CHAPTER 2

Extraterritoriality II: Foreign Perspectives and Commentary

Use of the casebook for educational purposes with attribution is available on a royalty-free basis under a Creative Commons Attribution-Share Alike 3.0 United States License, available at http://creativecommons.org/licenses/by-sa/3.0/us/. For all other uses please contact Professor Spencer Weber Waller at swalle1@luc.edu.

As you read the following sections of the EC Treaty and the Wood Pulp case, consider the similarities and differences to U.S. antitrust law. Are the EC rules more or less restrictive than U.S. laws with respect to jurisdiction to prescribe? How should other jurisdictions approach the question of extraterritoriality and or comity and interest balancing?

Treaty Establishing the European Communities

Article 81. *1.* The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices of any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make 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.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement or category of agreements between undertakings; any decision or category of decisions by association of undertakings; any concerted practice or category of concerted practices; which contributes to improving the production of distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82. 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 conclusions 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.

Re Wood Pulp Cartel: A. Ahlstrom Oy and Others v. EC Commission
Court of Justice of the European Communities, [1988] ECR 5193; [1988] 4 CMLR 901
27 September 1988

[Editor's note: In the original EEC Treaty Article 81 was originally set forth as Article 85, and the current Article 82 was Article 86. No substantive changes were made when they were renumbered. The original numbering is preserved in this excerpt of the decision. In addition, European spellings are preserved in this decision and the law review articles which follow.]

Facts

These applications are directed against the Commission Decision of 19 December 1984 establishing that 41 wood pulp producers, and two of their trade associations, all having their registered offices outside the Community, engaged in concerted practices on prices. Such concertation related to the prices announced at quarterly intervals to customers and also the transaction prices actually charged.

There are several associations of wood pulp producers including the Finnish company, Finncell, and the Pulp, Paper and Paper Board Export Association of the United States (commonly designated by the abbreviation KEA, being the initials of its former name Kraft Export Association), both of which are addressees of the contested decision. KEA is an association of United States exporters registered under the Webb-Pomerene Act of 10 April 1918 (15 US Code, paras 61-66), which permits exporters in certain circumstances to form associations without falling within the scope of the prohibitions laid down by United States antitrust legislation.

The Court asked the Commission the following question:

Does the Commission maintain that it has jurisdiction in these cases by reason of conduct which has taken place within the Community and, if so, what is that conduct? Or does it base its jurisdiction on the effects within the Community of conduct which took place outside the Community and, if so, what is that conduct and what are its effects?

The Commission answered that question as follows:

On the basis of Article 3(f) of the Treaty, the Commission considers that the primary objective of the rules on competition in the EEC Treaty is to ensure that the conduct of economic activity in the Community should not be distorted. Therefore, in considering what constitutes the relevant conduct for the purposes of Article 85, the Commission must determine how the agreement, decision or concerted practice has been implemented. In the case of a concerted practice, this means identifying the practices that have been concerted.

The Commission makes three further remarks. First, what is important from the point of view of jurisdiction is where the conduct of the parties which it is the object, or effect, of the agreement to influence occurred and not the place where the agreement was made. Secondly, the relevant conduct of the parties includes not only the conduct of the principals but also that of their subsidiaries, agents and others whose acts they direct. Finally, it is necessary to make a comprehensive assessment of the conduct of all the parties to the agreement or concerted practice is that each of the parties thereto intends the conduct of the other parties to be affected by the agreement or practice.

The Commission acknowledges that it is not always easy to distinguish 'the effects' of 'conduct' from the conduct itself. In the context of the Court's question, however, the Commission defines the 'effects' as the direct and perceivable consequences of certain 'conduct'. The distinction to be made is thus between 'conduct' which distorts the competitive process in the Community and 'conduct' which, though not itself distorting the competitive process within the Community, produces such consequences.

Applying those principles to this case, the Commission considers that the different kinds of conduct penalised in this case did indeed take place in the Community.

Thus the communication of announced prices was made in the Community. The transaction prices themselves were charged in the Community by the producers themselves, by their subsidiaries, branches or other establishments, or by their agents or employees.

With regard to the exchange of information within KEA, the Commission considers that it must first of all be regarded as facilitating the concerted practices on prices. In those circumstances, the relevant conduct for that infringement is in substance the same as that for the concertation on prices. However, if that exchange of information is treated as a separate infringement from that of Article 85

in as much as it exerts an artificial influence on the normal conditions of competition, it may be presumed to have taken place in the United States so far as KEA is concerned. However, such conduct had certain effects within the Community inasmuch as it facilitated the concertation on prices and also strengthened the system of mutual solidarity between the members of KEA.

Finally, as regards KEA's price recommendations, the Commission considers primarily that the relevant conduct from the point of view of its jurisdiction must be that of the KEA members which implemented those recommendations by announcing the KEA price to their Community customers and by charging it in subsequent transactions. Such conduct took place within the Community. If the Court were to regard the relevant conduct as that of KEA itself, that conduct admittedly took place outside the Community. However, the substantial, foreseeable and direct effect of that conduct is a restriction of competition within the Common Market, that is to say an effect which clearly took place within the Community.

Next, the Commission considers whether that kind of jurisdiction may be claimed under international law. In that regard, it emphasises in the first place that it is necessary to draw a distinction between legislative jurisdiction, which is the kind at issue in this case, and enforcement jurisdiction. Under international law, the exercise by a State of its legislative jurisdiction is recognised in principle and may be limited only by prohibitive rules expressly laid down by treaty or deriving from customary law. In contrast, the exercise by a State of enforcement jurisdiction outside its national territory requires a specific permissive rule of international law.

In this case, the Commission considers that if the Community's jurisdiction in this case is considered to be based on conduct which occurred within the Community, it is not in breach of any prohibitive rule of international law. The same holds true in so far as its jurisdiction is based on the effects within the Community of conduct which occurred elsewhere. The Community has not acted in a manner which is contrary to the laws or national interests of non-member countries, nor has it substantially interfered with the economic policy of the countries concerned, as is clear from the lack of any reaction from those countries.

There is nothing in international law which obliges the Commission to interpret away the word 'effect' in Article 85 of the Treaty as soon as that effect is produced across international boundaries. Although the 'effects doctrine' is still contested under international law, the Commission considers that the objections come primarily from the United Kingdom and not from the OECD or other countries. The Commission maintains that, in that respect, the Community should not be subject to a more restrictive jurisdictional criterion than that accepted for States.

Finally, the Commission emphasises that the reason why the Community has claimed jurisdiction is that the effects in question were direct, substantial and intended; moreover, the Community is not claiming any wider jurisdiction than that which States are acknowledged to have.

In conclusion, the Commission considers that the Community has exercised its jurisdiction, in particular with respect to KEA, in a manner which is not contrary to general State practice which does not transgress the limits set on the exercise of legislative jurisdiction by the relevant rules of international law.

In addition, in response to a request from the Court, the applicants furnished an example of the contracts between themselves and their agents in the Community in so far as they had such contracts available. A common feature of these contracts is that they reserve to the undertaking represented by the agent the right to determine the selling price of the products and the conditions of sale.

DECISION:

By applications lodged at the Court Registry between 4 and 30 April 1985, wood pulp producers and two associations of wood pulp producers, all having their registered offices outside the Community, brought an action under Article 173(2) of the EEC Treaty for the annulment of Decision IV/29.725 of 19 December 1984, in which the Commission had established that they had committed infringements of Article 85 of the Treaty and imposed fines on them.

The infringements consisted of: concertation between those producers on prices announced each quarter to customers in the Community and on actual transaction prices charged to such customers; price recommendations addressed to its members by the Pulp, Paper and Paperboard Export Association of the United States (formerly named Kraft Export Association and hereinafter referred to as 'KEA'), an association of a number of United States producers; and, as regards Fincell, the common sales organisation of some ten Finnish producers, the exchange of individualised data concerning prices with certain other wood pulp producers within the framework of the Research and Information Centre for the European Pulp and Paper Industry which is run by the trust company Fides of Switzerland.

In paragraph of the contested decision the Commission set out the grounds which in its view justify the Community's jurisdiction to apply Article 85 of the Treaty to the concertation in question. It stated first that all the addressees of the decision were either exporting directly to purchasers within the Community or were doing business within the Community through branches, subsidiaries, agencies or other establishments in the Community. It further pointed out that the concertation applied to the vast majority of the sales of those undertakings to and in the Community. Finally it stated that two-thirds of total shipments and 60 per cent of consumption of the product in question in the Community had been affected by such concertation. The Commission concluded that 'the effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices'.

As regards specifically the Finnish undertakings and their association, Fincell, the Commission stated in paragraph of the decision that the Free Trade Agreement between the Community and

Finland contains 'no provision which prevents the Commission from immediately applying Article 85(1) of the EEC Treaty where trade between member-States is affected'.

A number of applicants have raised submissions regarding the Community's jurisdiction to apply its competition rules to them. On 8 July 1987 the Court decided in the first instance to hear the parties' submissions on this point. By order of 16 December 1987 the Court joined the cases for the purposes of the oral procedure and the judgment.

All the applicants which have made submissions regarding jurisdiction maintain first of all that by applying the competition rules of the Treaty to them the Commission has misconstrued the territorial scope of Article 85. They note that in its judgment of 14 July 1972 (Case 48/69, ICI V EC COMMISION: [1972] ECR 619, [1972] CMLR 557) the Court did not adopt the 'effects doctrine' but emphasised that the case involved conduct restricting competition within the Common Market because of the activities of subsidiaries which could be imputed to the parent companies. The applicants add that even if there is a basis in Community law for applying Article 85 to them, the action of applying the rule interpreted in that way would be contrary to public international law which precludes any claim by the Community to regulate conduct restricting competition adopted outside the territory of the Community merely by reason of the economic repercussions which that conduct produces within the Community.

The applicants which are members of the KEA further submit that the application of Community competition rules to them is contrary to public international law in so far as it is in breach of the principle of non-interference. They maintain that in this case the application of Article 85 harmed the interest of the United States in promoting exports by United States undertakings as recognised in the Webb-Pomerene Act of 1918 under which export associations, like the KEA, are exempt from United States antitrust laws.

Certain Canadian applicants also maintain that by imposing fines on them and making reduction of those fines conditional on the producers giving undertakings as to their future conduct the Commission has infringed Canada's sovereignty and thus breached the principle of international comity.

The Finnish applicants consider that in any event it is only the rules on competition contained in the Free Trade Agreement between the Community and Finland that may be applied to their conduct, to the exclusion of Article 85 of the EEC Treaty, and that the Community should therefore have consulted Finland on the measures which it envisaged adopting regarding the agreement in question in accordance with the procedure provided for in Article 27 of that Agreement.

Incorrect assessment of the territorial scope of Article 85 of the Treaty and incompatibility of the decision with public international law

(a) The individual undertakings

In so far as the submission concerning the infringement of Article 85 of the Treaty itself is concerned, it should be recalled that that provision prohibits all agreements between undertakings and concerted practices which may affect trade between member-States and which have as their object or effect the restriction of competition within the Common Market are prohibited.

It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the Common Market.

It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the Common Market within the meaning of Article 85 of the Treaty.

Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article 85.

The applicants have submitted that the decision is incompatible with public international law on the grounds that the application of the competition rules in this case was founded exclusively on the economic repercussions within the Common Market of conduct restricting competition which was adopted outside the Community.

It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the Common Market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

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

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

As regards the argument based on the Infringement of the principle of non-interference, it should be pointed out that the applicants who are members of KEA have referred to a rule according to which where two States have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each State is obliged to exercise its jurisdiction with moderation. The applicants have concluded that by disregarding that rule in applying its competition rules the Community has infringed the principle of non-interference.

There is no need to enquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the Webb-Pomerene Act merely exempts the conclusion of export cartels from the application of United States antitrust laws but does not require such cartels to be concluded.

It should further be pointed out that the United States authorities raised no objections regarding any conflict of jurisdiction when consulted by the Commission pursuant to the OECD Council Recommendation of 25 October 1979 concerning Co-operation between member Countries on Restrictive Business Practices affecting International Trade.

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

Accordingly it must be concluded that the Commission's decision is not contrary to Article 85 of the Treaty or to the rules of public international law relied on by the applicants.

(b) KEA

According to its Articles of Association, KEA is a non-profit-making association whose purpose is the promotion of the commercial interests of its members in the exportation of their products and it serves primarily as a clearing-house for its members for information regarding their export markets. KEA does not itself engage in manufacture, selling or distribution.

It should further be pointed out that within KEA a number of groups have been formed, including the Pulp Group, to cover the different sectors of the pulp and paper industry. Under Article I of the Bye-Laws of KEA, undertakings may only join KEA by becoming a member of one of those groups. Article II of the Bye-Laws provides that the groups enjoy full independence in the management of their affairs.

It should lastly be noted that according to a policy statement adopted by the Pulp Group, the members of the group may conclude price agreements at meetings which they hold from time to time

provided that each member is informed in advance that prices will be discussed and that the meeting is quorate. The unanimous agreement of the members present is also binding on members who are absent when the decision is adopted.

It is apparent from the foregoing that KEA's price recommendations cannot be distinguished from the pricing agreements concluded by undertakings which are members of the Pulp Group and that KEA has not played a separate role in the implementation of those agreements.

In those circumstances the decision should be declared void in so far as it concerns KEA.

The question whether or not the competition rules in the Free Trade Agreement between the Community and Finland are exclusively applicable.

It is necessary to determine whether, as the applicants maintain, Articles 23 and 27 of the Free Trade Agreement have the effect of precluding the application of Article 85 of the EEC Treaty in so far as trade between the Community and Finland is concerned.

It should be noted first of all that, under Article 23(1) of the Free Trade Agreement, in particular, agreements and concerted practices which have as their object or effect the restriction of competition are incompatible with the proper functioning of the Agreement in so far as they may affect trade between the Community and Finland. Under Article 23(2), if a Contracting Party considers that a given practice is incompatible with Article 23(1), it may take appropriate measures in accordance with the procedures laid down in Article 27. In the context of those procedures it is to consult the other Contracting Party within the Joint Committee in order to reach agreement on the measures which it proposes to adopt in order to put a stop to the offending practices. If no agreement can be reached, the Contracting Party concerned may adopt safeguard measures.

It should also be observed that Articles 23 and 27 of the Free Trade Agreement presuppose that the Contracting Parties have rules which enable them to take action against agreements which they regard as being incompatible with that Agreement. As far as the Community is concerned, those rules can only be the provisions of Articles 85 and 86 of the Treaty. The application of those Articles is therefore not precluded by the Free Trade Agreement.

It should be pointed out finally that in this case the Community applied its competition rules to the Finnish applicants not because they had concerted with each other but because they took part in a very much larger concertation with United States, Canadian and Swedish undertakings which restricted competition within the Community. It was thus not just trade with Finland that was affected. In that situation reference of the matter to the Joint Committee could not have led to the adoption of appropriate measures.

Consequently the submission relating to the exclusive application of the competition rules in the Free Trade Agreement between the Community and Finland must be rejected.

On those grounds THE COURT before giving judgment on all the applicants' submissions, hereby:

Rejects the submission relating to the incorrect assessment of the territorial scope of Article 85 of the Treaty and the incompatibility of Commission Decision IV/29.725 of 19 December 1984 with public international law...

NOTES

1. Foreign jurisdictions have repeatedly expressed disapproval of the U.S. applying its antitrust laws to conduct which takes place abroad. What test for conduct is the European Court of Justice employing against the wood pulp producers?

2. While many jurisdictions have adopted extraterritoriality as a matter of case law or judicial doctrine, some have done so by statute. Consider Germany which has adopted the following provision for its own national competition law which its courts apply in addition to the EU competition law. "This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." Germany, Act Against Restraints on Competition (26 August 1998), Part V. Area of Application of the Act, Section 130. Public Undertakings; Area of Application.

3**.** Most jurisdictions have now adopted some version of the effects test. Do you see why this is necessary in the modern global economy?

Harold G. Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 Am. J. Comp. L. 579 (1983).

The extraterritorial application of United States law has been an irritant in United States relationships with its allies and other trading partners since World War II. Other governments have regularly voiced objections in principle to assertions by United States courts, government officials or commentators that the norms of United States regulatory legislation govern events or persons located abroad. The sharpest confrontations and the ones with the greatest potential for disrupting amicable political and economic relations, however, occur when the United States seeks to use its power over persons or entities before its courts or agencies to *enforce* its policies by requiring or prohibiting acts or omissions abroad that are contrary to the laws or policies of the foreign territorial sovereign. United States efforts to exercise control over technology and to exert pressure on U.S. business entities to prevent participation by European enterprise in the construction of the Soviet natural gas pipeline resulted in just such a confrontation. These jurisdictional issues on extraterritoriality are of

special importance because United States courts and scholars are engaged in on-going efforts to revise and refine the manner in which standards guiding jurisdictional assertions under United States law are being articulated.

My thesis is simply stated. The development of processes to resolve conflicting claims of authority to forbid or require conduct within a nation's borders is most appropriately carried out by diplomatic exchange, not by judicial decision in which a forum balances its own interest against the competing interests of other states. A trend toward the development of such processes may be getting underway. Careful nurturing and encouragement of this approach will serve the needs of the international system to resolve such conflicts with emphasis on coordinating competing interests in a climate of international cooperation, not on unilateral resolutions enabled by coercive local power. More important, it will contribute to the development of a community consensus by means of international dialogue on jurisdictional restraints that will further facilitate the flow of transnational commerce.

INTEREST BALANCING IN THE DIPLOMATIC FORUM

Three characterizations describe the overlapping jurisdictional considerations involved in determining the legal legitimacy of applying the social policies of a nation to events or persons outside its borders: jurisdiction to adjudicate, jurisdiction to prescribe and jurisdiction to enforce. Assertion of jurisdiction by United States courts to adjudicate claims based on activities of foreign persons carried out abroad usually engenders only the lowest level of foreign concern, primarily because the standards of due process and equal protection in this country require that the exercise of such jurisdiction not be so unfair as to violate minimum fairness standards. The assertion of jurisdiction to prescribe a rule of law applying to foreign events or persons runs a greater risk of interference with foreign sovereign interests because such assertions by a nation with the vast commercial influence of the United States has a coercive effect on acts abroad by persons or enterprises who might believe themselves likely later to become subject to judicial jurisdiction in United States courts. Ordinary prudence argues that the United States standards should be served by persons or entities having commercial relations in this country, regardless of the validity of the prescriptive jurisdiction asserted. The assertion of jurisdiction to enforce United States standards by requiring acts or omissions by United States citizens or foreign nationals within the borders of foreign nations creates a clash of governmental policies that can be resolved only by capitulation by some compromise by all in the light of principles of international law reflecting a weighing of both sovereign and community interests.

The conflict between the United States and its foreign allies over the Soviet pipeline construction contracts illustrates such a resolution in the international diplomatic forum. The United States sought to use its power over domestic corporations to influence them to put pressure on their foreign branches or subsidiaries not to fulfill contracts to deliver goods or technology to the Soviet Union for the pipeline project. The United States' action was inspired by an interest in applying pressure to the Soviet Union to mend its ways in Poland and a desire to prevent its European allies from being

placed in a position of dependence on the Soviets' keeping the pipeline open. On the other hand, the European nations involved perceived a real self-interest not only in reaping immediate economic benefit from participating in the huge construction project but longer term interests in diversifying energy resources available to their people. When it became apparent to the United States that its interest in using this form of pressure on the Soviet Union was less than its interest in maintaining effective relationships with its allies and in reassuring foreigners trading with United States connected firms that their commercial contracts would continue to be viable, the United States withdrew its threatened sanctions. Resolution of the pipeline dispute reflected not only the balancing of competing interests that occurred as part of each nation's internal decision-making processes but also that weighing of the relative interests of each nation against those of others that is inherent in the dispute resolution process in the international forum. This interest balancing in the formulation of reliable international jurisdictional rules in the diplomatic forum contrasts with that other "balancing of interests" that has been alluded to by United States courts and by some scholars to describe an appropriate mode for judicial resolution of extraterritorial jurisdictional conflicts in United States domestic forums.

In the diplomatic forum, the label "balancing of interests" merely characterizes the ordinary international formation process of demand, response and eventual accommodation in the light of reciprocal national needs and tolerances. The rules of international law describe community expectations that result from this process. Jurisdictional rules are fundamental because they describe community expectations about the reach of sovereign power. Therefore, these jurisdictional rules especially must reflect community interests. If they do not, jurisdictional principles become instruments of anarchy, not of order, and lose their utility as organizing principles for transnational conduct.

It is for this reason that the territorial principle of jurisdiction and its variations continues to serve as the benchmark against which other jurisdictional principles are weighed. The principle serves both to "limit" state authority and to distribute competence among political units. In this latter role, it enables the regulation of transnational activities by states in a system built on the fundamental premise that a state's *bona fide* territorial interests will be recognized as legitimate by the other members of the international community. This mutual recognition of legitimacy is a central element of the principle of comity and validates the exercise of state power. By characterizing the fundamental parameters of state responsibility, the territorial principle enables the process of reciprocal claim and mutual tolerance that is essential to the functioning of the system. The reciprocal nature of this claim and response process is the functional limit upon the exercise of state power. Therefore, any accurate description of that limit must include reference to a community dynamic. Neither fixed rules nor superficial comparisons of the relative local law interests of a small number of states in contention about a specific assertion of jurisdictional competence will suffice.

Thus, the long term interests of all nation states in preserving and developing an effective system must necessarily be foremost among the interests that energize diplomatic resolution of jurisdictional conflicts to create precedent compatible with an orderly resolution of future competing jurisdictional

claims as well. Both interests in attaining short term benefits and interests in having a system that permits effective future accommodations of competing national claims are necessarily influential.

In the pipeline situation, for example, a successful assertion of authority to act as it did by the United States would have seriously injured the reliability of the international jurisdictional system and, thus, have created a never-never land for transnational transactions. Ultimately, the countervailing pressures generated by the confrontation between the United States and its European allies made it clear that all parties had a greater interest in a system that would lend support to the reliability of transnational contracts and reaffirm the authority and responsibility of sovereign states to plot their own economic and political destinies than in the creation of community expectations that a single nation in pursuit of short term foreign policy goals could legitimately pressure foreign business entities to act contrary to the perceived interests of their host or national states.

The forum of negotiation is the ideal forum in which to accomplish an effective balancing of competing national interests of this kind. In this forum there is no authoritative decision-maker to lend legitimacy to the resolution of the dispute by means of *ex cathedra* statements. Rather, the participants themselves are the legitimizers of the resulting decision. Their dual role as advocates and decision-makers necessarily require them to balance short-term against long-term interests--or, put another way, to balance interests in achieving specific short-term results against interests in maintaining and developing an effective system for the future. This incentive for effective compromise and mutual tolerance is not present when such competing claims are sought to be resolved by unilateral action in a judicial forum. That domestic courts purport to apply international jurisdiction rules implicitly recognizes the increased legitimacy that community endorsement through an interest balancing process in negotiation or by generally accepted customary practice gives to conclusions about the validity of assertions of U.S. authority to coerce actions in foreign nations. These international jurisdictional norms reflect the results of a process in which the balancing of national interests is the principal characteristic of the law-formation function.

INTEREST BALANCING IN THE NATIONAL JUDICIAL FORUM

The two cases most often cited as modern authority for judicial interest balancing are *Timberlane Lumber Co. v. Bank of America* and *Mannington Mills v. Congoleum Corp.* In each of the cases the court listed factors and contacts to be considered in determining whether the standards of United States antitrust law should be applied to events taking place in foreign countries. Each court described the process as one that involved the balancing of governmental interests and reflected the principle of international comity embodied in § 40, *Restatement (Second) of Foreign Relations Law.* The term "interest balancing" suggests a decision-making process in which the court identifies the interests of the countries having contact with the situation to be adjudicated, weighs each country's interest in having its law applied against that of the others, and makes the choice of law decision according to the turn of the scales. Since in these two cases the principal issue was jurisdiction to prescribe, not jurisdiction to enforce, neither court actually carried out the balancing of interests that it mandated. Each remanded to the district court for further proceedings according to the appellate

opinion. These cases, together with authority from the domestic conflict of laws field, represent the principal judicial support for the interest balancing approach to resolve international jurisdictional issues adopted in § 403 of the Tentative Draft No.2 of the revision of the foreign relations law restatement currently underway. They are cited by other courts and commentators to establish the legitimacy of judicial "interest balancing" in extraterritorial jurisdiction cases.

The concept of "interest balancing" is directly related to the concept of comity. Comity, in turn refers both to legal policies that energize the rules of conflict of laws and to considerations of high international politics concerned with maintaining amicable and workable relationships between nations. Thus, the term "interest balancing" includes not only references that are meaningful in the context of the analytical jurisprudence of choice of law but has strong political implications as well. The remainder of this article addresses only the first element--the utility of judicial "interest balancing" as an analytical tool to enable decisions that will effectively coordinate the relevant substantive policies of nation-states and thus contribute to the development of a workable and reliable trans-national jurisdictional system.

The adoption of the term "interest balancing" to describe the touchstone of legal analysis in these cases is unfortunate. In the domestic judicial forum the concept implies an unwarranted flexibility that encourages "reasonableness" as a substitute for analysis and leads to the assertion of the primacy of United States interests in the guise of applying an international jurisdictional rule of reason" without identification of the policies to whose achievement that reasonableness should be directed. In such cases as *Timberlane* and *Mannington Mills* which deal with jurisdiction to prescribe rules of law to apply to foreign-based events, the interest balancing process principally involves identifying the interests that the appellate court believes should be considered, leaving for further consideration in the light of additional evidence to the extent to which one nation's interests can be said to outweigh the other's. Although those cases involving enforcement jurisdiction in which the resolution of a direct clash of national interests is required use the balancing rubric, they either give foreign national interest short shrift or ignore them completely.

The courts' emphasis should clearly be on finding the "natural" assignments of competence that are discoverable from the implications of a system based on territorially divided power, not on case-specific analyses attempting to weigh, for example, the apples of taxation against the oranges of bank secrecy to determine which is somehow more important to the governments whose laws assert these interests. As one writer puts it, this kind of balancing in effect requires a court "to choose between being unpatriotic or disingenuous. In each of these cases, the court chose the latter.

A comparison of these illustrations with the Tenth Circuit decisions *In re Westinghouse Electric Corporation Uranium Contracts Litigation* is instructive. In that case, Westinghouse sought documents from Rio Algom, a Canadian corporation, to support its allegation that the price of uranium had been artificially raised by the activities of an international uranium cartel. The Canadian Uranium Information Security Regulations made it a crime to produce these documents or to testify about their contents and a Canadian court had so held when it refused Westinghouse's

earlier efforts to have the material produced by means of letters rogatory. The court of appeals reversed the district court's contempt citation against Rio Algom for refusing to produce the documents. After finding that Rio Algom's efforts to procure a waiver from the Canadian government were not shown to be in bad faith, the circuit court concluded that the Canadian "national interest in controlling and supervising atomic energy was superior in this case to the United States interest in providing adequate discovery for litigants in its courts since the evidence sought was to a degree cumulative. Thus, although in this case the Canadian interests are identified, they appear to be given effect principally because they reflect policies that meet with the approval of the U.S. forum. The result flows not from a true balancing of conflicting governmental interests but from an evaluation of the substance of the conflicting policies. Taken together, the thrust of these cases is that we will respect those foreign laws and policies whose purposes we approve, but not those that we dislike. This is hardly a useful policy on which to base the development of an effective transnational system. It amounts, in effect, to applying the universality principle without universality. The courts made no effort to determine whether the conduct in question is, or even should be, universally condemned in the interests of the international community. Judicial approval or disapproval of the foreign national policies in question was the determining factor.

The second difficulty with these cases is their failure to assess the utility of the jurisdictional assertion that the court approves in context of the jurisdictional competences and limitations that best contribute to maintaining an international system reflecting divisions of authority appropriate to long term community interests. This difficulty is to a great degree inherent in any municipal decision-making process that purports to require objective balancing of the forum's local law interests against those of a foreign nation. The stimuli in the diplomatic forum that encourage effective balancing of short term against long term interests are not operative in the municipal judicial forum except in very general terms. The courts focus principally on municipal law. Even international legal considerations are treated as relevant in United States courts principally in terms of the inferences they raise about Congressional intent, not because they reflect considerations that are viewed as being independently important. The Constitution is the legitimizer of the municipal process. As long as the court fulfills its constitutional role, its decisions are by definition municipally legitimate. These courts do not seem to understand that their decisions are functional components of the international decision-making system nor that the international legitimacy of these decisions depends upon the degree to which they address systemic needs. In none of these cases does the court address the wisdom of a jurisdictional rule permitting the enforcement of one nation's social policies inside the territory of another contrary to that territorial sovereign's wishes in light of the impact that its selected jurisdictional rule would have adopted in the international community generally.

The court, unlike the diplomat, will not have to confront a foreign counterpart of equal status in a later negotiation and have to live with the results of its current decision. At worst, it may have to distinguish the case. Therefore, unlike the decisionmaker-advocates in the diplomatic forum, the court is not faced with that immediacy inherent in deciding one's own future fate. In the domestic judicial forum, it is never the institutional interest of the decision-maker that is being balanced in any immediate sense when it applies the jurisdictional rule. Where a United States societal interest is

involved, it is likely that courts will protect that interest by ruling in favor of the applicability of United States law, leaving it to the diplomatic forum to work out any difficulties that might arise in connection with the impact of the decision on the international legal system. In other words, the United States interest in contributing to an effective international system is not treated as one of the interests to be balanced in these cases to determine whether jurisdiction may be legitimately exercised.

Lastly, these decisions, by purporting to apply principles of international law while in fact arriving at results based on primarily on judicial evaluations of short term local law goals, weaken rather than strengthen the international system. Whenever one sovereign attempts to coerce or require activities inside the borders of another that conflict with the foreign sovereign's local policies it interferes with that nation's interest in controlling and guiding its own affairs. Decisions by national courts that purport to recognize foreign governmental interests while in fact adopting a parochial analysis do a greater disservice to the international system than would a straightforward approach that gives primacy to forum interests subject to international dispute resolution in the diplomatic forum at a later time. Such decisions use international law as a political cover, not as an authoritative source, and by so doing encourage and sanction similar attitudes abroad. As Arthur Nussbaum once put it, "Nothing is more inconsistent with harmonious international cooperation than insistence upon national viewpoints under the pretense of their being international."

NOTES

1. Do you agree with Professor Maier's thesis that interest balancing is more properly the subject of diplomacy than as a test for use by the judiciary on a case-by-case basis?

2. Did *Hartford Fire* implement this point of view?

P.M. Roth, Reasonable Extraterritoriality: Correcting the "Balance of Interests,"
41 Int'l & Comp. L.Q. 245 (1992).

The "balancing of interests" to determine jurisdiction presents national tribunals with a novel task. Like other new judicial techniques, it takes time to evolve through precedent and commentary. However, the development of this approach has been hindered hitherto by confusion and exaggerated demands regarding the criteria involved.

1. Burden of proof

If extraterritorial jurisdiction is exceptional, there should be no presumption in favour of extraterritoriality. The burden should rest on the plaintiff to overcome the threshold and establish that the jurisdiction is reasonable.

2. Relevant foreign State interests

The basis of assessment should be the extent to which the *conduct* at issue is in accordance with the policy or interests of the State where it is carried out, recognising that different political systems and cultures can employ more or less formal methods of governmental approval. Therefore, resentment by the foreign State at extraterritorial jurisdiction should not of itself be decisive. For the court to place emphasis on the existence or absence of a foreign blocking statute would effectively penalise those States that had not resorted to such an extreme response and encourage what has been described as "the downward spiral of retaliation". Hence, in the uranium litigation, the strength of foreign reaction to the jurisdiction asserted by the US courts was not due to simple opposition to extraterritoriality but to the fact that the uranium producers were major domestic industries that had been encouraged by their governments to establish co-operative arrangements because of an economic crisis, a situation that had resulted from a ban on uranium imports imposed by the United States. By contrast, in the *Insurance Antitrust* case, the UK government cannot assert that the alleged collective agreement between British reinsurers would accord with British policy or interests; indeed, if such an agreement were directed at insurers in the Common Market it would almost certainly violate Article 85 of the EEC Treaty.

3. Relevant domestic interests

The relevant connections are the nationality or place of business of the parties, the place where the acts in question take place, the significance of the effects of the conduct in the forum State as opposed tot he effects abroad, and, as indicated above, whether the conduct at issue was purposefully directed at the forum State. The court should look to the substance not the form of the transactions and the participants. As regards the parties, for example, a subsidiary may be identified with its foreign parent if it is acting under its control. As Warner A.G. observed in the *Commercial Solvents* case before the European Court of Justice, to import the strict notions of corporate personality into competition law serves only to divorce the law from reality.

4. Inappropriate considerations

The elaborate catalogue of considerations set out in § 403(2) of the *Restatement (Third)* is altogether impractical. Evaluation of the needs and traditions of the "international political, legal or economic system may be an impressive mandate to regulators negotiating an international agreement but it makes impossible demands of a tribunal deciding a particular case. Equally, the question of the effect of the exercise of jurisdiction on the State's foreign relations, a factor added by the court in *Mannington Mills*, should play no part in the determination. That is pre-eminently a political consideration for the executive branch of government. Above all, a court should not be expected to

assess the importance of the policy interest of its own State, as represented by the legislation at issue in the case before it. The concept of a State "weighing" its own State's policy against that of another State is not only inappropriate; it is flawed in principle as it is impossible to prescribe the criteria for such an assessment. The correct "balance of interests" is much simpler. Indeed, the metaphor of "balancing", although convenient, can confuse the issue. It is the threshold of effects and the closeness of the connecting links that *in themselves* establish the interest of the forum State. The more significant the effects and the greater the involvement of its own nationals or the importance of activity within its own territory, the stronger is the State's legitimate interest that its regulatory laws should apply to the conduct in question. On that basis, it is an exercise in judicial judgment to determine whether the extraterritorial jurisdiction is reasonable despite the relevant interests of affected foreign States.

On the issue of substantive law, there are relatively few reported decisions applying the balancing process to the facts. But in *Timberlane* itself, when the case came back before the appellate court, the claim was dismissed on the ground of a significant conflict with the law and policy of Honduras. Honduran law was found thoroughly to regulate private commercial activity; agreements between competitors there were permitted and agreements that improved the competitive position of domestic industries in world markets were promoted. This was a sufficient ground for denial of anti-trust enforcement as it was not outweighed by the various other factors. A similar result was reached by the trial court in *O.N.E. Shipping Ltd v. Flota Mercante Grancolombiana SA,* where the anti-competitive agreements were made by the Colombian and other foreign defendants pursuant to legislation designed to promote Colombia's economic development.

Effective consideration of foreign interests has also been demonstrated by US courts in other areas: in determination of extraterritorial jurisdiction in a trade-mark dispute; and in the interpretation of the reach of environmental statutes. Although there is scant EC jurisprudence on this question, in *Eastern Aluminum* the European Commission indicated a similar approach, stating that there was no reason to restrain the exercise of jurisdiction of the Eastern European producers on the grounds of comity. The parties were not being required to act contrary to their domestic law and the application of Community law did not "adversely affect important interests of a non-member state".

As the *Laker* litigation is often referred to as exposing the weakness of interest-balancing, it is appropriate to examine it in more detail. The conduct of air transport services between Europe and the United States inevitably involves activities on US territory and the allegations of predatory pricing therefore comprised conduct by the airlines within the Untied States. This was recognised by the House of Lords when, notwithstanding the opposition of the British government, it discharged the injunctions granted to the British airlines. In the American proceedings, Judge Wilkey was surely correct to reject an invitation to balance the interests of the United States and the United Kingdom in their different approach to anti-trust regulation of air transport. The anti-trust claims did not in fact involve an assertion of extraterritorial jurisdiction; if "interest-balancing" was relevant at all, then, applying the approach set out above, there were a host of connecting links between the

airlines and the United States; they flew their aircraft in and out of US airports, maintained American offices, and advertised and sold tickets there.

By contrast, when Laker subsequently threatened to join Midland Bank and its subsidiary as defendants in the US proceedings, the allegations against the banks concerned transactions carried out entirely in England with their English customer and governed by English law. Moreover, the banks' decision to withdraw financial support for Laker was taken after specific discussion with the British regulatory authorities. The English courts accordingly granted the banks an anti-suit injunction against Laker. But if Laker had brought such a claim against the English banks in the United States, the American court could appropriately have applied a balancing test to decline jurisdiction. Therefore the grant of anti-suit injunctions to Laker in the United Kingdom shows not the difficulty of the jurisdictional questions raised but rather the lack of confidence felt by the judiciary in each State regarding the readiness of the judiciary of the other State to have regard to the foreign interests involved. The real problem in *Laker* was the conflict between the UK and US governments in their interpretation of the Bermuda 2 treaty. That is precisely the kind of question to be determined by diplomatic negotiation or inter-State arbitration, something for which the treaty indeed provides.

F. Orders and Remedies

Appreciation of the correct approach to "interest-balancing" should not disguise its inherent difficulties. Its acceptance does not reduce the importance of other aspects of judicial control on over-reaching by a domestic legal system. The forms of orders and remedies imposed by the courts can significantly avoid or reduce jurisdictional conflicts. This can be seen as regards both anti-trust and discovery questions discussed above.

1. Anti-trust

Although the issue of remedies logically arises at a later stage in the proceedings than the issue of jurisdiction, the two are interwoven as the remedies determine the practical extent of the authority that is exercised. If the regulating State seeks to limit its control to the substantial effects within its territory, that is less offensive to other States' interests.

The handling of foreign mergers under German cartel law shows the scope for this approach. In *Philip Morris-Rothmans,* when the American tobacco giant Philip Morris acquired joint control of the Rothmans group through an elaborate arrangement involving Rothmans' holding company in England, the result was an increase in the oligopolistic structure of the German cigarette market where both Philip Morris's and Rothmans' subsidiaries had significant market shares. The Berlin Court of Appeal held that there was no basis for the ban imposed by the Federal Cartel Office on the transaction as a whole. However, international law did not prevent a more limited prohibition on the arrangements whereby the German subsidiaries of the two groups came under common control,

although this was achieved by transactions carried out by foreign companies outside Germany, and the order was restricted accordingly. This provides an instructive contrast with the approach of the US courts in the *Minorco* case. Once US interests were clearly affected, the US courts had no hesitation in granting an injunction that prohibited the entire merger, with worldwide consequences. Although the proceedings were not brought by the US Department of Justice but by the "target" companies, no consideration was given to foreign interests on the question of jurisdiction; and only brief and rather puzzling reference was made to international comity on the question of remedies.

2. Discovery

The problem created by foreign discovery are not essentially concerned with the extraterritorial reach of substantive law at all but they require sensitivity by the tribunals of one State to the different approaches adopted in other States. Thus foreign opposition to American discovery would be much reduced if the scope of the requests made were more limited. The Federal Rules of Civil Procedure give authority to the US courts to exercise control over the extent of subpoenas seeking discovery of documents outside the jurisdiction and the *Restatement (Third)* significantly calls for this power to be used. In some civil law States the taking of evidence for use in proceedings is an official function of the State, and this fundamental contrast with common law countries should be respected.

Furthermore, many problems would be avoided if more attention was paid to the question of personal jurisdiction over the entity from whom the discovery is sought regarding the transactions that gave rise to the documents. The real issue in considering an order is one of control over the documents. Many of the difficulties in the bank cases could be overcome by an order to the customer requiring him to consent to production. If that is not possible, a letter of request can be addressed to the foreign court and it is then for the foreign court to assess the relative interests in deciding whether to issue an order. When the English court received such a request for examination of bank officials in connection with proceedings commenced by the Securities and Exchange Commission concerning insider trading, the judge held that the public interest in confidentiality was heavily outweighed by the need to uncover fraud and made the order sought.

IX. JUSTIFICATION AND CONCLUSION

There is much scope for a pragmatic approach to the problems that underlie many aspects of extraterritoriality. Inter-governmental agreements almost invariably reserve the parties' formal position on jurisdiction. Excessive assertions of jurisdiction by one State can be counterproductive. But if, as is argued above, reasonable extraterritorial jurisdiction is necessary, the question remains of the basis upon which this is justified as a matter of international law. When the assertion of jurisdiction by one State provokes protests by another State as an infringement of its sovereignty, it is only through international law that the proper ambit of jurisdiction can be determined.

An argument can be made for the absorption of reasonable extraterritorial jurisdiction into the protective principle. Although the protective principle traditionally encompasses a somewhat

miscellaneous category of offences such as espionage, counterfeiting and the falsification of State documents, its rationale is that a State requires jurisdiction over acts, wherever committed, that threaten its fundamental interests and are unlikely to be prohibited by the State where they are carried out. However, the principle is regarded as an exceptional ground of jurisdiction, confined to acts directed at the integrity of the State or its governmental functions. It would be a dramatic transformation of the protective principle if it were extended to cover a State's wider economic interests, however fundamental.

The basis of the legislation discussed above and the need for regulatory control rests on economic or financial effects within the territory. As such extraterritorial jurisdiction therefore depends on this intra-territorial element, the jurisdiction comes more appropriately within the "objective territorial" principle. As noted above, that has been the primary contention of American exponents of the effects doctrine. With modern developments, there is little logic in confining the "objective" principle to physical acts that continue across the frontier and excluding all other activity that can cause at least as much damage.

The widespread adoption by developed legal systems of competition legislation based on economic effects, although relatively recent, is sufficient to establish such jurisdiction as accepted under customary international law. The critical question is whether international law also incorporates limitations on that jurisdiction. If a requirement of reasonableness is imposed by international law in extraterritorial cases, then it is not a discretionary exercise in judicial abstention carried out in the interest of comity. That is important in practice as well as in principle: as a requirement of law it cannot be dispensed with if the foreign defendants decline to appear, and the determination of lower courts is subject to appellate review. In some States effective application may require legislation whereas in others international law is itself directly applicable.

The extent of continuing criticism and the inconsistency of State practice means that "interest balancing" cannot be asserted as an independent principle of international law. At the same time, as economic effects can be remote and general, an unlimited acceptance of extraterritorial jurisdiction is inherent in the incorporation of this extraterritorial jurisdiction in international law. A requirement of reasonableness is the obvious basis; but for objective determination that in turn requires definition. "The fundamental question", wrote Jessup, "is to determine which national authorities may deal effectively with which transnational situation -- effectively in the sense that the authorities of other states will recognise that the exercise of authority is reasonable and will therefore give effect to judgments rendered or refrain from protests through the diplomatic channel." A threshold for the degree of effects is the starting point. Furthermore, the history of the practice of extraterritorial jurisdiction by the United States shows that lack of consideration of foreign State interests provokes diplomatic protests and counter-legislation. The emerging pattern of executive agreements and the articulation of executive policy demonstrate the need to moderate the reach of the State's law and authority. Assessment of the strength of connection with the legislating State and of the policy interest of other affected States can accordingly be viewed as a necessary concomitant to the adoption of extraterritorial jurisdiction based on economic or financial effects.

It can be confidently predicted that the range of areas raising the question of extraterritoriality will expand and the complexity of the problems within each area will increase. This presents a challenge to international law. "International law was not crystallised in the seventeenth century, but is a living and expanding code." If the requirement of reasonableness is not yet *lex lata*, then it is a necessary development. Comity played a major role in fashioning this approach and, as before, comity can serve as a catalyst for custom. It is only through the development of doctrine and the fashioning of new techniques that the international legal order can aspire to address these pressing questions of jurisdiction that Jennings described as "among the most important as well as the most intractable problems of international law".

NOTES

1. Roth is an English commentator. Is his position tenable given (a) England's membership in the EU, and (b) England's own use of an effects test?

2. Does Roth's critique matter after *Hartford Fire*?

3. Jonathan Turley questions the courts' evolved presumption in favor of extraterritoriality in market cases (i.e., antitrust and securities law), versus the requirement of express congressional intent of extraterritoriality in non-market cases (e.g. environmental and employment law). "Legal Theory: "When in Rome": Multinational Misconduct and the Presumption against Territoriality." 84 Nw. U.L. Rev. 598 (1990). Turley posits that the distinction between prescriptive and subject matter jurisdiction is often lost by courts deciding extraterritoriality cases.

Where the issue is subject matter jurisdiction, a court looks for express language by Congress giving the court jurisdiction over the matter. For prescriptive jurisdiction, in market cases, the courts forego an analysis of clear congressional intent, and instead apply conduct and effect tests to determine the courts' jurisdiction. According to Turley, the result reached by the court is highly outcome determinative, "turn[ing] on the issue of whether Congress can regulate certain conduct as opposed to whether Congress intended to regulate certain conduct."

Reasons advanced by Turley as to why the courts treat market and non-market cases differently are: (1) that violations of market statutes have a more direct effect on the U.S. than do non-market violations, making them more accepted areas of extraterritorial concern and regulation under international law; (2) non-market violations are typically considered matters of local concern and would be seen as more intrusive if applied extraterritorially, thus requiring clearly expressed intent; whereas market statutes are viewed as more a part of an international marketplace, legitimizing an extraterritorial intent; and (3) the change in scope regarding the territoriality of market statutes is a result of the increasingly transnational view of the financial markets as well as the courts' affinity for business interests.

4. Should there be an "express" requirement for prescriptive jurisdiction just as there is for subject matter jurisdiction? Turley's observation is that the courts require such language for non-market issues. Why do you think market issues have been treated differently? Should they be?

Spencer Weber Waller, International Trade and U.S. Antitrust Law (1st Ed. 2005)
Reprinted with Permission of Thomson/West. For more information about this publication please visit www.west.thomson.com.

§ 5.16 Bringing Meaning to Balancing

Litigants engaged in a balancing of national interests must provide the court with an evidentiary record to permit decisions on a principled basis. While the existing cases identify a laundry list of factors for a court to consider, there is little guidance as to the weight for such factors, the burden of proof, or the nature of evidence to be presented. Cases too often consist of the rhetoric of the parties, and the ill-defined exercise of discretion by the court. It is simply insufficient to point to a common law or statutory cause of action on behalf of a plaintiff, or the "sovereign" interests of a foreign country on behalf of a defendant.

It is possible to present persuasive evidence as to the respective interests of the United States and a foreign government in a particular piece of litigation. However, the direct participation of the United States government to set forth its views is highly unusual, especially at the trial level, except when the government is obligated to do so under a treaty.

One of the few times the United States offered its views in a private foreign commerce antitrust case occurred in *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp*. The Justice Department had previously refused the invitation of both sides to participate in the lower courts. The Supreme Court requested the views of the Justice Department as to the granting of certiorari and the decision on the merits. The Department argued that the plaintiffs had failed to prove an actionable conspiracy under the antitrust laws, and that the conduct of the Japanese defendants was immune pursuant to the foreign sovereign compulsion defense. The Court held that the defendants were entitled to summary judgment on substantive antitrust grounds, and did not discuss the other points raised by the Justice Department.

A foreign government may be similarly reluctant to intervene or submit *amicus* briefs or diplomatic notes in support of its interests. Any submission by a foreign government normally would be conclusive as to the existence and interpretation of foreign law. The foreign government pronouncement would not be conclusive as to the domestic legal significance of the foreign law issue. For example, a United States court may be bound to accept a foreign government's description of the economic regulation of its own nationals, but the court would still be free to examine whether

that foreign governmental policy is sufficient to satisfy the foreign sovereign compulsion defense as a matter of United States law.

A lawyer for a private litigant can fill this void of direct government participation through traditional advocacy skills and analysis of similar precedents, as well as creative use of international and comparative law research. The position and interests of the United States as a legal system are spelled out in many sources beyond traditional common law precedents. Counsel will need to examine the text and negotiating history of treaties, executive agreements, and the United States' extensive participation in international organizations. Domestic legal sources, including legislative history, administrative regulations, and diplomatic correspondence, may also be of help.

In the federal system, proof of foreign law is governed by Rule 44.1 of the Federal Rules of Civil Procedure, which permits a party to present evidence, whether or not otherwise admissible, as to the existence and meaning of foreign law. A party who intends to raise an issue concerning the law of a foreign country must give reasonable notice. A party may prove the existence and requirements of foreign law by submission of foreign legal materials, affidavits, or testimony. The court, in determining foreign law, may consider any relevant material or source, whether or not submitted by a party. The determination of foreign law is treated as a question of law and is the subject of *de novo* review on appeal.

Knowledge of the competition laws of the foreign nation involved will be invaluable. This analysis will require three levels. First, the private agreement or practice should be examined for its legality under the domestic competition law of the foreign nation. The legality of the practice within a foreign market can be significant confirmation or rebuttal of a claim that an anticompetitive practice in international trade is reflective of foreign national policy.

However, it is not sufficient to merely examine the legality of the practice within the foreign home market. It will be critical to further examine how the domestic competition law of the foreign nation regulates anticompetitive export conduct. For substantive, mercantilistic, and jurisdictional considerations, the treatment of anticompetitive conduct may be very different in domestic and export contexts.

It is a serious mistake to automatically equate the existence of an export cartel with a favorable national policy. The home nation of the export cartel may be anything from wildly enthusiastic to overtly hostile to the idea of export cartels, in general, or the existence of a particular cartel. At one extreme, certain countries will formally or informally require exporters to participate in price quantity restrictions. Other countries merely permit the existence of such cartels and are neutral toward their operation. Other countries do not condone the existence of export cartels, but find that their own national competition laws do not apply to pure export restrictions. Finally, a given export cartel may well be illegal, or may exceed the bounds of its unlawful existence, and be subject to civil or criminal penalties in its own country.

It is also necessary to examine the foreign nation's own attitudes towards extraterritoriality itself. This requires more than just the public pronouncements as to the particular matter in controversy. Actual state practice must be examined to determine if the state consistently exercises, or declines to exercise, extraterritorial jurisdiction in areas of economic regulation. The nation's sponsorship or assent to international agreements that explicitly or implicitly endorse extraterritoriality would also be relevant to confirm or rebut assertions of state policy in a litigated matter.

For example, Great Britain purports not to accept or apply the effects doctrine. In fact, Great Britain has done so in both economic and other forms of regulation. Great Britain has interpreted its government's secrets act as barring publication of prohibited material anywhere in the world, and has sought to prevent and punish publication of certain books outside of Great Britain. In the area of business torts and crimes, England has asserted jurisdiction over an attempted fraud on a life insurance company consisting of a fake suicide in the United States. Although all conduct was outside Great Britain, the English courts asserted jurisdiction since the effect of the fraud was in Great Britain, where the insurance company issued the policy and would have been responsible for the claim.

Even in the area of competition law, Great Britain has attempted to investigate and regulate certain conduct by non-British firms outside of Great Britain. In Britain's lengthy attempts to prevent foreign pharmaceutical manufacturers from charging supracompetitive prices for bulk drug sales to public agencies, Britain routinely requested elaborate price and cost information from the foreign parents of British subsidiaries. The foreign firm's failure to submit complete information was an explicit basis of the decision to require drastic price reductions on the basis of the best information available. A spirited debate ensued in the House of Commons as to the consistency of Great Britain's own information requests and a contemporaneous order to a British pharmaceutical firm forbidding the provision of information in an American antitrust investigation involving the pricing of a different drug.

The most flagrant example of British extraterritoriality is its adoption and use of the 1980 Protection of Trading Interests Act as a defensive measure to counteract perceived excesses in United States jurisdictional claims. The Act grants the British government the power to prohibit and "block" a private party's compliance with a foreign discovery request seeking information located within Great Britain. The Act also prohibits the enforcement of awards of multiple damages in Great Britain arising out of competition matters. The Act further permits a British defendant in a foreign competition case to bring an action to recover any portion of an award in excess of actual damages.

The Act is phrased toward the protection of Great Britain's trading interests around the globe, and not merely the protection of an abstract principle of territorial jurisdiction. The decision to invoke the Act's "blocking" provision is discretionary, and assessed on a case-by-case basis in light of Britain's perceived self-interest. This aspect alone suggests that the Act aims to promote Britain economic interests, both territorial and extraterritorial. The ironies of the Act were not lost on the House of Commons, which showed concern for allegations that the Act partook of the same vice that

it sought to cure. Most commentators, both in the United States and Great Britain, have conceded the extraterritorial effect of the Act, insofar as it relates to the conduct of British subjects outside the United Kingdom, and the ability to interfere with the awards of a United States court.

At least two commentators have asserted that a state has an implied interest in exclusively regulating its enterprise and shielding them from any form of extraterritoriality. Such a view is merely another version of the failed claim that extraterritoriality is not consistent with international law or state practice. A general preference for laissez-faire is not the same as a specific and articulable national policy crucial to the integrity of the state and the promotion of its national interests. Such a broad reading of national policy is merely an endorsement of protectionism and neo-mercantilism, which is not legitimate under the language and spirit of the international trading system.

In structuring arguments under the balancing tests, a litigant also should be aware of the work of the Organization for Economic Cooperation and Development ("OECD") and the United Nations Conference on Trade and Development ("UNCTAD"), the two key international bodies that have extensively addressed competition matters. The OECD includes the principal nations with active competition enforcement authorities. It arranges for regular meetings and consultations among the competition authorities of its member countries, and has promulgated a series of resolutions regarding cooperation among its members in competition matters.

The OECD has also promulgated substantive Guidelines for Multinational Enterprises addressing competitive practices. The OECD Guidelines state that enterprises should refrain from adversely affecting competition in a market by:

> (1) The abuse of a dominant position including anticompetitive acquisitions, predatory behavior, unreasonable refusals to deal, abuse of intellectual property rights, and price discrimination; or
>
> (2) Participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels.

The OECD is also a prodigious source of reports and other scholarly materials on competition. For example, the OECD has published the competition laws of its members, studies on the regulation of export cartel practices by its members, and other comparative works on competition law and economic regulation.

UNCTAD has also dealt extensively with competition policy. UNCTAD's membership and interests are significantly more diverse than the OECD, and encompass developed and lesser developed countries, as well as market and planned economies. Hence, UNCTAD's agenda and work product tends to be a compromise between true competition law and national economic development principles. Despite these differences, UNCTAD has produced a Set of Multilaterally

Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by unanimous United Nations declaration, which represents another source of information as to the consensus of nations regarding competition principles.

The UNCTAD principles state that enterprises should refrain from practices that "limit access to markets or otherwise unduly restrain competition, *having or being likely to have adverse effects on international trade. . . ."* The UNCTAD principles further set forth specific practices to be avoided including:

(1) Import and export cartels;
(2) Bid rigging;
(3) Quantity, market, and customer allocations among competitors.
(4) Concerted refusals to deal; and
(5) The abuse of a dominant position including predation, anticompetitive mergers, price discrimination, resale price maintenance in export markets, abuse of intellectual property rights, tying, and certain vertical restraints on distribution.

Because foreign commerce antitrust issues are inextricably related to the international trade practices, litigants may also find the work of the General Agreement on Tariffs and Trade ("GATT") useful in structuring arguments regarding the balancing of national interests. Although few provisions of the GATT deal directly with competition issues, the language of the GATT itself, the recommendations of GATT dispute resolutions panels, the interpretative and side agreements executed by the contracting parties, and the reports and exchange of views in the various GATT negotiating rounds represent the consensus of trading nations as to the permissible and impermissible international trade practices.

Similarly, the work of scores of international governmental organizations and international non-governmental organizations may be relevant to a United States antitrust challenge to conduct in a specific industry covered by the work of the organizations. The United Nations is the most prominent, but by no means the sole international organization where the United States and foreign nations exchange views on matters that address competition policy.
The negotiating history and the actual agreements creating these organizations may also contain valuable references to the strength of the United States and foreign interests involved in the litigation. The work product of the organizations may be further evidence of customary international law relevant to the balancing process.

In order to make this system work, both the bench and the bar must be the subject of an intensive educational process. These issues must be demystified and incorporated into the mainstream of commercial litigation practice to assure parties adequate representation and informed and consistent judicial rulings.

NOTES

1. Do the methods and considerations discussed provide a more workable format for courts in deciding whether to accept jurisdiction of conduct occurring outside of the country? Do they adequately respond to the concerns raised by thoughtful critics like Maier and Roth?

2. Do these concerns matter after *Hartford Fire*?

Problem 2

If you were considering the question of extraterritoriality of competition law on a clean slate, would you adopt rules of extraterritoriality? Rules of comity? Rules of interest balancing? Would such rules be statutory or common law in nature? Would your rules be different if you were considering the question from the point of view of a lesser developed country or country in transition from a planned or socialist economy?