THE EXTRA TERRITORIAL APPLICATION OF SOUTH AFRICAN COMPETITION LAW: LESSONS FROM THE EUROPEAN UNION AND THE UNITED STATES

by

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TABLE OF CONTENTS

CHAPTER 3
THE EXTRA-TERRITORIAL APPLICATION OF UNITED STATES ANTI-TRUST LAWS

3.1 Sections 1 and 2 of the Sherman Act

3.2 Mergers and Joint Ventures

3.3 "Effects" principle , Comity and the United States assertion of extra-territorial jurisdiction

CHAPTER 4
LESSONS FROM THE EUROPEAN UNION AND THE UNITED STATES

4.1 Problems facing the South African competition authority in the extra-territorial application of its competition law

- 4.1.1 Interfering with sovereignty
- 4.1.2 Trade friction with main trading partners
- 4.1.3 Absence of bilateral agreements
- 4.1.4 Shortcomings of domestic rules
- 4.1.5 Examination by different competition authorities
- 4.1.6 Business uncertainty
- 4.1.7 Exceptions

4.2 Cross-border competition issues: Possible solutions

- 4.2.1 "Effects"- principle
- 4.2.2 Sovereignty
- 4.2.3 Comity
- 4.2.4 Expert groups
- 4.2.5 Co-operation and consultation

CONCLUSION

Notice to the reader

The Treaty of Amsterdam entered into force on 1 May 1999. This Treaty amends the Treaty on European Union and provides for the renumbering of the articles of both the Treaty on European Union and the Treaty establishing the European Community.

As this work was started before 1 May 1999 and most of the content and the majority of references relate to the period before 1 May 1999, reference is made to the old numbering.

The corresponding old and new numbers of the articles in this paper are:

Old Number	*New Number*
Article 85	Article 81
Article 86	Article 82

INTRODUCTION

The extra-territorial application of national competition laws remains current in the international legal community for several reasons. Amongst these are the constant increase in cross border trade, the opening up of more markets, the increase in so called "mega-mergers" and the fact that no international competition rules exist. As a result international conflict relating to the assertion of jurisdiction is as intense as ever with the potential of ever increasing international conflict.

In recent years the debate over the circumstances in which a country can assert jurisdiction over an extra-territorial economic activity, having anti-competitive effects inside its territory, has been reinvigorated. It is clearly illustrated by matters like the *Gencor Lohnro* merger[1], the *Boeing/McDonnell Douglas* merger[2], the *Nippon Paper Industries* case[3] and the continued calls for the establishment of international competition laws and international competition authorities, the latest being the OECD Conference on Trade and Competition in Paris, 29-30 June 1999[4]. In the *Genco /Lohnro* case[5] the European Communities competition authorities asserted jurisdiction over economic activities conducted within South Africa. The *Boeing /McDonnell Douglas* case[6] focussed on the assertion of jurisdiction by the EC competition authorities over a merger between two American aircraft companies, co-operation between the European Union and United States competition authorities[7] and the call for an international competition authority. The *Nippon* case[8] illustrated the political sensitivity of the issues, seen in the light of the United States's chronically large trade deficit with Japan. In this case the United States asserted jurisdiction to a price fixing conspiracy that occurred outside the United States.

Globalisation is a fact of modern business. Many companies now function on an international level and competition cases therefore have a significant international component. *The Wall Street Journal* reported on 30 November 1998, in one issue, on four mega-mergers: *Exxon/Mobil*, the number one and two oil companies in the United States,

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[1] *Gencor/Lohnro* Commission Decision, Case IV/M.619, *OJ* L 011 p. 30, 14.01.1997
Gencor Ltd v Commission of the European Communities, Case T-102/96, Judgment of the Court of First Instance of 25.03.1999, not yet reported

[2] *Boeing/McDonnell Douglas* Commission Decision IV/M. 877, *OJ* L 336 of 08.12.1997

[3] *United States v. Nippon Paper Industries Co. Ltd* C.A. 1 No. 96-2001

[4] OECD Conference on Trade and Competition, Paris, 29-30 June 1999, Information taken from OECD Homepage on Internet <*http://www.oecd.org.dp/index.htm*>

[5] Supra, at 1

[6] Supra, at 2

[7] Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, 23.09.1991, *OJ* L 095/47, 1995
See also Lampert "International Co-operation Among Competition Authorities" 1999 *European Competition Law Review,* 214

[8] Supra, at 3

to create the world's largest privately-owned oil company; *Hoechst/Rhone-Poulec*, to form the world's largest life-sciences company; *Deutsche Bank/ Bankers Trust*, to create the world's highest asset financial services group and *Viag/Alusuisse Lonza*, to become a global leader. Lately the *Carrefour/Promodes* merger has also featured in many papers. The continued growth in internationalisation of business activities increases the likelihood that anti-competitive practices in one country or the co-ordinated behaviour of firms located in different countries may adversely affect the interests of those countries. It may also increase the number of transnational mergers that are subject to the merger control laws of more than one country. The unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned.

The South African competition authorities have to ensure that anti-competitive practices in foreign markets do not prevent South African companies from entering those markets, do not destroy competitiveness in South Africa or exploit South African consumers. The entry of direct foreign investors into South African markets may intensify competition in the domestic market, but can have negative effects if international investors simply start merging with large domestic firms. In order to regulate the creation of anti-competitive practices the South African competition authorities have to utilise their immediate instrument, the Competition Act 89 of 1998 (hereafter "Competition Act).[9]

The 1998 Competition Act provides specifically for the application of South African competition law "to all economic activity within, or having an effect within, the Republic".[10] Until now no case relating to the extra-territorial application of South African competition law has formally been brought before the South African Competition Board (Competition Commission in the Competition Act)[11] and the South African Courts have handed down no judgement. However, in a number of cases informal discussions with other authorities have been conducted and some agreements have been reached with foreign businesses operating in the South African market.

Chapter 1 looks at the provisions in South African law relating to the extra-territorial application of South African competition law, why it is important for the South African competition law to provide for the extra-territorial application, previous arrangements with business and the possible reaction of foreign nations to the assertion of jurisdiction by South African competition authorities over economic activities outside South Africa. Chapter 2 looks at the extra-territorial application of competition law in the European Union and Chapter 3 at the extra-territorial application of competition law in the United States Many other countries also provide for the extra-territorial reach of their competition laws, for example Germany. The extra-territorial reach of the German anti-trust laws centre on the construction and application of Article 98(2) of the German

[9] Competition Act 89 of 1998, in force from 1 September 1999

[10] Competition Act 89 of 1998 Section 3

[11] The Competition Board ceases to exist under the Competition Act 89 of 1998. The Act establishes a Competition Commission, a Competition Tribunal and a Competition Appeal Court.

Gesetz gegen Wettbewerbsbeschrankungen: *"Dieses Gesetz findet Anwendung auf alle Wettbewerbsbeschrankungen, die sich im Geltungsbereich dieses Gesetzes auswirken, auch wenn sie ausserhalb des Geltungsbereichs dieses Gesetzes veranlasst werden..."* Accordingly, this statute applies to all restraints of competition, which have an effect within the territorial scope of the statute, even when they are caused outside of the territorial scope of the statute. However, this paper is limited to a discussion of the situation in the European Union and United States for two reasons: Firstly, South Africa, the United States and the European Union have always been close trading partners; secondly, both the European Union and the United States apply some form of "effects"-doctrine to establish jurisdiction in the extra-territorial application of their competition laws and this doctrine will also give the South African competition authorities the necessary jurisdiction in extra-territorial competition matters. Many lessons can therefore be learnt form the experiences of the European Union and United States in this regard.

Competition law can only react to cross-border anti-competitive behaviour in a limited way. In Chapter 4 international law limits on the extra-territorial application of competition laws will be discussed and possible solutions to the problems. There are no existing binding rules relating to the practices of private firms at the multilateral level. From their very nature national competition rules can only have domestic effect in the absence of binding rules at the international level. As competition policy aims to create a level playing field for all players on the market, it is important to consider new instruments for the common application of competition rules for example through agreements with South Africa's closest business partners.[12] Closer co-operation with other countries in the form of specific notification procedures, internationally accepted time limits, common criteria for evaluating cases, exchange of information and consultation may prevent unnecessary friction with the main South African trading partners. Bilateral agreements, such as the one between the European Unon and the United States to promote co-operation and co-ordination and multilateral agreements within the framework of the WTO and OECD will be looked at.[13]

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[12] Van Miert "What does a level playing field mean in the global economy?" Speech presented to the *Davos World Economic Forum* on January 30, 1998

[13] Agreement Regarding the Application of Competition Laws with the United States on 23 September 1991 4/1991 *Common Market Law Reports* 823-831
Van Miert "Transatlantic Relations and Competition Policy" 1996 *Competition Policy Newsletter* Vol. 2 Number 3 at 1

CHAPTER 1

THE EXTRA-TERRITORIAL APPLICATION OF SOUTH AFRICAN COMPETITION LAW

1.1 The need for rules relating to the extra-territorial application of competition laws

Because the ability to monitor anti-competitive practices are severely limited via national means it is crucial to be able to address private anti-competitive practices at an international level. Many countries are currently re-writing their competition laws to fill this vacuum, in part stimulated by international cartels that have hurt consumers world-wide.

Joel Kleyn, head of the United States anti-trust division, at the OECD Conference on Trade and Competition in Paris 29-30 June 1999 observed that: "Over 80 countries now have anti-trust laws of some sort and another 20 or so countries are drafting such laws. Over 50 countries have pre-merger notification regimes of some sort and many anti-trust agencies not only in major industrialised countries but also in many developing countries have active anti-trust enforcement programs". In May 1999 the United States for example fined several participants in an international vitamins cartel that operated successfully for almost a decade. A Swiss and a German firm pleaded guilty and agreed to pay the largest criminal fines in anti-trust history, $725 million. [14]

Businesses operate on a global level and business activity may be organised in a way that escapes sanctions of a specific national authority. The same business activity may fall within the jurisdiction of two or more competition authorities, each applying its own national rules with the possibility of conflict all too apparent. Co-operation between authorities is therefore crucial.

The challenges associated with the dismantling of classical trade barriers remain high. In the absences of state protection companies may act to restrict the ability of new entrants to gain a foothold in their traditional markets. Competition concerns can also arise in the privatisation of state-owned enterprises when, as a condition of purchase, the foreign multi national demands those governments erect barriers to entry or permit certain pricing practices. Often, developing countries hungry for foreign investment may have no choice but to give in to these demands.

Action against mergers must be carefully analysed, this means blocking only mergers that are likely to harm consumers or setting conditions that allow mergers to go forward

[14] "Vitamin Cartel" 1999 *Global Competition Review* at 7

without inhibiting competition. It is therefore important to form a global view of the operation by gathering as much information about the operation on a world-wide scale. Competition policy is active in a constantly changing area and should not loose sight of the importance of reviewing regulations, some of which can inhibit competition and others which can help competition.

The South African authority must prevent practices outside South Africa from destroying companies and competition inside South Africa or exploit South African consumers. It is important to ensure a fair play ground for all the market players.

It is also important for the South African authority to prevent anti-competitive practices in third markets from blocking the entry of South African companies to those markets.

1.2 South African Competition legislation

1.2.1 Competition legislation before 1955

Prior to the Regulation of Monopolistic Conditions Act 54 of 1955, competition policy in South Africa, was reflected in numerous individual Acts dealing with a specific sector for example, the Board of Trade and Industries Act 33 of 1924, the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 and the Profiteering Act 27 of 1920.[15] These Acts regulated situations unique to South Africa and as such were never enforced in matters relating to the subject of this paper.

1.2.2 Regulation of Monopolistic Conditions Act 25 of 1955

The 1955 Act provided mainly for the prevention and control of monopolistic conditions and some other incidental matters. Section 2 stated that the Act should apply to all monopolistic conditions which "has or is calculated to have the direct effect of..." The Section then proceeds to list these effects in (i) to (vi).

The Act took the form of an enabling measure and contained no *per se* prohibition. It provided for each monopolistic condition to be judged in accordance with the public interest. The Board of Trade and Industries could undertake formal investigations if so directed by the Minister. If its investigations revealed monopolistic conditions, which were not justified in the public interest, the Board had to recommend suitable remedial steps.

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[15] Mouton en Lambrechts "Competition Policy in the Republic of South Africa" 1982 *Modern Business Law* 58

In the period 1955-1979, the Board investigations resulted in four prosecutions and convictions, none having a "foreign nature".

It is the view of this author, that if ever the Board was presented with a scenario of a monopolistic condition (as defined in the Act) which satisfied the "public interest"- test, whether the condition was created or controlled from outside the Republic or between foreign firms, the Act would have given the necessary jurisdiction.

1.2.3 Maintenance and Promotion of Competition Act 96 of 1979

The 1979 Act provided for all aspects of South African competition law at the time, including mergers. The Competition Board was empowered to investigate acquisitions, restrictive practices and monopoly situations. Like the 1955 Act, the 1979 Act constituted an enabling measure, containing no *per se* prohibitions. Each restrictive practice had to be investigated separately and judged according to the principle of public interest. Similarly, with regard to acquisitions, the Board had to inquire whether or not these were restrictive of competition. No merger or restrictive practice, however undesirable from the point of view of competition, was directly prohibited in the Act itself.
Section 1 of the Act defined a "restrictive practice". According to the section a restrictive practice exists when three elements are simultaneously present-
(a) a restriction on competition, direct or indirect;
(b) the restriction has or is calculated to have one or more of 7 effects stated in the section; and
(c) the restriction of competition is caused by one or more of four stated conditions
In other words a restrictive practise exist if competition is restricted either directly or indirectly, by any act or omission or situation.

As in the 1955 Act there was no specific provision for the territorial jurisdiction of the Act and the question of extra-territorial application was never formally addressed under the 1979 Act. Looking at the wide description above, it seems clear that the Board was empowered to investigate matter outside the Republic, if it became necessary. The Board indicated in its Report 20 that it could take cognisance of an acquisition occurring outside South Africa if such acquisition had a negative effect on competition in South Africa.[16]

[16] Report on the Board's investigation into alleged acquisitions by Anglo American Corporation of South Africa and De Beers Consolidated Mines Limited Goldfields of South Africa, January 5, 1989

1.2.4 Competition Act 89 of 1998

The introduction of the 1998 Act heralds an exciting development in South African competition law. It is clear that previous laws did not address the extra-territorial aspect of competition law effectively. The focal point of the extra-territorial issue in South African Competition Law can be found in Section 3 of the Competition Act 89 of 1998: "The Act applies to all economic activity within, or having an effect within the Republic." This sentence embodies the codification of the "effects" concept in South African competition law. The doctrine is based on the principle that the criterion for applying competition law to a particular situation is not the geographical location of the anti-competitive action, but the location of the anti-competitive effect. The Act intends to achieve in a general sense that all restraints of competition having a domestic effect can be prohibited regardless of where and by whom such restraints were agreed upon. The only limitations are those stated in Section 3 (a)-(d).

The economic activity referred to in Section 3 includes restrictive horizontal practices (Chapter 2, Section 4), restrictive vertical practices (Chapter 2, Section 5) and an abuse of a dominant position (Chapter 2, Section 6). Certain practices are outright prohibited.

The conditions for the application of the South African merger provisions are set out in Chapter 3, Section 11 and 12. According to Section 11 the Minister must in consultation with the Competition Commission and by Notice in the Gazette as soon as the Act comes into operation and thereafter at intervals of not less than five years
(i) determine the threshold of combined annual turnover, or assets, in the Republic, either in general or in relation to specific industries, at or below which Chapter 3 does not apply to a merger;
(ii) determine a second threshold of combined annual turnover, or assets, in the Republic, either in general or in relation to specific industries, higher than the threshold referred to in (i), for the purpose of determining the categories of mergers (being an intermediate merger or a large merger as defined in Article 11(3)); and
(iii) provide a method for the calculation of annual turnover and assets.

"Merger" is defined as being the direct or indirect acquisition or direct or indirect establishment of control, by one or more persons over all significant interests in the whole or part of the business of a competitor, supplier, customer or either person, whether that control is achieved as a result of
(a) purchase or lease of the shares, interest, or assets of that competitor, supplier, customer or other person;
(b) amalgamation or combination with that competitor, supplier, customer or other person; or
(c) any other means

No mention is made of international law limits, comity considerations or more practical limitations relating to the international competence of the Competition Commission, the

Tribunal and the Competition Appeal Court. In essence the "effects"-principle is not limited in any way. This means that the South African "effects"-principle is much wider than the American "effects"-principle or the European Union version thereof.

The deficiency of an exclusively "effects"-based approach to extra-territoriality has become apparent in the United States during the last decade (also in Germany where a pure "effects" doctrine was followed) and both countries have taken steps to remedy it. Looking back at the original hostile response to the strict application of the "effects"-principle in the United States, it is surprising that the South African legislator did not attempt to limit the principle. As it stands it will be for the Tribunal and the Competition Appeal Court to apply the pure "effects" test or to limit it by way of a "rule of reason" approach or comity principles.

1.3 Application of South African competition legislation to economic activity outside South Africa or between concerns not incorporated in South Africa

In December 1998 the British based parent Cadbury Schweppes plc of Cadswep (55% owned by the parent) announced an agreement with Coca-Cola to sell its soft drinks brands to the United States drinks company. The agreement covered trademark ownership for all Cadbury Schweppes major soft drink brands outside South Africa, France and the United States. Initially it was expected that the South African competition authorities would block the sale in South Africa.[17] However, the Competition Board cleared the deal. The Board stated that it could only block a merger if it was shown that the merger would reduce competition. Coca-Cola has a market share of 83 percent in South Africa and Schweppes' share was estimated at about 15 percent. The evidence before the Board proved that the competition situation post-merger would have been the same as the current situation. The Competition Board observed that the deal would not change the competitive landscape in South Africa, since Coke has bottled and distributed the Cadbury brands since 1960 in South Africa. According to Coca Coal spokesman, Ben Deutsch, the acquisition would only marginally contribute to Coke's volume and this would not affect the way these brands are currently marketed. The Board did reserve the right to re-open the matter, should the situation change in the future or new information be presented to the Board.[18]

Recently the Competition Board also entered into informal discussions with the parties relating to the *BAT/Rothmans* merger. [19] Although the merger would have given rise to a 95% market share, the Board declined to undertake a formal investigation. During the

[17] "Cadswep gains on Coca-Cola deal" 1999 *Reuters News Services* 05/07/99
[18] *Reuters News Service*, 07/07/99, 02/09/99
[19] Case IV/M.1415 of 17 March 1999

informal discussions serious anti-competitive issues were raised and the parties undertook to dispose of some pipe tobacco interests to an empowerment group.[20]

1.4 Possible reaction of foreign nations to the assertion of jurisdiction by the South African authority

Judging by the reaction to United States assertion of extraterritorial jurisdiction in anti-trust matters foreign nations may:

(i) protest by way of diplomatic notes in the initial phase.

(ii) enact statutes to impede discovery outside South Africa. The first "blocking" discovery was enacted by the Parliament of Ontario in response to a United States investigation of the Canadian newsprint industry in 1947.[21]Generally such statutes make the provision of certain evidence unlawful. Some prohibit compliance with foreign judgements.

(iii) enact statutes rendering certain types of South African anti-trust judgements unenforceable in foreign courts, for example the Australian Foreign Proceedings (Excess of Jurisdiction) Act 1984[22]. Non-enforcement of judgements is done on the basis of international law. In the wake of the *Westinghouse* case[23], South Africa enacted the Protection of Businesses Act 99 of 1978. The Act includes provisions that protect natural and juristic persons against foreign judgements that give the plaintiff multiple compensation. The Act also provides that a wide ranging number of judgements given outside the Republic may not be enforced in its territory.

(iv) enact legislation to recover damages paid in satisfaction of South African anti-trust judgements, "clawback" legislation.[24] Clawback provisions support the non-recognition of judgements enabling anti-trust judgement debtors to strike back at treble compensation awards by recovering damages from the plaintiff that are in excess of actual damages.

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[20] Information obtained from Mr. Wouter Meyer, South African Competition Board. Letter on file with author.

[21]Business Records Protection Act, R.S.O., BB Rule 19.6.1 (b) T.2 pp. 227-9 ch 54 (1970) (Can.) Comment in 1978 *Texas International Law Journal* Volume 8 at 57

[22] No. 3, Australian. Acts 1984

[23] *Westinghouse Electric Corporation v Rio Algom Ltd* 617 F2d 1248

[24] Neuhaus "Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law", 81/1981 *Columbia Law Review* at 1097

1:5 Jurisdiction under International law

Under international law, a state has prescriptive jurisdiction over individuals where it has a substantial, direct and foreseeable relationship with the conduct of the individuals. There are several jurisdictional principles which are recognised under international law and which serve as basis for the extraterritorial extension of jurisdiction for example, universality, nationality and territoriality for example. The appropriateness of a particular principle depends on the nature of the conduct over which jurisdiction is being extended. The Permanent Court of Justice recognised the possibility of extra-territorial jurisdiction in the *Lotus* case.[25] Many states have relied on an objective notion of in competition law cases for example the European Union in the *Wood pulp* case. [26] This case confirmed that the Community's jurisdiction to apply its competition rules to anti-competitive conduct occurring outside the European Union is limited by the international territoriality principle as universally recognised in international law.

The German proceedings relating to the *Philip Morris/Rothmans*[27] transaction provide a good illustration of how international law considerations can be incorporated in a merger analysis. The Federal Cartel Office blocked a merger between two non-European Union based multinationals, Philip Morris (US) and Rothmans (South Africa). The order aimed at preventing the merged enterprise from acquiring a dominant position in the German market. The South African Government objected to the proceedings. It argued that the actions of the Federal Cartel Office would violate the international law principles of non-intervention because they would violate the rights of South African nationals to dispose of the foreign assets.

The Federal Cartel Office based its decision on the "effects" principle, which is recognised by international law and which established the jurisdiction of a state to regulate matters that have a direct effect within its borders. It stated that limitations on the authority can only result from the principle of non-intervention in the internal affairs of other states as well as the international law prohibition on abuse of jurisdiction. Abuse of jurisdiction relates to the disproportionateness between the domestic regulatory interests and the disadvantages that the affected foreign enterprise or the corresponding states suffer through the issuance of the sovereign act.
The FCO's non-intervention principle required that the respective governmental interests be weighed according to a defined standard. Only when the interests of the foreign state in the execution of the merger significantly outweigh the German interest in preventing it, can there be a violation of the non-intervention principle.

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[25] *The Lotus* Permanent Court of International Justice. Serie A No 10 Serie C No 13-11 September 7, 1927
[26] Cases C 89, C104, C114, C116, C117, and 125-129/85, *Ahlström Osakeyhtio and others. v Commission of the European Communities* 27 September 1988 European Court Reports 5193 at 5243
[27] Decision of Kammergericht of July 1, 1983 Kart 16/82. The English version was published in 4 *CCH Common Market Reporter* par 40 571

CHAPTER 2

THE EXTRA-TERRITORIAL APPLICATION OF EUROPEAN COMMUNITY COMPETITION LAW

2:1 Introduction

It is generally accepted that the European Communities competition rules namely, Article 85 and Article 86 of the Treaty Establishing the European Economic Community[28] and the European Community Merger Regulation 4064/89 (hereafter Merger Regulation)[29] are in certain cases applicable to economic transactions between undertakings situated outside the territory of the 15 Member States of the European Union.

Article 85 (1) of the Treaty provides:
"The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited; any agreement between enterprises, any decision by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market"

In *Ahlström Osakeyhtio and others v Commission* (hereinafter "*Wood pulp* decision")[30] the European Court of Justice stated that Article 85 is applicable to agreements concluded outside the European Union but implemented within the European Union.

Article 86 of the Treaty provides:
"Any abuse by one or more enterprises of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States".

Article 86 is applicable even when non-European Union undertakings abuse their dominant position in the Community, the existence of a dominant position in the Community giving territorial jurisdiction.

In terms of Regulation 4064/89[31] the Commission has the necessary jurisdiction to investigate a concentration when the world and Community thresholds are met. The place

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[28] Treaty Establishing the European Economic Community, March 15, 1957
Lastly amended by the Amsterdam Treaty, May 1999
[29] *OJ* L 395, 31.12.1989, *OJ* L 257, 21.09.1990 last amended by Council Regulation 1310/97 of 30 June 1997, *OJ* L 180/1, 09.07.1997
See also Bellamy and Child *Common Market Law of Competition* 4th Edition (1993)paras 2-125
[30] Supra, at 26
[31] Supra, at 29

of business of the undertaking plays no role. The latest case in which this matter was discussed was the merger between *Gencor/ Lohnro*[32] and the subsequent judgement.[33]

2:2 Extra-territorial application of Article 85

In 1964 the European Commission already dealt with the extra-territorial application of their competition laws and looked at the so-called "effects"-doctrine.[34] In *Beguelin Import v. G.L. Import Export* the European Court of Justice did not give a ruling to this extent, but there were some dicta which suggested that the Court might approve of the effects doctrine.[35] The Court dealt with an agreement where one of the parties was situated in a foreign country, but the agreement had an effect in the common market.

It was not until 1972 when Advocate General Mayras specified the requirements for an effect to trigger the extra-territorial application of Article 85 and 86 in *Imperial Chemical Industries v Commission*[36](known as the *"Dyestuffs"*-case). These requirements are that it should imply a direct and immediate restriction of competition and it should be reasonably foreseeable by the infringing undertaking and the effect produced must be substantial.[37] The Court exercised jurisdiction over the parent company by means of the subsidiaries based within the Community. The judgement however, does not contain a specific ruling on the "effects"-doctrine. Instead the Court based its judgement on the "economic entity" doctrine which justified the fact that the Commission had taken jurisdiction on the basis of the territoriality principle.[38]
The European Court of Justice went behind the legal distinction between parent and subsidiary undertakings and said that ICI (although registered outside the EC), by making use of its power to control subsidiaries in the community, was able to ensure that its decisions were implemented in the common market. The fact that the subsidiary was a "separate legal entity" was not sufficient to exclude the possibility of imputing its conduct to the parent company.This approach was also followed in the *Continental Can* case[39] .

In 1984 the European Commission asserted jurisdiction on the basis of the "effects"-doctrine in the *Wood pulp* Decision.[40] It was said that jurisdiction can be asserted over conduct which has occurred wholly outside the territory of the state claiming jurisdiction, justified because of the consequential economic effects within the territory of that state.[41]

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[32] Supra, at 1
[33] Supra, at 1
[34] Commission Decision *Grosfilex-Fillestorf, OJ 58/915* of 9 April 1964 and Commission Decision 1 June 1964, *Bendix-Mertens en Straet, OJ 92/1426* of 10 June 1964
[35] EC Court of Justice Case 22/71 of 25 November 1971, European Court Reports 1971, 949
[36] European Court Reports 1972, 630, Court of Justice Case 48/69
[37] Opinion at 687-694.
[38] Mann "The Dyestuff Case in the Court of Justice of the European Communities" *International law Quarterly Review* (22) 1973 at 35
[39] Case 6/72 1973 European Court Reports 219
[40] 19 December 1984, Case IV.29.725 *OJ L 85/1* of 26 March 1985
[41] Van Gerven "EC Jurisdiction in Anti-trust Matters: The Wood Pulp Judgement" 1989 *Fordham Corporate Law Institute* (Hawk ed. 1990) 451 at 463

The Commission sued non-EC wood pulp producers for alleged restrictive practices that were a restraint of trade within the Common Market. Some defendants argued that there was no jurisdiction over them because they were located outside the Common Market. The Commission stated that "Article 85 of the EC Treaty applies to restrictive practices which may affect trade between Member States even if the undertakings and associations which are parties to the restrictive practices are established or have their headquarters outside the Community, and even if the restrictive practices in question also affect markets outside the EC".

The Commission argued that the economic effect was substantial and intended as "shipments affected by these agreements and practices amounted to about two-thirds of total shipments of bleached sulphate wood pulp to the Community and some 60% of Community consumption" and that "the agreements and practices appeared to have applied to at least the vast majority of the sales of the relevant products by the parties during the relevant periods".

The effect was direct as the producers were "exporting directly or doing business within the Community" and the concerted practices "concerned shipments made directly to buyers in the Community or sales made in the Community to buyers here".
In order to establish a territorial link with the Community the Commission set an implementation requirement. Implementation was defined as trading into the Community. This meant that jurisdiction did not arise from the concerted practices of the pulp companies, which were situated outside the Community, but from their conduct namely direct trading in the Community or using sales offices or agents to trade in the Community (similar to the *ICI* case mentioned above).[42] Torremans observed that the economic entity doctrine, as applied in the *ICI* case could not be applied as, depending on the pulp company involved, there were either no subsidiaries in the Community or the control exercised over them was not substantial enough.[43]

Subsequently, the European Court stated clearly that Article 85 of the Treaty applies to restrictive practices which may affect trade between Member States even if the undertakings and associations which are parties to the restrictive practices are established or have their headquarters outside the Community and even if the restrictive practice in question also affects markets outside the Community.[44] The Court asserted jurisdiction over the firms outside the Community by the fact that they implemented a price fixing agreement (reached outside the Community) by selling to purchasers within the Community.

Although Advocate General Darmon argued strongly in support of the "effects"-doctrine, that Article 85 applied whenever an effect on inter-state trade was found, the Court did

[42] Lange and Sandage The Wood pulp Decision and its implications for the scope of the EC Competition Law, 1989 26 *Common Market Law Review* 137-159
[43] Torremans " Extraterritorial application of EC and U.S. Competition Law" 1996/8 *European Law Review* 284
[44] Supra, at 26

not use the term "effects"-doctrine, but laid down an implementation requirement. It is the implementation of an agreement or a concerted practice in the Community that gives jurisdiction to the Commission. Implementation is defined in terms of engaging in a transaction with a Community customer, meaning a transaction involving the price, quantity or quality or a product sold to a Community customer.

The Court therefore did not advocate an unrestricted application of the "effects"-doctrine. The KEA passage of the judgement indicates that the effect should be direct and the implementation requirement seems to imply that the effect should be substantial and intended. [45]The judgement drew much criticism based on the fact that the court had actually applied the direct "effects"- doctrine without due justification and qualification. It is now, however, accepted by many writers that the European Court of Justice has applied the "effects"- doctrine" in all but name".[46]

Following the *Wood pulp* case the Commission has used the concept of implementation widely to assert jurisdiction over questionable conduct, for example in the case of a Norwegian producer of PVC that allegedly participated in a price fixing cartel,[47] and with regard to price fixing and set quotas by suppliers of low-density polyethylene.[48]

2:3 Extra-territorial Aapplication of Article 86

The extra-territorial application of Article 86 does not cause specific international problems because of the requirement of a dominant position within the Common Market.

The jurisprudence relating to Article 86 do not contain any reference to the "effects"-doctrine. The *Wood pulp* doctrine relates specifically to restrictive agreements. Similarly the Commission decisions on Article 86 does not specifically mention the extra-territorial application of Article 86. The Commission has, however, applied sanctions to undertakings situated outside the Community in terms of Article 86. These decisions being approved by the European Court of Justice. In *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*[49] (the *Commercial Solvents* case) the Commission fined CSC, an American partnership and ICI, the Italian daughter, because they refused to supply essential materials to the Italian concern Zoja. In *Europemballage and Continental Can v Commission*[50] (the *Continental Can* case) of 21 February 1973

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[45] Ferry "Towards Completing the Charm; The Woodpulp Judgement" 1989 *European Competition law Review* 58-73

[46] Friend "The long arm of Community Law, *European Law Review.*" 169, 1989
Van Gerven "EC Jurisdiction in Anti-trust Matters: the Wood Pulp Judgement" *Fordham Corporate Law Institute. 1990 ed (1989)*

[47] *Re the PVC Cartel: The Community v Atochem SA, OJ L74/1*, 14 1989

[48] *Re the LdPE Cartel: The Community v Atochem SA OJ L 74/21*, 35 1989

[49] 6-7/73, *European Court Reports* 1974 223

[50] 6-72, *European Court Reports* 1973, 215

Continental Can was accused of an abuse of its dominant position by obtaining control over a competitor via the interference of a daughter concern Europemballage.

2:4 Extra-territorial application of the Merger Regulation

The source of the European Commission's jurisdiction over concentrations is Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings the European Community Merger Regulation[51]. The Commission has jurisdiction in respect of the transaction if (i) it qualifies as a concentration and (ii) has a Community dimension. "Concentration" refers to a change in control over another undertaking.[52] The concept includes mergers, acquisitions and "full function" joint ventures.[53]

The wide scope of the Commission's authority to review and prohibit transactions outside the Community is not the result of the definition of a concentration, but the implications of the definition of "Community dimension". According to the Merger Regulation concentrations have a Community dimension if in the last year the undertakings had a combined world-wide turnover of ECU 5 billion and at least two of the undertakings each had a turnover in the Community of ECU 250 million. If each of the undertakings concerned achieves more than two-thirds of its Community-wide turnover in one and the same Member State the concentration will not have a Community dimension even if the thresholds mentioned above are exceeded.[54]

If the concentration does not meet the thresholds under the above test, it may still be considered as having a Community dimension if it meets a further test. A concentration has a Community dimension under the supplementary test if in the last year:
(i) the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2 billion;
(ii) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;
(iii) in each of these three Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 20 million; and
(iv) the aggregate Community-wide turnover of at least two of the undertakings concerned is more than ECU 100 million.

Article 1 does not require that, in order for a concentration to be regarded as having a Community dimension, the undertaking in question must be established in the Community or that the production activities covered by the concentration must be carried

[51] Supra, at 30
[52] Commission Notice on the concept of a concentration 1998 *OJ* C 66 at 5
[53] For a description of full function joint-ventures see, Commission Notice on the concept of full function joint-venture, 1998 *OJ* C 66
[54] Commission Notice on the notion of undertakings concerned 1994 *OJ* C 385 at 12 and Commission Notice on calculation of turnover 1994 *OJ* C 385 at 21

out within Community territory. The specific geographic location of the companies is therefore not important in deciding whether a concentration exists.

The Commission has asserted jurisdiction over the merger of two non-European Union undertakings,[55] over the acquisition of joint control over a non-European Union undertaking by an European Union undertaking and a non-European Union undertaking[56] and the acquisition of sole control of a non-European Union undertaking by a non-European Union undertaking. [57]

The *Boeing/McDonnell Douglas* merger was an example of the last scenario. On 19 March 1997 the European Commission announced that they would proceed with an in-depth investigation into the proposed merger between Boeing Company and the McDonnell Douglas Corporation (MDC), both American. The transaction involved the acquisition by Boeing, a company that accounts for roughly 60% of the sales of large commercial aircraft of a direct competitor in a market in which there is only one other significant rival, Airbus Industries, a European consortium. It was only after substantial last-minute concessions by Boeing, that the merger was authorised on 23 July 1997 by DG IV, the Competition authority of the European Union.[58] The United States Federal Trade Commission earlier cleared the merger.[59] The Federal Trade Commission based its decision on the view that McDonnell Douglas did not constitute a meaningful competitive force in the commercial aircraft market and that there was no economically plausible strategy McDonnell Douglas could follow to change this prospect.[60] The merger had the support of the Clinton administration and the United States Vice-President, Al Gore, gave a warning that the United States would take action to prevent the EC Commission from blocking the merger by going to the World Trade Organisation or possibly imposing trade sanctions.[61] "The European Union can't tell American companies how to do business" and "It seems ludicrous for the European Union to turn around and dismiss the Federal Trade Commission ruling" were statements made by Jim Talent, a Missouri Republican in the House of Representatives.[62] Similar comments were heard from Norm Dick when he warned that "we could be heading for a major trade war with the European Union over this" and if the Europeans make "unrealistic demands, the United States government is going to have to retaliate".[63] Throughout the saga the

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[55] Case IV/M.985 *Credit Suisse/Winterthur* October 15, 1997, Case IV/M.642 *Chase Manhattan/Chemical Banking* October 26, 1995, Case IV/M.1138 *Royal Bank of Canada/Bank of Montreal* April 1, 1998

[56] Case IV/M.619 *Gencor/Lohnro* 1997 *OJ* L 11 at 30, Case IV/M. 236 *Ericsson/Ascom* July 8, 1992, Case IV/M.648 *McDermott/ ETPM* November 27, 1995

[57] A non-exhaustive list includes: Case IV/M. 1120 *Compaq/Digital, Boeing/ McDonnell Douglas* Case IV/M.877 1997 *OJ* 336 at 16, Case IV/M. 069 *Kyowa/Saitama Banks* March 7, 1991; Case IV/M. 963 *Compaq/Tandem* August 11, 1997; Case IV/M. 977 *Fujitsu/Amdahl* September 8, 1997, Case IV/M.1069 *WorldCom/MCI* 1997 *OJ* C 362 at 6

[58] Commission Press Release *IP/97/729*, 30.07.97 and *EUROPE*, no 7022, 24.07.97

[59] FTC Press Release September 23, 1997

[60] Statement by Pitofsky and Commissioners Steiger , Starck and Varney, *File No 971-0051*, 1 July 1997

[61] *IP/97/729* of 30 July 1997, *The Times* July 23 1997 at 25 and 29

[62] *EUROPE*, no 7019, 18.07.1997 at 12

[63] *EUROPE*, no 7019, 18.07.1997 at 12

European Union and the government of the United States carried out consultations according to the 1991 Agreement on the application of their competition laws.[64]

The Commission took into account, consistent with European Union law, concerns expressed by the United States Government relating to important defence interests and limited the scope of its action to the civil side of the operation.[65] In announcing the outcome of the affair, Mr. Karel van Miert, Competition Commissioner for the European Union stressed the importance of the co-operation agreement. Although the differences between the United States and European competition authorities were highly publicised, (European authorities looking at the effect on the Common Market and United States authorities at the benefit for consumers) most of the and mutually supportive interaction between the two competition authorities was unpublicised. Mr. van Miert also mentioned the solidarity shown by all the Member States in supporting the Commission. Individual Member States were not able to intervene and would probably not have been heard by Washington. The Commission on the other hand, by relying on Community law, was able to act effectively and avert a trade war. This case stressed the seriousness of the European Competition authorities to prevent anti-competitive conduct, as serious as the United States authorities are and have been in the past.

As mentioned above, the Agreement on co-operation in competition matters between the European Union and the United States was tested to the limit in this case. Members of the United States Congress denounced the European approach to the case. Much of the verbal polemic focussed on the idea that the European Commission was trying to gain an unfair competitive advantage for Airbus, the troubled European consortium.[66] In the meantime Boeing was hoping that the political pressure it created in the United States at the highest level would make the European Commission sway.

The issue of whether to impose remedies or sanctions with respect to a "foreign" transaction (ie, foreign assets and operations) that has adverse "effects" within the Community was, for the first time raised in the *Gencor/ Lonrho* merger[67], a concentration of South African platinum mining operations that was prohibited by the Commission. The Commission decision and the Court ruling raised many questions about the European Union's role in Africa. The Commission decided that the concentration was incompatible with the Common market, as it would have led to the creation of a dominant duopoly in the platinum and rhodium markets. The South African competition authorities cleared the concentration.

On 25 March 1999, the EC Court of First Instance dismissed Gencor's application for the annulment of the European Commission's decision of 24 April 1996 under the EC Merger

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[64] Supra, at 7
[65] Commission Press Release, *IP/97/729*, 30.07.97
[66] The Lex Column, *Financial Times*, 22.07.97
[67] Supra, at 1

Regulation. One of the points raised in the case regarded the extra-territorial application of the Merger Regulation.

In June 1995 Gencor and Lonhro announced their intention to merge their respective operations in the Platinum Group Metal sector. Both companies were to acquire joint control of Impala Platinum Holdings Ltd ("Implats") which was controlled by Gencor. In a second stage Implats was to have sole control of the two companies representing Lonhro's activities in the Platinum Group Metal sector in which, at the time, Lonhro was the majority shareholder with Implats holding 27%.

Gencor argued that the Merger Regulation only applied to concentrations carried out within the Community and that the Commission did not have extra-territorial jurisdiction. In this case the economic activities were conducted within South Africa, a non-Member State. The *Wood pulp* test of implementation of an agreement in the European Community was not satisfied.[68] It is arguable that a merger between two non-Community firms with exports to, but no operations or assets in the Community cannot be said to be implemented in the Community within the meaning of *Wood pulp*. Similarly, it argued that, if the test was whether the concentration had an immediate and substantial effect on competition within the Community, it was also not satisfied.

The Court of First Instance dismissed these arguments stating that the parties carried out significant sales in the EC and that the *Wood pulp* test of implementation of an agreement in the EC was satisfied by mere sales within the EC. The Court noted that the Merger Regulation applied to all concentrations with a Community dimension (as defined in Article 1) even when the undertakings were not situated in the Community or the production activities covered by the concentration were carried out outside the Community.

With regard to the criterion of turnover it was stated that the concentration did have a Community dimension within the meaning of Article 1(2) of the Merger Regulation. The undertakings had an aggregate world-wide turnover of more than ECU 10 000 million above the 5 000 million threshold required by the Merger Regulation. Gencor and Lonhro each had a Community-wide turnover of more than ECU 250 million and they did not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

The Court further stated that the application of the Merger Regulation in this case was also justified under public international law where it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.

This ruling raised many questions about the European Union's role in Africa and the Commission's premise that it can have jurisdiction over multinational groups more than

[68] *Ahlsrtöm and Others v Commission* (1988) European Court Reports 5193, paragraph 18

10,000km from Europe. In the Financial Times of 25 April 1996 it was reported that, contrary to the Commission's claim that South Africa had broadly supported its conclusions, reliable sources at Impala claimed that, although Mr. Thabo Mbeki had endorsed the merger, he was reported to have said that " the ANC has always been critical of anti-competitive behaviour among the biggest conglomerates and in general terms the Government would share the European Union's concerns, but that does not mean it accepts their jurisdiction". It should be noted that the South African authorities cleared the merger.
The Commission kept the South African authorities informed throughout the investigation. Members of the European Competition authorities visited South Africa and representatives of the South African authorities attended the hearings organised in Brussels.[69] Although no formal agreement of co-operation in competition matters exists between the European Union and South Africa, informal discussions were conducted throughout the investigation and ensured an amicable result.

International law and comity issues arise when the Commission invokes its remedial powers under the Merger Regulation in transactions involving non-Community firms. Co-operation with foreign competition authorities is crucial to avoid unnecessary conflict[70]

Even where the Commission recognises that a concentration does not have an effect in Europe, it still exercises jurisdiction over concentrations. For example, in JCSAT/SAJAC,[71] four Japanese companies formed a joint venture in Japan to provide telecommunications services in Japan. Because of the licensing and technical requirements associated with the provision of telecommunication services the Commission concluded that the "concentration has presently no effect on the Community" and "this situation is not likely to change". Nonetheless, the transaction fell under the jurisdiction of the Commission as granted by the Merger Regulation. It would have fallen outside the ambit of the European Union competition laws if, for example, the venture has been structured as a co-operative joint venture, since the application of Article 85 (which generally applies to co-operative joint ventures) requires an appreciable "effect" within the Community.

2:5 "Effects"-principle, Comity and the application of European Union competition rules

Neither the *Wood pulp* nor the *Dyestuffs* cases can be seen as endorsing the "effects"-principle in the European Union.[72] There appears to be little difference between anti-competitive conduct outside the European Union "implemented" in the Common Market and the "effect" of such conduct in the Common Market for example, a refusal to export

[69] Commission Press Release *IP/96/346*, 24.04.96
[70] *Delta Air Lines/ Pan Am*, IV/M 130 Sept. 13, 1991
[71] Case IV/M.346 Jun. 30, 1993
[72] Van Gerven "EC Jurisdiction in Anti-Trust matters: The Wood Pulp Judgement" 1989 *Fordham Corporate Law Institute* 451, 466-467

to the European Union or to buy from the European Union. In any case it seems most likely that the Commission will probably use the "effects"-theory in cases where there are no implementation within the European Union. Jones and Gonzalez-Diaz [73]suggest that as far as concentrations are concerned, in reality there is little difference between the term "implemented" as used by the ECJ in *Wood pulp* on the one hand, and the test of direct, reasonably foreseeable and substantial effect as used by Advocate General Mayras in the *Dyestuff* case on the other hand.

Regarding the application of the international principle of "comity", it should be noted that the European Union adheres to the OECD Guidelines and Recommendations. According to the 1986 Recommendation of the OECD Council Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade,[74] the Member States of the European Union exercise moderation and restraint in the extra-territorial application of their competition laws and give effect to the principles of international law and comity

This Recommendation was replaced by the 1995 version, which again recognised the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation in the field of anti-competitive practices. It recognises that anti-competitive investigations and proceedings by one Member country may affect important interests of other Member countries and that it is therefore important for Member countries to co-operate in the implementation of their respective national legislation in order to prevent the harmful effects of anti-competitive practices. It also stresses the need for Member countries to co-operate in dealing with practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade. The OECD consists, of 29 countries sharing the principles of market economy, democratic pluralism and respect for human rights. South Africa is not a member of the OECD, but this does not mean the OECD instruments are not open to South Africa. But the principles adopted by the OECD seem to be in line with the Competition Guidelines issued by the South African Government and the Reconstruction and Development Program.[75]

In the *Aluminium Imports from Eastern Europe* case[76] the Commission, in asserting extra-territorial jurisdiction held that comity does not militate against the exercise of jurisdiction because the application of Community law does not require any undertakings concerned to act in any way contrary to the requirements of their domestic laws, nor would the application of Community law adversely affect import interests of a non-

[73] *The Merger Regulation* 1992 Ch 7 pp 88-91
[74] *OECD Document Number C (86) 44 (Final)*, May 21, 1986
[74] Revised Recommendation of the Council concerning Co-operation between Member Countries on Anti-competitive Practices affecting International Trade, 27 and 28 July 1995, *COM (95) 130/FINAL*
[75] Reconstruction and Development Programme, *Forbes Magazine*
[76] *OJ* L 92/1, 48, 1985

Member State. Such an interest would have to be so important as to prevail over the fundamental interest of the Community that competition within the Common Market is not distorted.

In the *Wood pulp* judgement the Court did not say much about international comity:
"As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling into question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument already has been rejected."[77]
This may indicate that the Court believes that international comity is an issue within the Commission's discretion. It should be noted that the Commission was involved in extensive negotiations with other countries in this case. Similarly, in the merger cases mentioned above, the Commission was involved in extensive informal discussions with foreign governments and Competition authorities. Whether this can be seen as a limitation on the Commission's powers or as international comity being an issue within the Commission's discretion is not clear.

[77] Supra, at 26

CHAPTER 3

THE EXTRA-TERRITORIAL APPLICATION OF UNITED STATES ANTI-TRUST LAWS

3:1 Sections 1 and 2 of the Sherman Act

In *United States v. Aluminium Co. of America (Alcoa)* [78], the United States Court of Appeals for the Second Circuit, acting for the Supreme Court, announced an "effects" test for establishing extra-territorial jurisdiction under the United States anti-trust laws. The Court was asked to dismiss a civil complaint brought by the American Anti-trust Division of the United States Department of Justice against a Canadian corporation that allegedly conspired with *Alcoa* to restrain commerce in the manufacture and sale of virgin aluminium ingot. It was alleged that the conspiracy was effected entirely outside the US. Judge Learned Hand stated that: "On the other hand, it is settled law.... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends, and these liabilities other states will ordinarily recognise." He declared that the Sherman Act[79] prohibits extra-territorial conduct that is "intended to affect imports to the United States and did affect them. The fact that the undertakings concerned were situated outside the United States or that the agreement was concluded outside the United States was held to be immaterial. The Court in *Alcoa* required two elements: both an effect upon United States commerce and intent to affect United States commerce.[80]

Theoretically, under *Alcoa* the Sherman Act may be applied to any form of conduct undertaken by any person anywhere, provided that such conduct is intended to have, and does in fact have an effect within the US. In the cases after *Alcoa* the "effects"- test was transformed into a "direct and substantial"-test.[81] *Alcoa* can be seen as the most extreme assertion of United States extra-territorial jurisdiction. The jurisprudence from *Alcoa* to *Hartford Insurance Co.* has gradually narrowed the application of the *Alcoa* test. This can partly be subscribed to the many negative reactions to the *Alcoa* judgement in the international arena.[82]

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[78] 148 F. 2d 416 2d Cir. 1945

[79] Sherman Act 1890

[80] Alcoa at 443-44

[81] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 615 (9th Cir.1976) and *Hartford Insurance Co.*, 113 S. Ct. at 2909

[82] Demaret "L'extraterritorialite des lois et les relations transatlantiques: une question de droit ordre diplomatic" 1985/21 *Revue Trimestrielle Droit Européen* 1-39 at 12
Makins "Extra-territorial application of U.S. Anti-trust law" 1997 *Tydskrif vir Suid Afrikaanse Reg* 498-518
Torremans "Extra-territorial Application of EC and US Competition Law" 1996 *European Law Review.*

In the 1978 *Timberlane Lumber Co. v. Bank of America*[83] decision, the United States Court of Appeals for the ninth Circuit held that the *Alcoa* "effects"-test is by itself incomplete because it fails to consider other nations' interests.

Judge Choy stated that: " A tripartite analysis seems to be indicated. As acknowledged above, the anti-trust laws require in first instance that there be some effect - actual or intended - on American foreign commerce before the Federal Courts may legitimately exercise subject matter jurisdiction under those statutes.
Secondly, a greater showing of burden of restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognisable injury to the plaintiffs and, therefore, a civil violation of anti-trust laws.
Thirdly, there is the additional question which is unique to the international setting of whether the interests of and the links to the United States - including the magnitude of the effect on American foreign commerce - are sufficiently strong vis-a-vis those of other nations, to justify an assertion of extra-territorial authority"[84]

The Court then adopted a "jurisdictional rule of reason" that involves evaluating and balancing relevant factors: "The degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance of the alleged violation within the United States as compared with conduct abroad." This list was subsequently enlarged in the *Mannigton Mills* case when Judge Weiss set forth a non-exhaustive list[85]. The 1982 Foreign Trade Anti-trust Improvements Act (FTAIA) amended the Sherman Act and the Federal Trade Commission Act[86] to provide that challenged conduct in export commerce or wholly foreign conduct must have a "direct, substantial, and reasonably foreseeable effect" on United States domestic commerce or on the trade of a person engaged in export commerce. In 1987 the Restatement (Third) of the Foreign Relations Law of the United States adopted a Timberlane-like approach.

In June 1993 the United States Supreme Court was again offered the opportunity to analyse the application of United States anti-trust law extra-territorially in *Hartford Fire Insurance Co. v. California*[87]. The action was brought by nineteen State Attorneys General and numerous private parties against United States insurance companies, London based reinsurance companies and other insurance industry entities. It was alleged that the

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Demetriou and Robertson "US Extra-Territorial Jurisdiction in Antitrust Matters: Recent Developments" 1995/5 *European Competition Law Review* at 461

[83] 549 F.2d 597 (9th Cir.1976)

[84] *Timberlane* at 613

[85] *Mannigton Mills Inc. v. Congoleum Corp.* 595 F. 1287 (3rd Cir. 1979)

[86] 15 U.S.C 45 (a)(3) 1988 & Supp. IV 1992

[87] 113 S. Ct. 2891 (1993)

London reinsurers conspired with their American co-defendants to alter the American commercial general liability insurance market by agreeing to withhold insurance unless certain primary insurers made changes to the terms of Comprehensive General Liability insurance policies. In the trial Court, the London reinsurers moved to dismiss the claims on the grounds that their alleged conduct took place outside the United States and therefore beyond the reach of the Sherman Act. And even if this was not the case, then the principle of comity required the Court to refuse jurisdiction. The Court agreed.

The decision was reversed on appeal. It was decided that the United States Courts have jurisdiction under the Sherman Act over foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.[88] If such an effect is present, a true conflict between the United States and foreign law would serve as the basis for a consideration of whether that conflict requires abstention from the exercise of jurisdiction. A true conflict only arises when the foreign law requires the defendant to act in a fashion prohibited by United States law, or compliance with the laws of the United States and the defendant's country is otherwise impossible.[89]

The majority did not take comity into account as part of the rules on the basis of which the court asserts jurisdiction. "Concerns of comity come into play, if at all, only after a court has determined that the exact complaint are subject to Sherman Act jurisdiction"[90]. Instead they stated that comity could only be taken into account once the Court had established its jurisdiction. Even in such cases comity would only influence the outcome if there existed a true conflict between United States and foreign law. Judge Scalia and his dissenting colleagues reacted that "the majority's holding will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other foreign countries - particularly our closets trading partners."

3:2 Mergers and Joint Ventures

Section 7 of the Clayton Act prohibits the direct or indirect acquisition by one person of all or any part of the stock or assets of another person where in any line of commerce or in any activity affecting commerce in any section of the United States, the effect of such acquisition may be substantially to lesson competition or tend to create a monopoly.[91] Thus, transactions by firms outside the United States are covered if they affect United States commerce. If, however, the only anti-competitive effects of the transaction are outside of the United States, section 7 does not apply.

The Hard-Scott-Rodino-Act requires that parties to certain large mergers and corporate joint ventures notify the Anti-trust Division of the Department of Justice and the Federal

[88] *Hartford Insurance Co.*, 113 S. Ct. at 2909
[89] Id. at 2910-1911
[90] Suora at 88
[91] 15 U.S.C. 18 (1988 & Supp. IV 1992)

Trade Commission of their proposed transaction and wait for stated periods of time before consummating the transaction. The financial thresholds for notification apply to transactions by foreign companies outside the United States. The implementing regulations exempt certain situations[92]

The Justice Department and the Federal Trade Commission have sued foreign firms for failing to report transactions under the Hard-Scott Radian Act and sued a foreign company for the first time in 1993 for failing to notify its acquisition of other foreign companies with significant sales in the United Sates.[93]

In 1988 the Justice Department issued Anti-trust Enforcement Guidelines for International Operations which contain illustrative cases relating to merger analysis. One of these cases deals specifically with the merger of two foreign firms and states that the Justice Department will not challenge an anti-competitive merger abroad unless one or both of the entities has United States production facilities or substantial distribution of assets in the United States.[94]

3:3 Comity, the "effects"-principle and the United States assertion of extra-territorial jurisdiction

International law has for some time recognised the validity of an "effects"-test to assert jurisdiction and the limitations on such assertion.
Already in the *Alcoa* case Judge Hand stated that the Sherman Act is not applicable to anti-competitive conspiracies not intended to affect United States commerce and not, in fact, affecting United States commerce. He continued: "Because of the international complication likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them."[95]

The international complication did rise, and in many circumstances, because of the strict application of the effects test or even a direct and substantial "effects"-test. It caused great controversy between the United States and United Kingdom and lead Lord Denning to observe in *British Nylon Spinners Ltd. v. Imperial Chemical Industries:* "The writ of the United States Courts doesn't run in this country, and if due regard is to be had to the comity of nations, it will not seek to run here."[96] South Africa has also not escaped the strict application of United States anti-trust law, for example the take-over by Minorco of

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[92] 15 U.S.C. 18(a) (1988 & Supp. IV 1992)
[93] *United States v Anova Holding AG* 1993-2 Trade Cas. (CCH) par. 70,383
[94] International Guidelines 4 *Trade Register Report (CCH)* 13, 109, 55 *Anti-trust & Trade Register Report. (BNA)* No. 1391 at S-3
[95] *Alcoa* at 416, 443
[96] (1954) 3 All England Reports. at 88.
Lowe "Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act" 1981 *American Journal of International Law* 257

Consolidated Goldfields of the United Kingdom[97] and the Westinghouse dispute regarding the uranium market price interference.[98]

Dissatisfaction with the strict application of the "effects"-principle has led to a tempering via considerations of international comity. In 1997 in United States *v. Nippon Paper Industries Co. Ltd.*[99] a United States Court of Appeals in Boston decided that United States anti-trust law applies, in the criminal context, to a price fixing conspiracy that occurred, in Japan, but was intended to and did have adverse effects in the United States. This was the first time that a Federal Court of Appeals extended Section 1 of the Sherman Act to wholly extra-territorial criminal conduct. Nippon argued that the doctrine of international comity should shield it from prosecution. The Court held that comity is more an aspiration than a rule, more a grace than obligation. It reaffirmed its decision by stating that the alleged acts against Nippon were illegal under both American and Japanese law. The principle that states should give due regard to the legitimate interests of other states and arrange their conduct in a conforming way is known as comity. Comity does not explain whether a state has jurisdiction over extra-territorial conduct, but whether a state ought to exercise already-existing extra-territorial jurisdiction. Before jurisdiction is established the matter of comity is totally irrelevant. In order to establish the legal basis of a state's assertion of extra-territorial jurisdiction, the fact that one state may have a greater interest in the subject matter of the litigation makes no difference. While states are under no international law rule obligation to account for comity in the exercise of their international affairs it may certainly be in their own interest and an advancement of the international public order to do so.[100]

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[97] *Consolidated Goldfields PLC v Minorco SA* 871 F 2d 252 (1989)

[98] *Westinghouse Electric Corporation v Rio Algom Ltd* 617 F2d 1248 (7th Cir 1980)

[99] C.A. 1No. 96-2001

[100] Reuland "Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws" 1994 *Texas International Law Journal* 180

CHAPTER 4

LESSONS FROM THE EUROPEAN UNION AND UNITED STATES

4.1 Problems facing the South African competition authorities in the extra-territorial application of its competition laws

4.1.1 Interfering with sovereignty.

In the *Gencor/Lohnro* merger[101] the South African competition authority had already taken a decision by the time the European Competition Commission stopped the merger. Similarly in the *Boeing/McDonnell Douglas* merger[102] the United States authorities had already taken a positive decision before the Commission was due to give its views. Can this not be seen as a breach of the principle of non-interference under international law, especially in the light of the other "domestic" issues surrounding the mergers? In the *Boeing* case[103] employment and defence played a major role in the authorities' investigation. It is interesting to note that the principle of non-interference was unsuccessfully invoked in the *Wood pulp* case.[104] The Court dismissed it as the rule would only mean that a state is required to exercise its jurisdiction with moderation if a person (or a company) is subject to "contradictory orders as to the conduct it must adopt".[105]

The United States faced several problems in dealing with the hostile response of foreign nations to its assertion of jurisdiction in competition matters relating to foreign companies. It cannot escape the fact that many markets (especially, former communist ones) are growing in importance. Disregard for the comity of nations and the international law principle of sovereignty will not be tolerated by other nations. Comity is relied on especially in order to consider the interests of foreign nations.

4.1.2 Trade friction with main trading partners.

The assertion of jurisdiction over companies situated outside the jurisdiction of a state is bound to have repercussions. The *Boeing* case[106] offers a good example of how extra territorial enforcement of competition matters can lead to conflicts between regulators and political embarrassment for governments. The contradictory decisions in Europe and

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[101] Supra, at 1
[102] Supra, at 2
[103] Supra, at 2
[104] Supra, at 26
[105] Bavasso "Boeing/McDonnell Douglas: Did the Commission Fly too High?" 1998 *European Competition Law Review.* 247
[106] Supra, at 2

in the United States laid bare the risks of an international crisis with inherent political as well as legal implications. We have seen the extent to which the *Boeing* merger [107] was played out in the international press. In the *Nippon* case[108] for example, it was seen as rather peculiar that a Japanese company was the first target of stricter United States competition rules, in the light of the United States trade deficit with that country.

4.1.3 International agreements

South Africa does not have any bilateral agreements regarding competition matters with other countries. This obviously can create difficulties obtaining evidence, the co-ordination of investigations and general co-operation in a competition matter. Apparently the South African Department of Trade and Industry is involved in bilateral and multilateral talks aimed at facilitating the application of competition law internationally. At the moment there exists a lack of international competition standards and/or an international competition authority, which means that there is no real guidance as to the application of extra-territorial jurisdiction in competition matters.

4.1.4 Applying domestic competition rules to anti-competitive practices with an international dimension

It is quite common that a country which has implemented comprehensive competition policies nonetheless lack the necessary instruments to apply domestic competition rules to anti-competitive practices with an international dimension. Information central to the investigation may be located outside its jurisdiction.
It has been proven that since the European Union and United States 1991 Agreement[109] on co-operation their exists a greater awareness by case-handlers of what their counterparts are doing, which is a result of more frequent personal contact and informal exchanges of view on the difference for example in analysing product markets. Discussions on the geographical market, for example, tends to be limited as usually the Commission and the United States agencies concentrate on the competitive effects of the transaction on their own markets. Different geographic markets mean that the products presenting competition problems are different for each authority.

4.1.5 Examination by different authorities at the same time

International mergers, strategic alliances and joint ventures, for example may face examination by different authorities at the same time. Divergence in the laws applicable to the same set of facts may result in conflicting conclusions as to the legality of the same behaviour. The remedy in each jurisdiction may also be incompatible. The review of commercial practices involves considerable work and costs, both for competition authorities and the businesses involved. The parallel activities of several national anti-

[107] Supra, at 2
[108] Supra, at 3
[109] Supra, at 7

trust agencies or courts involving crossborder competition cases can be a costly affair for the enterprises involved. Direct costs relating to multi jurisdictional merger review include professional advisors' fees, management time and filing fees. Indirect costs include the efficiencies lost by delayed transactions, enforcement errors and business uncertainty.

4.1.6 Legal Uncertainty

The business community is concerned about multiple assertions of jurisdiction. This can create great uncertainty because of the increased likelihood of the application of inconsistent legal standards and inconsistent remedies.

4.1.7 Specific problems: Export Cartels

Certain practices are difficult to tackle for example export cartels. Export cartels create specific problems insofar as their negative effects are only felt in the market of the importing country, while the relevant information is situated in the exporting country. The latter, of course, has neither an interest nor the jurisdiction to take action.

4:2 Cross-Border competition issues: Possible solutions

4.2.1 "Effects"-Principle

It is important for the South African competition authority to define clearly the "effects"-principle as it will be applied in South Africa. Will it be limited by international law principles or comity? One way of doing this is through issuing of "Guidelines" as was done in Germany, to clarify the extra-territorial scope of their merger provisions.

In the light of the United States and European Union experience, it is unlikely that the South African legislature had an unrestricted application of the "effects"-principle in mind. Such an interpretation could lead to constant embarrassment in the future. The limitations must be sought in the Act itself. In this regard the purpose of the Act is:
(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
(c) to promote employment and advance the social economic welfare of South Africans;
(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

If the "effect" of the "economic activity" falls within the scope of the "purpose" of the Competition Act, competition cannot be said to be restricted.

4.2.2 Sovereignty

It is essential to take account of the sovereign interests of other states in order to avert possible trade wars or unnecessary trade friction. Many examples can be found relating to the initial aggressive assertion of extra-territorial jurisdiction of the United States authorities in anti-trust matters. The United States now follows a "rule of reason" approach. This rule requires that in deciding whether to exercise jurisdiction in accordance with the notion of comity, a Court is to balance the interests of the states involved and refrain from exercising jurisdiction where the interests of the foreign state "outweigh" the interests of the United States.

4.2.3 Comity[110]

Positive comity is a law based anti-trust procedure that can promote competition and defuse some tension by providing a systematic law-based approach to fact gathering, reporting and bilateral consultation between anti-trust authorities. On 4 June 1998 the Positive Comity Agreement was signed between the European Union and the United States[111]

Positive comity in a South African context would create the means for the South African competition authority to ensure investigations and remedies in another country according to the competition laws of that country. In this sense positive comity can alleviate the need for extra-territorial enforcement that could lead to international confrontations.

Negative comity consists of a doctrine of politeness and good manners between nations, according to which a sovereign country, in case of a transnational violation, can in certain situations decide not to apply its laws and leave it to the authority of the other country where significant interests of that foreign country might otherwise be affected.

Positive comity differs from negative comity in that it consists in positive acts in co-operation and reciprocal assistance between national anti-trust authorities.

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[110] See also Chapter 2 and 3 relating to the principle of "comity"

[111] *Financial Times* 5 June 1998, *EUROPE* 5 June 1998, *OJ L 173*, 18.6.1998 and Atwood "Positive Comity - Is it a Positive Step?" *Fordham Corporate Law Institute* 1993 ed (1992)

4.2.4 Expert groups

The establishment of expert groups, arranged according to business activities, in order to address competition problems in a given market is important. Problems like pressure from international firms to participate in cartel activities and non-compliance with "essential facility" rules can then be detected at an early stage.

4.2.5 Co-operation and consultation

On 24 March 1999 a development and co-operation agreement between South Africa and the European Union was approved.[112] The agreements provide for the establishment of a bilateral free trade area between the European Union and South Africa in conformity with World Trade Organisation rules. Although the Agreement does not contain specific clauses relating to competition it can be seen as a sign of the importance of good trade relations with the European Union. In all competition cases with a foreign element informal discussions were held with the relevant parties resulting in amicable solutions. It is important for South Africa to participate in bilateral and multilateral discussions relating to competition issues.

Even if South Africa does not initially participate in all the provisions of an international competition mechanism, we would be beneficiaries of the enhanced control over anti-competitive practices with an international dimension. Insofar as competition rules can ensure that investments are fair, effective competition structures can support liberal investment regimes.

Early consultations with other authorities for example, can ascertain the degree of flexibility in a particular matter.

There have been many initiatives in the past to establish international rules on anti-competitive conduct. The 1947 Havana Charter was one of the first containing rules covering restrictive practices. The Charter was never ratified. It was followed by the General Agreement on Trade and Tariffs, which examined the trade-competition interface a few times, also with no clear result.[113]

In the 1970's a full competition Code was finally negotiated in the framework of UNCTAD at the request of developing countries. However, its provisions are not binding and therefore not taken serious.[114] The General Agreement on Trade and Tariffs was superseded by the World Trade Organisation on 1 January 1995 and in recent years the World Trade Organisation has been seen as the most appropriate forum for the

[112] *IP/99/195*, 25.03.99
[113] GATT BISD 7S/29, 9S/28, 170
[114] *United Nations Document* A/35/48 (1980)

development of internationally agreed anti-trust rules.[115] Generally one can say the European Union are much more in favour of World Trade Organisation involvement that the United States.[116]

[115] Keynote Address by Rt. Hon Sir Leon Brittan QC Vice President of the European Commission, OECD Conference on Trade and Competition, Paris 29-30 June 1999 Reprinted in European Commission Press Release *IP/96/523* of June 18, 1996, *Financial Times*, 24.09.1996, Commission Communication of 17 June 1996: Towards an International Framework of Competition Rules, *COM (96) 284*, 18.06.1996

[116] Demetriou and Robertson "Extra-territorial Jurisdiction in Anti-trust Matters: Recent Developments" 1995/8 *European Competition Law Review*. 461

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CONCLUSION

South African competition law has long recognised that the regulation of anti-competitive conduct is important to the South African economic process. The South African competition authority, comprising the Competition Commission, the Competition Tribunal and the Competition Appeal Court, stand at a departure point on the road of international competition. Behind it is the legacy of "apartheid", limits on investments, protection of a certain class of businesses, before it lies the relaxation of economic controls and investment opportunities for foreigners and South Africans. Unfortunately, this freedom brings with it possibilities of economic abuse. The globalisation of business activities will lead to an increase in competition cases with an international dimension. International competition cases raise difficult challenges for competition law enforcement, which can only be solved efficiently through enhanced international co-operation. It is therefore essential for the South African competition authorities to create an impressive presence not only in South Africa, but also in the world trade arena. International and national businesses and foreign competition authorities should know the extremely wide application and effect of the South African Competition Act.

It would be beneficial for South Africa to adopt an international approach in the extra-territorial application of its competition rules and in this respect, the lessons learnt from the European Union and the United States, in applying their competition rules outside their jurisdiction, should not be ignored. It is important to apply the competition rules in a matter consistent with international trade practices to avoid trade wars or unnecessary hostility. Consideration of another state's sovereignty, consideration of its competition rules, consideration of international free trade and the advancement of the world economy are essential principles to adhere to.

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ABBREVIATIONS

ECR	European Court Reports
EC Treaty	Treaty Establishing the European Community, March 25, 1957
FCO	Federal Cartel Office
IP	Internationale Presse
OECD	Organisation for Economic Co operation and Development
OJ	Official Journal of the European Communities