THE INTERNATIONAL LANGUAGE OF CONVERGENCE: REVIVING ANTITRUST DIALOGUE BETWEEN THE UNITED STATES AND THE EUROPEAN UNION WITH A UNIFORM UNDERSTANDING OF "EXTRATERRITORIALITY"

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1. INTRODUCTION

On August 21, 1995, the U.S. District Court for the District of Columbia entered a final judgment against the Microsoft Corporation for violations of sections 1 and 2 of the Sherman

* J.D. Candidate, 1997, University of Pennsylvania Law School; B.A., 1994, Cornell University. I am honored to accept the annual Samuel F. Pryor III Prize for the Most Distinguished Comment. This Comment is dedicated to my parents, Donald and Eileen Himelfarb, and brother, Evan, for their unconditional love and encouragement; to my grandmother, Jennie Himelfarb; and to the memories of Jacob Himelfarb and Sidney and Irene Rudman. Special thanks to Michael Fahey, Tina Chao, and Thad Bracegirdle for their support and assistance in editing this piece.

1 See United States v. Microsoft Corp., No. CIV.A.94-1564, 1995 WL 505998, at *1 (D.D.C. Aug. 21, 1995). Microsoft Corporation, “the world’s leading maker of software for [IBM-compatible Personal Computers ("PCs")], holds about 80 percent of the global market for PC operating systems, the programs that provide the crucial first level of interface between man and machine.” David Mok, New Windows 95 A Window of Opportunity for PC World, BUS. TIMES, July 1, 1995, at 6. In the computer industry, “once a breakthrough software package sweeps the market, it often proves extraordinarily difficult to displace.” MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.8.8, at 25 (Supp. 1995). Antitrust investigations of Microsoft initially concerned exclusionary conduct by the company which allegedly gave rise to “nonfunctional incompatibilities between [Microsoft’s] own and [its] competitors’ operating system software.” Id. § 3.8.8, at 26 n.49.
Antitrust Act of 1890 ("Sherman Act"). Following an unusual investigation by the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("Antitrust Division"), and an equally intricate procedural history, the district court enjoined Microsoft's use of per processor licenses, license agreements that exceeded one year in length, and restrictive nondisclosure agreements for a period of seventy-eight

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3 In 1990, the FTC began investigating Microsoft's alleged anticompetitive conduct, but ended its inquiry in 1993 when the commissioners could not agree to commence an administrative proceeding. See United States v. Microsoft Corp., 159 F.R.D. 318, 321 (D.D.C. 1995) [hereinafter Microsoft I]. Then, in a highly unusual maneuver, the Antitrust Division initiated its own probe of the company. See FTC Closes Antitrust Probe of Microsoft; Antitrust Division Begins Its Own Probe, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1629, at 288 (Aug. 26, 1993) ("While the FTC, on rare occasions, has looked at investigations that were closed by the [Antitrust] Division, the reverse situation is thought to be even more unusual.").

4 Judge Stanley Sporkin wrote the initial district court opinion. See Microsoft I, 159 F.R.D. at 321. He refused to enforce a consent decree negotiated between the Antitrust Division and Microsoft to restrict the length and nature of Microsoft’s licensing contracts, claiming that the agreement was not in the "public interest" under the Tunney Act, 15 U.S.C. § 16 (Supp. 1994), which establishes a system for procedural and substantive review of consent decrees. See 159 F.R.D. at 338. The Court of Appeals for the D.C. Circuit, bothered by Judge Sporkin’s apparent bias against Microsoft and his misapplication of the Tunney Act, reversed and remanded for rehearing by a different district court judge. See United States v. Microsoft Corp., 56 F.3d 1448, 1463-65 (D.C. Cir. 1995) [hereinafter Microsoft II]. On remand, Judge Thomas Jackson presided. See United States v. Microsoft Corp., No. CIV.A.94-1564, 1995 WL 505998, at *1 (D.D.C. Aug. 21, 1995) [hereinafter Microsoft III].


6 See Microsoft III, 1995 WL 505998, at *2, *7. The U.S. Department of Justice claimed that contracts with equipment manufacturers that lasted "for an excessive period" effectively precluded new market entrants from establishing themselves in the operating systems market. Consent Decree, supra note 5, at 268.
months. Nonetheless, the domestic implications of the U.S. government's relentless pursuit of computer software giant Bill Gates, Microsoft's chief executive and founder, are perhaps less intriguing than the international ramifications. Pursuant to an executive agreement with the United States, the European Union ("EU") agreed to treat the August 1995 consent decree as its own operative law, historically marking the first coordinated effort between the United States and the EU in initiating and resolving an antitrust enforcement action.

The cooperative venture began shortly after Novell, Microsoft's chief competitor in the applications software market, filed a complaint on June 30, 1993 with the competition division of the EU's policy enforcement body, the European Commission, alleging violations by Microsoft under the Treaty of Rome's primary antitrust provisions, articles 85 and 86. While Novell was soliciting aid from the European Commission, the United States' Assistant Attorney General ("AAG") of the Antitrust Division, Anne K. Bingaman, recovered the U.S. investigation of Microsoft from the FTC. Microsoft agreed to negotiate an

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9 See Microsoft I, 159 F.R.D. at 322 n.6; Microsoft Settles, supra note 7, at 106.

10 See Microsoft Settles, supra note 7, at 106; Louise Kehoe & Geof Wheelwright, EC to Probe Antitrust Allegations Against Microsoft, FIN. TIMES, Sept. 6, 1993, at 22. Novell raised similar issues of Microsoft's alleged attempts to limit competition by drafting per processor agreements and by "tying" sales of one product to another. Id. Each company accused the other of bad faith negotiations in the merger discussions which arose out of an unsuccessful bid by Microsoft to acquire Novell. See id.

11 See Microsoft I, 159 F.R.D. at 323-24. For a discussion of the unique transfer of the investigation from the FTC to the Antitrust Division, see supra
identical “undertaking” with the European Commission\(^\text{12}\) and consent decree with the Justice Department (“DOJ”)\(^\text{13}\) in order to resolve the allegations of anticompetitive activity.\(^\text{14}\)

The dual enforcement that arose out of the Microsoft investigation was the product of a 1991 competition Agreement between the DOJ, the FTC, and the European Commission.\(^\text{15}\)

The Agreement’s stated purpose was “to promote cooperation and coordination and [to] lessen the possibility or impact of differences between the Parties in the application of their antitrust laws.”\(^\text{16}\)

The international community’s positive response to this Agreement, as demonstrated by the Microsoft incident,\(^\text{17}\) was not surprising in light of a recent trend of nations forming bilateral competition agreements to align competition policies in the

\(^{12}\) Although an “undertaking” lacks a concrete definition, in the context of Articles 85 and 86 it symbolizes the point after which the European Commission may formally respond to, or regulate conduct in, an antitrust proceeding. See Jacques H.J. Bourgeois, Undertakings in E.C. Competition Law, in PROCEDURE AND ENFORCEMENT IN E.C. AND U.S. COMPETITION LAW 90, 93-94, 99 (Piet Jan Slot & Alison McDonnell eds., 1993) [hereinafter PROCEDURE AND ENFORCEMENT].

\(^{13}\) A consent decree is a “judicial order entered by [a] court with the consent of the [Antitrust] Division and the party or parties against whom the case was filed, upon a finding by the court that entry of the decree is in the public interest.” Thomas E. Kauper, The Use of Consent Decrees in American Antitrust Cases, in PROCEDURE AND ENFORCEMENT, supra note 12, at 104. The decree is neither an admission of guilt by the defendant nor a judicial determination that antitrust laws have been violated. See id. at 105.

\(^{14}\) See Microsoft Settles, supra note 7, at 106. In the Microsoft scenario, “the undertaking became effective in the [European Union] the moment it was signed on July 15, [1994].” Id. at 107. Ironically, the decree was not enforced formally in the United States, where it originated, until Judge Jackson delivered his final judgment on August 21, 1995. See Microsoft III, 1995 WL 505998, at *1.

\(^{15}\) See 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, U.S.-E.C., 30 I.L.M. 1491 [hereinafter Agreement]. Since 1993, the entity formerly referred to as the European Community (“EC”) has been known as the European Union (“EU”). Although the Agreement was originally signed in 1991, this Comment generally refers to the EU and speaks of the EC only where necessary for historical accuracy.

\(^{16}\) Id. art. I, at 1492.

international market.\textsuperscript{18} Despite this support, the European Court of Justice ("ECJ") invalidated the pact in the 1994 decision \textit{French Republic v. Commission}, finding it procedurally void because the European Commission lacked the authority to sign a treaty "intended to produce legal effects" in the international arena without the formal approval of the European Council of Ministers.\textsuperscript{19}

Although the ECJ vacated the Agreement strictly on procedural grounds without implicating competition law, one might speculate as to how the Court would respond to the Agreement's substantive terms. Specifically, the Agreement contains two provisions concerning the point in time when comity considerations authorize a nation's jurisdiction over conduct occurring beyond the nation's territory, a legal concept known as extraterritoriality.

Extraterritoriality pertains to the operation of laws "upon persons, rights, or jural relations, existing beyond the limits of the enacting state or nation, but still amenable to its laws."\textsuperscript{20} The "problem of 'extraterritorial jurisdiction'" arises when nations advance conflicting claims in an attempt to apply their own policies and laws "to regulate extraterritorial conduct 'in a way which may undermine and conflict with the laws and policies of a foreign government.'"\textsuperscript{21} This problem confronts many spheres of public international law, and is not confined solely to competition law.\textsuperscript{22}

\textsuperscript{18} See, e.g., Joseph P. Griffin, \textit{EC and U.S. Extraterritoriality: Activism and Cooperation}, 17 FORDHAM INT'L L.J. 353, 374 (1994) (discussing this Agreement's natural evolution from U.S. bilateral agreements with Australia, Canada, and Germany). In the first two years following this Agreement, the United States sent approximately 60 notifications to the EU, compared to four sent the year before signing. \textit{See id.} at 375. Likewise, the EU sent approximately 40 notifications to the United States during the first two years, compared to two the year before its signing. \textit{See id.}


\textsuperscript{20} BLACK'S LAW DICTIONARY 588 (6th ed. 1990).


In the competition realm, as well as in other areas of public international law, extraterritoriality determinations are often grounded in considerations of comity, "a willingness to grant a privilege, not as a matter of right, but out of deference and good will." The Agreement codifies the traditional U.S. concept of negative comity, in which Nation A extends its laws to a foreign defendant whose conduct is affecting Nation A's market, subsequent to a balance between its own interest in protecting its markets and the interests of the foreign defendant.

The conduct need not occur within Nation A's physical boundaries.

The Agreement also sets forth a positive comity provision, whereby Nation B complies with Nation A's affirmative request to prevent anticompetitive conduct within A's borders.

The European Commission has increasingly adopted the U.S. antitrust tenet of extraterritoriality, albeit in a limited form, and applied its laws to foreign defendants whose conduct affects commerce in the EU. By contrast, the ECJ remains beholden to the traditional EU policies of strict territoriality and furthering Union integration when reviewing European Commission decisions. In effect, then, the ECJ extends its jurisdiction to
foreign defendants only when the defendant’s conduct occurs on EU territory and necessarily threatens the unity among Member States.

On April 10, 1995, the Agreement was reinstated upon the requisite approval by the Council of Ministers and with the intent that it shall apply from September 23, 1991, the original date of enactment.29 However, because comity of nations involves “acts or practices of nations based on good will and mutuality, rather than strict application and enforcement of rules of law,”30 this Comment recognizes that the disparate theories of competition held by the European Commission and the ECJ create potential obstacles to vigorous enforcement of the Agreement’s provisions within the EU. The Microsoft episode serves as an illustration of how this bilateral Agreement can operate as a valuable step towards convergence of competition policies in today’s global economy. One expert on trade policy has recognized that “unless and until the United States and other industrialized nations concede their sovereignty over important economic policy issues, any process of achieving harmonization will be evolutionary at best.”31 Favoring the policies embodied in the Agreement’s positive and negative comity provisions, this Comment traces the evolution of dissent between the Commission and the ECJ, discusses the problems posed by their ideological divide, and suggests how the ECJ might approach the Agreement’s terms so it will decide future “hard cases” in accordance with the policies of the United States and the Commission.

In Section 2, this Comment contrasts the antitrust32 legisla-

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30 Fox, DICTIONARY, supra note 22, at 77.

31 Michael L. Weiner, Developments at the Division, in the Court, and in Congress: The Increasing Internationalization of Antitrust, ANTITRUST, Fall 1993, at 31, 33.

32 Although antitrust law encompasses both competition and trade, this Comment restricts its analysis to the former. For the view that competition can no longer enjoy a separate existence from trade, see Eleanor M. Fox, Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade, 4 PAC. RIM L. & POL’Y J. 1 (1995) [hereinafter Fox, Agenda for the WTO].
tion and case law of the United States with that of the EU, discussing each body's historical relationship with extraterritoriality. While the antitrust enforcement bodies and the courts in the United States share a uniform understanding of extraterritoriality, the European Commission and the ECJ do not enjoy such symmetry. Section 3 summarizes the substantive provisions and procedural flaws of the bilateral administrative Agreement that attempted to synchronize U.S. and EU antitrust policies. In Section 4, this Comment argues that different conceptions of extraterritoriality have contributed to the chasm between the European Commission and the ECJ, which in turn, threatens the future potency of the reenacted Agreement in ECJ decisions. Section 5 first considers and then rejects a global International Antitrust Code Working Group proposal as a sufficient alternative to such bilateral agreements and ultimately advocates vigorous enforcement of the reenacted Agreement. Section 5 concludes with suggestions for future implementation that will promote the Agreement's survival before the ECJ, endorsing an increased emphasis on discourse as a vehicle for mutual comprehension of comity principles. The accumulation of bilateral agreements, applied where the factions have mutual interests, will facilitate the long term goal of global convergence of policies, and may eventually translate into convergent legislation.

2. COMPARATIVE ANTITRUST

Although the United States and the EU each serve as the

33 In 1951, the Treaty of Paris gave rise to the first vestige of a European community, the European Coal and Steel Community ("ECSC"). See TREATY INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY]. In 1957, two additional communities evolved: the European Atomic Energy Community ("EURATOM"), see TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY], and the European Economic Community, see TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].

The Treaty of Rome established the European Economic Community with the primary goal of eradicating most, if not all, economic barriers between the six original Member States of France, Germany, Italy, Belgium, Luxembourg, and the Netherlands. See EEC TREATY; CLIFFORD CHANCE, THE CCH GUIDE TO 1993 CHANGES IN EEC LAW ¶ 102 (2d ed. 1990). In 1993, the Treaty of Rome was officially renamed the "Treaty Establishing the European Community," and "Economic" was eliminated from the entity's formal title, signifying the EC's new and broader political, social, and policy-oriented functions. See RALPH H. FOLSOM, EUROPEAN UNION LAW IN A NUTSHELL
other's predominant trading partner, they did not sign their first antitrust agreement until September 1991.\textsuperscript{34} This delay in adopting an agreement is even more surprising considering both entities have entered bilateral competition-based agreements with other nations.\textsuperscript{35}

The divergent goals and expectations of each party offer one possible explanation for the delay in drafting a convergence agreement. Past antitrust initiatives of the EU have often implemented substantive competition rules or enforcement procedures "to ensure that trade between the [EU] and [other] countries is not distorted by anti-competitive practices."\textsuperscript{36} In contrast, the United States has entered bilateral agreements "not to facilitate trade[,] but mainly to deal with an aspect . . . rather peculiar to U.S. antitrust law, i.e. extraterritoriality."\textsuperscript{37} Disparities between each entity's legislation and case law help explain the

\textsuperscript{8} (2d ed. 1995). At the same time, the Maastricht Treaty on European Union ("TEU") added non-economic provisions to the Treaty of Rome. See id.

The ECSC, EURATOM, and the EC collectively represent the European Union under the Maastricht Treaty on European Union. See EEC TREATY. As of January 1, 1995, the EU consisted of 15 Member States, with several Eastern European and Mediterranean countries having applied for membership. See FOLSOM, supra, at 32-33. Some experts contrast the U.S. principle of a "melting pot" with the EU emphasis on "the diversity of nation-states." Joel Havemann, One Europe—The Dream of Unity, \textit{L.A. Times}, Feb. 4, 1992, at 1 (quoting Peter Ludlow, Director of the Center for European Studies in Brussels).


\textsuperscript{35} See id. at 229. The EU has signed competition-related agreements with many countries including Cyprus, Israel, and Canada. See id. at 229-30 & n.3. The United States has signed bilateral agreements exclusively focused on competition practices with Canada, the Federal Republic of Germany, and Australia. See id. at 230 & nn.4-6. Similarly, the United States has employed a mutual legal assistance treaty ("MLAT") with Canada to jointly prosecute international cartels that have violated antitrust laws. See Bingaman Briefs, supra note 17, at 543. The 1993 Pacific Institution project, however, has experienced similar difficulties in its efforts to apply U.S. antitrust laws to the Japanese market. See \textit{generally UNILATERAL APPLICATION OF ANTITRUST AND TRADE LAWS: TOWARD A NEW ECONOMIC RELATIONSHIP BETWEEN THE UNITED STATES AND JAPAN} (Henry B. Cortesi ed. 1994) [hereinafter UNILATERAL APPLICATION] (presenting forum discussions held in Washington, D.C. and Tokyo and a series of position papers analyzing convergence between the United States and Japan).

\textsuperscript{36} Haagsma, supra note 34, at 230.

\textsuperscript{37} Id.
difficulties surrounding competition convergence.

2.1. Case Law Reinforcing Legislative Extraterritoriality in the United States

The classic model of U.S. antitrust jurisprudence permits unilateral, extraterritorial enforcement of sanctions on anti-competitive behavior affecting U.S. commerce. Literally applied, violators under the classic model need not be U.S. citizens. Although the model’s origin has been explained by historical and geopsychological factors, extraterritoriality’s endurance as a prominent theme of U.S. antitrust jurisprudence draws from the legislative text and the relevant case law.

2.1.1. The Legislative Birth of Comity

In the United States, antitrust policy has been shaped largely by a triad of early legislation. The Sherman Act, the Clay-

38 "Unilateral" is defined as "[o]ne-sided; . . . having relation to only one of two or more persons or things." Black’s Law Dictionary 1531 (6th ed. 1990).


40 See id.

41 James Friedberg, Professor of Law at West Virginia University, argues that geopsychological factors in the United States have socialized the population "with a sense of a continental government . . . that, while limited in its substantive power by constitutional federalism, is not limited by international geography in its jurisdictional reach." James J. Friedberg, The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine, 52 U. Pitt. L. Rev. 289, 297 (1991).

42 These three pieces of legislation illustrate the origin of extraterritoriality in competition policy. This limited discussion does not negate the importance of other legislation affecting competition in the United States. Of particular significance is the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1994), which prohibits importers from engaging in conspiracies, trusts, agreements, or contracts that restrain trade or increase import market prices. See id. § 8. Also relevant is the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1994), which grants the FTC the authority to act against "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Id. § 45(a)(1). Both of these statutes are explicitly named in the 1991 Agreement. See Agreement, supra note 15, art. I, § 2(a)(ii), at 1492.

Other relevant legislation includes Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1994), which equips the
ton Act of 1912 ("Clayton Act"), and the Robinson-Patman Act of 1936 ("Robinson-Patman Act") each had an impact on both local and foreign businesses. The Sherman Act responded to "the great social and economic dislocations caused by the industrial revolution" and reflected early misgivings towards big business. The Sherman Act imposes criminal penalties on antitrust violations in both interstate and foreign commerce, including:

(1) in the case of criminal actions brought by the DOJ, indictment by grand jury and a full-blown criminal investigation and trial, (2) in government civil cases, the DOJ's broad powers to discover information through Civil Investigative Demands (CIDS), and (3) in actions brought by private plaintiffs (or the government when it is the injured party), treble damages.

Criminal prosecution under this Act is usually confined to traditional per se violations of the law, including price-fixing, bid-rigging, and other cartel conduct considered unlawful in most countries.
The Clayton Act supplemented the Sherman Act by adding prohibitions against interlocking directorates, exclusive dealing, tying of deals, and acquisitions with the potential to substantially decrease competition or create monopolies. Enforced jointly by the DOJ and the FTC, as well as by private parties, the Clayton Act's non-criminal penalties apply to commerce "among the several States and with foreign nations," like those of the Sherman Act. Finally, the Robinson-Patman Act emerged from the New Deal, prohibiting large retailers from selling goods at discriminatorily low prices that would have disadvantaged small retailers. Although the Robinson-Patman Act only prohibits price discrimination within the United States, the Antidumping Act of 1916 applies similar standards for the international market.

A close analysis of the statutory language reveals that extraterritoriality concerns were a factor in each of these U.S. antitrust acts. Each act provided an important means for attaining the two central goals of U.S. antitrust law: preserving competition and [hereinafter Enforcement Guidelines]. If the anticompetitive conduct cannot be characterized as a per se violation, however, the government or private plaintiff must submit to "rule of reason" analysis, which carries a heavier burden of proof. See Donald I. Baker, Investigation and Proof of an Antitrust Violation in the United States: A Comparative Look, in PROCE ED AND ENFORCEMENT, supra note 12, at 144, 147. "The per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score." Id. (citation omitted).


50 See MARIO MARQUES MENDES, ANTITRUST IN A WORLD OF INTERRELATED ECONOMIES 66 (1991). The FTC is an administrative agency composed of one Chairperson and four Commissioners, whom the President appoints for seven-year terms. See id. Like the DOJ, FTC appointments are sometimes regarded as an extension of the President's will, thus emphasizing the executive branch's role in antitrust enforcement. See id. at 66-67.


52 Id. § 12.

53 See id. § 2.

54 See Fox, Abuse, supra note 46, at 370.

55 See 15 U.S.C. §§ 71-74. Note that the Robinson-Patman Act and the Antidumping Act of 1916 apply primarily to unlawful trade practices and are not the focus of competition convergence. See, e.g., Griffin, supra note 18, at 362-65 (focusing on antitrust laws, the Sherman Act, Foreign Trade Antitrust Improvements Act, and the case law arising from such provisions).

economic efficiency in the market. Accordingly, U.S. antitrust legislation can sometimes implicate foreign nations whose corporations face U.S. antitrust regulation. Extraterritoriality subjects foreign defendants to unpalatable elements of U.S. antitrust law. For instance, litigation of antitrust claims in the United States is often slow and expensive, and "for non-U.S. defendants, treble damages are one of the most onerous aspects of the U.S. antitrust laws."

In response to the extensive use of legislation that authorizes extraterritoriality, foreign nations have developed numerous defenses that aim to eliminate personal jurisdiction and thereby evade prosecution before U.S. courts. The entrance by

57 See Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 924 (D.C. Cir. 1984) (citing Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978)). See also THOMAS PAWLIKOWSKI, INTRA-GROUP ARRANGEMENTS UNDER ARTICLES 85 AND 86 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY at v (1984). Antitrust legislation was initially intended to support the political values of a free market and free enterprise. See Friedberg, supra note 41, at 296. In the 1980's, the Supreme Court used antitrust laws to protect a capitalist marketplace in which businesses of all sizes could survive and disperse economic power. See Fox, Abuse, supra note 46, at 370. Some academics, however, have reinterpreted the "goals" of antitrust legislation and are now looking to balance political and social democracy with economic efficiency. See MENDES, supra note 50, at 63-64 ("If one hundred years of federal antitrust policy have taught us anything, it is that antitrust is both political and cyclical." (citation omitted)).

58 See, e.g., Stroock, supra note 39, at 115-16 ("[C]hallenging cartels or cartelizing behavior that affect the United States might have an effect in [another country] on the profitability of exports or in discouraging such practices as allocating customers or market allocation.").

59 See id. at 116.

60 See id.

61 Id. at 115.

62 See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring that a defendant have "certain minimum contacts" with the forum state). Section 6 of the Sherman Act, however, grants a court in rem jurisdiction to seize goods acquired "under any contract or by any combination or pursuant to any conspiracy" that violates section 1. See PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS ¶ 173 (4th ed. 1988).

In Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984), foreign airline corporations deliberately filed suits in the United Kingdom to divest the U.S. Court of its jurisdiction. Ultimately, however, the D.C. Circuit determined that the United States had the requisite jurisdiction to enforce its antitrust laws and penalties against the foreign defendants. See 731 F.2d at 956.

63 See Stroock, supra note 39, at 136 n.34 (noting some antitrust defenses used by foreign nations, including: "(l) the foreign sovereign compulsion
United States into international antitrust agreements that codify a bilateral acceptance of its extraterritoriality policy may be an attempt to limit the use of these defenses by foreign nations.

2.1.2. Case Law and Comity

A study of legislative antitrust acts alone, however, cannot fully reveal the pervasiveness of extraterritoriality in U.S. antitrust law. Whatever roots extraterritoriality has in legislation, the U.S. courts' interpretation of the antitrust statutes has sustained comity-based extraterritoriality as a focal point of antitrust policy in the United States.  

In the 1945 decision *United States v. Aluminum Co. of America* ("Alcoa"), Judge Learned Hand of the Second Circuit crafted the "effects test" from the Sherman Antitrust Act. This test authorizes U.S. jurisdiction in an antitrust claim against a foreign defendant who engages in activity "intended to affect imports or exports" and where "its performance is shown actually to have had some effect upon them." In addition, this decision rejected the implications of an earlier Supreme Court opinion, *American Banana Co. v. United Fruit Co.*, that jurisdiction is permissible only where anticompetitive conduct touches U.S. territory. In defense; (2) traditional antitrust immunities for petitioning foreign governmental action; (3) principles of foreign sovereign jurisdictional immunity; and (4) the doctrine requiring judicial abstention from reviewing 'acts of state' (citations omitted)).

64 Within the United States, "[a]ntitrust is not the province of a single government agency, or a sole congressional committee, private plaintiffs, or courts. That is one of its virtues and one of its complexities." MENDES, supra note 50, at 68 (quoting Professor Thomas Kauper). Antitrust enforcement is a "quintuple" effort by the DOJ, the FTC, state governments, private parties, and the federal courts. See Barry E. Hawk & James D. Veltrop, Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community, in PROCEDURE AND ENFORCEMENT, supra note 12, at 21, 21.

65 148 F.2d 416 (2d Cir. 1945) (holding that an agreement between a Canadian corporation and European aluminum manufacturers violated section 1 of the Sherman Act for its intended and actual effect on U.S. commerce).

66 Id. at 444.


68 *Alcoa*, 148 F.2d at 444.

69 213 U.S. 347 (1909) (holding that the Supreme Court did not have jurisdiction over acts by the Costa Rican government on foreign land).

70 See id. at 355-56.
Continental Ore Co. v. Union Carbide & Carbon Corp.,\textsuperscript{71} the Supreme Court abandoned its prior philosophy and explicitly upheld the \textit{Alcoa} doctrine.\textsuperscript{72}

Although this principle remains central to U.S. antitrust law, it has been judicially softened in response to foreign defendants' opposition to the Second Circuit's sweeping judicial activism in sanctioning extraterritorial jurisdiction.\textsuperscript{73} In \textit{Timberlane Lumber Co. v. Bank of America},\textsuperscript{74} the Ninth Circuit tempered the effects test by embedding a consideration of comity for foreign defendants.\textsuperscript{75} Finding "substantial effects" to be a necessary, but not sufficient, component for jurisdiction, the court developed a "rule of reason" test and listed factors to be considered in balancing the two competing interests involved—protection of U.S. competition

\textsuperscript{71} 370 U.S. 690 (1962).

\textsuperscript{72} See id. at 704. ("[T]he domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.").


\textsuperscript{74} 549 F.2d 597 (9th Cir. 1976).

\textsuperscript{75} See id. at 612. The court acknowledged that U.S. notions of extraterritorial jurisdiction are not confined by international law or the text of the Sherman Act, leaving the task of definition to the courts. See id. Thus, "[t]he effects test by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country." Id. at 611-12 (footnote omitted).
and respect for the rights of foreign defendants.\textsuperscript{76}

Some appellate courts have evaded the Timberlane rule of reason comity analysis,\textsuperscript{77} which limits the ability to exercise extraterritorial jurisdiction, by aligning their holdings with that of Mannington Mills, Inc. v. Congoleum Corp.,\textsuperscript{78} a case that leaves the comity determination to the court's discretion.\textsuperscript{79} Nonetheless, the effects test remains a staple of U.S. decisional law and a strong symbol of extraterritoriality.\textsuperscript{80} The Timberlane balance frequently permits prosecution of conduct outside U.S. territory.\textsuperscript{81}

The DOJ and FTC Antitrust Enforcement Guidelines encourage a comity analysis, similar to that employed in Timberlane, that takes into account "all relevant factors."\textsuperscript{82}

\textsuperscript{76} See id. at 613-14. Factors considered in the Timberlane balancing analysis include:

- the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of the corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

\textit{Id.} at 614.

\textsuperscript{77} See In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) (granting default judgments for plaintiff, Westinghouse Electric Corporation, against nine foreign defendants who had fixed uranium prices and boycotted the plaintiff's products); but see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) (reinstating a district court's grant of summary judgment in favor of a Japanese television manufacturer because, according to Justice Powell, "American antitrust laws do not regulate the competitive conditions of other nations' economies").

\textsuperscript{78} 595 F.2d 1287 (3d Cir. 1979).

\textsuperscript{79} \textit{Id.} at 1297-98 (advocating case-by-case balancing, using a discretionary ten-factor test, of the interests and policies of each foreign nation against the U.S. interest in maintaining competition).

\textsuperscript{80} See Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2909 (1993) (holding that the importation of goods to the United States is often intended to affect U.S. commerce, making the critical question whether the effects were produced in fact).

\textsuperscript{81} See supra notes 73-76 and accompanying text.

\textsuperscript{82} Enforcement Guidelines, supra note 48, at 20,589-12. Relevant factors include:

1. the relative significance to the alleged violation of conduct within
Furthermore, with respect to restraint on U.S. exports, the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") codifies the effects test.83 Thus, although arguably modified to conform to the realities of international commerce, unilateral extraterritoriality has nevertheless survived as a guiding principle in the U.S. courts.84

the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.

Id. (citations omitted).

83 See 15 U.S.C. § 6a (1994). The Act provides that "acts affecting export trade are illegal only if they have a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce or if they harm the export trade or export commerce of a person engaged in such commerce in the United States." Stroock, supra note 39, at 120 (quoting Joel Davidow, a partner with the Washington, D.C. law firm Albondi, Foster, Sobin & Davidow). However, the legislative history of the Act clarifies that restraints on imports continue to be governed by case law. See H.R. REP. NO. 686, 97th Cong., 2d Sess. 9-10 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2490-91.


84 Compare Friedberg, supra note 41, at 298-308 (arguing that U.S. case law, and other materials which replicate the effects test—the Restatements (Second and Third) of Foreign Relations Law, the FTAIA, and the Department of Justice’s/FTC Guidelines—collectively represent a renunciation of the effects doctrine).

Roger Alford describes "a two-tiered test" in the United States for authorizing extraterritoriality. First, there is a statutory standard for determining whether there is a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. Alford, Application, supra note 21, at 217. Grafted on to this determination is a second tier, a common law analysis of whether, in light of international comity concerns, jurisdiction should be exercised under the instant facts. See id.
2.2. *Tension between the European Commission and the European Court of Justice in the EU*

In contrast to the three branches of U.S. government, four institutions comprise the EU: the European Commission,\(^8^5\) the Council of Ministers,\(^8^6\) the European Parliament,\(^8^7\) and the ECJ.\(^8^8\) The first three of these institutions collectively perform a legislative function, in which "the [European] Commission proposes, the [European] Parliament advises[,] and the Council [of Ministers] decides. Acts of [EU] institutions may be subject to judicial review by [the fourth component of the EU,] the [ECJ]."\(^8^9\)

Because this centralized enforcement system is largely directed by the European Commission\(^9^0\) and invites case law interpretation which generally parallels the Commission’s perspective, one would expect a uniform attitude regarding extraterritoriality. Despite the European Commission’s endorsement of a U.S. effects-

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\(^8^5\) See EEC TREATY arts. 155-63. The European Commission consists of seventeen members, apportioned among twenty-two Directorates General ("DGs"). *See A Brief Introduction to European Law, available in WL, ECLAW, CELEX-LEG Database,* at *1 [hereinafter European Law]. This governmental body: (1) develops EU policy and proposes legislation; (2) executes European Council decisions and maintain policy enforcement; and (3) commences legal actions against Member States, corporations, and individuals who do not comply with EU law. *See id.*

\(^8^6\) See EEC TREATY arts. 145-48, 150. One or more representatives from each Member State sits on the Council of Ministers, the EU’s supreme rule-making body. *See European Law, supra* note 85, at *1.

\(^8^7\) See EEC TREATY arts. 137-44. The citizens of the Member States directly elect the European Parliament, which in 1992 was comprised of 518 members. *See European Law, supra* note 85, at *2. With the exception of some budgetary legislative power, this body serves an advisory function and is charged with overseeing the European Commission’s activities. *See id.*

\(^8^8\) See EEC TREATY arts. 164-88. The governments of the Member States each appoint one judge to the ECJ, which, with the aid of six advocates general, interprets EU law. *See European Law, supra* note 85, at *2. The ECJ presides in cases against other EU institutions as well as against Member States which violate treaty provisions. *See id.* Upon request by national courts of the Member States, this body interprets EU law through advisory opinions. *See id.* In 1993, the Maastricht Treaty acknowledged the Court of First Instance, which has initial jurisdiction over certain matters as determined by statute. *See EEC TREATY* art. 168a.

\(^8^9\) CLIFFORD CHANCE, *supra* note 33, ¶ 402.

\(^9^0\) Although the European Commission is roughly analogous to an executive branch, it does possess legislative and judicial powers of its own, see EEC TREATY art. 155, which it shares with the Council of Ministers, see id. art. 145, and the ECJ. *See id.* art. 164.
based version of extraterritoriality, however, the ECJ has been reluctant to implement this policy. Its decisions reflect a refusal to extend jurisdiction when doing so would conflict with the "economic unit doctrine," a variant of the traditional territorial requirement. The EU’s continuing division over how to define and implement extraterritoriality fosters the relatively weak role the doctrine plays in EU jurisprudence as compared to the United States.

2.2.1. Legislation that Furthers Union Integration

In contrast to the U.S. goals of promoting competition, protecting consumers, and maintaining efficiency within its own borders, the predominant motive behind the EU’s antitrust jurisprudence has been the creation of a single market. In pursuit of this objective, EU legislation strives to prevent anticompetitive conduct from hindering integration. Social and political values dominate EU antitrust policy, while economic efficiency remains subordinate. The original legislation that addresses anticompetitive business practices in the EU is found in articles 85 and 86 of the Treaty of Rome. Today, the EU’s Merger Regulation, adopted in 1990 as a preventive device to keep markets “sufficiently unconcentrated to enable workable competition and entry by those who so wish,”

91 SIR LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET 7-9 (1991). Under the “economic unit doctrine,” the ECJ will not assume jurisdiction over an entity that is not a part of an economic unit with a party that has conducted an antitrust violation on EU territory. See id. at 7-8. By according traditional territorial concerns more importance than international comity concerns, the ECJ reinforces that its paramount concern is the promotion of Union solidarity. See Griffin, supra note 18, at 378-79.

92 See MENDES, supra note 50, at 74. The Treaty of Rome provides for “a system ensuring that competition in the common market is not distorted” as a mode for achieving this market integration. EEC TREATY art. 3(f).

93 The promotion of competition, however, has been regarded as a secondary goal. See PAWLIKOWSKI, supra note 57, at v.

94 See MENDES, supra note 50, at 83.

95 See EEC TREATY arts. 85-86.

96 Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 14 [hereinafter Merger Regulation].

may be of greater practical significance than articles 85 and 86. The Merger Regulation requires parties to notify the Commission before commencing a transaction which exceeds certain thresholds. Following notification, the Commission has the power to enjoin progression of any concentration that "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it." Nonetheless, as a regulation cannot supersede the EEC Treaty, "there is scope for residual application of articles 85 and 86..., particularly to those mergers falling below the thresholds for Community dimension, when inter-state trade is affected." Moreover, articles 85 and 86 continue to govern concentrations in the public sector. While the Merger Regulation may effect the nature and treatment of cases formerly brought under articles 85 and 86, the text of articles 85 and 86 is nonetheless instructive for comprehending the origin of competition policies in the EU.

Despite strong facial similarities with sections 1 and 2 of the Sherman Act, articles 85 and 86 of the Treaty of Rome do not intend to replicate the U.S. provisions. Like section 1 of the

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98 The Merger Regulation regulates most "concentrations" that were formerly addressed under Articles 85 or 86. See id. at 17. Thus, with respect to mergers that do not fall within Article 3(1)'s definition of a "concentration," Articles 85 and 86 have been largely displaced. See id. at 19-20.

99 See VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 238 (5th ed., Sweet & Maxwell Ltd. 1994). One author summarizes the threshold criteria contained in Article 1 of the Merger Regulation as requiring

a 'Community dimension' which is a size of parties test, and comprising three elements: worldwide turnover of the parties combined, Community wide turnover of at least two of the parties, and a two thirds rule, whereby if all parties generate their Community turnover in the same Member state, the transaction falls under the jurisdiction of the relevant national merger authority.

PORTWOOD, supra note 97, at 20.

100 Merger Regulation, supra note 96, art. 2.

101 PORTWOOD, supra note 97, at 19.

102 See id.

103 For a discussion of how the Merger Regulation invites ideological conflict between the European Commission and the ECJ, see discussion infra Section 5.

104 One commentator warns that attempting to understand Articles 85 and 86 by comparing and contrasting them to the U.S. provisions is "dangerous." Federal, State, Foreign Trends are Examined at ABA Spring Meeting, 1560
Sherman Act, article 85 of the Treaty of Rome targets cartels and concerted actions. Specifically, article 85 renders "automatically void" any "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." Ostensibly analogous to section 2 of the Sherman Act, article 86 of the Treaty prohibits monopolization, which is defined as "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it . . . in so far as it may affect trade between Member States." This ban on unilateral conduct complements article 85's restriction on bilateral, concerted activities.

Because articles 85 and 86 are considered "directly effective" provisions, national courts of the Member States also have authority to review them under EU law. Enforcement through the national courts, however, is less common than enforcement by the European Commission and the ECJ. Unlike the United States, the EU does not allow private parties to recover treble damages, thereby reducing their incentive to

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Antitrust & Trade Reg. Rep. (BNA) at 457, 461 (1992) [hereinafter ABA Meeting].

105 See EEC Treaty art. 85.

106 Id. art. 85(2).

107 Id. art. 85(1). Article 85 includes particular examples of such activities, which have been interpreted to encompass "the allocation of markets and customers, price fixing and price discrimination, arrangements akin to tying, and cartels." ABA Meeting, supra note 104, at 461. For a definition of "undertaking," see supra note 12.

Article 85(3) lists exemptions for practices "which contribute[] to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit." EEC Treaty art. 85(3).

108 EEC Treaty art. 86 (listing specific instances of "abuse").

109 See Fox, Abuse, supra note 46, at 367-68.

110 EEC Treaty art. 189 (stating that a regulation "shall be binding in its entirety and directly applicable in all Member States . . . but [a directive] shall leave to the national authorities the choice of form and methods").

111 See MENDES, supra note 50, at 82. In the EU, the European Commission is given disproportionate enforcement power compared to the DOJ and the FTC in the United States, and has been described as "rulemaker, policeman, prosecutor and judge, all rolled into one." Id. (citation omitted); see also discussion infra Section 2.2.2.
bring article 85 and 86 claims in the national courts. Even when such claims are brought by private parties, the national courts often defer to the anticipated ruling of the European Commission.

Textually, articles 85 and 86 lack the inherently broad inclusion of foreign commerce contained in the Sherman Act. Although the language of these articles somewhat mimics the "effects test" crafted by U.S. case law, the articles evoke a different sentiment that conflicts with the ECJ's favored theme of European integration. The words alone did not embrace the notion of "extraterritoriality" until interpreted as such by the European Commission.

2.2.2. Case Law and Diluted Comity

While in the United States statutory interpretation is an integrated product of numerous enforcement bodies, the EU's system of interpretation is Commission-governed. With respect to many issues, the European Commission is regarded as the most "supranational" branch of government in the EU, implying that it is the branch most devoted to the goal of European integration. Given this objective, all of the Commission's decisions are arguably made with an emphasis on unity.

112 In the context of Article 85, the European Commission has the ultimate power to declare an anticompetitive agreement void, permitting a national court to request a preliminary ruling from the ECJ or the European Commission itself before ruling on the validity of the agreement. See FOLSOM, supra note 33, at 325. Under Article 86, an injunctive penalty is not available, thereby effectively granting the national court discretion to apply its own remedy. See id. at 326.

113 See MENDES, supra note 50, at 82.


115 The "effect" language in Articles 85 and 86 does not suggest that any anticompetitive activity having an effect on EU commerce might be subject to regulation by the EU. See discussion supra Section 2.1.2. Rather, the wording merely "engages [EU] jurisdiction alongside the possible application of the competition laws of the Member States. It tells us little about the limitations which [EU] law provides in respect of its jurisdiction vis-à-vis foreign companies or States." BRITTAN, supra note 91, at 5.

116 See Friedberg, supra note 41, at 322.

117 See id.

118 See id. at 322-23.
European Council Regulation 17\textsuperscript{119} gives the European Commission, through its Directorate General for Competition ("DG IV"), the authority to investigate individual corporations and trade associations in antitrust actions.\textsuperscript{120} The procedure is similar to that used by the European Commission when it determines that a Member State has violated a competition provision of the EEC Treaty; in both instances the European Commission issues a "reasoned opinion" supporting its position.\textsuperscript{121} If a private enterprise or Member State opposes the European Commission's opinion, it may request a review by the ECJ.\textsuperscript{122} The ECJ, however, reviews the European Commission decisions only for improper procedure, adequate and accurate factual support, or abuse of power,\textsuperscript{123} and generally defers to the notices issued by the European Commission through which it expresses its enforcement policies and guidelines.\textsuperscript{124}

Although this practice significantly decreases meaningful judicial review,\textsuperscript{125} some commentators applaud it.\textsuperscript{126} One proponent argues that "since the [European] Commission is the executive arm of the [EU], it makes perfect sense that it should establish its own role as principal enforcer of European competi-


\textsuperscript{120} For an example of this procedure, see discussion supra Section 1. In addition to its investigatory powers, the European Commission may also impose fines, periodic penalty fees, and cease and desist orders, as well as grant negative clearances and exemptions. See MENDES, supra note 50, at 80.

\textsuperscript{121} See EEC TREATY art. 169.

\textsuperscript{122} See Council Regulation 17, supra note 119, art. 9(3). The ECJ's role is to "ensure that in the interpretation and application of [the EEC] Treaty the law is observed." EEC TREATY art. 164.

\textsuperscript{123} See MENDES, supra note 50, at 82.

\textsuperscript{124} Id. at 81. "Notices" are similar to, although often accorded greater weight than, the Antitrust Enforcement Guidelines issued by the Antitrust Division of the DOJ and the FTC. See id. at 82.

\textsuperscript{125} See id. In 1988, to improve the review process, the Council of Ministers established the Court of First Instance to hear direct actions brought against the Council or European Commission with regard to competition rules. See id. at 82.

\textsuperscript{126} Barry Hawk, a law professor at Fordham University, praises this "highly centralized system" and contrasts it with "the Byzantine proliferation of statutes, enforcement bodies[,] and fora in the United States." Id.
tion law . . . and should expand the international reach of that law in a way that validates its international legal personality."^{127}

With regard to extraterritorial application of the EU's laws, the European Commission has supplemented its own integration policy with U.S. notions of comity.^{128} By contrast, the ECJ's opinions traditionally have been rooted in the "economic unit" philosophy, thereby avoiding discussion or endorsement of extraterritoriality policy.\footnote{See Brittan, supra note 91, at 7-9; Alford, Application, supra note 21, at 30-37.} For example, in Imperial Chem. Indus. v. Commission ("Dyestuffs"),\footnote{See Case 48/69 Imperial Chem. Indus. v. Commission, 18 E.C.R. 619, [1971-1973 Transfer Binder], 11 C.M.L.R. 557 (1972) [hereinafter Dyestuffs] (asserting jurisdiction over three foreign defendants only because the concerted conduct of their subsidiary companies actually occurred "within the Common Market" under Article 85).} the ECJ ignored both the European Commission and the recommendations of the ECJ's own Advocate General\footnote{The Advocate General is a member of the ECJ, with status equal to that of the judges, who issues an independent opinion prior to judgment. See Korah, supra note 99, at 289. This opinion is frequently more detailed than the ECJ's ultimate judgment, as it attempts to express to the other judges what the Advocate General believes are the crucial issues. See id. at 289-90.} in explicitly adopting the U.S. Alcoa effects test.\footnote{See Friedberg, supra note 41, at 310.} To avoid considering the question of whether conduct occurring outside a Member State produced effects within its borders, the court deliberately based its decision solely upon its own economic unit doctrine and found that, because the defendants owned subsidiaries within what was then referred to as the European Community "EC", jurisdiction was appropriate.\footnote{See id. at 311. For a definition of the economic unit doctrine, see supra note 91.} Until 1985, the two philosophies peacefully coexisted, permitting the ECJ to uphold most European Commission decisions to extend the EC's laws to foreign defendants.\footnote{See Joined Cases 6 and 7/73, Instituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission, 1974 E.C.R. 223, 13 C.M.L.R. 309 (1974) (granting injunctive relief against a Maryland corporation that violated Article 86 because the company was a 51% shareholder in an Italian firm); Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973} Thus, it is

\footnotesize
\begin{itemize}
  \item \footnote{Friedberg, supra note 41, at 322-23.}
  \item \footnote{See Alford, Application, supra note 21, at 28-30; Brian Pearce, Note, The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison, 30 Stan. J. Int'l L. 525, 576 (1994).}
  \item \footnote{See Brittan, supra note 91, at 7-9; Alford, Application, supra note 21, at 30-37.}
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  \item \footnote{See id. at 311. For a definition of the economic unit doctrine, see supra note 91.}
  \item \footnote{See Joined Cases 6 and 7/73, Instituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission, 1974 E.C.R. 223, 13 C.M.L.R. 309 (1974) (granting injunctive relief against a Maryland corporation that violated Article 86 because the company was a 51% shareholder in an Italian firm); Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973}
\end{itemize}

https://scholarship.law.upenn.edu/jil/vol17/iss3/5
apparent that the extraterritoriality doctrine espoused by the United States and the integration doctrine of the EU are not mutually exclusive philosophies in every scenario. In 1985, however, a case finally arose "in which the economic unit theory, for all its elasticity, [supposedly] could not be stretched to cover truly non-European actors, whose actions outside the Community [were affecting] EC competition." In the *Wood Pulp* case, the European Commission initially applied the *Alcoa* effects test to find an article 85 price-fixing violation among wood pulp producers, although none of the defendants were located within the EC. Sir Leon Brittan, a vice president of the European Commission charged with overseeing the DG IV, viewed the European Commission's *Wood Pulp* decision as consistent with earlier Commission endorsements of the effects test.

After a long-awaited review four years later, the ECJ reluctantly affirmed the European Commission's decision. The Court concluded that "the [EC]'s jurisdiction to apply its competition rules to such conduct [was] covered by the territoriality principle as universally recognized in public international law" because the foreign producers sold directly to purchasers inside the EC in order to "implement" an agreement formed elsewhere.

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E.C.R. 215, 12 C.M.L.R. 199 (1973) (construing jurisdiction in an Article 86 action over a U.S. defendant merely because the U.S. corporation had a wholly-owned subsidiary incorporated on Member State territory).

135 Friedberg, *supra* note 41, at 318.


137 See *id.* Only some of the defendants in *Wood Pulp* had subsidiaries or agencies within EC territory. See *Brittan, supra* note 91, at 10.


140 See *id.* at 5243. Sir Leon Brittan denotes the ECJ's jurisdictional assessment as an "implementation" analysis which views anticompetitive conduct as having two parts: the agreement and the implementation. See *Brittan, supra* note 91, at 11-12. Since “[j]urisdiction over conduct cannot depend solely on the place of formation of the agreement because undertakings
Although several statements in the opinion, when coupled with the holding, imply the use of an effects test, the opinion seemingly sponsored a "modified effects doctrine." Notably, the Court did not repeat the explicit Alcoa language found in the European Commission decision. Although the ECJ did not blatantly reject extraterritorial comity principles, it stretched to find jurisdictional authority based on the defendants' sufficient links to EC territory.

The U.S. Antitrust Enforcement Guidelines have recognized this weak endorsement, conceding that "the 'implementation' test adopted in the ECJ usually produces the same outcome as the 'effects' test employed in the United States." Therefore, unlike in the United States, a uniform conception of comity principles does not exist in the EU. While the European Commission willingly endorses the U.S. doctrine of extraterritoriality, the ECJ remains partial to territorial requirements. The difference in opinion between these two EU political bodies exemplifies the difficulties that arise when the EU attempts antitrust convergence with the United States.

3. THE PROCEDURAL RISE AND FALL OF THE 1991 AGREEMENT

3.1. The Attempt to Synergize Competition Policies

On September 23, 1991, the United States and the European Commission signed a bilateral agreement composed of eleven

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cannot be given such an easy way of escaping their responsibilities[, ] . . . the second element, the place of implementation, must be decisive." Id. at 12.

141 See Friedberg, supra note 41, at 321.

142 See Commission Decision 85/202 Re Wood Pulp Cartel, 1985 O.J. (L 85) 15, para. 79 ("The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the [European Economic Community] was therefore not only substantial but intended, as was the primary and direct result of the agreements and practices.").

143 See Pearce, supra note 128, at 575-76 (noting the court's ambiguity in rejecting the foreign defendants' jurisdictional defense). One commentator notes that "the Court of Justice in one sentence appears to wholly reject a doctrine that U.S. courts have been wrestling with for over fifteen years." Alford, Application, supra note 21, at 37.

144 Enforcement Guidelines, supra note 48, at 20,589-8 n.51.

145 Representatives of the signatories included acting Attorney General William P. Barr for the DOJ, Janet L. Steiger for the FTC, and Sir Leon
articles\textsuperscript{146} which aimed to "promote cooperation and coordination and [to] lessen the possibility or impact of differences between the [United States and the EC] in the application of their competition laws."\textsuperscript{147} The Agreement was labeled "executive" or "administrative," not legislative,\textsuperscript{148} and therefore it did not purport to alter the existing laws of either party.\textsuperscript{149}

Although several provisions are considered "unprecedented" in their degree of support for coordinated enforcement and information sharing, many of the Agreement's provisions are not completely unique to bilateral agreements.\textsuperscript{150} Article II requires a participant to "notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other [p]arty,"\textsuperscript{151} subject to a participant's obligation to maintain confidentiality pursuant to article VIII,\textsuperscript{152} and to enforce its own existing laws pursuant to article IX.\textsuperscript{153} Article III establishes a procedure whereby the Brittan on behalf of the European Commission. See Agreement, \textit{supra} note 15, 30 I.L.M. at 1502.

\textsuperscript{146} The articles of the Agreement have the following headings:

- Article I: Purpose and Definitions
- Article II: Notification
- Article III: Exchange of Information
- Article IV: Cooperation and Coordination in Enforcement Activities
- Article V: Cooperation Regarding Anticompetitive Activities in the Territory of One Party that Adversely Affect the Interests of the Other Party
- Article VI: Avoidance of Conflicts Over Enforcement Activities
- Article VII: Consultation
- Article VIII: Confidentiality of Information
- Article IX: Existing Law
- Article X: Communications Under this Agreement
- Article XI: Entry into Force, Termination and Review

See\textit{id.} at 1492-1502.

\textsuperscript{147} \textit{Id.} art. I, at 1492.

\textsuperscript{148} See Haagsma, \textit{supra} note 34, at 233.

\textsuperscript{149} See Agreement, \textit{supra} note 15, art. IX, 30 I.L.M. at 1501.


\textsuperscript{151} Agreement, \textit{supra} note 15, art. VIII, 30 I.L.M. at 1493.

\textsuperscript{152} See\textit{id.} art. IX, at 1501.

\textsuperscript{153} See\textit{id.} art. IX, at 1501. For example, the United States would not be able to disclose information under The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 7A(h) (1994), which precludes sharing.
entities agree to meet twice a year to exchange information, although the exchange is limited by confidentiality and existing legislation. In article IV, the Agreement outlines an explicit analysis for determining which cases merit coordinated enforcement, recognizing that "[i]n cases where both [p]arties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate." Finally, article VII provides for prompt consultations between the participants, "with a view to reaching mutually satisfactory conclusions," at the request of one of the parties.

Articles V and VI are completely innovative components of the bilateral agreement, not merely in degree, but in content as well. Article V codifies a "positive comity" doctrine that gives each party the right to request intervention of the other in order to curtail anticompetitive conduct affecting the requesting nation's market. Article VI is also novel in that it codifies "tradition-


Specifically, the parties agree to discuss their "enforcement activities and priorities, . . . economic sectors of common interest, . . . policy changes which they are considering, and . . . other matters of mutual interest relating to the application of competition laws." Id.

Factors to be considered include:

(a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;
(b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
(c) the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and
(d) the possibility of reducing costs incurred by persons subject to the enforcement activities.

Id.

This Agreement uniquely enforces "structured semi-annual consultations" and "[c]alls for consultations not only as to action by the antitrust enforcement agencies but also by regulatory agencies which could affect the interest of the other party." Rill & Metallo, supra note 136, at 24.

The party receiving the request is not compelled to abdicate such anticompetitive activities, see id., in which case the requesting party is relegated to its own
al" or "negative comity," whereby each side considers "important interests of the other [p]arty in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, [and] the nature of the remedies or penalties sought." By redirecting the ECJ's focus from the positive and negative comity provisions to the notification, information-sharing, and consultation aspects, the Agreement will enjoy a more secure existence in the EU.

3.2. The Procedural Failure of the Agreement: French Republic v. Commission

On August 9, 1994, France, supported by Spain and the Netherlands, successfully persuaded the ECJ that the Agreement violated article 228(1) of the EEC Treaty. Under article 228, the European Commission has the power to negotiate agreements with foreign states, but "such agreements shall be concluded by the Council, after consulting the European Parliament." Unpersuaded by the European Commission's protests that, as an administrative agreement, the bilateral competition pact should be exempted from article 228, the Court determined that the Commission had exceeded its powers by enacting an agreement "intended to have legal effect" and subsequently voided the Agreement.

Concededly, this holding exclusively addresses procedural aspects of the Agreement; it does not purport to implicate competition law. By singularly concluding an international agreement, the European Commission overstepped the limits of its institutional powers. The opinion also "hamstring[s] the [European] Commission's ability to play an enhanced role on the policy of extraterritorial enforcement. See discussion supra Section 2.

159 Agreement, supra note 15, art. VI, 30 I.L.M. at 1499.
161 See id. at 3673.
162 EEC TREATY art. 228(1) (as amended 1993) (emphasis added).
164 See id. at 3678.
165 See Ehlermann, supra note 24, at 838 (stating the possible implications of the ECJ's determination prior to the issuance of the opinion).
international stage.\textsuperscript{166} The ECJ's explicit restriction of the European Commission's authority, however, calls attention to the ideological tension between the two governmental bodies.\textsuperscript{167} Meaningful reimplementation of the Agreement will require both an acknowledgement that the European Commission and the ECJ "[do not] always see eye-to-eye anymore"\textsuperscript{168} and a strategy to resolve their differences.

4. AN ALTERNATE PERSPECTIVE: WHY THE ECJ JEOPARDIZES THE SUBSTANCE OF THE AGREEMENT

The ECJ purportedly nullified the Agreement for improper procedure, specifically finding that the European Commission lacked the "internal power ... to alter the allocation of powers between the Community institutions with regard to the conclusion of international agreements."\textsuperscript{169} In other words, the ECJ found that the European Commission abused its power by speaking for the entire Union. Past conduct of the ECJ, however, suggests that it also is not prepared to suspend its vigilant pursuit of traditional territoriality and view competition policy through the lens of U.S. extraterritoriality.\textsuperscript{170} Without the Court's support, the EU as a whole is not prepared to vigorously enforce this aggressive competition agreement with the United States.

In the preamble to the Agreement, the two parties enumerate the considerations that inspired their joint action,\textsuperscript{171} suggesting that both parties entered the Agreement with common motives, philosophies, and vocabularies.\textsuperscript{172} Developments in antitrust law may have contributed to the illusion that the United States and

\textsuperscript{166} Charles Goldsmith, EC-U.S. Antitrust Accord is Set Back by Court Ruling, WALL ST. J. EUR., Dec. 17, 1993, at 2 [hereinafter Goldsmith, Accord Is Set Back]. For example, the decision also sets back negotiations for a similar competition agreement between the EU and Canada. See id.

\textsuperscript{167} See discussion supra Section 2.2.2.


\textsuperscript{170} See discussion supra Section 2.2.2.

\textsuperscript{171} See Agreement, supra note 15, at 1491.

\textsuperscript{172} The preamble notes that "the Government of the United States ... and the Commission of the European Communities share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them." Id.
the EU were finally speaking the same language of competition.\footnote{173}{See discussion infra Section 4.1.} The Agreement’s disproportionate embodiment of U.S. policies, however, may imperil its effectiveness now that it has been reenacted.\footnote{174}{See discussion infra Section 4.2.}

4.1. The Basis for the Illusion of Convergence

Approaching 1991, circumstantial evidence existed in the United States and what was then the EC showing that both were retreating from their respective policies of vigorous extraterritoriality and traditional territoriality. For instance, over a century of U.S. case law seemed to dilute the Sherman Act’s forceful assertion of authority to regulate the commerce of foreign states.\footnote{175}{See discussion supra Section 2.1.} Furthermore, frustrated by difficulties in unilaterally applying its laws to anticompetitive conduct in Japan, the United States acknowledged a need to retreat from its previously aggressive extraterritoriality doctrine.\footnote{176}{See Stroock, supra note 39, at 114-15. Although the United States genuinely seems to perceive its antitrust laws as a “charter of economic liberty,” other countries view the laws as protectionist legislation. See J. Paul McGrath, Views From the Justice Department—Enforcement Policy and Current Issues in International Trade, in 1984 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: ANTITRUST AND TRADE POLICIES IN INTERNATIONAL TRADE 269, 277 (Barry E. Hawk ed., 1985) (“Therefore, it is truly essential that private parties and the courts seek to apply [U.S.] antitrust laws in a way that is compatible with maintaining open markets, and that they consider the broader political ramifications of the offensive use of the antitrust laws.”).}

Simultaneously, in the EC, the outcome in Wood Pulp\footnote{177}{1988 E.C.R. 5193.} symbolized the potential for a doctrinal shift further away from singular reliance on traditional policy and closer to the U.S. Alcoa test.\footnote{178}{See discussion supra Section 2.2.2.} Furthermore, in 1990 the EC adopted a Merger Regulation\footnote{179}{See Merger Regulation, supra note 96. Merger regulation is generally effectuated through a simple requirement to notify an antitrust enforcement body of premerger plans. See KORAH, supra note 99, at 237.} extending the Commission’s jurisdiction to non-member States effecting a threshold level of commerce within the EC.\footnote{180}{For a general overview of the practical application of the Merger Regulation, see supra notes 96-103 and accompanying text.}
Mutual reliance on a 1986 recommendation by the Organization for Economic Cooperation and Development ("OECD") was another indicator that the parties had an equal understanding of the Agreement’s provisions and goals. The 1986 recommendation advocated notification procedures, consultation, coordinated enforcement, and consideration of the legitimate interests of other nations in competition enforcement. Examples of activities meriting notification include document requests, location of witnesses, and case investigations that implicate foreign information or individuals. The OECD’s policies have influenced its member nations to engage in special bilateral agreements called mutual legal assistance treaties ("MLATs"); by the mid-1980s, both the United States and the EC had entered into MLATs with other countries.

While agreements involving the EU generally establish substantive rules with nations lacking vigilant competition policies "to ensure that trade between the [EU] and those

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181 As of September 1996, the number of member countries in the OECD stood at 28. See Eduardo Lachica, Korea’s Path to Joining OECD Shortens as Key Tests Are Passed, ASIAN WALL ST. J., Sept. 18, 1996, at 13 (listing the OECD’s 28 members and predicting South Korea’s admission before the year’s end). This group of advanced industrialized nations has developed its own non-binding competition guidelines, and its semiannual meetings enable participating countries to discuss policies, develop guidelines, and exchange information. See Rill & Metallo, supra note 153, at 27.

182 See Agreement, supra note 15, 30 I.L.M. at 1491.

183 See Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C (86)44 (Final) (May 21, 1986).


186 See Haagsma, supra note 34, at 229. Cyprus and Israel, for example, are nations without vigilant competition policies. See id. at 229-30.
countries is not distorted by anti-competitive practices,\textsuperscript{187} the United States has concluded agreements with other countries in order to avert conflict resulting from the extraterritorial application of its own laws.\textsuperscript{188} Thus, the parties' past manifestations of the OECD policy reflect two different goals of competition: the EU's desire to promote internal economic unity and the United States' desire to protect its capital market. This demonstration of different approaches to a common source of competition policy foreshadows the potential for different interpretations of the Agreement's provisions.

4.2. Embodiment of U.S. Policies

An analysis of the Agreement's terms reveals striking parallels between its two comity provisions—articles V and VI—and U.S. competition policy. The ECJ's demonstrated aversion to comity concerns is likely to endanger future effectiveness of the reenactment. Although not dispositive of U.S. bias, both signatories acknowledged the role of efficiency, a traditional goal of the United States.\textsuperscript{189} Consideration of the anticipated benefit to consumers reflects another traditional U.S. aspect of competition policy.\textsuperscript{190}

The Agreement's substantive comity provisions most convincingly demonstrate the considerable level of U.S. influence. Article VI essentially codifies the U.S. effects test, which advocates negative or traditional comity.\textsuperscript{191} The Agreement's procedure

\textsuperscript{187} Id. at 230.
\textsuperscript{188} See id. at 230-31.
\textsuperscript{189} See Agreement, supra note 15, 30 I.L.M. at 1491; see also Alford, Application, supra note 21, at 47 ("[T]he parties shall consider, \textit{inter alia}, whether such coordination will result in increased efficiency . . . ."); Rule, supra note 150, at 1490 (discussing the hope that U.S. and EU antitrust authorities "will work together to minimize the disruption to international trade that multiple, uncoordinated investigations otherwise might cause"); \textit{U.S., EC Commission Sign Antitrust Cooperation Accord}, 8 Int'l Trade Rep. (BNA) 1407, 1407 (Sept. 25, 1991) [hereinafter \textit{Sign Accord}] ("The new coordination is intended to lead to agreements about which jurisdiction should take the lead in investigating a particular matter, contributing to a more efficient allocation of enforcement resources . . . .").
\textsuperscript{190} See Alford, Application, supra note 21, at 47 (noting the parties' consideration of whether coordination "will reduce the costs incurred by persons subject to the enforcement activities"); \textit{Sign Accord, supra} note 189, at 1407 (referring to a statement by FTC Chairperson Janet Steiger).
\textsuperscript{191} See Agreement, supra note 15, art. VI, 30 I.L.M. at 1498-1500.
for this comity determination resembles the balance of interest effects test crafted by the U.S. Court of Appeals for the Ninth Circuit in Timberlane\textsuperscript{192} and endorsed by the U.S. DOJ's 1988 Enforcement Guidelines.\textsuperscript{193}

Moreover, since 1991, the United States has expanded the Agreement's scope to include domestic activities, reflecting the synchrony between the Agreement and U.S. policies.\textsuperscript{194} For example, the most recent Antitrust Enforcement Guidelines for International Operations, issued jointly by the DOJ and the FTC, introduce provisions taken from article VI of the Agreement into the traditional effects balance.\textsuperscript{195} Furthermore, in Hartford Fire Ins. Co. v. California,\textsuperscript{196} a significant post-Agreement decision, the U.S. Supreme Court intimated that it would vigorously support the comity determinations advocated by the U.S. enforcement bodies.\textsuperscript{197} By holding that conflicts of law will not impact extensions of jurisdiction where defendants can comply with the laws of both the United States and a foreign nation, Hartford Fire has illustrated that the United States is not retreating from its attachment to broad, pre-accord notions of extraterritoriality.\textsuperscript{198}

Although the comity rights granted in articles V and VI theoretically extend to the EU as well as to the United States, the codification disproportionately benefits the United States. As discussed above, the EU's endorsement of U.S. notions of extraterritoriality in Wood Pulp\textsuperscript{199} was virtually one-sided.\textsuperscript{200}

\textsuperscript{192} See Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976). For a list of these factors, see supra note 76 and accompanying text.

\textsuperscript{193} See Enforcement Guidelines, supra note 48, at 20,589-20, 20,613 n.170.

\textsuperscript{194} See discussion supra Section 2.1.2.

\textsuperscript{195} See Enforcement Guidelines, supra note 48, at 20,589-12. For the eight factors as codified in 1995, see supra note 82. Factors seven and eight were specifically based on concerns expressed in the Agreement. See Enforcement Guidelines, supra note 48, at 20,589-12 n.74.

\textsuperscript{196} 509 U.S. 764 (1993).

\textsuperscript{197} See id. at 798.

\textsuperscript{198} See id. (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. e ("No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'"). For an argument claiming that Hartford Fire essentially extends U.S. jurisdiction to nearly every foreign defendant, negating the need for a comity balance, see 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 (1993).

\textsuperscript{199} 1988 E.C.R. 5193.
Sir Leon Brittan has indicated that as "the Court [of Justice] has never rejected the effects doctrine, ... the [European] Commission remains free to employ it, and ... will do so in future cases." Thus, while the European Commission expressed a newfound inclination towards U.S. competition jurisprudence, the ECJ has yet to reveal that its dedication to integration and territoriability has given way to effects-based extraterritoriality concerns.

The primary explanation for the ECJ's position is its obligation to consider the furtherance of Union integration ahead of the prosecution of foreign defendants. For example, Professor Mauro Cappelletti acknowledges that "it would be naive to expect the role of European courts in promoting legal integration to be a replay of the role of their [U.S.] counterparts ... European solutions must above all be sensitive to European traditions." Another theory posits that the creation of the Court of First Instance has accentuated the division between the ECJ and the European Commission. The Court of First Instance has more time to investigate evidence in competition cases, "often to the [European] Commission's chagrin;" this is a departure from the past, when the ECJ blindly deferred to Commission decisions. What began as an ideological debate between the European Commission and the ECJ, however, may have evolved into an

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201 In its opinion, the ECJ only devoted one sentence to its position regarding the application of international comity:

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

Wood Pulp, 1988 E.C.R. at 5244. Hardly indicating a commitment to international comity, this quote merely suggests that the court believes "that international comity is an issue within the [European] Commission's discretion, at least in facts similar to Wood Pulp, i.e., the challenged conduct was not required by foreign law and the remedy does not require the entities to act in any way contrary to the requirements of their local laws." Griffin, supra note 18, at 358-59 (citation omitted).

202 Collins, supra note 138, at 249.

203 Pearce, supra note 128, at 577 (quoting Professor Cappelletti) (citation omitted).

204 See Goldsmith, Market, supra note 168, at 1.

205 Id.
institutional power struggle.206

In light of the Agreement’s asymmetric embodiment of U.S. competition goals, the procedural invalidation in French Republic v. Commission gains symbolic significance in that it calls attention to the ECJ’s opposition to the European Commission’s endorsement of U.S. extraterritoriality principles.207 The United States has not retreated from its core value of promoting extraterritorial enforcement of its laws, and the ECJ is not prepared to wholeheartedly endorse U.S. comity principles. In drafting and translating the Agreement’s terms, the United States might have mistaken the European Commission’s awareness of alternative policies for the entire EU’s endorsement of them. Although the ECJ must confront the Agreement’s comity language, it continues to speak in a different vernacular than the other enforcement bodies. Successful reimplementation of the bilateral agreement should remedy this disparity in interpretation.

5. THE ARGUMENT FOR RESUSCITATING THE BILATERAL COMPETITION AGREEMENT

As French Republic v. Commission voided the Agreement solely on procedural grounds, the bilateral pact has been reratified in its original form in the EU.208 Yet, despite adoption in its initial form, the Agreement’s substance is not immune to attack. EU membership is rapidly increasing,209 giving rise to potentially

206 See discussion supra Section 3.2. For example, in his discussion of jurisdictional issues in EU competition law, Sir Leon Brittan demonstrates indifference, if not stubbornness, with respect to the ECJ’s competition policy. He states that “the Commission as a collegiate body does not have to consult another department or branch of government to ascertain the likely impact of a proposed course of action on the [EU]’s external relations. A Commission decision on competition policy reflects the totality of the Commission’s views and policies.” BRITTAN, supra note 91, at 16-17.

207 See discussion supra Section 2.2.2.


209 See FOLSOM, supra note 33, at 32-33. The most recent additions and applicants for Union membership include nations in Eastern Europe and the Mediterranean region. See id.
diverse, if not conflicting, interests of new Member States who might join existing dissenters in challenging the Agreement.\textsuperscript{210} Similarly, private parties may appeal European Commission decisions to enforce the comity provisions.\textsuperscript{211} Sir Leon Brittan has predicted that the ECJ will eventually “confront the ‘hard case’ where it must definitively accept or reject the effects doctrine.”\textsuperscript{212} The Agreement’s positive and negative comity provisions, as well as the realities of the modern transactional world, may inspire the arrival of this hard case.

In particular, the EU’s Merger Regulation\textsuperscript{213} represents a likely catalyst for a theoretical confrontation between the Commission and the ECJ. The Merger Regulation provides for Commission review of concentrations exceeding enumerated thresholds.\textsuperscript{214} As demonstrated by the \textit{Wood Pulp} analysis, “[p]roblems arise over the distinction between the formation of a contract to merge to which the [ECJ’s] implementation theory applies, and its performance, which is outside the theory.”\textsuperscript{215} For example, the Commission would assume jurisdiction over an imminent U.S. merger if both parties previously imported into the EU because “[t]he merger means that the number of imports is reduced, and the market more concentrated.”\textsuperscript{216} By contrast, the

\textsuperscript{210} See Goldsmith, \textit{Accord Is Set Back}, supra note 166, at 2 (discussing France’s previous attempts at limiting the Commission’s authority to regulate competition).

\textsuperscript{211} See Collins, supra note 138, at 273. “With increased enforcement by private parties or, perhaps more significantly, by national antitrust enforcement authorities, the Commission will no longer exclusively determine the circumstances in which to invoke the effects doctrine.” Id. Likewise, “such agreements cannot resolve the problems arising from private suits in U.S. courts because the U.S. government cannot legally control private treble-damage actions.” Alford, \textit{Application}, supra note 21, at 49.

\textsuperscript{212} Collins, supra note 138, at 249. For example, Sir Brittan claims that if the parties in \textit{Wood Pulp} had specifically agreed \textit{not} to fix prices in what was then the EC market, their conduct would not have been “implemented” within the EC. See BRITTAN, supra note 91, at 14. Thus, \textit{Wood Pulp}’s implementation doctrine does not reach the same result as the Commission’s comity analysis with respect to omissions, which are not conduct at all. See \textit{id}.

\textsuperscript{213} See Merger Regulation, supra note 96.

\textsuperscript{214} For a summary of the threshold requirements, see supra note 99.

\textsuperscript{215} PORTWOOD, supra note 97, at 37.

\textsuperscript{216} Id.
ECJ’s narrower “implementation theory” would not cover market changes following from such a merger because “the reduction of two importers to one is [merely] an effect of that coming together” and lacks “a tenable territorial link.”

Shortly after the EU adopted the Merger Regulation, Sir Leon Brittan conveyed his willingness to address competition in world markets. Conceding that the Merger Regulation directs the Commission to consider the EU market when evaluating the impact of a concentration, Sir Brittan nonetheless professed that “[i]f companies in third countries are competing within the EU, their market share or other manifestation of competitive pressure should of course be considered in any assessment of competition in the EU market.” Speaking for the Commission, he expressed “no hesitation” to “includ[e] foreign companies in the analysis of a merger before [him].” Sir Brittan thus appears to endorse a vigorous EU competition policy as an appropriate response to the extraterritorial jurisdiction applied by nations such as the United States.

In reality, “the ECJ’s territoriality principle cannot endure as a stand-alone principle as national economies become increasingly interdependent and as more businesses become multinational.” In 1991, Sir Leon Brittan anticipated an increase in the number of “problem cases” as a result of “falling barriers and integration of markets.”

Given the unique disagreement between the Commission and the ECJ regarding the appropriate view of competition policy, the Agreement as adopted in 1991 will not prevent the ECJ from

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217 For a more complete analysis of the implementation theory as developed in the Wood Pulp case, see supra notes 139-43 and accompanying text.
218 PORTWOOD, supra note 97, at 37.
219 See BRITTAN, supra note 91, at 56.
220 Id.
221 Id.
222 Alford, Application, supra note 21, at 41.
223 BRITTAN, supra note 91, at 18. One example of a globalized market introducing new and complex competition and regulation issues is the rapidly expanding telecommunications industry: See, e.g., The Big Picture: Europe Sees a Slew of Deals Redrawing Lines of Media Power, WALL ST. J. EUR., Aug. 17, 1995, at 1 (discussing the massive increase in international media mergers); Kimberley A. Strassel, Convergence: Policy, Regulatory Watch, WALL ST. J. EUR., Mar. 18, 1996, at 32 (summarizing regulatory developments throughout Europe in “telecommunications, broadcasting, and related fields”).
obstructing convergent enforcement by misapplying or failing to apply its provisions. Thus, the ECJ faces two potential options as it responds to a re-enacted competition Agreement: (1) effective nullification of the Agreement through the failure to give effect to the Agreement’s substantive provisions, or (2) promotion of the Agreement’s original form with a renewed approach to its interpretation.

5.1. Suspending the Bilateral Agreement

If the Court rejects the Agreement’s substantive terms in the “hard cases” likely to come before it, the United States and the EU will essentially revert to their pre-1991 status. The primary alternative to a bilateral agreement for resuming competition relations is an international competition agreement. In 1994, the twelve-member International Antitrust Code Working Group presented a “draft international antitrust code” at a meeting of the OECD in Paris. Written in a format suitable for submission to the General Agreement on Tariffs and Trade (“GATT”), the document is intended to integrate anticompetitive conduct on an international level.

224 See Ehlermann, supra note 24, at 833.
227 See International Antitrust Code Will Be Studied By GATT Members, 10 Int’l Trade Rep. (BNA) No. 35, at 1470 (Sept. 1, 1993) [hereinafter International Code Studied]. There are five governing principles for the Code:
[1] the application of substantive national law for the solution of international cases;
[2] national treatment under national law of nationals and foreigners;
[3] minimum standards for the national laws, agreed upon in an
The antitrust code proposal would create a governing agency called the International Antitrust Authority which would be headed by a president and a twenty-member international antitrust council.\textsuperscript{28} The International Antitrust Authority would have the power to enforce the code's provisions through actions between either private parties before national courts or contracting nations before an International Antitrust Panel.\textsuperscript{29}

While multinational cooperation has laudable intentions which are endorsed by the OECD,\textsuperscript{229} the GATT proposal should not, and in the near future will not, displace bilateral treaties to enforce competition policies.\textsuperscript{231} The negotiation of multilateral rules is a time consuming and complex process.\textsuperscript{232} Nations signing onto the GATT-Multilateral Trade Organization ("MTO") must concede to international principles that conflict with their own legislation, rendering passage of certain specific provisions improbable.\textsuperscript{233} The alternative to drafting such disputed, particular terms is drafting general principles as "non-binding sugges-

\begin{itemize}
\item[(4)] procedural initiatives to be taken if necessary for the effectiveness of international antitrust law by an international body or agency, as well as by parties to the agreement that are adversely affected; and
\item[(5)] restriction of these other four principles to cross-border situations.
\end{itemize}

\textit{Id.} at 1471.

\textsuperscript{228} \textit{See id.} at 1470.

\textsuperscript{229} \textit{See id.}

\textsuperscript{230} \textit{See FUGATE, supra note 208, § 15.11 (Supp. 1995).} Similarly, former Associate Attorney General James Rill recognized that "[i]t may be useful and timely to expand upon [the] 'bilateral' model for procedural convergence and explore antitrust procedural cooperation agreements among the world's major industrialized nations." Rill & Metallo, \textit{supra} note 153, at 27. For an analysis strongly advocating competition negotiations in the next round of the GATT, see Fox, \textit{Agenda for the WTO, supra} note 32.

\textsuperscript{231} \textit{See Gary N. Horlick & Michael A. Meyer, The International Convergence of Competition Policy, 29 A.B.A. SEC. INT'L LAW. AND PRAC. 65, 74-75 (1995).} Despite Sir Leon Brittan's enthusiasm for a GATT competition agreement, even he concedes "that the creation of international competition rules would be a long-term objective." \textit{Id.} at 75.

\textsuperscript{232} \textit{See Ehlermann, supra note 24, at 844-45.}

\textsuperscript{233} \textit{See Thomas J. Schoenbaum, The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust, 19 N.C. J. INT'L L. & COM. REG. 393, 427 (1994).} Joel Davidow, a Washington, D.C. attorney, opines that it is "totally unbelievable that the sovereigns are about to give [the] GATT the power to cut through the sovereign to the enterprise... [He does not] think [the] GATT is going to regulate the [antitrust-related] behavior of companies." \textit{Scant Prospect of Code, supra} note 225, at 221.
This approach, however, would render the code impotent. Therefore, while the proposed antitrust code may facilitate the exchange of information and discussion of competition policies, it should only be regarded as a potential supplement for bilateral negotiations. Dr. Claus-Dieter Ehlermann, the current Director General for Competition in the European Commission, regards the Agreement as a useful framework for subsequent multilateral platforms, noting that "eventually, the possibility of instituting international competition rules and an international competition authority may be considered as one of the final methods to regulate the increasingly important international dimension to each country's economic policy." Thus, global policy discussions are not viable replacements for the Agreement.

5.2. Resuscitating the Bilateral Agreement with a New Emphasis

Unable to rely on a multilateral competition code to resolve issues of comity, the United States and the EU should concentrate on reviving their bilateral contract. Bilateral agreements and MLATs continue to receive praise for their contribution to convergent policies. FTC Chairman Robert Pitofsky advocates "[b]ilateral information-sharing and enforcement . . . [as] the

234 Schoenbaum, supra note 233, at 427.
235 See id.
236 See Ehlermann, supra note 24, at 845 (noting that while a multilateral agreement may eventually come about, the Agreement provides a framework for other EU bilateral agreements).
237 See id. If the EU were to reject the comity provisions of the bilateral Agreement, they might jeopardize "the delicate climate required for bilateral and, to an even greater extent, multilateral treaties." Pearce, supra note 128, at 525 n.220.
238 Ehlermann, supra note 24, at 845 (emphasis added).
239 For example, on November 2, 1994, President Clinton signed the International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, 108 Stat. 4597 (1994), which supports the formation of MLATs by authorizing the DOJ and the FTC to enter into such agreements. Operating under OECD recommendations, the agency responsible for a given case provides antitrust evidence to foreign authorities. See Enforcement Guidelines, supra note 48, at 20,589-8. See also id. at 20,589-2 (noting that the agencies referred to in the statute include both the DOJ and FTC).
first step toward convergence.”

The joint investigation of Microsoft illustrates how convergence can bring about gains in efficiency, consumer benefits, and a level playing field. AAG Bingaman assessed the close working relationship between the United States and the EU as clearly beneficial to “permit effective competition to emerge in the market for personal computer operating software and ... [to] ensure a level playing field to any company that seeks to compete against Microsoft in the future.” Similarly, the European Commission viewed the endeavor as “an important model for the future, as it shows how the two authorities can combine their efforts to deal effectively with giant multinational companies.”

In the Agreement's second incarnation, the enforcement bodies should adopt a new emphasis to promote its survival against substantive attack or weak interpretation by the ECJ. Rather than myopically focusing on the comity implications of articles V and VI, the enforcement bodies should give equal attention to article II (notification), article III (exchanges of information), article IV (cooperation and coordination of enforcement mechanisms), and article VII (consultation). These other articles, when rigidly enforced, increase the opportunity for enforcement bodies to become familiar with the mechanics of convergence.

In addition to changing their focus, the United States and the EU must learn from past experience. The parties must make a conscientious effort to increase the number of coordinated

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241 See discussion supra Section 1.

242 Bingaman Briefs, supra note 17, at 543 (quoting Bingaman's speech to the 21st Annual Conference of the Fordham Corporate Law Institute). AAG Bingaman considered “[t]his unprecedented, historic cooperative action” to be “a powerful message to firms around the world that the antitrust authorities of the [United States] and the European Commission are prepared to move decisively and promptly to pool resources to attack conduct by multinational firms that violate the antitrust laws of the two jurisdictions.” Microsoft Settles, supra note 7, at 106 (quoting a July 16, 1994 news conference).

243 Microsoft Settles, supra note 7, at 107 (quoting an EC statement).

244 See Agreement, supra note 15.

245 See Ehlermann, supra note 24, at 835 (describing the notification clause, in particular, as a vehicle for facilitating the other provisions).
enforcement activities under article IV.246 Although the Agreement was signed in September 1991, the July 1994 Microsoft case was the first joint investigation and enforcement effort between the parties.247 Thus, despite increases in the transnational flow of information,248 coordinated enforcement remained a dormant concept for over two years. Limited use of the provisions translates into limited discourse and impedes progress towards convergent interests.

Once the United States and the EU gain a greater amount of practical exposure to each other’s policies and goals, they will be better equipped to handle comity issues. These comity provisions are not as menacing to the ECJ’s tenets as they may seem; they merely provide an incentive for the EU to add the vigorous enforcement of competition rules to its existing political agenda. Commentators predict that the positive comity provision is unlikely to overwhelm or prejudice a party.249 First, the provision applies only when challenged conduct infringes upon a host country’s laws.250 Second, “[i]t is not realistic to expect one government to prosecute its citizens solely for the benefit of another.”251 Finally, positive comity is an ally to any nation that does not want to engage in negative comity analyses; under positive comity, the host party is entitled to address the problem under its own laws.252

The positive comity provision represents the first formal recognition of the U.S. right to request that the European Commission take action to stop anticompetitive activity occurring “in the [EU] that adversely affects the economic interests of U.S. businesses or consumers.”253 One commentator has observed that “in effect, each country attempts to rely on the other country’s local enforcement mechanisms, rather than resorting to extraterritorial application of its own antitrust law.”254 Positive

246 See Agreement, supra note 15, 30 I.L.M. at 1496-97.
247 See Microsoft Settles, supra note 7, at 106-08.
248 See Griffin, supra note 18, at 375.
249 See id. at 377.
250 See id.
251 Id. (citation omitted).
252 See Ehlermann, supra note 24, at 836.
253 Rule, supra note 150, at 1489.
254 Deanna Conn, Note, Assessing the Impact of Preferential Trade Agreements and New Rules of Origin on the Extraterritorial Application of
comity, therefore, limits the number of instances where the United States will be required to enter the negative comity thicket of article VI.255 Thus, the EU will be in a position to evade some of the unpalatable comity analyses conducted by U.S. courts and antitrust enforcers in previous cases.256 In *Laker Airways*, the U.S. Court of Appeals for the D.C. Circuit recognized that "diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association. These forums should . . . be utilized to avoid or resolve conflicts caused by contradictory assertions of concurrent prescriptive jurisdiction."257

Increased levels of conversation will also enhance the entire EU's exposure to the U.S.-influenced negative comity provision, thereby augmenting the ECJ's sensitivity to extraterritoriality concerns. In his appeal to the ECJ to endorse the effects test, Sir Leon Brittan labeled this comity concern a principle of international law.258 Furthermore, as decisional law has proven, the theory of negative comity rarely produces different results than the theory of union integration in determining whether a court has extraterritorial jurisdiction over a foreign defendant.259 The two policies are not always mutually exclusive. One commentator cleverly demonstrates this assertion by applying the ECJ's "implementation" test from *Wood Pulp* to the facts in *Alcoa*.260 Under the *Wood Pulp* test, the Ninth Circuit's assumption of jurisdiction in *Alcoa* would persist because in *Alcoa*, foreign defendants "implemented" a production quota that restricted imports into the United States.261 Furthermore, negative comity will enhance the protection of the EU market, since "all undertakings doing

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255 See Ehlermann, *supra* note 24, at 836 ("[T]he Agreement gives a preferred solution under which the [United States] should first ask the EU to apply EU rules . . . rather than applying U.S. law extraterritorially.").


257 *Id.* at 955.

258 See *BRITTAN*, *supra* note 91, at 15.

259 See discussion *supra* Section 2.2.2.

260 See *Alford, Application*, *supra* note 21, at 38.

261 See *id.* at 38-39.

business within the EEC must respect the rules of competition in the same way, regardless of their place of establishment."\textsuperscript{262}

Reratification of the original Agreement, with the required approval of the Council and Parliament, potentially symbolizes a new policy for the EU as a whole: in the circumstances where the theories of extraterritoriality and economic unit produce divergent outcomes, the EU now chooses to endorse the former. This position does not suggest that the EU has succumbed to U.S. interests, but rather that the EU is sometimes willing to give competition a high priority for the international good. Both parties will benefit from this symbiotic relationship. While yielding to U.S. notions of comity, the EU can simultaneously persuade U.S. enforcement bodies to recognize important EU principles, such as Union solidarity and integration.

Increasing the quantity and quality of bilateral communication advances the "soft harmonization" of legislative policies.\textsuperscript{263} Soft harmonization of policies is a critical step in taking negotiations out of the realm of administrative agreements and into the realm of joint legislation.\textsuperscript{264} Moreover, the cumulation of bilateral agreements with soft harmonization will promote the ultimate goal of global convergence.\textsuperscript{265}

\section{Conclusion}

Interactive discourse is critical to the success of the original draft of the Agreement, ensuring "that differing conceptions of the antitrust laws are not a barrier to trade."\textsuperscript{266} Consequently, the U.S. antitrust bodies and the European Commission should promote articles II, III, IV, and VII of the Agreement in order to reduce the ECJ's difficulties with the comity aspects of articles V and VI.

The original format of the Agreement, although admittedly dominated by U.S. philosophies, provides the essential tools for harmonizing competition policies. When not abused, supplementing negative comity with positive comity can be a powerful force

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\textsuperscript{262} BRITTAN, supra note 91, at 10 (citation omitted).
\textsuperscript{263} Haagsma, supra note 34, at 242.
\textsuperscript{264} See id.
\textsuperscript{265} See id.
\textsuperscript{266} Schoenbaum, supra note 233, at 436 (discussing the need to consolidate trade and antitrust policy).

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for attaining international harmony. Although positive comity is not a cure-all for avoiding the difficult decisions of negative comity, it creates the potential for one nation to render affirmative aid to another—to protect another's capital market and individual consumers. These provisions adhere to pre-1991 recommendations of the OECD and, since 1991, have been supported by the enforcement bodies of both the United States and the EU.

An international competition policy is not a panacea for the need of the United States and the EU to speak a common language of competition; "[r]enewed efforts are needed to develop a uniform approach to antitrust law that reflects the interests and respects the policies of both the EU and the United States." The bilateral relationship provides a more specific and definite format for convergence discourse. Admittedly, the United States and the EU sit at the negotiating table with two separate histories of competition. Their policies, however, are not mutually exclusive. As willing participants in bilateral policy negotiations, they represent two political entities on the brink of legislative convergence. Convergence on the bilateral level should be regarded as a supplement and precursor to the goal of global harmonization.

The ECJ remains the major barrier to effective implementation of the Agreement's terms. Rather than treating the Agreement as a sacrifice of the EU's commitment to integration for the U.S. doctrine of strict enforcement of antitrust laws, the ECJ should regard the Agreement as a realistic and immediate opportunity to strengthen its own competition rules and to share experiences.

267 See id. at 435.

268 Compare the Agreement's endorsement of international comity concerns with the philosophy presented by Bill Gates in response to governmental attacks on Microsoft Corporation's monopolistic conduct: "Mr. Gates, like [Adam] Smith before him, believes that capitalism is the best means to serve, protect[, and] accommodate the common man. To that end, he feels that a computer-linked world is the best means to achieve what he calls 'friction-free capitalism.'" Steven T. Khalil, Microsoft and the 'Invisible Hand', WALL ST. J., Jan. 3, 1996, at A8.

269 See discussion supra Section 4.1.

270 See Griffin, supra note 18, at 387 (discussing different governments' continuing self-preservation through the use of "blocking statutes" despite converging international competition policy).

271 Id.
Through discourse, the two bodies will develop convergent vocabularies, interests, and goals in the spirit of international economic harmony.