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EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAWS: MINIMIZING THE CONFLICTS

KEVIN R. ROBERTS*

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I. INTRODUCTION

Since the end of World War II, the United States' relationships with its trading partners have been strained as a result of the extraterritorial application of American antitrust laws.¹ Generally, foreign nations perceive that the reach of United States antitrust jurisdiction is excessively broad, and that it represents a threat to their territorial sovereignty. In specific cases, the extraterritorial application of U.S. antitrust laws presents a severe conflict with the laws, policies and goals of the foreign government. To be sure, when the United States attempts to regulate transactions ordinarily subject to the exclusive jurisdiction of a foreign sovereign, it only seeks to ensure that policies which are strictly enforced in its domestic legal order not be thwarted from abroad. Still, other nations believe just as passionately that their national policies should not be undermined by American actions.² They consider it fundamentally unfair that its citizens may be found in violation of U.S. laws, possibly even subject to criminal prosecution, as a result of conduct which is perfectly legal under their own national laws. Indeed, U.S. assertions of extraterritorial jurisdiction remove from the foreign sovereign its ability to control the activities of its own citizens within its own borders and, as such, constitute a violation of the foreign nation's territorial sovereignty.³

The territoriality principle is the benchmark against which all other jurisdictional principles are measured. It delimits the bounds of a state's authority and distributes competence to rule among the various world actors.⁴ Under the principle's latter role, international transactions are controlled under the theory that a state's *bona fide* interests in regulating its own territory will be respected by other nations.⁵ It is precisely this concept of reciprocity that undergirds the exercise of state power.⁶ In order for international transactions to flourish, a reliable system of international law must be in place. Any system which allows a single nation to exert pressure on a foreign entity to act, or refrain from acting, in a manner inconsistent with its own laws, policies, and interests will inevitably harm this needed international system.⁷ The legislative

¹ Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1978); 1 FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 74-78 (3d ed. 1982); NEALE, ANTITRUST LAWS OF THE USA (2d ed. 1970); 1 ATWOOD & BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4.01-18 (2d ed. 1981).

² Schreiber, *The Proper Reach of Territorial Jurisdiction: A Case Study of Divergent Attitudes*, 2 (Supp. 2) GA. J. INT'L & COMP. L. 43, 50 (1972).

³ *Id.* at 51.

⁴ See Maier, *supra* note 1.

⁵ *Id.* at 585.

⁶ See STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 33 (1883).

⁷ See Maier, *supra* note 1, at 586; *When the Pipeline Row is Over*, The Economist, Oct. 30, 1982, at 16.

and judicial branches of the United States government, however, are of the firm opinion that in some areas, most notably antitrust, the interests of the United States are important enough to annul the territoriality principle. Broadly stated, the issue is whether the United States goes too far in attempting to enforce policies which it deems vital to its national interests, and whether, in doing so, the United States violates international law.⁸

The two reasons generally given to justify the extraterritorial application of a nation's domestic laws are the "effects doctrine" and the nationality principle.⁹ Almost all states acknowledge the nationality principle as a rule of international law, even though substantial disagreement exists as to its precise application.¹⁰ Use of the effects doctrine, however, has not been universally accepted. The effects doctrine is not only the least recognized of all internationally sanctioned principles of transnational jurisdiction, but is also the principle that has generated the most contention in the international arena.¹¹

Generally, foreign reactions to assertions of extraterritorial jurisdiction have centered around the invocation of the "effects doctrine," under which the United States claims extraterritorial jurisdiction over foreign activities which have a direct, substantial, and foreseeable effect on American commerce.¹² Reactions on the part of foreign governments, such as blocking statutes, complaints over specific assertions of extraterritorial jurisdiction, and antisuit injunctions, illustrate the extent to which they perceive that the doctrine, as applied by the United States, violates international law. And such perception is not far from the truth. International law is a field concerned with policy. Part of this policy is to limit the authority and actions of states. The simple fact that a United States court chooses to uphold the applicability of the effects doctrine does not signify that the doctrine has become acceptable under international law. On the contrary, by using the effects doctrine to justify an assertion of extraterritorial jurisdiction, U.S. courts act outside the boundaries of international law, regardless of what the domestic law and policy involved might implicate. Indeed, it is a well-settled principle of international law that "a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subject."¹³

⁸ See Schreiber, *supra* note 2.

⁹ *Growing Incidence of Extraterritoriality Threatens International Business, ICC Says*, International Trade Reporter (BNA), Sept. 30, 1987, at 88.

¹⁰ *Id.*

¹¹ See B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 31-32 (1979).

¹² 15 U.S.C. § 6(a) (1982 & Supp. 1986).

¹³ *United States v. Guatemala*, 1982 DEPT. OF STATE ARB. 851, 876-77 (Ser. 3).

It should not be surprising, then, that when a nation attempts to assert extraterritorial jurisdiction, considerable international tensions are created, for the nations affected regard such an attempt as a direct violation of their national sovereignty.¹⁴ For instance, an attempt to force a corporation to conform to a forum's national laws will invariably lead to an international dispute, as it is very possible that a practice which the forum has a policy of prohibiting is a practice which a corporation's home-state protects, and possibly encourages or compels.¹⁵ Any claim by a nation to export its antitrust legislation is therefore bound to conflict with the foreign government's legal and economic policy, especially when the allegedly illegal practice is required by the foreign government.¹⁶ Because of this, laws which are intended to be "true and fair" in the domestic legal order are severely criticized abroad as being distortive of trade practices.¹⁷ In fact, the British House of Lords has characterized it as "axiomatic" that, in antitrust matters, what one nation seeks to defend may be what it is the policy of another nation to attack.¹⁸ It is no accident that in the case of the United States, the nation most often accused of impermissibly asserting extraterritorial jurisdiction, there have been five diplomatic protests against such exercise of jurisdiction for every single instance of express diplomatic support. Moreover, for every cooperation agreement, three blocking statutes have emerged.¹⁹

In essence, foreign nations see two problems with United States antitrust laws: (1) the substance of the laws, and (2) the reach of the laws. This article will deal primarily with the latter, but the former will also be addressed as the two problems often intertwine. Many nations perceive the substance of the laws as a problem, because while the United States confidently relies on competition to regulate its market, other smaller nations feel that a more regulated economy is more appropriate to their economic needs.²⁰ It is this fundamental difference on market organization and economic policy that is at the heart of the dispute over extraterritorial jurisdiction. A nation is rightfully offended when it finds

¹⁴ C.P. Rogers, *Still Running Against the Wind: A Comment on Antitrust Jurisdiction and Laker Airways Ltd. v. Sabena, Belgium World Airlines*, 50 J. AIR L. AND COMM. 931, 932 (1985).

¹⁵ See *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation*, [1978] A.C. 547, 617.

¹⁶ Note, *In Re Japanese Electronic products Antitrust Litigation: Sovereign Compulsion, Act of State, and the Extraterritorial Reach of the United States Antitrust Laws*, 36 AM. U.L. REV. 721 (1987).

¹⁷ See Pettit & Styles, *The International Response to Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982).

¹⁸ See *Rio Tinto Zinc*, *supra* note 15, at 617.

¹⁹ Pettit and Styles, *supra* note 17, at 699.

²⁰ Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 354 (1983).

that its choice on market organization is imperilled, possibly nullified, by the choices made by a foreign government in organizing its own market.²¹

This article seeks to provide viable alternatives to the extraterritorial application of U.S. antitrust laws. To this end, Part II begins by focusing on the reach of U.S. antitrust laws and discusses the U.S. viewpoint on extraterritorial jurisdiction. Part III examines the problems that arise from the U.S. exercise of extraterritorial jurisdiction under international law. Part IV surveys the reactions of various nations to U.S. assertions of extraterritorial jurisdiction and the measures they have taken in attempting to curb these expansive U.S. tendencies. Finally, Part V provides several suggestions as to how the United States could avoid, or perhaps minimize, the disruptive conflicts caused by its assertions of extraterritorial jurisdiction.

II. THE VIEWPOINT OF THE UNITED STATES

The main concern of any state enacting antitrust or competition laws is to protect its economic interests. Within this area, the United States has legitimate concerns. The American economy is based on free trade and free competition. The United States has a right to protect this economy from foreign encroachment. U.S. firms are no less injured when the harm comes from a foreign nation than when it does from the U.S. itself. Significant problems arise, however, when the reach of that protection exceeds the territorial boundaries of the United States. In essence, the United States is of the opinion that there is little or no international law on the subject of extraterritorial jurisdiction. Thus, it believes that while there may be a question of comity or a need to consult on occasion, there is no obligation to refrain from taking any measures necessary to enforce United States law. If the United States decides that an entity has violated American law, and can gain jurisdiction over that entity under United States law, the question for the court becomes one of appropriateness, not one of ability. Whether such jurisdiction is extraterritorial is of little consequence to the court's ultimate decision.

The United States position is grounded on the decision in *United States v. Aluminum Co. of America (Alcoa)*.²² Although the decision purports to conform with international law, it rests only on Judge Hand's personal view of international law, namely that, "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . ."²³ Having established the effects doctrine as a general basis for extraterritorial jurisdiction, the *Alcoa* Court went on to distinguish between

²¹ *Id.* at 354.

²² *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

²³ *Id.* at 443.

"direct" effects and "indirect" effects.²⁴ In order to be direct, an action has to be performed with the intent of effecting the forum state. In contrast, if the intent is absent, and the objectives of the acting party are limited to activities within the foreign state, any effects upon the forum state are indirect, and cannot be used as a basis for extraterritorial jurisdiction.²⁵ Only six years later, in *United States v. Imperial Chemical Industries (ICI)*²⁶, Judge Ryan found the law to be "crystal clear: a conspiracy to divide territories, which affects American commerce, [violates the American antitrust law]."²⁷ U.S. courts have used the effects test provided in *Alcoa* as a basis for jurisdictional analysis.²⁸ Moreover, the effects doctrine has been codified in United States law. Under such codification, if a "substantial, direct, and foreseeable" effect restraining American trade is found to exist, United States courts can claim jurisdiction.²⁹ Both these cases and the codification of the effects doctrine, however, show a basic misunderstanding as to the competence of the United States, under *international law*, to assert jurisdiction over foreign nationals for acts performed outside its national territory.³⁰

II. PROBLEMS WITH THE U.S. APPLICATION OF THE EFFECTS DOCTRINE

There are two basic problems with U.S. courts application of the effects doctrine. First, the "effects doctrine" lacks support among the community of nations. Second, American courts have been totally unable to adequately take into consideration the interests of the nations affected by their exercise of extraterritorial jurisdiction.³¹ It is true that a balancing test, supposedly used to determine the reasonableness of an assertion of jurisdiction, purports to take foreign interests into account. This test, however, lacks clear definition both as to whether the test is binding and as to the manner in which foreign interests are to be examined. These problems allow the test to be used in an inconsistent manner, when it is utilized at all.

²⁴ *Id.* at 441-444.

²⁵ FUGATE, *supra* note 1, at 63.

²⁶ 100 F.Supp. 504, *final order entered* 105 F.Supp. 215.

²⁷ *Id.* at 592.

²⁸ *See, eg.*, *Timberlane Lumber Company v. Bank of America N.T. and S.A.*, 549 F.2d 597 (9th Cir. 1976); *U.S. v. Watchmakers of Switzerland Information Center, Inc.*, 1963 TRADE CAS. (CCH) Section 70,600 at 77,414; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

²⁹ 15 U.S.C. § 6(a) (1982 & Supp 1986).

³⁰ Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L. J. 638, 643.

³¹ Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983).

A. Problems with the Theory of the Effects Doctrine

The first problem with an assertion of extraterritorial jurisdiction based upon the effects doctrine surfaces on a theoretical level, even before a specific claim of jurisdiction is made. Proponents of the *Alcoa* approach claim that the effects test is based on the case of the *S.S. Lotus*, decided in 1927 by the Permanent Court of International Justice.³² The other view is that the *S.S. Lotus* did not stand for the effects test at all, but instead referred to the principle of objective territoriality.³³ The better view is that the *S.S. Lotus* stood for the latter proposition. Objective territoriality, a settled theory of jurisdiction in international law, refers to the power of a state to take jurisdiction over foreign nationals for acts committed abroad. The effects doctrine "allows" a nation to do the same. There is a critical difference, however, in the relationship between the acts and the effects. In order for a nation to justify an assertion of jurisdiction under a theory of objective territoriality, the effects felt in the asserting nation must be a constituent element of the action, without which no cause of action would have arisen.³⁴ Under the effects doctrine, however, the nexus between the action taken abroad and the effects felt domestically is much weaker: a nation can assert jurisdiction under the effects doctrine over any action which has a direct effect, above the *de minimis* line, even when such effect is not a constituent element of the action.

In the *S.S. Lotus*,³⁵ the leading case on the issue of whether a state can assert jurisdiction based on the effects of an action, a French ship travelling in international waters negligently rammed a Turkish ship. The Permanent Court of International Justice determined that Turkey had correctly assumed jurisdiction over the officer on watch aboard the French vessel because the constituent elements of the action - the negligence on the French ship and the effect/injury on the Turkish ship - were "legally, entirely inseparable, so much so that their separation [rendered] the offense non-existent."³⁶ In other words, if there had been no French negligence, there would have been no Turkish injury. More importantly, if there had been no injury, there would have been no negligence, or at least none that would have been legally cognizable.

Foreign nations take a more narrow view of the *S.S. Lotus* and the principle of objective territoriality: the principle, of which the effects doctrine is a part, was meant to deal only with conduct which is universally considered

³² *Case of the S.S. Lotus*, 1927 P.C.I.J. (ser.A) No.9.

³³ See Schreiber, *supra* note 2, at 45.

³⁴ See Haight, *supra* note 30, at 640.

³⁵ See *supra* note 32.

³⁶ See *supra* note 32, at 30.

a crime.³⁷ As such, violations of American antitrust laws cannot be prosecuted under this principle, as they are far from being universally considered as crimes. The commitment of the United States to free trade and competition, however, is much greater than that of any other nation -- including that of America's trading partners,³⁸ and that has led it to stretch the holding of the *S.S. Lotus* well beyond its *ratio decidendi*.

Leaving aside the proposition that the community of nations must regard the action as justifying an exception to strict territoriality, it is clear that the "effects doctrine" still falls short of the *S.S. Lotus* principle: antitrust cases, especially transnational ones, are too complex to definitively claim that the allegedly anti-competitive effect was a constituent part of the actions taken.³⁹ For instance, in *Laker Airways v. Sabena, World Airlines*,⁴⁰ a case that will be discussed at greater length in the next section of this article, a cartel would have forced Laker Airways into bankruptcy, even if the American market were not involved at all. Without the price fixing arrangement there would have been no injury, but the reverse cannot be said. Had Laker been financially stronger, it may have weathered the conspiracy without injury. Thus, the price fixing agreement could have existed without injury to Laker. Although the price fixing arrangement lead directly to an injury, the existence of an injury was not necessary to the existence of the arrangement. Thus, the injury was not legally, entirely inseparable, as it had been in the *S.S. Lotus*.

The objective territoriality principle is well-settled in international law. But an attempt to assert jurisdiction over agreements made by foreigners outside the jurisdiction of the United States, on the grounds that some "effects" have been felt on United States commerce, is stretching the principle beyond its original meaning and intent.⁴¹ Partly because of this, the effects doctrine has been characterized as the least recognized international jurisdictional principle.⁴² Foreign nations resent the doctrine as applied by the United States because it is grounded in U.S. municipal law and has no basis for guidance in international law.⁴³ There have been fewer complaints when Germany or the European Community have sought to apply the effects doctrine, as these forums must look to international law once a direct effect has been found, in order to determine

³⁷ Griffen, *American Antitrust Law and Foreign Governments*, 13 J. INT'L L. & ECO. 137, 138 (1978).

³⁸ Marks, *State Department Perspectives on Antitrust Enforcement Abroad*, 13 J. INT'L L. & ECO. 153, 154 (1978). Of special concern to other nations is the treble damages remedy in American law. Shenefield, *supra* note 20, at 356.

³⁹ See Haight, *supra* note 30, at 698.

⁴⁰ 731 F.2d 909 (D.C. Cir. 1984).

⁴¹ Jennings, XXXIII BRIT. Y.B. INT'L. L. 148, 175 (1958).

⁴² See Hawk, *supra* note 11, at 31-32.

⁴³ See Gerber, *supra* note 31.

if they may exercise jurisdiction.⁴⁴ Many nations, however, resent even this modification.

B. Problems with the Application of the Effects Doctrine.

On a more practical level, two types of problems emerge from an exercise of extraterritorial jurisdiction based on the effects doctrine. First, the doctrine does not adequately consider the interests of other nations and does not recognize any internationally obligated limitations. Second, longer-termed problems follow, as assertions of extraterritorial jurisdiction harm the international trading system and affect other nations.

1. Fails to Adequately Consider Foreign Interests.

The major complaint that foreign nations have about the reach of United States antitrust law is that the law, especially when a private suit is initiated, does not adequately take into account the interests of the foreign nation.⁴⁵ The primary concern of these nations is that, in deciding what is "direct" or "substantial," a nation's courts will invariably look only to that nation's interests.⁴⁶ While "direct" or "substantial" may modify the doctrine, such modification will only reduce the number of times that extraterritorial jurisdiction will come into play, and will not help the conflicts that will arise when jurisdiction is asserted.⁴⁷ The problem remains that the forum nation's judge, looking to the forum nation's municipal law, will decide whether the forum nation will exercise jurisdiction.

Perhaps the most critical primary problem with the United States' exercise of extraterritorial jurisdiction is that, once the American court has determined the existence of direct and substantial effects, the court needs only to find that an exercise of jurisdiction is reasonable. In doing so, the court looks to domestic policy and law. In fact, existing or developing rules of international law need not be considered, except to the extent that they form part of U.S. domestic law.⁴⁸ The examination of international law ends once the court has decided that the dictates of the *Alcoa* test are met. Even this is a cursory deferment at best, as *Alcoa* is an American interpretation of international law,

⁴⁴ *Id.*

⁴⁵ See Meeson, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 793-94 (1984). After examining a number of cases involving disputes over the reach of United States antitrust law, Meeson comes to the conclusion that because nations protest where there are elements of strict territoriality, but sometimes do not protest when the elements are not present, that attempts by American courts to take evidence abroad sometimes do and sometimes do not provoke a dispute, and that the substance of the antitrust law, i.e. treble damages, were not the sole cause of conflict, "the crux of the matter is adverse effect on foreign interests." *Id.* at 795.

⁴⁶ Gerber, *supra* note 31, at 779.

⁴⁷ *Id.*

⁴⁸ See Meeson, *supra* note 45, at 789.

and does not reflect a rule of international law. Moreover, when a United States court utilizes the balancing of interests approach, it does so only in the context of interests which the United States condones. When an American court declines jurisdiction on the basis of another nation's interests, it does so only after determining that the foreign interest meets United States standards.⁴⁹

One method of determining if an assertion of American jurisdiction is reasonable is to apply a balancing test. In such a test, the court weighs the interests of the United States in asserting prescriptive jurisdiction against the interest of the foreign government involved.⁵⁰ At some point under this balancing test, American interests will be so weak, while foreign interests will be so strong, that adjudication in an American court may be inappropriate. United States courts, however, have been confused in their attempts to find this point. In fact, their lack of information on the dictates of foreign law and policy have generated considerable tension among U.S. trading partners.⁵¹ This lack of information has led U.S. courts to rely solely upon domestic conflict of laws principles and has caused them to find that U.S. interests outweigh those of the foreign government involved. This, in turn, has led foreign nations to view American antitrust jurisdiction primarily as an exportation of intrusive American policy.

One reason why the United States courts do not pay more attention to the interests of foreign nations when engaged in a balancing test is that the foreign government itself is not a party to the dispute before the court. Most antitrust suits are private, generally between two corporations or groups of corporations. The court weighs the interests of the private parties involved relative only to

⁴⁹ See Maier, *supra* note 1, at 593. After discussing *Timberlane*, *Mannington Mills* and *Westinghouse*, Maier comes to the conclusion that, although in this case the [foreign] interests are identified, they appear to be given effect principally because they reflect policies that meet with the approval of the US forum. The result flows not from a true balancing of conflicting governmental interests but from an evaluation of the substance of the conflicting policies. Taken together, the thrust of these cases is that we will respect those foreign laws and policies whose purposes we approve, but not those that we dislike. *Judicial approval or disapproval of the foreign national policies in question was the determining factor* (emphasis added).

⁵⁰ In *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), the Court examined seven factors: (1) the degree of conflict with foreign law or policy, (2) nationality and principle place of business of the party, (3) the extent to which a judgement can be expected to be enforced, (4) the relative significance of effects on the United States as compared with those felt elsewhere, (5) the extent to which the party intended to harm American commerce, (6) the foreseeability of the effect felt in the United States and (7) the relative importance of the violations charged of conduct within the United States as compared to conduct outside the United States.

⁵¹ There had been at least two balancing tests used before the *Laker* court added to the confusion by declaring that the test was not neither needed nor helpful. Cf. *Timberlane with Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). The Third Circuit supplemented the *Timberlane* approach with other factors, including the possible effects on foreign relations of an assertion of jurisdiction, whether the party censured will be subject to conflicting obligations, whether the remedy granted would be acceptable to the United States were a foreign nation to impose it upon an American defendant, and whether there is a treaty controlling.

each other. The interests of governments are not directly considered.⁵² For instance, the American court in *Laker* admitted that the balancing of interests was not a good solution to the problem, because United States courts had declined jurisdiction on these grounds only when the United States interest had been *de minimis*.⁵³

2. Fails to Recognize International Boundaries.

A second point of contention between the United States and its trading partners is that the United States takes the view that, in asserting jurisdiction, there exist no internationally recognized limitations. As James R. Atwood has put it:

In the absence of treaty constraints, international law recognizes the prerogative of each sovereign state to regulate conduct within its territory and the conduct of its nationals outside its territory. Further, the United States may regulate conduct outside its territory between non-nationals where that conduct results in effects within the United States that are direct and substantial. *See, e.g.*, Restatement (Second) Foreign Relations Law of the United States §18 (1965). *Many U.S. cases in the antitrust field recognize the legitimacy of this exercise of extraterritorial jurisdiction.* Of course, the principle of comity should be given due weight in cases involving extraterritorial enforcement.⁵⁴

It should come as no surprise that foreign nations accuse the United States of acting contrary to international law, for the United States does not even look at international law in order to determine whether its assertions of extraterritorial jurisdiction violate international law. Instead, it looks to the American interpretation of international law and to domestic case law supporting this interpretation.⁵⁵

3. Affects the Rights of Other Nations

⁵² *See* Maier, *supra* note 1, at 289.

⁵³ *Laker*, 731 F.2d at 950-51. The Court cited several cases where the court in question had dismissed because the effects inside the United States were deemed to be insignificant.

⁵⁴ Letter of November 19, 1979 from James R. Atwood, Deputy Legal Adviser of the Dep't of State to Michael Gadbaw, Assistant General Counsel, Office of the Special Trade Representative, reprinted in 74 AM. J. INT'L L. 667 (1980)(emphasis added).

⁵⁵ A former Director of Policy Planning of the Antitrust Division of the United States Department of Justice stated that he was surprised that American leadership in the antitrust field had not been met with the international teamwork that what he perceived as an apparent international consensus would lead one to expect. *See* Davidow, *Extraterritorial Antitrust: an American View*, Address to the International Chamber of Commerce, Paris, Mar. 12, 1981; *See also* Pettit & Styles, *supra* note 17, at 698. This viewpoint contains an erroneous assumption: the fact that the international community wishes to protect free trade does not mean that it wishes to utilize the effects doctrine, treble damages, or the private cause of action as a means to this end.

Another problem arising from the application of the effects doctrine is that effects of the same nature against which the United States complains may be felt in the foreign nation. After all, if a foreign entity performs an action which has effects in the United States, but is then told that it must pay damages for this action, such penalty will immediately affect the entity's position in its home market. This could be seen by the foreign government as a "direct and substantial effect" of the court's decision in its internal economic affairs. Indeed, a distinct possibility exists that the effect of U.S. judicial action on another nation might be more direct or substantial than the effect of the foreign entity's action in the United States.⁵⁶ Therefore, the foreign government would have the same reason to retaliate against the United States firm which originally brought the action in the United States court. Moreover, even when parties legitimately subject themselves to United States antitrust jurisdiction, foreign reaction centered around the substance of the antitrust laws will undoubtedly follow.⁵⁷

4. Harms the International System.

Perhaps the largest problem associated with assertions of extraterritorial jurisdiction is that, even when a particular dispute is ultimately settled, an unacceptable assertion of jurisdiction does long-term damage to the system of international law and trade. According to a 1987 study conducted by the International Chamber of Commerce, the growing incidence of countries trying to apply their national laws outside their territory is harming international business.⁵⁸ The study showed that the frequency and intensity of conflicts over jurisdiction have increased in recent years.⁵⁹ The disputes over the Trans-Siberian Pipeline and the *Laker* suit were cited as two particularly difficult cases.⁶⁰ The report noted that the problem of extraterritorial jurisdiction for international business is that "[i]t creates a climate of commercial and legal uncertainty, distorts investment and trading decisions, results in unwarranted costs for international business, and sometimes imposes conflicting legal requirements on companies. The overall effect is to discourage productive

⁵⁶ V. NANDA, *THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS* § 10.03[1] (1989).

⁵⁷ The possibility of a damage award in excess of \$1 billion was, in all likelihood, weighing heavily on the minds of the British politicians and judges, as they decided the issues in *Laker*. Due to the nature of the claim, the entire judgement could have been enforced against any one of the defendants, or any combination of the entirety. The British government was faced with the possibility that British corporations would be "forced" to pay over \$1 billion in damages. If this is not a direct and substantial effect felt in the United Kingdom, one is hard put indeed to imagine what is needed to constitute such an effect. The jurisdictional basis of the suit brought by *Laker* was not really in question, as all the defendants were operating within the territory of the United States.

⁵⁸ See *supra* note 9, at 88; Pettit & Styles, *supra* note 17, at 698.

⁵⁹ See Saurmann, *The Regulation of Multinational Corporations and Third World Countries*, 11 SOUTH AFRICA Y.B. INT'L L. 55, 71 (1985-86).

⁶⁰ See *supra* note 9.

economic activity, including international investment, and ultimately to reduce employment and economic growth."⁶¹

Nevertheless, the United States interest in a well-functioning international system is not a factor which is usually weighed in the process of determining if jurisdiction can be legitimately exercised.⁶² Once the requirements of the effects test have been met, and an American court has found it may assume jurisdiction, the balancing test basically informs the court whether it should take jurisdiction. The court is then free to make its decision without evaluating the possible impact such decision may have either on other nations individually or on the international legal system as a whole.⁶³ International law, however, is the product of an intergovernmental process which reflects the demand, response, and compromise of co-equals. When a court unilaterally decides what is internationally permissible, without looking at international law and at the interests of other affected states to determine whether a legal principle prohibits the court from taking jurisdiction, it effectively skews this process,⁶⁴ and predictability in the international market is significantly affected.

Furthermore, a court lacks the ability to weigh long-term goals against short-term goals.⁶⁵ One such long-term goal involves the maintenance of an international system reflecting various divisions of authority, which, in turn, by promoting international trade and general goodwill among nations, would be beneficial to the interests of the community of nations as a whole.⁶⁶ A municipal court, however, generally pursues only short-term goals - its scope of action is limited to the adjudication of the dispute which is before it. If there is any domestic societal interest involved, the court will, in all likelihood, act to protect that interest.⁶⁷ If any diplomatic problems arise because of the court's decision, their resolution will be left to diplomats. This balancing of short-term interests over long-term interests weakens the international system. The method often has the result of coercing the activities of a foreign entity performed inside a foreign sovereign's territory.⁶⁸

⁶¹ *Id.*

⁶² See Maier, *supra* note 1, at 594. For a discussion of United States Supreme Court decisions which do emphasize the importance of the international system, see Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 303-16 (1982).

⁶³ See Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 299 (1982).

⁶⁴ *Id.* at 317.

⁶⁵ See Rogers *supra* note 14, at 939, and cases cited therein.

⁶⁶ See Maier, *supra* note 1, at 594.

⁶⁷ See Maier, *supra* note 63; Rogers *supra* note 14, at 939.

⁶⁸ See Maier, *supra* note 1, at 594. See also Schrieber, *supra* note 2, at 51.

III. REACTIONS BY THE COMMUNITY OF NATIONS

Foreign reactions to U.S. assertions of extraterritorial jurisdiction have taken on two basic forms: (1) protests over individual disputes and, more recently, (2) blocking statutes designed to prevent all unacceptable claims. Multinational efforts to fight extraterritorial jurisdiction have also been made through treaties and conventions. The opinion of the international community was perhaps best stated by the United Kingdom in an *aide-memoire* to the Commission of the European Community:

On general principles, substantive jurisdiction in antitrust matters should only be taken on the basis of either (a) the territorial principle, or (b) the nationality principle. There is nothing in the nature of antitrust proceedings which justifies a wider application of these principles than is generally accepted in other matters; on the contrary, there is much which calls for a narrower application.⁶⁹

The effects doctrine was not considered as a permissible basis for an exercise of jurisdiction.⁷⁰

A. Protests Over Specific Cases

Among the most important cases that have generated strong protests from foreign governments are *Laker Airways v. Sabena, Belgian World Airlines* (settled out of court prior to trial), the Siberian Pipeline Dispute (ultimately resolved by political means), and the *Matsushita* case (judicially resolved).

1. *Laker Airways v. Sabena, Belgian World Airlines*

a. Facts of the Case

In 1977, Laker Airways, Ltd., a British corporation, began offering a low-priced, no-frills air service between London and New York. The prices offered by Laker were approximately one-third of the comparable price offered by the airlines comprising the International Air Transport Association (IATA).⁷¹

⁶⁹ Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980* 75 AM J. INT'L L. 261 (1981).

⁷⁰ *Id.* See also Letter by A.J. Mantle, Assistant Secretary, Dep't of Trade, to Dr. E. Niederleithinger, Vice President of the Bundeskartellamt in Berlin, in which the British Government expressed its "firm view that for the authorities of one state to assert jurisdiction over the acts of foreign companies occurring outside its territory on the basis of the effects of such acts within its territory is not consistent with principles of international law." Reprinted in LV BRIT. Y.B. INT'L L. 539 (1984).

⁷¹ The IATA is an organization consisting of the world largest air carriers. The airlines establish fixed fares at annual meetings, which are then subject to official authorization from the governments involved. Because the IATA "substantially controlled" the prices of transatlantic flights, the existence of Laker's low prices threatened the IATA cartelized pricing system. See *Laker*, 731 F.2d at 916-17.

IATA countered by fixing prices at a predatory level in an effort to drive Laker from the skies.⁷² In 1981, three airlines dropped ticket prices on their full-service flights and met Laker's no-service price.⁷³ Allegedly, these three airlines paid travel agents to divert potential customers away from Laker. Laker then attempted to reschedule its financing, but Sabena, KLM and other IATA carriers allegedly pressured Laker's creditors to withhold financing which they had previously promised. Laker was forced to liquidate.

Through its liquidator, Laker brought suit in the United States District Court for the District of Columbia, alleging that the predatory pricing and subsequent pressure on creditors by the IATA had forced Laker to leave the transatlantic market.⁷⁴ At this point, the foreign defendants obtained an interlocutory injunction from the British High Court of Justice which prevented Laker from proceeding against them in the American courts.⁷⁵

Although the immediate issue was the initiation by Laker of an antitrust suit in the United States, the real objection of the United Kingdom was the reach of the United States jurisdiction.⁷⁶ The British government felt the lawsuit was penal in nature and that rights granted to the United Kingdom and to British airlines under the Bermuda 2 Agreement⁷⁷ were being undermined.⁷⁸ The purpose of a regime of bilateral agreements regulating international aviation is to give some assurances of predictability and fair dealing. From the British perspective, the United States' undertaking a unilateral action such as *Laker* undermined this very foundation.⁷⁹ British sovereignty was being threatened, as the United States was attempting to control actions of a British corporation in Great Britain, thus effectively taking the control of this corporation out of British hands.⁸⁰

⁷² Once this was accomplished, the IATA apparently planned to raise its prices back to the pre-Laker level. *Id.*

⁷³ Pan American Airlines, Trans World Airlines and British Airways.

⁷⁴ The defendants in this suit were Pan American World Airlines, Trans World Airlines, McDonnell Douglas Corp., McDonnell Douglas Finance Corp., British Airlines, British Caledonian Airways, Lufthansa, and Swissair. Damages were alleged at \$350 million, which if trebled would amount to \$10.5 billion.

⁷⁵ *Laker*, 731 F.2d at 918.

⁷⁶ See Rogers, *supra* note 14, at 958.

⁷⁷ Agreement Relating to Air Services, Feb. 11, 1946, United States-United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507.

⁷⁸ Letter from the United Kingdom Solicitor's Office of the Department of Trade and Industry to Pan American's London solicitors, December 19, 1984, *reprinted in* LVI BRIT. Y.B. INT'L L. 481 (1984).

⁷⁹ Speech by A.I. Aust, at the Third International Civil Aviation Authority Conference in Montreal, October 21, 1985, *reprinted in* LVI BRIT. Y.B. INT'L L. 504-05 (1985).

⁸⁰ See Pan Am Letter, *supra* note 78.

Following this temporary setback, Laker filed another antitrust suit in the United States against KLM and Sabena, who had not been named as defendants in the original action. This action was consolidated with the first, and an injunction was issued preventing the American defendants from taking any action in a foreign court which would impair the jurisdiction of the United States court. Subsequently, the British High Court of Justice overturned the injunction previously requested by the original defendants on grounds that the United States action did not violate British sovereignty.⁸¹ The British government then invoked the British blocking statute⁸² on the grounds that the United States suit threatened to harm British trading interests.⁸³ Pursuant to this order, all entities conducting business within the United Kingdom were prohibited from complying with any measures arising out of Laker's American lawsuit.

KLM and Sabena, who had been enjoined from seeking foreign relief, appealed to the Court of Appeals for the District of Columbia. They asserted that the injunction violated their right to a parallel proceeding in a foreign forum, undermined the international principle of comity by interfering with foreign judicial proceedings, and hampered the United Kingdom from exercising its right to apply British law to a British subject.⁸⁴ The Court of Appeals affirmed the injunction on the ground that the British rulings were not intended to protect British jurisdiction and interests but were instead meant to deny jurisdiction to the United States courts. Thus, the court ruled that the British proceedings were not deserving of comity.

In the interim, Laker had appealed the injunction prohibiting Laker from pursuing its antitrust claims in the United States to the House of Lords. The House of Lords ruled that no valid reason to restrain Laker from pursuing these claims existed. Two grounds were dispositive of both appeals: (1) if Laker's allegations could be proven, there was a cause of action under United States antitrust law, and (2) there was no similar cause of action under British common law.⁸⁵ Because all defendants were legitimately subject to United States law and because the United States was the only forum which could hear the entire

⁸¹ *British Airways Board v. Laker Airways, Ltd.*, [1983] W.L.R. 545, 549.

⁸² Protection of Trading Interests Act, 1980 Ch. 11. The statute allows the English Secretary of State to require business entities performing operations in the United Kingdom to refuse to comply with foreign judicial orders, including requests for discovery.

⁸³ In a letter from the Solicitor to the Department of Trade and Industry to Laker's London Solicitor, Messrs. Durrant Piesse, on December 9, 1983, the position of the British government was succinctly laid out: "In the Secretary of State's view it would be unacceptable and an invasion of the proper jurisdiction and sovereignty of the United Kingdom, unjustified by international law," if United States domestic policies were to be enforced by resort to penal sanctions — such as treble damages — when a British national inside British territory was acting pursuant to British law, simply because those actions were against United States law. *Reprinted in* LV BRIT. Y.B. INT'L L. 540 (1983). This same letter explained that HM Government felt the Laker dispute would be better resolved as a matter of intergovernmental negotiations, rather than by the court systems.

⁸⁴ *Laker*, 731 F.2d at 915, 921. See also *Rogers*, *supra* note 14, at 945.

⁸⁵ [1985] A.C. 80.

case, if the case was to be heard at all, the House of Lords concluded that it should be heard in the United States.⁸⁶ There was thus a recognition that the *substance* of the American law would permit a cause of action and that the United States could gain in personam jurisdiction over all the parties. This was not necessarily an admission that the United States' basis for finding subject matter jurisdiction was acceptable under international law.

Some criticism of the United Kingdom's position has been levelled on grounds that the UK was not protesting on grounds of international law, but rather on domestic law. In a letter to a private citizen who had requested information, however, the British Overseas Trade Board wrote: "The [United States Export Administration Act of 1985] like the [predecessor] 1979 Act, is extraterritorial in nature . . . The United Kingdom government has formally registered its disappointment and concern that the extraterritorial provisions which are in our view inconsistent with international law have been retained. . ."

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Later, in response to questions on United States antitrust laws applicable to civil aviation, the United Kingdom Secretary of State for Trade and Industry wrote that the United Kingdom was of the view that when the activities of airlines were authorized and regulated in accordance with an international agreement, domestic laws cannot be used to constrain or regulate those activities, except to the extent specifically delineated in the agreement or necessary for the effectuation of the agreement.⁸⁸ As Sir Michael Havers, then-Attorney General of the United Kingdom, elaborated: "There is . . . a deep sense of dismay over the actions of the United States Justice Department in setting up a grand jury investigation of the Laker collapse . . . American extensions of jurisdiction have been inching forward, and I think it is a very dangerous development."⁸⁹

b. The Problems with Laker

The *Laker* court itself set the stage for the primary problem: the effects doctrine has virtually no limits. According to the Court, territorial jurisdiction arises from the "prerogative of a nation to control and regulate activities within

⁸⁶ The House of Lords ruled that "[f]or an English court to enjoin the claimant from having access to that foreign court is, in effect, to take upon itself a one-sided jurisdiction to determine the claim upon the merits in his favour." *Id.*

⁸⁷ Letter by British Overseas Trade Board, October 23, 1985, reprinted in LVI BRIT. Y.B. INT'L L. 480-81 (1985). See also Letter from United Kingdom Solicitor's Office of the Department of Trade and Industry to Pan American's London solicitors, December 19, 1984, reprinted in LVI BRIT. Y.B. INT'L L. 481 (1984); HC Debs., vol. 88, Written Answers, col. 624: December 11, 1985, reprinted in LVI BRIT. Y.B. INT'L L. 483 (1985).

⁸⁸ HC Debs., vol. 88, Written Answers, col. 624: December 11, 1985, reprinted in LVI BRIT. Y.B. INT'L L. 483 (1985).

⁸⁹ N.Y. Times, Aug. 17, 1983, at D1, col. 3, D2, col. 5.

its boundaries . . . an essential element of sovereignty."⁹⁰ Thus, conduct outside the territory of a state which has effects inside the territory may be controlled by the state, for the same reason that conduct within the state which may have effects outside the state may be controlled.⁹¹ This, however, is the exception that swallows the rule: by their very definition, all transnational actions have some sort of effect within the territory of at least two nations, and by allowing any nation which feels a self-determined substantial and direct effect to take jurisdiction over the *entire* transaction, the concept of territoriality ceases to exist.⁹²

Furthermore, the *Laker* Court did not even attempt to take foreign interests into account. The interests of the foreign governments were strong indeed, as the European airlines involved were heavily state-subsidized and operated in an anticompetitive atmosphere. Due to the nature of *Laker's* claim, the entire judgement, were one to be entered, could be enforced against any of the defendants. This judgement would have been in the area of one billion dollars. Had *Laker* pursued such a course of action, instead of settling out of court, one or more of these airlines could easily have gone bankrupt, with serious effects upon the subsidizing nation. Although free trade is the rule in the United States, European governments feel compelled to regulate and subsidize various industries. Yet, because the Court decided "there is no evidence that interest balancing represents a rule of international law,"⁹³ foreign interests were not examined.

This leads into a second problem with *Laker*. Although other United States Courts of Appeals had engaged in balancing tests, the *Laker* Court declined to do so. By disposing of the balancing test, the Court was able to take virtually any action it felt necessary. There were, the Court felt, no internationally recognized boundaries to any remedy which might be fashioned. Had the Court reached the merits of the case, the European airlines may have been faced with conflicting duties: conduct their home nations allowed, encouraged, or required versus a mandate from the United States that this conduct have no effect on the United States.

⁹⁰ *Laker*, 731 F.2d at 921.

⁹¹ *Id.*, at 921-22.

⁹² If a state were allowed to assert jurisdiction over extraterritorial acts by foreign nationals, simply on grounds that these actions *affected* that state, there is practically no limit on the exercise of jurisdiction. See Haight, *supra* note 30, at 643. In many countries a highly competitive economy is considered to be wholly incompatible with that nation's well-being. For one nation to say that another nation must change its economic policy simply because the latter's policy directly effects its trade is reduced to an absurdity if one takes this to its logical conclusion: because the United States trades with the entire world, any action will effect US trade at some point, thus American antitrust laws are applicable to everyone. See Claudy, *Sherman Anti-Trust Law: Applicability to Foreign Commerce*, 37 CORNELL L. Q. 821, 825 n.25 (1952) (" . . . [I]t is difficult to imagine any association of even potential unestablished competitors that might not produce, from within or without the United States, a proscribed effect upon United States export or import trade.").

⁹³ *Laker*, 731 F.2d at 950.

What, then, is the United States position as to interest balancing and conflicting duties? Will interests be balanced? If not, does the defendant have any defense for anti-competitive conduct performed abroad, even if this conduct was consistent with the law of the place of performance? There is grave uncertainty as to what American law is on these points, and this acts as a disincentive to do business with the United States. The uncertainty of American law means that no foreign actor will be able to perform an action without wondering if it will be hailed into an American court. The fact that American law is capable of putting conflicting duties upon an entity is enough to keep that entity as far from United States commerce as possible.

Finally, the effects of this case going to judgment would have been far-reaching. By awarding a billion dollar remedy to Laker, the Court would have given the airlines the choice of either (1) paying the money, or (2) removing themselves from the United States market in the hope that this would also remove them from in personam jurisdiction and enforcement of the judgement. Had some of the airlines chosen the latter route, the ones staying in the American market would have been forced to pay the entire amount. Either option would have had effects in another country. For instance, had Lufthansa been forced to bear the brunt of paying the judgment, it would probably have gone bankrupt. Given the level of subsidization of most European airlines, this could easily have had a negative effect on the government supporting the airline.

2. The Dispute Over the Trans-Siberian Pipeline Contracts.

In the Trans-Siberian Pipeline dispute, the United States, in an effort to impede construction of the pipeline, attempted to force foreign subsidiaries of United States firms, and anyone using American equipment, to break all pipeline construction contracts with the Soviet Union.⁹⁴ The European nations bitterly protested what they felt was an impermissible assertion of United States regulation.⁹⁵ In an *aide-memoire* to the Department of Commerce, they soundly condemned the United States action as contrary to internationally accepted principles of jurisdiction, an encroachment upon their sovereignty, and inconsistent with agreements professed to have been reached at the Versailles Summit. Individual states then moved to retaliate by usage of their blocking statutes.⁹⁶

The basis of their argument was clear: a company registered and incorporated in Europe, doing business there, employing a European workforce, using manufacturing equipment of European design, and using European

⁹⁴ See Maier, *supra* note 1, at 583.

⁹⁵ See Legal Serv. of the Comm'n of the European Communities, *European Communities: Comments on the U.S. Regulation Concerning Trade with the U.S.S.R.*, reprinted in 21 I.L.M. 891 (1982). See also Maier, *supra* note 1, at 583.

⁹⁶ See Shenefield, *supra* note 20, at 352. The end result of this problem was that after the intense reaction of the foreign nations, the United States decided not to go forward with its plans.

material would have been prohibited from carrying out their existing contracts simply because they were owned by a United States company.⁹⁷ Although the basis for the U.S. jurisdiction was apparently nationality, the same can be said about territorial jurisdiction under the effects test.

3. *The Matsushita Case*

In *Matsushita* an antitrust suit was brought in U.S. District Court against Japanese television manufacturers. The manufacturers had allegedly entered agreements to set high prices in the Japanese market, while prices on exports into the American market were set at a low level in order to drive American producers out of the U.S. market. Any loss temporarily sustained would be covered by the high profits in Japan and would eventually be made up once these manufacturers controlled the United States market and raised prices.⁹⁸ The agreements were supposedly government-ordered and were an essential part of Japanese trade policy. The Ministry of International Trade and Industry (MITI) sent, through the Japanese ambassador, a statement clarifying its role in the policies involved. MITI, in fact, would have unilaterally controlled television export had the companies involved resisted entering into the agreements at issue. Despite this, the United States Court of Appeals for the Third Circuit found it had jurisdiction because the agreement was intended to and did have an impact on American commerce.

Noticeably absent from the Third Circuit opinion was any application of the *Mannington Mills* balancing test, supposedly binding on the Court. By ignoring this precedent, the Court was able to disregard the monumental conflicts between U.S. antitrust law and Japanese law and policy, even though the Japanese government expressly asked the Court not to question its policies.⁹⁹ The Court also ignored the suggestions made by the United States Department of State, as well as by the Japanese government, that the court consider the effect which an exercise of extraterritorial jurisdiction in this particular case would have. The *Matsushita* case provoked an angry response by the offended Japanese government, which felt that its sovereignty had been violated. By unilaterally deciding that price agreements executed in Japan, under Japanese law, violated the United States Sherman Antitrust Act, the Court was, in effect, ruling that a foreign government's action, performed within its own territory, violated American law.

⁹⁷ Speech by Sir Michael Havers, Attorney General of the United Kingdom, to the American Bar Association (1983), reprinted in LVI BRIT. Y.B. INT'L L. 418 (1985).

⁹⁸ In re Japanese Elec. Prod. Antitrust Litigation, 723 F.2d 238, 251, *rev'd. sub nom* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Zenith's contentions were ultimately dismissed. However, the dismissal was based upon the holding of the United States Supreme Court that Zenith had not proven a direct and substantial effect upon American commerce. *Id.*, 106 S.Ct. at 1354 and note 6.

⁹⁹ *Matsushita*, 723 F.2d at 306.

B. The Emergence of Blocking Statutes

In reacting to U.S. assertions of extraterritorial jurisdictions, foreign governments have taken a variety of legislative steps. A number of blocking statutes have sprung up, both in developing and developed nations, in direct response to the application of national competition or antitrust laws to activities conducted by foreign nationals acting outside the territory of the asserting state.¹⁰⁰ The United Kingdom's Protection of Trading Interests Act of 1980, which represents the "high water mark of English jurisdictional protectionism,"¹⁰¹ is one of the most controversial and most used blocking statutes, but many other nations also have such statutes.¹⁰² Each statute is different, but the common thread running through them is that each protects a nation's sovereignty and its corporations from foreign attempts at extraterritorial jurisdiction.¹⁰³ These "blocking statutes" have the general effect of refusing to enforce United States requests for production of documents located within the territory of the "blocking" nation, and of preventing the enforcement of American judgements.¹⁰⁴ The former has the practical effect of preventing the normal "trial by document" antitrust suit.¹⁰⁵ The latter type of statutes, in addition to preventing the enforcement of American judgements, often feature a "clawback" provision. Such a provision either does not recognize treble damages claimed against a national entity, or allows the national entity to bring

¹⁰⁰ MARKE & SAMIE, ANTITRUST AND RESTRICTIVE BUSINESS PRACTICES, INTERNATIONAL, REGIONAL AND NATIONAL LEGISLATION ix (1983).

¹⁰¹ See Pettit & Styles, *supra* note 17, at 701.

¹⁰² See, e.g., the Combines Investigation Act 1923, as amended 1976 (Canada); Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 and Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Australia); Protection of Businesses Act, no. 99 of 1978, as amended by Protection of Businesses Amendment Act, No. 114 of 1979 (South Africa); Wet Economisch Mededinging (Economic Competition Act) of June 28, 1956 as amended (the Netherlands); Code of Civil Procedure, Article 249, Code of Criminal Procedure, Articles 351, 352 and Act (No. 488) of July 24, 1980 (Italy); Law No. 680678 relating to the communication of commercial and other documents and information to foreign individuals and legal entities as amended in 1980 (France); Law relating to the Regulation of Maritime and Air Transport of March 27, 1969 as amended, June 21, 1976 (Belgium).

Japan has also considered such legislation. In February, 1983, the United States Internal Revenue Service obtained a court order compelling the Toyota Corporation to produce certain documents needed for a tax investigation. The Japanese Deputy Director General of the North American Affairs Bureau, Ministry of Foreign Affairs related the Japanese government's position to the Diet. Stating that the government took the view that this order for submission was in effect tantamount to the seizure of evidence by foreign prosecutors, he emphasized the fact that this was nothing more than an exercise of the public power of the United States inside the territory of Japan. As the Japanese felt this was inconsistent with principles of international law, a note verbale was given to the United States. After stating again that the United States was "rather blatantly" resorting to such actions as are contrary to international law, he concluded that the only way to combat United States assertions of extraterritorial jurisdiction was to adopt strong affirmative counter-measures. Minutes of the Foreign Affairs Committee, House of Representatives (Diet), 98th Session No. 3, (25 March 1983), at 8-9.

¹⁰³ For an excellent discussion on various blocking statutes see Pettit & Styles, *supra* note 17.

¹⁰⁴ See Rogers, *supra* note 14, at 932; Pettit & Styles, *supra* note 17, at 699.

¹⁰⁵ See Rogers, *supra* note 14, at 932.

suit in the national court to recoup any damages lost in the American court which are above the amount of actual damages suffered. These provisions have the effect of converting an American punitive award into a compensatory one.¹⁰⁶

Violation of a blocking statute generally results in criminal liability in the blocking nation's courts. Foreign nations view this as the most effective method of deterring assertions of extraterritorial jurisdiction. Even though this approach is often combative and is not designed to lower international tensions, reasonableness on this issue appears practically useless.¹⁰⁷ As Viscount Dilhorne of the English House of Lords has stated,

For many years now the United States has sought to exercise jurisdiction over foreigners in respect to acts done outside the jurisdiction of that country. This is not in accordance with international law and has led to legislation on the part of other states, including the United Kingdom, designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty.¹⁰⁸

Most of the blocking statutes go beyond just the antitrust field, but all were designed primarily to protect against the broad reach of United States antitrust legislation.¹⁰⁹ Among these statutes, the United Kingdom's Protection of Trading Interests Act of 1980 has been called "a remarkable response to United States longarm jurisdiction and represents the high water mark of English jurisdictional protectionism."¹¹⁰ As such, it deserves some special attention as an example of an effective blocking statute. This act, invoked during the *Laker* dispute, gives the British Secretary of State the authority to:

- (1) require that entities doing business in the United Kingdom cease compliance with designated foreign orders,
- (2) prevent British courts from complying with foreign requests for documents or discovery orders and

¹⁰⁶ See Rogers, *supra* note 14, at 933 (specifically referring to the British Protection of Trading Interests Act, 1980, ch 11 § 6).

¹⁰⁷ See Shenefield, *supra* note 20, at 352.

¹⁰⁸ Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation, [1978] A.C. 547, 631.

¹⁰⁹ See Marks, *supra* note 38, at 153-54; Lowe, *supra* note 69; Toms, *The French Response to The Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585 (1981).

¹¹⁰ See Pettit and Styles, *supra* note 17, at 701.

(3) forbid the enforcement of any foreign antitrust or treble damages awards.¹¹¹

Furthermore, the Act provides that no judgement for multiple damages can be enforced either at common law or by registration pursuant to statute.¹¹² This, in fact, allows a qualifying defendant, broadly defined to include almost any entity having significant contacts with the United Kingdom, to recover from a person not within the normal jurisdiction of the British courts any part of a foreign judgement paid to such person which was not purely compensatory.¹¹³ The Act was expressly designed to allow the United Kingdom to protect the interests of entities inside the United Kingdom from the application of laws, orders, and regulations of another nation. This concern was prompted by the abrogation by the United States of British treaty rights.¹¹⁴

C. Multilateral Efforts To Combat U.S. Extraterritorial Jurisdiction

1. The Hague Evidence Convention

An example of the multinational efforts made by foreign nations to curb U.S. assertions of extraterritorial jurisdiction can be seen in the reservations made pursuant to Article 23 of the Hague Evidence Convention.¹¹⁵ The Convention gives a mechanism for compelling pre-trial discovery from defiant litigants in transnational cases by requiring parties to the treaty to honor a Letter of Request from abroad seeking the production of specified documents. This obligation has only a few narrow exceptions. Chief among these is Article 23, under which member states may enter a reservation that they "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."¹¹⁶ Of the 21 states that are

¹¹¹ British Protection of Trading Interests Act, 1980, ch. 11; Pettit and Styles, *supra* note 17, at 702; Rogers, *supra* note 14, at 958.

¹¹² British Protection of Trading Interests Act, 1980, § 5. See also Pettit and Styles, *supra* note 17, at 705.

¹¹³ British Protection of Trading Interests Act, 1980, § 6.

¹¹⁴ Press Release by the British Department of Trade and Industry and Department of Transport, June 24, 1983, reprinted in LIV BRIT. Y.B. INT'L L. 484 (1983). See also H.C. Debs. vol.37 Written Answers, col. 548, February 25, 1983: "We have made it quite clear that we regard the application of [United States] laws to companies registered and doing business in the United Kingdom as quite unjustified and contrary to international law." Reprinted in LIV BRIT. Y.B. INT'L L. 483 (1983). When submitting the Bill to Parliament, the then-Secretary of State for Trade clearly stated that what the British government was seeking was to protect British trading interests from the application of United States antitrust laws. LIII BRIT. Y.B. INT'L L. 451 (1982).

¹¹⁵ Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

¹¹⁶ *Id.* Art. 23.

party to the treaty,¹¹⁷ only three, Czechoslovakia, Israel, and the United States have not entered such a reservation. This evidences a basic unwillingness upon the part of the community of nations to have their nationals successfully hailed into an American court.

2. *Accord between Canada and Australia*

A recent exchange of notes between Canada and Australia provided a mechanism for cooperation between the two nations in the event a third nation attempted to apply its laws extraterritorially. If such an attempt would place conflicting duties on either Canadian businesses in Australia or Australian businesses in Canada, the host country would notify the other. Thus, the two nations could more effectively combat the assertion of extraterritorial jurisdiction by another nation.

IV. SUGGESTED SOLUTIONS

The international community has yet to fully develop rules of jurisdiction in order to accommodate both the interests of the state within whose territory the action occurs as well as the interests of the affected nations.¹¹⁸ Since the United States is not likely to abandon the use of the effects doctrine anytime in the foreseeable future, the solution lies in minimizing the conflicts.

A. *Intergovernmental Negotiations*

The correct means by which to resolve conflicting claims of jurisdiction is intergovernmental negotiation, not a unilateral judicial decision.¹¹⁹ Trade disputes are best settled by intergovernmental negotiations, for they involve policy decisions which should not be left to ad hoc, private party litigation.¹²⁰ When one nation clashes with another over which nation will apply its laws, each nation feels that it is acting in its best interests. Quite often, matters of grave national concern are at stake. In a setting such as this, the only solution is either for one side to capitulate totally, or for both sides to compromise. The latter option can be achieved only by governmental negotiations performed in light of international principles, with both sovereigns taking account of the interests of the other.¹²¹ The conflict over the Soviet pipeline is a good

¹¹⁷ Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, Mexico, Monaco, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States.

¹¹⁸ See Gerber, *supra* note 31, at 756.

¹¹⁹ See Maier, *supra* note 1, at 581.

¹²⁰ See Griffen, *supra* note 37, at 147.

¹²¹ See Gerber, *supra* note 31, at 583.

illustration of this type of negotiation. When the United States realized the harm that was being done to its trade relationships, it decided that the goodwill of the European nations, collectively as well as individually, was more important than seeing the pipeline contracts broken.¹²² This was accomplished through intergovernmental negotiations. A situation such as this allows the nations involved to weigh their long-term goals against their short-term goals.

An example of a mechanism designed to establish successful intergovernmental negotiations when a dispute over jurisdiction in antitrust matters arise is the recent United States-Australia Accord on Antitrust Enforcement.¹²³ Under this agreement, the United States agrees to act as a quasi-*amicus curiae* for the Australian government when a private antitrust suit threatens to interfere with Australian national interests. In return, the Australian government has promised not to trigger its blocking statutes simply because the American court seeks to procure discovery of documents located in Australia.¹²⁴ This alternative is especially plausible because the mechanism required for its implementation - diplomacy - is already in place. Instead of leaving the problems to private parties to resolve, diplomats can begin the negotiations.

B. Modification of Existing Law

Another method of possibly avoiding open conflict, instead of either granting or rejecting jurisdiction, would be to modify the substantive domestic law when an international problem arises.¹²⁵ An example of this would be for a United States court to take jurisdiction, but, assuming the plaintiff wins, award only compensatory damages. This would have the effect of upholding the policies regarding competition, which is of primary concern to the United States, while at the same time removing a potential point of conflict with other interested nations. Another example of such a method would be for courts to weigh interests much as they do now under the Second Restatement on Conflicts of Law, but instead of this being a binding decision, the judicial determination would be subject to review by the nation's diplomats.¹²⁶ This would have the effect of allowing the diplomats to sort out the foreign policy questions after consultation with interested nations, and possibly avoid the problems which would arise with a unilateral assumption of extraterritorial jurisdiction.

In the case of the United States, this should be done by amending the remedies section of the Sherman Antitrust and Clayton Acts. Likewise, the

¹²² *Id.*

¹²³ 43 Antitrust and Trade Reg. Rep. (BNA) No. 1071 at 36 (July 1, 1982).

¹²⁴ *Id.*

¹²⁵ See Meeson, *supra* note 45, at 798.

¹²⁶ See Maier, *supra* note 1, at 595.

jurisdictional statute, 15 U.S.C. 6(a), could be amended to conform with the latter suggestion. Given the present language of the statutes, the court system's duty to adjudicate issues without rendering advisory opinions, and the long history of statutory interpretation, a court would have difficulty interpreting the current statutes in the suggested manner. Alternatively, the United States courts could adopt an approach such as the one taken by Germany or the European Community. Though not enough time has passed to accurately gauge the reaction to the decision of the European Court of Justice in the Wood Pulp Case, the German technique, employed for many years, has provoked much less criticism than has the United States method.¹²⁷

A change such as this could be accomplished by Congress, or possibly the courts. The courts, however would find the changes more difficult to make than Congress. As noted above, a court adjudicating a private dispute is not the correct forum for either making fundamental changes in the law or for settling international problems. The thrust of all this is to move away from the American methodology currently used in personam/subject matter jurisdictional theory. Instead, a less theoretical and more functional system-dictated approach should be utilized. In this approach, the interests of other nations are involved, and the decisions of whether and to what extent to enforce United States law would be up to the branches which are best able to decide such matters. If new laws need to be promulgated or existing ones changed, this should be done. This approach is only an alternative to the intergovernmental negotiation approach, as an assertion of jurisdiction would still be a unilateral decision. However, the changes in the law could be coupled with the formation of an international tribunal, as discussed below. The result would be a lessening in tension between the United States and its trading partners.

1. *The Effects Doctrine as Applied by Germany*

The German Code of Civil Procedure (ZPO) provides that international jurisdiction is based on the territory of the state where the act took place.¹²⁸ Even though an act can "take place" in the territory where the consequences of an action occurred, extraterritorial jurisdiction will not lie unless the consequences are an integral and inseparable part of the complained of action; that is, in a case where, absent the consequences, the act would not be completed.

Under German law, extraterritorial application of domestic law requires a two-step inquiry. The first level of inquiry is whether the effects of an action are felt within German territory.¹²⁹ This is broader than the American application of the effects doctrine: under *Alcoa* and subsequent legislation, the

¹²⁷ See Gerber, *supra* note 31.

¹²⁸ Article 32, German Code of Civil Procedure.

¹²⁹ Law Against Restraints of Competition (GWB) § 98(2).

effects must be direct and substantial. This aberration can be explained by reference to the timing of the passage of the GWB in 1957. The GWB was the first true German antitrust statute; as such, the German legislature had no experience with the problems extraterritorial jurisdiction caused. The main source of guidance was *Alcoa*, but even this was somewhat misleading. Even though the United States had been slowly expanding its antitrust jurisdiction in the twelve years since *Alcoa*, the extremely broad assertions of United States jurisdiction and its attendant repercussions had not developed at that time.¹³⁰ Now, in order to exercise extraterritorial jurisdiction, a German court must find that, in addition to the effects being direct and substantial, the effects must interfere with the protective purposes of the specific statute which declares the action to be anticompetitive.¹³¹

The German Kammergericht first ruled in the *Cigarettes* case that the effects doctrine alone is not sufficient to satisfy the dictates of international law.¹³² Thus, if a German court finds that the requisite effects were felt in Germany, a second inquiry must be made to determine if international law prohibits the exercise of German jurisdiction. This question is much more serious to German judges than it is to their American counterparts, as the German Constitution expressly provides that general international law is binding on both the legislature and the courts.¹³³ To determine whether international law prohibits an exercise of extraterritorial jurisdiction, the German courts use a balancing test, much as American courts do. The German balancing test, however, is significantly different from that used in the United States. In Germany, the international principles of nonintervention and abuse of jurisdiction are looked at in a *legal* context, rather than in a political context. This means a judge is required to apply a principle of law and reach a legal conclusion.¹³⁴ In the United States, the balancing of interests does not take place in a strictly legal context, but is grounded instead in principles of comity, which have intrinsic political overtones.¹³⁵ A further difference is that while American courts have no binding guide by which to weigh the interests of other nations,¹³⁶ such a standard exists for German judges. When applying the principle of nonintervention, the interests of Germany will outweigh foreign interests, unless the foreign interests "significantly outweigh" them. The abuse

¹³⁰ See Gerber, *supra* note 31, at 759-61.

¹³¹ *Id.* at 781.

¹³² *Id.* at 775.

¹³³ *Id.* at 760, Grundgesetz, Art. 25.

¹³⁴ *Id.* at 781.

¹³⁵ *Id.*

¹³⁶ A list which contain various interests, both domestic and foreign, to be weighed exists. However, there is no objective guide to tell a judge what weight to give to which interest. See *Mannington Mills and Timberlane*, *supra* notes 50-51 and accompanying text. This leads to inconsistency, and then to uncertainty in the market. See Gerber, *supra* note 31, at 781.

of jurisdiction principle will be triggered only if injuries to the foreign state are "crassly disproportionate" to German interests.¹³⁷

Other nations do not react as vehemently when Germany makes claims of extraterritorial jurisdiction as they do when the United States makes such assertions. This is due to the public international law approach of Germany's two-part analysis. Germany has expressly recognized that external restraints exist which limit the use of the effects doctrine, while the United States apparently has not yet reached this realization. The critical problem when the United States attempts to balance the interests of foreign nations is that it looks to domestic law for guidance. It does not purport to apply a rule of international law. Foreign governments are thus very dubious when the United States claims their interests are being weighed.¹³⁸

In the prohibition order of March 3, 1989, concerning the merger of Linde, a German corporation, and the Kaye organization, a British company with a German subsidiary, the German Federal Cartel Office faced the issue of the extraterritorial reach of German merger control legislation.¹³⁹ The Decision Making Board concluded as a threshold matter that Linde held a dominant position in the German forklift market. Normally, this would have prevented Linde from acquiring another company operating in the same market, unless the merger had procompetitive effects which outweighed the anticompetitive effects. The Kaye Organization operated in several European countries, including Germany; thus, acquisition of Kaye would seem an impermissible strengthening of Linde's dominant position. The Decision Making Board, however, allowed the merger, prohibiting only the acquisition of the German subsidiary. This was allowed, even though the gain of the non-German business of Kaye was considered to strengthen Linde's dominant position in the German market. In the opinion of the Board, Germany, under public international law, had no authority to prohibit the acquisition of a foreign company. *Linde* may be a step towards the abandonment of the effects principle by Germany, since under that theory, Germany would have had jurisdiction over an acquisition having anticompetitive effects within Germany.¹⁴⁰

2. Assumption of Extraterritorial Jurisdiction by the European Community

In the *Wood Pulp* case, forty-one producers of bleached sulfate wood pulp and two trade associations, all non-members of the European Community, petitioned the European Court of Justice to revoke a ruling by the European

¹³⁷ See Gerber, *supra* note 31, at 782.

¹³⁸ *Id.*

¹³⁹ See *Regional Developments: Antitrust Law: German Antitrust Law*, 24 INT'L LAW. 265 (1990).

¹⁴⁰ *Id.* at 266.

Commission.¹⁴¹ The Commission had determined that practices engaged in by the applicants were in violation of Article 85(1) of the Treaty of Rome. The Commission had used the effects doctrine to determine that it had jurisdiction over the allegedly anticompetitive practices. Most of the applicants contested the right of the Commission to apply the European competition laws extraterritorially, focusing on the lack of territorial connection between their practices and the European Community in an attempt to have the Court apply the principle of strict territoriality.

The Court, however, declined to accept either of the proposed principles as controlling. The Court reasoned that nothing in the Treaty prohibited its application to entities located outside the territorial boundaries of the European Community.¹⁴² The Court then noted that to apply a strict principle of territoriality would have the result of giving "undertakings an easy means of evading those prohibitions."¹⁴³ Ultimately, the Court determined the practices were subject to EC jurisdiction because the "decisive factor" of an allegedly anticompetitive act is "the place where it is implemented."¹⁴⁴ Although the Court did not elaborate upon the meaning of the term "implemented," its analysis of the case sheds some light upon the question. First, competition within the EC is restricted when a supplier performs an action in the EC involving the price which will ultimately be charged to their customers inside the EC.¹⁴⁵ Second, in dismissing the claim against a U.S. trade association, the Court held that the association neither engaged in the "manufacturing, selling, or distribution" of the product, nor did it play "a separate role in the implementation" of the agreement.¹⁴⁶ A third passage described the jurisdiction of the Community over practices which "directly, intentionally, and appreciably affect competition within the Community"¹⁴⁷ Taken together, these passages suggest the reach of European competition law will be based somewhere between the two extremes of strict territoriality and a strict application of the effects doctrine. In order for extraterritorial jurisdiction to arise in the European Community, there must be direct, intentional and appreciable effects on European trade *and* an action actually conducted on European soil.¹⁴⁸ Effects on Community trade and, *additionally*, the foreign entity must have some direct connection with the anticompetitive action. This

¹⁴¹ A. Ahlstrom Osakeyhtio v. Commission, [1987-1988 transfer Binder, Common Mkt. Rep (CCH) 14,491 at 18606-07 [hereinafter, Wood Pulp].

¹⁴² Wood Pulp, 14,491 at 18,611-12.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 18,613.

¹⁴⁷ *Id.* at 18,605.

¹⁴⁸ For a more detailed discussion of Wood Pulp, see Vollmer & Sandage, *Casenote: The Wood Pulp Case*, 23 INT'L LAW. 721 (1989).

is what separates the jurisdictional holding of *Wood Pulp* from the effects doctrine. In order for the United States to assert its extraterritorial jurisdiction, there need not be an anticompetitive action actually occurring on American soil.

C. A Balancing Test Performed by an International Tribunal

A third possible method of avoiding open conflicts would be for the United States to avoid, or at least minimize, the application of extraterritorial jurisdiction of national laws. One method of doing this is through the emerging jurisdictional rule of reason. This rule would *require* that a nation refrain from extraterritorial application of its laws when to apply those laws would unreasonably intrude into the legitimate interests of other states.¹⁴⁹ At least one scholar has attempted to formulate a balancing test based on international law.¹⁵⁰ According to this rule, a state would be prohibited from assuming jurisdiction over antitrust matters if the "regulatory interests it is pursuing are outweighed by the interests of one or more foreign states likely to be seriously injured by those measures."¹⁵¹ This rule, however, is inadequate by itself, as it still gives no binding guidance, and a domestic forum applying the rule will still give paramount weight to its own interests. Even though the rule states that domestic and foreign interests should carry equal weight, in reality judges are a product of the system of which they are a part. A domestic interest which to a totally neutral observer may seem trivial may be of extreme importance to a domestic court. Thus a domestic court will, in all likelihood, not be able to weigh domestic and foreign interests equally. On the positive side, this is a step in the right direction. The bias problem could be best solved by allowing an international arbitral tribunal to conduct the balancing.¹⁵² Questions by domestic courts could be submitted to this tribunal, which would render binding opinions on the existence and interpretation of rules of international law.¹⁵³ In this manner, the interests of all concerned states would be weighed equally and fairly .

VI. CONCLUSION

When all is said and done, international law is binding on all actors upon the international stage. One of the most important bases of this body of law is what is known as customary international law - that is, what nations do. What nations do, when faced with an assertion of extraterritorial jurisdiction based on the effects doctrine, is protest. Nations protest, claiming that such assertions are contrary to international law, because of the problems, both theoretical and

¹⁴⁹ See *Growing Incidence of Extraterritoriality Threatens International Business, ICC Says*, International Trade Reporter (BNA), Sept. 30, 1987, at 88.

¹⁵⁰ See Meeson, *supra* note 45, at 804.

¹⁵¹ *Id.*

¹⁵² *Id.* at 809.

¹⁵³ *Id.*

practical, that arise when one nation attempts to enforce its laws inside another nation's borders. For various reasons, only one nation asserts jurisdiction based on a strict application of this principle. This nation should not be allowed to justify this assertion on grounds that it is accepted in international law: the actions of all other nations belie its position. That nation, in the interests of international trade, should modify its position. Inter-governmental negotiations can begin the very next time a dispute arises. Substantive changes in American and international law may take longer. But in the interests of the well-being of an ever-more interdependent world economy, these changes should be made.