

Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute Over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*

I. INTRODUCTION

When Boeing announced its plans to purchase McDonnell Douglas in 1996, little did the two American corporations realize that the biggest anti-trust hurdle to their planned merger would not come from the United States Federal Trade Commission, but rather, the European Commission.¹ On July 1, 1997, the Federal Trade Commission (FTC)

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1. The European Commission is the central European Union (EU) institution, which is responsible for both the formulation of policy initiatives, and for ensuring that the EU Member States fulfill their obligations under EU treaties. As the "executive" of the EU, the Commission must also apply particular rules in certain areas, including competition and mergers. There are twenty Commissioners, two each from France, Germany, Italy, Spain, and the U.K., and one each from the ten smaller states. Commission members agree to work for the general interest of the EU as a whole, and to be "completely independent" of their state. See Derek W. Urwin, *From a Europe of States to a State of Europe?* in THE EUROPEAN UNION HANDBOOK 3, 16-18 (Philippe

approved the takeover unconditionally by a four-to-one vote, ruling that the merger would not “substantially lessen competition in any relevant market.”² However, three days later on July 4, the European Union’s (EU) Antitrust Advisory Committee virtually ignored the FTC’s decision and recommended that the Boeing and McDonnell Douglas merger be blocked on the grounds that the merger would harm fair trade.³ On July 10, just thirteen days before the European Commission’s deadline for approval, a spokesperson for Karel Van Miert, the European Competition Commissioner, reiterated that the merger would not be approved unless Boeing came up with satisfactory concessions to address the European Commission’s concerns over the merger.⁴

The growing dispute led to threats of retaliation and sanctions by the United States if the EU did not approve the merger.⁵ Tensions between the two entities rose to such a point that President Clinton had to personally intervene “at the eleventh hour to head off one of the most bruising trade disputes between Europe and the United States in recent years.”⁶ After intense private negotiations and public acrimony, the

Barbour ed., 1996). See also THE EUROPEAN UNION HANDBOOK, *supra*, at 303.

2. John-Thor Dahlburg, *Europe Panel Rejects Boeing Merger Plan*, L.A. TIMES, July 5, 1997, at A1 [hereinafter Dahlburg, *Europe Panel Rejects*]. See also Karen West, *EU Panel Rejects Boeing Merger*, SEATTLE POST-INTELLIGENCER, July 17, 1997, at C1 [hereinafter West, *EU Panel*].

3. See *Eu Panel*, *supra* note 2. European officials stated that the FTC approval of the merger was irrelevant to their ruling. See Dahlburg, *Europe Panel Rejects*, *supra* note 2. The advisory committee found that the merger would reinforce Boeing’s “existent dominant position and therefore should be prohibited.” The reason, according to one EU official, was because the committee decided that Boeing’s willingness to modify its long-term contracts which bound three U.S. airlines (American, Delta, and Continental) to buy only Boeing planes, was “not sufficient” to meet the EU’s concerns in preventing Boeing from gaining too large a share of the commercial airliner market. *Id.*

4. See *Merger Control: Boeing Working Towards Accommodation with European Commission*, EUR. REP., July 12, 1997, available in LEXIS, Eurcom Library, Ecnnews File. The spokesperson stated that the concessions must be “structural” remedies, which he explained would include: Boeing selling off parts of the merged company’s manufacturing business, licensing some of its technology, and renouncing the exclusive contracts with major U.S. airlines. *Id.* See also Karen West, *Boeing Intensifies Merger Negotiations With EU*, SEATTLE POST-INTELLIGENCER, July 11, 1997, at B1.

5. See Steven Pearlstein & Anne Swardson, *U.S. Gets Tough to Ensure Boeing, McDonnell Merger; Retaliation Plan in Works as Europe Threatens*, WASH. POST, July 17, 1997, at C1. See also West, *EU Panel*, *supra* note 2. Rep. Norm Dicks of Washington State where Boeing is located stated: “We could be heading for a major trade war with the EU over this If they make unrealistic demands, the United States government is going to have to retaliate.” *Id.* See also Karen West, *Boeing Gets Working on EU to Take Merger*, SEATTLE POST-INTELLIGENCER, July 9, 1997, at B5 [hereinafter West, *Boeing*]. A senior U.S. trade official said that the U.S. could file a complaint against the EU with the World Trade Organization by declaring any fine against Boeing an illegal tariff, as well as impose sanctions on products from individual EU nations. See *id.*

6. Ralph Vartabedian & John-Thor Dahlburg, *European Union OKs Boeing Deal*

European Commission finally approved Boeing's takeover, but only after Boeing agreed to numerous concessions and conditions,⁷ which will be discussed below.

During the height of the dispute, several lawmakers, as well as the general public, questioned why the EU even had the right to approve or disapprove a merger between two American corporations.⁸ This

With McDonnell, L.A. TIMES, July 24, 1997, at A1. See also Peter Kaplan & Lorraine Woellert, *EU Won't Fight Boeing-McDonnell Merger*, WASH. TIMES, July 24, 1997, at B7. President Clinton personally lobbied European officials during the final days before the European Commission decision. *Id.* Clinton also put pressure on the Commission by publicly threatening to go to the World Trade Organization if the EU moved against the Boeing and McDonnell Douglas merger, and hinted at retaliatory sanctions against the EU as well. See Alison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, N.Y. TIMES, July 18, 1997, at D2. See also Eleanor M. Fox, *Antitrust Regulation Across National Borders: The United States of Boeing versus the European Union of Airbus*, 16 BROOKINGS REV. 30, 30 (1998).

7. See *Commission Approves Boeing-McDonnell Douglas Merger*, EUR. REP., Aug. 2, 1997, available in LEXIS, Eurcom Library, Ecnews File; *Merger Control: Boeing Merger Approval Points up Lessons for Regulators and Industry*, EUR. REP., July 26, 1997, available in LEXIS, Eurcom Library, Ecnews File [hereinafter *Merger Control*]; Karen West, *Final Hurdle Cleared as EU Approves Deal*, SEATTLE POST-INTELLIGENCER, July 31, 1997, at C1. See also Eleanor M. Fox, *Lessons From Boeing: A Modest Proposal to Keep Politics Out of Antitrust*, [1997] Antitrust Rep. (MB) 19 (Nov. 1997), for a discussion of the "political escalation" of tensions between the U.S. and EU, and the reasons for the politicization of the Boeing-McDonnell Douglas merger.

8. See Lorraine Woellert & Peter Kaplan, *EU Fears Could Hinder Boeing-McDonnell Move*, WASH. TIMES, July 8, 1997, at B6. In response to the Senate's outrage towards what lawmakers saw as the EU's interference with a deal between two American companies, the Senate Commerce Committee was, at the time, initiating plans to hold hearings on the matter in late July 1997. See *id.* According to one Commerce Committee aide, "A lot of the (Commerce) committee members feel like it's pretty presumptuous for the EU to intervene at this point." *Id.* See also Kaplan & Woellert, *supra* note 6. In the House, more than one hundred members voted to send a letter to the President of the European Commission, Jacques Santer, declaring that the EU's position was "unacceptable." *Id.* However, according to EU law, the European Commission does have authority to review the merger. Under the Merger Regulation which took effect in 1990, the Member States granted the European Commission sole authority to review and approve large mergers, acquisitions and joint ventures. Commission Regulation 4064/89, 1990 O.J. (L257) 13. See also Joseph P. Griffin, *Mergers, Joint Ventures and Takeovers*, in EUROPEAN UNION LAW AFTER MAASTRICHT, 425, 425 (Ralph H. Folsom et al. eds., 1996). The Commission has authority under this regulation to review business combinations, including those involving U.S. and other foreign companies, when the following financial thresholds are met: 1) the transaction involves a combined worldwide annual turnover of at least \$5.6 billion; and 2) two or more of the parties involved in the transaction each have sales of at least \$280 million in the EU; unless 3) each of the parties to the transaction generates more than two-thirds of its EU sales within the same Member state. Commission Regulation 4064/89, *supra*, art. 1(2). See also Griffin, *supra*, at 425-26; West, *supra* note 4, at B1. As a result, the Commission is required to review whether the merger of foreign firms would threaten

sentiment was perhaps best summarized by Senator Slade Gorton, R-Washington, when he said: "I am outraged the Europeans are asserting antitrust authority in an extraterritorial manner where there is no relevance, other than the fact that we sell airplanes in their market."⁹ Although the EU could not have actually blocked the merger, it did have the authority to impose multi-billion dollar fines based on ten percent of Boeing's world income, if it had found that the merger would adversely affect free trade in Europe.¹⁰ The EU could have also imposed other sanctions and conditions which would have made it very difficult for Boeing to sell its aircraft in the EU countries.¹¹

Just a year before, in 1996, the U.S. Federal Trade Commission required two Swiss pharmaceutical companies that had merged, Ciba-Giegy Ltd. and Sandoz Ltd., to sell off key units of their business and to license a patent to a competitor as a condition for approval of their merger.¹² The FTC reached its decision on the grounds that the merger in Switzerland could "quash" domestic competition and thus cause harm to consumers in the United States, despite the fact that European

competition within the EU, even if neither company had any facilities within the EU, as long as their worldwide and EU sales met the threshold requirements. See Griffin, *supra*, at 426.

9. West, *EU Panel, supra* note 2, at C1. Senator Gorton represents the state of Washington, where Boeing's headquarters and main manufacturing facilities are located. See Dahlburg, *Europe Panel Rejects, supra* note 2, at A1.

10. See *Boeing Merger Sparks Meetings Between U.S., EU*, L.A. TIMES, July 14, 1997, at D2. Under the Merger Regulation, the Commission's powers of investigation include the authority to impose financial sanctions of fines up to ten percent of worldwide turnover. Commission Regulation 4064/89, *supra* note 8, art. 14. The consolidated annual turnover of the newly merged Boeing and McDonnell Douglas companies is approximately \$50 billion and so, a ten percent fine would equal about \$5 billion. See Mark Rice-Oxley, *EU Threat to Boeing: Law and Politics*, NAT'L L.J., June 9, 1997, at B1.

11. See Christopher Carey, *European Aide Blasts Mac, Boeing Merger*, ST. LOUIS POST-DISPATCH, May 13, 1997, at 06C; Kaplan & Woellert, *supra* note 8, at B6. The European Union currently has fifteen member nations, including all the major economic powers and markets of Western Europe. Such members include: Germany, France, the United Kingdom, Italy, and Spain. See Urwin, *supra* note 1, at 14. As a result, the EU is a large and lucrative market, with an aggregate population and gross product exceeding that of the United States and Canada combined. See 2 RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS § 27.8 (1995). If Boeing was fined ten percent of its consolidated annual turnover, this expense would most likely be transferred and incurred by European companies doing business with Boeing. In addition, European officials could seize Boeing's property assets within the EU if Boeing failed to pay the fine. See Woellert & Kaplan, *supra* note 8, at B6. Under the Merger Regulation, the Commission also has the power to impose divestiture orders. Commission Regulation 4064/89, *supra* note 8, art. 8(4).

12. See Woellert & Kaplan, *supra* note 8, at B6. Specifically, the FTC forced the companies to sell a pet care unit, which was bought by a California company, Central Garden and Pet Co. The FTC also ordered the companies to divest their corn-herbicide business, which was bought by BASF, a German company. The companies' gene-therapy patent was licensed to a French competitor, Rhone-Poulenc Rorer SA. See *id.*

officials had little concern over the deal.¹³ Similarly, the EU, in approving the Boeing and McDonnell Douglas merger, also imposed several conditions that Boeing had to comply with, including: the licensing out of patents to other aircraft manufacturers (including Airbus) which are obtained through McDonnell Douglas' military contracts; maintaining McDonnell Douglas' commercial aircraft business as a separate legal entity for ten years; and giving up its exclusive buying agreements with major U.S. airlines.¹⁴

Due to the increase of "mega-mergers" between corporations trying to compete in the global economy, cross-border regulation of mergers and acquisitions by both the United States and the European Union has become much more common.¹⁵ Until recently, such reviews and

13. *Id.* See discussion *infra* Part IV.B.1.

14. See *Merger Control*, *supra* note 7; Kaplan & Woellert, *supra* note 6, at B6. At the time of the proposed merger, McDonnell Douglas had a six percent share of the world market for large aircraft (having a capacity of over 100 seats). The merger would increase Boeing's share of the market for large aircraft to seventy percent. In addition, the merger of McDonnell's commercial aircraft business would increase Boeing's customer base to eighty-four percent from sixty percent at the time of the proposed merger. See Amelia Torres, *EU Details Concerns about Boeing, McDonnell Deal*, THE REUTER EUR. COMMUNITY REP., May 23, 1997, available in LEXIS, Eurcom Library, Ecnws file. At the time of the merger, McDonnell Douglas was the world's second largest defense manufacturer, and the leading manufacturer of military aircraft. As a result, Boeing's acquisition of McDonnell's defense business greatly enhances Boeing's access to government-funded R&D and intellectual property. This increase in know-how provides substantial advantages to Boeing by increasing the benefits gained from the transfer of military technology to commercial aircraft. Boeing's dominance would be considerably strengthened to the detriment of its competitors if Boeing were allowed to exclusively hold the patent rights to such technology. See *The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations*, RAPID, July 30, 1997, Press Release, IP: 97/729, available in LEXIS, Eurcom Library, Ecnws file. The effect of Boeing's concession on the twenty-year exclusive contracts it had with Delta, American, and Continental Airlines is unclear at this time. The three airlines had placed orders for 240 new aircraft under the contracts, and Boeing Chairman Phil Condit has maintained that these customers were unlikely to reduce their orders as a result. The European Commission viewed the concession as an important one, and Airbus believed that the removal of the exclusivity clauses would at least provide "an opportunity to make sales pitches to top airline executives," and thus weaken the competitive advantage which Boeing had under the long-term contracts. Although Condit stated that the concession would have little or "zero" impact on Boeing's bottom line, he did admit that Boeing had been reluctant to give up the exclusivity clauses right up to the "eleventh hour" before the European Commission's final decision on the merger. *Merger Control*, *supra* note 7. See also Adam Bryant, *Concession with Little Immediate Effect*, N.Y. TIMES, July 24, 1997, at D5.

15. See Woellert & Kaplan, *supra* note 8, at B6. According to William Baer, director of the FTC Bureau of Competition, cross-border regulation has dramatically increased over the past five years to the point where "[t]wenty-five to 30 percent of what

regulatory acts by foreign regulators only rarely caused trade disputes or tensions in diplomatic relations.¹⁶ In order to maintain cooperation and prevent serious disputes over regulation of each other's domestic corporations, the United States and the European Union entered into an agreement on the application of antitrust laws in 1991.¹⁷

This U.S./EC Agreement on Antitrust Cooperation and Coordination¹⁸ is based on the concepts of voluntary cooperation and "positive comity."¹⁹ Under Articles VI and VII, the parties agree to recognize the interests of each side and to provide for regulators on both sides to coordinate and regularly consult with each other on anti-trust matters.²⁰ Under the concept of "positive comity" incorporated in Article V of this Agreement, U.S. and EU regulators may request the other side to initiate appropriate enforcement activities, if the requesting party believes that its important interests are being adversely affected by anticompetitive practices in the other party's territory.²¹

we do involves foreign firms, mergers and non-mergers." *Id.* During the period between 1991 and 1996, the European Commission reviewed at least twenty-four transactions in which both parties were foreign firms and had headquarters outside of the EU. *See* Griffin, *supra* note 8, at 449 & n.88.

16. *See* Woellert & Kaplan, *supra* note 8, at B6. Examples of mergers which have faced little opposition from either U.S. or EU antitrust authorities include: Gillette's \$7.1 billion purchase of Duracell International Inc. in December, 1996, and the former \$20.8 billion merger of British Telecom and MCI Telecommunications in 1994. *See id.* The \$9.7 billion purchase of American Cyanamid Co. by American Home Products Corp. was also cleared in 1994. *See* Doug Abrahms, *EU Plans Probe of U.S. Plane Merger*, WASH. TIMES, Jan. 23, 1997, at B7.

17. *U.S., EC Commission Forge Antitrust Cooperation Accord*, 61 Antitrust & Trade Reg. Rep. (BNA) 375 (Sept. 26, 1991). In March, 1990, Sir Leon Brittan, Vice President of the European Commission and also responsible for EC competition policy, made a remark after a speech in New York that, since both the EC and the U.S. have "forward doctrines of jurisdiction when it comes to antitrust matters," he believed that an accord could prevent potential disputes and conflicts. *Id.* The fact that this accord was finalized and signed by the U.S. and the EC within eighteen months of Brittan's remark indicated both sides' desire to respond to their awareness of the increasing globalization of markets with a cooperative antitrust agreement which would establish "boundaries on notification, information exchange, consultation, and confidentiality." *Id.*

18. Agreement Between the Government of the United States of America and The Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487, 1491 (1991) [hereinafter U.S./EC Agreement].

19. As discussed in Part IV.B below, an inherent weakness of this agreement is that cooperation and positive comity are not required. Both parties have full discretion in deciding whether or not to take any enforcement action, either under positive comity when the party has been requested to do so, or under the cooperation and comity provisions of Article VI. *See* U.S./EC Agreement, *supra* note 18, arts. V ¶ 4 & VI, at 1498-1500. *See also infra* Part IV.B and accompanying notes.

20. U.S./EC Agreement, *supra* note 18, arts. VI, VII ¶¶ 1-2, at 1498-1501. *See also* U.S., *EC Commission*, *supra* note 17, at 377.

21. U.S./EC Agreement, *supra* note 18, art. V ¶¶ 1-2, at 1497-98. *See also* U.S., *EC Commission*, *supra* note 17, at 376-77. This agreement introduced the concept of

However, the contentious nature of the approval process for both the Boeing/McDonnell Douglas and the Ciba-Giegy/Sandoz mergers,²² seem to indicate that the concepts of cooperation and positive comity under the U.S./EC Agreement are no longer being practiced. Although the parties agreed to consider each side's important interests in determining whether or not to initiate an investigation, and could also ask the other party to initiate appropriate enforcement, there was little cooperation or recognition of each side's interests between the U.S. and EU in both of these mergers.²³ The European Commission virtually ignored the findings of the FTC in the Boeing merger, while the FTC made a contrary ruling to the European regulators in the Ciba-Giegy merger.²⁴

In addition, a Supreme Court decision subsequent to the U.S./EC Agreement, *Hartford Fire Insurance Co. v. California*,²⁵ established an alternative "true conflicts" approach to extraterritorial jurisdiction of antitrust laws.²⁶ In this case, the Supreme Court ruled that U.S. courts should not incorporate the principle of comity in considering the interests of a foreign sovereignty, unless there is a true conflict between the laws of the two countries.²⁷ After this decision, in 1995, the Department of Justice issued new guidelines for international antitrust enforcement.²⁸ With respect to comity, the guidelines specifically refer

"positive comity," which "permits one authority to request the other authority to initiate appropriate enforcement activities." *Id.* See also discussion *infra* Part IV.A.

22. See *supra* pp. 1163-66.

23. See *id.* See also *supra* notes 20 & 21.

24. See *supra* pp. 1163-66.

25. 509 U.S. 764 (1993).

26. *Id.* at 798-99. Justice Souter cites Comment e of the Restatement (Third) of Foreign Relations Law in determining why a "true conflict" between U.S. and British law did not exist. *Id.* Comment e defines a conflict between the regulations of two states as:

[W]hen one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section [§ 403 - Limitations on Jurisdiction to Prescribe] is otherwise impossible. [True conflict] does not [exist] where a person subject to regulation by two states can comply with the laws of both; for example, where one state requires keeping accounts on a cash basis, the other on an accrual basis. [True conflict] does not [exist] merely because one state has a strong policy to permit or encourage an activity which another state prohibits, or one state exempts from regulation an activity which another regulates.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1987) [hereinafter RESTATEMENT (THIRD)].

27. See *Hartford Fire*, 509 U.S. at 798-99. See also discussion *infra* Part III.B.3.

28. See U.S. Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations, April 5, 1995, 68 Antitrust &

to the “true conflict” analysis of *Hartford Fire*, and state that international comity analysis is a factor only when there is a true conflict between the laws of the two states.²⁹

This Comment will analyze what status and role the principle of comity will have in resolving future conflicts of antitrust laws, in view of the Boeing/McDonnell Douglas merger, as well as the *Hartford Fire* decision and the 1995 Department of Justice guidelines. Specifically, the following issues will be addressed: 1) What role, if any, did the principle of comity have in the final EU approval of the Boeing/McDonnell Douglas merger, and what is the role of comity in resolving extraterritorial antitrust disputes between the U.S. and the EU after Boeing? 2) During the height of the dispute, acting assistant attorney general for antitrust, Joe Klein, flew to Brussels and told the Europeans that vital economic and military interests of the U.S. were at stake, and that the Clinton administration would not tolerate any interference with such a key industry.³⁰ Given the “realpolitik” concept that every nation will protect its own economic interests as evidenced by the Boeing merger dispute,³¹ can the current U.S./EC agreement based on the concept of “positive comity” continue to be a viable framework for resolving antitrust jurisdiction disputes? 3) Can comity be successfully utilized to resolve future conflicts of antitrust laws, or is there a need for an international agreement providing uniform standards for antitrust jurisdiction?

Part II of this Comment summarizes the legal basis for extraterritorial application of antitrust law by both the United States and the European Union. Part III outlines the principle of comity and the development in the United States of the comity principle’s role in resolving conflicts of antitrust law. Part IV critiques the U.S./EC Antitrust Cooperation Agreement and its effectiveness during the Boeing merger dispute. Part V analyzes the current status and role of comity after the Boeing merger dispute. Part VI provides an overview and comparison of other bilateral agreements and models for resolution of conflicts in antitrust laws. Part VII concludes that, with the increasing number of countries expanding their antitrust/competition laws and the growth in “mega-mergers” which have widespread impact in a global economy, there is a need for an international agreement within a forum such as the World Trade Organization to provide uniform rules for antitrust enforcement.

Trade Reg. Rep. (BNA) Special Supplement (Apr. 6, 1995), reprinted in MATTHEW BENDER, ANTITRUST LAWS AND TRADE REGULATION PRIMARY SOURCE PAMPHLET, 137 (2d ed. 1997) [hereinafter 1995 DOJ Guidelines].

29. *Id.* ch. 3.2, at 157.

30. See Pearlstein & Swardson, *supra* note 5, at C1.

31. See *supra* pp. 1163-65.

II. LEGAL BASIS FOR EXTRATERRITORIAL ANTITRUST JURISDICTION

A. *United States: The Sherman Act*³²

The Sherman Act, which governs U.S. antitrust law, includes two basic prohibitions. In Section 1, every “contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade” is illegal.³³ Section 2 makes it illegal for an individual to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize” any part of commerce or trade.³⁴ Both Sections 1 and 2 contain specific language that these prohibitions apply to trade or commerce “with foreign nations.”³⁵ In addition, Section 6a provides for extraterritorial application of the Sherman Act on foreign enterprises conducting restraints on trade that have a “direct, substantial, and reasonably foreseeable effect” on the domestic U.S. market.³⁶

The right to apply the Sherman Act prohibitions to foreign commerce that is either intended to or does affect the U.S. market was judicially upheld in *United States v. Aluminum Co. of America*.³⁷ In this case, the Sherman Act antitrust laws were applied to a foreign cartel that acted almost completely outside of the U.S. by making its agreements in Switzerland, but still caused restraint on U.S. imports by agreeing to

32. Sherman Act of 1890, 15 U.S.C. §§ 1-7 (1994).

33. *Id.* § 1. Specifically, Section 1 provides: “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, is declared to be illegal.” *Id.*

34. *Id.* § 2. Specifically, Section 2 provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .” *Id.*

35. *Id.* §§ 1-2.

36. *Id.* § 6a. Section 6a provides:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless – (1) such conduct has a direct, substantial, and reasonably foreseeable effect – (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

Id.

37. 148 F.2d 416 (2d Cir. 1945).

limit the amount of aluminum to be sold in the U.S.³⁸ Judge Learned Hand developed the “effects test,” for governing the extraterritorial application of U.S. antitrust laws. Under this test, any agreement made by foreign corporations is illegal if it was either intended to or does affect commerce within the U.S. in an unlawful manner under the Sherman Act.³⁹ Judge Hand based this “effects test” on the principle that if a foreign corporation’s conduct outside the state’s borders has consequences within that state’s borders, then that state may impose liabilities even upon those corporations “not within its allegiance.”⁴⁰

B. *European Union: Articles 85 and 86 in the Treaty of Rome*

European Union competition law arises directly from Articles 85 and 86 of the Treaty of Rome of 1957.⁴¹ Article 85 prohibits agreements and concerted practices in restraint of trade.⁴² Article 86 prohibits the “abuses of [a] dominant position,” and also regulates single and multiple party activities.⁴³

38. *See id.* at 443-45.

39. *Id.* at 444-45.

40. *Id.* at 445.

41. *See* Stephen Johnson, *EU Competition Law*, in *EUROPEAN UNION LAW AFTER MAASTRICHT*, 341 (Ralph H. Folsom et al. eds., 1996). The signatory nations of the Treaty of Rome were: France, West Germany, Italy, Netherlands, Belgium, and Luxembourg. *See* Urwin, *supra* note 1, at 13. The Treaty of Rome was incorporated into the Treaty on European Union which created the current European Union. *See* Treaty on European Union, Feb. 7, 1992, tit. II, 31 I.L.M. 247 [hereinafter Treaty on European Union]. *See also* RALPH H. FOLSOM, *EUROPEAN UNION BUSINESS LAW SOURCEBOOK* 1, (1995). The signatory nations were: Belgium, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, and the United Kingdom. *See* Treaty on European Union, *supra*, 31 I.L.M., at 247.

42. *See* Johnson, *supra* note 41, at 342-43. Article 85(1)-(2) states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling price or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

Treaty of Rome, March 25, 1957, art. 85(1)-(2), *reprinted in* FOLSOM, *supra* note 41, at 1, 36-37 [hereinafter Treaty of Rome].

43. *See* Johnson, *supra* note 41, at 343-44. Article 86 provides in full:

There are three distinctive features of EU competition law: 1) EU competition law aims to ensure that the Common Market works effectively; 2) The Competition Commission can exempt normally prohibited agreements which restrict competition from the Article 85 prohibitions, if there are certain benefits for efficiency and consumers; and 3) EU industrial policy. Community integration and fairness to individual competitors or consumers are an important part of the EU analysis for competition jurisprudence.⁴⁴

The key language in Article 85 is that the agreements, undertakings, and concerted practices that are prohibited are those that "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."⁴⁵ Article 86 has similar language, by prohibiting any abuses of a dominant position "within the common market or . . . in so far as it may affect trade between Member States."⁴⁶ Although the language of both Articles 85 and 86 do not specifically include commerce with "foreign nations" as the Sherman Act does, both articles certainly leave open the possibility for interpretation of extraterritorial application, by prohibiting any agreement or act which has an "effect" on the "Member States."

Indeed, the Commission and European Court of Justice have taken such a broad view of EU competition law and have found jurisdiction for actions by non-European companies directed at the EU Common Market.⁴⁷ For example, the European Court of Justice extended

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Treaty of Rome, *supra* note 42, art. 86, at 37-38.

44. See Johnson, *supra* note 41, at 341-42.

45. Treaty of Rome, *supra* note 42, art. 85(1), at 36-37. See also Johnson, *supra* note 41, at 342-43.

46. Treaty of Rome, *supra* note 42, art. 86, at 37-38. See also Johnson, *supra* note 41, at 343-44.

47. See Johnson, *supra* note 41, at 347-48.

extraterritorial application of Article 86 to Commercial Solvents, a Maryland company that refused to sell its product to a competitor of its affiliate in the EU.⁴⁸ The Court stated that conduct outside of the EU which merely had repercussions on the Common Market competitive structures fell within the parameters of Article 86, and ordered Commercial Solvents, through its Italian affiliate, to supply the competitor at a reasonable price.⁴⁹

The Court of Justice also expanded the extraterritorial application of Article 85 in a case where the Court fined woodpulp producers from the United States, Canada, Sweden, and Finland for price-fixing activities which affected EU trade and competition.⁵⁰ This case is significant because EU competition laws were applied extraterritorially, even though all the firms involved were primarily exporters to the Common Market, and did not have substantial operations within the EU.⁵¹ In another case, the Court applied Articles 85 and 86 extraterritorially to airfares in and out of the community.⁵² Based on these decisions, it

48. See Case 6, 7/73, *Commercial Solvents Corp. v. Commission*, 1974 E.C.R. 223, 13 C.M.L.R. 309 (1974).

49. See *id.* The Court found that Commercial Solvents exercised enough control over its Italian subsidiary that the two companies should be treated as a "single undertaking" under Article 86. *Id.* at 253-54, 13 C.M.L.R. at 343. The Court also found that Commercial Solvents held a dominant position, i.e. a world monopoly on certain chemicals used to manufacture ethambutol, and abused that dominant position by refusing to supply those raw materials to a major manufacturer of ethambutol in the EC. See *id.* at 250-51, 13 C.M.L.R. at 340-41. The Court allowed the Commission to force Commercial Solvents to supply to the EC manufacturer (Zoja), because otherwise Commercial Solvents would have been able to control the cost price of Zoja to the extent that Zoja's production of ethambutol would likely have become unmarketable. See *id.* at 256, 13 C.M.L.R. at 345. The Court found this "effect" to fall within the language of Article 86, which, again, prevents the abuse of a dominant position that "may affect trade between Member States." *Id.* at 252-53, 13 C.M.L.R. at 340-42.

50. See Case 89, et al./85, *A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901 (1988) [hereinafter *Wood Pulp Case*]. In the judgment of the Court, the combined cases (case 89, et. al./85) were referred to as "wood pulp". 1988 E.C.R. at 5233.

51. 1988 E.C.R. at 5242-43, [1988] 4 C.M.L.R. at 940-41. The Court in its judgment noted that although the main sources of wood pulp in the global market were countries outside the EU, if these producers sold directly to EU purchasers and "engage[d] in price competition in order to win orders" from EU customers, then that qualified as competition within the EU. *Id.* Having determined that the non-European producers qualified under competition rules in the EU, the Court concluded that Article 85 applied because these producers both "concert[ed]" and put into effect that concentration by selling at coordinated prices which had the "object and effect" of restricting competition within the EU under the meaning of Article 85. *Id.* at 5243, [1988] 4 C.M.L.R. at 941.

52. Case 66/86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*, 1989 E.C.R. I-838, [1990] 4 C.M.L.R. 102 (1989). In this case, the Court applied both Articles 85 and 86 to a dominant firm which had succeeded in having tariffs applied by other firms. *Id.* at I-844-51, [1990] 4 C.M.L.R. at 131-36 (1989). Although Article 85 is usually applied to concerted action while Article 86 is applied to

appears that EU competition laws will be used to find jurisdiction over foreign companies which have activities or conduct business directed at the EU market.⁵³

III. THE PRINCIPLE OF COMITY'S ROLE IN RESOLVING CONFLICTS OF ANTI-TRUST LAWS

A. *The Principle of Comity in Restatement (Third) Foreign Relations Law of the United States*

The concept of comity is defined in the Third Restatement of Foreign Relations Law as follows:

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.

When conflicts arise between two or more nations claiming jurisdiction over a matter (as is increasingly the case in international antitrust disputes), international law provides this doctrine of comity for resolving such conflicts, because there is no rule of principle under international law for resolving issues related to concurrent jurisdiction.⁵⁵

unilateral action by a dominant firm, the Court found that both can apply in a situation such as this case, where an agreement is entered into and that agreement masks the dominant firm's exercise of its market power. See 2 Eur. Union L. Rep. (CCH) ¶ 2001 & n.21.

53. See Johnson, *supra* note 41, at 348.

54. RESTATEMENT (THIRD), *supra* note 26, INTERNATIONAL LAW DEFINED § 101 cmt. e, (1987) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

55. See Robert C. Reuland, *Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT'L L.J. 159, 192 (1994). Reuland notes that although comity can be viewed as the "international equivalent of the Golden Rule" in requiring states to "do unto others as they would have done unto them," comity is criticized for being vague and "airy." *Id.* For other criticism of the comity doctrine, see Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L., 280 (1982). Maier observes that:

In Anglo-American law the extension of comity to another nation is viewed as a unilateral decision of the forum, not as an act required by a rule of the public international system. This emphasis on the voluntary nature of the doctrine has led to its use to describe an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith. Like the concept

The objective of a comity analysis is to determine which of the nations that have a basis for jurisdiction has the superior or most "reasonable" claim.⁵⁶ Comity, therefore, does not determine whether a nation has extraterritorial jurisdiction. Rather, once jurisdiction exists among two or more nations, comity is utilized to determine whether a nation should exercise its jurisdiction.⁵⁷ However, the doctrine of comity can be considered limited in its effectiveness because, as stated above in the *Restatement (Third)* definition of comity, it is not a legal obligation and therefore is not legally binding.⁵⁸

In determining whether a nation can assert its existing jurisdiction extraterritorially,⁵⁹ the *Restatement (Third)* limits the exercise of such jurisdiction if it is unreasonable.⁶⁰ Under this "principle of reasonableness," several factors are delineated to determine whether extraterritorial jurisdiction is reasonable or not.⁶¹ If it is not

of public policy in the conflict of laws, the label "comity" in modern times has sometimes come to serve as a substitute for analysis.

Id. at 281.

56. See *RESTATEMENT (THIRD)*, *supra* note 26, § 403 cmts. d, e.

57. See Reuland, *supra* note 55, at 194.

58. See *supra* note 54. See also Reuland, *supra* note 55, at 192-94 ("A state's failure to account for comity does not breach international law and subjects a state to no penalty greater than another state's refusal to reciprocate."). *Id.* at 194; Maier, *supra* note 55, at 281. Maier states that "The doctrine of comity is not a rule of public international law . . ." *Id.*

59. Section 402 of the *RESTATEMENT (THIRD)* establishes the general basis for jurisdiction, including extraterritorial jurisdiction:

Subject to Section 403, a state has jurisdiction to prescribe law to: a) conduct that, wholly or in substantial part, takes place within its territory; b) the status of persons, or interests in things, present within its territory; [and] c) conduct outside its territory that has or is intended to have substantial effect within its territory.

See *RESTATEMENT (THIRD)*, *supra* note 26, § 402(1)(a)-(c).

60. See *id.* § 403(1). Section 403(1) states in full: "Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Id.*

61. *Id.* § 403(2). The *RESTATEMENT (THIRD)* has eight considerations relevant to determining whether a particular exercise of jurisdiction is reasonable. They are:

- a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which the other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- d) the existence of justified expectations that might be protected or hurt by the regulation;

unreasonable for two or more nations to exercise jurisdiction, then according to the *Restatement (Third)*, each nation is obligated to evaluate both its own and the other state's interest in exercising jurisdiction under the factors listed in section 403(2),⁶² and a nation "should defer" to the other nation if that nation's interest is clearly greater.⁶³

It is interesting to note how the *Restatement (Third)* both differentiates and integrates the concepts of comity and the principle of reasonableness. Comment (a) of section 403 specifically states that the "principle of reasonableness" is a rule of international law,⁶⁴ whereas "comity" is specifically distinguished from international law in the *Restatement (Third)*'s definition of international law.⁶⁵ Comment (a) notes that although some courts in the United States have applied the principle of reasonableness as "a requirement of comity," this principle is independent of comity, and applies regardless of the relationship between the jurisdiction-exercising nation and the nation whose interests are affected.⁶⁶

The concept of comity is also integrated in the reasonableness principle, both in considering the factors for determining reasonableness in section 403(2),⁶⁷ and when there are conflicting reasonable exercises of jurisdiction between two countries.⁶⁸ However, according to the language of section 403(3) and subsequent explanation in comment (e),

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- e) the importance of the regulation to the international political, legal, or economic system;
 - f) the extent to which the regulation is consistent with the traditions of the international system;
 - g) the extent to which another state may have an interest in regulating activity; and
 - h) the likelihood of conflict with regulation by another state.

Id.

62. *Id.*

63. *Id.* § 403(3).

64. *Id.* cmt. a.

65. *Id.* § 101 cmt. e.

66. *Id.* § 403 cmt. a.

67. *Id.* Comment (a) refers to the "reciprocity" element of comity and states that some elements of reciprocity may be relevant in considering the Section 403(2) factors. In addition, Reporter Note 6 states that for subsections (2)(g) and (h) (*see supra* note 61), as well as for Section 403(3), "it may be necessary to identify and weigh the respective interests of the concerned states in regulating (or refraining from regulating) a given activity or transaction."

Id. § 403(3) rep. note 6 (1986).

68. *See id.* § 403(3) & cmt. e.

although each nation is required to evaluate both its interests and the interests of the other nation, the *Restatement (Third)* appears to give a nation discretion in deferring to the nation with the greater interest, by stating that a nation “should” defer.⁶⁹ Therefore, it appears that the role of comity for the principle of reasonableness rule is to provide a means to determine whether already-existing jurisdiction which could be reasonably exercised should be asserted, whereas the principle of reasonableness determines whether extraterritorial jurisdiction exists, independent of any comity analysis.

With regards to extraterritorial jurisdiction of anti-competitive activities, section 415 provides for extraterritorial jurisdiction over any agreement or conduct carried on outside of the U.S. if the principal purpose is to interfere with the commerce of the U.S. and has some effect on commerce,⁷⁰ or if it has a substantial effect on U.S. commerce.⁷¹ Any exercise of extraterritorial jurisdiction under this section however, is subject to the general principles of sections 402 and 403, and is only allowed if the exercise of such jurisdiction is reasonable.⁷² Therefore, the concept of comity has an inherent role in determining the exercising of extraterritorial jurisdiction of U.S. anti-competitive laws, but only within its application under the principle of the reasonableness rule.

69. *Id.* Section 403(3) states in full:

When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, *each state has an obligation to evaluate* its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); *a state should defer* to the other state if that state’s interest is clearly greater.

Id. (emphasis added). *See also* Reuland, *supra* note 55, at 202-03.

70. RESTATEMENT (THIRD), *supra* note 26, § 415(2). Section 415(2) provides in full:

Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

Id.

71. *See id.* § 415(3). Section 415(3) provides in full: “Other agreements or conduct in restraint of the United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.” *Id.*

72. *See id.* cmt. a.

B. *Development of the Application of Comity in the Exercising of Extraterritorial Jurisdiction of U.S. Antitrust Laws*

1. *Jurisdictional Rule of Reasoning: The Timberlane Lumber Case*

The seminal case for establishing the concept of comity in the extraterritorial jurisdiction analysis is *Timberlane Lumber Co. v. Bank of America*.⁷³ Prior to this case, the prevailing U.S. approach for establishing extraterritorial jurisdiction of its antitrust law was the “effects test,” established in 1945 by Judge Learned Hand in *U.S. v. Aluminum Co. of America* [hereinafter *Alcoa*].⁷⁴ This case held that if an agreement made outside of the United States was intended to affect U.S. imports or exports and did have an actual effect, then the Sherman Act would apply.⁷⁵

In *Timberlane*, the lumber company alleged that Bank of America and other U.S. and Honduran companies conspired to prevent Timberlane, through its Honduras subsidiaries, from milling lumber in Honduras and exporting it to the United States. The intended effect was to maintain control of the Honduran lumber export business among a few selected individual companies financed and controlled by the Bank. The district court dismissed the case for lack of jurisdiction and because there was no substantial effect on U.S. foreign commerce, which was deemed as a prerequisite for jurisdiction.⁷⁶

The Ninth Circuit held that the “effects test” established in *Alcoa* was “incomplete” to determine whether to exercise jurisdiction, because it failed “to consider other nations’ interests,” and because it did not “take into account the full nature of the relationship between the actors and this country.”⁷⁷ The court specifically stated that “as a matter of international comity and fairness,” the effect on U.S. commerce is not a sufficient basis on its own “on which to determine whether American authority *should* be asserted.”⁷⁸

73. 549 F.2d 597 (9th Cir. 1976).

74. 148 F.2d 416 (2d Cir. 1945).

75. *Id.* at 444-45. Judge Hand declared that it was “settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.” *Id.* at 443.

76. *Timberlane*, 549 F.2d at 601.

77. *Id.* at 611-12 (citations omitted).

78. *Id.* at 613.

As a result, the court adopted the “jurisdictional rule of reason” test, which balances foreign and domestic interests as a preferred approach to determine extraterritorial jurisdiction of antitrust laws, and established a three-part test of jurisdiction.⁷⁹ The requirements for establishing jurisdiction included comity considerations: 1) there had to be some effect on the foreign commerce of the United States; 2) the effect had to be substantial enough to be “cognizable” as a violation of the Sherman Act; and 3) as a matter of international comity and fairness, the interests of the United States had to be strong enough, in balancing the interests of the other nations, to justify the exercising of extraterritorial jurisdiction. The court provided seven factors for consideration when applying its three-part test.⁸⁰

The significance of the *Timberlane* case, therefore, was that the notion of comity was incorporated into the analysis for determining extraterritorial jurisdiction of U.S. antitrust laws. The *Timberlane* approach and evaluating factors were adopted by the *Restatement (Third)*.⁸¹

2. Rejection of Jurisdictional Rule of Reasoning

Although the *Timberlane* approach was adopted by some circuits,⁸² other circuits rejected the balancing approach. In *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*,⁸³ the D.C. Circuit rejected the balancing approach because it believed that courts were not capable of balancing the vital national interests of the United States and other nations to determine which should predominate.⁸⁴ The 7th Circuit in *In re Uranium Antitrust Litigation*⁸⁵ held that comity considerations are discretionary, and should only be considered for the purposes of deciding whether jurisdiction that had already been determined to exist should be asserted.⁸⁶ With regard to the *Timberlane* approach, the court

79. *Id.* at 613-15.

80. *See id.* The seven factors include: 1) the degree of conflict with foreign law or policy; 2) the nationality or allegiance of the parties; 3) the extent to which enforcement by either state can be expected to achieve compliance; 4) the relative significance of effects on the United States as compared to the impact elsewhere; 5) the degree of intent to affect commerce in the U.S.; 6) the foreseeability of the effect; and 7) the relative importance of the violation within the U.S. compared to the importance of the violation elsewhere. *Id.* at 614 (footnotes omitted).

81. *See* RESTATEMENT (THIRD), *supra* note 26, § 403(2).

82. *See, e.g.,* *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 869-71 (10th Cir. 1981).

83. 731 F.2d 909 (D.C. Cir. 1984).

84. *Id.* at 950-52.

85. 617 F.2d 1248 (7th Cir. 1980).

86. *Id.* at 1255.

concluded that *Timberlane* “reaffirms” the *Alcoa* standard of determining when jurisdiction is present.⁸⁷

3. “True Conflict” Approach: The Hartford Fire Case

The biggest setback for the role of comity considerations in resolving conflicts in antitrust laws appears to have occurred with the majority opinion of the Supreme Court in *Hartford Fire Ins. Co. v. California*.⁸⁸ This case stemmed from the consolidated complaints of nineteen states and several private plaintiffs that alleged that the defendants, which included domestic and London-based companies in the insurance industry, violated the Sherman Act by conspiring to force certain primary insurers to change and restrict the terms of their standard commercial general liability insurance coverage and policies to conform with the policies that the defendants wanted to sell.⁸⁹ The states alleged that this agreement which modified the policy forms was a boycott.⁹⁰

With regard to the London-based defendants, the district court dismissed the claims by applying the *Timberlane* analysis and invoking international comity as a basis for declining to exercise jurisdiction.⁹¹ The Ninth Circuit Court of Appeals reversed the district court’s holding, including the issue of extraterritorial jurisdiction.⁹² In addressing the claims against the London-based defendants, the Ninth Circuit also applied the *Timberlane* analysis, but concluded that comity did not bar the exercising of Sherman Act jurisdiction, because only one factor pointed towards the declining of jurisdiction - the conflict with long-established British policy towards the trade of underwriting insurance.⁹³

Justice Souter, writing the opinion for the majority of the U.S. Supreme Court, established at the outset of the holding that the Sherman Act did apply to foreign conduct that was unlawful under the Act, and that was meant to have and did have a substantial effect in the United States.⁹⁴ The Court found that there “undoubtedly” was jurisdiction over

87. *Id.* at 1255 & nn.25 & 28.

88. 509 U.S. 764 (1993).

89. *See id.* at 770-71.

90. *See In re Insurance Antitrust Litigation*, 723 F.Supp. 464, 468 (N.D. Cal. 1989), *rev’d*, 938 F.2d 919 (9th Cir. 1991).

91. *See id.* at 486-87.

92. *See In re Insurance Antitrust Litigation*, 938 F.2d 919, 922, 932-34 (9th Cir. 1991).

93. *See id.* at 932-34.

94. *See Hartford Fire*, 509 U.S. at 796 (citations omitted).

the conduct of the London-based defendants under the Sherman Act.⁹⁵ Justice Souter then rejected the British defendants' argument that consideration of circumstances under international comity would preclude the exercise of Sherman Act jurisdiction.

Justice Souter rejected the argument that a conflict existed between domestic and foreign law, by establishing a narrow definition of "true conflict" as the inability to comply with both domestic and foreign law.⁹⁶ Justice Souter then framed the issue as to whether "there is in fact true conflict between domestic and foreign law," and held that international comity did not preclude the exercise of jurisdiction in this case because British law did not require the defendants to act in a way which was contrary to United States law. Therefore, the defendants could have complied with U.S. law without violating British law; and according to Justice Souter, no true conflict exists between domestic and foreign law when "a person subject to regulation by two states can comply with the laws of both."⁹⁷

The Supreme Court declined to address the issue of whether a court should ever decline the exercise of Sherman Act jurisdiction on the grounds of international comity.⁹⁸ In addition, although the Court cited the *Timberlane* analysis, it did not address the validity of the comity

95. *Id.* at 795-96. The conduct of the defendant British insurance companies allegedly violated Section 1 of the Sherman Act. The British reinsurers allegedly conspired to coerce U.S. primary insurers to offer CGL coverage on a claims-made basis, which would have made "occurrence CGL coverage . . . unavailable in the State of California for many risks." *Id.* at 795 (citations omitted). The defendants also allegedly conspired to limit coverage of pollution risks in North America which would have resulted in making pollution liability coverage unavailable for most casualty insurance purchasers in California. In addition, the defendants allegedly conspired along with domestic retrocessional insurers to eliminate seepage, pollution and property contamination risk coverage in California. *See id.* (citations omitted). In addressing the issue of whether the Sherman Act applied to the conduct of the British defendants, Justice Souter stated: "Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect." *Id.* at 796 (citations omitted). The London reinsurers conceded in their oral argument that a U.S. court had jurisdiction of the Sherman Act claims and instead argued that this extraterritorial jurisdiction should be "restrained" under the principle of comity. *Id.* at 795.

96. *Id.* at 797-99.

97. *Id.* The London reinsurers and British government argued that application of the Sherman Act would conflict with British law because the defendant's alleged conduct was lawful under a regulatory regime over the London reinsurance market established by the British Parliament. *See id.* at 798. In citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 415 Comment j, Justice Souter found that there was no conflict between U.S. and British law because "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct." *Id.* at 799.

98. *Id.* at 799.

analysis of the *Timberlane* three-part test for jurisdiction.⁹⁹ As a result of the Court not addressing these issues, it remains uncertain whether lower courts will continue to use the *Timberlane* approach or incorporate the approach of *Hartford Fire*, which applies a comity analysis only if a true conflict exists.¹⁰⁰

The resulting effect on the role of comity in resolving conflicts of extraterritorial jurisdiction after the *Hartford Fire* case remains unclear, and Justice Souter's opinion is open to a variety of interpretations.¹⁰¹ Several commentators believe that the *Hartford Fire* decision has "swept away" the concept of comity, the rule of reasonableness, and section 403 of the *Restatement (Third)*.¹⁰² Andreas F. Lowenfeld, a reporter for the *Restatement (Third)*, and a member of the legal team that prepared the brief in chief on behalf of the foreign defendants to the Supreme Court in the *Hartford Fire* case, commented that the U.S. Supreme Court "takes the *effects doctrine* for granted" and, at the very least, the *Timberlane* approach of the rule of reason "seem[s] to have lost some of [its] significance."¹⁰³

99. *Id.* at 797-98 & 797 n.24.

100. See 1 EARL W. KINTNER, FEDERAL ANTITRUST LAW 32-33 (Supp. 1998).

101. *Id.* Justice Souter utilized language which was open to different interpretations when he declared: "We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Hartford Fire*, 509 U.S. at 799.

102. See, e.g., Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 220-25 (1993) (In *Hartford*, the Supreme Court "unequivocally affirmed" the effects test, which brings "the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries" quoting J. Scalia's dissent in the *Hartford Fire* case. As a result, *Hartford* shows little consideration of or concern for the valid sovereign interests of another country with concurrent jurisdiction); Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity?*, 15 U. PA. J. INT'L BUS. L. 221, 252 (1994) (The *Hartford* decision "brings to an end the debate concerning the propriety of a *Timberlane* comity analysis [jurisdictional rule of reason]. While not explicitly rejecting the *Timberlane* approach . . . the Court's conflict resolution test will result in . . . the application of the forum state's law when the forum has any interest at all in the conduct at issue."); Philip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 56-57 (1995) (The majority in *Hartford* declined to apply Section 403 of the RESTATEMENT (THIRD). "The Court's opinion represents an important development in the customary international law of prescriptive jurisdiction. The decision itself . . . becomes part of U.S. state practice . . . [and] [t]his resulting authoritative statement of customary international law reaffirms the traditional, unqualified 'effects' doctrine and rejects section 403." (emphasis added)).

103. 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

The results of the *Hartford Fire* decision may indeed prove Professor Lowenfeld's observation to be true. Under *Hartford Fire*, the concept of comity, which is utilized in the jurisdictional rule of reason for determining whether extraterritorial jurisdiction should be exercised, will now only be applied if the court determines that a true conflict exists. As Justice Souter notes in his opinion, there is no true conflict between domestic and foreign law when a person subject to regulation by two states can comply with the laws of both. The 1995 DOJ Guidelines observe that it has become increasingly true that an actual conflict between the U.S. and a foreign antitrust law does not exist, because more countries have adopted antitrust or competition laws that are compatible with the laws of the United States.¹⁰⁴ With the growing convergence of national antitrust laws among nations, true conflicts will become very rare. Therefore, under the true conflict approach of *Hartford Fire*, the jurisdictional rule of reason approach of *Timberlane* will rarely be utilized in determining whether extraterritorial antitrust jurisdiction should be exercised.¹⁰⁵

Another important result of the *Hartford Fire* decision in relation to the role of comity for resolving conflicts in the extraterritorial jurisdiction of antitrust laws, is that it brings the United States closer to the approach of the EU: namely, that comity is not used unless there is a true conflict.¹⁰⁶ The holding of *Hartford Fire* is consistent with the approach of the European Court of Justice utilized in the *Wood Pulp* case.¹⁰⁷ The European Court of Justice's "implementation approach" asserts jurisdiction on the basis of objective territoriality. The Court in *Wood Pulp* refused to consider comity because it would question the European Union's jurisdiction to apply its competition rules, an argument that had already been rejected. The only time that comity would be considered is if a true conflict existed, which the court did not

L. 42, 47-48 (1995).

104. 1995 DOJ Guidelines, *supra* note 28, ch. 3.2 at 157. *See also* Alford, *supra* note 102, at 229.

105. *See* Alford, *supra* note 102, at 229.

106. *See id.* at 214.

107. *See Wood Pulp* Case, 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901(1988). *See also* Alford, *supra* note 102, at 225-26. Alford argues that *Hartford Fire* and *Wood Pulp* demonstrate a convergence on matters of comity between the U.S. and the EU:

The effects doctrine is continually being narrowed and qualified to require a showing of stronger jurisdictional nexus through direct, substantial, and reasonably foreseeable effects, while the objective territoriality approach is being reformulated and expanded to encompass certain activities that would fall well outside its traditional ambit. The result is a convergence of application of [E.U.] and U.S. antitrust laws vis-a-vis foreign defendants.

Id.

find in *Wood Pulp*.¹⁰⁸ The significance of the *Hartford Fire* and *Wood Pulp* cases is that the narrow definition of a “true conflict” of laws will “ensure[] that comity will almost never be a factor in the extraterritorial application of antitrust laws.”¹⁰⁹

4. U.S. Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations

In 1995, the Justice Department and FTC issued guidelines explaining the agencies’ policies on the international enforcement of U.S. antitrust law.¹¹⁰ With regards to comity, the 1995 DOJ Guidelines are significant because they specifically cite to the *Hartford Fire* case and adopt the

108. See *Wood Pulp Case*, 1988 E.C.R. at 5244, [1988] 4 C.M.L.R. at 942. The wood pulp producers argued that the extraterritorial application of Article 85 violated international law because it applied to their conduct outside the European Community. The Court rejected this argument and stated that even though the producers’ conduct was adopted outside of the Community, there were economic repercussions within the Community because of the producers’ implementation of their agreement and therefore, “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.” *Id.* at 5243, [1988] 4 C.M.L.R. at 941(emphasis added). See also Alford, *supra* note 102, at 226.

109. Alford, *supra* note 102, at 227. Alford observes that under both the U.S. and EU approaches towards determining extraterritorial jurisdiction, a “true conflict” only exists “when there are mutually exclusive state obligations that make compliance with both impossible [I]n the vast majority of antitrust cases the conflict is between one state *encouraging* or *permitting* certain behavior and another state *prohibiting* that same behavior.” *Id.* at 226-27 (emphasis in original).

110. See 1995 DOJ Guidelines, *supra* note 28. Under these guidelines, there are four major principles for the agencies’ international antitrust enforcement operations:

[1] “[F]oreign commerce cases can involve almost any provision of the antitrust laws;”

[2] The enforcement agencies “do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties”;

[3] The agencies do not use their antitrust authority to further non-antitrust objectives; and

[4] Once jurisdictional requirements, comity and doctrines of foreign governmental involvement have been considered and satisfied, the substantive antitrust rules that apply to domestic operations apply with equal force to international operations.

68 Antitrust & Trade Reg. (BNA) 462 (Apr. 6, 1995). The guidelines discuss relevant federal antitrust and related statutes. The guidelines also include factors for the Department of Justice and the Federal Trade Commission to consider in deciding whether to exercise jurisdiction over anticompetitive conduct. These factors are illustrated through hypothetical situations which explain how the agencies would analyze such situations. See *id.*

position that comity analysis applies only when there is a true conflict.¹¹¹ The guidelines also adopt the affirmation of the effects test in *Hartford Fire* for determining Sherman Act jurisdiction in foreign commerce cases, and they acknowledge that the *Hartford Fire* holding is consistent with the EU approach articulated in the *Wood Pulp* case.¹¹² As a result, the 1995 guidelines utilize the effects test affirmed by *Hartford Fire*, rather than the jurisdictional rule of reason.

This is a significant departure from the 1988 guidelines that were replaced by the 1995 version. In the 1988 Antitrust Enforcement Guidelines for International Operations,¹¹³ the guidelines begin the chapter on “Factors Affecting the Department’s Exercise of Discretion in Asserting Jurisdiction” by recognizing the considerations of comity in enforcing antitrust laws.¹¹⁴ In the 1988 DOJ Guidelines, the Department of Justice appears to adopt the “jurisdictional rule of reason” in the language of the guidelines. Specifically, the 1988 Guidelines state that “in determining whether it would be *reasonable* to assert jurisdiction or to seek particular remedies in a given case, the Department considers whether significant interests of any foreign sovereign would be affected and *asserts jurisdiction only when the Department concludes that it would be reasonable to do so.*”¹¹⁵

In contrast, the 1995 DOJ Guidelines begin the issue of jurisdiction by citing *Hartford Fire* and adopting the effects test for determining extraterritorial jurisdiction for the Sherman Act.¹¹⁶ The doctrine of comity is introduced *after* the chapters on the determination of extraterritorial jurisdiction.¹¹⁷ Although the 1995 DOJ Guidelines state

111. 1995 DOJ Guidelines, *supra* note 28, ch. 3.2, at 157. Chapter 3.2, in discussing the consideration of international comity states:

With respect to the factor concerning conflict with foreign law, the Supreme Court made clear in *Hartford Fire* that no conflict exists for purposes of international comity analysis in the courts if the person subject to regulation by two states can comply with the laws of both. Bearing this in mind, the Agencies first ask what laws or policies of the arguably interested foreign jurisdictions are implicated by the conduct in question.

Id.

112. *Id.* ch. 3.1, at 149 & n.51. The DOJ states that: “the ‘implementation’ test adopted in the European Court of Justice usually produces the same outcome as the ‘effects’ test employed by the United States.” *Id.* at 149 n.51.

113. Antitrust Enforcement Guidelines for International Operations-1988, (Nov. 10, 1988), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,109 at 20,589-20 [hereinafter 1988 DOJ Guidelines]. According to the Department of Justice, these guidelines were “intended to provide businesses engaged in international operations with practical guidance concerning the Department’s internal antitrust enforcement policies and procedures.” *Id.* at 20,589-21.

114. *Id.* at 20,612.

115. *Id.* (emphasis added).

116. 1995 DOJ Guidelines, *supra* note 28, ch. 3.1 at 149.

117. *See id.* at 149-57. Under the chapter for “Threshold International Enforcement

that comity will be considered in enforcing antitrust laws, it again cites *Hartford Fire* and emphasizes that only “true conflicts” require comity analysis.¹¹⁸

Therefore, comity has less prominence in the 1995 DOJ Guidelines, where it is considered after jurisdiction has been established, than in the 1988 DOJ Guidelines, where comity is stated as one of the factors in the Department’s exercise of discretion in asserting jurisdiction.

Indeed, as one commentator has observed, the focus of the 1995 DOJ Guidelines appears to have shifted from resolving conflicts in laws through comity, to exploring who should enforce antitrust actions.¹¹⁹

IV. THE U.S./EC ANTITRUST COOPERATION AGREEMENT OF 1991

A. *Incorporation of Comity Principles*

In 1991, the United States and the European Community entered into an executive agreement on antitrust cooperation and coordination.¹²⁰ The main objective of the agreement is to promote cooperation and coordination and lessen the possibility of differences between the parties’ competition laws through notification, exchange of information, consultation, and comity in the application and enforcement of the parties’ respective competition laws.¹²¹ This agreement was also the first bilateral agreement at the time to introduce the concept of “positive

Issues,” jurisdiction is first discussed (in 3.1), followed by comity (in 3.2). It is interesting to note that the jurisdictional rule of reason language adopted in the 1988 DOJ Guidelines (the DOJ “asserts jurisdiction only when the Department concludes that it would be reasonable to do so”) is not included in either the jurisdiction or comity discussions in the 1995 DOJ Guidelines. Compare 1988 DOJ Guidelines, *supra* note 113, at 20,612 with 1995 DOJ Guidelines, *supra* note 28, at 149-57.

118. 1995 DOJ Guidelines, *supra* note 28, at 157.

119. See Robert D. Shank, *The Justice Department’s Recent Antitrust Enforcement Policy: Toward a “Positive Comity” Solution to International Competition Problems?*, 29 VAND. J. TRANSNAT’L L. 155, 174 (1996). See also 1995 DOJ Guidelines, *supra* note 28, ch. 3.2 at 157. Ch. 3.2 on comity states: “The Agencies also will consider whether the objectives sought to be obtained by the assertion of U.S. law would be achieved in a particular instance by foreign enforcement.” *Id.* at 158. When the Department of Justice decides to prosecute an antitrust action in lieu of foreign enforcement because the Department believes the domestic antitrust enforcement interests are strong, the Department holds that the courts no longer have a role to “second-guess the executive branch’s judgment as to the proper role of comity under these circumstances.” *Id.*

120. See U.S./EC Agreement, *supra* note 18.

121. *Id.* at 1491-1501.

comity.”¹²²

Under the concept of positive comity set out in Article V of the U.S./EC Agreement, one of the parties can request the other party’s competition authorities to initiate appropriate enforcement activities, if the requesting party believes that anticompetitive activities being carried out in the other party’s territory are adversely affecting the requesting party’s “important interests.”¹²³

Article VI provides for the more traditional concept of comity, by requiring the parties to “take into account the important interests of the other party,” during its investigation and enforcement proceedings.¹²⁴

What is unique about the concept of positive comity, according to then Assistant Attorney General James F. Rill, is that either the U.S. or the EC could ask the other party’s authorities to proceed under foreign law against any potential or actual anticompetitive activity which could harm the requesting party’s interests.¹²⁵ This concept of comity goes beyond the traditional notion of comity, where parties agreed to consider the other’s interests in determining whether to take any enforcement action.¹²⁶

B. Effectiveness of U.S./EC Agreement in Resolving Conflicts

Both U.S. and EC officials hailed the intention of the new coordination and positive comity provisions as a way to reach an agreement about which jurisdiction should take the lead in investigating a particular matter. With regard to mergers, the notification provisions were intended to enable the other party’s views to be taken into consideration.¹²⁷ However, it is important to note that the U.S./EC

122. See *European Lawyers Predict Negative Impact on Business Sector from New U.S./EC Accord*, 61 *Antitrust & Trade Reg. Rep.* (BNA) 376, 376 (Sept. 26, 1991).

123. U.S./EC Agreement, *supra* note 18, art. V ¶ 2, at 1498.

124. *Id.* art. VI, at 1498.

125. See *U.S., EC Commission Forge Antitrust Cooperation Accord*, 61 *Antitrust & Trade Reg. Rep.* (BNA) 375, 375 (Sept. 26, 1991).

126. See William K. Walker, *Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community-United States Antitrust Agreement*, 33 *HARV. INT’L L.J.* 583, 590 (1992). Walker provides the following example of how positive comity would “ideally” work: “If the United States was concerned that a proposed merger of two European companies would have an adverse impact on American trade in Europe . . . it could request that the European Community, under its own competition laws, prevent or rescind the merger.” *Id.* However, as discussed below, in reality this has not happened in recent “mega-merger” cases in both the U.S. and the EU.

127. See *U.S., EC Commission Forge Antitrust Cooperation Accord*, *supra* note 125, at 375. To enable the other party’s views to be taken into consideration, the agreement calls for the parties to notify the other party “far enough in advance” about any enforcement activities that may affect the other’s interests and to specify when it should occur. Each party is to also provide the other party with information about anticompetitive activities that could violate the other’s antitrust law. *Id.*

Agreement still allows the parties full discretion in deciding whether or not to take any enforcement action, either under positive comity, when the party has been requested to do so, or under the coordination and comity provisions in Article VI.¹²⁸

Therefore, the effectiveness of the U.S./EC Agreement is questionable, given that the parties still have full discretion to exercise extraterritorial jurisdiction of their respective antitrust laws. Indeed, the process and results of the Boeing/McDonnell Douglas as well as the Ciba/Sandoz mergers seem to provide further evidence that in reality, the concepts of positive comity and comity incorporated in the U.S./EC Agreement have not been very effective in preventing disputes or enhancing coordination in antitrust matters.

1. *FTC's Approval of the Ciba-Geigy and Sandoz Merger*

In March 1996, two European pharmaceutical giants, Sandoz and Ciba-Geigy, announced their plans to merge and form a new company, Novartis.¹²⁹ The EU Competition Commission expressed initial concerns

128. U.S./EC Agreement, *supra* note 18, arts. V ¶ 4 & VI, at 1498-1500. *See also* Walker, *supra* note 126, at 589-90. Walker observes that although article VI requires each party to take into consideration the other party's important interests in all stages of enforcement activities, article VI only requires this consideration "to the extent compatible with its own important interests." *Id.* at 589 (citing U.S./EC Agreement, *supra* note 18, art. VI). As a result, in Walker's opinion, this provision "adds little that is innovative or binding." *Id.* at 590.

Perhaps an indication that the positive comity provisions needed to be strengthened was the approval by the European Parliament in April, 1998, of a new agreement which "fleshes out provisions on 'positive comity'" in article V of the 1991 U.S./EC Agreement. *EU Parliament Backs Agreement With U.S. on Competition Cooperation*, 15 Int'l Trade Rep. (BNA) No. 14, at 611 (April 8, 1998) [hereinafter *EU Parliament*]. The agreement is called "Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws." *Proposed U.S.-EU Pact Calls for More Cooperation in Competition Cases*, 14 Int'l Trade Rep. (BNA) No. 27, at 1161 (July 2, 1997) [hereinafter *Proposed U.S.-EU Pact*]. The European Commission views the new draft as "an important step forward from Article V . . . as it not only provides guidelines on how positive comity requests should be dealt with, it raises a presumption that in certain circumstances a party will normally defer or suspend its own enforcement activities." *EU Parliament, supra*, at 611. However, it is important to note that this new agreement does not cover merger investigations, such as the Boeing/McDonnell Douglas merger. *Proposed U.S.-EU Pact, supra*, at 1161.

129. *See* USA: Pharmaceuticals—Ciba-Geigy and Sandoz, Reuter Textline, Dec. 19, 1996, available in LEXIS, Eurcom Library, Ecnews file. Both companies are based in Switzerland, which is not part of the European Union. *See* EU Clears CIBA/Sandoz Deal After Licencing Move, The Reuter Eur. Community Rep., July 17, 1996, available

and started an investigation into the merger which would create the world's second largest pharmaceutical firm, because there were several sectors where the activities of the two companies overlapped. Specifically, the EU Commission was concerned with the overlapping in the areas of pharmaceuticals, crop protection, and animal health, and stated its concern that the new company's combined research and development potential would "far exceed all other competitors."¹³⁰ The EU Commission's concerns were serious enough that it was believed the Commission would put conditions on the merger in return for its clearance,¹³¹ and there were discussions between Sandoz and Ciba-Geigy and the Commission regarding possible solutions to make their merger compatible with EU competition rules.¹³²

The European Commission ultimately cleared the merger in July (two months ahead of the scheduled decision) after the two companies agreed to grant non-exclusive licenses for an animal anti-parasite product, even though the merger would affect 100 specific markets in the areas of human health, animal health, plant protection products, and seeds.¹³³ Despite the Commission's initial concern about the two companies' combined research and development potential far exceeding a competitor and thus possibly foreclosing the gene therapy sector, the Commission still concluded that there was little likelihood for future market dominance in that sector.¹³⁴

The U.S. Federal Trade Commission, however, took a much "tougher line" in its review of the merger than the EU Commission. The FTC was especially concerned that the merger would create the number one

in LEXIS, Eurcom Library, Ecnews file; *see also* Urwin, *supra* note 1, at 14. However, because the turnover of the two companies exceeded the threshold within the European Economic Area (EEA), the EU Commission was obligated to review the negative impact on competition and to either modify the terms of the merger or refuse authorization of the merger if the Commission's concerns were not met. *See* Peter O'Donnell, *True Love's Path . . . The European Union (EU) announces a research probe into this co and Sandoz/Ciba-Geigy merger*, 16 PHARMACEUTICAL EXECUTIVE 40, 41-42 (June 1996), available in LEXIS, Busfin Library, ABI file.

130. *EU Starts Full Probe Into Sandoz/Ciba Deal*, The Reuter Eur. Community Rep., May 3, 1996, available in LEXIS, Eurcom Library, Ecnews file.

131. *See id.* After its preliminary probe into proposed merger, the European Commission found that there were a number of sectors where the two companies' activities overlapped, particularly in pharmaceuticals, crop protection, and animal health. As a result of its findings, the European Commission decided to start a full probe into the deal, which increased the likelihood that the Commission would impose conditions before approving the merger. *See id.*

132. *See EU Discussing Remedies to Sandoz/Ciba Deal*, The Reuter Eur. Community Rep., July 3, 1996, available in LEXIS, Eurcom Library, Ecnews file.

133. *See Commission Set to Give Conditional Approval for Ciba-Geigy/Sandoz Merger*, Eur. Rep., July 17, 1996, available in LEXIS, Eurcom Library, Ecnews file.

134. *See EU: EU/Competition - Conditions for Ciba-Geigy/Sandoz Merger*, Reuter Textline, July 19, 1996, available in LEXIS, Eurcom Library, Ecnews file.

company in world crop protection and the number two company in seeds and animal health.¹³⁵ The FTC was also concerned about the merger's effect on the gene therapy sector, where both Ciba-Geigy and Sandoz were major players.¹³⁶

The FTC finally approved the merger, but only after requiring several conditions, such as the licensing of certain gene therapy patents and technology to a French competitor, as well as substantial divestitures in the herbicide and pet flea-control market.¹³⁷ In fact, the divestiture of Sandoz's corn herbicide business to the Germany company BASF for \$780 million was one of the largest divestitures that the FTC had ever ordered.¹³⁸ The FTC also barred Novartis from acquiring any new patent rights for gene therapy products, from re-entering the U.S. flea-control market for six years, and required Novartis to obtain FTC approval of any acquisitions in the U.S. market for ten years.¹³⁹

In comparing the approvals of both the EU Commission and the FTC, although they had similar concerns with regards to market share dominance in the same particular sectors, the respective responses and conditions were quite different. Judging by the conditions and requirements which the FTC imposed on Novartis, it gave little

135. See William Hall, *Ciba, Sandoz in US Deal to Speed Merger*, FINANCIAL TIMES, Aug. 29, 1996, at 11, available in LEXIS, World Library, Fintme file. For example, in the U.S. corn herbicide market, Ciba controlled more than thirty-five percent of the market, and Sandoz had approximately ten percent of the sales. The FTC was concerned because both companies had pursued strategies in the past which limited generic competition even after the expiration of patents on the products, and because development and testing of such products could take more than a decade. Ciba and Sandoz were also the leading sellers of flea control products for pets in the United States, including pills, collars, shampoos, sprays and foggers. See *FTC Settles Challenge to Merger of Ciba-Geigy, Sandoz*, NAT'L ASS'N OF ATT'YS GEN. ANTITRUST REP., Mar./Apr. 1997, at 8, 9 [hereinafter *FTC Settles*].

136. See *Novartis Has New Roadblock*, CHEMICAL MARKETING REP., Sept. 30, 1996, at 9. Prior to the proposed merger, Sandoz had acquired Genetics Therapy Inc., and Ciba held a forty-nine percent share of Chiron. See *id.* The acquisition of these holdings in other gene therapy companies strengthened the status of Ciba and Sandoz as being two of only a few companies which are capable of commercial development of gene therapy products. The FTC was concerned that because entry into the gene therapy market could take up to twelve years, the patents held by Ciba and Sandoz would severely limit the capability of any competitors to enter the market. See *FTC Settles*, *supra* note 135, at 9.

137. See Woellert & Kaplan, *supra* note 8, at B6. See also *supra* note 12 and accompanying text.

138. See Felix Bauer, *Regulators Approve the Creation of Novartis*, GLASGOW HERALD, Dec. 18, 1996, available in LEXIS, News Library, Curmws File.

139. See *FTC Settles*, *supra* note 135, at 9.

consideration to the analysis and evaluation of the EU Commission's approval of the merger.

2. EU Commission's Approval of the Boeing-McDonnell Douglas Merger

Just as the FTC imposed major conditions on the Ciba/Sandoz merger for approval despite the EU Commission's earlier and relatively unconditional approval, so too did the EU Commission impose conditions on Boeing for approval of their merger with McDonnell Douglas, despite the FTC's unconditional approval.¹⁴⁰ The contentious and acrimonious approval process by the EU Commission of the Boeing/McDonnell Douglas merger came after Alexander Schaub, the number two man in the EU Competition Authority, pledged that the EU would coordinate the analysis of the merger with the U.S., and that the EU would "do everything to come to identical views with American authorities [the FTC] on objections to the deal and . . . look into possible remedies."¹⁴¹

Despite this pledge and the subsequent unconditional FTC approval, the EU pressed for several concessions from Boeing to address the EU's concerns. The EU's concerns reflected a marked distinction in its anti-competition analysis from that of the FTC. While the FTC ruled that the merger would not "substantially lessen competition in any relevant market,"¹⁴² the EU expressed several concerns, including that the dominant position which the enlarged Boeing would have in the commercial aircraft market would make it difficult for Airbus Industrie to effectively compete.¹⁴³ Another major competition concern the EU had was with Boeing's exclusive twenty year supplier contracts with both American and Delta Airlines, which the EU believed would harm competition by locking out any sales to these airlines by Boeing's competitors (i.e. Airbus) for twenty years.¹⁴⁴ The EU sought concessions from Boeing to address these and other concerns.¹⁴⁵

140. See discussion *supra* Part I.

141. *EU to Coordinate Boeing Analysis with US - Schaub*, The Reuter Eur. Community Rep., June 5, 1997, available in LEXIS, Eurcom Library, Ecnnews file.

142. Dahlburg, *supra* note 2, at 41.

143. See West, *supra* note 4, at B1. Airbus "feared" the 20-year exclusive contracts Boeing had with airline companies because in practical terms, an airline would be reluctant to begin carrying the additional costs involved in bringing in new plane types after moving to an all-Boeing fleet over a period of 20 years. See Bryant, *supra* note 14, at D5. Jean Pierson, managing director of Airbus, expressed Airbus' concern by stating "[e]xclusive deals are not for 20 years, they are for eternity." *Id.*

144. See West, *supra* note 4, at B1. See also Stanley Holmes, *Condit Rejects EU Merger Concerns*, SEATTLE TIMES, May 22, 1997, at E1.

145. Other EU concerns included: 1) As the new supplier of spare parts to existing

Just as Ciba-Geigy and Sandoz had to make major concessions, so did Boeing. Specifically, Boeing had to make the following concessions right before the deadline in order to gain the EU Commission's approval: 1) Boeing agreed not to enforce the twenty-year exclusivity clauses with American, Delta and Continental Airlines, and refrain from entering into any similar agreements until 2007; 2) the civilian airliner division of McDonnell Douglas was to remain a separate legal entity for ten years; 3) Boeing was to license out patents obtained from McDonnell Douglas' government-funded military contracts and cross-license blocking patents to other airline manufacturers; and 4) Boeing made a commitment not to leverage customer service and support arrangements with existing McDonnell Douglas customers in a way that would unfairly promote Boeing aircraft, or abuse relationships with parts suppliers that would force them away from their relationships with other airline makers.¹⁴⁶

3. Effectiveness of the U.S./EC Agreement in the Boeing-McDonnell Douglas and Ciba-Sandoz Mergers

As discussed in Part IV, one of the main intentions of the U.S./EC Agreement was to provide for coordination and agreement about which jurisdiction should take the lead in investigating a particular matter, in a way that each party would "conduct its enforcement activities . . . insofar as possible, consistently with the enforcement objectives of the other party."¹⁴⁷ This did not take place in the Boeing merger. Indeed, throughout the dispute with the EU Commission, Boeing argued that the FTC should have been given the lead role under the U.S./EC Agreement.¹⁴⁸ However, the EU Commission argued that because it was empowered to rule against a deal which creates or strengthens a dominant market position in the EU, the agreement did not cover this merger.¹⁴⁹

There was also little evidence of consideration of the other respective

McDonnell Douglas customers, Boeing would use its position to pressure them to buy Boeing jets or punish them if they bought from Airbus. See Pearlstein & Swardson, *supra* note 5, at C1. 2) The potential for public money earmarked for defense research and development from McDonnell Douglas' defense operations benefiting Boeing's commercial aviation business. See West, *supra* note 4, at B1.

146. See *Merger Control*, *supra* note 7.

147. U.S./EC Agreement, *supra* note 18, art. IV ¶ 3, at 1499.

148. See Torres, *supra* note 14.

149. See *id.*

party's rulings on the particular mergers. In both the Boeing and Ciba/Sandoz mergers, the FTC and EU Commission's analyses were far apart in their respective conclusions about anti-competitive concerns. In the end, the FTC found little concern about Boeing, a U.S. company, but major antitrust concerns about Ciba/Sandoz, European companies. The EU Commission's concerns were directly opposite, with little concern about Ciba/Sandoz (despite strong initial public concerns),¹⁵⁰ and major concerns about Boeing. In reviewing the results of these two particular merger cases, it appears that each antitrust authority protected its own national interests.

The wide disparity between the findings of the FTC and EU Commission in both merger cases also indicates a lack of cooperation with, or at least consultation with, the other party's analysis of the proposed mergers' antitrust concerns. After the EU approval of the Boeing merger, Boeing Chairperson Phil Condit again publicly expressed his regret that the EU Commission did not give "greater deference to the [FTC]" which had prime jurisdiction and had approved the merger unconditionally.¹⁵¹ It is interesting to note that Karl Van Miert, the European Competition Commissioner who had been so vocally opposed to the merger during the approval process, publicly spoke out after the EU approval and expressed the need to improve "transatlantic cooperation" on such cases in the future. He even went so far to suggest that a separate organ within the World Trade Organization should be established to deal with international mergers.¹⁵²

The effectiveness of the U.S./EC Agreement in view of the results of the Boeing and Ciba/Sandoz mergers is questionable. Although the agreement calls for cooperation, coordination, and consultation in both enforcement activities and avoiding conflicts, the inherent weakness of the agreement is that there is no binding obligation on either party to comply with requests, or to take into consideration the other party's interests.¹⁵³ Although certainly the goals of the agreement are

150. Perhaps political concerns played a part in the EU's approval of the Ciba/Sandoz merger as well. Switzerland applied for membership to the EU in May 1992, but its application has been frozen due to the Swiss voters' rejection in December of 1992. Given Switzerland's geographical position within the EU, its significance as a trading partner with EU members, and the necessity of many EU producers to transit across Switzerland, the EU maintains interest in Swiss membership and has been receptive to Swiss government overtures. However, negotiations between the EU and Switzerland remain delicate and strained. See David Phinnemore, *New and Aspiring Members of the European Union*, in *THE EUROPEAN UNION HANDBOOK* 77, 78-81 (Philippe Barbour ed., 1996).

151. *Merger Control*, *supra* note 7.

152. *Id.*

153. See U.S./EC Agreement, *supra* note 18, art. V & art. VI, at 1497-1500. Article V, paragraph four provides that: "Nothing in this Article limits the discretion of the

worthwhile to pursue, it does not have the necessary enforcement to be effective in cases such as the Boeing merger, in which sensitive interests of both parties are substantially affected.

V. THE AFTERMATH OF THE BOEING-MCDONNELL DOUGLAS MERGER: WHAT IS THE ROLE OF COMITY IN RESOLVING EXTRATERRITORIAL ANTITRUST JURISDICTION?

Under the concept of positive comity espoused in the U.S./EC Agreement, the European Union, concerned about the harmful effect of the Boeing-McDonnell Douglas merger on the business of Airbus in the United States and other countries, could have requested that the United States prevent or rescind the merger under its own antitrust laws.¹⁵⁴ In reality, of course, this did not occur, nor could one expect the United States to comply with such a request, given the vital economic and military interests which the United States claimed were involved with the merger.¹⁵⁵ Likewise, the FTC, rather than requesting the EU Commission to address the FTC's concerns over the Ciba/Sandoz merger, made its own independent findings which resulted in much more substantial conditions being placed on the merger than the EU

notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities. . . ." *Id.* art. V ¶ 4, at 1498. Article VI states: "Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek . . . to take into account the important interests of the other Party." *Id.* art. VI, at 1498-99 (emphasis added). *See also* Walker, *supra* note 126, at 590. With no binding obligation, Walker argues that:

[The]commitment to coordination and comity thus leaves both parties free to act independently, and allows the jurisdictional conflicts which led to the Agreement to be raised once again. Without any restriction on the activities of the parties, the United States may continue to exercise jurisdiction in Europe under the "effects doctrine," and the European Community can exercise jurisdiction in the United States. . . . [The Agreement] fails to create any binding rule that sets forth specific jurisdictional boundaries.

Id. at 590-91.

154. *See* U.S./EC Agreement, *supra* note 18, art. V & art. VI, at 1497-1500. *See also* Walker, *supra* note 126, at 590.

155. *See* Pearlstein & Swardson, *supra* note 5, at C1. Prior to the final decision by the European Commission, top officials from the Department of Justice and the Pentagon flew to Brussels to emphasize that the Clinton administration "would not tolerate undue interference in the operations of an industry crucial to the economic and military strength of the United States." *Id.*

Commission imposed.¹⁵⁶ As one European commentator observed about positive comity: "It would be hardly realistic from a political point of view to presume that one of the parties would start proceedings only for the benefit of the other party, independently of the question whether the laws of the parties would permit such an action."¹⁵⁷

The concepts of positive comity and the comity considerations of the other party's interests have also been eroded by the *Hartford Fire* decision and 1995 DOJ Guidelines which adopted *Hartford Fire* in the United States, and by the *Wood Pulp* decision in the EU.¹⁵⁸ Both the U.S. Supreme Court and the European Court of Justice in their respective decisions have converged their respective approaches in determining extraterritorial antitrust jurisdiction to the effects test,¹⁵⁹ and both courts have rejected comity considerations absent a true conflict.¹⁶⁰

The recent EU Commission ruling on Boeing, the FTC ruling on Ciba/Sandoz, and the court decisions in *Hartford Fire* and *Wood Pulp*, are strong indications that neither a national court or antitrust authority can effectively conduct a comity consideration analysis and thus, cannot act as a neutral mediator between the conflicting policies of two countries.¹⁶¹ In addition, both judicial and antitrust enforcement agencies also appear to be shifting from comity considerations to "realpolitik" considerations and the protection of their respective economic self-interests.

VI. VIABILITY OF INTERNATIONAL AGREEMENTS FOR RESOLVING DISPUTES IN EXTRATERRITORIAL JURISDICTION OF ANTITRUST LAWS

In addition to the U.S./EC Agreement, the United States has bilateral antitrust cooperation agreements with Australia, Canada, and Germany. There have also been multi-lateral efforts, mainly through the Organization of Economic Cooperation and Development (OECD),

156. See *supra* Part IV.B.1.

157. Allard D. Ham, *International Cooperation in the Anti-Trust Field and in Particular the Agreement Between the United States of America and the Commission of the European Communities*, 30 COMMON MKT. L. REV. 571, 594 (1993). Mr. Ham opined when he wrote his article in 1993 that the positive comity provision in the U.S./EC Agreement would be utilized infrequently. *Id.*

158. See Alford, *supra* note 102, at 228-29.

159. See discussion *supra* Part III.B.3-4. and accompanying notes.

160. See Shank, *supra* note 119, at 174. See also Alford, *supra* note 102, at 228.

161. See Michael Tepass, *Resolving Extraterritoriality Conflicts in Antitrust: Two Case Studies and Proposals of Solution*, 5 CONN. J. INT'L L. 565, 620 (1990). Tepass states that courts can only assert or decline its national jurisdiction. As a result, the court rejects the other side's substantive policy by either applying national laws or by declining jurisdiction. It is for this reason that national courts cannot act as a neutral mediator. *Id.* at 620.

which has adopted guidelines, and there have been proposals for establishing an international code for antitrust law as well. The OECD guidelines and bilateral agreements with both Australia and Canada have been viewed as relatively successful, and perhaps can serve as models to build on for future bilateral or multi-lateral agreements. These bilateral antitrust cooperation agreements with Australia, Canada, and Germany, as well as the OECD Guidelines, will each be examined separately below.

A. *U.S./Australia Accord on Antitrust Enforcement*

The United States and Australia entered into an antitrust cooperation agreement in 1982, after the friction caused by the antitrust suit in *In re Uranium Antitrust Litigation*,¹⁶² which involved Australian uranium companies and challenged Australian government policies implemented by the uranium industry.¹⁶³ The agreement requires both countries to notify and consult with each other to resolve conflicts in antitrust laws, and to resolve such conflicts based on comity considerations and mutual respect for each country's sovereignty.¹⁶⁴

The agreement allows for each country to request consultations with the other if the other country adopts an antitrust policy or action which may have implications for the requesting country's antitrust laws or national interests.¹⁶⁵ The agreement requires both parties in such consultations to give "due regard to each other's sovereignty and to considerations of comity."¹⁶⁶ The United States is also required to notify the Australian Government about any antitrust investigation which may

162. 617 F.2d 1248 (7th Cir. 1980).

163. *Id.* See also *U.S., Australia Sign Agreement to Cooperate in Antitrust Matters*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1071, at 23 (July 1, 1982) [hereinafter *U.S., Australia*].

164. Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation of Antitrust Matters, June 29, 1982, 21 I.L.M. 702 (1982) [hereinafter *U.S./Australia Agreement*]. According to U.S. Attorney General William French Smith, the agreement was "rightly characterized . . . as a breakthrough." Australian Attorney General Peter Durack stated that it had been his government's desire to protect its trade laws and policies, and that despite the sharp divergent views and potentially conflicting goals of the parties when the negotiations began, the accord "recognizes the right of each country ultimately to take whatever action it deems necessary to protect its interest." See *U.S., Australia*, *supra* note 163, at 23.

165. *U.S./Australia Agreement*, *supra* note 164, art. 2 ¶¶ 1-2, at 703-04.

166. *Id.* art. 2 ¶ 5, at 704.

affect Australian laws, policies, or interests before the commencement of any investigation or action.¹⁶⁷ Australia, on the other hand, has the option to notify the United States if it adopts a policy that may have consequences for the United States, and before the policy is implemented if possible.¹⁶⁸

What is unique about this agreement, compared to other bilateral agreements of the U.S. (which all incorporate the doctrine of comity), is that the U.S./Australia Agreement mentions specific interests of each country and requires both countries to give mutual recognition of each other's interests, and to give "the fullest consideration" to modifying a policy or action that may harm the specified interests of the other country.¹⁶⁹ The defined interests of the United States to which Australia must give full consideration are the enforcement of U.S. antitrust laws and the interests protected by U.S. antitrust laws.¹⁷⁰ The interests delineated for Australia which the U.S. must give full consideration to are any interests related to the exportation of Australian natural resources, manufactured goods, or produced goods.¹⁷¹

167. *Id.* art. 1 ¶¶ 2-4, at 703.

168. *Id.* art. 1 ¶¶ 1, 3, at 703.

169. *Id.* art. 2 ¶ 6(a), (b)(1)-(4), at 704-06. *See also* Tepass, *supra* note 161, at 612-13.

170. U.S./Australia Agreement, *supra* note 164, art. 2 ¶ 6(a) at 704-05. Article 2 paragraph 6(a) provides that:

[T]he Government of Australia shall give the fullest consideration to modifying any aspect of the policy which has or might have implications for the United States in relation to the enforcement of its antitrust laws. In this regard, consideration shall be given to any harm that may be caused by the implementation or continuation of the Australian policy to the interests protected by the United States antitrust laws

Id.

171. *Id.* art. 2 ¶ 6(b), at 705. The U.S. must give full consideration to modify or refrain from any antitrust investigations or proceedings which relate to activities that:

- 1) [were] undertaken for the purpose of obtaining a permission or approval required under Australian law for the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia;
- 2) [were] undertaken by an Australian authority, being an authority established by law in Australia, in the discharge of its functions in relation to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia;
- 3) related exclusively to the exportation from Australia to countries other than the United States, and otherwise than for the purpose of re-exportation to the United States, of Australian natural resources or goods manufactured or produced in Australia; or
- 4) consisted of representations to, or discussions with, the government of Australia or an Australian authority in relation to the formulation or implementation of a policy of the government of Australia with respect to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia.

Id. art. 2 ¶ 6(b)(1)-(4), at 705-06.

In addition to notification provisions which provide a means to resolve potential conflicts before friction occurs, the agreement also allows for the Australian government to request the U.S. government to participate in a private antitrust litigation that is related to a subject of notification and consultation. If requested, the U.S. Government must report the substance and results of the consultations regarding the subject of antitrust litigation to the court.¹⁷² Such participation by the U.S. government helps to facilitate resolution of potential conflicts by providing information to the courts which would allow for more educated considerations of comity.¹⁷³

The U.S./Australia Agreement has been considered successful by both governments to the extent that in 1997, both countries entered into a tentative "first-ever" Mutual Antitrust Assistance Agreement, which provides for each country to exchange evidence, witnesses, and information needed in each other's antitrust investigations.¹⁷⁴ This proposed agreement came about from the close relationship built between antitrust enforcement agencies of both countries since the 1982 U.S./Australia Agreement.¹⁷⁵ The U.S./Australia Agreement has been observed as a model for future agreements because, unlike other agreements, it states the defined interests of each country in specific areas and requires mutual recognition and full consideration of those interests.¹⁷⁶

B. U.S./Canada Agreement on Cooperative Enforcement

In 1995, the United States and Canada entered into a new antitrust

172. *Id.* art. 6, at 708. This provision was very important to the Australian government, especially after the United States government had refused to participate in the uranium cartel antitrust case. See Tepass, *supra* note 161, at 613 n.238.

173. See Tepass, *supra* note 161, at 613.

174. U.S., *Australia Propose First-Ever Mutual Antitrust Assistance Agreement*, 72 Antitrust & Trade Reg. Rep. (BNA) No. 1807, at 386 (Apr. 17, 1997).

175. *Id.*

176. See Tepass, *supra* note 161, at 623. Tepass argues for the effectiveness of the U.S./Australia Agreement by using the dispute between the U.S. and Australia over the uranium cartel in the *In re Uranium Antitrust Litigation* as an example. This conflict was determined for the most part by Australia's interests in exploiting and exporting its natural resources. Under the U.S./Australia Agreement, the U.S. has agreed to consider this specific interest of Australia when deciding to apply antitrust laws to businesses that have contacts with Australia. At the same time, the recognition of Australia's defined interest in exporting natural resources under the Agreement does not prevent U.S. antitrust action against other Australian export cartels. *Id.* at 623 (citation omitted).

agreement which replaced a previous non-binding memorandum of understanding from 1984.¹⁷⁷ Similar to the U.S./Australia Agreement, the agreement with Canada also provides for each country to provide early notification regarding any “enforcement activities that may affect important interests” of the other country in order to prevent conflicts.¹⁷⁸ The procedures and timetables for notification regarding different types of antitrust investigations are specifically delineated in the agreement.¹⁷⁹

The U.S./Canada Agreement incorporates comity considerations for the purpose of minimizing any conflicts caused by antitrust enforcement actions of either country.¹⁸⁰ Each party is required to give “careful consideration” to the other party’s “important interests” in all phases of the investigation and enforcement, including the decisions regarding the initiation and scope of any investigation or proceeding.¹⁸¹ If one party’s enforcement activities may adversely affect the important interests of the other party, then that party is required to consider all “appropriate factors” in assessing what measures a party will take. The agreement sets out a non-exhaustive list of factors, which both parties should consider.¹⁸²

177. Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practice Laws, Aug. 3, 1995, 35 I.L.M. 309, 311 (1995) [hereinafter U.S./Canada Agreement]. The new agreement’s emphasis is on law enforcement cooperation, built on the success that U.S. and Canadian antitrust authorities previously had in joint criminal investigations of price fixing. Provisions of the agreement include notification, cooperation and coordination of enforcement activities, conflict avoidance and consultations, application to certain consumer protection laws, and limitations on confidentiality and use. See U.S., *Canada Sign Cooperation Agreement Covering Competition, Deceptive Practices*, 69 Antitrust & Trade Reg. Rep. (BNA) No. 1725, at 174 (Aug. 10, 1995).

178. U.S./Canada Agreement, *supra* note 177, art. II ¶ 1, at 313.

179. *Id.* art. II ¶¶ 3-9, at 313-15.

180. *Id.* art. VI ¶¶ 1, 4, at 318.

181. *Id.* art. VI ¶ 1, at 318.

182. *Id.* art. VI ¶ 5, at 318. The factors delineated in the U.S./Canada agreement include:

- 1) the relative significance to the anticompetitive activities involved of conduct occurring within one Party’s territory as compared to conduct occurring within that of the other;
- 2) the relative significance and foreseeability of the effects of the anticompetitive activities on one Party’s important interests as compared to the effects on the other Party’s important interests;
- 3) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party’s territory;
- 4) the degree of conflict or consistency between the first Party’s enforcement activities (including remedies) and the other Party’s laws or other important interests;
- 5) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

In addition, the U.S./Canada Agreement also includes a “positive comity” provision, modeled on the U.S./EC Agreement.¹⁸³ If one party believes that its important interests are being adversely affected by anticompetitive activities in the territory of the other party, then a party may request the other party’s antitrust authorities to initiate “appropriate enforcement activities.”¹⁸⁴ Once a request has been made, the requested party is required to “carefully consider” whether to initiate or expand any enforcement activities.¹⁸⁵ If any enforcement activities are commenced, then the requested party must advise the requesting party of the outcome and also, if possible, about any significant developments in the enforcement process.¹⁸⁶

Similar to the U.S./EC Agreement however, the requested party has full discretion in deciding whether to initiate or proceed with any enforcement activities in accordance with the other party’s request. In addition, the requesting party under this provision is also not precluded from proceeding with its own enforcement activities in response to the specified anticompetitive activity.¹⁸⁷

It is interesting to note that these key features of the U.S./Canada Agreement which replaced a memorandum of understanding are modeled on key provisions of other bilateral agreements, namely the positive comity of the U.S./EC Agreement, and the notification provisions of the U.S./Australia Agreement. The U.S./Canada Agreement also provides for coordination, cooperation and consultations regarding enforcement, and requires semi-annual meetings to exchange

6) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

7) the location of relevant assets;

8) the degree to which a remedy, in order to be effective, must be carried out within the other Party’s territory; and

9) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.

Id. art. VI ¶ 5(i)-(ix), at 318-19.

183. U.S./EC Agreement, *supra* note 18, art. V ¶ 2, at 1498.

184. Compare U.S./Canada Agreement, *supra* note 177, art. V ¶ 2, with U.S./EC Agreement, *supra* note 18, art. V ¶ 2. (The language of the article V provisions for positive comity in both agreements is virtually identical).

185. U.S./Canada Agreement, *supra* note 177, art. V ¶ 3, at 317.

186. *Id.*

187. See *id.* art. V ¶ 4, at 317-18. Cf. U.S./EC Agreement, *supra* note 18, art. V ¶ 4, at 1498. (as with the positive comity provisions in both agreements, the language for discretionary power of the parties to accommodate the other party’s request for initiating enforcement is virtually identical).

information, discuss policy changes, and any other matters regarding the agreement.¹⁸⁸

C. U.S./German Antitrust Cooperation Accord

Signed in 1976, this is the United States' oldest written bilateral agreement on antitrust cooperation and was intended to expand upon the notification procedures for antitrust enforcement activities recommended by the Organization of Economic Cooperation and Development (OECD).¹⁸⁹ This agreement is mainly one of cooperation in the exchange of information and with proceedings for antitrust and trade regulation matters between the two countries.¹⁹⁰

The agreement calls for both parties to "cooperate and render assistance" to the other party's antitrust officials in relation to antitrust investigations or proceedings, studies, and activities related to competition policy, potential changes in antitrust laws, and to also extend the same cooperation for activities related to restrictive business practices by international organizations in which both countries are members.¹⁹¹ Each party also agrees to provide any significant information it may come across that may have a substantial effect on the other party, and to also provide any information requested by the other party relating to antitrust investigations, proceedings, and studies.¹⁹² Each party may also request the other party to obtain for the requesting party, information or interviews from a person or business within the requested party's jurisdiction.¹⁹³ Both parties also agree to consult with the other party in relation to coordination of any antitrust investigation or proceeding which is related to or would affect either party, if requested to do so.¹⁹⁴

The U.S./Germany Agreement incorporates comity considerations as well.¹⁹⁵ Both parties agree within the bounds of their own laws, policies, and interests, not to act in a way which would interfere with the other

188. U.S./Canada Agreement, *supra* note 177, arts. IV, VIII, IX, at 316-17, 320-21.

189. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, reprinted in [July - Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 772, at D-1 (July 13, 1976) [hereinafter U.S./Germany Agreement]. See also *U.S.-German Antitrust Cooperation Accord Signed*, [July - Dec] Antitrust & Trade Reg. Rep. (BNA) No. 771, at A-9 (July 6, 1976) [hereinafter *U.S.-German Antitrust*].

190. *U.S.-German Antitrust*, *supra* note 189, at A-9.

191. U.S./Germany Agreement, *supra* note 189, art. 2 ¶ 1(a)-(c), at D-1.

192. *Id.* art. 2 ¶ 3, at D-1.

193. *Id.* art. 2 ¶ 4, at D-1.

194. *Id.* art. 2 ¶ 5, at D-1.

195. *Id.* art. 4, at D-2.

party's antitrust investigation or proceeding. If one party's antitrust enforcement activities are likely to adversely affect the "important interests" of the other party, then the Agreement calls for that party to notify the affected party and to "consult and coordinate" with that party to the appropriate extent possible.¹⁹⁶

An inherent weakness of this agreement, however, is that a party may refuse to comply with requests for assistance or render assistance for any of several reasons stated in the agreement.¹⁹⁷ Each party can determine whether compliance is either not possible or is inconsistent with its own interests.¹⁹⁸ In addition, the parties are not obligated to employ compulsory powers or undertake efforts that are an unreasonable burden in providing information or assistance to the other party.¹⁹⁹

D. OECD Recommendation Concerning Cooperation

Since 1967, the OECD has adopted recommendations for cooperation between member countries on restrictive business practices affecting international trade, and has periodically revised its recommendations.²⁰⁰ These recommendations have taken a more "pragmatic" approach by providing for notification, exchange of information, and coordination of antitrust enforcement activities by the member countries.²⁰¹ The recommendations have encouraged and served as a basis for agreements between member nations.²⁰²

The most recent revised recommendations were adopted in 1995.²⁰³ The key features of the 1995 revisions are that they recognize positive comity, and specify steps that countries should take in order to adhere to

196. *Id.* art. 4 ¶¶ 1-2, at D-2.

197. *Id.* art. 3 ¶ 1, at D-1.

198. *Id.*

199. *Id.* art. 3 ¶¶ 2-3, at D-2.

200. See Organization for Economic Cooperation and Development: Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade July 27-28 1995, 35 I.L.M. 1313, 1314 (1996) [hereinafter OECD Recommendations].

201. See P.M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests"*, 4 INT'L & COMP. L.Q. 245, 269 (1992).

202. See *id.* See also U.S./Germany Agreement, *supra* note 189, pmb.; U.S./Canada Agreement, *supra* note 177, pmb. (both agreements cite the OECD Recommendations in the respective preambles, and give "regard to" the OECD recommendations).

203. OECD Recommendations, *supra* note 200.

positive comity concepts.²⁰⁴ The OECD Recommendations also provide a mechanism and forum for the mediation of disputes between member countries which they cannot resolve on their own.²⁰⁵

In addition, the OECD Recommendations continue to recommend the processes of notification, cooperation, and consultation based on the principles of comity.²⁰⁶ Finally, the OECD Recommendations include guidelines which specify procedures for notification, consultation and cooperation in order to minimize or prevent conflicts in the extraterritorial jurisdiction of antitrust laws.²⁰⁷ These guidelines are also meant to clarify the procedures for a common understanding among the member countries.²⁰⁸

E. Draft International Antitrust Code

The Draft International Antitrust Code [hereinafter DIAC], is a proposal that was presented to GATT in 1993 by Professor Wolfgang Fikentscher and the International Antitrust Code Working Group, which is a group of competition law scholars based in Munich.²⁰⁹ DIAC was drafted and submitted for consideration by GATT [now WTO] members as a Plurilateral Trade Agreement with a practical approach to competition by providing rules for international trade and commerce, rather than providing a theoretical model of competition.²¹⁰ DIAC is

204. *Id.* at 1314-16. Article I.B.5(a) recommends that: "A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries . . ." *Id.* art. I.B.5(a), at 1316. Article I.B.5(c) continues, by recommending that:

The Member country addressed which agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures, on a voluntary basis and considering its legitimate interests

Id. art. I.B.5(c), at 1316.

205. *Id.* art. I.B.8, at 1316. The OECD recommends that the disputing member countries, if they agree, should have "recourse to the good offices of the Competition Law and Policy Committee with a view to conciliation." *Id.*

206. *Id.* pmb., art. I, at 1314-15.

207. *Id.* app., at 1317.

208. *Id.*

209. Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement, July 10, 1993, reprinted in 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628, at S-1 (Special Supplement) (Aug. 19, 1993) [hereinafter DIAC]. See also Wolfgang Fikentscher, *The Draft International Antitrust Code ("DIAC") in the Context of International Technological Integration*, 72 CHI.-KENT L. REV. 533 (1996).

210. DIAC, *supra* note 209, Introduction Part VII, at S-4 to S-6. See also

based on five principles which include establishing minimum standards through an international agreement for national antitrust laws, and providing procedures for both an international body and the parties to the agreement to ensure the effectiveness of international trust law.²¹¹

DIAC provides minimum standards for the national laws of the parties for major areas of competition laws, including price-fixing and distribution strategy agreements, mergers and acquisitions, and state-authorized cartels.²¹² According to Professor Eleanor M. Fox of the New York University School of Law, and one of the members of the DIAC drafting group, any country party to this agreement would have to "adopt, in accordance with its constitution, the measures necessary to ensure the effective application of this Agreement."²¹³ A party could also enact stricter laws than the minimum established by the International Code.²¹⁴ Professor Fox provides the example that if the United States became a signatory to such an agreement, it would have to eliminate its statutory exemptions for export cartels, because they would not conform to the international code.²¹⁵

Perhaps the key provisions in the DIAC for ensuring compliance among the parties is the establishment of two international organizations, one for ensuring compliance and the other for resolving disputes. DIAC would establish the International Antitrust Authority to ensure that the national laws of the parties based on the minimum standards of the International Code are enforced.²¹⁶ This international authority would have broad powers and the authority to: 1) bring actions against national antitrust authorities in that nation's courts if the authorities refuse to take appropriate action; 2) sue private persons; 3) sue a party to the agreement before the International Antitrust Panel; 4)

Fikentscher, *supra* note 209, at 535-37.

211. DIAC, *supra* note 209, Introduction Part VI, at S-6; Fikentscher, *supra* note 209, at 536-39. The DIAC summarizes the five underlying principles as providing for (1) national, substantive law that grants (2) national treatment and provides for (3) minimum standards and (4) international procedural initiatives which are (5) limited to cross-border situations. *Id.*

212. DIAC, *supra* note 209, arts. 4, 5, 8-13, 16, at S-11 to S-17, S-19.

213. *Id.*, art. 2 ¶ 1(a), at S-10. See also *International Antitrust Code Will be Studied by GATT Members*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1628, at 259 (Aug. 19, 1993) [hereinafter *International Antitrust Code*].

214. DIAC, *supra* note 209, art. 2 ¶ 2(a), at S-10. See also *International Antitrust Code*, *supra* note 213, at 259.

215. See *International Antitrust Code*, *supra* note 213, at 259.

216. DIAC, *supra* note 209, art. 19 ¶ 1, at S-20. See also Fikentscher, *supra* note 209, at 538-39.

hold a right to appeal, even when the authority is not a party to the case; and 5) assist parties with the enactment and enforcement of antitrust law.²¹⁷

The International Antitrust Panel would also be established to settle disputes with legally binding decisions.²¹⁸ Each party may bring an action against another party before the panel, after the failure of consultations between the parties and the International Antitrust Authority.²¹⁹ Not only are the panel's decisions legally binding, but if the national court's decision is inconsistent with the obligations of the agreement, then that court or the nation's authorities "have to reconsider their decision respecting the findings of the International Antitrust Panel."²²⁰

Thus, the DIAC would provide an international set of antitrust rules, as well as an enforcement agency and dispute resolution mechanism and forum on the international level. Such proposals are considered to be the most ambitious in the area of international antitrust enforcement in recent years.²²¹ As one commentator observed, "[T]he DIAC proposal is probably premature given the nation state system of today where each state jealously guards its sovereignty."²²²

F. Discussion

The above bilateral cooperation agreements, multilateral recommendations, and plurilateral agreement proposals reflect the

217. See DIAC, *supra* note 209, art. 19 ¶ 2, at S-20 to S-21; *International Antitrust Code*, *supra* note 213, at 259.

218. See DIAC, *supra* note 209, art. 20 ¶ 1, at S-21; *International Antitrust Code*, *supra* note 213, at 259.

219. See DIAC, *supra* note 209, art. 20 ¶ 2, at S-21.

220. *Id.* art. 20 ¶ 4, at S-21.

221. See *International Antitrust Code*, *supra* note 213, at 259 (Professor Fox, a member of the DIAC drafting group herself, has urged a more "minimal approach"). See Also, Eleanor M. Fox, *International Antitrust: Against Minimum Rules; for Cosmopolitan Principles*, 43 THE ANTI-TRUST BULL. 5 (1998) [hereinafter Fox, *International Antitrust*]. Professor Fox has suggested a "pragmatic" solution of "overarching framework principles that provide a discipline against nationalistic measures, that keep enforcement at the national level, that require procedural vehicles and safeguards to assure access to national courts, and that provide choice of law rules where the significant antitrust effects are localized within one nation." *Id.* at 5-6. See also, Mitsuo Matsushita, *Competition Law and Policy in the Context of The WTO System*, 44 DEPAUL L. REV. 1097, 1110-11 (1995). An ABA proposal advocates an agreement on basic principles among nations, without an international enforcement agency. *Id.* (citations omitted).

222. Matsushita, *supra* note 221, at 1111. Mr. Matsushita goes on to comment that perhaps in the future when globalization of economies reaches to the level such as the EU, then there will be a need for a "supra-national" enforcement process similar to what the EU currently has now (with the EU Competition Commission). *Id.* at 1111-12.

growing awareness among nations of the necessity for the internationalization of antitrust law. The bilateral cooperation agreements which the United States has with the EU, Australia, Canada and Germany have been successful in facilitating greater communication and cooperation between the parties and have also produced some concrete results in antitrust enforcement involving multinational anti-competitive activities.

However, as the Boeing/McDonnell Douglas merger showed, such bilateral agreements are ineffective in resolving the disputes where strong national interests and the protection of vital industries are at stake. Without a dispute settlement mechanism, it took extreme political pressure and the threat of an all-out trade war to bring about the EU approval. This is an inherent weakness in all four current bilateral cooperation agreements which the United States is a party to, namely that although comity considerations and cooperation procedures are specifically incorporated, none of these agreements obligates the parties to ultimately make antitrust enforcement decisions based on comity or to comply with cooperation requests.²²³

In addition, "realpolitik" considerations, where each country protects its own best interests in an increasingly competitive global economy, will require a country to apply its own antitrust laws. Such considerations will also compel countries to increasingly apply extraterritorial jurisdiction of their antitrust laws when their interests are adversely affected by what that nation perceives as anticompetitive activities in another country.

For these reasons, the need for an international agreement providing at least common guidelines for antitrust enforcement and more importantly, a binding dispute resolution mechanism, is a valid one. Indeed, the need for such a dispute resolution body has been recognized on the international level. As discussed above, the OECD's most recent Recommendations include procedures for OECD members to seek resolution of unsettled disputes through the Competition Law and Policy Committee,²²⁴ and the DIAC calls for both an enforcement agency and dispute resolution panel with the authority to make legally-binding decisions.²²⁵

Perhaps the most compelling evidence for the necessity and feasibility

223. See discussion *supra* Parts IV.A-B, VI.A-C.

224. See discussion *supra* Part VI.D.

225. See discussion *supra* Part VI.E.

of an international agreement on antitrust enforcement and the establishment of a dispute resolution mechanism is the agreement to establish the World Trade Organization (WTO)²²⁶ which annexes the Uruguay Round Multilateral agreements on the Trade in Goods (GATT),²²⁷ and the Uruguay Round Understanding of Rules and Procedures Governing The Settlement of Disputes (DSB).²²⁸ Under the WTO agreement, the Multilateral Trade Agreements are binding on all members.²²⁹ These agreements have established international rules and guidelines governing previous areas of international trade friction which were very contentious and protectionist, such as agriculture, textiles, intellectual property rights, as well as subsidies and dumping.²³⁰ Without the success of establishing the WTO, the world would have been subject to damaging unfair trade practices, protectionism, and trade wars.²³¹

The DSB established rules and procedures for a dispute settlement

226. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations, 33 I.L.M. 1140, 1144 (1994) (entered into force Jan. 1, 1995) [hereinafter WTO Agreement].

227. Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1154, 1154-55 (1994) [hereinafter GATT 1994].

228. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1226 (1994) (entered into force Jan. 1, 1995) [hereinafter DSB]. DSB is the acronym for the Dispute Settlement Body. *Id.* art. 1 ¶ 2, at 1226.

229. WTO Agreement, *supra* note 226, art. II ¶ 2, at 1144.

230. *See, e.g.*, GATT 1994, *supra* note 227, at 1153. The Agreement on Agriculture, Agreement on Textiles and Clothing, Agreement on [Antidumping], and Agreement on Subsidies and Countervailing Measures were all incorporated as an annex to GATT 1994 under the WTO Agreement. *Id.* The Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights was also incorporated as an annex under the WTO Agreement. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPs]. *See also* ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 53 (1997). These Multilateral Trade Agreements incorporated into the WTO Agreement “strengthen and supplement the general GATT guarantees of trade and non-discrimination, especially with regard to agricultural, textiles and ‘grey area’ trade restrictions . . . which have escaped effective GATT legal disciplines for a long time.” *Id.*

231. *See* PETERSMANN, *supra* note 230, at 45. The WTO Agreement was adopted by 124 countries and the EU. In commenting on its importance, Petersmann opines that the WTO Agreement is:

[T]he most important worldwide agreement since the UN Charter of 1945 As a global integration agreement, which regulates international movements of goods, services, persons, capital and related payments in an integrated manner, the WTO Agreement reduces the current fragmentation of separate international agreements and organizations for movement of goods, services, persons, capital and payments.

Id.

mechanism which leads to binding adjudicative proceedings.²³² A key provision for the success of and compliance with this dispute resolution system is if a member does not comply with the DSB ruling, then that nation becomes subject to unilateral trade retaliation by the injured member(s), sanctioned by the WTO.²³³ Through the DSB, the WTO has an effective mechanism to encourage the member nations to settle disputes because the DSB is procedural, adjudicative, and binding.²³⁴ For example, it is interesting to note that during the initial forty-three month period after the WTO DSB came into force in 1995, there were 139 consultation requests for dispute settlement.²³⁵ In comparison, there

232. DSB, *supra* note 228, arts. 1, 2 ¶ 1, 4-9, 12, 15-20, at 1226-38. See also John Weeks, *Procedures for Dispute Settlement Under the World Trade Organization - GATT 1994 and Under Chapter 19 of The North American Free Trade Agreement*, 18 *HAMLIN L. REV.* 343, 343-44 (1995). Briefly, under the WTO dispute settlement system, the complaining parties can request that a dispute settlement panel be established if the parties cannot reach an agreement within sixty days after a request for consultations with the alleged injuring party. After the panel is established, it has six months to take written submissions and oral arguments from the parties, and then submit a report to the Dispute Settlement Body (DSB). The panel's report must be adopted by the DSB unless there is a consensus not to adopt the report. Under a standing Appellate Body there is an appellate review process which cannot exceed ninety days. The Appellate Body's decision must also be adopted by the DSB, unless there is a consensus not to do so. If a member nation is found to be in violation of an obligation under GATT, then that nation must indicate its plans to remedy the violation and/or comply with the panel report's recommendation. See Weeks, *supra*, at 343-44. See also Matsushita, *supra* note 221, at 1100-01.

233. DSB, *supra* note 228, art. 22 ¶¶ 2-3, at 1239-40. Article 22 provides that if a member country has failed to comply with the DSB rulings, or has failed to provide satisfactory compensation, then "any party having invoked the dispute settlement procedures may request authorization of the DSB to suspend" the concessions and benefits of the WTO Multilateral Trade Agreements applied to that member. *Id.* art. 22 ¶ 2, at 1239.

234. See, e.g., Matsushita, *supra* note 221, at 1100-01. The dispute settlement process under the WTO is a "judicial process" which establishes an "international trade tribunal" which adjudicates disputes between member states. *Id.* at 1100 n.31.

235. *Overview of the State-of-play of WTO Disputes* (last modified July 27, 1998) <<http://www.wto.org/wto/dispute/bulletin.htm>>. In addition to encouraging members to utilize the DSB system for the settlement of disputes, another important factor for the future success of the WTO's dispute settlement system is whether member nations that are major economic powers will comply with a DSB binding decision. In an early case under the new DSB system, the United States, in what was viewed as a sign of positive support for the WTO DSB system, complied with a DSB recommendation in 1997. See *Overview of the State-of-play of WTO Disputes, supra*. In a complaint by Costa Rica, the DSB had found that a U.S. measure which restricted textile imports from Costa Rica violated obligations under GATT, and recommended that the measure be repealed. After losing on appeal, the U.S. complied with the DSB recommendation by letting the measure expire one month after the Appellate Board Report, and not renewing the

were a total of 196 disputes submitted for settlement over a period of forty-six years from 1948 to 1994, under the previous 1947 GATT Agreement system.²³⁶

As a result of the successful establishment of the WTO and its trade agreements, there would be several advantages to establishing an international agreement on antitrust enforcement through the WTO. The WTO is an international body that has 124 member nations and an established framework to enforce compliance;²³⁷ therefore, an antitrust agreement within the WTO would automatically cover the vast majority of trading nations.²³⁸ In addition, the WTO and its GATT Agreements have proven to be successful in establishing international agreements based on procedures and rules of law for very difficult and contentious trade areas, such as agriculture and intellectual property.²³⁹

It is interesting to note that Professor Fox has suggested a multilateral agreement that focuses on "a cosmopolitan framework, procedures and comity . . . along the lines of TRIPs²⁴⁰ [Agreement on Trade-Related Aspects of Intellectual Property]."²⁴¹ Although Professor Fox does not believe that an international agreement of substantive antitrust rules is

measure after it had expired. *Id.*

236. See PETERSMANN, *supra* note 230, at 74 n.7.

237. See *id.* at 45.

238. Indeed, the EU has formally proposed to develop an international framework of competition rules to be incorporated under the WTO Agreement. See PETERSMANN, *supra* note 230, at 222-23 & nn. 41-42. The EU proposal emphasizes the need for making the substantive law and procedures under any such competition and antitrust framework to be enforceable through the WTO dispute settlement system. See *id.* at 223. By incorporating an international competition rules agreement under the WTO dispute settlement system, the EU argues that competition sanctions and trade sanctions could be authorized to enforce compliance. See *id.* There have also been legal studies which have examined the feasibility of settling disputes over international competition and antitrust rules through the WTO dispute system. See *id.* at 223 & nn. 43-44. In addition, the WTO itself, at the first WTO Ministerial Conference in December 1996, established a WTO working group to study the interaction between trade and competition policy. INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 98 (Ernst-Ulrich Petersmann ed., 1997).

239. See PETERSMANN, *supra* note 230, at 64-65. Petersmann argues that the WTO dispute settlement system can serve as a model for international adjudication:

[The] international legal guarantees of economic freedom, non-discrimination and rule of law, such as those in GATT/WTO law, have . . . extended, for the benefit of individual citizens and consumers, liberal constitutional principles to the ever more important area of economic policy-making of governments . . . As international relations are increasingly determined by economic relations, this change from power-orientated "diplomatic" to rule-orientated "legal" methods of foreign policy-making and dispute settlement, and the worldwide acceptance of a compulsory dispute settlement system as part of the WTO Agreement, are an important new development in international law.

Id.

240. TRIPs, *supra* note 230.

241. Fox, *International Antitrust*, *supra* note 221, at 8-9.

feasible,²⁴² she suggests that a possible solution would be to have an “overarching framework of principles,” with procedures similar to those provided in the TRIPs Agreement to protect harmed nations.²⁴³ In addition, Professor Fox also suggests that dispute resolution be available, but limited, as in the TRIPs Agreement, to provable breaches of the multilateral agreement obligations.²⁴⁴

Although some commentators do not believe that an international antitrust agreement or code is feasible given the inclination of each country to protect its own self-interests,²⁴⁵ other commentators have called for incorporating an international antitrust agreement either within the WTO because it has an internationally agreed-upon and enforceable dispute settlement system already in place, or through some other multilateral agreement.²⁴⁶

242. *See id.* at 7-8.

243. *Id.* at 5, 8-9. These procedures are included within the ten points that Professor Fox suggests should be incorporated in a multilateral agreement. The procedures, similar to those found in TRIPs include:

[An] opportunity for harmed nations to complain to domestic authorities, and protocols . . . established for cooperation in discovery and enforcement . . . [in addition] the importing nation should be obliged to provide an accessible litigation system accompanied by the safeguards of due process, as recourse for harmed nations and persons . . .

Id. at 8-9.

244. *See id.* at 9.

245. *Id.* at 8 (observing that “if homogeneity of substantive rules were a good idea, it is an idea that is unlikely to be achieved.”). Professor Fox believes that there are “contextual differences” in the antitrust laws of the industrialized nations and in the interests of developed and developing countries which are “resistant to harmonization.” As a result, Professor Fox believes that “there is no wisdom in trying to negotiate common antitrust rules, let alone minimum rules en route to . . . a complete set of world substantive rules.” *Id.* at 7-8. *See also* Tepass, *supra* note 161, at 620-23 (advocating bilateral agreements modeled on the US/Australia Agreement which gives mutual recognition and full consideration to defined and limited economic interests of the parties, rather than international antitrust agreements or codes which “provide only unsatisfying solutions to extraterritoriality conflicts.”). *Id.* at 621; Spencer Weber Waller, *Antitrust and American Business Abroad Today*, 44 DEPAUL L. REV. 1251, 1284-87 (1995) (urging that the WTO consider the role of harmonizing fundamental norms and procedures which would “harness each country’s own self interest as a tool for progress,” rather than an international code which would favor some countries and burden others).

246. *See, e.g.,* Matsushita, *supra* note 221, at 1115. Matsushita believes that one advantage of including an international competition code in the WTO Agreement is that coordination between competition policy and other policies within the WTO Agreements such as with anti-dumping, intellectual property, and safeguards would be easier than if a competition code would be established separately from the WTO. *See id.* Matsushita observes that because anti-competitive practices can offset the benefits of the

VII. CONCLUSION

In 1995, Deputy Assistant Attorney General for the Antitrust Division of the Department of Justice, Diane P. Wood, in commenting on the internationalization of antitrust law stated: “[a]ntitrust law must take its place in international markets . . . [The question we face today] . . . is how best to go about making antitrust an effective tool to protect competition in international markets.”²⁴⁷

The issue of extraterritorial application of antitrust laws has become an increasingly contentious one between countries as merger activity grows between multinational corporations, and as nations seek to protect their own markets and economic interests. With the globalization of markets, the conduct of multinational corporations usually brings about concurrent jurisdiction between two or more countries where the corporation’s conduct has an effect. As a result, national courts and governments have attempted to provide an approach to govern the extraterritorial application of national antitrust laws.

In the past, U.S. courts have utilized the doctrine of comity, which recognizes and balances the interests of the foreign jurisdiction, to temper extraterritorial application of U.S. antitrust laws.²⁴⁸ Both bilateral and multi-lateral agreements to which the United States is a party have also incorporated the concept of comity. By taking into consideration the other nation’s interests in determining which jurisdiction’s antitrust laws should be exercised, these agreements attempt to provide an approach through which concurrent antitrust jurisdictional disputes can be resolved.²⁴⁹

However, comity considerations, including positive comity, although ideal in concept, have become less influential in preventing and certainly resolving disputes over the extraterritorial application of antitrust laws.

liberalization of trade in goods and services brought about by WTO, it is necessary to have an international antitrust policy to preserve the effectiveness of the WTO Agreements. *See id.* at 1103. *See also* Alford, *supra* note 102, at 230:

A solution might also be found in recent initiatives to codify, in a multilateral convention, the extraterritorial reach of antitrust laws in light of international comity considerations . . . Such cooperation may now be needed, for, as Judge Fitzmaurice admonished in *Barcelona Traction*, international law obligates every state to “exercise moderation and restraint as to the extent of [its] jurisdiction[.]” so as to “avoid undue encroachment on a jurisdiction more properly appertaining to . . . another State.” (citation omitted).

Id. *See also* P.M. Roth, *supra* note 201, at 268 (“[An] international agreement is undoubtedly the most satisfactory way of avoiding jurisdictional conflicts.”).

247. Diane P. Wood, Address Before the DePaul Law Review Symposium [on] Cultural Conceptions of Competition: Antitrust in the 1990’s (Feb. 3, 1995), in 44 DEPAUL L. REV. 1289, 1298 (1995).

248. *See* discussion *supra* Part III.B.1.

249. *See* discussion *supra* Part IV.A, VI.A-D.

National courts and antitrust enforcement agencies in both the United States and Europe have come to reflect the realpolitik national interests of protecting domestic markets and key industries. Rather than seeking to resolve conflicts in antitrust laws by using a comity analysis to determine whether extraterritorial jurisdiction should be exercised, the exercise of antitrust jurisdiction is now determined on the basis of whether the extraterritorial conduct has an effect on the nation's market. Comity is utilized only if there is a "true conflict" between the laws of the concurrent jurisdictions.²⁵⁰

As discussed above in Part V of this Comment, the dispute over the Boeing/McDonnell Douglas merger was a poignant example of the ineffectiveness of international agreements which incorporate the doctrine of comity, but lack enforceable guidelines or a dispute settlement mechanism. Comity considerations and positive comity incorporated in the U.S./EC Agreement did not even come into play during the review of the Boeing merger by the FTC and the EU Commission. Instead, both the United States and the EU Commission applied their own antitrust laws and analysis. Without a dispute settlement mechanism, it took extreme political pressure and the threat of an all-out trade war to bring about the EU approval.

There is evidence that an international agreement for antitrust enforcement is feasible. For example, the WTO has successfully reached agreements in previously difficult and contentious trade areas and practices. More importantly, the WTO has also successfully established an international enforcement authority and binding dispute settlement system. Given the established framework of the WTO and GATT Agreements for liberalizing international trade and limiting protectionist and anti-free trade practices, it would be logical to incorporate an antitrust enforcement agreement within the WTO to protect the achievements of the multi-lateral trade Agreements.²⁵¹

The dispute over the Boeing merger between the U.S. and EU antitrust authorities was a bruising one. With the continued globalization of markets and corporations, there is also a likelihood of similar disputes in the future with other trading partners. Given the aftermath of the Boeing dispute and the likelihood of future conflicts in national antitrust laws, the argument for an enforceable international agreement on antitrust

250. See discussion *supra* Part III.B(2)-(4).

251. See Matsushita, *supra* note 221, at 1115. See also *supra* note 241 and accompanying text regarding Matsushita.

enforcement, combined with a binding international dispute settlement system, is a compelling one.

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