NOTE

THE WOOD PULP CASE: THE APPLICATION OF EUROPEAN ECONOMIC COMMUNITY COMPETITION LAW TO FOREIGN BASED UNDERTAKINGS

I. Introduction

The realities of foreign commerce today reveal the deficiency of traditional theories of jurisdiction in defining the permissible scope of application of a state's competition law to foreign-based undertakings. The lack of spatial containment of foreign commerce often frustrates the attempted application by states of their competition laws based on nationality, place of business, domicile, or residence.

The formulation of new jurisdictional doctrines and diplomatic methods addressing the activities of foreign undertakings is necessary to avoid allowing the transnational character of a restrictive business practice to remove that practice from the ambit of a State's law.

The recent decision of the European Court of Justice in *Re Wood Pulp Cartel: A. Ahlstrom Oy and Others v. E.C. Commission (Wood Pulp)* represents that Court’s implicit recognition of the limits of the traditional principles of jurisdiction, namely the territoriality principle. While the Court purports in the decision to validate the jurisdiction of the European Commission to apply EC competition law to the restrictive activities of foreign-based wood pulp producers under

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1 An "undertaking" is a legal or physical person. 2 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY § 85.11, pt. 3, at 90-94 (the authors use the term "enterprise" in the place of undertaking; see 88.05 at 3-81). This paper will use the term undertaking.

2 For this reason, the competition laws of a state can not be confined in their application solely to activities occurring within the sovereign’s territory. J. Castel, Extraterritorial Effects of Antitrust Laws, 179 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL 13, 22 (1983). But see United Kingdom Aide-Memoire of 20 October 1969 to Commission of the European Communities, reprinted in I. BROWN-LIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310, 313 (1979) [hereinafter Aide-Memoire].

3 Akehurst, Jurisdiction in International Law, 1972-73 BRIT. Y. B. INT'L L. 145, 192.

the doctrine of territoriality, the jurisdictional standard actually promulgated resembles more closely the classic "effects doctrine" first formulated by Judge Learned Hand in *United States v. Aluminum Co. of America.*

The Court's reluctance to expressly adopt the effects doctrine appears to stem from its desire to avoid the conflict that the effects doctrine often creates between a sovereign's rights and international law. As a result of this reluctance, the Court fails to devise a standard of jurisdiction that adequately defines Community policy concerning competition regulation other than to reaffirm the broad scope of application exercised by the Commission in this case.

II. BACKGROUND

A state's right to prescribe and apply its laws to persons, goods, and resources located within its territory is an essential attribute of state sovereignty. Implicit in a state's right to assert jurisdiction is a reciprocal duty not to infringe upon the sovereign rights of other states. This principle, the jurisdictional doctrine of territoriality, defines the traditional parameters of a state's jurisdiction.

The traditional formulation of territoriality underwent a controversial expansion in the Permanent Court of International Justice's decision in the *S.S. Lotus* case. On August 2, 1926 a French mail steamer, the S.S. Lotus, struck a Turkish vessel, the Boz-Kourt, on the high seas, splitting the latter vessel in half. Eight Turkish nationals died in the collision.

After securing the presence of the captain of the French vessel, the Turkish Criminal Court of Stamboul conducted proceedings against

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5 148 F.2d 416 (2d Cir. 1945). See infra note 29 and accompanying text.
7 Id.
8 Id. The principle of territoriality flows from the principles of sovereignty and equality of states. This universally accepted norm divides jurisdictional competence into territorial subdivisions over which each state may exercise its sovereign powers. Castel, *supra* note 2, at 27.
9 (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10. Although the S.S. *Lotus* addressed jurisdiction in the criminal context, many have cited the case for the proposition that "any state may impose liability even upon persons not within its allegiances for conduct outside its territory that has harmful consequences within its territory." Castel, *supra* note 2, at 29.
11 Id.
him, eventually finding him guilty of manslaughter. The French government protested the subjection of its national to proceedings in the Turkish courts for an act that occurred outside Turkish territory. After failing to resolve the dispute, the French and Turkish governments turned to the Permanent Court of International Justice with the question whether the Turkish exercise of jurisdiction over the French national violated principles of international law. The Court found no violation and concluded that international law, "[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, . . . leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules." The Court held that assertions of extraterritorial jurisdiction over persons were legitimate when a constituent element of the person's actions occurred or an adverse effect of those actions existed within that nation.

The desire of nations and international organizations to control and regulate global trade has triggered assertions of Lotus-type jurisdiction for the application to foreign legal persons of national laws governing restrictive business practices. The actions of several nations in this regard and the responses thereto have substantially impacted the formulation and application of EC competition law. Three of the most influential states are the United States and two EC Member States, the Federal Republic of Germany (Germany) and the United Kingdom.

A. The United States

The Sherman Antitrust Act and its interpretation by American courts make up a substantial portion of United States antitrust law.

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12 Id. at 11.
13 Id. at 6-8.
14 Id. at 12.
15 Id. at 19.
16 Id. at 23.
17 Castel, supra note 2, at 29.
Section (1) of the Act prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ."\textsuperscript{20} The act affords the courts broad substantive jurisdiction to address all restraints of trade, both domestic and foreign.\textsuperscript{21} The courts, in cases brought by the Antitrust Division of the United States Department of Justice and by individuals with standing under the Act, have played a crucial role in defining the jurisdictional reach of the Act.\textsuperscript{22}

The Supreme Court of the United States received its first antitrust case involving foreign commerce in 1909 in the form of a private action. The case, \textit{American Banana Co. v. United Fruit Co.}, arose out of allegations brought by American Banana that the United Fruit Co. had deprived American Banana of the opportunity to grow fruit in Costa Rica and Panama for sale in the United States.\textsuperscript{23} American Banana sought damages under the Sherman Act for the exclusively foreign anticompetitive activity of United Fruit.\textsuperscript{24}

The Supreme Court, in refusing to find jurisdiction, characterized American Banana's assertions as "startling" and "surprising."\textsuperscript{25} Utilizing the "Conflict of Laws" notion that the "character of an act as unlawful must be determined wholly by the Law of the country where the act is done . . . .,"\textsuperscript{26} the Court declared that the principle of comity and non-interference precluded application of "prima facie territorial" legislation to activity occurring within the territory of another state.\textsuperscript{27} The Court thus refused to apply the Sherman Act to the foreign activities of United Fruit, and thereby reaffirmed its historical adherence to the doctrine of territoriality.\textsuperscript{28}

\textsuperscript{21} The explicit language of the Act indicates that at a minimum the statute "reaches beyond the water's edge to some extent." The courts' role has been to determine how far. J. Atwood & K. Brewster, \textit{Antitrust and American Business Abroad} 22 (2d ed. 1981 & Supp. 1988).
\textsuperscript{23} 213 U.S. 347 (1909).
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 355.
\textsuperscript{26} \textit{Id.} at 356.
\textsuperscript{27} \textit{Id.} at 357.
\textsuperscript{28} Justice Story, writing for the majority in \textit{The Apollon}, stated: "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens." 22 U.S. (9 Wheat.) 362, 370 (1824). The United States Supreme Court gave constitutional approval to the territorial principle of jurisdiction by drawing
Almost forty years later, the United States Court of Appeals in the ALCOA case abandoned the territorial definition of jurisdiction to apply the Sherman Act to activities engaged in outside U.S. territory.29 In an action brought by the United States government, the Court found one of two agreements entered into in Switzerland by foreign corporations to be in violation of § 1 of the Sherman Act.30 The agreements limited the amounts of aluminum each of the parties could sell.31 Judge Learned Hand, writing for the Court, held it was "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct [occurring] outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."32 Judge Hand was aware that "international complications [were] likely to arise" if the Sherman Act was held to extend beyond intentional activity and to cover mere repercussions of foreign activity.33 Concluding that Congress had never intended the Sherman Act to have such an expansive reach, Judge Hand promulgated a two part test for determining the scope of its application: first, the parties must intend to affect United States commerce by their agreement; and second, the agreement must have an actual effect on United States commerce.34 The ALCOA holding is generally considered the classic formulation of the effects doctrine.35

Foreign governments and commentators vigorously challenged Judge Hand's assertion in ALCOA that the effects doctrine is "settled law".36 Criticism focused on the ALCOA Court's going beyond United

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29 The Justices of the Supreme Court could not muster a quorum. Therefore, the Supreme Court certified the case for a hearing by a panel of the Second Circuit. 148 F.2d 426, 421 (2d Cir. 1945).
30 Id. at 444-45.
31 Id. at 442.
32 Id. at 443.
33 Id.
34 Id. at 443-44. Sufficiency of effect affording jurisdiction should not be confused with sufficiency of effect establishing liability. Restatement (Third) of Foreign Relations Law of the United States § 415 reporters' Note 3 (1987) [hereinafter Restatement].
35 Restatement, supra note 34.
36 In 1959, then State Department Legal Adviser Loftus E. Becker reported that "there are a number of friendly foreign governments, foreign officials, and even foreign courts, which believe strongly—or even passionately . . .—that [ALCOA and similar cases constitute] a violation and infringement" of international law and sovereignty." Becker, The Antitrust Law and Relations with Foreign Nations, 40 U.S. Dept. State Bull. 272-73 (1959).
States precedent and the practice of other nations.\(^{37}\) A judicial response to this criticism came from the Ninth Circuit Court of Appeals in *Timberlane Lumber Co. v. Bank of America.*\(^{38}\) Timberlane, a United States corporation, brought four separate actions, including one under the Sherman Antitrust Act, in which it alleged that the Bank of America and others had conspired to prevent Timberlane from milling lumber in Honduras and exporting it to the United States.\(^{39}\)

Timberlane had sought to establish lumber operations in Honduras for export to the United States.\(^{40}\) Companies that already had established operations in Honduras responded unfavorably to the prospect of increased competition. Timberlane eventually ceased operation due to economic harassment and actions taken against its employees.\(^{41}\) This conspiracy, Timberlane asserted, "directly and substantially affected the foreign commerce of the United States."\(^{42}\)

In reversing the District Court's dismissal of Timberlane's antitrust complaint,\(^{43}\) Judge Choy relegated the "effects" determination to the status of a threshold consideration.\(^{44}\) Judge Choy promulgated a three-part test for extraterritorial applications of the Sherman Act. The elements of the test were: first, whether some effect, intended or unintended, on American commerce existed; second, whether United States antitrust law contemplated the particular restraint, in terms of magnitude and type, as a violation; and third, whether the United States' interests were sufficiently strong to justify an assertion of extraterritorial jurisdiction.\(^{45}\)

\(^{37}\) *Atwood*, *supra* note 21, at 156-59.

\(^{38}\) 549 F.2d 597 (9th Cir. 1976).

\(^{39}\) *Id.* at 601.

\(^{40}\) *Id.*

\(^{41}\) *Id.* at 604-05.

\(^{42}\) *Id.* at 605.

\(^{43}\) The District Court dismissed Timberlane's complaint on two grounds: "[The Court] is prohibited under the act of state doctrine from examining the acts of a foreign sovereign state; and in any event, that there is no direct and substantial effect on United States foreign commerce." *Id.* at 601.

\(^{44}\) "An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness." *Id.* at 613. (Emphasis added).

\(^{45}\) *Id.* The Timberlane test underwent further judicial elaboration in *Mannington Mills, Inc. v. Congoleum Corp.* where the Third Circuit Court of Appeals listed
The Timberlane test requires that the court conduct an analysis of possible competing interests of different nations in determining whether the court should apply United States law or decline jurisdiction. While acknowledged to be a better test than that of "effect" alone, this interest balancing or jurisdictional rule of reason has received substantial academic as well as judicial condemnation. Judge Wilkey, in *Laker v. Sabena, Belgian World Airlines*, criticized judicial interest balancing in this situation on the grounds that a court is not capable of properly balancing the interests of the United States against those of a state that is often not represented before the court. Diplomacy and negotiations by the Executive Branch, Judge Wilkey asserted, best serve that purpose. Professor Mann expressed similar sentiments

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1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nation has addressed the issue.

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595 F.2d 1287, 1297-98 (3d Cir. 1979).
46 Id., see Atwood, *supra* note 21, at 159-161.
47 Mann, *supra* note 6, at 89.
49 731 F.2d 909 (D.C. Cir. 1984).
50 Judge Wilkey stated:

The resources of the Judiciary are inherently limited when faced with an affirmative decision by the political branch of the government to prescribe specific policies. Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction.

*Id.* at 955.

51 *Id.* Judge Wilkey continued:

In contrast [to the judiciary], diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of inter-
in calling interest balancing a judicial consideration of essentially political factors. Mann concluded that legal analysis should address "contacts" as opposed to interests. Finally, the Justice Department has taken the position that the executive branch, and not the courts, should balance US and foreign governmental interests when necessary.

In 1982, President Reagan signed into law the Foreign Trade Antitrust Improvement Act which adopted the "direct, substantial, and reasonably foreseeable effect" standard for determining the extraterritorial applicability of § 1 of the Sherman Act. The Restatement (Third) of Foreign Relations Law of the United States has incorporated this test into its jurisdictional rule of reasonableness as one factor in determining the permissible scope of prescriptive jurisdiction.

B. The Federal Republic of Germany

German restrictive practices law grew out of the efforts of the United States and the United Kingdom to dismantle the large industrial cartels, syndicates, and trusts that had supported the Nazi war effort. While the Allied efforts had little practical effect with respect to this goal, they did establish a free market legacy which the West German government fully embraced.

The West German antitrust law, the Act Against Restraints on Competition (GWB), contains both substantive standards proscribing certain anticompetitive activity and a jurisdictional standard defining

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national associations. These forums should . . . be utilized to avoid or resolve conflicts caused by contradictory assertions of concurrent prescriptive jurisdiction.

Mann, supra note 71, at 31.

Id. Mann asserts that courts should refrain from addressing subjective or political interests and should instead apply an "objective test of the closeness of connection, of a sufficiently weighty point of contact between the facts and their legal assessment."

Atwood, supra note 21, § 6.11 (Supp. 1988).


Restatement, supra note 34, § 403.


Id. at 1-20.

Id. at 1-23, § 1.03[2]. GWB is an abbreviation of the act in German, Gesetz gegen Wettbewerbsbeschränkungen.

See GWB §§ 1-8, 25(1) (W. Ger.), reprinted in World Comp. L., supra note 57, at app.1 (addressing horizontal restraints on competition).
the scope of application of the substantive rules. The basic goal of
the GWB is to maintain the competitive market structure of the
Federal Republic of Germany (FRG) and to ensure that all enterprises
have free access to the market. To further this purpose, the FRG
has adopted a mixed system of administration and adjudication.
West German law assigns policy judgments to the administrative body
and vests the application of binding law in the judiciary.

Section 98(2) of the GWB contains an expansive jurisdictional
standard: "This Act shall apply to all restraints of competition which
have effect in the area to which this Act applies, even if they result
from acts done outside the area to which this Act applies." (emphasis
added). The Federal Supreme Court has held that section 98(2) extends
the application of the substantive provisions of the GWB to extra-
territorial activity, but only if the specific provisions of GWB pro-
scribe the domestic effect of that activity. Intent to affect competition
alone will not create a sufficient nexus upon which to establish
jurisdiction. Furthermore, the determinative factor in deciding whether
to apply the provisions of the GWB is the domestic effect resulting
from the proscribed conduct, not the location of the parties or the
conduct producing the effect.

Article 25 of the West German Constitution incorporates the general
rules of public international law into West German federal law. Recognizing
the restrictions that international law places on its ability
to apply the GWB extraterritorially, the Court requires the existence
of a reasonable link between the domestic effect and the foreign

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61 Id. at § 98(2).
62 Federal Republic of Germany, supra note 57, § 2.02[1], at 5.
63 MAXEINER, supra note 22, at 8.
64 Id. at 14. While policy questions enter into the legal interpretation of statutes,
Maxeiner feels that policy judgments should not be made in the application of
statutes.
65 GWB, supra note 60, § 98(2).
66 Steinberger, The German Approach, in EXTRA-TERRITORIAL APPLICATION OF
LAWS AND RESPONSES THEREETO 77, 82 (C.J. Olmstead ed. 1984) [hereinafter Stein-
berger] (discusses Judgment of 12 July 1973, Federal Supreme Court for Civil Cases,
Wu W/E BGH 1267, also known as Oilfield Pipes case).
67 Id. at 82-83 (discussing Judgment of 29 May 1979, Federal Supreme Court for
Civil Cases, Wu W/E BGH 1613, also known as Organic Pigments); Business
68 Steinberger, supra note 66, at 85.
69 Id. at 84-86 (discusses Judgment of the Federal Cartel Office of 23 September
1980, WuW/E BKartA 1837; Judgments of the Court of Appeals of Berlin of 26
November 1980 - Kart 17/80 - (Synthetic Rubber I - principal case), WuW/E OLG
2411; Kart 18/80 - (Synthetic Rubber II - preliminary relief), WuW/E OLG 2419).
undertaking under section 98(2) GWB to establish the applicability of the substantive provisions. Such an application in the absence of this link would constitute a violation of the general rules of public international law.\textsuperscript{70}

C. The United Kingdom

The territoriality principle continues to define the jurisdictional scope of United Kingdom competition law and to form the basis of the United Kingdom's reaction to the extraterritorial application of competition laws by other states. In 1976, the British Parliament enacted legislation requiring registration of all agreements affecting goods, services, and information entered into by two or more persons "conducting business" within the United Kingdom.\textsuperscript{71} The registration requirement under the Restrictive Trade Practices Act (RTPA) of 1976 does not extend to foreign parties engaged in proscribed activity which merely affects the United Kingdom, or to situations in which a citizen of the United Kingdom enters into such an agreement with foreign parties.\textsuperscript{72} To be subject to this legislation, persons must engage in direct business activity within the territory of the United Kingdom.\textsuperscript{73}

Under the RTPA, production, supply or processing of goods within the United Kingdom is sufficient evidence that an undertaking is "conducting business" within the United Kingdom.\textsuperscript{74} Jurisdiction therefore depends on two factors: first, the existence of facts sufficient to establish that a person is conducting business within the United Kingdom; and second, the location where the parties conducted sales or entered into a contract of sale.\textsuperscript{75}

The diplomatic response of the United Kingdom to the EC Commission's application of EC competition law in \textit{Imperial Chemical Industries Ltd. v. Commission of the European Communities}\textsuperscript{76} (Im-

\textsuperscript{70} \textit{Id.} at 86-89.

\textsuperscript{71} Restrictive Trade Practices Act, 1976, ch. 34, §§ 1(7), 6, 7, 11, and 12, \textit{reprinted in} 4 World Comp. L. (MB) app.I (1981) [hereinafter RTPA]. A finding that an agreement is registerable raises a presumption that it is contrary to public interests. Whether the parties can rebut this presumption forms the basis of litigation before the Restrictive Practices Court. R. \textsc{Merkin} \& K. \textsc{Williams}, \textsc{Competition Law: Antitrust Policy in the United Kingdom and the EEC} 35-36 (1984).

\textsuperscript{72} \textsc{Merkin}, \textit{supra} note 71, at 469.

\textsuperscript{73} RTPA, \textit{supra} note 71, § 6(1).

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} Business Organizations, \textit{supra} note 67, 66.02[4]. The first part of this test is very similar to the "contacts" test advocated by Mann. \textit{See} \textit{supra} note 53.

\textsuperscript{76} 1972 E. Comm. Ct. J. Rep. 619; \textit{see infra} note 102 and accompanying text.
perial Chemical) case echoes the territorial requirements of the British legislation. The British government objected to the Commission’s application of Community competition law to a U.K.-based undertaking because the Commission did so without finding that a constituent element of the alleged offense occurred within the Community. The government of the United Kingdom argued that only the territoriality principle “justifies proceedings against foreigners and foreign companies . . . in respect of conduct which consists in whole or in part of some activity by them in the territory of the State claiming jurisdiction.” The United Kingdom maintains that a state should not exercise jurisdiction against “a foreigner who or a foreign company which has committed no act within its territory.”

The government of the United Kingdom carried its policy of territoriality one step further with the passage of the Protection of Trading Interests Act of 1980. This act has the effect of frustrating foreign discovery processes by authorizing the Secretary of State of the United Kingdom to prohibit British businesses from complying with foreign discovery orders. In applying this act, the Secretary must only consider whether the proposed or implemented proceedings threaten to damage the trading interests of the United Kingdom.

In 1983, the British Secretary of State issued such an order to prevent British air carriers from complying with a request for documents stemming from the Laker v. Sabena case in a U.S. court.

77 Aide-Memoire, supra note 2, at 311-12.
78 Id. at 311. The United Kingdom did not join the EC until January 1, 1973. Therefore, the UK company involved was a foreign-based undertaking. The Chancery Division in Registrar v. Schweppes echoed the principle objection to imputation expressed in the Aide-Memoire. This opinion addressed the single economic unit or entity doctrine of parent-subsidiary relations in the context of RTPA. The Court stated: “[I]f, after counting as one any parties to it which are interconnected bodies corporate, one still finds that restrictions relating exclusively to the goods supplied are accepted as between two or more persons by whom the goods are to be supplied, § 7(2) [of the RTPA] does not apply.” [1971] 1 W.L.R. 1148, 1169, [1971] 2 All Eng. Rep. 1473, 1488. The Court concluded that the legislature did not intend the provision of the RTPA to treat a foreign company and its UK subsidiary as a single entity. Id.
79 Aide-Memoire, supra note 2, at 313 (emphasis added).
80 Id.
82 Id. at 273.
83 MERKIN, supra note 71, at 477.
84 731 F.2d 909 (D.C. Cir. 1984).
The suit addressed Laker Airway's claim for treble damages for harm resulting from the predatory pricing activities of British Airways and other members of the International Air Transport Association. The House of Lords rejected Laker's challenge to the Secretary of State's actions. The British statute gives the Secretary the discretion to apply the 1980 Act to circumstances involving international relations, and the House of Lords therefore placed a substantial burden on the challenger of a blocking order by the Secretary of State to show that "no reasonable person holding the office of minister . . . could have reached [the same conclusion]." The Protection of Trading Interests Act thus affords the Secretary of State broad powers to frustrate almost any action against a British business if the Secretary deems the action, or a request for information pursuant to it, a threat to British trade or industry.

D. The European Community

Articles 85 and 86 of the Treaty of Rome form the foundation of EC competition law. Article 85(1) prohibits undertakings from entering into bilateral and multilateral agreements which may or do adversely effect interstate commerce. Since the Treaty of Rome is the engendering document of the EEC, the European Court of Justice has considered Article 85(1) in the broader context of the goals of the European Economic Community, namely market integration.

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86 Id.
88 P.T.I.A., supra note 81, at 273.
90 This result is achieved through "the combined operation of section 1 [of the PTIA] and a claim for an injunction by the defendant in the English courts." MERKIN, supra note 71, at 478.
91 Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 11 [hereinafter Treaty of Rome]. Given the differences in translations, the version published by the European Communities is treated as authoritative for the purposes of this paper. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 331 (1978). Analysis of EEC competition policy will address only the provisions of the treaty involved in the Wood Pulp case, Article 85(1).
92 Id. at art. 85.
94 In Commercial Solvents, the ECJ stated that Community competition laws must be interpreted and applied in the context of Articles 2 and 3(f) of the Treaty
Article 85(1) prohibits practices deemed incompatible with these goals. The proscribed practices include all agreements between undertakings, all decisions of associations of undertakings, and all concerted practices of undertakings that are likely to affect commerce between Member States and have as their object or consequence prevention, restriction or distortion of competition within the Common Market.

The Treaty of Rome charges the EC Commission with the direct and active role of ensuring "that the provisions of this Treaty and measures taken by the institutions pursuant thereto are applied." In 1962, the EC Council adopted Regulation 17 which conferred upon the Commission additional means of enforcing Community competition law. Article 17 of the Regulation affords the Commission the power to enforce, by means of fines and periodic penalty payments, the obligations imposed upon undertakings by the Treaty. The Com-
mission may pursue alleged infringements of Community law upon its own initiative or upon application by Member States or "natural or legal persons who claim a legitimate interest." The Commission has vigorously exercised this power and has in turn adopted an expansive view of the scope of application of Article 85(1).

In the field of competition law, the European Court of Justice (ECJ) serves an appellate function. The Court reviews decisions of the Commission brought before the Court under Article 173 of the Treaty of Rome. While the Court has generally agreed with the results of Commission decisions concerning the extension of Article 85(1) prohibitions to foreign-based undertakings, the Court has based its affirmations on the EC's right to prescribe and apply its competition rules within its territory, as opposed to extraterritorially.

The ECJ has avoided assessing the extraterritorial reach of EEC competition laws by imputing the conduct of a subsidiary found within the Community to its foreign-based parent company. The Court's treatment of this issue began with Imperial Chemical in which the Commission alleged that Imperial Chemical Industries (ICI), a foreign-registered undertaking, had engaged in concerted practices within the EC by dictating pricing instructions to its wholly owned subsidiary incorporated within the EC. The Commission supported jurisdiction on three related theories: first, that ICI had actually been engaged in the concerted practices by dictating pricing to its EC-based subsidiary which acted merely as ICI's agent; second, that ICI

99 Id. at art.3.
100 See generally CAMPBELL, supra note 93, at 39-77.
101 Article 173 affords the Court broad review of the legality of acts of the Commission and Council other than recommendations and opinions. Any natural or legal person may institute proceedings against a Commission decision directed against that person, or in which that person has a direct and individual concern. Treaty of Rome, supra note 91, art. 173.
103 Id.
104 In the Dyestuffs case, the European Court of Justice imputed the activity of a Community based subsidiary to its foreign based parent company. The grounds for imputation included: (1) the subsidiary's failure to act autonomously in making decisions, (2) the ownership by the parent company of a majority of the subsidiary's shares, and (3) the actual exercise by the parent of "decisive influence over the policy of the subsidiary[y] as regards selling prices in the Common Market." Id. at 662.
105 ICI was one among 10 undertakings found in violation of Article 85 by the Commission of the EC. Id.
was present in the EC because of its corporate control over its subsidiary; and third, that the activity of ICI produced effects within the Common Market.\textsuperscript{106} The Court based its decision on the second theory and thereby avoided addressing the Commission's application of the effects doctrine.\textsuperscript{107} The Court found that ICI had a presence in the Community through ICI's control of its non-independent EC subsidiary.\textsuperscript{108} The presence of ICI within the Community established the domestic jurisdiction of the Commission under the territoriality doctrine. Basing jurisdiction on territoriality allowed the Court to avoid considering the extraterritorial application of EC competition law,\textsuperscript{109} and thus the consideration of the relationship between Community competition law and public international law.

### III. Analysis

On December 19, 1984, the Commission found forty-one wood pulp producers and two of their trade associations in violation of Article 85 of the Treaty of Rome.\textsuperscript{110} The infringements included 1) announced concerted prices for delivery to the EC and actual transaction prices charged in the EC;\textsuperscript{111} 2) Kraft Export Association (KEA) pricing recommendations and the exchange of individualized data, based on KEA rules, concerning prices for wood pulp deliveries;\textsuperscript{112} and 3) the exchange of pricing data within the framework of the Research and Information Center for the European Pulp and Paper Industry run by Fides of Switzerland.\textsuperscript{113} The Commission found that the wood pulp producers and their cartels had created an artificially


\textsuperscript{107} While acknowledging that in form subsidiaries enjoy a separate legal identity from their parent companies, the court concluded that under those specific circumstances "the formal separation between [the subsidiary and parent company], resulting from their separate legal personality, cannot outweigh [sic] the unity of their conduct on the market for the purpose of applying the rules on competition." 1972 \textit{E. Comm. Ct. J. Rep.} 619, 663.

\textsuperscript{108} \textit{Id.} at 663.

\textsuperscript{109} \textsc{Goyer}, \textit{supra} note 106, at 388.


\textsuperscript{111} \textit{Id.} at 26, art.1(1) & (2).

\textsuperscript{112} \textit{Id.} at art. 1(3). The U.S. pulp producers involved were members of the Pulp, Paper, and Paperboard Export Association of the United States, formerly named the Kraft Export Association (KEA) (this abbreviation is still used in the industry, was used in the Commission and Court decisions, and will be used throughout this paper). \textit{Id.} at 6, para. 28.

\textsuperscript{113} \textit{Id.} at 26, art. 1 (4).
transparent market by their concerted activities which affected competition between the Member States.\textsuperscript{114} The Commission then imposed fines on thirty-six of the forty-three addressees pursuant to Regulation 17.\textsuperscript{115}

Several wood pulp producers and two wood pulp trade associations, all having their registered offices outside the Community, brought actions in the European Court of Justice under Article 173 of the Treaty of Rome seeking the annulment of the Commission decision.\textsuperscript{116} The Court consolidated the actions and then bifurcated the proceedings following its decision to address challenges to the Community's prescriptive jurisdiction over undertakings established in non-EC member countries first.\textsuperscript{117}

A. ECJ Decision

In a characteristically brief opinion, the ECJ for the first time upheld the jurisdiction of the Commission to apply EC competition law directly to foreign undertakings on grounds other than imputation.\textsuperscript{118} The applicants claimed that the Commission decision violated public international law.\textsuperscript{119} The Commission, the applicants alleged, had based its application of Community competition law "exclusively on the economic repercussions within the Common Market of conduct restricting competition which was adopted outside the Community."\textsuperscript{120} The Court, in rejecting this challenge, concluded that

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\textsuperscript{114} Id. at 15, para 85.
\textsuperscript{115} Id. at 27, art. 3(1).
\textsuperscript{117} These initial proceedings also addressed a challenge by Finnish wood pulp producers to the application of Article 85 based on an assertion that trade relations between the Community and the Finnish producers are regulated exclusively by a Free Trade Agreement. This, the Finnish producers asserted, precluded application of the Community competition rules. The Court upheld the Commission's decision finding Community law applicable on grounds that the articles 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." The Commission concluded, and the Court affirmed, "those rules can only be the provisions of Articles 85 and 86 of the Treaty." Id. at 943. The ECJ had not issued a decision on the substantive challenges to the Commission decision at the time this paper was completed.
\textsuperscript{118} Id. at 939. When asked by the author of this note whether the Court had in fact adopted the "effects" doctrine, Judge Joliet, judge rapporteur of the Wood Pulp decision, responded emphatically in the negative.
\textsuperscript{119} Id. at 939-40.
\textsuperscript{120} Id. at 941.
\end{flushleft}
the decisive factor in assessing the territorial scope of Article 85 is the place of implementation of the anti-competitive agreement, decision or concerted practice, not the place where the parties formed the agreement, decision or concerted practice.\footnote{Id.}

Unlike the statutes of the Federal Republic of Germany and the United States, the Treaty of Rome does not establish a separate standard for jurisdiction.\footnote{See supra note 95 and accompanying text.} Article 85(1) addresses "agreements between undertakings, decisions by association 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."\footnote{Id.} The Commission, unlike the Court, has distilled a broad standard of jurisdiction based on the language of Article 85. The Commission stated in its Wood Pulp decision that

Article 85 . . . applies to restrictive practices which \textit{may affect} trade between Member States even if the undertakings and associations which are parties to the restricted practices are established or have their headquarters outside the Community, and even if the restrictive practices in question also affect markets outside the EEC.\footnote{28 O.J. EUR. COMM. (No. L 85) para. 79, at 14-15 (1985). (Emphasis added).}

From the Commission's perspective, EC competition law operates in a consistent manner regardless of whether the actors are domestic or foreign undertakings. This perspective has two results. First, a potential effect on trade between the Member States creates a sufficient nexus between the foreign undertakings and the Community upon which to base jurisdiction. Second, the existence of effects within another jurisdiction resulting from the same activity has no bearing on the Commission's claim of jurisdiction.

IV. ANALYSIS OF THE WOOD PULP DECISION

While the Court's decision represents an expansion of the permissible scope of Commission application of Community competition law, the Court refrained from expressly adopting the expansive standard of jurisdiction afforded by the "may affect" language of Article 85. The Court instead established a purportedly more restrictive standard than the Commission. The \textit{Wood Pulp} standard consists of two
essential elements. The first element is the existence of an agreement, decision or concerted practice entered into by two or more undertakings.\textsuperscript{125} The second element consists of the actual implementation within the EC of the agreement, decision or concerted practice.\textsuperscript{126}

The second element, implementation, signals a marked departure in the theoretical basis of EC jurisdiction. Formerly, as evidenced by the \textit{Imperial Chemical} case, the Court based jurisdiction on finding that the undertakings engaged in activity within the EC, either directly or through the activity of a non-independent EC based subsidiary.\textsuperscript{127} By contrast, the Court in the \textit{Wood Pulp} case based jurisdiction not on actual activity within the EC but on the fact of implementation within the EC of the agreement, decision or concerted practice.\textsuperscript{128} The Court, however, in promulgating this standard, left unsettled two related issues: what constitutes "implementation", and what role does international law play in this standard?

\textbf{A. Territoriality}

The Court stated that "the Community's jurisdiction to apply its competition rules [under the facts of this case] is covered by the territoriality principle as universally recognized in public international law."\textsuperscript{129} Territoriality traditionally allows the sovereign to address a physical presence, activity or conduct within its territory.\textsuperscript{130} In \textit{Wood Pulp}, the Court based jurisdiction on finding that the foreign undertakings implemented their pricing agreements within the Community. The common definition of "implement" is "to carry into effect."\textsuperscript{131} As a territorial standard of jurisdiction, implementation would therefore appear to require some constituent act or conduct within the Community which carries the concerted pricing scheme into effect. Yet the Court did not clearly define what implementation means.

The Court, however, did emphasize several central elements or conclusions based on the facts of this case. First, the main sources of supply of wood pulp were outside the Community.\textsuperscript{132} Second, the

\textsuperscript{126} Id.
\textsuperscript{127} \textit{See supra} note 104 and accompanying text.
\textsuperscript{129} Id.
\textsuperscript{130} \textit{Restatement}, \textit{supra} note 34, § 402 and comment c; Mann, \textit{supra} note 7, at 20.
\textsuperscript{131} \textit{Webster's New World Dictionary} 705 (2d ed. 1979).
foreign wood pulp producers sold directly to purchasers established in the Community. Third, the wood pulp producers engaged in Article 85 competition within the Common Market by engaging in competitive pricing in order to win orders from EC purchasers. Fourth, producers concerted on the prices to be charged to customers within the EC. Fifth, producers placed the concerted prices into effect by selling at the coordinated prices.

From these factors, the Court concluded that the implementation occurred within the EC. But not one of the five factors contains any reference to defined acts or conduct within the territory of the EC. In fact, all of these elements could have, and in one case allegedly did, occur outside the territory of the EC.

The Court's view of territoriality is much broader than that of the United Kingdom. The United Kingdom, which intervened in favor of the Commission in several of the Wood Pulp cases, supported basing jurisdiction on three possible grounds: first, upon finding an undertaking has its registered office within the Community; second, upon finding the foreign-based undertaking liable for the conduct of its EC-based subsidiaries; or third, by imputing the activity of an agent within the EC to the foreign-based undertakings dictating its actions. Under the United Kingdom view, the determinative factor is whether an undertaking gave effect to the agreement within the Community. But the United Kingdom, unlike the Court, defined "giving effect" or implementation as the activities within the Community of the foreign based undertakings' EC based agents.

133 Id. at 941.
134 Id.
135 Id.
136 Id.
137 Weldwood of Canada, Ltd. (case 126/85) alleged that "it did not ever 'do business' in the Community in any real sense since its decisions on the pricing of its products were made in Canada and sales of its products were concluded in that country." This applicant continued by arguing that only under the "effects" doctrine could the Community claim to exercise jurisdiction over them. [Part III of the Report of the Hearing which contains the parties' submissions is on file at the EC publications office in Washington, D.C. but has been omitted from the Common Market Law Reports report of the case. For this reason, all references to the Submissions of the Parties will be cited to the Report of the Hearing available from the EC office] Report of the Hearing at 26.
138 Id. at 31. In Imperial Chemical, the Court adopted only the parent/subsidiary liability rationale for imputing activity within the EC to undertakings established outside the EC. 1972 E. Comm. Ct. J. Rep. 619, 663. See supra note 102 and accompanying text.
The Court, however, clearly stated that "it is immaterial [whether a foreign based undertaking] had recourse to subsidiaries, agents, subagents, or branches within the Community."\textsuperscript{140} The Court did not share Britain's concern for establishing the existence of activity, either directly or imputedly, within the territory of the entity asserting jurisdiction. Rather, the Court appeared to have established jurisdiction on a "reasonable links" standard akin to that which the German courts promulgated to mitigate the broad scope of the West German statutory "effect" standard,\textsuperscript{141} although the ECJ did not articulate the standard in this way.

The five factor analysis suggests that the Court will uphold jurisdiction whenever the Commission can establish sufficient links between a party or its activities and the Community. In the context of global markets, the European Community will consistently be able to establish these links based on the sheer size of the EC alone. The Community represents the economic interests of the twelve Member States. The Commission, it appears, can now address almost any alleged global pricing scheme under the claim that the scheme affects competition among the Member States of the EC.

\textbf{B. Effects}

Although the Court claimed that the Commission's jurisdiction based on implementation within the EC is commensurate with the territoriality principle, the "implementation" standard bears a striking resemblance to the effects doctrine as formulated in the \textit{ALCOA} case.\textsuperscript{142} The effects doctrine addresses activity which has an intended effect on trade.\textsuperscript{143} "Implementation" requires the existence of an agreement, decision or concerted practice on prices that producers will charge purchasers within the Community and the implementation thereof within the Community.

The first element of the "implementation" test, the existence of an agreement, decision or concerted practice, serves as an intent requirement. The parties must have some desire to affect a pricing scheme within the EC. For example, assuming Nation X is not a Member State of the EC, a pricing agreement between foreign wood pulp producers to affect the selling price of wood pulp in Nation X

\textsuperscript{141} See supra note 70 and accompanying text.
\textsuperscript{142} See supra note 29 and accompanying text.
\textsuperscript{143} Id.
would theoretically not be subject to EC competition law even if the sale price of wood pulp in Nation X had repercussions within the Community. No intent to affect EC trade would exist, and implementation within the EC would not have occurred. The Court, however, offered no guidance for determining whether certain conduct is intended to affect EC competition. Therefore, the Court could find intent by concluding that foreign undertakings entering into an agreement which has an effect on trade between the Member States would have reasonably foreseen this result, thereby placing the burden on the undertakings to rebut a heavy presumption of intent.144

The second element, implementation, is analogous to the ALCOA "affect imports" requirement. The Court does not expressly define the degree of involvement each undertaking must have had to be deemed to have had a role in the implementation. De minimus effect, however, appears sufficient to establish that an undertaking played a role in implementation. One applicant argued that its share of the market was so small that its activity alone could not have had any significant effect on trade between Member States.145 The Court's implicit denial of this defense suggests that for the purposes of jurisdiction the Court views as determinative the aggregate effect of the implemented concerted pricing, and will not consider in isolation the individual activity of each undertaking.146

Although the Court did not expressly address the effects standard, the Court afforded the Commission this opportunity. The Court asked the Commission to respond to the following questions:

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?147

146 In its substantive analysis as to whether agreements, decisions or practices have anti-competitive effects in violation of article 85(1), the Court considers them "in the context in which they occur, that is to say, in the economic and legal context of such agreements, decisions or practices and where they might combine with others to have a cumulative effect on competition. An agreement cannot be examined in isolation from the above context." Brasserie de Haecht v. Wilkin-Janssens, 1976 E. Comm. Ct. J. Rep. 407, 415.
147 Report of the Hearing, supra note 137, at 45.
The Commission's responses appear to have influenced the Court's formulation of the "implementation" standard, and thus, its circumvention of the effects doctrine. The Commission distinguished between conduct that distorts the competitive process in the Community and conduct that, although it does not itself distort the competitive process within the Community, produces such consequences. The necessary implementing conduct in which the undertakings in this case all engaged was sales to EC purchasers. But as stated earlier, not all of the applicant undertakings engaged in sales within the Community. Therefore, it appears that the controlling factor is who the purchasers were as opposed to where the sales agreement occurred. If foreign undertakings enter into a pricing scheme directed at EC purchasers and then sell to those purchasers at the agreed price, they have implemented an agreement within the EC affecting Community trade, regardless of the contractual terms, even if the contractual terms were F.O.B seller's port.

C. Role of International Law

The Court's treatment of international law brings to mind the proverbial placing the cart before the horse. The Court offered a simplistic and unsatisfactory response to these issues. International law, the Court concluded, has no impact on the question of adjudicatory jurisdiction in the Wood Pulp case. The Court appears to have based its dismissal of international law on this reasoning: Implementation equals territoriality; Territoriality equals a sovereign's right to apply law domestically; Domestic application of law precludes international law; Therefore, implementation precludes the consideration of international law. The Court thereby implicitly claimed to be applying its laws domestically, rather than extraterritorially, to conduct allegedly having occurred within its boarders.

Evidence of this rationale is especially apparent in the Court's response to the applicants' assertion that the Commission's application of Community law to address activity of foreign-based undertakings occurring outside the EC fails to consider the international law principles of comity and non-interference. The Court summarily dismissed the comity argument, stating that "it suffices to observe that [comity] amounts to calling in question the Community's jurisdiction to apply

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148 Id.
149 See supra note 137.
its competition rules to conduct such as that found to exist in this
case and that, as such, that argument has already been rejected.”

The court claimed to have based its assertion of jurisdiction on
the territoriality principle. A finding that its jurisdiction is consistent
with the territoriality principle was essential to the validity of the
Court’s treatment of international law because the Court used this
position to dismiss the comity argument, an issue which it should
have considered initially in deciding whether to extend jurisdiction.

Although the Court also confronted the applicants’ non-interference
objection after finding jurisdiction, the Court’s response better ad-
dressed the issue raised by this objection than did its response to
comity. The applicants from the United States, all members of
United States wood pulp producers’ trade association, claimed that
the Webb-Pomerene Act of the United States mandates the creation
of export cartels. They argued that EC proscription of this activity
therefore violated the principle of non-interference. The Court re-
responded by defining circumstances which raise the non-interference
issue and then found that those circumstances did not exist in the
Wood Pulp case. In so doing, the Court appears to have implicitly
balanced the United States policy of encouraging export trade against
the EC policy of ensuring undistorted competition between Member
States and to have predictably found the EC interest paramount.

D. The Role of Diplomacy

Professor Akehurst once wrote that “the acid test of the limits of
jurisdiction in international law is the presence or absence of dip-
lomatic protest.” This statement has special significance in the
context of extraterritorial applications of national competition laws.
Unilateral application invites international condemnation and national
retaliatory action. Bilateral and multilateral consultation and con-

151 Id.
152 See, e.g. RESTATEMENT, supra note 34, § 403.
154 Non-interference, the Court stated, is “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.” Id.
The Court dismissed the non-interference argument upon concluding that 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.”
Id. at 942.
155 Akehurst, supra note 3, at 176.
156 See, e.g. Lowe supra note 81.
ciliation fosters applications of law, or restraint therefrom, consistent with international law.\textsuperscript{157}

Regardless of whether the basis of the implementation standard is territoriality, as the Court holds, or effects as it appears to be, diplomatic channels serve a crucial role in ensuring that assertions of jurisdiction do not produce breaches of international law. The Court pointed out that the Commission notified the United States government, pursuant to Organization for Economic Co-operation and Development (OECD) Recommendation of 25 October 1979, that United States nationals were the subject of a Commission investigation.\textsuperscript{158} The United States raised no objection in its response to the Commission's assertion of jurisdiction, thereby appearing to acknowledge the Commission's right to address this conduct.\textsuperscript{159}

The OECD recommendation contains voluntary guidelines which entreat the country initiating proceedings to be mindful of its obligation under international law to consider the legitimate interests of other states.\textsuperscript{160} The notification provision not only affords the state of the foreign addressee the opportunity to articulate its concerns, but also the opportunity "to take remedial action under its own law to deal with the restrictive business practices."\textsuperscript{161} The recommendation also recognizes that the ultimate decision whether to pursue enforcement of national competition law rests exclusively with the sovereign state alleging the existence of an infringement.\textsuperscript{162}

V. Conclusion

Whether the European Court of Justice has adopted the effects doctrine as the Community standard of jurisdiction for addressing the anticompetitive activity of foreign based undertakings is more than a debate over mere semantics. By concluding that the jurisdiction of the Commission to address this activity is consistent with the

\textsuperscript{157} Castel \textit{supra} note 2, at 93.


\textsuperscript{160} OECD Recommendation, \textit{supra} note 158, at 78.

\textsuperscript{161} \textit{Id.} at 79.

\textsuperscript{162} \textit{Id.}
territoriality theory, the Court clearly sought to avoid the thorny international law considerations raised by the extraterritorial application of national law. As a result, however, the Court failed to use the *Wood Pulp* case as a vehicle for establishing a clear Community policy and standard. In essence, the Court has told the Commission, "you may"; the Court has yet to tell the Commission whether and when "you should".

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