Review Essay

The Coming of Age of EC Competition Policy


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Sir Leon Brittan, the primary force today in European Community competition policy, serves as a vice-president of the European Commission and as the commissioner charged with overseeing financial institutions and competition matters. Nominated to the Commission in 1986 by the United Kingdom after service as Chief Secretary to the Treasury, Home Secretary, and Trade and Industry Secretary, Brittan rapidly became a major voice in and for the Community. In the Hersch Lauterpacht Memorial Lectures, delivered at Cambridge University in February 1990 and now published,¹ Brittan addresses two important aspects of Community competition policy: the assertion of antitrust jurisdiction over acts beyond the territorial boundaries of the Community, and the antitrust regulation of mergers and acquisitions within the Community.

The lecture on European Community jurisdiction speaks to the emerging "foreign policy" of the single European market. The address is noteworthy if only for its concise description of the evolution of the law of extraterritorial jurisdiction in the European Court of Justice through the Wood Pulp decision.² Much more important, however, is the insight Brittan provides into the institutional tension between the Commission and the Court. While since 1969 the Commission has employed the "effects doctrine" to reach actors outside the Community whose acts have an impact within it, the Court has used narrow, if sometimes strained, factual findings to assert jurisdiction on the basis of presence within the Community. Brittan makes clear that the Court has never rejected the effects doctrine, that the Commission remains free to employ it, and that the Commission will do so in future cases. Because the Commission continues to scrutinize foreign business activities, he predicts that the Court eventually will have to confront the "hard case" where it must definitively accept or reject the effects doctrine.

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¹ SIR LEON BRITTN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET (1991) [hereinafter COMPETITION POLICY].
Brittan's first lecture seems much like a brief to the Court, urging approval of the effects doctrine (to extend the broadest jurisdiction over anticompetitive activities adversely affecting the Common Market), as well as a promise by the Commission to exercise discretion and not abuse this power to the detriment of the Community's overall domestic and foreign policy interests. After first reviewing in Part I some necessary background on the history of the single European market, Community competition law, and the structure of Community policymaking, I examine in Part II the argument implicit in Brittan's lecture that the effects doctrine should be explicitly recognized as the governing principle of Community competition law.

Brittan's second lecture focuses on the "domestic policy" of merger control. In 1989, after years of urging by the Commission, the Council of Ministers approved new legislation introducing Community-wide merger control.\(^3\) Brittan, who played a significant role in the adoption of the Merger Regulation, devotes much of his second lecture to explaining some of the law's intricacies, by no means a trivial task. This explanation, given soon after the Council's action and six months before the regulation's effective date, was of the utmost importance at the time for its insight into how the Commission might implement the regulation. While Brittan's lecture remains a good short introduction to the subject, it necessarily lacks detail. Moreover, at the time the lectures were given, Brittan could only speculate as to how the Merger Regulation would perform in operation. In Part III I assess merger control in the Community. I also consider the subtext of Brittan's treatment: the almost overt attempt to continue to sell the Merger Regulation to the Community even after the law's adoption and to minimize the enormous political differences among member states requiring compromise before the Council could approve the measure. Brittan's lecture reminds us of the difficulties faced by the Community in fashioning a coherent domestic competition policy.

A theme connecting the two seemingly disparate lectures is Brittan's call for international harmonization of competition law. The assertion of extraterritorial jurisdiction by its very nature is likely to impinge upon the interests of foreign sovereign states, and, in a world of multinational conglomerates, even ostensibly domestic merger control can have a substantial impact outside a jurisdiction. The experience of the United States portends some of the tensions likely to arise as the Community continues to extend its prescriptive jurisdiction to activities outside the Common Market and as its merger control impedes or blocks transactions involving companies with only minimal contact with Europe. In Part IV of this essay I examine Brittan's call for international

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harmonization of competition law and explore some of the hurdles that stand in the way.

I. THE SINGLE MARKET, COMPETITION LAW, AND COMMUNITY POLICYMAKING

Upon the signing in 1957 of the European Economic Community (EEC) Treaty (Treaty of Rome), four six Western European states—France, Germany, Italy, Belgium, the Netherlands, and Luxembourg—sought to create a common market by 1970. Although the original countries were successful in eliminating internal tariff barriers and in establishing a common external tariff by the late 1960s, national markets remained distinct through non-tariff barriers and the lack of a common currency. The incentives for further market consolidation were dulled by virtually uninterrupted economic growth and low inflation in the late 1950s and 1960s, which left Europeans complacent with their small, protected national markets.

In the 1970s and early 1980s, Europe steadily lost its ability to compete both internationally and at home, first with the United States and then with Japan. Instead of emulating their international competitors and organizing along transnational lines, however, European businesses and governments turned their attention inward through a series of defensive national mergers and the creation of "national champions," new national non-tariff trade barriers, and increased state aid to local industry. The downward spiral in competitiveness continued, particularly in the high-technology sectors, while inflation and unemployment rose and productivity stagnated.

A fundamental problem in the European economy was that the increasingly isolated national markets were not large enough to permit industry to take advantage of economies of scale in production or distribution, or to support competitive research and development programs. Although the Treaty of Rome had given the Community a lawmaking capacity that could have been used to temper the member states' reemerging national economic protectionism and to facilitate a larger, more efficient single market, as a political matter the Community institutions were paralyzed. New single-market legislation, including regulations and directives necessary to harmonize the national laws of member states, required unanimity in the Council, the Community's ultimate lawmaking body. By design the Council, which consists of one delegate from each member state, is the body where the self-interests of the member states find their most direct expression. In the economic turmoil of the times, the willingness of member states to compromise and reach agreement in the Council became exhausted by efforts to resolve budget disagreements, deal

4. Treaty Establishing the European Economic Community [EEC Treaty].
with the increasingly expensive common agricultural policy, and negotiate the enlargement of the Community to include the United Kingdom, Denmark, and Ireland in 1973, Greece in 1981, and finally Spain and Portugal in 1986. The common will simply did not exist to dispense with national protectionism and promote a common market.

The Community reversed course in the mid-1980s. In June 1985, the Commission, the Community’s executive arm, issued its famous White Paper, Completing the Internal Market, proposing roughly 300 measures (later pared to 279) to abolish physical, regulatory, tax, and other non-tariff barriers along national borders and create a single market by 1992. The Commission, a body of seventeen members appointed by the member states, is designed to be a "supranational" institution intended to represent the Community’s interests and to promote further integration of the member states. The Commission’s White Paper, while perhaps a dramatic example, was very much in keeping with its institutional purpose. Within a year, "Project 1992" received the imprimatur of the member states through ratification of the Single European Act (SEA). The SEA set a deadline of December 31, 1992, for the completion of the internal market, which the Act defined as "an area without internal frontiers." The SEA also loosened the requirement of unanimity in the Council, particularly with respect to Community legislation necessary to harmonize municipal law on single market issues. By the end of 1991, the Council had adopted 213 of the Commission’s single market proposals. Also by the end of 1991, market integration had advanced to the point where the member states, in the Treaty of Maastricht, could look beyond an internal market defined merely by the absence of trade barriers and create the framework for an Economic and Monetary Union with a single currency, to be in place by the beginning of 1999.

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6. Commissioners must be nationals of a member state, and the Commission must include at least one but no more than two nationals from each member state. Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 5, 1965, art. 10(1), 1967 O.J. (152) 2. Although commissioners are appointed by the common accord of the member states, id. art. 11, in practice the five largest member states (Germany, France, Italy, Spain, and the United Kingdom) each have two nationals on the Commission and the others one each.
7. Commissioners are required to act "in the general interest of the Communities," to be completely independent in the performance of their duties, and neither to seek nor to take instructions from any national government. Member states have agreed not to seek to influence commissioners in the performance of their duties. Id. art. 10(2).
9. EEC Treaty art. 8a (as amended 1987).
10. See Single European Act, supra note 8, arts. 7, 14, 18. The changes in voting introduced by the Single European Act are somewhat byzantine. For a discussion, see T.C. Hartley, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 30-45 (2d ed. 1988). The climate of Council decisionmaking has changed with the passage of the Single European Act. Unanimity today results more from compromise made to avoid the adoption of legislation by something less than an unanimous vote than from compromise made to avoid the threat of a veto.
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A single market requires a single competition policy, or at least a competition policy to deal with trans-Community activities. Cartels of nationally-based firms can divide and allocate markets within the Community much like protectionist government policies, and monopolists and other "dominant firms" can disrupt a common market by organizing their distribution systems along national lines to separate markets and to price discriminate. The Framers of the Community foresaw these problems, and in the Treaty of Rome charged the Community with "the institution of a system ensuring that competition in the common market is not distorted." Another, perhaps even more important, goal for the Community is the elimination of measures that restrict the import and export of goods between member states. Competition policy is an essential instrument in promoting both economic integration and an efficient allocation of resources.

Two provisions contain the Treaty's generally applicable substantive competition standards. Article 85(1) prohibits "as incompatible with the common market" agreements and other concerted practices among two or more independent undertakings (a broad Community concept which includes firms, partnerships, company groups, and other commercial enterprises operating as single business units) that may affect trade between member states and seek the "prevention, restriction or distortion of competition within the common market." Provisions in contracts that violate Article 85 are void automatically, thus national courts of member states cannot order their performance.

Article 85 specifically prohibits price-fixing, output limitations, divisions of markets, price discrimination, and non-price vertical restraints (such as territorial or customer limitations or exclusivity arrangements) not reasonably necessary to the legitimate commercial object of the contract, although these examples by no means are intended to be exhaustive.

Article 86 speaks to action, unilateral or otherwise, on the part of undertakings with a "dominant position" within all or a part of the Common Market. It prohibits, again as incompatible with the Common Market, "abuses" of this dominant position to the extent the abuse may affect trade between member states. A dominant position usually exists when a firm achieves a forty-percent market share, although the Commission contends that dominance can

11. EEC TREATY art. 3(f).
12. Article 3 of the Treaty of Rome declares as the first activity of the Community "the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the importation and exportation of goods, as well as of all other measures with equivalent effect." Id. art. 3(a).
14. EEC TREATY art. 85(1).
15. Id. art. 85(2); see also Case 37/79, Marty v. Lauder, 1980 E.C.R. 2481.
16. EEC TREATY art. 86.
be found as to firms with shares as low as twenty percent.\textsuperscript{17} Article 86 gives as examples of dominant firm abuses the imposition of "unfair purchase or selling prices," limitations on production, markets, or technical development "to the prejudice of consumers," and the price discrimination and non-price vertical restraints of the type prohibited by Article 85. Significantly, Article 85(3) grants exemptions from the prohibition of Article 85(1) for a concerted practice that satisfies four requirements: the practice 1) must improve the production or distribution of goods or promote technical or economic progress; 2) must allow consumers a "fair share" of the resulting benefit; 3) must not impose restrictions other than those indispensable in attaining the activity's legitimate objectives; and 4) must not eliminate competition in a substantial part of the affected market.\textsuperscript{18} In contrast, Article 86 authorizes no such exemptions.\textsuperscript{19}

The language of Articles 85 and 86, like the substantive provisions of the Sherman Act in the United States, is almost constitution-like in quality. Interpretation, not textual directive, determines the boundaries between lawful and unlawful business conduct. A variety of Community and national institutions are involved in the application, and consequently the interpretation, of Community competition law. The Council makes the final decision on most EC legislation, including regulations and directives to detail and substantiate the Treaty's competition provisions.\textsuperscript{20} The Court of Justice and, below it, the new Court of First Instance are the judicial arbiters of the law's construction.\textsuperscript{21} National legislatures, courts, and enforcement authorities are obligated

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\textsuperscript{17} COMMISSION OF THE EUROPEAN COMMUNITIES, TENTH REPORT ON COMPETITION POLICY 103 (1981).
\textsuperscript{18} EEC TREATY art. 85(3).
\textsuperscript{19} Id. Although Articles 85 and 86 may resemble sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1988), there are distinct and important differences. Section 1, which makes unlawful every "contract, combination . . . or conspiracy, in restraint of trade or commerce," has been strictly interpreted by the Supreme Court to prohibit all concerted practices that adversely affect competition, even if the practice may promote some other societal non-competition interest. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). Article 85, by contrast, employs a more encompassing notion of anticompetitive effect, particularly in the area of vertical restraints, but also provides for administratively conferred exemptions on both competition and non-competition grounds (e.g., economic progress, exports, or employment). Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize, reaches unilateral action designed to create or augment unilateral market power, while Article 86 is concerned only with abuses of a preexisting dominant position, not the creation of the dominant position in the first instance. Where Article 86 applies, however, it has a broader reach than section 2. For example, Article 86, by its terms, makes "unfair" pricing by a dominant firm an actionable abuse, whereas the Supreme Court has never construed the Sherman Act to make a level of pricing unlawful.
\textsuperscript{20} EEC TREATY art. 87(2)(e).
\textsuperscript{21} Members of the courts include judges, possessing ultimate authority of adjudication, and advocates general, who act as independent advisors and publish detailed analyses and recommendations as to the disposition of pending cases. Since the Court of Justice does not publish dissenting or individual statements of judges, the opinions of the advocates general are often read against the Court's opinion for insight into which issues may have been close or disputed.
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to act consistently with Community competition law, and to apply Community competition law within their respective jurisdictions.22

The single most important Community antitrust institution, however, is the Commission, which serves as the Community's law enforcement arm. Like the Federal Trade Commission in the United States, the Commission has broad powers to conduct antitrust investigations, find violations of Community competition law, terminate infringements by way of injunction, and punish violators by imposing fines.23 In addition, the Commission has the exclusive power to grant individual exemptions under Article 85(3), to fashion so-called "block exemptions" that exempt categories of conduct from Article 85 pursuant to Council-enacted enabling legislation, and to certify through nonbinding "negative clearances" that notified conduct does not violate either Article 85 or Article 86. The Commission undertakes its fact-finding, prepares its draft decisions, and formulates its competition policy proposals in Directorate General ("DG") IV, one of twenty specialized departments in the Commission's secretariat. The Commission, through its Legal Service, also reviews the form of its decisions and proposals and defends its actions in Community courts. Parties to whom a Commission decision is addressed and others to whom it is of direct and individual concern may appeal to the Court of First Instance and ultimately the Court of Justice, which may review the decision for lack of jurisdiction, failure to observe any essential procedural requirement, or infringement of the Treaty of Rome or its implementing regulations.24

Each of the Commission's directorates general reports to a designated commissioner. Sir Leon Brittan is the commissioner with oversight responsibility for DG IV. Naturally, the career staff of DG IV is attentive to Brittan's policies and predilections when allocating its limited enforcement resources, exercising its investigative and prosecutorial discretion, and formulating competition policy proposals, just as the staff of the Federal Trade Commission is attentive to its chairman. At the Commission table, Brittan is responsible for advancing competition policy initiatives and ensuring that any relevant competition policy considerations are taken into account in Commission decisions, regardless of the subject matter. Indeed, the Commission has delegated to Brittan as the competition commissioner the authority to act in the Commission's name in a variety of matters. His is a voice to be carefully regarded whenever he speaks on competition policy. This is particularly true when he makes a major address, as he did in the Lauterpacht Lectures.

22. To ensure that national courts in different member states apply Community law uniformly, Article 177 of the Treaty of Rome requires that national courts bring before the Court of Justice for a preliminary ruling any issue regarding the construction of any Treaty provision, including Articles 85 and 86. EEC Treaty art. 177.
With this as background, we may turn to Brittan's first topic, the extraterritorial jurisdiction of the Community's competition laws.

II. THE "FOREIGN POLICY" OF COMMUNITY COMPETITION LAW

In a world economy, business conducted in one country may have substantial effects in another country. If the affected country regards these effects as detrimental to its interests, what recourse does it have? If the conduct is illegal in the host country, the affected country may be able to obtain redress under the host country's laws. Even if the conduct is not illegal, the affected country may appeal to the good graces of the host country for assistance in eliminating the source of the harmful effects. But what if the conduct is not illegal in the host country or if the remedies available are inadequate in the view of the affected country, and the host country is unable or unwilling to intervene to the affected country's satisfaction? Can the affected country prescribe standards, that is, exercise prescriptive jurisdiction to regulate the extraterritorial conduct of the actors so as to halt the undesirable domestic effects?

The exercise of prescriptive jurisdiction, to regulate extraterritorial conduct—usually called extraterritorial jurisdiction—solely on the basis of that conduct's domestic effects is known in antitrust law as the "effects doctrine" and more generally in international law as the objective territorial principle. This doctrine has been largely developed and most aggressively employed by the United States, although other countries, including Germany and Japan, subscribe to the doctrine in one form or another. These countries contend that their exercise of extraterritorial jurisdiction under the effects doctrine is essential to protect their markets from anticompetitive schemes (especially price-fixing and world market divisions) formulated abroad.

The effects doctrine is usually traced to the 1945 decision of the Court of Appeals for the Second Circuit in United States v. Aluminum Co. of America (ALCOA). ALCOA resulted from one of a number of investigations and prosecutions commenced by the Justice Department beginning in the mid-1930s against private international cartels. In 1937, the U.S. Department of Justice


26. 148 F.2d 416 (2d Cir. 1945). Although at the time appeals from trial court judgments in antitrust cases were made directly to the Supreme Court, in ALCOA the Court lacked a quorum of six justices who had not at some point in their careers represented one of the parties. To permit an appeal, Congress passed special legislation to certify the case to a three-judge panel of the Second Circuit as the court of last resort. The panel hearing the appeal consisted of Chief Judge Learned Hand and Judges Thomas W. Swan and Augustus Hand.

brought a civil action charging, among other things, that Aluminum Limited (Limited), a Canadian corporation created by ALCOA to take over its non-U.S. interests and spun off to ALCOA's shareholders in 1928, conspired with several European companies through a Swiss-based cartel to limit their exports of aluminum to the United States as well as to other parts of the world. The trial court found that Limited did not operate in the United States either directly or through agents and that it was independent of any U.S. company (including ALCOA), and dismissed Limited from the case for lack of jurisdiction. The Second Circuit, in an opinion by Chief Judge Learned Hand, reinstated the charge. Although Judge Hand agreed that jurisdiction could not be based on any theory that Limited was present in the United States, in a radical departure from prior case law he held that jurisdiction nonetheless existed since Limited's conduct had adverse effects in the United States: "It is settled law—as "Limited" itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . . .\textsuperscript{28} Judge Hand viewed the question solely as one of domestic law and statutory construction. He held that Limited was subject to U.S. antitrust jurisdiction because of its participation in the foreign cartel, since that cartel intended to limit exports to the United States from abroad and since it could be inferred from this intent that the cartel in fact adversely affected U.S. import trade.\textsuperscript{29}

The effects doctrine continues to be cited by U.S. courts as defining the outer boundaries of antitrust jurisdiction, although some courts have used their discretion as an independent branch of government not to employ the doctrine to its full extent in given cases.\textsuperscript{30} Even when courts do not act, however, the

\textsuperscript{28} ALCOA, 148 F.2d at 443. Prior to ALCOA, U.S. courts consistently followed the rule, originally articulated in 1909 by Justice Holmes, that "all legislation is prima facie territorial" and consequently that the exercise of Sherman Act jurisdiction was confined to activities occurring within the borders of the United States. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909). One of the more puzzling questions in the history of extraterritorial jurisdiction is why Limited agreed to the Second Circuit's rendition of "settled law."

\textsuperscript{29} ALCOA, 148 F.2d at 444. Technically, the court held that a rebuttable presumption of effect on commerce arose upon a showing of intent to depress U.S. import trade and the adoption of cartel policies designed to effectuate this intent. Limited failed to rebut this presumption; therefore, no affirmative showing of effect was required. Significantly, the Second Circuit assumed in dictum that Congress did not intend the Sherman Act to reach extraterritorial agreements not intended to affect the United States. Id. at 443. The requirement of intent as well as effect is known as the "intended effects" doctrine, and it provides a sufficient but not necessary test for extraterritorial jurisdiction. See, e.g., Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 870 (10th Cir. 1981); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979); Conservation Council of W. Austl., Inc. v. Aluminum Co. of Am., 518 F. Supp. 270, 275 (W.D. Pa. 1981). The majority of U.S. courts today find either an actual effect or an intent to affect adequate as the basis for jurisdiction.

\textsuperscript{30} Some cases explicitly have recognized the distinction between the power and the judicial discretion to exercise jurisdiction. See, e.g., In re Uranium Antitrust Litigation, 617 F.2d 1248, 1253 (7th Cir. 1980); Mannington Mills, 595 F.2d at 1296; Conservation Council, 518 F. Supp. at 275. Other cases are silent on the distinction but require some consideration of foreign interests, either by a balancing test or by a
effects doctrine has provided the jurisdictional authority for U.S. antitrust enforcement agencies to open grand jury investigations into extraterritorial business conduct, and for private plaintiffs to pursue treble damage actions (with their typically enormous pretrial discovery) against such conduct.31

Other countries, especially the United Kingdom, denounce the effects doctrine as an affront to their sovereignty. The basis for this view is the strict territorial principle, perhaps best enunciated by Chief Justice Marshall in *The Schooner Exchange v. McFadden.*32

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.33

While some of these countries also recognize the objective territorial principle where the conduct in question is more universally condemned—for example, the firing of a bullet across international borders—they reject any extension of the doctrine to commercial activities which are common and lawful, if not encouraged, in much of the world. The countries brand efforts to assert extraterritorial jurisdiction over commercial activities as "economic imperialism" and have responded with diplomatic protests, *amicus* briefs urging dismissal of pending cases,34 refusals to assist foreign discovery,35 injunctions against their nationals prosecuting antitrust actions in a foreign forum,36 restrictions on giving evidence in foreign proceedings37 and on complying

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31. *See, e.g., Montreal Trading,* 661 F.2d at 869; *Timberlane Lumber Co. v. Bank of Am.*** 549 F.2d 597 (9th Cir. 1976).
32. 11 U.S. (7 Cranch) 116 (1812).
33. *Id. at 136; accord, The Apollon,* 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."). A similar formulation was adopted in the *Lotus* case before the Permanent Court of International Justice. *S.S. Lotus (Fr. v. Turk.),* 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("Now the first and foremost restriction imposed by international law is . . . that—falling the existence of a permissive rule to the contrary—it [a State] may not exercise its power in any form in the territory of another State.").
34. *See, e.g., In re Uranium Antitrust Litig.,* 617 F.2d 1248, 1253 (7th Cir. 1980) (Canada, Australia, South Africa, and United Kingdom as *amicus curiae*; France filed memorandum with court through U.S. Department of State).
37. A number of countries have enacted so-called "blocking" legislation to prohibit or limit compliance with foreign discovery requests. Many of these statutes were passed in the aftermath of specific antitrust investigations or proceedings under U.S. law. For example, the Netherlands statute followed the 1952 world petroleum investigation. The United Kingdom and Germany first enacted blocking statutes in response to
with judicial orders in the affected country's proceedings, refusals to recognize or enforce remedies awarded in foreign civil antitrust litigation, and even enactment of "claw back" legislation to permit nationals to recover in domestic courts some of the damages paid as a result of a foreign antitrust judgment.

The uranium cartel litigation dramatically illustrates this tension. To protect its domestic industry in the face of excess world supply, the United States in 1964 imposed an embargo on imports of uranium for use in nuclear power plants. This action closed over two-thirds of the world market to foreign producers. In response (and with the encouragement of their respective governments) uranium producers from the United Kingdom, Canada, Australia, South Africa, and France entered into a marketing agreement to fix minimum prices and allocate the remaining markets in the world. In the early 1970s, the situation reversed, with demand outstripping supply. Between 1973 and 1976, the price of uranium increased seven-fold. Although the United States had lifted the embargo, Westinghouse, which had built many of the domestic nuclear power plants and was under long-term contracts to keep them supplied with uranium fuel, was economically unable to keep its supply commitments. A number of utilities sued Westinghouse in Virginia for $2 billion for breach of contract. Westinghouse defended in part on the grounds of commercial impracticability, alleging that the original marketing agreement had evolved.


into a worldwide cartel and that the price increases in uranium that made performance impracticable were the result of this cartel's price-fixing endeavors. Westinghouse also commenced its own treble-damage antitrust action in Illinois against the alleged cartel's members. At about the same time, the Department of Justice opened a grand jury investigation of the alleged uranium cartel. Westinghouse's antitrust action ultimately settled, but only after the uranium producers refused to appear, their governments' efforts to have the case dismissed as beyond U.S. jurisdiction were rejected, and a default judgment was issued against them. 41

The contract action also significantly contributed to the international dispute. In order to obtain discovery from Rio Tinto Zinc and its officers in Great Britain, Westinghouse had obtained letters rogatory from the Virginia court. The Justice Department subsequently intervened in this discovery effort to obtain additional information for its grand jury investigation. In a celebrated decision, the House of Lords refused to enforce the letters rogatory, deferring to the British Government's view that the U.S. actions infringed upon British sovereignty. 42 Moreover, Canada, Australia, and South Africa enacted legislation prohibiting their nationals from complying with discovery requests in the uranium litigation. 43 Finally, although the Justice Department ultimately ended its grand jury investigation without action, the fact that the foreign producers were being pursued as targets in criminal proceedings in the United States for actions encouraged by their governments further infuriated these countries.

Although the effects doctrine has been in issue in several Community competition cases, it has never been considered essential by the Commission or recognized as part of Community law by the European Court of Justice. In the seminal Dyestuffs case, 44 decided before the United Kingdom became part of the Community, the Commission employed the effects doctrine as a secondary ground to extend jurisdiction over one British and two Swiss companies that were part of a conspiracy to fix the prices of aniline dyes sold in the Community. The Commission found the foreign companies' commercial relationship with the Community concerning the sale of dyes, the effect that

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the price-fixing arrangement had on the Community, and the essential interest of the Community in protecting itself against price-fixing to be sufficient under international law to invoke the effects doctrine and permit the Community to exercise extraterritorial jurisdiction. The Commission's primary argument, however, was that the foreign parent companies gave instructions to their subsidiaries in the Community to increase dye prices in furtherance of the illegal concerted practice, and that this active influence constituted conduct within the Community. On appeal, although the Advocate General endorsed the Commission's approach, the Court of Justice—perhaps moved by a strongly worded Aide-Mémoire presented by the British Government—resisted so broad a holding. The Court held that where, as here, a subsidiary in the Community does not enjoy true autonomy in its commercial actions and instead acts at the direction of its parent to increase prices, the identities of the parent and subsidiary merge into a single "undertaking" within the meaning of Article 85, so that jurisdiction existed over the parent by virtue of the controlled subsidiary's presence in the Community.45 This "merging of identities" has become known as the "economic entity" doctrine.46

In the 1985 Aluminum Imports case the defendants sought to put the effects doctrine at issue.47 The Commission found that the foreign trade organizations of the Soviet Union, Poland, Hungary, Czechoslovakia, and the German Democratic Republic entered into an unlawful market-sharing conspiracy with the major aluminum producers in Western Europe, whereby the Eastern producers would not sell any aluminum into Europe except through Western producers. The Eastern producers argued that the Commission lacked jurisdiction, since they were not situated in the Community nor had they entered into the market-sharing arrangement within the Community. The Commission disagreed, finding that some of the Eastern producers controlled subsidiaries in the Community and to this extent were subject to the Community's jurisdiction under the economic entity doctrine articulated in Dyestuffs.48 The Commission found that the other Eastern producers, although organized outside the Community, traded aluminum pursuant to the agreement within the Common Market, and so were subject to the Community's jurisdiction by virtue of their

48. Id. at 48.
implied presence under the well-known *Béguelin* doctrine. While the Eastern producers may have tried to entice the Commission into relying on the effects doctrine so as to better their chances on appeal, it is hard to see that the Commission in fact employed the doctrine. The parties did not appeal the decision.

Most recently, in the *Wood Pulp* case, the Commission arguably used the effects doctrine—although not by name—to find jurisdiction over various North American, Scandinavian, Portuguese, and Spanish wood pulp producers involved in a conspiracy to fix the price of pulp sold in the Community. The Commission found that the parties were either "exporting directly to or doing business within the Community" during the period of infringement. To the extent that the parties had branches, subsidiaries, or agents operating within the Community through which the defendants effectuated their prices, these defendants were present by "doing business within the Community" under the economic entity doctrine. The Commission exercised jurisdiction over those defendants not covered by the economic entity doctrine by virtue of the fact that they were "exporting directly to" the Community. To reach other parties the Commission found that the concerted price-fixing arrangements, price data exchanges, and export resale prohibitions all "concerned shipments made directly to buyers in the Community or sales made in the EC to buyers there" and that the effect of these practices on prices charged to customers within the EC was "not only substantial but intended and was the primary and direct result of the agreements and practices." To many, including Brittan, this grounded jurisdiction in the effects doctrine, but it seems more like the implied-presence analysis articulated in *Aluminum Imports*.

On appeal, the Advocate General agreed that the effects doctrine should be applied, provided that jurisdiction would be exercised only where there was a "direct and immediate, reasonably foreseeable and substantial effect." However, the Commission adopted a more equivocal stance before the Court, asserting that the effects doctrine did not correctly reflect the basis of the Community's jurisdiction. Rather, the Commission argued, jurisdiction was based on the *implementation* of the concerted practice in the Community, either by directly trading in the Common Market or by using agents or sales offices there. The Commission also observed that it was not strictly necessary for each

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49. *Id.* In *Béguelin*, the Court held that a foreign manufacturer was present in the Community where it sold its products to a Community distributor, and that this presence gave the Community antitrust jurisdiction over the manufacturer to review the exclusive distribution agreement between the two parties. Case 22/71, *Béguelin Import Co. v. SAGL Import-Export S.A.*, 1971 E.C.R. 949.


52. *Id.*

53. See *COMPETITION POLICY*, supra note 1, at 10; *Ferry*, supra note 40, at 19.

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of the parties to have an intermediary in the Community implementing its practices; it was sufficient that some of the parties used intermediaries, since the actions of those intermediaries in implementing the unlawful arrangement were "attributable to all the undertakings engaged in the restrictive practices concerned."55 Once again, the British government appeared as amicus curiae to oppose adoption of the effects doctrine, and the Court found jurisdiction on narrower grounds. Although only some of the defendants had subsidiaries or branches in the Community, those that did not nonetheless implemented the conspiracy in the Community by selling directly into it at conspiratorially set prices. Implementation entails presence, so the Court again found no need to resolve the question of the effects doctrine.

In the wake of Brittan's Lauterpacht Lectures, a renewed dispute has appeared within the Community about the incorporation of the effects doctrine into its law. Brittan cites Dyestuffs, Aluminum Imports, and Wood Pulp as straightforward effects-doctrine cases, and clearly indicates that the Commission will continue to use the effects doctrine as the basis for extraterritorial jurisdiction in the future. Implicit in Brittan's lecture is the argument that, when the hard case arises where the Court will not be able to ground jurisdiction on the economic entity doctrine of Dyestuffs, the implied presence doctrine of Béguélin/Aluminum Imports, or the implementation doctrine of Wood Pulp, the Court finally should recognize the effects doctrine, notwithstanding the international political problems that the United States has faced in employing the doctrine and the resistance that the United Kingdom undoubtedly will raise.

The underlying argument for recognition appears to have the following elements: 1) Community law permits, if not compels, incorporation of the effects doctrine; 2) the Community's self-interest requires the expansion of existing doctrines of jurisdiction to include the effects doctrine in order to reach the anticompetitive effects within the Community which the hard case scenario assumes cannot otherwise be reached; 3) international law constrains but does not prohibit use of the effects doctrine; and 4) the Commission will use discretion in exercising jurisdiction under the effects doctrine so as to maximize the overall interests of the Community, taking into account in any given case not only the magnitude of the economic harms to be ameliorated but also the political reaction of individual foreign states and the international community as a whole. Given the potential political firestorm that attends the effects doctrine, the craftsmanship of the logic, and the status of the author, the argument deserves thoughtful attention. Upon analysis, however, Brittan's case is not compelling.

The EC derives its powers through the consent of the member states, and thus the Community's capacity to employ the effects doctrine in the first

55. Id. at 5205, 4 C.M.L.R. at 914 (1988).
instance must find its source in the Community's enabling acts. Brittan looks to Article 3(f) of the Treaty of Rome, which obliges the Community to ensure that competition "in the common market" is not distorted, and the specific provisions of Articles 85 and 86, which both, in Brittan's words, "require that something should happen 'within the common market.'" To Brittan these provisions make the fundamental scope of Community competition law territorial in nature. From this observation, Brittan implicitly concludes that Community jurisdiction extends as far as international law permits under the territorial principle.

This conclusion is not obvious. It is true that the Treaty provisions find their basis in the territorial principle, but that does not necessarily mean they reach as far as the effects doctrine. The provisions could equally be confined to the strict territorial principle. Indeed, the plain language of Articles 85 and 86 is more consistent with the latter principle than with the former. First, the articles require not only that "something" happen within the Common Market, but also that the concerted practices or dominant firm abuses "affect trade between Member States." Brittan gives this language short shrift, dismissing it as engaging Community jurisdiction along with national jurisdiction for trade among member states, but telling us nothing about trade across Community borders. The language, however, appears analogous to the federal subject matter jurisdiction predicate of interstate commerce in U.S. law, which is distinct from the predicate of U.S. import or export commerce that is seemingly required to permit application of the effects doctrine.

Second, while the "something" that must be "within the common market" for Article 85 to apply is an actual or intended anticompetitive effect, the "something" under Article 86 appears to be the dominant position of the alleged violator, not the abuse. The reach of Article 85 to effects may be no more than the closing of a loophole that otherwise would permit European companies to escape liability by making the situs of their anticompetitive agreements some non-Community country. Conversely, if Article 85 was intended to include the effects doctrine, why did the language of Article 86 require the dominant firm itself and not the abuse (the counterpart of the effect required under Article 85) to be within the Community? When all the provisions are read together, the jurisdiction-enabling language appears to be more "the effect on trade between member states" than something merely "occurring within the Community." This conclusion is also consistent with the intent of the original six member states in 1957 to create a customs union free of internal tariff barriers.

56. COMPETITION POLICY, supra note 1, at 5.
57. EEC TREATY arts. 85, 86 (emphasis added).
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This challenge to Brittan's enabling argument may prove too much for three reasons. First, the statutory reference to trade between member states may have been intended only to exclude from Community jurisdiction activities with local effects within a single member state, and not to exclude activities in Community foreign commerce. Second, the Court of Justice has taken a very expansive view of what it means to affect trade between member states: the test is satisfied if the action is reasonably likely to have "an influence, direct or indirect, actual or potential, on the pattern of trade among Member States." Under this test, for example, the Court has held that the interstate trade requirement is satisfied by conduct that affects the structure of the market (such as a refusal to deal) and by price-fixing of raw materials that do not trade in interstate commerce but are used in the manufacture of products traded among member states. The conventional wisdom in the Community appears to hold that, under this standard, an anticompetitive practice on the Community's import trade necessarily affects trade between member states.

Third, the EEC was never intended to be only a simple customs union. The Treaty of Rome was also framed to have the Community represent and protect the collective interests of the member states in international commercial affairs. The Community seeks to establish a common external customs tariff and a common commercial policy toward third-party countries. The Treaty expressly empowers the Community to enter into commercial treaties with third-party countries on all aspects of the Community's common commercial policy, including not only tariff and trade agreements but also export aid, credit and finance, multilateral commodity agreements, and aid to third-world countries. More importantly, the Community under the Treaty has implied powers to engage in foreign relations necessary and appropriate to implement accepted internal Community objectives. To the extent that extraterritorial activities have anticompetitive effects that distort the Common Market, the Community should have the capacity to employ the effects doctrine under the Community's implied foreign relations powers, if not under the express language of the Treaty's competition provisions.

62. EEC TREATY art. 3(b).
63. Id. art. 113.

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Assuming that the Community is empowered by the member states to employ the effects doctrine, is it in the Community’s interest to do so? What if the actors cannot be found to be present in the Community through their actual business dealings in a member state or through the alter ego of their Community subsidiaries? Brittan confidently predicts that inevitably the truly hard case will present itself when the Common Market suffers anticompetitive harm from a foreign sales cartel whose members, for example: 1) make no direct sales into the Common Market but deal only through independent middlemen; or 2) divide world markets, with some members agreeing not to export to the Common Market at all; or 3) allocate from abroad markets within the Community, with each cartel member respecting the assigned territory of the others; or 4) rig a market in some way by refusing to act within the Common Market. Is not the effects doctrine, Brittan asks rhetorically, necessary to reach these types of injurious conduct? Indeed, as long as the exercise of jurisdiction is consistent with international law (a point to which we will return shortly), doesn’t the Treaty of Rome compel the use of the effects doctrine against extraterritorial activities that distort competition within the Common Market and affect trade between member states?

Brittan’s point rests on the underlying argument that it is necessary to plug jurisdictional holes where they exist and the effects doctrine is just the putty with which to do the repair. Apart from aesthetics, however, plugging holes is important only if they are below the waterline. As Brittan implicitly recognizes, the examples he posits seldom if ever go below the water’s surface.

Of the four hypotheticals, the first best presents the question. Can there be implementation within the meaning of the Wood Pulp doctrine when cartel members refuse to sell directly or indirectly in the Community, and the only price-fixed goods that enter the Community are those imported by independent middlemen? While it is hard to see how any implementation, and with it meaningful presence, in the Community could be found on these facts, it is equally hard to imagine them arising in practice. I am aware of no case where the members of a foreign sales cartel could resist implementing their anti-competitive scheme through subsidiaries or agents in the world's major markets. The temptation to profit from global price discrimination is simply too great, and dealing through independent middlemen opens the door to arbitrage in the secondary market. The hypothetical is a good one for a small market in an isolated country; for a market the size of the Community, the scenario is unrealistic.\textsuperscript{65}

\textsuperscript{65}. A similar analysis applies in the case of a foreign dominant cartel with a competitive fringe in a world market. In this situation the cartel sets the world price, which the competitive fringe independently follows. The regulating state, as part of the world market, is certainly harmed by the cartel’s price-fixing endeavors, even if only members of the competitive fringe sell into that state. As in the case of Brittan’s first hypothetical, however, it is unlikely that a cartel capable of setting prices in a world market would choose on economic grounds to operate completely outside of the Community. The same result should
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The market allocation hypotheticals are more easily treated analytically. To make the market allocation hypothetical applicable to the Common Market (and not merely a boycott as in the fourth example), market allocations make economic sense only when some cartel member has the "rights" to sell in the Community. But the creation of these rights, and their subsequent observation, are every bit as much of an implementation of the anticompetitive scheme as selling into the Common Market at prices set conspiratorially. While cartel members who do not have "rights" to sell in the Common Market may not themselves be present directly in the Community through their own implementing activities, it is a small step to recognize their presence, under the Béguelin/Aluminum Imports doctrine, through the implementing activities of their co-conspirators who do have such rights, under the theory that co-conspirators are agents of one another when acting in furtherance of the conspiracy. The Commission argued as much in Wood Pulp.

Finally, depending on the details, the failure-to-act hypothetical will have the attributes of either the price-fixing example or the market allocation example. If the failure to act is complete on the part of all conspiring participants, then the hypothetical is similar to the price-fixing scenario in that it is analytically clean but unlikely to occur in practice. If the failure to act is not complete—that is, if some of the co-conspirators do something in the Community (such as submit bids while others refrain)—then we are back to the market allocation case, in which the agency theory of conspiracy can be used to impute presence as a result of the implementing acts of co-conspirators.

Accordingly, if Brittan's examples reflect the types of anticompetitive conduct that the Community wants to prohibit, a Commission victory in persuading the Court of Justice to adopt the effects doctrine may be more aesthetically pleasing than revolutionary. The Dyestuffs economic entity doctrine, the Béguelin/Aluminum Imports presence doctrine, and the Wood Pulp implementation doctrine appear sufficient to reach not only Brittan's hypotheticals but indeed almost all of the types of cases that have arisen. Given the

obtain with respect to foreign mergers capable of affecting world prices; for this reason concurrent merger control jurisdiction presents some of the thorniest problems in the international harmonization of competition law.

66. A possible exception to this proposition may be emerging in the case where foreign firms agree among themselves (perhaps with the encouragement of their government) to purchase their requirements only from their co-national suppliers, in effect boycotting exporters in other countries and causing anticompetitive harm to their export trade. The Antitrust Division of the U.S. Department of Justice recently has expressed concern that the Japanese keiretsu (informal vertically integrated conglomerates) may be operating in this manner, and it has indicated that it is studying the application of the effects doctrine to reach such practices under U.S. antitrust law. See Antitrust Division May Use Sherman Act to Attack Anticompetitive Conduct Abroad, Antitrust & Trade Reg. Rep. (BNA) No. 1461, at 554 (Apr. 12, 1990); Keith Bradsher, U.S. Weighs Broadening of Antitrust, N.Y. TIMES, Feb. 24, 1992, at D5. Of course, this case may not be as interesting for the Community for a variety of reasons. First, such foreign boycotts may not actionable under Article 85 for lack of the requisite effect on trade between states. Second, it is difficult for a foreign boycott actually to distort competition in the Common Market. Third, boycotts
hostile political reaction to the incorporation of the effects doctrine into Community law—particularly from so important a Community member as the United Kingdom—the price in hostility created may not be worth the result.\textsuperscript{67}

On the third leg of his argument Brittan turns to the proposition that international law constrains but does not prohibit the use of the effects doctrine. To Brittan, the Community as a creature of international law is bound \textit{a fortiori} by that law's constraints. International law contains a number of limiting principles designed to foster a peaceful political equilibrium in a world where different states have conflicting interests concerning the same conduct. Since states tend to be parochial with respect to affairs occurring within their territorial boundaries and can view efforts by other countries to regulate those affairs as an affront to their sovereignty, international law has evolved several doctrines to balance these interests. Some of these principles, such as foreign sovereign immunity, act of state, and foreign sovereign compulsion, are specific in the limitations they entail but narrow in their scope of application. More generally applicable principles are harder to define and apply. The best recognized of these principles is comity, about which the U.S. Supreme Court made the following observation:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws.\textsuperscript{68}

In other words, comity calls for restraint in the exercise of jurisdiction in cases with a foreign element when foreign interests and laws may be implicated.\textsuperscript{69} A special species of comity may be the principle of noninterference, which prohibits a state from applying its law if the regulatory interests it seeks to
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advance are outweighed by the interests of a foreign state likely to be harmed if jurisdiction is asserted and relief granted.\textsuperscript{70}

Brittan advances his political argument that the Court should accept the effects doctrine by emphasizing the requirement that the Community obey international law in its exercise of jurisdiction. Not only does he appeal to the international law-abiding proclivities of his audience (including the Court), he also seeks to distinguish the use of the effects doctrine by the Community from that by the United States. Many believe the United States has not given due regard to international law principles in its exercise of extraterritorial jurisdiction, and that its cavalier attitude has been the source of many of its troubles in the area. To the extent that international law incorporates limitations on the effects doctrine to balance conflicting state interests in a neutral manner, if these limitations are observed the Community should not run afoul of world sentiment as has the United States.

The argument is appealing at first glance, but exactly what limits does international law impose on the exercise of territorial jurisdiction? International law has its sources in international conventions, international custom as evidenced by the practice of states, general principles of law recognized by civilized nations, and judicial decisions and teachings of the most highly qualified publicists. No treaties or other international conventions govern the exercise of extraterritorial jurisdiction.\textsuperscript{71} The practice of states, as we saw in the introduction to this section, varies widely, precluding any settled international custom. Comity, noninterference, and other general principles of law, all of which emphasize the sovereignty, territorial integrity, and equality of states, are poorly defined in practice and usually call for some balancing of interests on a scale of unknown measure. Judicial decisions and respected commentary on the subject are a quagmire, although the weight of authority strongly suggests that there is some limit on extraterritorial jurisdiction. The upshot, as the International Court of Justice concluded in a related context in the \textit{Barcelona Traction} case, is that:

\begin{quote}
\textit{International law does not impose hard and fast rules on States delimiting spheres of national jurisdiction... but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits—though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.}\textsuperscript{72}
\end{quote}

\textsuperscript{70} \textit{COMPETITION POLICY, supra} note 1, at 15-16. On the principle of non-interference, see Meessen, \textit{supra} note 40.

\textsuperscript{71} Some international agreements, however, provide for consultation in international antitrust matters. \textit{See infra} notes 152-167 and accompanying text.

This lack of definition in international-law principles places Brittan's argument on the horns of a dilemma. On the one hand, if international law is read restrictively to impose binding constraints on the exercise of extraterritorial jurisdiction, it may remove the very ability of the effects doctrine to reach foreign actors and their conduct not already covered by the economic entity, implied presence, and implementation doctrines, at least in the cases that are empirically likely to arise. In Brittan's hypotheticals, the truly hard case involves a foreign cartel whose members do not sell the supracompetitively priced products directly or through agents in the Community; the products which find their way into the Common Market get there through independent middlemen. Can the effects doctrine reach this conduct where the implementation doctrine cannot? The cartel's conduct is included within the specific examples given in Article 85 of concerted practices that are prohibited, and presumably the Common Market suffers the requisite distortion of competition when the price-fixed goods are sold to Community customers. We may therefore assume that some "effect" is present, but will international law permit the effects doctrine to reach the foreign cartel members? Under most modern interpretations, including that of Brittan, international law demands at a minimum that the effect be "direct and immediate, reasonably foreseeable and substantial" in order to give the prosecuting state a sufficient interest to justify regulating conduct occurring within the territory of another state. Certainly the prosecuting state would have no jurisdiction if no state exported the price-fixed goods, and modern cases applying the effects doctrine suggest that the independent conduct of third parties in exporting to the regulating state breaks the essential "directness," if not "foreseeability," of the effect. Under this interpretation, the effects doctrine as constrained by international law is congruent to the implementation doctrine.

On the other hand, if the principles of international law are more loosely interpreted, they quickly cease to remain binding constraints. The principle of comity, for example, has never been held to require deference to foreign interests that are contrary to a fundamental policy of the regulating state. Where the principles are too ambiguous to provide meaningful guidance, a promise to adhere to international law is of little use either as a means of distinguishing the Community from the United States or as a guide to situations in which jurisdiction can be exercised.

I suspect Brittan would resolve this dilemma by agreeing that the constraining principles of international law are indeed ambiguous, permitting jurisdiction beyond the economic entity, implied presence, and implementation doctrines

but not providing the effects doctrine with unfettered reach. If the principles are ambiguous, however, in what sense are they binding? Brittan might respond that they are binding in a political sense, which brings us to the final leg of his argument. Extraterritorial jurisdiction in competition matters, regardless of the legal rubric under which it is claimed, ultimately presents a political question: When is it best to exercise extraterritorial jurisdiction in an effort to restore competition to the Community, and when is it best to refrain from exercising jurisdiction because of the hostile reaction of foreign states in the community of nations?

Brittan implicitly suggests that the Commission, as the executive arm of the Community, is in the best position to make this decision in the Community's interest. Brittan notes that the Commission scrupulously abides by the recommendations of the Organization for Economic Cooperation and Development (OECD) and other international bodies, and consistently inform and consults with foreign authorities about enforcement activities that may impinge on their interests. Brittan believes, and it is unquestionably true, that the Commission enjoys significant goodwill throughout the world in its antitrust enforcement endeavors. The natural but unstated implication is that the effects doctrine, interpreted flexibly in the first instance by a responsible and politically sensitive Commission, will best serve the interests of the Community.

The point is a good one. If the economic entity, implied presence, and implementation doctrines do not reach far enough and the Court eventually recognizes the effects doctrine, the Commission as an institution should have the proper incentives to use discretion and act in the Community's overall best interests in exercising extraterritorial jurisdiction. In antitrust matters, the Commission assesses liability or imposes fines by decision, a procedure that requires a majority vote of the seventeen-member body. As Brittan notes, not only does he cast his vote as a commissioner in a competition case, but so does his fellow commissioner who is responsible for the Community's external relations. Brittan could have added that two commissioners traditionally of British nationality would also be casting their vote on any decision that relies on the effects doctrine, and, although these commissioners do not "represent" the United Kingdom on the Commission, their background is likely to predispose them to caution in applying the doctrine. To the extent the Commission seeks to proceed with broad agreement among its members rather than minimal winning coalitions, it is likely to be sensitive to the international implications of its use of the effects doctrine in any given case. Certainly the Commission's efforts to date, including the Dyestuffs, Aluminum Imports, and Wood Pulp cases and its reluctance to pursue discovery outside the Community, suggest that the Commission will be sensitive to the international implications of its actions and will exercise restraint in applying the effects doctrine.
By contrast, the institutional situation in the United States has not encouraged great sensitivity in the use of the effects doctrine. Within the federal government, the Assistant Attorney General (AAG) in charge of the Antitrust Division of the Department of Justice can initiate prosecutions on his or her own authority, and AAGs, given their narrow portfolio, tend to emphasize U.S. competition policy interests. Over the years the Justice Department has shown little hesitation in opening grand juries or civil investigations targeted at foreign business conduct and in aggressively pursuing discovery abroad. Of course, the Justice Department often consults with the Department of State on the foreign implications of U.S. antitrust actions. This, however, is too frequently a matter of courtesy rather than an effort to obtain meaningful advice. Conversely, the State Department often does not contribute usefully even when asked. The State Department does not usually place the international consequences of the exercise of extraterritorial jurisdiction high on the list of foreign policy concerns, and consequently only infrequently gives significant analysis or high-level attention to such matters, even when asked for its view by the Justice Department. Nor does the State Department often concern itself with the domestic competition effects of extraterritorial conduct. The State Department apparently knew, for example, about the existence of the uranium cartel but never informed the Justice Department, and when the Justice Department did open its grand jury investigation the State Department sought to have it terminated. Similar if not greater problems confront decisionmaking in the Federal Trade Commission, which has concurrent authority to enforce the federal antitrust laws but is an independent agency outside the executive branch. The courts add another level of complexity to the U.S. institutional environment. Because the courts are independent of the executive branch, a court might pay little heed to the opinion of the Justice or State Departments. Therefore, if a case is before a court (brought, for example, by a private party like Westinghouse), it might elect to exercise jurisdiction under the effects doctrine.

75. As with every general tendency, there are exceptions. The State Department was actively involved in President Reagan's decision in 1984 to terminate a Justice Department grand jury investigation which sought evidence of an alleged predatory pricing conspiracy among trans-Atlantic airlines to drive Sir Freddie Laker's discount "Skytrain" out of business. The State Department sought to foreclose the British Government's reaction to the Justice Department's assertion of jurisdiction to target an investigation in part at the conduct of U.K. airlines outside the territorial boundaries of the United States. See President Reagan Halts Grand Jury Investigation of UK-USAir Travel, Antitrust & Trade Reg. Rep. (BNA) No. 1191, at 929 (Nov. 22, 1984).


77. In In re Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980), the State Department encouraged several governments, including that of the United Kingdom, to appear as amici on the question of jurisdiction. In affirming the default judgment for lack of appearance by the foreign defendants, the Court of Appeals for the Seventh Circuit expressed shock that "the governments of the defaulters have subserviently presented ... their case against the exercise of jurisdiction." Id. at 1255-56.
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Notwithstanding the comparative advantage the Commission might have over the U.S. antitrust enforcement agencies, it must be remembered that the Commission is not the only institution enforcing the Community's competition laws. Many of the most significant efforts in the United States to assert extraterritorial jurisdiction have been made in cases brought by private plaintiffs. While the role of private plaintiffs in the enforcement of Community law has not been substantial in the past, several states, as well as the Commission itself, now advocate greater private-party participation given the Community's limited enforcement resources. It is well settled that private parties are entitled to use Articles 85 and 86 as defenses in contract actions in national courts, and the courts of several member states have accepted the principle that private parties may obtain money damages or injunctions in national court proceedings for breaches of these provisions. With increased enforcement by private parties or, perhaps more significantly, by national antitrust enforcement authorities, the Commission will no longer exclusively determine the circumstances in which to invoke the effects doctrine.

Consolidated Gold Fields' antitrust defense against a hostile takeover by Minorco illustrates the problem, albeit in a U.S. setting. In October 1988, Minorco, S.A., a Luxembourg corporation whose principal shareholders include Anglo-American Corporation of South Africa, De Beers Consolidated Mines Limited (also a South African company), and the Oppenheimer family commenced a hostile tender offer for Consolidated Gold Fields PLC (ConsGold), a British corporation. The group made its offer in the United Kingdom, and explicitly disallowed the applicability of the offer in the United States. Minorco and its shareholders are the largest producer of gold outside the former Soviet Union. ConsGold is the second largest gold producer in this market. ConsGold and Newmont Mining Corporation, its forty-nine percent subsidiary and the largest gold producer in the United States, filed suit in federal district court in the Southern District of New York. The complaint charged that the acquisition of ConsGold by Minorco threatened competition in the free-world gold market in violation of U.S. antitrust laws, and it sought a preliminary injunction to block the consummation of the tender offer in the United Kingdom. Although neither the Department of Justice nor the Federal Trade Commission objected to the acquisition, the district court in ConsGold's

80. One solution to this problem, of course, is to permit only the Commission to employ the effects doctrine, butBrittan maintains that the same rules of jurisdiction should apply regardless of which plaintiff initiates the action. COMPETITION POLICY, supra note 1, at 3.
private action entered the requested preliminary injunction. When the Second Circuit affirmed, Minorco's tender offer abroad became impracticable to continue and was withdrawn. The foreign business community was outraged by the interference of a U.S. court in what they saw as a strictly non-U.S. transaction. The U.S. antitrust authorities were wholly uninvolved in the private action, and their views toward the exercise of extraterritorial jurisdiction (whatever they may have been) were irrelevant to the result.

In sum, Brittan's argument that the European Court of Justice should explicitly embrace the effects doctrine is not compelling. Even if the Community enabling acts permit recognition of the doctrine, the Community has no apparent public policy need to expand its jurisdiction beyond what it already asserts under the Dyestuffs economic entity doctrine, the Béguelin/Aluminum Imports implied presence doctrine, and the Wood Pulp implementation doctrine. The explicit adoption of the effects doctrine is likely to involve the Community in a politically charged debate, undermine the Community's standing in a significant part of the international community, and diminish the goodwill of Community institutions in the minds of some member states. The consequences will not be forestalled by the Community's commitment to international law in its exercise of extraterritorial jurisdiction under the effects doctrine, since international law on the subject is too ambiguous to provide politically adequate binding constraints. Nor are the good intentions of the Commission likely to save the day. Even if the Commission exercises the utmost restraint, it will not be able to control the conduct of national antitrust authorities and private plaintiffs, who may be expected to avail themselves of jurisdiction accorded by the effects doctrine for their own purposes. The jurisdiction doctrines already recognized by the Court are adequate to the task of protecting Community interests, competition and otherwise. It is unnecessary, if not counterproductive, for the Community to embrace the effects doctrine.

III. THE "DOMESTIC POLICY" OF COMMUNITY COMPETITION LAW

In December 1989, the Council adopted Council Regulation 4064/89 on Control of Concentrations Between Undertakings, more commonly known as the "Merger Regulation," to enter into force on September 21, 1990. The Merger Regulation introduces a comprehensive merger control law into the Community for the first time in over thirty years of Community existence. The

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Merger Regulation is designed to be the exclusive Community-wide law governing concentrations (as mergers, acquisitions, and certain joint ventures are known in Community law) that meet its coverage thresholds, although smaller concentrations of stock or assets where control is not transferred or consolidated remain to some extent subject to Articles 85 and 86 as well as to the individual merger control laws of member states.

The second half of Brittan’s Lauterpacht Lectures looks at the new merger law, providing both a short history of the development of the Merger Regulation and a discussion of some issues of the regulation’s interpretation and administration. The lecture, given in February 1990, was closely scrutinized for indications of how the Commission would enforce the regulation. Today there are numerous explanations of the Merger Regulation that surpass in detail what Brittan could cover in thirty-three pages, and that also have the advantage of observing the Commission make actual decisions regarding its enforcement.83 Brittan’s lecture remains important, however, as an authoritative source short of a formal pronouncement as to the Commission’s approach to a regulation whose intricacies and cross-currents are legendary.

Significantly, throughout the lecture Brittan continues to "sell" the wisdom of the Merger Regulation and to minimize the considerable differences among the member states that impeded its adoption during almost two decades of active Commission lobbying. Brittan’s forward-looking perspective is natural for a Community official largely responsible for the ultimate adoption of the regulation and charged with the oversight responsibility for its implementation by DG IV. But we should not turn away too quickly from the history of the Merger Regulation. This history, together with the insights we can gain from the Commission’s merger enforcement activities in the roughly one and one-half years that the regulation has been in force, tells us much about the difficulties of fashioning a "domestic" competition policy in a Community whose member states can have widely differing views about their economic self-interest, competition policy goals, and the tension between Community competition law enforcement and national industrial policy.

In 1966, the Commission engaged a group of academics to study the application of Community competition law to mergers and acquisitions. The Commission concluded after considering their reports that concentrations could be reached under Article 86 to the extent that a merger or acquisition could be characterized as an abuse of a dominant position. The Commission further

concluded that combinations were not subject to review under Article 85, which applies only to cartels and other concerted practices among firms that remain independent of one another. The Commission’s view on the application of Article 86 was confirmed in 1973 by the European Court of Justice in Continental Can, its first merger control case, where the Court held that the extension of a preexisting dominant position by means of a merger between an already dominant firm and a competing firm was an actionable abuse. Although the Court did not address Article 85, the notion that this provision was inapplicable to concentrations soon became part of the received wisdom.

Continental Can provided much too narrow a basis for a complete program of merger control. Not only did it leave a serious question about the ability of Article 86 to reach the full range of anticompetitive mergers in the Community, but the Commission clearly had no authority to require concentrations to be notified in advance. As the experience of the United States had shown, without premerger notification it is almost impossible to return competition to the status quo ex ante after an anticompetitive merger has been closed. Moreover, there were doubts whether the Commission had the authority to order interim relief to restrain a merger during an investigation, or to order divestiture of all unlawful transactions that already had closed. Finally, Article 86 left transactions subject to the concurrent antitrust jurisdiction of the individual member states, thereby threatening to produce a confused and inconsistent legal environment in the Community.

Shortly after the Court’s Continental Can decision, the Commission, at the invitation of the member states, presented a draft merger control regulation

84. Interestingly, a majority of the academics participating in the study agreed that Article 85 should apply to mergers by agreement so long as two legal entities remained after the closing (presumably even if they came under common control), but not to purchases from third parties or stock exchanges. (This partially echoes the practice in the United States of regarding anticompetitive mergers and acquisitions as falling within the concerted action prohibitions of Sherman Act Section 1; see, e.g., Northern Securities Co. v. United States, 193 U.S. 197 (1904)). The Commission disagreed, concluding 1) that Article 85(1) was too severe on mergers, which were socially beneficial in more instances than restrictive practices; 2) that the exemption conditions under Article 85(3) were too restrictive (especially the indispensability requirement); 3) that due to their permanent nature, mergers could not be unwound like restrictive practices, in effect negating any review of an Article 85(3) exemption; and 4) that the application of Article 85(1) to mergers by agreement, but not to economically equivalent acquisitions from third parties, would lead to unequal treatment. COMMISSION OF THE EUROPEAN COMMUNITIES, MEMORANDUM ON THE PROBLEM OF MERGERS IN THE COMMON MARKET, COMPETITION SERIES No. 3 (1966) pt. III, reprinted in RITTER, supra note 66, at 873-76.
86. Continental Can remains the only case in which the Court of Justice applied Article 86 to block a merger. The Commission, however, has used Article 86 against a number of mergers, including the British Airways/British Caledonian merger (where British Airways was obligated to give certain commitments to the Commission as to the future conduct of the merged entity) and the consortium bid for Irish Distillers (which was dropped when the Commission objected to it as an abuse of a dominant position by the consortium).
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to the Council. The proposal contained three principal features: coverage
thresholds, a premerger notification requirement, and a substantive competition
standard. The draft regulation covered horizontal, vertical, and conglomerate
concentrations that eliminated a company's independence, whether or not such
concentrations involved a dominant firm within the meaning of Article 85,
provided that at least one of the enterprises involved was established within
the Community. Substantively, the regulation would have prohibited as incompat-
ible with the Common Market any covered transaction whereby the under-
takings involved acquired the power or enhanced their ability to "hinder
effective competition." Otherwise prohibited concentrations, however, could
be exempted on an individual basis where the concentration was indispensable
to the attainment of some industrial, technological, social, or regional objective
to which the Community gave a higher priority. Significantly, the enabling
power for the draft regulation was drawn not only from the Council's authority
under Article 87 of the Treaty of Rome to promulgate regulations to implement
Articles 85 and 86, but also from the Council's authority under Article 235
to take "appropriate measures" necessary to achieve one of the Community's
stated objectives where the Treaty itself did not provide the requisite powers.
The use of Article 235 would give the regulation a legal status equivalent to
Articles 85 and 86. The regulation gave the Commission exclusive enforcement
authority, unlike Articles 85 and 86, for which member states share enforce-
ment authority.

Although the European Parliament approved the 1973 draft regulation with
some modifications, the regulation encountered stiff resistance in the Coun-
cil, which could promulgate the new law only with a unanimous vote. This
resistance derived from a fundamental concern that decisions taken in individu-
al cases by the Community authorities could be at odds with the domestic
industrial, social, or regional policies of one or more of the member states.

The Community's failure to adopt a comprehensive merger control law in
the 1970s and early 1980s probably was not a serious deficiency, since almost
all European mergers and acquisitions occurred between firms within the same
country and would not be reached by a Community merger control law in any
event. In the late 1980s, however, four emerging developments generated
enormous political pressure for a comprehensive Community merger control
regime.

First, European business began a substantial restructuring through trans-
Community mergers, acquisitions, and joint ventures. The number of trans-

87. Draft Merger Regulation, 1973 O.J. (C 92) 1; see COMMISSION OF THE EUROPEAN COMMUNITIES,
THIRD REPORT ON COMPETITION POLICY 28-31 (1974).
89. The Commission conducts an ongoing study of concentration activity in the Community, and
publishes the results in annual competition reports. The statistics cited in this paragraph are drawn from
TWENTIETH REPORT, supra note 13, at 223 tbl. 6, 224 tbl. 7; COMMISSION OF THE EUROPEAN COMMU-
Community mergers and acquisitions involving at least one of the Community’s one thousand largest firms rose from 65 in financial year 1985 to 315 in financial year 1990. Indeed, in financial year 1989, the number of cross-border industrial mergers and acquisitions exceeded the number of national transactions for the first time. Joint ventures also increased. Second, several member states, notably Germany and the United Kingdom, had developed their own sophisticated merger control programs, and other member states were in the process of creating such programs. Third, changes in both the applicability of the existing treaty provisions to concentration and the Commission’s announced enforcement policies significantly expanded the Commission’s ability to fashion a merger control program without the need for additional enabling legislation. Finally, frustrated by the lack of progress, Commissioner Peter Sutherland, Brittan’s predecessor as the commissioner responsible for competition matters, adopted an aggressive program to place mergers and acquisitions under the scrutiny of Articles 85 and 86.

In 1988, momentum finally began to build for a merger regulation. The European Parliament called for the Commission to end the thirteen-year deadlock by withdrawing its earlier proposals to the Council and starting afresh. In response, the Commission asked the Council to adopt a political position that would allow a merger regulation to go forward. After intensive bilateral discussions with the member states, four principles emerged to guide the drafting of a new proposal. First, merger control should apply to large-scale mergers that have a "truly European dimension" in order to prevent both the creation and enlargement of a dominant position. This principle acknowledged an allocation of responsibility between the Community and the member states. It placed responsibility for control of large-scale mergers on the Community and smaller-scale mergers on the member states. Second, the regulation should include provisions for premerger notification and strict time limits for Commission decisionmaking. Third, the regulation should permit otherwise

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90. Most notably, in Philip Morris/Rothmans the EC Court of Justice, at the urging of the Commission, reversed the conventional wisdom and declared that Article 85 could apply in principle to mergers and acquisitions in which one firm acquires a minority interest in another with the result that the firms remain legally independent but can coordinate their commercial conduct so as to restrict or distort competition. Joined Cases 142 & 156/84, British Am. Tobacco Co. v. Commission, 1987 E.C.R. 4487, 4 C.M.L.R. 24 (1987).

91. Following a complaint lodged by the Irish Distiller Group, for example, the Commission for the first time intervened in a hostile takeover bid. In a controversial decision, it found that the joint bid by Allied Lyons, Guinness, and Grand Metropolitan for Distillers infringed Article 85. This holding led the consortium to drop its bid. See COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY 85 (1989).

prohibited mergers to proceed for reasons analogous to those indicated in Article 85(3). This principle represented a critical compromise between those states that wished the merger regulation to take into account industrial policy considerations, and those states that desired a purely competition-based merger control policy. Fourth, the regulation should ensure the participation of the member states in the decisionmaking process.93 Many member states remained skeptical of giving the Commission a free hand to apply the regulation, even with all its compromises and safeguards, to mergers and acquisitions in which several member states were likely to have significant national interests.

In April 1988, the Commission presented to the Council a new draft merger regulation based on these principles.94 Although the member states accepted in principle the need for a Community-wide merger law, no consensus emerged on the thresholds of applicability, the surviving subject matter jurisdiction of Articles 85 and 86, the substantive standard to be applied, or the roles to be played by member state competition authorities. The 1988 proposal languished until 1989. That year, Brittan became the commissioner responsible for competition matters and Jacques Delors of France became President of the Commission. Under their leadership, Council Regulation 4064/89 on the control of concentration between undertakings was finally adopted by the Council on December 21, 1989, and entered into force on September 21, 1990.95 Although the Merger Regulation retains coverage thresholds, a premerger notification requirement, and a substantive antitrust standard, the regulation is a much diluted version of the Commission’s original proposal due to the compromises necessary to achieve passage.

Application of the regulation is limited to concentrations with a Community dimension. The Community has always defined concentrations by reference to a transfer or consolidation of control in at least one firm involved in the transaction. For purposes of the Merger Regulation, a concentration exists whenever 1) two or more previously independent firms merge into a single entity, or 2) one or more undertakings acquire control of all or part of another undertaking.96 The test of "control" for a concentration is the existence of "rights, contracts or any other means which, either separately or in combination . . . confer the possibility of exercising decisive influence on an undertaking."97 Acquisitions that result in minority holdings typically will not be deemed to be concentrations and will continue to be subject to scrutiny by the Commission under Articles 85 and 86. In some circumstances, however,

94. 1988 O.J. (C 130) 4.
95. Merger Regulation, supra note 3.
96. Id. art. 3(1).
97. Id. art. 3(3).
control may be exercised through a minority interest. In *Arjomari-Prioux/Wiggins Teape Appleton*, for example, the Commission found that the acquisition by Arjomari of a thirty-nine percent stake in Wiggins Tepe transferred control, where the remaining shares were widely held (no other shareholder held more than four percent), so that Arjomari could be expected to exercise a decisive influence on its minority subsidiary.\(^9\)

In contrast to the Merger Regulation's unremarkable definition of concentration, the boundaries of a "Community dimension" evoked sharp dispute during negotiations. The regulation defines a concentration to have a "Community dimension" whenever 1) the combined aggregate worldwide turnover of all the undertakings concerned exceeds five billion ECU, and 2) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than two hundred fifty million ECU, except where each undertaking concerned in the transaction achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state.\(^9\)

Even accounting for inflation, these "Community dimension" thresholds are a substantial departure from the 1973 proposal to cover all concentrations involving turnover of two hundred million ECU or more. As a result of the higher thresholds, the Merger Regulation was expected to cover about fifty transactions per year (a remarkably accurate prediction), as opposed to over three hundred transactions predicted in the 1973 draft during a time when merger activity generally was much lower. Moreover, given the high thresholds, the Merger Regulation is likely to be applied most often to huge conglomerate transactions, which are much less likely to be anticompetitive as a whole than narrower, strategic horizontal or vertical acquisitions.\(^10\)

The regulation requires a qualified majority of the Council to review the coverage thresholds no later than the end of 1993.\(^10\) In a statement accompanying the adoption of the Merger Regulation, the Commission stated its view that the worldwide turnover threshold should be lowered to two billion ECU, and has indicated elsewhere that the Community turnover threshold should be lowered to one hundred million ECU.\(^10\) If adopted, these new thresholds would increase the number of reportable transactions at present levels of merger activity to somewhere between two hundred fifty and three hundred per year,

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\(^10\) Korah reports that roughly half of the gross Community product is produced in industries in which there are no two firms with aggregate turnover of five billion ECU or more. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 213 (4th ed. 1990).
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proportionally more of which should involve strategic horizontal acquisitions likely to present significant competition concerns.

The importance of the coverage thresholds, of course, stems from their role in dividing merger control responsibility between the Community and the member states. If the coverage thresholds are satisfied and none of the exceptions discussed below applies, the concentration is within the exclusive purview of the Commission (subject to review by the Court of First Instance and the Court of Justice). Member states have no jurisdiction to investigate or prosecute such transactions under the regulation or to apply their national antitrust legislation. If the coverage thresholds are not satisfied, so that the concentration lacks a Community dimension, member states are free to employ their national legislation to examine concentrations.

The Merger Regulation also provides the exclusive standard of review for notifiable transactions. To ensure that the Sutherland program's aggressive pursuit of notifiable mergers and acquisitions under Articles 85 and 86 would not be revived alongside it, the Merger Regulation preempts use of Articles 85 and 86 to scrutinize covered transactions. In addition, the Merger Regulation provides that Regulation 17, which gives the Commission its investigatory powers and authority to impose fines to enforce Articles 85 and 86, does not apply to concentrations generally, including those below the thresholds or exempt from coverage. This latter provision effectively renders the Commission powerless to review concentrations not covered under the regulation, although private parties and national antitrust enforcement authorities may still apply Articles 85 and 86 to such concentrations in proceedings in national courts.

The Merger Regulation provides two vehicles for member states to protect their interests in local markets when threatened by a concentration with a Community dimension. In a concession to the member states with developed merger control policies, the regulation provides that if a member state informs the Commission that a covered transaction threatens to create or strengthen a dominant position and so impede competition in a distinct market within that

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103. Merger Regulation, supra note 3, art. 21(1).
104. Id. arts. 21(2), 22(1).
105. Id. art. 22(1)-(2).
106. Id. art. 22(1).
107. Id. art. 22(2).
108. Technically, the Commission could still proceed against excluded concentrations under Articles 85 or 86, pursuant to the enforcement authority conferred by Article 89. The Commission has explicitly reserved its right to invoke that authority, although it has indicated that it does not intend to take action with respect to concentrations with a worldwide turnover of less than two million ECU, or below a minimum Community turnover level of one hundred million ECU. Statements of the Commission and the Council Relating to the Merger Control Regulation, reprinted in RITTER ET AL., supra note 66, at 893, 897. In the event that the Commission did invoke Article 89, however, it would have no ability to require information or to impose fines.
member state, the Commission may refer the matter to that member state to permit it to regulate the concentration under its national competition laws. This provision is known as the "German clause." It was included at the insistence of Germany, which sought to preserve the jurisdiction of its Bundeskartellamt to investigate covered transactions in local markets threatened by competition. To the extent the German clause has any force in practice, it represents a significant departure from the "one-stop shop" principle (a single merger control regime for the entire Community) upon which the Commission relied so heavily when urging adoption of a merger control regulation. Brittan finds this provision "politically necessary, but . . . narrowly circumscribed" and suggests that it is likely to be applied only infrequently. Moreover, Brittan has stated that the German clause does not represent a breach of the "one-stop shop" principle, since the Commission retains the power to decide unilaterally whether the transaction is best reviewed at the Community level or by the national antitrust authorities of the requesting member state. Thus, the Commission can ensure that only one competition authority will review a given covered transaction. These sentiments not only represent a deviation from the spirit of the compromise underlying the German clause, they also may overstate the case, since the regulation permits a requesting member state to appeal a denial of a referral to the Court of Justice. It remains to be seen how strongly member states will press for referrals. To date, the German clause has been invoked—appropriately by Germany—in only one instance, the Varta/Bosch automobile starter battery joint venture. The Commission initiated proceedings itself and did not refer the case to the German authorities, a decision Germany did not appeal to the Court of Justice.

109. Merger Regulation, supra note 3, art. 9. Member state requests must be made within three weeks of receipt from the Commission of a copy of the notification. Id. art. 9(2). A request automatically extends the waiting period from three weeks to six weeks. Id. art. 10(1). During this extended waiting period, the Commission must either 1) concur that a distinct market and threat to competition is present and open proceedings to investigate; 2) concur that a distinct market and threat to competition exists and refer the matter to the requesting member state; or 3) disagree that a distinct market or threat to competition exists, adopt a decision refusing to refer the matter to the requesting member state, and clear the transaction. Id. art. 9(3). The Merger Regulation provides that Article 9 will be reviewed by the Council in 1994. Id. art. 9(10).

110. COMPETITION POLICY, supra note 1, at 39-40.


112. Merger Regulation, supra note 3, art. 9(9).


114. The Commission ultimately found that Germany constituted a separate relevant market for starter batteries, and that the joint venture's 44% share threatened to create or strengthen a dominant position and impede competition in that market. The venture was approved only after Varta agreed to terminate its license agreement with Delta/Mareg, the second largest competitor in the German replacement market for starter batteries, and to terminate the overlapping membership of the supervisory boards of the two companies. 1991 O.J. (L 320) 32-33.
Conversely, to aid the smaller states without their own merger control regimes, the so-called "Dutch clause" of the Merger Regulation provides that a member state may request the Commission to investigate concentrations below the coverage thresholds. Under this provision, inserted at the request of the Netherlands, Italy, and Belgium, the Commission may review such non-covered concentrations under the regulation if it finds the transaction creates or strengthens a dominant position and thereby impedes competition within the territory of the concerned member state. The Dutch clause was adopted as a compromise in lieu of the preference of the smaller member states for a worldwide turnover threshold lower than five billion ECU. Significantly, the Dutch clause works only in one direction. A member state can ask the Commission to oppose a merger within its territory. However, companies contemplating otherwise anticompetitive mergers may not proceed without review solely by invoking the Dutch clause to claim that, since no member state raised an objection, the Commission could not intervene. Brittan predicts that the clause will be invoked infrequently, and no member state has yet asked that it be applied.

Premerger notification is required of all concentrations covered by the Merger Regulation. The prescribed notification must be made no later than one week after the agreement is signed, a public bid is announced, or a controlling interest acquired, and not less than three weeks prior to closing. Within one month of receiving the completed notification (six weeks if a request is made under the German clause), the Commission must adopt one of three decisions: 1) a decision that the notified transaction is not a concentration with Community dimension and therefore not subject to the Merger Regulation; 2) a decision that the transaction is a concentration with Community dimension but raises no "serious doubts" (an undefined term) as to its compatibility with the Common Market, thereby clearing the transaction; or 3) a decision that the transaction is a concentration with a Community dimension that raises "serious doubts" about its compatibility with the Common Market, and requires proceedings to investigate further. If the Commission does initiate proceedings, it has four months (rather than nine under the 1973
proposal) to complete its work and render a decision as to the compatibility of the transaction with the Common Market. At the end of the four-month period, the Commission must adopt by decision one of three alternatives closing the proceedings: 1) approval of the transaction without conditions; 2) approval of the transaction with conditions imposing obligations on the parties; or 3) prohibition of the transaction as incompatible with the Common Market.

These time limits place considerable pressure on the Commission and represent a substantial reduction of the time periods contained in the 1973 proposal. In its original proposal, the Commission sought three months for a preliminary investigation; the Merger Regulation provides only four weeks. Although this is comparable to the thirty-day initial waiting period under the U.S. Hart-Scott-Rodino (HSR) Antitrust Improvements Act, the HSR premerger notification form requires only limited (and often useless) information, and U.S. antitrust authorities have virtually unfettered discretion in opening formal investigations and demanding (through a so-called "second request") additional documents and interrogatory responses. By contrast, Form CO, the notification form the Commission prescribes, requires the parties (subject to limitations negotiated in each case with the Merger Task Force) to submit initially much the same information as the U.S. authorities require in their standard second request. While this gives the Commission much more information in the preliminary investigation period, the Commission can open proceedings for further investigation only by a publicly announced, formal decision delineating the nature of the Commission's "serious doubts" about the transaction. From the perspective of the member states, this holds the Commission accountable to a degree absent in the preliminary decisionmaking under U.S. law. It also permits interested member states to prepare their case and work within Community institutions to encourage the Commission to permit or block a notified transaction. Finally, the short preliminary investigation deadline ensures that mergers and acquisitions will not be impeded for months merely because of bureaucratic wrangling and indecision, a frequent occurrence in non-merger investigations. Similar considerations led to the four-month limit on formal proceedings under the Merger Regulation, when by comparison second request investigations in the United States often take six to nine months or more to complete. Although this difference is mitigated by the fact that parties in a U.S. second request investigation must produce materials which presumably would have been produced initially to the Commission upon submission of Form CO, the Merger Regulation's time periods unquestionably are demanding.

120. Merger Regulation, supra note 3, art. 10(3).
121. Id. art. 8(2)-(3).
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The entire substantive prohibition of the Merger Regulation appears in Article 2: "A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."\(^{123}\)

This prohibition structures the substantive analysis into three parts: 1) delineating the product and geographic dimensions of the relevant market(s) in which the effect of the concentration is to be assessed; 2) determining whether the concentration will create or strengthen a dominant position in the relevant market; and 3) if so, determining whether this creation or strengthening of a dominant position will significantly impede effective competition in the relevant market. In assessing these questions, the regulation requires the Commission to consider: 1) the structure of the markets in which competition may be affected and the actual or potential competition entailed in those markets by firms both within and outside the Community; 2) the market position of the parties; 3) their economic and financial power; 4) the alternatives available to suppliers and customers in their access to supplies and markets; 5) legal and other barriers to entry; 6) supply and demand trends in the relevant markets; 7) the interests of intermediate and ultimate consumers; and 8) the development of technical and economic progress "provided that it is to the consumers' advantage and does not form an obstacle to competition."\(^{124}\) The preamble to the Merger Regulation indicates a presumption that a concentration is compatible with the Common Market where the combined share of the undertakings does not exceed twenty-five percent either in the Common Market or in any substantial part of it.\(^{125}\)

Although the Merger Regulation contains no guidance on market definition, it appears the Commission will employ demand-side substitutability as the primary consideration in determining product market boundaries. Form CO defines a product market to be "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."\(^{126}\) Significantly, the Commission appears increasingly willing to take into account supply-side substitutability,\(^{127}\) which in recent years has come to dominate market definition in most U.S. antitrust investigations. Product market definition does not

\(^{123}\) Merger Regulation, supra note 3, art. 2(3).

\(^{124}\) Id. art. 2(1)(b).

\(^{125}\) Id. pmbl. § 15.


yet appear to pose a serious problem in EC merger antitrust analysis, perhaps because of the willingness of the parties and the Merger Task Force to agree on the product market boundaries in the process of negotiating data "waivers" for the premerger notification report.

Geographic market definition is more hotly contested. Given the history of industrial nationalism in the Community, the existence of a dominant position is often more sensitive to the geographic dimensions of the relevant market than to the product boundaries. Substantial disputes already have arisen over whether a market should be national, Community-wide, or worldwide in scope. In close cases, the Commission’s natural incentive is to find national markets. This will inhibit the creation of "national champions," which may not be dominant if markets are broadly defined geographically, and encourage cross-border mergers, which are likely to aid in the Community’s integration. As a result, geographic market definition could be an area of controversy not only between the Commission and the merging parties, but also between the Commission and individual member states wishing to strengthen their national firms.128

After determining the product and geographic dimensions of the relevant market, the next step in the analysis is to assess whether the concentration will create or strengthen a dominant position in that market. Although the Merger Regulation does not define the term, the notion of dominance is employed in Article 86. Cases interpreting Article 86 look to the ability of a firm "to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."129 Dominance, then, at least under Article 86, is a behavioral concept, whose existence in any given case depends on all the factors that compel or constrain business behavior (including those listed in Article 21 of the Merger Regulation) and is not defined merely by references to structural market share thresholds. Nonetheless, a firm must be able to achieve and sustain some significant market share in order to insulate itself

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from competitive prices, and the Court of Justice has never found a firm with a market share of less than forty percent to have a dominant position. The Merger Regulation, however, consistent with past Commission pronouncements, provides a "safe harbor" from dominance only up to twenty-five percent,130 leaving open the possibility that firms with market shares of twenty-five to forty percent will be dominant for merger control purposes.

If a concentration does create or strengthen a dominant position, the final step in the liability analysis is to ascertain whether that dominant position would significantly impede effective competition in the relevant market. The factors to be taken into account are for the most part traditional competition indicia. Significantly, there is no justification like that found in the 1973 draft for permitting an otherwise anticompetitive concentration to proceed where the transaction was found to be indispensable to the attainment of some industrial, technological, social, or regional Community objective. The inclusion of technical and economic progress, however, may allow assessment of industrial policy considerations, and probably reflects an inability on the part of the Council to resolve completely the differences between member states such as Spain, Portugal, Italy, and France that favor such considerations, and member states such as the United Kingdom and Germany that favor a pure competition approach to merger control. Furthermore, the Merger Regulation recognizes that states may have legitimate interests in public security, plurality of media, and prudential rules, and permits member states to apply national laws to concentrations to protect these interests after notifying the Commission.131

Finally, one of the recitals to the Merger Regulation, apparently inserted at the insistence of Spain, refers to various goals of the Community in addition to the preservation of competition, including the "strengthening [of] . . . economic and social cohesion,"132 and "the achievement of the internal market by 1992 and its further development."133 This so-called "Spanish clause" suggests that the Merger Regulation’s interpretation should be informed by these noncompetition goals, particularly when reviewing concentrations involving less-developed regions of the Community. While Brittan has emphasized that the Merger Regulation will be interpreted to apply a strict competition standard,134 the exact operative notion of competition remains to be seen. Even if the Commission does not pursue an industrial policy, it is likely that it will weigh heavily Community integration goals as well as economic efficiency when allocating resources to enforce the Merger Regulation.

130. Merger Regulation, supra note 3, pmbl. ¶ 15.
131. Id. art. 21(3).
132. Id. recital 13 (referring to EEC TREATY art. 130a).
133. Id. recital 2.
134. See, e.g., COMPETITION POLICY, supra note 1, at 35-36.
The Merger Task Force is the organization responsible for merger review within DG IV. The Task Force is composed of approximately forty-five professionals, half of whom are seconded from the national competition authorities of member states pursuant to an agreement reached at the time the Merger Regulation was adopted. The Commission's merger decision-making procedures are more streamlined than those found in other areas of competition policy. Decisions typically run about four or five pages in length, compared to twenty or thirty in a case under Article 85 or Article 86, and this shorter length mitigates the burden of translating decisions into the nine official languages. Even with this streamlining, however, it appears the present Merger Task Force is fully occupied with the approximately fifty reportable transactions under the current thresholds. If the Commission successfully lowers the reporting thresholds and increases the number of reportable transactions to between two hundred fifty and three hundred per year, many of which likely will be more complicated strategic horizontal acquisitions, the Merger Task Force will have to be augmented substantially. With this augmentation, it may be difficult to maintain the existing high levels of speed and quality in the analysis of reportable transactions.

Although a year is too brief to draw any final conclusions, experience to date indicates that the Merger Regulation is a workable regime of merger control for the Community. As expected, the Commission received about fifty notifications during the first year of the Regulation's operation. Unlike earlier drafts, which required the establishment of at least one of the undertakings in the Community as a basis of subject matter jurisdiction, the Merger Regulation contains no such requirement. A number of transactions outside the EC were notified in the first year. These non-EC transactions included Mitsubishi/Union Carbide, Matsushita/MCA, and AT&T/NCR (the first hostile takeover covered by the Regulation). Roughly half of the notified transactions were concentrative joint ventures. In every case, the deadlines prescribed by the Merger Regulation were met. With the exception of the Renault/Volvo transaction—ironically, the first of the notifications—none of the transactions appeared to present any substantial factual or analytical complexity.

135. TWENTIETH REPORT, supra note 13, at 38-39.
136. See supra text accompanying note 100.
EDS/SD-Scion was the second contested takeover notified to the Commission. EDS/SD-Scion, notified June 18, 1991, 1991 O.J. (C 162) 11, cleared July 30, 1991, 1991 O.J. (C 23) 44.
140. Joint ventures have presented the most serious questions of reportability under the Merger Regulation. The regulation draws a distinction between "concentrative" joint ventures, which are subject to the regulation, and "cooperative" joint ventures, which are outside of the regulation and are subject to the provisions of Article 85.
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Most of the notified transactions (including all non-EC transactions) were approved during the initial one-month examination period, without the initiation of proceedings for further investigation. A few transactions were declared not to fall within the scope of the Regulation, primarily because the transactions were deemed not to be concentrations.142 As of the end of 1991, the Commission had initiated proceedings in five cases. Following four-month investigations in these cases, the Commission declared one compatible with the Common Market,143 three compatible with the Common Market subject to conditions or obligations,144 and one incompatible with the Common Market.145

The Commission appears much more willing than the Antitrust Division of the U.S. Department of Justice or the Federal Trade Commission to accept commitments ("conditions") short of divestiture to alleviate antitrust concerns in an otherwise anticompetitive transaction. To satisfy the federal antitrust authorities in the United States, parties almost always must agree to divest the entire business operations of either the acquiring or acquired firm in the problematic market to a third party acceptable to the investigating agency. The idea is that the third party will "step into the shoes" of the divesting firm, so that after both the investigated transaction and the "fix" (as the curative divestiture is known in the trade) are closed, the merged firm and the third party will compete in the market in the same way as did the acquiring and acquired firms prior to the merger. Only in rare cases will the U.S. authorities accept something less, and in many cases even divestiture is not an adequate solution for U.S. agencies to an anticompetitive merger or acquisition. In contrast, the Commission appears willing to entertain non-divestiture solutions.

The Alcatel/Telettra transaction146 provides a good example. Alcatel sought to acquire control of Telettra, Fiat’s telecommunications subsidiary. The Commission opened proceedings due to concern that the acquisition would have an anticompetitive impact in Spain in the market for telecommunications transmission equipment. The two companies were direct competitors in Spain and held a combined share of eighty percent of the telecommunications market, and a combined eighty-three percent share in the market for microwave equipment. Telefonica of Spain, the telecommunications company most directly

affected by the transaction, held twenty-one percent of Alcatel Standard Electrica S.A. and ten percent of Telettra España (the merging parties’ respective supply subsidiaries in Spain), and raised no objection to the concentration. Competitor-suppliers such as Siemens, however, complained that Telefonica’s minority shareholdings in the Alcatel and Telettra subsidiaries gave them a privileged position and created a barrier to entry into the Spanish market. The Commission permitted the acquisition to proceed when Alcatel agreed to buy Telefonica’s interest in the supplier-subsidiaries and Telefonica agreed to pursue a diversified purchasing policy in the future. Given these assurances, the Commission found that the threat of entry would keep the Spanish telecommunications equipment markets competitive (essentially an "ease of entry" defense in the United States), and that the merger would not lead to a dominant position that threatened to impede competition. Based on similar facts in a U.S. market and similar findings about the competitive impact of an unstructured transaction, U.S. antitrust agencies almost certainly would have insisted on the divestiture of either Alcatel Standard Electrica S.A. or Telettra España had they the independent capacity to manufacture the equipment in question, or would have attempted to block the deal if the subsidiaries lacked this manufacturing capability.

The only blocking decision entered by the Commission through the end of 1991 was in Aérospatiale-Alenia/de Havilland. Aérospatiale SNI and Alenia-Aeritalia e Senlenia SpA jointly sought to acquire the de Havilland division from Boeing company. The Commission found that the market shares of the companies in Europe and worldwide, and the structure of the industry, would give the combined company an unassailably dominant position in the world market for commuter aircraft. Following the Commission's decision there were cries of outrage from Italy and France, and Martin Bangemann, the EC commissioner with oversight responsibility for the internal market and policy, staged a vigorous assault on the Commission’s decision to delegate to Brittan exclusive authority to initiate proceedings without any need to consult other commissioners. Bangemann’s effort was an explicit attempt to insert industrial policy concerns into a process he found governed solely by competition considerations. Although the Commission rejected the Bangemann proposal and renewed for another year the delegation of merger review authority to Brittan, politics and political pressure are likely to remain part of the merger control activity in the Community.

Given the widely divergent views of the member states towards merger control generally and the role of the Commission in particular, we can now

147. The Commission used a similar "open competition" approach in the Varta/Bosch transaction.
148. The U.S. result also depends on the considerable skepticism of the Antitrust Division and the FTC regarding the workability of the "ease of entry" defense.
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see more clearly why Brittan in the Lauterpacht Lectures continued to "sell" the Merger Regulation even after its promulgation. Although unanimously adopted by the Council and considerably weaker than the original Commission proposals, many in the Community were skeptical about the feasibility of the Merger Regulation. The Commission had to prove it was up to the task of reviewing notified mergers under extremely tight time constraints, particularly given the voluminous amount of information accompanying the notifications, the need to prepare decisions in nine official languages, the relatively small professional staff of the Merger Task Force, and the complexities of bureaucratic control that historically accompany Commission decisionmaking in competition matters. Moreover, there was apprehension over the ability of business to collect and supply the information demanded by the premerger notification form—much of which business regards as unnecessary—and the ability of the Commission to keep this highly proprietary business material confidential. Finally, there was concern over whether the Commission and the member states could work in harmony in merger control and whether the Commission would limit its analysis to competition or take other interests or even national policies into account. These concerns now have largely abated. The Commission has demonstrated to the satisfaction of most that the Merger Regulation is workable and that the Commission can apply it fully and fairly in a timely manner. Undoubtedly, the debate will continue over the proper balance between traditional competition concerns over the efficient allocation of resources and the industrial and social policy considerations of an open economy. This debate, however, is fundamentally no different from the ongoing discussion over the goals of the Sherman Act in the United States over the last century. The key is that the concept of Community merger control and national preemption has become the status quo and is no longer subject to serious dispute. If the Commission can continue its existing levels of performance as it is presented with greater numbers of analytically more complicated transactions after the coverage thresholds are lowered in 1994, Brittan will no longer have to cast himself in the role of a salesman.

IV. THE INTERNATIONAL HARMONIZATION OF COMPETITION LAW

A common theme in Brittan's two Lauterpacht Lectures is the need for increased international cooperation and understanding in antitrust regulation. As businesses and markets grow increasingly international in scope, more jurisdictions will find themselves interested in the competitive implications of a given transaction or market activity. As we have seen, the exercise of extraterritorial jurisdiction under the effects doctrine puts into sharp relief any tensions that may be present among the policies of interested countries, but these tensions equally can be illuminated by the use of the less expansive
Indeed, in a world populated by transnational mergers, acquisitions, and joint ventures, international distribution arrangements, and multinational technology licenses, antitrust regulation even under the strict territorial principle easily can generate discord in the international community.

To begin a new era of international cooperation, Brittan used the Lauterpacht Lectures to call for a treaty between the United States and the Community to provide for notification and consultation in matters of common interest, the exchange of nonconfidential information, mutual assistance in investigations, best efforts to cooperate in enforcement when interests coincide, and, when interests clash, a means to designate one party to undertake the investigation and any enforcement action and to require the other party to abstain.151

International agreements, while not common, are not new in antitrust law.152 The most important international agreement is the 1986 OECD Recommendation,153 to which the twenty-four member nations subscribe. The Recommendation urges that whenever an antitrust enforcement authority of a member country undertakes an antitrust investigation that may affect important interests of another member country, the investigating country should notify (in advance if possible) these other countries, and while retaining full freedom to act, solicit their views. Notification should be sufficiently detailed to permit an initial evaluation by the notified country of the likelihood of any effects on its interests, and should include the names of persons to be investigated, the activities under investigation, and the character of the investigation. The Recommendation further urges interested members, through consultations or otherwise, to seek a mutually acceptable means of approaching the business practice in question in light of respective national interests. If no satisfactory solution can be devised, the Recommendation invites the parties to use the good offices of the OECD Committee of Experts on Restrictive Business Practices with a view to nonbinding conciliation.

The United States also is a party to three bilateral antitrust agreements. The agreement with Germany, signed in 1976, is the earliest of these agreements.154 The German agreement, which codified existing informal practice, was designed more to facilitate cooperation in investigations and antitrust studies than to mitigate or reconcile conflicts of national interests. The agreement provides for assistance in the collection of information relevant to an

150. See supra notes 46-55 and accompanying text.
151. COMPETITION POLICY, supra note 1, at 20-21.
152. See generally 1-A HAWK, supra note 37, at 736-45, 786-800.
investigation, confidential treatment of exchanged information, cooperation on concurrent enforcement activities, and consultation regarding investigations or proceedings that might affect important interests of the other party. The agreement also provides that, to the extent compatible with "domestic law, security, public policy or other important national interests," the parties will not interfere with investigations carried out by each other. The German agreement generally memorializes the close ties between the two countries on antitrust matters and does not impose restrictions on investigatory or prosecutorial discretion.

The bilateral agreements with Australia and Canada, on the other hand, evolved in the wake of the uranium cartel proceedings and are designed to give fair warning to those countries of U.S. antitrust enforcement activities that may affect their interests. The Australian agreement, signed in 1982, provides that each party will give prior notice (to the extent possible) to the other party before commencing any criminal or civil investigation that may have implications for the notified party's interests, obligates the notifying party to consult at the request of the notified party, and requires both parties to "seek earnestly to avoid a possible conflict . . . and for that purpose to give due regard to each other's sovereignty and to considerations of comity." Significantly, notifications are to be made through diplomatic channels, not through the national antitrust enforcement agencies. The agreement with Canada, signed in 1984, is much like the Australian agreement, only more detailed with respect to the situations requiring notification, the timing of notification, and the method of delivery of the notification.

U.S. officials warmly greeted Brittan's invitation to negotiate a U.S.-EC antitrust agreement. A cooperation agreement reached the signers on September 23, 1991, demonstrating amazing dispatch for international negotiations. The agreement, a combination of the OECD and German models, is by far the most detailed of antitrust cooperation agreements to which the United States is a party. It provides for advance notification whenever enforcement activities of one party may affect important interests of the other party. In particular, notification is required under the following circumstances: 1) whenever enforcement actions are directed at conduct carried out in significant part within the other's territory, at a merger or acquisition in which at least one

155. Id. art. 4(1).
of the firms in the transaction is incorporated under the laws of the other party or one of its member states, or at activities believed to have been required or encouraged by the other party; or 2) when enforcement actions involve remedies that would, in significant respects, require or prohibit conduct in the other party’s territory. The agreement also requires the competition authorities of each party to render assistance to investigations and other proceedings conducted by the other’s competition authorities, at least to the extent compatible with domestic laws and interests and consistent with reasonably available resources. When one party learns of anticompetitive activities that may warrant enforcement action by the other party’s antitrust authorities, the knowledgeable party must inform the other party of those activities. Moreover, when one party believes it is being adversely affected by anticompetitive activities carried out in the other party’s territory, the harmed party may request the other party’s competition authorities to initiate appropriate enforcement action. This introduces for the first time the notion of "positive comity" in international antitrust enforcement, a theme stressed by both U.S. and EC officials at the signing of the agreement.

Significantly but not surprisingly, the agreement does not provide for any allocation of enforcement authority over matters in which both the United States and the Community have concurrent jurisdiction. Brittan, a wise and worldly politician, almost surely realized how impracticable his proposal was for the United States (if not for the Commission) in this regard, and rather offered it as an opening gambit to push the United States toward cooperation as far as possible. In any event, Brittan achieved an agreement requiring that:

[E]ach Party will seek, at all stages of its enforcement activities, to take into account the important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought . . .

The Agreement requires each party to consult at the other party’s request in an effort to avoid conflicts arising from enforcement activities. The agreement also recognizes that the potential impact of enforcement activities on the other party’s interests generally increases as a matter proceeds from investigation to prosecution to relief, thereby suggesting that continuing and perhaps increasing consultations may be in order as a matter goes forward. Finally, the agreement contains an extensive list of factors for consideration in accommodating each others’ interests. These factors include "[t]he relative signifi-

160. Id. art. II(2).
161. Id. art. IV(1).
162. Id. art. III(3).
163. Id. art. V(2).
164. Id. art. VI.
165. Id. art. VII(1).
166. Id. art. VI(2).
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cance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory," and "[t]he presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party’s territory."\textsuperscript{167}

These factors echo the type of considerations taken into account in a comity or jurisdictional rule of reason analysis, and to that extent are not remarkable. What is significant is that the United States and the Commission, two forceful proponents of the effects doctrine, have committed to each other to consult and consider these factors before taking enforcement action.

The U.S.-EC antitrust agreement is another major competition policy victory for Brittan and for the Community. With its comprehensive consultative obligations, the agreement ensures that the Community will be able to join with the United States, and not be shunted aside, in the consideration of the major business transactions and activities with implications for both sides of the Atlantic. Indeed, the agreement makes the Commission the natural European vehicle for most consultations with the United States, and to this extent permits DG IV to trump Germany's \textit{Bundeskartellamt} and Britain's Monopolies and Mergers Commission in dealing with the Justice Department and the Federal Trade Commission. The agreement also provides an excellent model for the Community in negotiating future antitrust cooperation agreements with other international antitrust enforcement powers. Finally, the agreement mitigates the obtrusiveness of the United States into business activities within the Community. To the extent consultation and openness aid understanding and encourage reconciliation of diverse national interests in competition matters, the agreement should help the Community and its member states to rein in the United States in its use of the effects doctrine in situations which threaten European interests.

\textbf{V. Conclusion}

Brittan's Lauterpacht Lectures mark a milestone in EC competition policy. Regardless of whether the Court of Justice accepts Brittan's invitation to recognize the effects doctrine as the law of the Community, the ability of the Community to protect its interests by asserting jurisdiction over extraterritorial anticompetitive activities is ensured in all significant cases by the now-established economic entity, implied presence and implementation doctrines. Brittan's jurisdiction lecture, if nothing else, puts the international community on notice that the Commission will use the tools at its disposal during his tenure to pursue an increasingly aggressive foreign competition policy. Domes-

\textsuperscript{167} Id. art. VI(3).
tically, nothing reveals the internal tensions within competition policy as clearly as the fashioning of a new merger control law. The Community lacked any merger control program for the first thirty-two years of its existence, and the tortured debate and stalemate that resulted for sixteen of those years in the wake of the Commission's first merger control proposal augured against a resolution. The successful adoption and implementation of the Merger Regulation, with Brittan as its principal architect, demonstrates that the Community can fashion a coherent and politically tractable domestic competition policy despite the widely divergent views of its member states. The signing in September 1991 of the U.S.-EC antitrust cooperation agreement caps the competition policy accomplishments of Brittan and the Commission to date, and symbolizes the emergence of the Community as a leading competition policy force in the world. EC competition policy has truly come of age.