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extraterritoriality under WTO law from a comparative perspective**
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5 | Extraterritoriality under competition law

5.1 INTRODUCTION

Extraterritoriality in a competition law context refers to the extraterritorial application of national competition laws. The rationale behind such application is to safeguard the objectives of competition rules, which would be impaired if competition could be applied exclusively to conduct of nationals (including legal persons). As Wagner-von Papp stated, 'a cartel is no less harmful just because the cartelists travelled to an exotic location for their meetings; and consumers are hardly interested in the nationality of those who exploit them'.¹ Theoretically, one could rely on a system of home jurisdiction, where states rely exclusively on antitrust enforcement by the jurisdiction in which the anticompetitive conduct takes place. However, domestic consumers will have no voice against a possible strong lobby of producers and exporters abroad. Furthermore, there is no guarantee that the home state has antitrust legislation in place or sufficient resources to enforce existing legislation effectively.² The home state may also be unwilling to enforce its competition law in respect of export cartels that do not affect its own market.³

The United States have taken a lead in this extraterritorial development, but other jurisdictions such as the EU and Japan have applied their competition rules to conduct taking place abroad. While there is an increasing number of bi- and multilateral cooperation agreements, in practice, the unilateral extraterritorial application of national competition laws is still the most effective tool to address foreign anticompetitive behaviour that affects domestic markets. Such extraterritorial application of competition rules relies upon the effects doctrine, referring to conduct abroad affecting or impacting on competition within the domestic market, or in other words conduct abroad that leads to harmful domestic effects.⁴

1 Florian Wagner-von Papp, 'Competition Law and Extraterritoriality' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar Publishing 2012) 22.

2 Ibid 23.

3 See for example the US Webb-Pomerene Export Trade Act, 15 USC §§ 61-66 (2000), adopted first in 1918. See also Margaret Levenstein and Valerie Suslow, 'The Changing International Status of Export Cartel Exemptions' 2005, 20 *American University International Law Review* 785.

4 Dodge (2011), 692.

This chapter will explore the rationale of the effects doctrine as applied in (domestic) competition law, seeking to determine whether it can also be applied to npr-PPMs addressing environmental concerns outside the territory of the regulating state. The aim is not to give a technical analysis of competition law issues, but rather to identify why and how an extraterritorial application of laws through the effects doctrine is applied and accepted. A parallel will then be drawn between the rationale of the effects doctrine in competition law, and the rationale for relying on the effects doctrine in an environmental context to determine whether the extraterritorial effects of npr-PPMs could be permitted.

As noted in chapter 4, npr-PPMs are no extraterritorial measures in a strict sense, as they are only activated when market access is sought; rather, PPMs can be defined as measures with an extraterritorial effect. In contrast to competition law, where the effects on the market form the basis for states to exercise jurisdiction, with respect to npr-PPMs, the environmental effects would form part of the substantive analysis of the measure to determine whether the measure can be permitted under Article XX GATT. Nonetheless, the analysis of the effects doctrine in a competition context remains highly relevant for our analysis with respect to the rationale of relying on effects in order to act.

5.2 THE EFFECTS DOCTRINE AND COMPETITION LAW

5.2.1 The legal basis of the effects doctrine

Under the effects doctrine states can legislate activities that originate abroad but that have a substantial, direct and foreseeable effect upon or in its national territory.⁵ In other words, a state can exercise jurisdiction over acts taking place outside its territory because it is affected by those actions. Measures based upon the effects doctrine are defined as extraterritorial measures, even though reliance upon the effects doctrine as a legal basis does arguably justify such extraterritorial application.⁶

The recognition of this doctrine under general international law remains uncertain. The Third Restatement of Foreign Relations Law accepts prescriptive jurisdiction over foreign conduct that has or is intended to have substantial effects,⁷ but only few countries, such as the US, actually recognize the effects doctrine as a separate legal basis. When not considered a separate legal basis,

⁵ See chapter 4 for a discussion of the territoriality principle and other bases for jurisdiction.

⁶ Whether a justified extraterritorial measure should then be qualified as 'territorial' is more a semantic question, but for the purpose of this study, I will refer as extraterritorial to all measures, which prescribe conduct outside the territory of the regulating state.

⁷ 1986, §402(1)(c), §415. See also chapter 4.

effects jurisdiction can be seen as a degree of territorial connection under the territoriality principle.⁸

While the effects doctrine is mostly known for its use in competition law, it does not originate there. Rather, within criminal law, the effects theory has been used by the state in which the effects of a crime were felt in order to exercise jurisdiction (see *Lotus*).⁹ When the effects test was first used, courts reasoned for instance that the shooter accompanied a bullet across state lines so that his conduct actually occurred in the state where the effects were felt.¹⁰ In other fields as well, an application of the effects doctrine can be traced, such as securities regulation in the US¹¹ and rules on trade in financial instruments in the EU.¹²

§402 of the (third) Restatement states that conduct occurring outside a state may be subject to that state's law if the conduct has or is intended to have substantial effects within that state's territory.¹³ The Restatement further requires that the exercise of jurisdiction is reasonable under §403. Extraterritorial jurisdiction may not be exercised when unreasonable or in direct conflict with domestic legislation of the other state. In the case of conflict, a state should defer to a state with a greater interest. This seems to point to a preference for exclusive legislative jurisdiction, even though it is possible, particularly

8 See for instance Alan C. Swan, 'The Hartford Insurance Company Case: Antitrust in the Global Economy – Welfare Effects and Sovereignty' in Jagdeep S. Bhandari and Alan O. Sykes (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press 1997) 551. See chapter 4.

9 As discussed in chapter 4. See for instance Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' 2013, 9 *Utrecht Law Review* 68.

10 See e.g. *Simpson v State*, 17 S.E. 984, 985 (Ga. 1893) ('If a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes.').

11 Kathleen Hixson, 'Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States' 1988, 12 *Fordham International Law Journal* 127. See also the recent case of US Supreme Court, *Morrison v National Australia Bank Ltd.* 2010, 130 S. Ct. 2869, whereby the US Supreme Court held that Section 10(b) of the Exchange Act applies extraterritorially to foreign conduct that affects transactions in the United States.

12 The EU's Regulation on derivatives (European Market Instruments Regulation 648/2012) imposes clearing and risk-mitigating obligations on persons concluding certain types of derivative contracts. Contracts that are concluded exclusively between third country entities may be subject to these obligations where the contract in question has a direct, substantial and foreseeable effect within the EU. Also the Market Abuse Regulation 596/2014, on an integrated and transparent financial market refers to the effects of foreign transactions. In contrast to the EMIR, the qualifiers for effect are less pronounced: the effects must be 'likely' or 'intended' but there is no need for them to be either 'significant' or 'direct'. See Scott (2014), 15.

13 1986, §402(1)(c). See also chapter 4.

in the field of antitrust, to have instances of concurrent legislative jurisdiction.¹⁴

§415 of the Restatement, dealing specifically with antitrust, provides that agreements made, or conduct carried out predominantly, outside a state in restraint of that state's trade may be subject to the state's prescriptive jurisdiction if

- '(2) ... if a principal purpose of the agreement or conduct is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce;
- (3) [in the case of other agreements] ... if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.'

The Restatement thus refers explicitly to effects on commerce, and the effects doctrine is likewise being applied by a growing number of states, such as Brazil, Singapore or Japan, in the field of competition law.¹⁵

The Court of Justice of the EU has not yet recognized the validity of the effects doctrine, but other approaches have been developed in order to address foreign anti-competitive behaviour.¹⁶ A strict application of the subjective territoriality principle in cartel matters for instance, would prevent states from asserting jurisdiction over conduct that, even though taking place beyond their national borders, gravely affects their economic interests. Therefore the idea that the states should be empowered to prosecute and sanction conduct arising outside their borders does not generate major controversy (anymore).¹⁷ Problems rather arise with the approaches used for the assertion of extraterrit-

14 Dodge argues that 'judicial unilateralism', whereby courts apply domestic legislation without taking into account possible conflicts of jurisdiction with other nations, would on the one hand correct for failures in the legislative process that lead to underregulation in areas like antitrust, and on the other also promote international negotiations in the long run. See William S. Dodge, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' 1998, 39 *Harvard International Law Journal* 101.

15 The effects doctrine was approved by the International Law Association as a principle of international law at its 55th Conference in 1972 where the effect is a constituent element of the act. L'Institut de Droit International stated during its session in 1977 that the effects doctrine could be applied extraterritorially to anti-competitive behaviour of multinationals where effects were intentional or foreseeable, substantial, direct and immediate. These approvals bear no hard law value, however, their recognition has been important for growing support for the theory. See also below in this chapter for more examples of countries adhering to the effects doctrine.

16 See below. See also Yves Botteman and Agapi Patsa, 'The Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits' 2012, 8 *European Competition Journal* 365, 366., referring to the 'often muddled and convoluted approaches' the EU has used.

17 Ibid 365.

orial jurisdiction¹⁸ and with the question how to resolve conflicts when they occur.¹⁹

5.2.2 Extraterritorial enforcement

When discussing an extraterritorial exercise of jurisdiction based on the effects doctrine, one usually refers to an extraterritorial exercise of prescriptive jurisdiction. However, in competition proceedings involving anti-competitive behaviour abroad, it seems that the effectiveness of such proceedings is also very much linked to enforcement of possible penalties imposed. As already noted, extraterritorial exercise of enforcement jurisdiction is not accepted under international law, unless the territorial state has given consent to such actions.²⁰

With regard to penalties, Advocate General (AG) Darmon recognized, in his opinion to the *Wood Pulp* case, the distinction between prescriptive and enforcement jurisdiction.²¹ He argued that the mere imposition of a pecuniary sanction is a matter of prescriptive jurisdiction, and only becomes a matter of (extraterritorial) enforcement jurisdiction where steps are taken for its recovery outside a state's territory. AG Darmon stated that imposing a fine is 'indissolubly linked (...) to the application of the law, and to deny the court the power to make such an order would render that 'prescriptive jurisdiction' nugatory'.²² Ordering to pay a fine should be distinguished from the forcible execution of such fine. Enforcement thus remains territorial, whereby it is likely that companies refusing to pay their fines would face difficulties when conducting business in the EU in the future.

Enforcement in antitrust proceedings also includes the investigations into the anti-competitive behaviour in question. Under international law, countries cannot carry out investigations into the territory of another country absent permission. Investigated companies can supply information voluntarily, incentivized, for instance, by lenience procedures, which works especially well for powerful jurisdictions, such as the US or the EU. However, as will be described in the section below, there is also increasing cooperation on this matter between countries through informal understandings or formal bi- or multilateral agreements on, for example, collecting evidence and exchange of information.

18 Ibid 366., referring to the 'often muddled and convoluted approaches' the EU has used.

19 Eleanor M. Fox, 'Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked' 2009, 42 International Law and Politics 159, 160.; Dodge (1998).

20 See chapter 4.

21 Opinion AG Darmon, *Ahlström Osakeyhtiö and Others v Commission (Wood Pulp I)* Court of Justice of the European Union 1998, Joined cases 89, 104, 114, 116, 117, 125-129/85 ECLI:EU:C:1988:447.

22 Ibid.

5.2.3 A combination of approaches

Whereas anti-competitive behaviour was originally addressed in a unilateral way, attempts have been made to seek bi-, pluri- and multilateral ways to approach the matter as well. These are needed either as a *complement* to the unilateral approach where the latter proves to be deficient (enforcement gaps or ‘underregulation’), or, as a *partial substitute* to the unilateral approach, where the lack of coordination of unilateral enforcement by multiple jurisdictions creates problems (enforcement overlaps or ‘overregulation’).²³

The need for bi- and plurilateral approaches has increased tremendously. At the end of the 1970s only nine jurisdictions had competition rules in place, whereas at the end of 2013, about 127 jurisdictions had competition rules in place, of which 120 had a functioning competition authority.²⁴ This expansion is due to a number of factors, but mostly because it is recognized that competition policy promotes economic growth, consumer welfare and a vibrant market economy.

At the multilateral level, there are a few non-binding initiatives. As early as 1967 the OECD adopted its first recommendation encouraging its members to cooperate in antitrust issues by e.g. notifying other members when their important interests would be at stake; coordinating parallel investigations; disclosing information concerning investigations; exchanging information on anti-competitive behaviour.²⁵ In 1995, a recommendation was issued on international cooperation for enforcement.²⁶ In 1998 states adopted a recommendation to enforce laws against hardcore cartels.²⁷ In 2005, the OECD Competition Committee issued a series of Best Practices for the formal exchange of information between competition agencies in hardcore cartel investigations.²⁸ Many bilateral agreements have been modelled after the OECD’s recommendations.

23 Wagner-von Papp(2012), 24. See also Eleanor M. Fox, ‘Antitrust Without Borders: From Roots to Codes to Networks’ in Andrew T. Guzman (ed), *Cooperation, Comity and Competition policy* (Oxford University Press 2011) 274.. For an overview of the costs of under- and overregulation, see OECD, *Challenges of International Cooperation in Competition Law Enforcement* (2014).

24 OECD (2014), 26.

25 Recommendation of the Council concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade of 5 October 1967, C(567)33(final). This recommendation was amended in 1973, 1979, 1986 and 1995.

26 Recommendation of the Council concerning Cooperation between Member-Countries on Anti-competitive Practices Affecting International Trade of 21 September 1995, C(95)130 (final).

27 Recommendation of the Council concerning Effective Action Against Hard-Core Cartels, C(98)35(final).

28 OECD, Best Practices for the Formal Exchange of Information Between Competition Agencies in Hardcore Cartel Investigations, October 2005, at <http://www.oecd.org/competition/cartels/35590548.pdf>.

In 1994 the WTO was created after the Uruguay Round, with more attention to non-tariff barriers, creating also a Working Group on the Interaction between Trade and Competition Policy at the end of the 1990s.²⁹ The Doha Development Round scheduled negotiations for a WTO Agreement with a hardcore cartel prohibition and provisions on non-discrimination, due process and technical assistance – but these were jettisoned not much later.³⁰ In 1997, an Agreement on Telecommunications Services was reached within the WTO Group on Basic Telecommunications.³¹ The agreement included competition rules, creating a sector-specific competition law agreement.³²

Apart from this WTO's agreement on telecommunications, the only multilateral (non-binding) competition agreement to date is the Restrictive Business Practices Code (RBP Code)³³ under the auspices of the United Nations Conference on Trade and Development (UNCTAD). Its substantive provisions deal with anti-competitive behaviour such as abuse of dominant position, price-fixing and market allocation.³⁴ While being the principal multilateral agreement, the Code has limited value because of its voluntary nature, its rather vague provisions, and the lack of support from developing countries (who wanted to see additional rules included in the agreement but were held back by the developed countries).³⁵ Another international forum for antitrust law is the International Competition Network (ICN). The ICN was created in 2001

29 For information on and documents by the Working Group on the Interaction between Trade and Competition Policy (WGTCIP) see https://www.wto.org/english/tratop_e/comp_e/comp_e.htm. The working group is currently closed down.

30 See among others Anu Bradford, 'International Antitrust Cooperation and the Preference for Non Binding Regimes' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 323.

31 The agreement took the form of a protocol to be attached to the GATS, designated as the Fourth Protocol to the GATS.

32 Almost all participating countries to the Fourth Protocol agreed to enter into additional commitments concerning regulatory principles to be applied in the telecommunications sector, laid down in a Reference Paper that was prepared by a group of countries in April 1996. Paragraph 1.1 of the Reference Paper for instance contains a commitment to enact appropriate measures to prevent anti-competitive practices by major suppliers. The Reference Paper is legally binding for those WTO Members who have appended the document to their schedules of commitments. (at https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm) See Marco C.E.J. Bronckers and Pierre Larouche, 'Telecommunications Services and the World Trade Organization' 1997, 31 *Journal of World Trade* 5.; Marco C.E.J. Bronckers and Pierre Larouche, 'A Review of the WTO Regime for Telecommunications Services' in Kern Alexander and Mads Andenas (eds), *The World Trade Organisation and Trade in Services* (Martinus Nijhoff Publishers 2008) 330.

33 The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, UN Doc TD/RBP/CONF 10/Rev.1 (1980), endorsed by GA Res. 63, UN Doc A/RES/35/63 (1980), 19 ILM 813 (1980).

34 RBP Code, Section D, paras. 3-4. The substantive provisions of abuse of a dominant position have been reviewed in 2015, see TD/RBP/Conf.8/L.2; on restrictive agreements or arrangements in 2012, see TD/b/C.1/CLP/L.4.

35 Debra J. Miller and Joel Davidow, 'Antitrust at the United Nations: A Tale of Two Codes' 1982, *Stanford Journal of International Law*, 354.

under the auspices of the International Chamber of Commerce as an informal network among the world's competition agencies to explore and implement solutions to common problems, and has over 100 members today.³⁶

Apart from these multilateral organizations, a number of regional organizations such as the European Competition Network (ECN), the Andean Community, the Asia-Pacific Economic Cooperation (APEC), the Association of Southeast Asian Nations (ASEAN), the Common Market for Eastern and Southern Africa (COMESA), the Caribbean Community and Common Market (CARICOM), the Southern Africa Development Community (SADC) and the West African Economic and Monetary Union (WAEMU) provide opportunities for national competition authorities to cooperate and continue a process of convergence of substantive competition standards.³⁷ With regard to enforcement cooperation, the most advanced example can be found in the European competition network between the competition authorities of the EU Member States, but examples can also be found among the Scandinavian countries, in Latin America, Africa and Asia.³⁸

Outside these networks, bilateral agreements are the most important instruments to resolve some of the problems that have occurred due to the internationalisation of business practices. They are mostly cooperation agreements, and do not aim at harmonizing the competition laws of the countries involved, even though they can lead to convergence by better understanding the other laws and policies.³⁹ Other benefits include improved efficiency in investigations, avoidance of jurisdictional conflict, and protection for the legitimate interests of the cooperating parties etc.⁴⁰ Free trade agreements

36 See the website of the International Competition Network, at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Competition/International-Competition-Network-ICN/>.

37 OECD (2014), 17; Daniel Sokol, 'International Antitrust Institutions' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011).

38 OECD, *International Enforcement Cooperation: Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation* (2013) 89.

39 The EU for instance has cooperation agreements with Canada (Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (1999)); with Japan (Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities (2003)); with the Republic of Korea (Agreement between the EU and the Republic of Korea concerning cooperation on anti-competitive activities (2009)); with Switzerland (Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws); and with the US (Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (1995) and Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (1998)).

40 See for a more comprehensive discussion Maher Dabbah, 'Future Directions in Bilateral Cooperation: A Policy Perspective' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 287.

(FTAs) can contain substantive (harmonized) principles of competition law, and may also contain clauses that allow for cooperation among competition enforcers, even though these may be less detailed than those in cooperation agreements.⁴¹ Despite their benefits, the number of cooperation agreements remains limited: the US, for instance, has only nine cooperation agreements,⁴² and the EU has only five.⁴³ Countries can also agree on non-binding Memoranda of Understanding. Informal cooperation has grown significantly over time but it faces important limits when it comes to activities that are restricted under national law, such as the exchange of confidential information.⁴⁴

The most obvious example of formal bilateralism in the field of competition law is the cooperation between the EU and the US,⁴⁵ as the world's most advanced and most influential competition law regimes. Two agreements have been crucial in their cooperation: the 1991 and 1998 Agreements. The 1991 Agreement deals with, among others, the avoidance of conflict over enforcement activities. It also contains a positive comity provision,⁴⁶ providing that if either the US authorities or the European Commission believes their 'important interests' are being adversely affected by anticompetitive activities occurring within the other's territory that also violate the other's competition laws, the affected authority may request that the other initiate enforcement activities.⁴⁷ The Agreement did not oblige the authorities to follow up on such request, though. The 1998 Agreement, or 'positive comity' agreement, supplements the 1991 Agreement, providing, among others, guidelines to deal with positive comity requests. A request to investigate and remedy anti-competitive behaviour can be made 'regardless of whether the activities also violate

41 E.g. chapter 11 of the EU-South Korea Free Trade Agreement, dealing with competition rules.

42 Australia, Brazil, Canada, Chile, EU, Germany, Israel, Japan and Mexico.

43 US, Canada, Japan, Republic of Korea and Switzerland. Both the EU and the US have Memoranda of Understanding with other competition authorities, such as China and India.

44 OECD (2014), 18.

45 For a discussion of cooperation between the EU Member States in their own right and the US, see ABA Section of Antitrust Law, *International Antitrust Cooperation Handbook* (2004).

46 Whereas negative or traditional comity involves a country's consideration of how to prevent its laws and enforcement actions from harming another country's important interests, positive comity involved a request by one country that another country undertakes enforcement activities because anti-competitive behaviour are affecting the interests of the referring country.

47 Antitrust Cooperation Agreement 1991, art V(2). See also similar provisions in the Agreement between the EU and Japan concerning cooperation on anticompetitive activities (2003) and the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (1999).

the Requesting party's competition laws'.⁴⁸ These positive comity rules have rarely been invoked, however.⁴⁹

The EU and the US furthermore have agreed on an Administrative Arrangement on Attendance,⁵⁰ whereby the respective competition authorities allow for attendance at certain stages of the procedures; and have set up a Merger Working Group with the principal objective of enhancing cooperation in global mergers control through a set of Best Practices.⁵¹ They cover coordination on timing, collection and evaluation of evidence, communication between the reviewing agencies and the consistency of remedies. According to Mario Monti, then Commissioner, the Best Practices document was issued 'with a view to minimizing the risk of divergent outcomes in the interest of both businesses and consumers'.⁵²

Despite the increase in cooperation over the last 20 years,⁵³ more cooperation is needed, but this remains challenging due to the substantive differences in competition policy. Business is ever more globalised and integrated; and more jurisdictions have adopted or are adopting competition rules. The OECD has measured the complexity of cooperation, measured by the number of pairs of competition authorities needing to cooperate, and found that by 2014 the complexity in cartel cases had increased by 53 times since 1990.⁵⁴ More cooperation would be beneficial for the companies involved in terms of costs.⁵⁵ Bilateral cooperation in competition matters, being a more realistic alternative than (binding) multilateral agreements, needs to be continued, and deepened.

48 Article III.

49 For examples, see Damien Geradin, Marc Reysen and David Henry, 'Extraterritoriality, Comity and Cooperation in EU Competition Law' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 32.

50 The Administrative Arrangement on Attendance (AAA) is an understanding about administrative arrangements to apply the 1991 Agreement.

51 See US-EU Merger Working Group: Best Practices on Cooperation in Merger Investigations, available at <http://www.usdoj.gov/atr/public/international/docs/200405.htm>.

52 Press Release, European Commission DG Competition, EU and US Issue Best Practices Concerning Bilateral Cooperation in Merger Cases (Oct 30, 2002).

53 The International Chamber of Commerce called upon increased international cooperation between antitrust authorities in a Policy Statement of 28 March 1996 (doc nr 225/450), at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/1996/International-Cooperation-between-Antitrust-Authorities/>.

54 OECD (2014), 6.

55 David J. Gerber, 'Prescriptive authority: Global Markets as a Challenge to National Regulatory Systems' 2004, 26 *Houston Journal of International Law*, 299.

5.3 STATE PRACTICE ILLUSTRATIONS

5.3.1 The US

The US antitrust system⁵⁶ is largely based on criminal law, with financial and custodial penalties against individuals. Private enforcement plays an important role in the US system, where victims of anticompetitive practices can be awarded treble damages. The main purpose of US antitrust law is protecting consumer economic interests, aimed at structuring the market so as to maximize benefits to consumers (low prices). The US antitrust policy reflects in part a deregulatory approach.⁵⁷

The Sherman Act (1890)⁵⁸ sets forth the basis antitrust prohibition against cartels and monopolies. The Sherman Act, dealing with foreign commerce and imports, has been amended by the 1982 Foreign Trade Antitrust Improvements Act (FTAIA) delineating the rules for conduct involving trade or commerce other than imports, and has also been amended by the Clayton Act (1914)⁵⁹ on mergers. The Sherman Act applies to conduct abroad under the broad language of the Commerce Clause of the Constitution, which gives Congress the power to regulate commerce with foreign nations and among the several states.⁶⁰ The Act itself is silent on its extraterritorial scope. Over the years, federal courts have interpreted its scope through different approaches, which will be discussed in the following section: a territorial approach in *American Banana Co v United Fruit Co*; an effects approach in *United States v Aluminium Co of America (Alcoa)* and a 'balancing' approach in *Timberlane Lumber Co. v Bank of America*. In *Hartford Fire Ins. Co v California* the Supreme Court was split between the latter two approaches.

Initially, the US application of the effects test triggered strong, adverse reactions from other countries. Some went so far as adopting so-called blocking statutes, prohibiting their companies from cooperating with US authorities.⁶¹

56 For a full overview of the relevant legislation see US Department of Justice and the Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations*, 1995, at <http://www.justice.gov/atr/public/guidelines/internat.htm>.

57 Eberle (2009), 476.

58 15 U.S.C. §§ 1-7.

59 1914 (15 U.S.C. § 12-27), Section 7 Clayton Act.

60 US Constitution Article 1, sec.8, cl.3; Kelly L. Tucker, 'In the Wake of *Empagran* – Lights Out On Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve Out a Prevailing Standard' 2010, 15 Fordham Journal of Corporate and Financial Law 807, 809.

61 There are discovery blocking statutes, aimed at preventing compliance with foreign state requests or order for documents or information; and there are judgment blocking provisions that declare unenforceable the decisions of a foreign court purporting to affect foreign nationals. See Note, 'Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests and Treble Damages' 1987, 50 Law and Contemporary Problems 197.. See for example Law 68-678 of the French Republic; Swiss Penal Code, Art.273 (1971); UK Protection of Tradition Interests Acts, 1980, 27 Eliz. 2, ch.11, *reprinted in* 21 Int'l Leg.

Interestingly, although the position of countries (like the EU and its Member States) has shifted over time, sometimes endorsing their own version of the effects doctrine, several of these blocking statutes remain on the books.⁶²

5.3.1.1 *American Banana and a territorial approach*

The first Supreme Court decision to evaluate the extraterritorial application of the Sherman Act was the 1909 *American Banana Co v United Fruit Co*⁶³ case whereby the plaintiff alleged that United Fruit had effectively monopolized Central American banana trade in Panama and Costa Rica. The Court applied a doctrine of 'strict territoriality', holding that legislation is *prima facie* territorial and the Sherman Act did not extend to acts done abroad.

5.3.1.2 *Alcoa and effects*

The territoriality approach was seen as the basic approach in the following years, until the Court reevaluated its stance in the *Alcoa* case in 1945.⁶⁴ With this case the extraterritorial application of antitrust laws in the US began.⁶⁵ When the case came to the US Supreme Court, the Court announced it could not assemble the requisite quorum of six judges qualified to hear the case,⁶⁶ and so the Second Circuit, court of last resort by special statutory designation, decided the case that was to become a landmark decision on the extraterritorial application of the Sherman Act. The Court had to assess whether the Sherman Act applied to a production quota agreement between a Canadian, a British, a French, a Swiss and two German corporations. Judge Learned Hand applied the Sherman Act to the cartel quota agreements and found these to be 'unlawful, though made abroad, if they were intended to affect imports and did affect them'.⁶⁷ The Court rejected the notion that domestic *effects* alone would suffice, but required *intent* in addition. Once *intent* was established, the burden of proof

Mat. 834 (1982) (United Kingdom); Foreign Extraterritorial Measures Act, *reprinted in* 24 Int'l Leg. Mat. (1985) (Canada); Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Australian Acts No.121, amended by Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, Australian Acts No.122.

62 The French blocking statute (Loi 68-678 of the French Republic, modified by Loi 80-538), originally adopted in light of US antitrust enforcement against shipping cartels, is a well-known example. See also Pierre Grosdidier, 'The French Blocking Statute, The Hague Evidence Convention and the Case Law: Lessons for French Parties Responding to American Discovery' 2014, 50 Texas international Law Journal 11.

63 213 US 347 (1909).

64 2d Cir., *US v Aluminium Co of America (Alcoa)* 1945, 148 F.2d 416

65 For an interesting historical overview of how and why extraterritoriality developed in the US, see James J. Friedberg, 'The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine' 1991, 52 University of Pittsburgh Law Review 289, 297.

66 Six judges had recused themselves.

67 *Alcoa* 1945, 444.

for an absence of domestic effects shifted to the defendant.⁶⁸ Alcoa was an American aluminium company that did not itself participate in the cartel, but had created the Canadian company *Limited*, transferred nearly all of its assets located outside the US to Limited and issued all the shares in Limited to Alcoa's common shareholders, while Alcoa continued to have a substantial state in Limited. It was Limited, however, that participated in the international cartel. The Second Circuit accepted the District Court's assessment that Alcoa and Limited were separate entities, and this might have resulted in a broader extraterritorial application than would have been the case if both companies had been seen as a single entity. Lifting the corporate veil would have shown that the actors and beneficiaries of Limited were predominantly US citizens.⁶⁹ However, Judge Learned Hand only based his judgment on intention and effects.⁷⁰ With that notion of intent, Judge Learned Hand rejected jurisdiction over unintended effects, as 'almost any limitation on the supply of goods in Europe, for example, or in Latin America, may have repercussions in the United States, if there is trade between the two. Yet (...) Congress did not intend the Sherman Act to cover them'.⁷¹ Intent was thus indispensable to avoiding 'international complications'.⁷²

Subsequent courts have not always been very clear on the precise requirements and the relationship between intent and effects: are both required or could they be alternatives?⁷³ The Supreme Court in *Hartford Fire* seems to reaffirm Alcoa's proposition that intent and effects are required cumulatively by stating that 'it is well established by now that the Sherman Act applies to foreign conduct that was *meant to* produce and did in fact produce some substantial effect in the United States'.⁷⁴

The intent required is not a specific, but a general intention, which can be also be retraced in requirements of foreseeability and directness of effects.⁷⁵ It has been suggested that within the scope of the FTAIA – adopted to reduce tensions over the Act's extraterritorial application and to clarify the standards to be used by the courts (without much success)⁷⁶ – the requirement that effects be 'reasonably foreseeable' has replaced the 'intent' requirement, and that the foreseeability requirement is less demanding than the intent

68 Ibid 443ff.

69 Wagner-von Papp(2012), 28.

70 See for an interesting discussion of Judge Hand's reasoning Swan(1997), 568.

71 *Alcoa* 1945, 443.

72 Ibid.

73 See for instance 9th Cir., *Timberlane Lumber Co. v Bank of America* 1977, 549 F.2d 597, 613; 3d Cir., *Mannington Mills v Congoleum Corp.* 1979, 595 F.2d 1287, 1301

74 US Supreme Court, *Hartford Fire Insurance v California* 1993, 509 US 764, 796; 113 S.Ct. 2891.

75 Coppel (1993), 85.

76 Edward Swaine, 'Cooperation, Comity and Competition Policy: United States' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 7.

requirement.⁷⁷ However, these two elements might not differ all that much, as it has never been made entirely clear whether the ‘intent’ requirement refers to a subjective or objective intent. If objective intent would suffice, then that would arguably be fulfilled when domestic effects were reasonably foreseeable.⁷⁸

The effects test can be criticized for being overly broad in scope: in theory almost everything can affect almost anything. The test is difficult to apply as it lacks doctrinal clarity. When are the effects considered sufficient to trigger the application of domestic rules to foreign conduct?⁷⁹ Courts and legislature have continuously tried to qualify the effects that are necessary to trigger an extraterritorial reach.⁸⁰

The FTAIA requires that there must be ‘direct, substantial and reasonably foreseeable’ effects on domestic or import commerce.⁸¹ However, it is not always very clear what each element entails and how they relate to each other. Firstly, when can an effect be said to be *direct*? The Department of Justice (DOJ)/Federal Trade Commission (FTC) Guidelines consider, for instance, that the domestic effect is sufficiently direct where a foreign cartel sells the affected products to an unrelated intermediary who will foreseeably sell them on to buyers in the US.⁸² In this interpretation, the distinction between direct and reasonably foreseeable becomes blurred though, making the requirement of directness arguably redundant. Nevertheless, the emerging view seems to be that competition authorities must be able to *show* the direct effect on the market, as *assuming* that e.g. price-fixing will harm competition on the market is not good enough.⁸³ The Ninth Circuit has interpreted ‘direct’ as an ‘immediate consequence’ of the defendant’s conduct,⁸⁴ whereas the Seventh and Second Circuits rejected that approach and read a ‘reasonably proximate causal nexus’ in directness.⁸⁵ Secondly, the requirement of *substantial* effects also raises questions. In *Alcoa* the potential effects were sufficient, as long as the absence of actual effect was not shown. The DOJ/FTC Guidelines also consider

77 Wagner-von Papp(2012), 30.

78 Ibid.

79 Robert Y. Jennings, ‘Extraterritorial Jurisdiction and the United States Antitrust Laws’ 1957, 33 British Yearbook of International Law 146, 159.; see also L. Austen Parrish, ‘The Effects Test: Extraterritoriality’s Fifth Business’ 2008, 61 Vanderbilt Law Review 1455, 1480.

80 Parrish (2008), 1481.

81 See 15 U.S. Code § 6a – Conduct involving trade or commerce with foreign nations.

82 DOJ/FTC Antitrust Enforcement Guidelines for International Operations (April 1995), Section 3.121.

83 See e.g. CJEU, *InnoLux Corp., formerly Chimei InnoLux Corp. v European Commission* 9 July 2015, ECLI:EU:C:2015:451; US Court of Appeals, 7th Cir., *Motorola Mobility LLC v. AU Optronics Corp.* 26 November 2014, 775 F.3d 816

84 9th Cir., *United States vs LSL Biotechnologies* 2004, 379 F.3d 672, 680

85 2d. Cir., *Lotes Co. v Hon Hai Precision Indus.* 2014, 753 F.3d 395, 410 ; 7th Cir., *Minn-Chem Inc. v Agrium Inc.* 2012, 683 F.3d 845, 856-57

that potential harm can qualify as substantial under the FTAIA.⁸⁶ The third requirement of foreseeability seems to be the operative one. If it is foreseeable that conduct will have anticompetitive effects in the US, the rules can be applied to that conduct. If, however, somehow US markets are implicated in conduct in a way that the actors did not and could not foresee, then it is a matter of legal certainty not to apply foreign laws to these actors.⁸⁷

The criteria of direct, substantial and foreseeable limit the application of US antitrust law to foreign conduct, and are usually considered as a 'jurisdictional limit' without which US authorities and courts have no jurisdiction over the conduct in question. As the effects doctrine functions as a legal basis to exercise jurisdiction, it is a logical consequence that the qualifications for such effect thus form part of the jurisdictional analysis. After the Supreme Court's ruling in *Arbaugh* in 2006 on subject-matter jurisdiction in the ambit of the Civil Rights Act,⁸⁸ the judiciary has begun to re-evaluate the jurisdiction-or-merits question with regard to the FTAIA as well. In 2011, for example, the Third Circuit in *Animal Science* considered the elements set forth by FTAIA as part of the substantive antitrust claim, rather than a jurisdictional limit.⁸⁹ In 2012, the Seventh Circuit in *Minn-Chem* followed suit.⁹⁰ The DC Circuit and the Ninth Circuit, however, have each held that the FTAIA presents a jurisdictional bar.⁹¹ It may be up to the Supreme Court to resolve this issue. The distinction is more than an academic exercise, as considering the matter as a jurisdictional or a merits question will have an impact on the burden of proof, will postpone jurisdictional determinations to a later stage of proceedings, making them more costly and possibly undermining the principle of comity.⁹²

86 DOJ/FTC Antitrust Enforcement Guidelines for International Operations (April 1995), Section 3.121.

87 Wagner-von Papp(2012), 35.

88 US Supreme Court, *Arbaugh v. Y & H Corp.* 2006, 546 US 500; 126 S. Ct. 1235, paras.515ff. The Court noted that 'if the legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character'. See also Abbott Lipsky and Kory Wilmot, 'The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?' August 2013, The Antitrust Source, 6.

89 3d Cir., *Animal Science Products, Inc. v China Minmetals Corp.* 2011, 654 F.3d 462

90 *Minn-Chem Inc. v Agrium Inc.* 2012.

91 822 F.Supp. 2d 953 (N.D. Cal. 2011). See also US Supreme Court, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* 2004, 542 US 155 paras.159ff., treating the FTAIA as governing subject-matter jurisdiction.

92 Lipsky and Wilmot (August 2013), 8.

5.3.1.3 Seeking a Balance: tempering the effects doctrine?

The adoption of the FTAIA in 1982, limiting and defining the extraterritorial reach of the Sherman Act, with an explicit reference to the effects doctrine, capped an extended period of debate regarding the extraterritorial application of US antitrust laws. Very few actions were dismissed based on lack of jurisdiction, raising controversy with other countries. According to one commentator in 1981, 'there have been five diplomatic protests of US antitrust cases for every instance of express diplomatic support, and three blocking statutes for every cooperation agreement'.⁹³ During this period, US courts developed the effects doctrine to moderate the extraterritorial application of US jurisdiction, which they tempered by applying versions of a jurisdictional rule of reason, reasonableness test or comity analysis.⁹⁴

In *Timberlane* the Court suggested that in addition to the effects test, one should also consider other interests.⁹⁵ The plaintiff, the US company Timberlane Lumber Co., alleged that the Bank of America had conspired with officials in Honduras to monopolize the timber industry. The conduct took place entirely in Honduras, it involved only foreign citizens and the economic impact was primarily felt in Honduras. The Court stated that it must be considered 'whether the interests of, and links to, to the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority'.⁹⁶ An effect on US commerce is alone not a sufficient basis to determine whether jurisdiction should be asserted 'as a matter of international comity and fairness'.⁹⁷

In *Mannington Mills*, the Court indicated that a comity analysis was not part of a threshold inquiry into whether the conduct fell within the Sherman Act, but instead was a discretionary factor according to which courts could abstain from proceedings.⁹⁸ The defendant, Congoleum Corp., an American company, used patents that it owned in foreign countries to exclude the plaintiff, Mannington Mills, also an American company, from those foreign markets. The plaintiff claimed that the patents had been obtained fraudulently and breached US standards, so Congoleum should not be able to use those

93 Joel Davidow, 'Extraterritorial Antitrust and the Concept of Comity' 1981, 15 *Journal of World Trade* 500, 502. See for instance Swiss Penal Code, Art.273 (1971); Protection of Tradition Interests Acts, 1980, 27 *Eliz. 2*, ch.11, *reprinted in* 21 *Int'l Leg. Mat.* 834 (1982) (United Kingdom); Foreign Extraterritorial Measures Act, *reprinted in* 24 *Int'l Leg. Mat.* (1985) (Canada); Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Australian Acts No.121, amended by Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, Australian Acts No.122.

94 Swaine(2011), 10. On comity and reasonableness, see chapter 4.3.2.

95 *Timberlane Lumber Co. v Bank of America* 1977.

96 *Ibid.*

97 *Ibid* 613.

98 *Mannington Mills v Congoleum Corp.* 1979.

patents in order to restrain US foreign commerce. The Court decided it had subject matter jurisdiction over the claim, but held it may abstain from jurisdiction if principles of comity so dictate. Thus, according to the Court, effects have to be analyzed first to determine whether jurisdiction exists, before determining whether to abstain based on comity factors.⁹⁹ In the wake of these initial decisions, a similar set of principles was developed in the Third Restatement of Foreign Relations Law, linking the comity inquiry to prescriptive jurisdiction and providing a list of criteria to determine whether the exercise of jurisdiction was unreasonable.¹⁰⁰

In *Hartford Fire*,¹⁰¹ the Supreme Court left open the question whether courts could engage in a comity analysis, but rather applied a test of 'true conflict': whether those accused of infringement cannot comply with the demands of foreign law and US law at the same time. The case involved a conspiracy by a group of London coinsurance companies to limit the kind of insurance offered in the US, such as limiting the coverage of various pollution damage claims. The UK defendants argued their conduct was lawful under British law. UK regulation permitted, but not compelled, action that was not allowed in the US, therefore not leading to 'true conflict' according to the majority of the court.¹⁰² A person subject to regulation of both countries could comply with the laws of both countries. The Court was very much divided in that case (5-4), so the decision led to controversy and confusion. Justice Scalia, writing for the four dissenters, argued that any nation having a basis for prescriptive jurisdiction must nevertheless refrain from exercising that jurisdiction if such exercise would be unreasonable, referring to the Third Restatement.¹⁰³ According to the dissenters, a conflict of laws exists where two laws provide different substantive rules, without one necessarily compelling an act that is considered unlawful by the other.

In *Empagran*,¹⁰⁴ the Supreme Court took again into account comity considerations, albeit in a more summary form than in *Timberlane*. The case considered a class action suit brought by foreign purchasers of vitamins, alleging that certain US and non-US vitamin manufacturers and distributors had engaged in a price-fixing conspiracy that resulted in the rise of prices of

99 Walter Steinberg, 'Mannington Mills, Inc v Congoleum Corp: A Further Step Toward a Complete Subject Matter Jurisdiction Test' 1980, 2 Northwestern Journal of International Law & Business 241, 244; 258.

100 1986, §401;403.

101 *Hartford Fire Insurance v California* 1993.

102 Swan(1997), 534.

103 *Hartford Fire Insurance v California* 1993, 819 (Scalia J. dissenting). For a further commentary, see Andreas F. Lowenfeld, 'Conflict, Balancing of Interests and the exercise of jurisdiction to prescribe: reflections on the Insurance Antitrust case' 1995, 89 American Journal of International Law 42; Phillip Trimble, 'The Supreme Court and International Law: The demise of Restatement Section 403' 1995, 85 American Journal of International Law 53.

104 *Empagran* 2004.

vitamins in the US and elsewhere.¹⁰⁵ Rather than domestic plaintiffs litigating against foreign defendants or foreign plaintiffs litigating against domestic defendants, in *Empagran*, foreign plaintiffs injured abroad brought a claim against a global cartel including foreign defendants.¹⁰⁶ The Court declined to extend the Sherman Act so as to apply to foreign purchasers as it held that US Courts do not have jurisdiction when the foreign injury is *independent* of any effect on US commerce.¹⁰⁷ Even though domestic plaintiffs might have suffered (domestic) injuries as well, where the foreign harm was wholly separate from the domestic harm, jurisdiction cannot be established.¹⁰⁸ The Court noted that it would be unreasonable to apply antitrust laws to foreign conduct where that conduct did not cause domestic injury,¹⁰⁹ referring amongst other to the differences that still exist among the antitrust laws of affected countries.¹¹⁰ Any such application of US laws would then interfere with the interests of other nations. The Court thus resurrected comity to help construe the FTAIA's scope.¹¹¹

Despite the attempts to rely on comity to mitigate the scope of the FTAIA and the effects test, courts have found comity to apply only in rare circumstances.¹¹² When applied, courts have differed in their approaches to comity issues, dismissing cases because of 'true conflict' issues, as well as because of comity concerns.¹¹³ Furthermore, even if comity is applied, questions arise

105 Stigall (2012), 346.

106 When discussing the extraterritorial scope of US antitrust rules it is important to note that private enforcement plays an important role in the US antitrust system. Whereas extraterritoriality in the EU refers mainly to the European Commission or EU courts exercising jurisdiction over foreign companies, in the US the question also refers to whether victims injured abroad by anticompetitive conduct can bring suit in US federal courts under US antitrust laws when the conduct abroad also has an effect on domestic business.

107 To determine the standard of 'dependence' of foreign injury, the case was sent back to the DC Circuit Court (DC Cir, *Empagran SA v F. Hoffman-LaRoche Ltd (Empagran II)* 2005, 417 F.3 1267, 1270 That court found that a direct causal relationship or proximate cause is required: the domestic effects must be the proximate cause of the plaintiffs' injuries. It noted that 'a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anticompetitive activity within their own borders' (at 1271).

108 Tucker (2010), 824.

109 *Empagran* 2004, 169.

110 *Ibid* 167.

111 Lynn S. Diamond, 'Empagran, The FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking' 2006, 31 Brooklyn Journal of International Law 805, 828.

112 Parrish (2008), 1477.

113 Joseph P. Griffin, 'Extraterritoriality in US and EU Antitrust Enforcement' 1999, 67 Antitrust Law Journal 159, 166.

whether courts are able to assess foreign interests meaningfully, consistently, and/or do so in a neutral way, not favouring US interests.¹¹⁴

5.3.2 The EU

In contrast to the criminalized US antitrust system that includes private enforcement, the EU has an administrative system for the enforcement of its competition laws, in which companies are penalized with fines. EU competition law is most concerned with the protection of competitors' interests (smaller firms should not be driven out of the market by big firms) and the protection of consumer safety and well-being (consumers should not be exploited or misled by big firms). Compared to the US system, the EU approach is arguably more proactive in enforcing antitrust law, intervening where necessary to protect the market, society and culture.¹¹⁵

The EU competition rules are constituted by Articles 101 (cartels and concerted practices) and 102 TFEU (abuse of dominant position), as well as by various guidelines and regulations governing mergers and other relevant matters. The EU competition rules were drafted with the aims of advancing European integration and diminishing interstate tension through free trade. Also, the rules were intended to benefit European consumers.¹¹⁶ The set-up within the EU is based on a two-tier system whereby the Commission and the national competition authorities have parallel competence to apply Articles 101 and 102 TFEU.¹¹⁷ The Commission can furthermore assess possible mergers with a Community dimension, based on the Merger Regulation.¹¹⁸

Article 101 TFEU is silent on its territorial (or extra-territorial) reach, referring to conduct that 'may affect trade between Member States' and has as its 'object or effect the prevention, restriction or distortion of competition'. Under well-established case law, the test for determining whether the conduct may affect trade between Member States requires that it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between them.¹¹⁹ The threshold for the effect on trade test is thus rather low: it is enough if

114 See also chapter 3 on comity. See also Notes, 'Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction' 1985, 98 *Harvard Law Review* 1310, 1320.

115 Eberle (2009), 477.

116 Friedberg (1991), 295.

117 Council Regulation 1/2003 of Dec.16, 2002 on the implementation of the rules on competition.

118 Council Regulation 139/2004 of Jan.20, 2004 on the control of concentrations between undertakings.

119 Botteman and Patsa (2012), 367; CJEU, *Stichting Sigarettenindustrie and others v Commission of the European Communities* 10 December 1985, Joined cases 240, 241, 242, 261, 262, 268, and 269/82; ECLI:EU:C:1985:488, para.48.

conduct is *capable of* having an effect on intra-EU trade.¹²⁰ Even indirect influences on EU cross-border trade are captured by the test, for instance where the cartelised product is used as input for the final product that is traded between Member States.¹²¹

Whereas the EU originally strongly opposed the US exercise of extraterritorial jurisdiction in the field of antitrust, in the last decades of the 20th century, the EU slowly moved toward a similar approach, especially in the application of EU competition law by the Commission (to a lesser degree also by national competition authorities).¹²² The EU has claimed jurisdiction in competition matters over conduct arising outside EU territory. The Commission and the courts have relied upon three doctrines: the single economic entity doctrine, the implementation doctrine, and the effects doctrine. The European Commission has since long attempted to assert jurisdiction on the basis of the effects that cartel conduct has within the internal market.¹²³ To date, the CJEU has never recognized the effects doctrine (but not rejected it either), rather relying on less contentious doctrines, such as the single economic entity doctrine or the implementation doctrine, however, the General Court did rely upon the effects doctrine in the context of merger control in *Gencor*.¹²⁴ The following part will discuss the main theories and their landmark judgments.¹²⁵

5.3.2.1 *Dyestuffs and the economic entity theory*

In the *Dyestuffs* case, the question as to whether an extraterritorial application of EC competition rules could be accepted based on the effects doctrine, was

120 CJEU, *Irish Sugar plc v Commission of the European Communities* 1999, T-228/97 [1999] ECR II-2969, para.170; CJEU, *Müller International Schallplatten GmbH v Commission of the European Communities* 1978, 19/77 [1978] ECR 131, para.15.

121 CJEU, *Bureau national interprofessionnel du cognac v Guy Clair* 1985, 123/83 [1985] ECR 391, para.29; *Inmolux* 9 July 2015,.

122 Friedberg (1991), 291; Geradin, Reysen and Henry (2011); Botteman and Patsa (2012); Wagner-von Papp (2012). National courts have been reluctant to accept the effects doctrine, except for Germany. In *Phillip Morris, Inc v Bundeskartellamt* (1984 ECC 393) (Case Kart 16/82), the German Federal Cartel Authority embraced the effects doctrine.

123 See for instance Decision of EC Commission 64/233, March 11, 1964, No. IV/A-00061, OJ 58, *Grosfillex-Fillistorf*.

124 , *Gencor v Commission* General Court 1999, T-102/96 ECLI:EU:T:1999:65.

125 Extraterritorial elements can be traced in a number of other cases, however, very often the facts will allow the Commission to claim jurisdiction through territorial inks because of agreements with European companies. In few cases does the Commission explicitly argue for its extraterritorial jurisdiction, and in even fewer cases will the parties appeal on these grounds. For a discussion of more cases see for instance Botteman and Patsa (2012); Chie Sato, 'Extraterritorial Application of EU Competition Law: Is It Possible for Japanese Companies to Steer Clear of EU Competition Laws?' 2010, *Journal of Political Science and Sociology* 23; Yves Van Gerven and Lorelien Hoet, 'Gencor: Some notes on Transnational Competition Law Issues – European Court of First Instance 25 March 1999, T-102/96, *Gencor Ltd. V Commission*' 2001, 28 *Legal Issues of Economic Integration* 195.

raised for the first time. Without much elaboration the Commission referred to effects felt in the common market, as a result of concerted practices among ten producers, among which the UK-based company (at the time the UK was not yet a EU Member State) Imperial Chemical Industries (ICI).¹²⁶ AG Mayras recommended that the Commission's decision should be upheld on the basis of the effects doctrine. He thereby referred to reasonably foreseeable and substantial effects and relied heavily on American precedents such as *Alcoa*.¹²⁷

The ECJ upheld the Commission's decision by finding that the behaviour indeed constituted a concerted practice prohibited by Article 85(1) EEC Treaty (current Article 101 TFEU), but not by relying on the effects doctrine. Rather the Court based its judgment upon the single economic entity doctrine, according to which parents and subsidiaries can be considered as one undertaking where the subsidiary is acting on its parent's instruction.¹²⁸ The Court thereby noted that the conduct of ICI's subsidiaries established in the EU could be imputed to the parent company, and that they could be treated as one single economic unit.¹²⁹ In the case at hand, the ICI parent had ordered the subsidiaries to engage in the anticompetitive conduct in question and 'was able to ensure that its decision was implemented on that market'.¹³⁰ The Court, however, did not explain why it did not adopt the AG's opinion, nor why it did not reject the effects doctrine outright. The Court might have opted to keep its options open at that point, realizing that the effects doctrine was still controversial.¹³¹

5.3.2.2 *Wood Pulp and the implementation theory*

For fifteen years following the *Dyestuffs* case, the effects doctrine was not directly confronted in EU courts, mainly because the results yielded by the Commission's application of the effects doctrine and the Court's (flexible) economic unit theory were exactly the same. With the *Wood Pulp* case,¹³² however, the Court was facing a factual situation in which the economic unit theory could not be stretched to cover truly non-EU actors. The case dealt with price-fixing practices involving forty-one producers of sulphate wood pulp

¹²⁶ OJ 1969, L195/11, para. 28.

¹²⁷ , *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)* Court of Justice of the European Union 1972, case 48/69 ECLI:EU:C:1972:70, 696.

¹²⁸ Ibid 628.

¹²⁹ Ibid 130.

¹³⁰ Ibid 130.

¹³¹ Friedberg (1991), 312. *Dyestuffs* was an Article 101 TFEU case, and the single economic unit argument was also applied in the subsequent Article 102 TFEU cases *Continental Can* and *Commercial Solvents*. (CJEU, *Europemballage Corp and Continental Can Co v European Commission* 1973, 6/72 [1973] ECR 215; CJEU, *Instituto Chemioterapico Italiano and Commercial Solvents Corp v European Commission* 1974, 6/73 and 7/73 [1974] ECR 223.) See also for a discussion Friedberg (1991), 313.)

¹³² Court of Justice of the European Union *Wood Pulp I* 1998.

and two related trade associations, most of them having their registered offices outside the EU. Ten US companies and one trade association were initially charged by the Commission, which was a first where neither the enterprises involved nor any of their corporate affiliates were located within the Community. The economic entity theory could thus not be relied upon.

The Commission based its decision upon an *Alcoa*-style effects doctrine, an approach supported by Advocate General Darmon, who suggested the adoption of the criteria of direct and immediate, reasonably foreseeable and substantial effects.¹³³ The Court eventually adopted a modified version of the effects doctrine, without explicitly subscribing to it. Between the lines of the Court's judgment, one can nevertheless identify clear references to effects. In paragraph 13, the Court refers to a 'concertation which has the object and effect of restricting competition within the common market'. In paragraph 14, the Court confirms that 'the Commission has not made an incorrect assessment of the territorial scope of Article 85'.

The Court noted that an infringement of Article 101 TFEU consists of conduct made up of two elements: the formation of the agreement, decision or concerted practice; and the implementation thereof. Establishing jurisdiction must not depend on where the agreement was formed, as that 'would obviously give undertakings an easy means of evading those prohibitions', but must depend on the place of implementation of an agreement.¹³⁴ Such application would fall under the territoriality principle and hence not be controversial under public international law. The Court hereby relied on the objective territoriality principle, whereby (part of) an act occurred outside the state's territory, which in a competition law context more or less equals the effects doctrine, as the effects of anti-competitive behaviour are a necessary element for that behaviour to fall within the scope of the competition rules.¹³⁵ In *Wood Pulp*, the Court found that the producers implemented their pricing agreement within the common market, so it was immaterial whether or not they had recourse to subsidiaries, agents or branches within the Community.¹³⁶

It is not clear to what extent the Court's 'implementation' theory actually differs from the effects doctrine.¹³⁷ In *Wood Pulp*, the anti-competitive acts were 'implemented' within the EU through price announcements and transaction prices. Such market conduct taking place within EU territory is according to the Court covered by the territoriality principle. However, can the selling of goods within the EU at 'cartelized prices' by non-EU companies also be seen as economic effects of foreign anti-competitive behaviour? That would undoubtedly be the case under the US understanding of the effects doctrine.

133 Opinion of Advocate General Darmon, ECLI:EU:C:1988:258, 36-42; 53.

134 Court of Justice of the European Union *Wood Pulp I* 1998, 16.

135 Ibid para.18. Coppel (1993), 83.

136 Court of Justice of the European Union *Wood Pulp I* 1998, para.17.

137 Griffin (1999), 186.

Rather than referring to the effects doctrine, the CJEU relied on an 'effects doctrine in disguise',¹³⁸ without indicating how an element of market conduct and 'implementation' differs from economic effects.¹³⁹ Arguably, implementation requires a direct conduct, for instance, the direct selling of products by the cartel members, whereas indirect sales could still be covered under the effects doctrine, in the example where a foreign cartel sells its products through a bona-fide non-EU intermediary purchaser who will then sell the products within the EU. Even though the prices in the EU will undoubtedly be affected, the cartel conduct would then not be regarded as directly implemented in the EU.¹⁴⁰

An example of 'indirect' sales and effects was at issue in the recent case *InnoLux v Commission*.¹⁴¹ Innolux, a Taiwanese company, produced LCD panels sold to its vertically-integrated non-EU subsidiaries.¹⁴² They incorporated those LCD panels into finished products such as TVs and computer monitors which were then sold on to independent third parties within the EU. While it was not disputed that the Commission had jurisdiction to apply Article 101 TFEU to the cartel at issue as the cartel was implemented in the EU by selling finished products incorporating LCD panels,¹⁴³ the question was whether the Commission, when imposing its fine, could also take into account the intra-group sales of the input products that occurred outside of the EU and the European Economic Area (EEA).¹⁴⁴ In order to calculate the relevant EEA turnover,¹⁴⁵ the Commission looked at the first 'real' sale within the EEA of the LCD panel as such or integrated in a final product, thus taking into account

138 Jürgen Basedow, 'International Antitrust: From Extraterritorial Application to Harmonization' 2000, 60 Louisiana Law Review 1037, 1040.

139 Wagner-von Papp(2012), 27.

140 Ibid 29.

141 *Inmolux* 9 July 2015.

142 Authorities in Japan, Korea, the EU and the US investigated a cartel between LCD panel-makers that agreed on price-fixing from 1999 to 2006. All cartel meetings had taken place in Korea and Taiwan. Samsung had disclosed to the Commission the existence of a cartel on the market for LCD Panels.

143 *Inmolux* 9 July 2015, para.73. For the Commission's reasoning on jurisdiction where it referred both to the implementation doctrine (para.230) and the effects doctrine (para.231), see Commission Decision of 8 December 2010, Case COMP/39309, para.238.

144 See OJ 2006 C210, Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation EC 1/2003. The Commission shall establish the value of sales of the cartelized product to which the infringement related directly or indirectly. This should reflect the economic significance of the infringement and the relative size of the undertaking's contribution to it. Whether the relevant sales are to independent third parties or to entities belonging to the same undertaking should not matter, as that would otherwise give an unjustified advantage to vertically integrated companies by allowing them to avoid a proportionate fine. (See CJEU, *Guardian Industries and Guardian Europe v Commission* 2014, C-580/12P, EU:C:2014:2363, paras.57ff.).

145 For the purpose of calculating a fine in competition proceedings, the Commission will take into account the sales in the European Economic Area (EEA) rather than only the EU. (Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210).

direct sales of LCD panels to independent EU undertakings, as well as sales where the LCD panel was transformed within the same group into a TV or computer, and then sold within the EEA. Innolux argued that only the sales of the finished products into the EEA could be taken into account.¹⁴⁶ AG Wathelet agreed with Innolux, arguing that taking intra-group sales that have taken place outside of the EEA would be an unjust extension of the territorial scope of Article 101 TFEU.¹⁴⁷ The AG argued that intra-group sales outside the EEA could not be seen as ‘implementation’ of a cartel within the EU.¹⁴⁸ Even if the Court were to rely on the effects doctrine, these ‘indirect’ sales could not, according to the AG, be considered as immediate and substantial effects.¹⁴⁹ The CJEU did not follow the AG and did not elaborate on the jurisdictional question, finding the arguments on territorial jurisdiction ‘irrelevant’.¹⁵⁰ The Court based its reasoning on the theory of a single (vertically-integrated) undertaking, justifying the Commission’s decision to include internal intra-group sales of the goods concerned by the infringements, if the finished products are sold within the EU – even if those intra-group sales took place outside the EU.¹⁵¹ The *Innolux* case can be seen as extending the Commission’s territorial jurisdiction. However, that jurisdiction is not unlimited: the cartel must still be implemented through sales within the EEA.

Innolux leaves unanswered the question of double jeopardy. If the Commission, for instance, considers intra-group deliveries as the first sale, and includes those when imposing fines, there is a risk of concurrent penalties and jurisdictional conflict with other competition authorities that could pursue companies based on the same sales. The CJEU only stated that ‘*non bis in idem*’ nor any other principle of law obliges the Commission to take account of proceedings and penalties to which the undertaking has been subject in non-member States’, an answer that seems unsatisfactory in light of international cooperation

146 Commission Decision of 8.12.2010, C(2010) 8761 final, para.9. The indirect sales of LCD panels to non-EU undertakings who would then sell the finished products into the EU are not included. (para.381).

147 AG Wathelet opinion (30 April 2015) to *Innolux* 9 July 2015., para.44.

148 Ibid, para.46.

149 Ibid, paras. 49-53.

150 CJEU *Innolux Corp.*, para.71.

151 Ibid, paras.65-70. This is contrary to a finding by the US 7th Circuit in a private enforcement case *Motorola* 26 November 2014. When Motorola, a US company, claimed damages from the LCD cartel, the Court found that the FTAIA’s conditions had not been fulfilled because Motorola had based its claim on sales of the cartelized LCD panels to Motorola’s non-US subsidiaries who subsequently delivered the finished products to their parent company in the US. The court found the effects to be too indirect. In a public enforcement case related to the LCD cartel, the US Court of Appeals for the Ninth Circuit did hold in an appeal by AU Optronics that the price-fixing by the LCD cartel had a direct and substantial effect in the US. (9th Cir., *United States of America v AU Optronics Corp et al* 10 July 2014, 12-10492 F.3d.).

in competition matters.¹⁵² International cooperation agreements or comity considerations could be useful to determine in such situations which authorities should reasonably exercise jurisdiction.

5.3.2.3 *Gencor and the effects doctrine*

In 1999 the General Court did accept the application of the effects doctrine to a merger of two South-African companies in the *Gencor* case.¹⁵³ Mergers and acquisitions fall within the scope of competition law, as mergers will generally lead to fewer competitors, which could harm the competitive structure of the market and confer monopolistic power upon the surviving firm, which could lead to abuses of dominant market positions.¹⁵⁴ Over the last decades the EU's merger policy has shifted its focus from punishing actual abuse of market dominance to a pre-emptive approach whereby market structures and potential post-merger effects are scrutinized as a condition precedent to merger approval by the Commission.

The main rules for such assessment are laid down in the Merger Regulation 139/2004, which scope is defined exclusively by reference to a 'Community dimension' of the concentration, which exists whenever the undertakings concerned exceed both worldwide and Community-wide turnover thresholds.¹⁵⁵ The Community dimension can exist irrespective of the place of incorporation or main seat of the undertakings – they must only have substantial operations within the EU. In *Gencor*, a case concerning a joint venture between Gencor Ltd., a South African company whose metal activities are exercised by its South African subsidiary Implats; and Lonhro Plc, a British company whose metal activities are exercised by its South African subsidiary LPD, the territorial scope of the Merger Regulation¹⁵⁶ was discussed.¹⁵⁷

¹⁵² *Innolux* 9 July 2015, para.75.

¹⁵³ General Court *Gencor* 1999.

¹⁵⁴ Kenneth J. Hamner, 'The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China' 2002, 11 *Journal of Transnational Law and Policy* 385, 388.

¹⁵⁵ Article 1(2) of the Merger Regulation reads that a concentration has a Community dimension where the aggregate Community-wide turnover of all the undertakings concerned is more than EUR 5000 million, and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. According to Article 1(3) there can also be a Community dimension where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million, with a combined aggregate turnover of all undertakings in at least three undertakings of more than EUR 100 million.

¹⁵⁶ Note that at the time mergers were regulated under Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, amended by Council Regulation EC/1310/97 of 30 June 1997. As Regulation 139/2004, the old merger regulation required a Community dimension for undertakings that could be established through minimum thresholds of worldwide and Community turnover.

Firstly, Gencor argued that the proposed concentration did not fall within the territorial scope of the Regulation as the economic activities were conducted in South Africa. The Court (then Court of First Instance) referred to the turnover criteria in the Merger Regulation, finding that the joint venture did fall within the scope of the Regulation. Secondly, Gencor argued that the Commission did not have jurisdiction under international law to examine the transaction. In this view, a finding that a transaction falls within the scope of the Regulation does not necessarily mean that there is international jurisdiction.¹⁵⁸ The Court noted that 'application of the Regulation is justified under public international law when it is *foreseeable* that a proposed concentration will have an *immediate* and *substantial effect* in the Community'.¹⁵⁹ The Court found there indeed to be immediate, substantial and foreseeable effects, without explicitly referring back to the turnover thresholds.¹⁶⁰ The transaction would give rise to a lasting alteration of the market structure and would have created conditions in which abuses were not only possible but economically rational.¹⁶¹ It is not clear whether the Court, by referring to the effects of a transaction, imposed an additional requirement of substantive market analysis as a jurisdictional element, or whether that analysis in any case forms part of the merits (or to what extent this analysis of effects differs from the merits analysis of finding an impeding effect on competition). Neither in later case law, nor in the new 2004 Merger Regulation, is the requirement of effects presented as a condition to establish jurisdiction, but rather as part of the Commission's assessment of the concentration.¹⁶² While the turnover requirements establish a nexus with the EU, it can be questioned whether that nexus is sufficient to establish jurisdiction under international law (for competition matters) when there are no or negligible effects on EU competition.¹⁶³

The Court in *Gencor* distinguished between the application of the Regulation and actually exercising jurisdiction by prohibiting the merger. It examined whether exercising jurisdiction would violate the principles of non-interference and proportionality with respect to the South-African authorities, as the latter had already approved the transaction.¹⁶⁴ The Court relied on a *Hartford Fire*-like analysis of 'true conflict', stating that there was no conflict because the

157 General Court *Gencor* 1999.

158 Van Gerven and Hoet (2001), 204.

159 General Court *Gencor* 1999, 90.

160 Ibid paras.91ff.

161 Van Gerven and Hoet (2001), 197.

162 When a merger has no or negligible effects in the EU, joint ventures or mergers that exceed the turnover thresholds still need to notify the Commission, but the Commission will usually deal with such cases under the 'simplified procedure' involving a routine check, clearing them without substantive doubts. See Commission Notice 2013/C 366/04 on a simplified procedure for treatment of certain concentrations under Council Regulation EC/139/2004.

163 James Killick and Charlotte Burnett, 'Time to end the EU's needless review of extraterritorial joint ventures' February 2013, White & Case.

164 General Court *Gencor* 1999, 102.

South-African authorities had approved the transaction but they did not *require* that such an agreement be entered into.¹⁶⁵ It would then seem that the decision to exercise jurisdiction also depends on the thresholds of national competition law. The Court did not examine the substantive obligations of South-African merger control laws.

Another example of a possible conflict emerged with the proposed merger of Boeing and McDonnell in 1997, both US companies. The Commission exercised jurisdiction on the basis that both parties exceeded the Community turnover requirements.¹⁶⁶ The Boeing and McDonnell Douglas merger was opposed by the EU, but ultimately approved after a transatlantic trade dispute almost erupted. It was argued that the EU's concerns were protectionist in nature in order to promote Airbus,¹⁶⁷ but the Commission relented only after Boeing agreed to several major concessions.¹⁶⁸ More high-profile 'extraterritorial' cases include the blocked mergers of US telecom companies World Com and Sprint Corp in 2000, as well as the conditional approval of US entertainment giant Time Warner and Internet service provider AOL.¹⁶⁹ In 2001 the European Commission blocked the mega-merger between helicopter engine manufacturers General Electric Corporation (GE) and Honeywell, after the US Department of Justice and the US Federal Trade Commission had granted final approval for the merger.¹⁷⁰

Over the last decade, blocked mergers by the Commission involved at least one EU company; which could be due to an increase of cooperation between competition authorities in competition proceedings and/or due to an increased awareness among companies of competition rules globally.¹⁷¹ There is no official statement by the European Commission that would imply that the

165 Ibid 103.

166 Commission Decision of 30 July 1997 in case No IV/M.877 – Boeing/McDonnell Douglas, para.7.

167 Barbara Crutchfield-George, Lynn V. Dymally and Kathleen A. Lacey, 'Increasing Extraterritorial Intrusion of European Union Authority into US Business Mergers and Competition Practices: US Multinational Businesses Underestimate the Strength of the European Commission From *GE-Honeywell* to *Microsoft*' 2004, 19 Connecticut Journal of International Law 571, 576.

168 Case IV/M.877, Boeing/McDonnell Douglas v Commission, 1997 OJ (C372) 17. For a discussion of the case in this context, see Hamner (2002), 395.

169 Commission Decision of 28 June 2000 in case No COMP/M.1741 – MCI WorldCom / Sprint; Commission Decision of 11/10/2000 in case No COMP/M.1845 – AOL/Time Warner.

170 Commission Decision of 03/07/2001 in case No COMP/M.2220 General Electric/Honeywell. For a discussion of these mergers, see Sarah Stevens, 'The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust' 2002, 29 Syracuse Journal of International Law and Commerce 263.

171 Examples include Ryanair-Aer Lingus; UPS-TNT; NYSE Euronext-Deutsche Börse; Olympic Air-Aegean Airlines; Energias de Portugal-ENI-Gas de Portugal; Tetra Laval-Sidel. For an overview of all cases, see <http://ec.europa.eu/competition/mergers/cases/>.

Commission would be more reluctant in blocking non-EU mergers when these fall within the scope of EU law and hence the Commission's competence.

5.3.3 Extraterritoriality beyond the US and the EU

The following section aims to give a non-exhaustive overview of other significant economies, small or big, that have applied the effects doctrine in one form or another. Its purpose is to highlight that there is broader acceptance of extraterritorial application of competition rules, rather than giving an in-depth analysis of the legislation and jurisprudence.

5.3.3.1 Japan

The Japan Fair Trade Commission (JFTC), rather than Japanese Courts, has played a leading role in enforcing the Japanese competition rules, the Antimonopoly Act (AMA). Under the AMA, the JFTC has the power to enforce the Act, subject to judicial review. Originally, the Act contained very strict prohibitions on cartels, monopolies, mergers and even the existence of large enterprises. After the Korean War in 1953, the AMA was eased with regard to cartel restrictions.¹⁷² The AMA is silent on its jurisdictional scope, even though Article 6 prohibits any international agreement that constitutes an unreasonable restraint of trade or unfair trade practices. There has, to date, been no judicial decision clarifying the scope yet and the possible extraterritorial application can thus only be judged by the JFTC's practices, which seem to allow for an application of the effects doctrine.

In its *amicus curiae* brief in the 1996 Nippon Paper case, where a Japanese company was prosecuted under the US Sherman Act, the Japanese government argued that the extraterritorial application of the Act was unlawful under international law.¹⁷³ An earlier report by the JFTC contradicts this position as it stated that 'presence in Japan of a foreign firm's branch or subsidiary is not necessarily a condition for the applicability of the Antimonopoly Act, with respect to acts which harm competition in the domestic market'.¹⁷⁴

The effects and implementation doctrines are interpreted strictly in Japan, and international cartels involving foreign companies or mergers between two foreign companies may often not be covered, even though they might have

172 Charles A. Brill and Brian A. Carlson, 'US and Japanese Antimonopoly Policy and the Extraterritorial Enforcement of Competition Laws' 1999, 33 *The International Lawyer*, 82.

173 Brief of Amicus Curiae of the Government of Japan in the Nippon Paper Case, US Ct App 1st Cir, 18 November 1996. For an overview of the historical background and analysis of why Japan's competition policy differs from US policy, see *ibid* 76.

174 JFTC, Report of the Study Group for the Antimonopoly Act on External Affairs, February 1990.

been under other jurisdictions, such as the EU or the US.¹⁷⁵ For instance, in the Boeing/Mc Donnell Douglas merger, although Japan's flagship airline company was a major purchaser of passenger aircraft manufactured by the parties, the JFCT did not consider it had jurisdiction under the AMA because at least one of the parties had to be Japanese. The AMA was reformed in 1998, so as to also cover foreign mergers.

The first case in which the AMA was enforced against foreign companies was in the *Marine Hoses* cartel case of 2008.¹⁷⁶ This case involved an international cartel among Japanese and European companies on market allocation, whereby it was agreed that non-Japanese companies would not enter the Japanese market. As any fine is calculated on the basis of actual turnover on the market, and none of the foreign cartel participants generated any turnover in Japan, it was formally impossible for the JFTC to fine them. Thus only the Japanese company, Bridgestone Corporation, was subject to a fine.¹⁷⁷ By contrast, in the Gas Insulated Switchgear cartel,¹⁷⁸ the European Commission fined the Japanese participants by looking at the aggregate combined turnover of the cartel participants, even though the Japanese participants had agreed not to enter the European market. These cases have led to a feeling of unfairness in Japan and have stirred the debate as to whether the AMA should be amended.¹⁷⁹

As there has been no explicit acceptance of the effects doctrine in Japan, the required magnitude of effects has never been specified. Article 2(3) AMA refers to a 'substantial restraint of competition' and 2(9) to 'a tendency to impede fair competition'. While slightly differently worded, similar elements as in the US and EU jurisdictions are required: effects or restraints must be 'substantial', and they can be 'actual or potential'. Subjective intent or foreseeability is, however, not required for the JFTC to be able to issue administrative orders.¹⁸⁰

5.3.3.2 Israel

175 Kameoka. Etsuko, *Competition Law and Policy in Japan and the EU* (Edward Elgar Publishing 2014) 194.

176 *Marine Hoses*, JFTC Decision of 20 February 2008.

177 Sato (2010), 40. All participants to the cartel (except for the Japanese immunity applicant) were fined by the European Commission, see COMP/39406.

178 COMP F/38.899.

179 Etsuko Kameoka, *Competition Law and Policy in Japan and the EU* (Edward Elgar Publishing 2014) 196.

180 Naoki Ukhubo and Zenichi Shishido, 'Cooperation, Comity and Competition Policy: Japan' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 89.

The Israeli Restrictive Trade Practices Law 1988 incorporates international customary law, including the subjective and objective territoriality principle.¹⁸¹ The latter was relied upon, and referred to as the effects doctrine, by the Israeli Antitrust Authority in the *James Richardson* case,¹⁸² in order to apply the Israeli Restrictive Trade Practices Law 1988 to foreign perfume manufacturers. The anticompetitive effects had to be ‘substantial, direct and intentional’.

5.3.3.3 Brazil

The Federal Antitrust Law of Brazil states that ‘this law applies to acts wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered therein’.¹⁸³ The effects doctrine has to date not been applied in practice yet.¹⁸⁴

5.3.3.4 China

The 2008 Anti-Monopoly Law of China¹⁸⁵ provides in Article 2 that even if monopolistic conduct occurs outside the territory of the People’s Republic of China, if this conduct had exclusive or restrictive effects on competition in the domestic market, the Anti-Monopoly law will apply. The law does not specify the magnitude of the effects. The Act has been applied with regard to foreign companies who have engaged in anti-competitive behaviour with Chinese companies, but not yet in a fully extraterritorial context (foreign behaviour not involving Chinese companies).¹⁸⁶

5.3.3.5 Singapore

181 Michal Gal, ‘Extraterritorial application of antitrust – the case of a small economy (Israel)’ 2009, Working Paper 09-03 NYU Center for Law, Economics and Organization, Law and Economics Research paper Series

182 Director of Israeli Antitrust Authority, *Selective Perfume Market – James Richardson*, 2002.

183 Federal Antitrust Law, Federal Law 8884 of 1994, Section 2.

184 Brendan Sweeney, ‘International Governance of Competition and the Problem of Extraterritorial Jurisdiction’ in John Duns, Arlen Duke and Brendan Sweeney (eds), *Comparative Competition Law* (Edward Elgar Publishing 2015) 378; Javier Tapia and Alexandre Ditzel Faraco, ‘Latin American Antitrust Law and Policy: An Overview of Three Jurisdictions – Brazil, Chile and Colombia’ in John Duns, Arlen Duke and Brendan Sweeney (eds), *Comparative Competition Law* (Edward Elgar Publishing 2015).

185 Zhonghua Renmin Gongheguo Fanlongduanfa (‘反不正当竞争法’) [The Anti-Monopoly Law of the Peoples’ Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. National People’s Cong. Gaz. 68, art. 57 (China).

186 Michael Faure and Xinzhu Zhang, ‘Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law that Avoids Trade Conflicts’ 2013, 45 George Washington International Law Review 101, 103.

Singapore's Competition Act (SCA) clearly states that an infringement can occur even if the relevant actors are outside of Singapore, or if the anti-competitive conduct has taken place outside of Singapore, as long as the conduct has as its 'object or effect the prevention, restriction or distortion of competition within Singapore'.¹⁸⁷ The Act was applied for the first time to extraterritorial conduct in 2014 in the *Ball Bearings* case, which involved four Japanese ball and ring bearings manufacturers and their Singapore subsidiaries, the anti-competitive activities of which took place both in and outside of Singapore.¹⁸⁸ In *Freight Forwarding* the Competition Commission of Singapore (CCS) held that the fact that ten freight forwarding companies had engaged in anti-competitive behaviour taking place only in Japan was no bar to fall within the scope of the SCA.¹⁸⁹

5.3.3.6 India

The Indian Competition Act 2002 empowers the Competition Commission of India (CCI) to inquire into any agreement, abuse or combination that has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.¹⁹⁰ In relation to competition law, the effects doctrine was first raised under the MRTP Act, the predecessor to the Competition Act in 2002. Under the MRTP Act, the Indian Supreme Court has consistently held that the Act did not include any extraterritorial jurisdiction.¹⁹¹ With the explicit incorporation of the effects doctrine in the Competition Act 2002, this restriction is overcome. Till date there have not yet been any cases where the CCI exercised her powers extraterritorially based on the effects doctrine.¹⁹²

5.4 THE EFFECTS DOCTRINE AND ENVIRONMENTAL EFFECTS

187 Competition Act of Singapore of 2004, section 34.

188 Infringement of the Section 34 Prohibition in Relation to the Supply of Ball and Roller Bearings, CCS 700/002/11 (27 May 2014).

189 Infringement of the Section 34 Prohibition in Relation to the Provision of Air Freight Forwarding Services for Shipments from Japan to Singapore, CCS 700/003/11 (11 December 2014).

190 Competition Act of India of 2002, No. 12 of 2003, section 32.

191 American Nature Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and Others (1998), CompLJ 252 MRTPC; Haridas Exports v. All India Float Glass Manufacturers Association (2002) 6SCC 600.

192 Kartik Maheshwari and Simone Reis, 'Extraterritorial Application of the Competition Act and Its Impact' 2012, January 2012 Competition Law Reports 144, 147; Nishith Desai, *Competition Law in India: A Report on Jurisprudential Trends* (June 2015).at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition_Law_in_India.pdf.

One of the main reasons for an extraterritorial application of competition law is the fact that the marketplace is expanding. A global economy increases the level of international economic transactions; transnational firms operate in different countries. In order to sufficiently safeguard the objectives of competition law, authorities and courts in a growing number of states rely upon the effects doctrine (or a variant thereof such as the implementation doctrine) to address foreign anti-competitive behaviour that affects or harms domestic interests. This line of reasoning can easily be transposed to environmental challenges.¹⁹³ More difficult is the actual application of the effects theory and determining the magnitude of the required effects in the context of environmental damage.

With regard to competition law, this chapter has shown that there is agreement that any effect must be direct, substantial and foreseeable. It has been discussed whether intent could also be required, but there does not seem to be a widespread adoption of an intent requirement. Any exercise of extraterritorial jurisdiction should furthermore respect the legitimate interests of other sovereign states, and should avoid conflict where possible through comity or the rule of reason. The principles of comity, rule of reason or proportionality all lead to the result that the country with the most important or primary interests will have jurisdiction. In a comity analysis two questions need to be considered: firstly, are the effects felt in one state more direct than those felt in other states; and secondly, are the effects felt in one state more substantial than those felt in other states?¹⁹⁴

Applied to the protection of environmental concerns outside the territory of the regulating state,¹⁹⁵ a number of challenges arise with regard to these standards. It makes sense that jurisdiction based upon effects where such effects were an unintended consequence or a mere side effect, seems to create more resistance than where the effects were clearly intended. This requirement of intent, however, can be problematic when applied in an environmental context. In a competition law context, intent has a malevolent connotation, while that is not necessarily the case where environmental concerns are at issue. Rather, considering foreseeability seems more accurate: could the damag-

193 Eckard Reh binder, 'Extra-Territoriality of Pollution Control Laws From a European Perspective' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 128; Horn and Mavroidis (2008), 1133; Geert Van Calster, *International & EU Trade Law: The Environmental Challenge* (Cameron May Publishing 2000) 214.

194 Akehurst (1972-1973), 198.

195 See for support in literature that the effects doctrine can be applied to environmental law, Reh binder(2012), 128; Jeremy Remy Nash, 'The Curious Legal Landscape of the Extra-Territoriality of US Environmental Laws' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 163.; see also Philippe Sands, *Principles of International Environmental Law* (CUP 2003) 238; Patricia Bernie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3d ed. edn, Oxford University Press 2009) 712.

ing effects have been foreseen by the party causing the damage? Also, are the effects a direct result of the actions taken? Are the actions taken the sole cause of the environmental effects, and if not, to what extent have they contributed to the damage? Can effects be foreseen if other factors contributing to environmental damage are uncertain, and if the aggregate effects of all factors combined are also uncertain? Foreseeability of effects also raises the question of future effects: environmental damage can take much longer to realise than the speed of a bullet hitting its victim, or the reactions of financial markets. Can states, in the absence of sufficient scientific evidence, rely upon the precautionary principle when determining effects? Closely related to foreseeability is the matter of directness of effects: when is an environmental effect direct? Can severe droughts on the African continent be considered direct effects of pollution from steel producers in China? Must there necessarily be damaging effects to the environment in the territory of the imposing state itself, or could moral concerns about environmental damage occurring fully outside a state's territory (for instance, a severely polluted lake located in another state) also be taken into account? This option of moral concerns would seem too indirect to qualify as an environmental effect. Next to foreseeable and direct, the effects doctrine also requires effects to be substantial. But what is the standard for substantial effects? Must the effects be appreciable?

The three notions of direct, substantial and foreseeable effects are closely linked, but as in competition law, their precise interpretation can be much dependent on the circumstances. Equally, there is no exact definition of how they should be interpreted to give full meaning to them in the context of environmental concerns. What is clear, though, is that determining effects in an environmental context will require a scientific analysis; the details, requirements and limitations of which will depend on the specific environmental concern, on the knowledge available on a specific topic, as well as the information available within a certain time frame. This analysis will inform the criteria of direct, substantial and foreseeable. When proposing the extraterritoriality tree in chapter 6, the questions put forward here will be elaborated upon. Furthermore, the body of international environmental law can be of relevance when assessing environmental effects: in contrast to competition law, where there are no relevant international rules, there is an extensive body of (mostly soft law) environmental instruments. Considering these instruments could justify a more lenient approach to the requirements of direct, substantial and foreseeable in an environmental context: where state action is supported by a formal instrument recognizing the urgency of an environmental threat, even weaker or uncertain effects taken in light of precaution could suffice to justify the extraterritorial effects of npr-PPMs.

While raising challenging questions with regard to its application to environmental concerns, the effects doctrine allows for a more feasible and widely applicable assessment of environmental damage. In the landmark WTO decision in which jurisdiction was shortly touched upon, *US-Shrimp*, the AB relied on

a 'sufficient nexus' between the US and the sea turtle species that the US aimed to protect through its measures. The AB seemed to imply a territorial link, as it referred to 'some of the turtles' crossing US waters 'some of the time'.¹⁹⁶ It failed, however, to define or further qualify what such nexus could consist of. Looking beyond the specific circumstances of migrating sea turtle species, a 'sufficient nexus' test creates considerable vagueness and uncertainty of what a nexus could consist of. Can such a nexus be imagined in a context of climate change, air pollution, or global commons? The effects doctrine offers a better-suited tool to determine whether states can impose trade measures that aim at protecting environmental concerns located outside the territory of the regulating state, and whether they are affected by activities abroad that have an impact on the environment. Can the extraterritorial effect of environmental npr-PPMs be permitted? The existence of direct, substantial and foreseeable effects could establish a link with the regulating state permitting the extraterritorial reach. The effects doctrine would permit npr-PPMs that aim at the protection of inward-looking concerns, and partly outward-looking concerns. Those concerns that do not affect the regulating state in any way would not be justifiable through the effects doctrine.

5.5 CONCLUSION

The current chapter has shown that there is increasing acceptance of a unilateral extraterritorial application of competition law where anti-competitive behaviour abroad affects domestic interests. Effects must be direct, substantial and foreseeable. Whereas the first cases whereby the US relied upon the effects doctrine to exercise jurisdiction with regard to foreign companies were met with protest and controversy, an increasing internationalization of business markets has led to a growing number of countries adopting competition laws, and applying these laws. A considerable number of recent competition laws refers explicitly to effects of foreign anti-competitive behaviour. Unilateral approaches to competition law enforcement are combined with strong bilateral cooperation, either formal or informal, as well as multilateral cooperation through organizations such as the OECD or the ICN. In a globalized and interdependent world, unilateral action could be seen as a good alternative to a lack of international action and agreement. Unilateral action could also be seen as an incentive for states to invest in finding multilateral solutions and cooperation between national competition authorities.

The effects doctrine could be applied to environmental concerns and could form a useful test in assessing the extraterritorial effect of npr-PPMs aiming to protect environmental concerns outside the territory of the regulating state. Those concerns that are inward-looking, or partly outward-looking and that

196 AB Report *US-Shrimp* 1998, para.133.

affect the regulating state could be permitted through reliance on the effects doctrine. The practical application of direct, substantial and foreseeable effects in an environmental context raises a number of questions that must be considered on a case-by-case basis. Chapter 6, proposing the extraterritoriality decision tree, as well as chapter 7, applying the tree to case studies of npr-PPMs, will elaborate on these.

In light of the existing body of international environmental law – consisting of a wide array of soft law in addition to a few binding instruments –, it could be argued that also weaker or uncertain effects could lead to justification of the extraterritorial effects of npr-PPMs, when the norm imposed by the PPM is supported by such an international instrument. The following chapter on international human rights law will take a closer look at the multilateral or common nature of substantive norms in an extraterritorial application of laws, to further determine whether that element can be taken into account next to an application of the effects doctrine when assessing environmental trade measures with an extraterritorial effect. For instance, if the environmental effects are weaker, could a state then still impose trade measures extraterritorially when the substantive norm imposed through those measures stems from a binding international agreement? Likewise, would it matter whether the norm imposed is based on soft law norms or is unilateral in character, when the effects are sufficiently strong? The following chapters will turn to these questions.

