

## EXTRATERRITORIAL JURISDICTION— EUROPEAN RESPONSES<sup>φ</sup>

*Alexander Layton and Angharad M. Parry\**

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### I. INTRODUCTION

In Europe, the United States is commonly seen as the key proponent of legislation having an extraterritorial effect, while Europeans regard themselves as eschewing this practice. This article will seek to examine whether this perception is right or whether the approaches of the United States and Europe are closer than may be commonly supposed. It will first examine European (and particularly British) responses to assertions of extraterritoriality by the United States and will then consider

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<sup>\*</sup> 20 Essex Street, London WC2R 3AL, England. Alexander Layton is a Queen's Counsel and Angharad M. Parry is a barrister.

the European way of dealing with extraterritoriality. In both cases, the focus will be on antitrust or competition law.

## II. EUROPEAN RESPONSES TO U.S. ASSERTIONS OF EXTRATERRITORIAL LEGISLATIVE JURISDICTION

### A. U.S. Antitrust Laws and the U.K. Response

Antitrust or competition law is a particularly interesting hybrid from a legal point of view, comprising elements of public and private law and involving specific public institutions. Moreover, although trade is global, there is no single global regulator. Further, different nations and regions will have different economic and political perspectives and requirements.<sup>1</sup> To protect perceived national interests, states have asserted extraterritorial jurisdiction. This has been reconciled with international law on the basis of a broad reading of the so-called “effects doctrine.” It is well established that jurisdiction can be asserted on the basis of conduct occurring within a territory that has effects outside of the territory’s borders.<sup>2</sup> This is relatively uncontroversial when the effect is direct and obvious—teachers of law favour the example of a gun being fired across a border—but the situation is much more problematic where the effects are indirect and economic.

The classic example of a piece of legislation asserting extraterritorial jurisdiction based on the “effects doctrine” is the U.S. Sherman Antitrust Act.<sup>3</sup> This was given a broad

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1. For a full discussion of the factors at play, see David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of International Law*, 10 YALE J. INT’L L. 185, 192–202 (1984); David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 27 HOUS. J. INT’L L. \_\_\_\_, \_\_\_\_ (2004).

2. The so-called “protective principle” is a well-established principle whereby a state may assert authority over matters producing a harmful effect to itself, “the state,” regardless of where the acts causing the harm have occurred. *Codification of International Law*, 29 AM. J. INT’L L. 435, 543 (Sup[i]1935). According to the Harvard Research Team, examples of the protective principle could be found in the national laws of most states. *Id.* The “effects doctrine” may go beyond the protective principle in that it may be directed at conduct which is not obviously contrary to a state’s public interest.

3. Sherman Antitrust Act of 1890, 15 U.S.C. § 4 (2000). Although this is the classic example of extraterritorial legislation, other more recent examples in other fields may be found. To take a recent controversial example, the Sarbanes-Oxley Act of 2002,

interpretation in *United States v. Aluminum Co. of America*,<sup>4</sup> where the U.S. Second Circuit Court of Appeals stated that “it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . . .”<sup>5</sup> Later, other U.S. courts attempted to adopt a more moderate approach, importing factors such as reasonableness and balancing of interests,<sup>6</sup> but this softening of approach did little to mollify most foreign states.

In many cases their response, by the late 1980s, was to adopt so-called “blocking” legislation. Although these measures did not necessarily refer to the United States by name, it was clear that the U.S. extraterritorial legislation was their focus.<sup>7</sup> One example of such blocking legislation was the U.K. Protection of Trading Interests Act of 1980.<sup>8</sup> This Act used two methods to target the potentially detrimental effect of the U.S. antitrust law on U.K. businesses. Sections 1–3 of the Act focused on trade measures and gave powers to the Secretary of State to take various steps to protect U.K. interests. The Secretary of State was allowed to prohibit compliance with measures taken under foreign legal systems (the United States was not specified by name) which were damaging or threatening to damage the trading interests of the United Kingdom. These steps could be

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Pub. L. No. 107-204, 116 Stat 745 (2002), setting out new rules for American corporate governance, has been seen as an extraterritorial measure by some European corporations. For a fuller discussion, see Detlev F. Vagts, *Extraterritoriality and the Corporate Governance Law*, 97 AM. J. INT’L L. 289, 289 (2003).

4. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443–45 (2d Cir. 1945).

5. *Id.* at 443.

6. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-15 (9th Cir. 1976), *superseded by* Foreign Trade Antitrust Improvements Act 15 U.S.C. § 6a (2000); *cf. Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993) (holding that when compliance with both U.S. and foreign laws is possible, no conflict of law exists).

7. For examples, see 1 SPENCER WEBER WALLER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 4.16 (3d ed. 2002).

8. For a comparative approach, see the Canadian Foreign Extraterritorial Measures Act (FEMA), R.S.C. ch. F-29, §§ 1–11 (1985) (Can.). Following the 1984 passage of FEMA amendments, a revised, more explicit title entered into force on Feb. 14, 1985, and gives the Attorney General in Canada powers similar to that of the Secretary of State in the United Kingdom.

prohibited “in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of (the relevant foreign) country by persons carrying on business in the United Kingdom.”<sup>9</sup> The Secretary of State was also endowed with powers to require information or to prohibit the production of information and documents.<sup>10</sup> Failure to comply with requirements imposed under the Act was made subject to an unlimited fine.<sup>11</sup>

The latter half of the statute particularly stigmatized the U.S. antitrust law, though again without making specific reference to it. Section 5 prohibited the enforcement in the United Kingdom of any judgment for multiple damages (a feature of the Sherman Act), and section 6 created a right of action for the recovery of a multiple damages award paid by a defendant, insofar as the award exceeded the amount attributable to compensation. During the passage of the Bill which eventually became the 1980 Act, an exchange of diplomatic notes took place between the United Kingdom and the United States.<sup>12</sup> The United States expressed concern that the U.K. stance would encourage a confrontational, as opposed to a cooperative, approach to the problem. The United Kingdom responded that this was not its intention and that, where possible, differences of opinion in legal and economic issues should be resolved by inter-governmental discussion and agreement. The U.K. governmental stance, however, was that the triple damages provision in U.S. antitrust law undermined inter-governmental cooperation by allowing private individuals to enforce what were effectively public law issues.<sup>13</sup> There was an obvious danger that businesses would

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9. Protection of Trading Interests Act, 1980, c. 11, § 1(1)(b) (Eng.).

10. *Id.* § 2. Both § 2 and The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order, (1996) SI 1996/3171, art. 3, § 1 are not applied to the extent that they are covered by EC Council Regulation 2271/96, art. 5, 1996 O.J. (L. 309).

11. Protection of Trading Interests Act § 3.

12. See United States Diplomatic Note concerning the U.K. Protection of Trading Interests Bill, Nov. 9, 1979, 21 I.L.M. 840; see also United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interest Bill, Nov. 27, 1979, 21 I.L.M. 847.

13. The U.K. note is an interesting example of persistent European misunderstanding of the role of triple damages—usually regarded as a purely penal

seek enforcement of antitrust laws for less than public-spirited motives. Moreover, in the eyes of the United Kingdom, the United States was exposing international businesses to double jeopardy.

Most fundamentally, the United Kingdom objected to the U.S. attempt to establish an extraterritorial regime. The U.K. Diplomatic Note stated:

Finally, and most important, the U.S. courts claim subject matter jurisdiction over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations. Although in recognition of international objections to the wide reach of antitrust law enforcement in civil cases, the U.S. courts have begun to devise tests which may limit the circumstances in which the remedy may be available, these tests remain within these wider claims to jurisdiction to which Her Majesty's Government object.<sup>14</sup>

Extraterritorial prescriptive jurisdiction was being rejected by the United Kingdom. However, it is unclear at this juncture whether it was the concept in the abstract which was unacceptable, or whether the problem was its detrimental impact on U.K. trading interests.

In either event, the Secretary of State did not take any action under the 1980 Act until the mid 1990s.<sup>15</sup> However, by this stage a number of factors had contributed to a change in the atmosphere—notably, a shifting American approach and the involvement of the European Union (as it is now called).

#### *B. The Shifting U.S. Stance on Extraterritoriality*

In the early 1980s, the United States seemed to be at pains to appease its trading partners who objected so strongly to the antitrust legislation. The Foreign Trade Antitrust

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measure, with no regard given (for example) to the non-availability of pre-judgment interest.

14. United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interest Bill, *supra* note 12, at 849–50.

15. See The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order, (1996), SI 1996/3171.

Improvements Act of 1982 established that the Sherman Act should only be applicable where the effects were “direct, substantial and reasonably foreseeable.”<sup>16</sup> This reinforced the approach being taken by U.S. courts after the *Timberlane* case,<sup>17</sup> which encouraged a balancing exercise in relation to conflicting interests. These refinements may have been influential in keeping critical foreign states at bay.

However, by the mid 1990s, the United States had changed tack once again. Two separate strands of influence came into play. First, there was a Supreme Court decision in 1993, *Hartford Fire Insurance v. California*.<sup>18</sup> In *Hartford*, the Court, divided narrowly at 5–4, held that a balancing of interests was only relevant (if at all), where there was a “true conflict” between U.S. and foreign jurisdiction. The majority took a very narrow view of what constituted such conflict—only where a defendant would have to violate the laws of a foreign state was there really a conflict.<sup>19</sup> Such a conflict was rarely going to occur.<sup>20</sup> Although there was a strong minority in *Hartford*, led by Justice Scalia, and significant academic criticism of the case,<sup>21</sup> it nevertheless stood as the leading American authority on the interpretation of antitrust law.

The second aspect of the more hard-line U.S. approach to extraterritoriality was the unilateral sanctions introduced by the United States against “rogue” states. The two most famous of these are the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, the Helms-Burton Act, and the Iran and Libya Sanctions Act of 1996, the D’Amato Act. These two Acts

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16. Foreign Trade Antitrust Improvements Act 15 U.S.C. § 6a (1997).

17. See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 608–15 (9th Cir. 1976), *superseded by* Foreign Trade Antitrust Improvements Act § 6a.

18. *Hartford Fire Ins. v. California*, 509 U.S. 764, 798–99 (1993).

19. *Id.* In the majority opinion, Justice Souter stated: “No conflict exists . . . ‘where a person subject to regulation by two states can comply with the laws of both.’” *Id.* at 799 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1987)).

20. However, it may have been more likely to occur where one participant was a government-owned entity.

21. See e.g., Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT’L L. 42, 47–52 (1995).

were merely the tip of the iceberg. In the years between 1993 and 1996, sixty-one laws and executive actions were enacted, authorizing unilateral economic sanctions against thirty-five countries for foreign policy purposes.<sup>22</sup> Clearly such measures caused consternation in affected businesses and affected states.<sup>23</sup> However, states which were not on the U.S. “black-list” also objected strongly to the dramatic extraterritorial claims of the United States.<sup>24</sup> Most significant, for the purposes of this article, was the response of the European Union.

### C. The E.U. Response to U.S. Extraterritorial Claims

The European Union responded in three key ways to the U.S. assertion of extraterritorial prescriptive jurisdiction. First, there was the normal flurry of diplomatic activity, including “megaphone diplomacy.” A variety of press releases were issued

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22. NATIONAL ASS'N OF MNFRS, EXECUTIVE SUMMARY, A CATALOG OF NEW U.S. UNILATERAL ECON. SANCTIONS FOR FOREIGN POL'Y PURPOSES 1993-96 (Mar. 1997), available at <http://www.usaengage.org/archives/studies/nam.html>; MARINO MARCICH, NATIONAL ASS'N OF MNFRS INTRODUCTION, UNILATERAL ECON. SANCTIONS 1997-98: A PRELIMINARY ASSESSMENT (Jun. 4, 1998), available at <http://www.usaengage.org/archives/studies/catalogII.html>. By 1998, the Asian African Legal Consultative Organization (AALCO), which strongly protested against such sanctions, had listed as targets of U.S. unilateral sanctions: Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Bahrain, Bangladesh, Belarus, Belize, Myanmar, Burundi, Cambodia, Canada, China, Columbia, Costa Rica, Cuba, Djibouti, Egypt, Gambia, Georgia, Guatemala, Haiti, Honduras, Iran, Iraq, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Lebanon, Liberia, Libya, Maldives, Mauritania, Mexico, Moldavia, Morocco, Nigeria, North Korea, Oman, Pakistan, Panama, Paraguay, Qatar, Romania, Russia, Rwanda, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Taiwan, Tajikistan, Tanzania, Thailand, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Yugoslavia and Zaire. ASIAN-AFRICAN LEGAL CONSULTATIVE ORG., THE EXTRATERRITORIAL APPLICATION OF NAT'L LEGISLATION: SANCTIONS IMPOSED AGAINST THIRD PARTIES 14 & n.33 (2003), at, at <http://www.aalco.org/EXTRATERRITORIAL2003.doc> (last visited Dec. 29, 2003). This list of seventy-one states clearly extends beyond the “usual suspect” states.

23. Consider the AALCO 1997 Tehran proceedings, the 1998 New Delhi, India proceedings, and the Report on the Seminar on the Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties. *Id.* at 12-15. In response to U.S. extraterritorial claims, Canada passed FEMA, R.S.C., ch. F-29, §§ 1-11 (1985) (Can.).

24. For a more extensive discussion of the responses in a range of jurisdictions, see Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 87 (1999).

by the European Union condemning extraterritoriality generally and the Helms-Burton and D'Amato Acts in particular.<sup>25</sup> Second, the European Union passed Regulation 2271/96 in response to the Helms-Burton and D'Amato Acts. In substance, the regulation had considerable similarities with the U.K. Protection of Trading Interests Act of 1980. It listed in an Annex a number of measures (here called the "Listed Sanctions"), with which compliance was prohibited unless express E.U. authorization was obtained.<sup>26</sup> Judgments giving effect, directly or indirectly, to the Listed Sanctions were not to be given effect in the European Union;<sup>27</sup> and E.U. persons involved in commercial activities between the European Union and third countries were empowered to recover any damages awarded against them under the Listed Sanctions.<sup>28</sup> E.U. persons were also placed under a reporting requirement to report to the Commission if they were affected, either directly or indirectly, by a Listed Sanction or by an action based on or resulting therefrom.<sup>29</sup>

The European Union also initiated World Trade Organization (WTO) proceedings against the United States in October 1996, on the basis that the Helms-Burton Act resulted in infringement of E.U. members' rights under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).<sup>30</sup> The D'Amato Act was not included in

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25. See Press Release No. 23/96, European Union, EU Regrets US Trade Legislation on Cuba, Iran and Libya (Apr. 22, 1996), available at <http://www.eurunion.org/news/press/1996-2/pr23-96.htm>; Press Release No. 52/97, European Union, European Commission Publishes 1997 Report on US Trade Barriers (July 29, 1997), available at <http://www.eurunion.org/news/press/1997-3/pr52-97.htm>; Press Release No. 101/98, European Union, European Commission Finds Significant Barriers To Trade With United States (Nov. 30, 1998), available at <http://www.eurunion.org/news/press/1998-4/pr101-98.htm>.

26. Council Regulation (EC) 2271/96, art. 5 & Annex, 1996 O.J. (L 309) 1-6.

27. *Id.* at art. 4.

28. *Id.* at art. 6.

29. *Id.* at art. 2.

30. Clark, *supra* note 24, at 87-88. In 1994, GATT and GATS were both annexed to the Final Act of the Uruguay Round and signed in Marrakesh. See World Trade Organization, Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, available at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm).

proceedings, though it was mentioned as a cause of concern. The United States, instead of defending the case, decided on a policy of non-participation.<sup>31</sup>

Negotiations began between the European Union and the United States, leading to the Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act on 11 April 1997.<sup>32</sup> The European Union agreed to the suspension of the WTO proceedings. In return for the European Union stepping-up its commitment to democracy in Cuba, Title III of the Helms-Burton Act would continue to be suspended. The U.S. Administration would also seek permission from Congress to waive Title IV of the Act. Efforts were also to be made to strengthen cooperation between the European Union and United States to develop principles to strengthen investment protection and to resolve the issue of “conflicting jurisdictions.”

Regarding sanctions on Iran and Libya, the United States considered that the E.U. commitment to taking measures against Iran and to inhibiting the spread of weapons of mass destruction was sufficient for the United States to work towards granting the European Union waivers under sections 4C<sup>33</sup> and 9C<sup>34</sup> of the Act. The European Union, however, was still unhappy with the position, and issued a statement on 15 December 1997, acknowledging the agreement reached but reserving its right to restart WTO proceedings.<sup>35</sup> Moreover, the European Union restated its dissatisfaction with extraterritoriality, saying that it was “opposed to the use of extraterritorial legislation, both on legal and policy grounds.”<sup>36</sup>

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31. *Id.* at 88; see Paul Blustein & Anne Swardson, *U.S. Vows to Boycott WTO Panel*, WASH. POST, Feb. 21, 1997, at A1.

32. See European Union–United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, 36 I.L.M. 529 (1997).

33. *Id.* at 530 (regarding Iran).

34. *Id.* (regarding Libya).

35. Statement, European Union, Helms-Burton Act – EU Statement (Dec. 15, 1997), *available at* [http://www.europa.eu.int/comm/external\\_relations/us/extraterritoriality/statement\\_15\\_12\\_97.htm](http://www.europa.eu.int/comm/external_relations/us/extraterritoriality/statement_15_12_97.htm) (last visited Dec. 30, 2003).

36. *Id.*

Finally in May 1998, the United States and European Union concluded a Transatlantic Partnership on Political Cooperation and an Understanding with Respect to Disciplines for Strengthening of Investment Protection (the “positive comity agreement”).<sup>37</sup> The European Union promised to implement the “disciplines for strengthening investment protection” and not to establish a WTO Panel against the United States with respect to either the Helms-Burton or the D’Amato Acts. These promises were conditional on the waiver of Title III of the Helms-Burton Act remaining in effect, the waiver of Title IV being exercised, and the provision that no action would be taken against E.U. companies or individuals under the D’Amato Act. Waivers under the latter Act were also a prerequisite, as was the protection of investment in infrastructure for oil and gas transport through Iran.

### III. THE EUROPEAN APPROACH TO EXTRATERRITORIALITY—POTS AND KETTLES?<sup>38</sup>

It is tempting to conclude from the above discussion that the Europeans have adopted a purist stance to extraterritoriality, espousing a strict interpretation of the effects doctrine. This is an over-simplification, but one that is very easy to adopt. It is the purpose of this section to argue that the European Union, though avoiding the unilateral sanctions favoured by the United States, has nevertheless developed its competition law in line with a broader view of the effects doctrine.<sup>39</sup> A potted history of three key cases in the European Court of Justice indicates the development of this principle.

In the so-called *Dyestuffs Case*,<sup>40</sup> the British multinational

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37. Clark, *supra* note 24, at 89.

38. According to the ancient English proverb, “the pot calls the kettle black” although both are equally black.

39. The European Commission has primary responsibility for implementing the competition law and policy of the European Union. For an analysis of the comparative history of economic approaches to competition law in the United States and European Union, see Kenneth J. Hamner, Comment, *The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China*, 11 J. TRANSNAT’L L. & POL’Y 385, 386, 390–97 (2002).

40. Case 48/69, *Imperial Chem. Indus. v. Commission*, 18 E.C.R. 619, [1971–1973 Transfer Binder] Common Mkt. Rpt. (CCH) ¶ 8161 (1972). Britain did not join the

company Imperial Chemical Industries (ICI) was said to have engaged in price-fixing within the European Economic Community (EEC), as it was then called, by instructing its wholly owned Belgian subsidiaries. The European Commission commenced proceedings against ICI, and as a result, ICI initiated proceedings in the European Court of Justice, protesting the Commission's assertion of extraterritorial jurisdiction. Advocate General Mayras, in his Opinion, accepted one of three arguments put forward by the Commission, namely that ICI's activities had had effects within the Community. He relied on the effects doctrine and stipulated the following three conditions for its application: the effects had to be direct and immediate, reasonably foreseeable, and substantial. The European Court of Justice, however, neither accepted nor rejected this approach but instead adopted another argument put forward by ICI. The argument adopted was that the activities of the Belgian subsidiary could be imputed to the parent, because the subsidiary did not have autonomous control over its own behaviour. The parent and subsidiary were considered to form an economic unit. So far, the European Court of Justice had not gone the way of the American courts—although the Advocate General's approach could be seen as a step in that direction.

The next significant case is that of *Ahlstrom v. Commission*,<sup>41</sup> otherwise known as the *Wood Pulp Case*. Again, the case involved there was alleged price fixing, this time involving producers of wood pulp whose registered offices were in Finland.<sup>42</sup> However, they had agents, branches, and subsidiaries within the Community. Again the Commission argued for jurisdiction based on the effects of the agreement within the Community, at least as long as they were substantial and intended. Advocate General Darmon broadly supported this position, saying that the effects doctrine could be used where the effects were "substantial, direct and foreseeable." The European Court of Justice, however, again fudged the issue. No direct

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European Community until 1973.

41. Case 89/85, *Ahlstrom v. Commission*, 1988 E.C.R. 5193, [1988], 4 C.M.L.R. 901 (1988).

42. Finland did not join the European Community until 1995.

reference was made to the effects doctrine. Instead, it was held that the relevant anti-competitive conduct consisted of two parts—the formation of an agreement and then its implementation. The implementation here took place within the Community, and it was irrelevant that such implementation took place via the medium of branches, agents, or subsidiaries:

16. 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 mean of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

17. 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.

18. Accordingly, the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.<sup>43</sup>

Although this was not an explicit adoption of a broad effects principle giving rise to extraterritorial prescriptive effect, the interpretation of "conduct" is so broad that the same result is actually reached. So long as any agreement is implemented within the European Union, as it obviously will be, this will be sufficient. It is hard to see how this is radically different from the U.S. approach stigmatizing conduct which, although

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43. *Ahlstrom*, 1988 E.C.R. at 5243, 4 C.M.L.R. at 941.

primarily taking place outside the United States, had an effect within it.

The last case for consideration is a case which came before the Court of First Instance.<sup>44</sup> *Gencor v. Commission*<sup>45</sup> concerned the merger of a number of mining operations in South Africa, which affected the European Union and the European Economic Area. The Court held that E.U. jurisdiction can apply when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the European Union. This use of the effects doctrine was specifically held not to violate either a principle of non-interference in the affairs of other states or the principle of proportionality.<sup>46</sup> There was considered to be no conflict with South African law, because there was no legal compulsion under South African law.

This reasoning seems to be remarkably similar to that used by the American courts in their exposition of the effects doctrine. The Court of First Instance openly espoused an effects doctrine, based on the same principles of effect and foreseeability as that propounded by the United States. Significantly, the Court appears to have defined the concept of legal compulsion in the same narrow terms as the U.S. courts. Admittedly, this is a first instance decision, as opposed to one reached by the European Court of Justice. However, the decision must be read in conjunction with the earlier Advocate Generals' opinions and the actual results achieved by the decisions of the European Court, with their somewhat ambiguous reasoning. The combination is strongly suggestive of a European adoption of the effects doctrine, as it is understood in the United States.

It is, however, worth mentioning that the Court of First Instance considered, but dismissed, two principles which might have weighed against the application of the effects doctrine: namely, the principle of non-interference in the affairs of other

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44. The Court of First Instance was established in 1989 with competence, *inter alia* to review the Commission's conduct on competition matters. An appeal lies to the European Court of Justice.

45. Case T-102/96, *Gencor Ltd. v. Commission*, 1999 E.C.R. II-753, [1999] 4 C.M.L.R. 971 (1999).

46. *Id.* at II-788.

states and the principle of proportionality.<sup>47</sup> The Court evidently considered that the use of the effects principle was not contrary to international law, as it did not constitute an illegitimate interference in the affairs of a foreign state. This is significant, in that it may constitute recognition by the Court of First Instance of the effects doctrine in this form as an acceptable tenet of international law. This represents a reversal of previous European statements suggesting that such use of extraterritorial prescriptive jurisdiction was contrary to international law.<sup>48</sup> It is not clear, though, whether the Court was speaking generally or whether it was referring to the application of the effects doctrine on the facts of the case.

Similarly, the Court of First Instance did not clarify whether the proportionality doctrine could ever restrain the use of the effects doctrine. In other words, it is not clear whether the use of the effects doctrine is always to be considered in itself a proportionate response, or whether individual applications of the doctrine would be open to challenge on proportionality grounds. If proportionality was deemed to be a limiting factor in the application of the effects doctrine, then this could become a useful tool in court restraint of over-exorbitant extraterritorial legislation. However, court assessment of proportionality would necessarily entail judicial consideration of whether the legislature's response to a perceived economic and political situation was proportionate. Whether a court, be it European or American, would or should undertake this assessment successfully is a separate, but obviously contentious, issue.

#### IV. CONCLUSION—THE WAY FORWARD

It is evident that, from a perspective of legal theory, the E.U. approach to extraterritoriality (at least in the antitrust field) appears to be converging with that of United States. However, so far there has not been an open acknowledgement of this development by the E.U. judiciary. It is possible that various doctrines inherent in E.U. law, particularly proportionality, may

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47. *Id.* at II-788–90.

48. *See* Press Release No. 23/96, *supra* note 25; Press Release No. 52/97, *supra* note 25; Press Release No. 101/98, *supra* note 25.

be invoked to water down the most extreme examples of extraterritoriality. As there has not yet been open European judicial acknowledgement of the creeping growth of extraterritoriality, it is difficult to predict how the concept will in fact develop. Certainly, there seems to be no indication that the European courts, as opposed to the Advocates General, will tackle the extraterritoriality issue in an open and principled fashion.

It is also unclear whether Member States of the European Union will also begin to take a more American approach to extraterritoriality, or whether this will only remain appropriate on a macro-European level.<sup>49</sup> Clearly, Member States have had to review their blocking legislation in light of European regulation of the situation. However, it remains to be seen whether Member States, such as the United Kingdom, will observe the inherent contradiction in condemning American antitrust extraterritoriality and extolling the European use of the same tactic.

From a practical point of view, it is clear that the E.U. and U.S. competition authorities work in close cooperation in many instances, despite occasional disputes. For example, when the European Union prohibited the merger of two U.S. telecommunications companies, MCI Worldcom and Sprint,<sup>50</sup> it was clear that there had been extensive consultation and information exchange between the E.U. Commission and the U.S. Department of Justice. Representatives of the U.S. Department of Justice attended the Commission hearing regarding the merger—a practice that is becoming increasingly common, but would have been implausible only a few years earlier. Similarly, in the Alcoa-Reynolds<sup>51</sup> and AstroZeneca-Novartis disputes, the U.S. and E.U. authorities cooperated with

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49. An on-going policy of devolution of competition responsibilities to Member States is under way.

50. Commission Decision COMP/M.1741 – MCI WorldCom/Sprint, *available at* [http://europa.eu.int/comm/competition/mergers/cases/decisions/m1741\\_en.pdf](http://europa.eu.int/comm/competition/mergers/cases/decisions/m1741_en.pdf) (Jun. 28, 2000).

51. Commission Decision COMP/M.1693 – Alcoa/Reynolds, *available at* [http://europa.eu.int/comm/competition/mergers/cases/decisions/m1693\\_en.pdf](http://europa.eu.int/comm/competition/mergers/cases/decisions/m1693_en.pdf) (Mar. 5, 2000).

a view of ensuring that incompatible approaches were not taken on each side of the Atlantic. Other recent examples can also be found in which cooperation took place, even if the end result on opposite sides of the Atlantic turned out to be different. Further, a transatlantic working group was set up to examine aspects of merger control in 1999, and has since focused on a comparative analysis of E.U. and U.S. remedies. Moreover, it has worked on developing best practice standards for investigation and handling of complaints in this economic sphere.

The previous megaphone diplomacy between the European Union and the United States has now been replaced by a diplomacy promoting the harmonious relationship between two key partners in a global economy. Both sides clearly wish to market themselves as the power-houses of the world's economy, and as the standard-setters to be emulated by other developing economies. To quote from the speech of Mario Monti:

Our experience of EU/US cooperation has been that it works very effectively—and particularly so in merger cases, substantially reducing the risk of divergent or incoherent rulings. Commission staff are in close and daily contact with their counterparts at the Antitrust Division of the U.S. Department of Justice and Federal Trade Commission. Indeed, I am proud to say that EU/US cooperation in competition/antitrust law enforcement has become something of a model for transatlantic cooperation generally.<sup>52</sup>

However, as one controversy appears to be dying away, another arises. Extraterritorial prescriptive jurisdiction is not just the province of antitrust-competition law. In a global economy dominated by multinational industries, countries may wish to regulate the control of businesses which operate in their own jurisdiction and in other jurisdictions. The new *bête-noire* of European, particularly English,<sup>53</sup> lawyers is the Sarbanes-Oxley

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52. Mario Monti, EU–US Cooperation in the Control of International Mergers: Recent Examples and Trends, Speech Before the Institute for International Economics (March 30, 2001), *available at* <http://www.eurunion.org/News/speeches/2001/010330mm2.htm> (last visited Dec. 30, 2003).

53. Given their many transatlantic links.

Act. Extraterritoriality may arise here in that foreign accounting companies preparing accounts for public companies listed in the United States will be subject to the jurisdiction of a newly established U.S. regulatory accounting board. U.S. jurisdiction is also extended to non-U.S. companies which have a secondary listing on U.S. exchanges. These forms of extraterritoriality are subtle in that, to a certain extent, they rely on cooperation which is, at least theoretically, voluntary.<sup>54</sup> Similarly, extraterritoriality may be seen in other U.S. attempts to regulate multinational business, such as the Foreign Corrupt Practices Act of 1977. Significantly, U.S. companies may seek to require compliance with the Act by imposing contractual terms into the standard form contracts used by their non-U.S. subsidiaries; again, this may be construed as a subtle form of extraterritoriality.

What then is the future of extraterritorial legislation with respect to business practice? Since the collapse of Enron and the more stringent enforcement of corporate regulation, this will certainly be a live issue. Whether it will prompt the same level of E.U.–U.S. controversy as the earlier antitrust-competition disputes remains to be seen. Alternatively, we may find that there is a harmonization of principles again, between the European Union and the United States, with the aim of achieving uniform and enforceable standards. If this does materialize, then it may again debunk the myth that the Europeans adopt a legally pure approach to extraterritorial prescriptive jurisdiction while United States does not. The reality seems to be that there is a convergence of approaches, both in theory and in practice, even if the nuances are different. Either way—and despite their divergent economic, cultural, and legal traditions—the United States and Europe have a common interest in responding to the challenges posed by globalization of economic activity.

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54. Theoretically, foreign accounting firms could refuse to work for U.S. clients, or non-U.S. companies could de-list within the United States—although these are scarcely realistic economic options for the firms and companies in question.