S. antitrust laws (voluntary applicant for export certificate of a review must show that export activity will produce "neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant" 15 U.S.C. § 4013(a)(1)) and the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6(a), 45(a)(3) (1982) (Sherman Act coverage over import trade not limited). Some will find cause for optimism in the long-awaited successor to the 1977 Antitrust Guidelines for International Operations, the new version having been published in mid-1988 by the U.S. Department of Justice. See *supra* notes 27-28. But the problem persists of the private plaintiff, who ill-understands matters of international comity.

30. Dunfee & Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883 (1984).

sence they advocate a purely national approach: Each nation's courts will adopt the objective territorial principle as a restraint on the exercise of jurisdiction. The authors' view of a better scheme assumes a judicial disinclination to expansive views of jurisdiction. It may occur in practice, though, that few judges like to decline jurisdiction when counsel argues that none exists. Furthermore, while concededly the objective territorial principle, with correct judicial adherence, would provide stability and precedential certainty, it is somewhat disappointing to be told that the court, before assuming jurisdiction, must have found that "in a meaningful sense" the proscribed activity has been conducted within the jurisdiction. Such a finding seems subject to judicial manipulation. Courts, on an ad hoc basis, while straining to ground jurisdiction, might transmogrify the objective territorial principle into the effects doctrine, too readily finding meaningful activity within their jurisdictions.

Finally, given the Sherman Act in the United States, the problem persists, for example, of the private plaintiff who is ill-equipped to understand matters of international comity. Surely this plaintiff's indisposition to shape the private lawsuit to the imperatives of foreign policy points to the need for proposals for reforming municipal competition laws.

In that vein, the substantive municipal competition laws of the industrialized world may overlap, leave omissions of coverage, or clash and irritate. Hence the desirability of the authors' postulating a uniform competition law code to be adopted by sovereign states. Such a code is not beyond the realm of possibility, at least in the U.S. and EEC, because of similarities in their antitrust laws. In patterning the Community's competition laws after those of the U.S., the EEC has already adopted the best and rejected the worst features of U.S. antitrust law. A revision of the U.S. antitrust laws, proposed often but unsuccessfully so far, is needed to resolve a great deal of domestic confusion as well.

The way to resolve most of the problems among trading partners is joint adoption of the same set of substantive competition laws. The need for the effects doctrine would thereby disappear. Even so, the problem of differing interpretations would emerge, state A having a different perspective from state B. Hence, it would become necessary for, if not a suprana-

tional enforcement body, then at least a standing body of representatives from each country to meet periodically towards resolution of interpretive difficulties.

In sum, U.S., British, and EEC students and practitioners alike, as well as policy-makers in each of the jurisdictions, will undoubtedly find much of interest in this slim volume. Entirely readable, this is the one book for those with no prior experience in the subject, because it conducts a thoughtful odyssey through the case law. At the same time it is recommended for those already acquainted with the case law, for the perspective is broad and the analysis keen. The quality of this work is high. There is much to praise (meticulously researched, clear and elegant prose) and little to criticize (perhaps an entire chapter devoted solely to "Our Resolution of the Problem" instead of "weigh[ing] up the state of the argument" in the last two chapters (p. 165), with the aim of finding "the balance of advantage between the benefits and cost of various types of claim to jurisdiction" (p. 166)).³¹ But this may be a niggling criticism of format—and this is an admirable work, nonetheless.

31. The book is divided into three parts entitled "Introduction to the Problem and the Relevant Law," "Case-law on Extraterritorial Jurisdiction," and "The State of the Argument." In chapter 10, in regard to jurisdiction, the authors ask: "Is there a Better Answer?" (pp. 181-87); in chapter 11, in respect of discovery, they include: "Better Options—Disclosure" (pp. 194-200) and "Better Options—Enforcement" (pp. 200-05).

