

Extraterritoriality in Competition Law and  
Globalization: *Square Peg in a Round Hole?*

Submitted by  
David M. Gomez

In Reading for the  
LLM in International Trade Law  
By Distance Learning Program

University of Northumbria  
August 2005

# **Extraterritoriality in Competition Law and Globalization: *Square Peg in A Round Hole*<sup>1</sup>?**

David M. Gomez

## ABSTRACT

Globalization has impacted on the state in deep and fundamental ways. The result has been a changing global market place that has seen the emergence of non-state actors and changing notion of state sovereignty as manifested in jurisdiction and territoriality. The result of these changes is that the challenge now facing international antitrust and competition law now lie not only in the emergence of global markets and the increasing nationalization of business and processes as manifested in mergers and acquisitions, but more importantly in the profound and comprehensive changes to the regulatory framework, in particular considering that there is no international regulatory regime. Whereas before extraterritoriality was seen, at least by the economically larger and more powerful nations, as an adequate policy tool for regulating economic activities that extended beyond a state's territorial boundaries but which had an impact on it nonetheless, and for realizing states objectives, the utility of that practice is now questioned as states increasingly seek, in the face of globalization, to determine what framework of cooperation is best suited for addressing regulatory matters within international anti-trust and competition law. The resulting reshaping of the regulatory landscape suggests that the round hole of globalization has rendered extraterritoriality in international antitrust and competition law a square peg, in large part because extraterritoriality is unable to address anti-competitive conduct which arises at the global level. Increased but formal international regulatory cooperation now seems inevitable, or in the least a necessity.

---

<sup>1</sup> A square peg will only fill part of a round hole leaving apertures that will need to be filled by some other means; in order to completely seal the hole the square peg must not only be replaced by a round one but by a round one that fits. In the face of the challenges posed by globalization to the concept of state sovereignty as the basis of the intellectual framework for international law, extraterritoriality is increasingly perceived as inadequate for addressing the competition policy issues that may arise in the new globalized economy. Has therefore extraterritoriality been rendered a square peg, or has it in fact filled the apertures by tilting the discipline towards formal cooperation at the global level?

## Table of Contents

1.	Introduction.....	1
2.	An Analytical Framework for Antitrust Regulation.....	9
3.	From National Territory to Global Markets: State Sovereignty & Jurisdiction .....	25
4.	Extraterritoriality: Exercise & Limits .....	41
5.	International Cooperation or Regime Formation? .....	54
6.	Conclusion: .....	60

## List of Cases

*American Banana v. United Fruits* 213 U.S. 347, 29 S. Ct. (1909)

*Empagran v. Hoffman-LaRoche* 315 F.3d 338 (DC Cir 2003)

*General Electric/ Honeywell* Case No. COMP/M2220; O.J. C074/06

*Hartford Fire Insurance Co. v. California* 509 U.S. 764 (1993)

*Hoffman-LaRoche Ltd. v. Empagran S.A.* 642 US June 14, 2004

*Imperial Chemical Industries Ltd. V. Commission of the European Communities (Dyestuff)*, 1972, E.C.R. 619

*Industrial Investment Development Corp. v. Mitsui & Co.* 671 F.2d 876 (5<sup>th</sup> Cir. 1982)

*Mannington Mills Inc. v. Congoleum Corp.* 595 F.2D 1287 (3<sup>rd</sup> Cir. 1979)

*Timberlane Lumber Co. v. Bank of America* 549 F.2d 597 (9<sup>th</sup> Cir. 1976)

*Timberlane Lumber Co. v. Bank of America* 749 F.2d 1378 (9<sup>th</sup> Cir. 1984)

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

*United States v. American Tobacco Co.* (1911) 221 U.S. 106, 31 S. Ct. 632, 55 I. Ed. 663

*United States v. Nippon Paper Industries Co. (Nippon Paper)* 109 F.3d (1<sup>st</sup> Cir. 1997)

*United States v. Sissal Sales Corporation* (1927) 274 U.S. 268

*Wood Pulp* 85/2002 (1985) OJ L85/1

Case 60/81, *IBM v. EC Commission*, 1981 E.C.R. 2639, 3 C.M.L.R. 635 (1981)

## **List of Statutes**

Clayton Act 1914

Robinson Pantman Act (1936)

Restatement (First) Conflicts of Laws (1934)

Restatement (Second) Conflict of Laws (1971)

Restatement (Second) Foreign Relations Law of the United States (1965)

Restatement (Third) Foreign Relations Law of the United States (1987)

Regulation 139/2004 [2004] OJ L24/1 Merger Regulation (ECMR)

Sherman Act 1890 15 U.S.C. §§ 1-7 (1994)

Treaty Establishing the European Union Articles 81-89

## **Treaties**

USA and EC Agreement regarding Competition Laws 1991 [1995] OJ L95/45

USA and EC Agreement regarding Competition Laws 1998 (EU-US Positive Comity Agreement) [1998] OJ L173/28, [1999] 4 CMLR 502

## **Acknowledgements**

There is an old adage – something about jumping into the deep end. This endeavor started out that way and at some point of retrospect will probably have ended that way. But it was a necessary progression in my academic and personal development, one hopefully that will take me to the next level...

The sacrifice was a huge one both in terms of family and personal time. And the path was rife with obstacles: marriage, new home, employment, no employment, and new endeavors. But in the end, jumping in the deep end was perhaps the only way to do it.

To *Celene, Devon, and Kia*.

## 1. Introduction

*“...the legal order depends not on power or coercion but on the coordination of interests and on patterned expectations.”*

*Andrew Hurrell<sup>2</sup>*

The growing debate concerning the future regulatory framework for international coordination in antitrust and competition law matters<sup>3</sup> signals fundamental changes in the way states have for decades approached the issue. Whereas before extraterritoriality was seen, at least by the economically larger and more powerful nations, as an adequate policy tool for regulating economic activities that extended beyond a state's territorial boundaries but which had an impact on it nonetheless, and for realizing states objectives, the utility of that practice is now questioned as states increasingly seek, in the face of globalization, to determine what framework of cooperation is best suited for addressing regulatory matters within international anti-trust and competition law. The recent case of *Hoffman-LaRoche, Ltd. v. Empagran S.A. (Empagran)*<sup>4</sup>, a case involving a “worldwide cartel for vitamin manufacturers that fixed prices for vitamins and vitamin products throughout the 1990s”<sup>5</sup>, in an ironic twist of sorts,

---

<sup>2</sup> Hurrell, Andrew, “Conclusion: International Law and the Changing Constitution of International Society”, in *The Role of Law in International Politics: Essays in International Relations and International Law*, Edited by Michael Byers, Oxford University Press 2001, page 328.

<sup>3</sup> See for example First, Harry, “Evolving Towards What? The Development of International Antitrust”, URL: <http://www.law.nyu.edu/kingsburyb/spring03/globalization/First.pdf>; Montini, Massimiliano, “Globalization and International Antitrust Cooperation”, Paper Presented at the International Conference Trade and Competition in the WTO and Beyond, Venice, December 4<sup>th</sup> – 5<sup>th</sup>, 1998; Zanettin, Bruno, *Cooperation Between Antitrust Agencies at the International Level*; Greve, Michael S., and Richard A. Epstein, “Introduction: The Intractable Problem of Antitrust Jurisdiction”, in *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy*, AEI Press (Washington) 2004; Takaaki Kojima, “International Conflicts over the extraterritorial application of Competition Law in a Borderless World”, URL: <http://www.wefia.harvard.edu/fellows/papers01-02/kojima.pdf>; also Klodt, Henning, “Conflicts and Conflict Resolution in International Antitrust”, Kiel Working Paper No. 979, Kiel Institute of World Economics; Fox, Eleanor M., “Antitrust and Regulatory Federalism: Races Up, Down, and Sideways”, 75 N.Y.U. L. rev. 1781.

<sup>4</sup> 124 S. Ct. 966 (2003)

<sup>5</sup> Latham & Watkins, “U.S. Jurisdiction Over Foreign Antitrust Claims After Empagran: Many Questions Remain Open”, *Client Alert*, Number 399, July 8, 2004, URL: [http://www.lw.com/resource/Publications/pdf/pub1032\\_1.pdf](http://www.lw.com/resource/Publications/pdf/pub1032_1.pdf), page 1.



serves to highlight the situation. Ironic because foreign companies apparently felt that the United States' expansive approach to extraterritorial application of their antitrust laws had reached the point where foreign antitrust claims on foreign transactions brought by foreign companies could be dealt with under the *Sherman Act*<sup>6</sup> – i.e. U.S. would have jurisdiction. More importantly however, the case, in my view, puts the spotlight on the concerns of “extraterritorial enforcement of antitrust laws ... [at the international level, and on] the question of the desirability and feasibility of a global antitrust regime”<sup>7</sup>.

The attempt to graduate from a regulatory framework comprised of different national legal regimes and where extraterritoriality is the hallmark of conduct to a global regime for cooperation in international antitrust and competition law however, may prove challenging for states, and this is perhaps what Kenneth W. Dam had in mind when he testified that “antitrust policy has to be rethought as global integration...and other rapidly changing conditions in the economic environment transform the world within which antitrust policy must function.”<sup>8</sup> Indeed, the challenge facing international antitrust and competition law lie not only in the emergence of global markets and the increasing trans-nationalization of business as manifested in mergers and acquisitions, but more importantly in the profound and comprehensive changes to the regulatory framework, especially since there is no international regime. Therefore, because states remain relegated to utilizing their own national legal regimes for regulating anticompetitive conduct in global markets, any establishment of

---

<sup>6</sup> 15 U.S.C. §§ 1-7

<sup>7</sup> Greve, Michael S., and Richard A. Epstein, “Introduction: The Intractable Problem of Antitrust Jurisdiction”, in *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy*, AEI Press (Washington) 2004, URL:[http://www.aei.org/docLib/20040430\\_book770introduction.pdf](http://www.aei.org/docLib/20040430_book770introduction.pdf), page 1.

<sup>8</sup> Dam, Kenneth W., “Testimony Before the Federal Trade Commission, in the Hearings on Global and Innovation-Based Competition”, October 12, 1995, URL: [http://www.ftc.gov/opp/global/dam\\_kw.htm](http://www.ftc.gov/opp/global/dam_kw.htm).

an international regime for cooperation will effectively “shift regulatory responsibility out of the hands of the state.”<sup>9</sup>

The changes to the regulatory framework stem from the process of globalization, and are various. For one, globalization has engendered trans-nationalization and the emergence of global markets. Both are related and in fact it may be argued that one resulted in and remains dependent to some extent on the other. To explain, trans-nationalization involves the extension of processes and activities beyond the territorially defined state (e.g. the global movement of capital and international communications) and this has led to the emergence of global markets. More broadly speaking though, global markets are themselves the result of globalization. The convergence of information technology and telecommunications, coupled with decreased transportations costs and consumer convergence has de-linked markets from specific geographic locations. Hence, consumers from across the world can now purchase goods and services over the internet with the mere click of a mouse, and without having to leave their physical locations. Global markets transcend national and regional territorial configurations and as a result economic activity is usually either beyond the regulatory reach of national governments or it creates jurisdictional overlaps between two or more states. Trans-nationalization and the emergence of global markets have put pressures on the state in terms of regulatory responses to anticompetitive conduct that now arise at the international level in particular because regulatory authority remains nationally constituted and based. As a result there is a situation of regulatory misfit.

The emergence of global markets in and of itself is not necessarily the problem but rather that while “economic activity has become increasingly global, its normative [and regulatory] context remains largely

---

<sup>9</sup> Gomez, David, *Regulatory Jenga?: Challenges in the Transition from Monopoly to Open Markets in International Telecommunications Services*, M.A. Dissertation, University of Kent, Canterbury (1998), page 2.

state-based”<sup>10</sup> and as such they challenge the regulatory mechanisms which states are able to employ in response to anticompetitive conduct. According to Gerber, global markets affect regulatory approaches because (a) they “challenge the effectiveness of jurisdictional law...by creating new interests, values and opportunities that the current framework does not address”<sup>11</sup>; and (b) they “alter the relationships among states and between states and markets”<sup>12</sup>. In Gerber’s view, global markets have changed the economic and political circumstances and for which the current tools of international legislative jurisdiction were developed to respond to<sup>13</sup>, and therefore, instruments such as extraterritoriality have been rendered inadequate. He adopts a competitive approach in his definition of global markets, and sees it as one in which “geographical location places minimal constraints on demand and supply”<sup>14</sup>. Put differently, globalization has led to demands for increased cooperation in antitrust and competition law matters as firms adjust their competitive positions, by integrating new production approaches or forging strategic international alliances.<sup>15</sup> However, while economic activity has gone global “...the legal field [remains] fragmented into multiple national legal orders”<sup>16</sup>. As one writer puts it, the current system is “a multitude of national competition laws and enforcement agencies with more or less different substantive and procedural rules”<sup>17</sup>. As a result States attempt to impose their national legal regimes extraterritorially onto other states in an

---

<sup>10</sup> Gerber, David J., “Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems”, Paper prepared for presentation at the Conference on Transnational Business Transactions sponsored by the Association of American Law Schools and the European Law Faculties Association, Barcelona, Spain: June 1-3, 2003, URL:<http://www.aals.org/profdev/international/gerber.pdf>, page 21.

<sup>11</sup> Ibid, page 29.

<sup>12</sup> Ibid, page 31.

<sup>13</sup> Ibid, page 22.

<sup>14</sup> Ibid, page 29.

<sup>15</sup> For a discussion of this see Bergel, Inga, “*Effects of Globalization on Antitrust Policy*”, URL: <http://www.econ.ilstu.edu/dloomis/335web/spapers/global.pdf>.

<sup>16</sup> Stern, Brigitte, “How to Regulate Globalization?”, in *The Role of Law in International Politics: Essays in International Relations and International Law*, Edited by Michael Byers, Oxford University Press 2001, page 255.

<sup>17</sup> Kerber, Wolfgang, “An International Multi-level System of Competition Laws: Federalism in Antitrust”, *German Working Papers in Law & Economics*, Vol.2003, Paper 13, URL: <http://ideas.repec.org/p/bep/dewple/2003-1-1065.html>, page

effort to regulate competition matters that arise beyond their own territorial boundaries but which they deem to affect their domestic economies. The problem here is that “domestic antitrust have their bounds and limits and because of this they are unable to address international restraints effectively”<sup>18</sup>. As Anne-Marie Slaughter argues, “in a world of global markets...governments must have global reach”<sup>19</sup>.

Two, is that the introduction of non-state actors into the international society of states have posed normative and institutional challenges to the international legal order in that it has led to the “creation of new institutions and changed the roles and importance of existing ones”<sup>20</sup>. This is because non-state actors are now also the focus of international law and, as regards international antitrust and competition law, have become the primary targets of regulation. Put differently, the extension of economic activity across borders and the introduction of non-state actors coupled with the changing roles and importance of existing regimes, have themselves “changed the context within which the jurisdictional framework operates”<sup>21</sup>. The increased mobility of capital and productive capacity given technological changes have made it possible for firms to move to more competitive locations and or to act through subsidiaries and partners formed through mergers and acquisitions and this has created “new interests, values and opportunities that the current framework does not address”<sup>22</sup>. Moreover, as firms have transnationalized it has led to the participation and inclusion of more and more states in the regulatory process. This has prompted some to argue that the international system is now a “dense web...in which many actors have

---

<sup>18</sup> Dabbah, Maher M., *Internationalization of Antitrust Policy*,

URL:<http://assets.cambridge.org/05182/0790/sample/05218079ws.pdf>, page 4.

<sup>19</sup> Slaughter, Anne-Marie, *A New World Order*, Princeton University Press (2004), page 4.

<sup>20</sup> Gerber, op cit, page 32. Haigh, Stephen Paul, *Globalization and the Sovereign State: Authority and Territoriality Reconsidered*, Paper Presented to the First Oceanic International Studies Conference, Australian National university, Canberra, 14-16 July 2004,

URL:<http://rspas.ame.edu.au/ir/Oceanic/OCISPPapers/Haigh.pdf>,

<sup>21</sup> Ibid, page 32.

<sup>22</sup> Gerber, op cit, page 23.

multiple national links and identities”<sup>23</sup>, or to put it in spatial terms - actors now act across a global scale. According to Slaughter,

if the primary actors in the system are not states but individuals and groups represented by State governments, and international law regulates States without regard for such individual and group activity, international legal rules will become increasingly irrelevant to State behavior.<sup>24</sup>

Considering that the regulatory landscape for international antitrust and competition has historically been linked to territorially defined sovereign states acting in an inter-state system, then the participation of non-state actors<sup>25</sup> such as multi-national or transnational corporations and firms in that system, has necessarily meant that policy tools previously employed to respond to anticompetitive conduct (for instance, extraterritoriality) have had or need to be adjusted to account for the new actors and institutional players. This is crucial particularly given that the international legal system remains organized around a community of sovereign states and where those states are seen as the unitary actors.

And three, globalization has challenged the traditional notions of state sovereignty as expressed in autonomy and decision making within existing regulatory frameworks. Globalization has impacted on the traditional notions of state sovereignty in such a way as to shift their internal balances so that states now find it necessary to look to the international community in a number of regulatory areas in order to maintain their sovereignty, and this has led to some arguing that there is now a new world order<sup>26</sup>. To be sure, while the state has not withered away in the face of globalization it has had to yield its sovereign authority

---

<sup>23</sup> Slaughter, Anne-Marie and David T. Zaring, “Extraterritoriality in a Globalized World”, URL: <http://ssrn.com/abstract=39380>, page 7.

<sup>24</sup> Slaughter, Anne-Marie, “International Law in a World of Liberal States”, 6 *EJIL* 1995, page 2.

<sup>25</sup> Although there have always been non-state actors such as the Holy See and other international organizations with a global presence. See for example Schreuer, Christopher, “The Waning of the Sovereign State: Towards a New Paradigm for International Law?” *European Journal of International Law* (1993), pp. 447-471.

<sup>26</sup> For a discussion of this see Anne-Marie Slaughter, *A New World Order*, Princeton University Press, Princeton and Oxford, 2004. See also, Friedman, Thomas, *The Lexus and the Olive Tree*, for a discussion on globalization as *the* new world order.

in a number of regulatory areas to other institutions often of a global nature. For example, regulation of international trade has been ceded to the World Trade Organization (WTO); air transportation to the International Civil Aviation Organization (ICAO) for matters on flights standards amongst other things, and the International Air Transport Association (IATA) for economic regulatory matters; and telecommunications to the International Telecommunications Union (ITU), to mention a few. As Haigh argues however, “this is often done, paradoxically, as a way of demonstrating that the state in fact retains its sovereign authority”<sup>27</sup>. This means that although states will seek to change the way they currently attempt to regulate international antitrust and competition matters, *they will remain at the center of regulatory decision-making*. In antitrust and competition law matters this will probably mean the creation of a new global regulatory regime for antitrust as there is currently no overarching global framework.

The sum of the above changes, to borrow from Slaughter and Zaring, is that it is now imperative that the bases of the regulatory framework for antitrust be redefined. In the very least there is a “need to redefine territory ... as [the] base for extraterritorial jurisdiction”<sup>28</sup>. This may be so because, as one writer puts it, “the central feature of ...globalization [is] the reshaping of the regulatory landscape”<sup>29</sup>, and therefore changes to the bases which inform the regulatory approach to antitrust and competition matters are bound to result in some reshaping of that very framework. If indeed the regulatory framework for antitrust is

---

<sup>27</sup> Haigh, Stephen Paul, *Globalization and the Sovereign State: Authority and Territoriality Reconsidered*, Paper Presented to the First Oceanic International Studies Conference, Australian National University, Canberra, 14-16 July 2004, URL:<http://rspas.ame.edu.au/ir/Oceanic/OCIS Papers/Haigh.pdf>, page 3. For other perspectives on globalization and sovereignty see Krasner, Stephen D., *Globalization, Power, and Authority*, Paper Presented at the American Political Science Association Annual Meeting, San Francisco, Aug. 29 – Set. 2, 2001, URL:<http://www.reformwatch.net/fixers/66.pdf>; and Alan Hudson, “Beyond the Borders: Globalization, Sovereignty and Extra-territoriality”, *Geopolitics* (1998), Vol.3, No.1.

<sup>28</sup> Slaughter, Anne- Marie, and David T. Zaring, “Extraterritoriality in a Globalized World”, URL: <http://ssrn.com/abstract=39380>, page 8.

<sup>29</sup> Hudson, Alan, “Beyond the Borders: Globalization, Sovereignty and Extra-territoriality”, *Geopolitics* (1998), Vol.3, No.1, page 92.

changing then it raises the issue of the impact of globalization on the use of certain policy tools. That is, it puts forward the question of whether territorial sovereignty will continue to provide the basis for regulatory approaches in antitrust and competition law in a globalized economy; or if in fact the impacts of globalization and a re-conceptualized notion of sovereignty will render extraterritorial jurisdiction unnecessary and therefore extraterritoriality, for all intents and purposes, dead within the discipline. If sovereignty and territory, the concepts on which the current international legal order is based, are being outmoded by globalization then what future utility does an increasingly globalized economy hold for extraterritoriality which is itself premised on these very same concepts? Has the round hole of globalization rendered extraterritoriality in international antitrust and competition law a square peg?

The evidence suggests that this might be the case. It also suggests that there is a growing need for enhanced and increased international regulatory cooperation, but formally so. This need is a reflection of the tension in international antitrust which arises because extraterritoriality operates at the local scale (i.e. it involves substituting the regulatory regime of one state for that of another), while the increasing transnationalization of business demands a collateral transcendence of regulation from the local to the global scale. This essay argues that despite the diminishing utility of extraterritoriality as a policy tool as it is unable to address the competition policy issues that arise in a globalized economy it may have filled the gaps nonetheless, by tilting the regulatory framework towards formal regime creation at the global level. The issue is broached from an analysis of the ways in which globalization has impacted on the regulatory environment and framework for addressing international antitrust and competition law issues. The rest of this essay is as follows: Section 2 discusses the analytical framework for interpreting the use of extraterritoriality as a regulatory policy tool in antitrust and competition law. It does so by placing it within the context of international

law, and adopting theoretical approaches of international relations and international political economy because this writer agrees that the challenges inflicted upon the regulatory environment and framework by the process of globalization are the result of international economic and political processes that derive from and are influenced by the very same theories.<sup>30</sup> Section 3 discusses how globalization has challenged the traditional notions of sovereignty in terms of state autonomy and jurisdiction, in particular legislative and enforcement jurisdiction. It tackles the issue from the perspective of spatiality and geography for the primary reason that sovereignty and jurisdiction, which inform regulatory authority, are both premised on a geographical concept – territory, and as such “accords with the Westphalian model of sovereignty that under-girds...”<sup>31</sup> the international system. Section 4 explores recent trends in extraterritoriality in antitrust and competitions law with a view to illustrating how its application and hence its limitations are dictated by the changing environment within which it has had to function (i.e. 2 and 3 above). Section 5 briefly examines the emerging paradigm of international cooperation by assessing the various approaches and options that have been proposed thus far vis-à-vis the continued exercise of extraterritoriality. Section 6 concludes.

## **2. An Analytical Framework for Antitrust Regulation**

The current regulatory framework for addressing international antitrust and competition law issues is one which is legitimized and perpetuated by an international legal system whereby states are the primary actors and where “territoriality is a systemic feature”<sup>32</sup>. To be sure,

---

<sup>30</sup> This is an inversion of the approach by Anne-Marie Slaughter who explored the impact of international legal rules on international political processes in an effort to determine how nations behave. See Slaughter, “International Law in a World of Liberal States”, 6 *EJIL* (1995) 1-538.

<sup>31</sup> Raustalia, Kal, “The Geography of Justice”, page 18.

<sup>32</sup> Haigh, *op cit*, page 22.



modern international law grew out of a period characterized by the rise of “territorially consolidated independent units”<sup>33</sup> referred to as nation states, and according to Shaw “its foundations lie firmly in the development of Western culture and political organization”<sup>34</sup>. The Peace of Westphalia in 1648<sup>35</sup> is usually recognized as the starting point for modern international law as it heralded the emergence of the Westphalian State and the beginning of the modern state-system.<sup>36</sup> More precisely

it represented the passing of some power from the Holy Roman Emperor with his claim to holy predominance to many kings and lords who then treasured their own predominance...with time this developed into notions of absolute right of the sovereign and what we call ‘Westphalian sovereignty’”<sup>37</sup>.

As Shaw notes “it was the evolution of the concept of an international community of separate, sovereign...states that marks the beginning of what is understood by international law”<sup>38</sup>.

Westphalia however was not the first international legal order as there were others prior to that, except that those legal orders were organized around themes which made for divine and natural law; and religions of the medieval world, including Christianity and Islam. What is different about the Westphalian international legal order is that the “cardinal organizing principle... is the division of the globe’s surface into mutually exclusive geographically defined jurisdictions enclosed by discrete and meaningful borders”<sup>39</sup>. In such a system, (a) the state became recognized as the central and unitary actor in the international system – i.e. they are its principal subjects, and are the formulators and

---

<sup>33</sup> Shaw, Malcolm, *International Law* (Fourth Edition), Cambridge University Press (2000), page 18.

<sup>34</sup> *Ibid*, page 12.

<sup>35</sup> See Peace of Westphalia, *Wikipedia*, URL: [http://en.wikipedia.org/wiki/Peace\\_of\\_Westphalia](http://en.wikipedia.org/wiki/Peace_of_Westphalia)

<sup>36</sup> See Schreuer, Christoph, “The Waning of the Sovereign State: Towards a New Paradigm for International Law?”, 4 *EJIL* (1993) 447-471; also

<sup>37</sup> Jackson, John H., “Sovereignty-Modern: A New Approach to an Outdated Concept”, 97 *Am. J. Int’l L.* 782, page 3.

<sup>38</sup> Shaw, *op cit*, page 18.

<sup>39</sup> Kobrin, Stephen J., *Sovereignty@Bay: Globalization, Multinational Enterprise, and the International Political System*”, URL: <http://www-management.wharton.upenn.edu/kobrin/Research/Oxford%20rev%20pint.pdf>, page 4.

subjects of its laws; (b) the concept of sovereignty evolved further and “became central to most thinking about...international law”<sup>40</sup> to the point of being one of its core legal norms; and (c) because authority and control required a defined territory, the “Westphalian idea of statehood is thus predicated on territoriality”<sup>41</sup>. These, Raustalia argues, became the “bedrock principles for the development of international law in the post-Westphalian era”<sup>42</sup>. Indeed, the paradigm underpinning contemporary international law is premised on the existence of the ‘sovereign state’. This represented a qualitative difference over previous international legal orders, as normative considerations in the international law would now evolve around the state as opposed to higher natural orders or religious beliefs. The inherent constraint with such a legal order however, is that because states were the only actors, and this necessarily led to that system being (i) “horizontal as opposed to hierarchical”<sup>43</sup>.

Shaw sees this as a fundamental difference between international law and other forms of law, and uses the concept of the pyramid to illustrate how other forms of law “legal structures are normally hierarchical and authority vertical”<sup>44</sup>. This is possible at the level of national or domestic law for example, because individuals are the focus of such laws and it is the state that is the matrix of authority. In the international legal system however, there is no legislature and it is the state which is the legal person (i.e. the focus). In addition, its legal competence, usually described in terms of jurisdiction and sovereignty and traditionally contingent on territorially defined space (one of the bases of agreement at Westphalia) - including land, air, and sea<sup>45</sup> is to be found in the very same entity – the state. Put differently, in the domestic system the law is above

---

<sup>40</sup> Jackson, *op cit*, page 1.

<sup>41</sup> Raustalia, Kal, “The Evolution of Territoriality: International Relations and American Law”, URL: <http://www.law.georgetown.edu/LegalTheory/documents/Territoriality.doc>, page 6.

<sup>42</sup> *Ibid*, page 6.

<sup>43</sup> Jackson, *op cit*, page 5.

<sup>44</sup> *Ibid*, page 5.

<sup>45</sup> Brownlie, Ian, “Territorial Sovereignty,” in *Principles of Public International Law*, Fifth Edition, Oxford University Press (1998), page 106.

the individual in society and is made by a sub-state political entity usually the government; however in international law 'the law only exists as between states...and it is the states themselves that create the law'<sup>46</sup>. This means that in international law the state is THE only actor (or at least that was the assumption) and as such is both the focus and the source of the law. In this regard, and I agree with Schreuer here, as it relates to international law, "the concept of an international community made up of sovereign states is the basis of [its] intellectual framework"<sup>47</sup>.

It is this structural reality (i.e. of states as the basis of our intellectual framework of international law) which has defined the nature of the discipline and facilitated its understanding. In fact, international law "presupposes this structure...and [therefore its] classical sources...depend on the interaction of states"<sup>48</sup>. To be sure, it is widely held that international law has three main sources, namely: (a) international agreements and treaties between states, the latter being "the most important source of international law and also serve as the origins of IGOs, which in turn are important sources of law"<sup>49</sup>; (b) customary practices "derived from the consistent practice of States accompanied by *opinio juris*, i.e. the conviction of States that the consistent practice is required by a legal obligation"<sup>50</sup>; and (c) general legal principles that are generally accepted by a number of states. The picture of the international legal system which now begins to emerge is of a self-fulfilling, self-legitimizing one, premised on certain core concepts (i.e. the sovereign state) and which requires sources of law also premised on the exercise of the authority and powers vested in those very same sovereign states as manifested through their acquiescence to treaties and acceptance of customary practices. Against this backdrop, it is submitted, it is possible to

---

<sup>46</sup> Shaw, *op cit*, pages 5-6.

<sup>47</sup> Schreuer, Christoph, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?", 4 EJIL (1993) 447-471, URL: <http://www.ejil.org/journal/Vol4/No4/art1.pdf>, page 1.

<sup>48</sup> *Ibid*, page 448.

<sup>49</sup> Brahm, Eric, *International Law*, URL: [http://www.beyondintractability.org/m/international\\_law.jsp](http://www.beyondintractability.org/m/international_law.jsp)

<sup>50</sup> International Law, URL: <http://www.answers.com/topic/international-law-1>

understand why the two core concepts of territoriality and sovereignty are the bases on which international law remains premised – because these facilitate maintenance of its three sources of law.

If we accept this to be so, then it is evident that any fundamental or substantive changes to either territoriality (as manifested in jurisdiction), or sovereignty, or both, would in turn inevitably impact on the three main sources of international law mentioned above – but this is precisely what globalization has done. It has engendered fundamental changes in the core concepts to the point that the sources of international law are affected. For instance, the emergence of non-state actors in the international system in the form of international institutions and non-governmental organizations has led to a situation where international law making is increasingly influenced by those new actors. According to Toope, this is because “the true beneficiaries of the system are not States”<sup>51</sup>, but rather individuals and other non-state actors. As Kobrin puts it, “private actors are increasingly engaged in authoritative decision-making that was previously the prerogative of sovereign states”<sup>52</sup>. For international law, this means that general legal principles, as a source of international law, are seriously questioned because acceptance is no longer limited to only states. The reality is that regulatory control over transnational business is no longer merely within the realm of the state, and is perhaps why the “increase in non-state arbitration for transnational business disputes is a factor in transforming private contract practices into authoritative law”<sup>53</sup>.

International political economy offers an opportunity for examining the above (i.e. states as the bases of the analytical framework for international law), because international law traditionally “shares the same

---

<sup>51</sup> Toope, Stephen J., *Emerging Patterns of Governance*, in Michael Byers (ed.), page 93.

<sup>52</sup> Kobrin, *op cit*, page 22.

<sup>53</sup> Schacter, Oscar, “The Decline of the Nation-State and Its Implications for International Law”, 36 *Colum. J. Transnat'l L.* 7, page 3.

conceptual space”<sup>54</sup> with international political economy and has therefore been similarly “rooted in the...dominant analytical framework [of realism] for some time now”<sup>55</sup>. In other words, international law has itself been underpinned by realist assumptions which, broadly speaking, “...emphasize the state’s comprehensive control, through coercive and administrative means, over its territory”<sup>56</sup>. As is discussed in the next section this comprehensive control is embedded in the state’s authority for legislative, prescriptive and enforcement jurisdiction, but as an example here, the *Restatement (Third) Foreign Relations Law of the United States (1987)* may be understood in this context. §402 for instance sets out that ‘a state has jurisdiction to prescribe law with respect to conduct that...takes place within its territory, ... and the status of persons, or interest in things present within its territory’.

Realism bears certain core assumptions, which are as follows: one is that “the constitutive actors in the international system are sovereign states”<sup>57</sup>, and as such are both rational and functionally identical. Perhaps this is a reflection of the political period out of which it grew, and suggests that the reification of the state was apparently the only approach by which ‘Westphalia’ could possibly have succeeded.<sup>58</sup> By establishing territoriality and sovereignty as the bases upon which the international legal system was built – it afforded legitimization and perpetuation of the state as the

---

<sup>54</sup> Slaughter, Anne-Marie, “International Law in a World of Liberal States”, 6 *EJIL* (1995), page 1. She also makes the point that “international relations is the discipline charged with thinking and theorizing systematically about State behavior in the international system”, page 2.

<sup>55</sup> *Ibid*, page 2.

<sup>56</sup> Stubbs, Richard and Geoffrey Underhill, “State Policies and Global Changes,” in Richard Stubbs and Geoffrey R.D. Underhill (editors) *Political Economy and the Changing Global Order*, Macmillan Press Ltd, 1994, page 421.

<sup>57</sup> Krasner, Stephen, “The accomplishments of international political economy”, in Steve Smith, Ken Booth, and Marysa Zalewski, *International theory: Positivism & Beyond*, Cambridge University Press 1996, page 114.

<sup>58</sup> This of course is wide open to debate. According to Immanuel Wallerstein however, the “modern world-system has evolved a political structure composed of states, each of which claims to exercise sovereignty in a delimited geographical area and which are collectively bound together in an inter-state system; and such a political structure is the only one that can guarantee the persistence of the partially free market which is [its] key requirement.” See Wallerstein, Immanuel, “The inter-state structure of the modern world system,” in Steve Smith, Ken Booth, and Marysa Zalewski, *International theory: Positivism & Beyond*, Cambridge University Press 1996, page 89.

core political entity. Even where decisions were taken to constrain their policy autonomy, it was done in such a way as to maintain the state as the key decision maker. In this way states were able to retain their sovereignty. This is particularly evident whereby states have decided to vest their regulatory authority in international regimes such as for example, the WTO. Such a regime is not yet existent in the field of competition law, and therefore “the domestic laws of each state regulate private restraints...in the relevant markets”<sup>59</sup>. Two, is that given the state of anarchy in the international system, states must “determine their own national policies although their options may be severely constrained by the power of other states”<sup>60</sup>. Here again this is evident in the act of states enacting blocking statutes in response to US assertions of extraterritorial jurisdiction<sup>61</sup>, by ordering the disclosure of documents in France for example; or as in the case of *Boeing Co/ McDonnell Douglas*<sup>62</sup>, whereby the European Commission exercised jurisdiction in the then proposed merger of the two US based aircraft manufacturers which had received the ‘go ahead’ from the US. The case concerned a proposed merger between Boeing Co. of Seattle, Washington and McDonnell Douglas of St. Louis and had already been cleared by the US Federal trade Commission. The EU however felt that if allowed to go through in the proposed format it would create unfair competitive advantages in particular as it related to accessing government funded research and development. Boeing/McDonnell Douglas was allowed to proceed but only after it had agreed to certain terms with the Commission, including canceling current and future exclusive supply contracts. Three, is that “states must be concerned with their own security ... [and therefore] must act to protect their territorial... integrity”<sup>63</sup>. States do so through the erection of legal

---

<sup>59</sup> Kojima, op cit, page 1.

<sup>60</sup> Krasner, op cit, page 115.

<sup>61</sup> See Griffin, Joseph P., “Foreign Governmental Reactions to US Assertions of Extraterritorial Jurisdiction”, *E.C.L.R.* 1998, 19(2), 64-73.

<sup>62</sup> Case No. IV/M877; 1997 O.J. L336/16 (CEC)

<sup>63</sup> Krasner, op cit, page 115.

regimes at the national level whereby they “retain in principle exclusive jurisdiction over their territories and nationals under international law”<sup>64</sup>. In this regard, legislative jurisdiction (“the power of a state to prescribe substantive law”<sup>65</sup>) and enforcement jurisdiction (“the authority of a state to induce or compel compliance, or punish noncompliance, with its laws”<sup>66</sup>) are both very important. And four is that realism assumes the “separation of...the domestic and international realms ... [where] the laws and dynamics of each are separate”<sup>67</sup>. This is why “ordinary statutes were generally believed to correspond to a state’s geographic border”<sup>68</sup>, and why the issue of extraterritoriality causes ‘international conflicts’. This separation is evident in the very concept of international law.

According to Krasner, realism’s “key explanatory variable...is the distribution of power among states” and therefore its “analyses of international political economy have addressed...how national power has influenced relations among [states]”<sup>69</sup>. This position seems to be supported by Slaughter who writes that for realism “international norms are likely to be enforced or are enforceable by a hegemon...and where positive sum games where all states benefit from cooperation is relatively low”<sup>70</sup>. In other words, the outcome of state interaction is zero-sum and therefore is determined by the relative power of those states interacting with each other – i.e. where there is a world hegemon interaction will be determined by the power which that hegemon holds. Within such a system then, there certainly was no space for non-state actors, or at least that was a core assumption, and hence non-state actors were excluded from the framework of analysis. Slaughter argues however, that in order to fully

---

<sup>64</sup> Kojima, op cit, page 1.

<sup>65</sup> Born, Gary G., *International Civil Litigation in United States Courts: Commentary & Materials*, (Third ed.), Kluwer Law International: The Netherlands (1996), page 2.

<sup>66</sup> Ibid, page 1.

<sup>67</sup> Underhill, Geoffrey R.D., “Conceptualizing the Changing Global Order”, in Stubbs and Underhill *Political Economy and the Changing Global Order*, page 25.

<sup>68</sup> Raustalia, op cit, page 12.

<sup>69</sup> Krasner, op cit, page 115.

<sup>70</sup> Slaughter, supra footnote 53, page 5.

understand the theoretical position of realism it is necessary to see, “not only what it includes in its analytical framework, but also what it excludes ...for example issues of transnational actors”<sup>71</sup>. Perhaps it was from an appreciation of this theoretical position that Krasner wrote that non-state actors such as “multi-national corporations, or non-governmental organizations are subordinate to states in that they must operate within governing structures established by states”<sup>72</sup>. If realism excludes transnational issues however, it is submitted that, it could only have been because the theoretical approach purposefully excluded it in order to ensure that any non-state actor would have to be subordinated to the state, and in doing so would further legitimize it (the state) as the focal political entity in the international system, including the international legal system. Against this theoretical backdrop, it is now possible to appreciate how the extraterritoriality was (and still is) the policy tool of choice in regulating anticompetitive behavior, and how it gained wide use, if not broad acceptance by states. The reality is though, that only those states acting from relative positions of hegemony are in fact able to effectively apply and enforce their national competition laws extraterritorially. It should come as no surprise therefore that the U.S., widely considered the hegemon in the global economy, is traditionally the most aggressive in exercising its antitrust laws extraterritorially.

Realism however has been challenged by another analytical framework, namely liberalism. Contrary to realism, liberalism’s core assumption is that ‘the primary actors in the international system are individuals and groups acting in domestic and transnational civil society’<sup>73</sup>. Liberalism also assumes that all “these actors are rational and calculating but that they pursue different objectives” and that they “are more concerned about their absolute well being than with their relative position

---

<sup>71</sup> Ibid, page 7.

<sup>72</sup> Krasner, *op cit*, page 115.

<sup>73</sup> Slaughter, *op cit*, page 6.



vis-à-vis others”<sup>74</sup>. According to Krasner, “the most important empirical development...of the liberal perspective is the growth of global interactions”<sup>75</sup>. For many, this growth in global interactions has come to represent a period of economic globalization but the latter is not a new phenomenon.<sup>76</sup> The difference here was that this most recent ‘wave’ of globalization was having a “profound...effect on states, and on the structure, configuration and assumptions of the international system”<sup>77</sup>. This view is shared by a number of people, including Reinicke and Witte who argue that “globalization represents a qualitative transformation of the international system...including changes in the nature of the legal processes and structures that shape the relationships and interactions among states”<sup>78</sup>. Snyder believes that the “...tremendous growth of multinational companies [enterprises] and international production networks, new technology...and the rise of new actors on the international scene”<sup>79</sup> have been the main reasons for this.

Indeed, this upshot of liberalism (i.e. the introduction of non-state actors and institutions into the equation) is responsible to a large extent for changing the dynamics of the international system, as states are no longer seen as representing their own self interests but rather are seen to be interacting with the other actors in the international system in a complex process of both representation and regulation. But while states are no longer the “locus of power”<sup>80</sup> and interaction in the international system, the responsibility for regulatory control remains largely state-based, and

---

<sup>74</sup> Krasner, op cit, page 110.

<sup>75</sup> Ibid, page 111.

<sup>76</sup> It is argued elsewhere that this is the third wave of globalization.

<sup>77</sup> Haigh, op cit, page 2.

<sup>78</sup> Reinicke, Wolfgang H. and Jan Martin Witte, “Interdependence, Globalization, and Sovereignty: The Role of Non-Binding International Legal Accords”, Chapter in Dinah H. Sheldon (ed.) (1999), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford, Oxford University Press, URL:<http://www.loccum.de/materialien/globalisierung/Reinicke-Witte.pdf>, page 2.

<sup>79</sup> Snyder, Francis, “Economic Globalization and the Law in the 21<sup>st</sup> Century”, URL: <http://lse.ac.uk/collection/europeanInstitute/articles/snyder2.pdf>, page 2.

<sup>80</sup> Krasner, Stephen, “Globalization, Power, and Authority”, Paper prepared for presentation at the American Political Science Association Annual Meeting, San Francisco, Aug. 29 – Sept. 2, 2001, URL: <http://www.reformwatch.net/fitxers/66.pdf>, page 3.

as such predicated on the concepts of territoriality and sovereignty. This is the crux of the regulatory issue in international antitrust matters – as the sovereign state wanes, it continues to regulate an increasingly global economy. The result is one of ‘anarchy’ and has led to international conflicts over the extraterritorial application of antitrust and competition law<sup>81</sup>, in particular because there is no overarching international legal order or regulatory framework in this field and therefore each state attempts regulation using its own domestic laws.

It is this state of ‘anarchy’, Slaughter believes, why regulation now takes place through government networks because as she sees it, instead of disappearing, the state is instead “disaggregating into its component institutions...which then join the traditional actors...and the resulting...networks...are all tangible manifestations of a new era of transgovernmental regulatory cooperation”<sup>82</sup>. This position is inherently a liberal one, and the liberal perspective holds that “effective management [and regulation] of this increasingly trans-nationalized [economy] requires higher levels of cooperation”<sup>83</sup>. Berman is of the same view, and moreover sees the practice of extraterritoriality as one that is ultimately self-defeating. He argues that, “assertions of jurisdiction on an [extraterritorial] basis will almost inevitably tend toward a system of universal jurisdiction because so many activities will have effects far beyond their immediate geographical boundaries”<sup>84</sup>. While ‘universal jurisdiction’ in terms of global government is highly unlikely at this juncture, international cooperation by

---

<sup>81</sup> See for example, Takaaki Kojima, “International Conflicts over the extraterritorial application of Competition Law in a Borderless World”, URL: <http://www.wefia.harvard.edu/fellows/papers01-02/kojima.pdf>; also Klodt, Henning, “Conflicts and Conflict Resolution in International Antitrust”, Kiel Working Paper No. 979, Kiel Institute of World Economics; Fox, Eleanor M., “Antitrust and Regulatory Federalism: Races Up, Down, and Sideways”, 75 N.Y.U. L. rev. 1781; Kahler, Miles, “Territoriality and Conflict in an era of Globalization”, ; also Trenchard, Robert W., Esq., “The Scope of Antitrust Jurisdiction Abroad: A Classic Conflicts-of-Law Problem”, [ssrn-id533462\[1\].pdf](https://ssrn.com/abstract=533462).

<sup>82</sup> Slaughter, Anne-Marie, “Governing Through Government Networks”, in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford: Oxford University Press (2001), page 178.

<sup>83</sup> Krasner, op cit, page 112. Krasner was in fact describing the position set forth by Robert Keohane and Joseph Nye under trans-nationalism.

<sup>84</sup> Berman, Paul Schiff, “From International Law to Law and Globalization”, 43 *Colum. J. Transnat'l L.* 485, page 14.

the society of states to facilitate jurisdiction that covers the compass of international antitrust is not; and therefore Berman's argument could be understood as suggesting international cooperation as perhaps a necessary first step towards establishing jurisdiction over anticompetitive conduct which has a base in global markets, and where transnational corporations and firms are the primary actors. This view is one that seems to have been supported by Randolph Tritell, the then Assistant Director for International Antitrust in the US Bureau of Competition. Writing on the recent developments in US antitrust, Tritell stated that

U.S. and foreign antitrust authorities are increasingly finding that cooperating with each other ... serves both parties' interests well and enables them to deal more effectively with the challenges posed by the increasingly global scope of business transactions.<sup>85</sup>

Four years earlier, in 1995, Dianne P. Wood, then-Deputy Assistant Attorney General in the U.S. Department of Justice's Antitrust Division in an address to the DePaul Law Review Symposium on Cultural Conceptions of Competition had stated to similar effect. According to Wood, the U.S.'s short and medium term priorities at that time were "to continue to work for strong and effectively enforced antitrust laws in all countries ... and to improve the tools for cooperation that link antitrust authorities"<sup>86</sup>.

International cooperation is predicated on cooperation theory which "analyses market failure problems"<sup>87</sup>, such as for example, the antitrust problems which global markets present. Cooperation theory in turn is a variant of the liberal analytical framework<sup>88</sup>, which focuses primarily on inter-state relations, and challenges the earlier mentioned realist

---

<sup>85</sup> Tritell, Randolph, "The Application of U.S. Antitrust Laws to Foreign Conduct: Recent Developments", USIA, Economic Perspectives, February 1999, URL: <http://usinfo.state.gov/journals/ites/0299/ijee/tritell.htm>, page 1.

<sup>86</sup> Woods, Dianne P., "The Internationalization of Antitrust Law: Options for the Future", Address delivered at the DePaul Law Review Symposium Cultural Conceptions of Competition: Antitrust in the 1990's, February 3, 1995, URL:<http://www.usdoj.gov/atr/public/speeches/0099.pdf>, page 13.

<sup>87</sup> Krasner, op cit, page 113.

<sup>88</sup> Ibid, page 113.

assumption of the “separation of...the domestic and international realms”<sup>89</sup>. This is interesting for it is along these very lines (i.e. in the separation between the domestic and international realms) that the conflict of regulatory authority is being waged. In Stephan’s view, the issue is one of ‘overlapping regulation’ whereby “national regimes...impose inconsistent rules and pursue conflicting ends”, the response to which is the exploration of “the possibility of international governance”<sup>90</sup>. Stephan argues that the proposals for international cooperation are borne out of a conviction that “the inadequacies of national regulation justify the creation of international institutions to promote coordination of national regulatory programs”<sup>91</sup>. Zanettin studies the issue more parochially, focusing on the effects doctrine. Nonetheless his findings are similar, and he holds that the “origin of cooperation or of the need for cooperation [may be found] in the effects doctrine which recognized application of competition laws to activities occurring outside the territory of the prosecuting sovereign state”<sup>92</sup>. The net effect of this perceived need for international cooperation is that the regulatory framework for international antitrust and competition law now seems to be tilting towards the establishment of a global regime, as states now concede that their national competition laws are not capable of reaching anti-competitive conduct which originate outside of their own jurisdictions, and hence the national legal system approach “is ineffective in addressing the conflicts and challenges that [derive from] the changes that arise as a result of globalization”<sup>93</sup>. This regulatory deficit or misfit has been recognized by a few, including Kerber who noted that, “most antitrust experts hold the opinion that the traditional system of national competition

---

<sup>89</sup> Supra, footnote 66.

<sup>90</sup> Stephan, Paul B., “Global Governance, Antitrust, and the Limits of International Cooperation”, ExpressO Preprint Series, Year 2004, Paper 145, URL: <http://law.bepress.com/expresso/eps/145>, page 2.

<sup>91</sup> Ibid, page 2.

<sup>92</sup> Hovenkamp, Herbert, “Publication Review of Cooperation Between Antitrust Agencies at the International Level”, by Bruno Zanettin, *E.L. Rev.* 2003, 28(4), 570-572, page 1.

<sup>93</sup> Morgenthau, Hans J., *Politics amongst Nations: The Struggle for Power & Peace*, (Brief Edition), page 254.

laws...is not sufficient for the protection of competition in the new millennium”<sup>94</sup>.

Global regime formation may be either in the form of a formal institution; or as explicit ‘rules, norms, and principles’ around which states can achieve international cooperation. Regimes are defined by Krasner as,

sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge on a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specified prescriptions or proscriptions for actions. Decision-making procedures are prevailing practices for making and implementing collective choice.<sup>95</sup>

Robert Keohane on the other hand defines regimes as “institutions with explicit rules, agreed upon by governments that pertain to particular sets of issues of international relations”<sup>96</sup>. Keohane places “particular emphasis on rules, arguing that specific institutions exist where there is a ‘persistent set of rules’ that must ‘constrain activity, shape expectations, and prescribe roles”<sup>97</sup>.

Regimes present an opportunity for bridging the separation between the domestic and the international, and regime theory postulates that, “states have an incentive to look for solutions to collective action problems”<sup>98</sup>. In other words, “regimes are created as a result of a mutually perceived need for inter-state cooperation and are generally believed to offer states several advantages in such efforts”<sup>99</sup>. To borrow from previous

---

<sup>94</sup> Kerber, op cit, page

<sup>95</sup> Krasner, Stephen D., “Structural causes and regime consequences: regimes as intervening variables”, in Stephen D. Krasner (ed.) *International Regimes*, (Ithaca, New York: Cornell University Press, 1983), p. 2.

<sup>96</sup> Keohane, Robert O.,

<sup>97</sup> Buzan, Barry, *The Primary Institutions of International Society*, Paper presented at BISA Conference, London December 2002, URL:<http://www.leeds.ac.uk/polis/englishschool/buzan02b.doc>, page 5.

<sup>98</sup> Cowhey, Peter F., “The International Telecommunications regime: roots of regimes for high technology”, *International Organization*, 44, Spring 1990, page 170.

<sup>99</sup> Gomez, op cit, page 7.

work<sup>100</sup>, there are four reasons why this is so. One, international cooperation would allow states to be able to eliminate the problems posed by jurisdictional or regulatory overlap and hence bring anticompetitive conduct within an agreed framework, albeit in the international realm. Although states would no longer be able to act unilaterally, they would still be able to promote their best interests and influence solutions for problems but from a position of collective decision-making. A good example of this may be found in the international telecommunications regime where “despite the shift in the economic principles underpinning the international telecommunications regime...states continued to make policies which reflected their economic and national interests”<sup>101</sup>. As explained there, this was grounded in, inter alia, a need for ‘technical interconnection’ and the decision to constrain policy autonomy...was taken collateral with the decision to mutually agree to maintain the sovereign state international system.<sup>102</sup> In international antitrust, cooperation is grounded in, amongst other things, the need to eliminate or at least limit the “jurisdictional ... problems arising from the enforcement of antitrust laws by multiple authorities on both the domestic and international fronts”<sup>103</sup>. Two is that, “regimes allow enforcement of agreements though reciprocity...and bring game theoretic applications to bear, most often along the lines that states perceive as offering the best cost/ payoff opportunity”<sup>104</sup>. Three, “regimes foster co-operative measures in anarchical situations”<sup>105</sup> therefore if agreement can be reached on some form of global governance framework then the current state of anarchy that exists between the domestic and the international would be lessened. The problem here is that the E.U. and the U.S. both want to pursue international cooperation differently. In fact, US DOJ’s Joel Klein proposal

---

<sup>100</sup> Supra, footnote 4.

<sup>101</sup> Gomez, op cit, page 12.

<sup>102</sup> Ibid, page 12.

<sup>103</sup> Greve, et al, op cit, page 1.

<sup>104</sup> Gomez, op cit, page 7.

<sup>105</sup> Ibid, page 8.

for international cooperation opposed that of the EU to have the issue handled under the WTO. (International cooperation is dealt with in more detail in section five but it is important nonetheless to point out here that there are differences in approach by the two leading states in antitrust and competition law matters.) And four, “regimes assist states in achieving their policy objectives, albeit while also ...constraining their policy autonomy and decision making powers”<sup>106</sup>.

Understanding the realist –liberal debate is crucial to understanding the challenges which the regulatory framework for international antitrust and competition law matters now face, and the new extent to which states policy autonomy and decision making are either expressed or constrained. Although there is no formal regime at the global level, there has been a ‘loose and informal one of sorts in the sense that regulatory control occurs through states exercising their national antitrust laws extraterritorially. But this approach is a vestige of the Westphalian international legal system. Given the transnational nature of the global economy, regulatory control and authority now has to graduate from the national to the global level. If regulatory regimes in other economic sectors are any indication of what the decision making process is like, then it is likely that any future regime will reflect neoliberal assumptions insofar as its membership is based on mutual recognition of (1) the need for international cooperation; and (2) agreement to maintain state sovereignty and autonomy. The neorealist approach however, will in my view, continue to tend to characterize the nature of regulatory decision-making.

In short, liberal theories have impacted on the international legal system in two key ways: (i) by the introduction of non-state actors into the international system; and (ii) by the movement of regulatory control over economic decisions and activities beyond the territorially defined state often into the hands of international regulatory regimes. Because the “...theory of modern international law depict[ing] states as constituting a

---

<sup>106</sup> Ibid, page 8.

society in the course of showing them to be bound by a system of legal rules...”<sup>107</sup> was traditionally premised on realist assumptions, states acted in order to recognize and uphold state sovereignty and autonomy and hence the regulatory approach tended to reflect realism’s core assumptions. Technological advancement in the telecommunications and transportation sectors however led to economic globalization, and allowed businesses to reposition strategically by either moving their production processes abroad, or by seeking out mergers and acquisitions in other locations and states, in some cases thereby giving those businesses a global presence. This process of trans-nationalization along with the emergence of non-state actors in the international system has inevitably led to need for states to look for higher levels of international regulatory cooperation, but such cooperation may require that states concede some of their sovereignty and jurisdiction.

### **3. From National Territory to Global Markets: State Sovereignty & Jurisdiction**

As the liberal approach in the previous section above sets out, international regulatory cooperation is possible through the creation of international regimes and or institutions. Jackson however sees these as “...substitutes for portions of nation-state sovereignty...”<sup>108</sup>. In other words, creation of international regulatory regimes leads to a ‘loss’ of autonomy and jurisdiction, and this calls into question the nature and limits of state sovereignty. So why would states agree to international regulatory regimes if it means loss of sovereignty? Substitution it seems is inevitable in the face of the onslaught of challenges posed by globalization, leading to some declaring that “sovereignty is at bay”<sup>109</sup>; that “sovereign authority

---

<sup>107</sup> Bull, Headley, “Society and Anarchy in International Relations (1966)”, in *International Theory: Critical Investigations* by James Der Derian (Edited), MacMillan Press Ltd. 1995, page 79.

<sup>108</sup> Jackson, John, H., “Sovereignty-Modern: A New Approach to an Outdated Concept,” 97 *Am. J. Int’l L.* 782, page 14.

<sup>109</sup> Vernon, Raymond.



is ... being withdrawn”<sup>110</sup>; and that “state authority [was] being changed and probably eroded in a deep and enduring way”<sup>111</sup>.

Sovereignty described as “the bundling of rule making authority within bounded territories, is the hallmark of the modern international political economy”<sup>112</sup> and contemporary international law. Historically the notion of sovereignty is rooted in realist philosophy and theory, and in the English school of thought<sup>113</sup> was understood to mean that states were endowed with full jurisdiction to determine all matters within a defined territory. Sovereignty and jurisdiction therefore are ‘historically’ tied to territoriality and as such the state derived its economic power from the resources, natural and other, available within its territory. States, in particular developing countries, believed that this imbued them with a sense of permanent sovereignty – i.e. they felt that it was their “inalienable right to do with their resources as they saw fit”<sup>114</sup>. Put differently, “state sovereignty was the centering of power and authority inside a given territory”<sup>115</sup>. States however do not exist of and by themselves and in fact form part of a wider international society, and hence this led to the international legal order being “constructed around the mutual recognition of sovereignty”<sup>116</sup>.

There are two issues with this. First, if sovereign authority is a part of the interstate relationship then it means that the notion of sovereignty is a relative one, acquired only by virtue of recognition by other sovereign states in the international system of states. In other words, states come to be recognized as being sovereign when other sovereign states in the international system recognize them as such. Sovereignty therefore is not

---

<sup>110</sup> Haigh, *op cit*, page 3.

<sup>111</sup> Krasner, *Globalization, Power, and Authority*, page 4.

<sup>112</sup> Hudson, *op cit*, page 1.

<sup>113</sup> See Headley Bull, *The Anarchical Society: A Study of World Politics*, Hong Kong: MacMillan Press Ltd., 1977.

<sup>114</sup> Gomez, *op cit*, page 16.

<sup>115</sup> Kingsbury, Benedict, “Whose International Law? Sovereignty and Non-State Groups,” *The American Society of Law: Proceedings of the 88<sup>th</sup> Annual Meeting*, Washington, D.C. April 6-9, 1994, p. 3.

<sup>116</sup> Hurrell, *op cit*, page 336.

automatic. Secondly, is that the international legal system is built upon certain laws, the defining feature of which is that they are rules which must be accepted – i.e. law imposes a binding obligation. If international law imposes binding obligations upon states though, then this suggests that states are less than sovereign. Sovereignty however, need not be total, and in fact states have been signing away their decision-making authority for decades (to the United Nations and the World Trade Organization for example) at the same time that they are increasingly declaring their sovereignty. Two possible reasons for this are offered here. One is that “...sovereignty is increasingly ‘shared among many polities”<sup>117</sup>; and two, states now “share authority and control with a wide range of actors...and there are some kinds of activities, such as those driven by market forces, which cannot be controlled at all”<sup>118</sup>. This is precisely why the transnational nature of the global economy poses significant challenges to states in terms of their ability to regulate anti-competitive conduct – because the authority to do so is no longer the right of only the state, much less that of only one state.

This behavior by states (i.e. signing away of their decision-making authority) may be explained by realism, which sees sovereignty as a constant and therefore holds that “the state as a unitary actor will seek to preserve its autonomy and maximize its self interest among other similarly interested states in a world characterized by competition and anarchy”<sup>119</sup>. The fact that states remain as the key actors in the international system seems to support this assumption. Haigh does not agree with the realist position. In his view, sovereignty is not a constant, but rather as “flexible enough to accommodate changes in the capacity and functions of the state without thereby losing its substantive core”<sup>120</sup>. To explain, the fundamental basis of sovereignty is jurisdiction, and this is informed by

---

<sup>117</sup> Hudson, op cit, page 10.

<sup>118</sup> Krasner, op cit, page 6.

<sup>119</sup> Neack, Laura and Roger M. Hudson, “Re-Imagining the Sovereign State: Beginning an Interdisciplinary Dialogue,” *Alternatives*, 21, January-March 1996, p. 136.

<sup>120</sup> Haigh, op cit, page 3.

two key concepts, namely authority and territoriality. As Haigh notes, these are “the two overlapping conceptual dimensions”<sup>121</sup> of the sovereignty concept. As concerns authority, this is “assigned to states by the international community”<sup>122</sup> and hence in one sense sovereignty may be understood in terms of “the recognition by internal and external actors that the state has the exclusive authority to intervene coercively in activities within its territory”<sup>123</sup>. Arguments therefore about states losing their sovereignty are to an extent about them losing their authority to, for example, “prescribe norms with respect to conduct”<sup>124</sup> within their territories.

“The sense that state authority is being changed is at the core of the transformationist argument”<sup>125</sup>. The interesting thing about this is that in order for such for such changes to occur it has to first be authorized by the state. If the authority for change remains with the state, then has globalization really eroded state sovereignty? According to Haigh, “authority is embodied in the formal-legal dimension of sovereignty”<sup>126</sup>, and he believes that globalization “encroaches into those formal-legal aspects of sovereignty that secure or tie down authority”<sup>127</sup>. The manifestation of this encroachment may be understood from a neo-liberal perspective which argues that states are “likely to have important mutual interests in cooperation; that international institutions can facilitate cooperation; and that states are increasingly entering regimes that constrain their policy autonomy”<sup>128</sup>. In other words, the formal-legal aspects of sovereignty involves authority, and therefore the impact of globalization may be understood in terms of states agreeing to cede

---

<sup>121</sup> Haigh, op cit, page 6.

<sup>122</sup> Gerber, op cit, page 22.

<sup>123</sup> Thompson, J.E., “State Sovereignty in International Relations: Bridging the Gap Between theory and Empirical Research,” *International Studies Quarterly*, Vol 39, No. 2, 1995, p 219.

<sup>124</sup> Gerber, page 22.

<sup>125</sup> Krasner, op cit, page 4.

<sup>126</sup> Haigh, page 7.

<sup>127</sup> Ibid, page 8.

<sup>128</sup> Zacher, Mark and Brent Sutton, *Governing Global Networks: International Regimes for Transportation and Communications*, Cambridge: Cambridge University Press, (1996), page 18.

regulatory authority to an international regulatory regime whereas before regulation was the sole authority of the state (i.e. it was nationally based). But as Haigh observes, “the delegation of power ‘away’ from the state is authorized, and that authorizing body is still and always the state”<sup>129</sup>. According to Krasner, it is “state authority [that has] generated and legitimated most non-state actors”<sup>130</sup>. One needs look no further than the existing global regulatory regimes (i.e. the ITU, WTO, and IAEA, to name a few) to understand that their creation was as a result of the preferences on the part of states to do so perhaps because they each served some special interest or the other. Moreover, even after such regimes and institutions are created, states continue to be their primary source of decision-making authority. Authority therefore never left the domain of the state and if the state is the one to authorize power away from itself, then arguably authority will never leave the state. This is crucial, for it means that states retain the authority to act unilaterally if they so choose, and to continue to pursue their respective national agendas and policy objectives, albeit through new frameworks of authority but at the international and or global level. It is unlikely that the US will do away with the *Sherman Act* for example, even when and if a global regulatory regime for antitrust is created. At the same time however, if a global regulatory regime is realized, the ability of the US to exercise its antitrust laws extraterritorially will be further constrained beyond the limitations imposed by international law; and therefore the likeliness of it doing so lessens substantially. Rather, the US will more likely use its power to ‘create’ new ways of securing its interests and achieving its objectives albeit through mechanisms or regimes at the global regime level.

Turning to the concept of territoriality, it’s heretofore predication on the physical territory is what ascribes sovereignty its geo-spatial limitation, or as Krasner muses, what makes “regulatory authority fall into the

---

<sup>129</sup> Haigh, op cit, page 8.

<sup>130</sup> Krasner, op cit, page 13.

territorial trap”<sup>131</sup>. Raustalia refers to this conception of territoriality –where the scope and reach of the law is connected to territory”<sup>132</sup>- as ‘legal spatiality’. In other words, “the defined territory demarcated...the reach of the sovereign’s law”<sup>133</sup>. Haigh in support, believes, that “in the traditional view states are not truly states unless they have clearly defined boundaries”<sup>134</sup>. In *Laker Airways v Sabena*<sup>135</sup> for example, it was held that the “territoriality base of jurisdiction is universally recognized...[as] the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power”.<sup>136</sup> Where a state had jurisdiction then, it normally meant that that state had the right to regulate matters within its territory; and where questions about jurisdiction arose it was usually about the right to regulate matters not within a state’s territory. States were therefore responsible for deciding on a number of issues including the market, and this represented a “bounded territorialisation of power and social relations”<sup>137</sup>. The Sherman Act enacted in 1890 for example, in the early part of the 1900s was not thought to apply extraterritorially. In fact, it was on a narrow interpretation of this basis (i.e. of the “spatial limitations of federal law”<sup>138</sup>) that the decision of the US Supreme Court in the case of *American Banana Co. v United Fruit Co. (American Banana)*<sup>139</sup> was taken. In the case which involved a civil action suit by American Banana Company against United Fruit Company for anti-competitive conduct which occurred outside the U.S., Justice Holmes ruled that

that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done, and that in cases of doubt, a statute should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.

---

<sup>131</sup> Hudson, *op cit*, page 1.

<sup>132</sup> Raustalia, *supra* footnote 31 at pages 8-9.

<sup>133</sup> *Ibid*, page 11.

<sup>134</sup> Haigh, *op cit*, page 11.

<sup>135</sup> 731 F.2d 909, 921 (D.C. Cir. 1984)

<sup>136</sup> Born, “International Law Limits on Legislative Jurisdiction” in *International Civil Litigation in United States Courts*, p. 507.

<sup>137</sup> Hudson, *op cit*, page 90.

<sup>138</sup> Raustiala, *supra* footnote 31 at 19.

<sup>139</sup> 213 US 347, 356, 29 S.Ct. 511, 512 (1909)

Justice Holmes' ruling is indicative of the Westphalian conception of territorial sovereignty wherein "geographic borders...coincide...with the reach of national laws".<sup>140</sup> This is not to confuse territory with territoriality, as they are essentially different concepts here. To be sure, globalization is having an impact on territoriality and not on territory. States for example, are not losing their physical territory as expressed in geographical size and shape because of globalization; however they are losing their ability to exercise jurisdiction over certain activities which were previously within their scope of authority (international telecommunications being one such area of activity). Sassen offers a similar explanation. He describes the situation as one whereby "globalization leaves national territory basically unaltered ... [while] its effects are on ... the institutional encasements of the geographic fact of national territory"<sup>141</sup>. Against this distinction territoriality may be understood as "the national and international frameworks through which national territory has assumed an institutional form"<sup>142</sup>. This definitional interpretation is useful for it provides for an explanation of how jurisdiction may extend beyond states' physical borders, through the very international regulatory frameworks that it authorizes (the state that is) such as those described by Slaughter.<sup>143</sup>

On analysis then, it seems that globalization has re-conceptualized the basis for sovereignty by "render[ing] strict territorial limits on jurisdiction increasingly unworkable"<sup>144</sup>. This is why "the current tools of international legislative jurisdiction are inadequate to meet the challenges of global markets"<sup>145</sup> – because as Gerber argues, "they were developed

---

<sup>140</sup> Raustiala, supra footnote 31 at 17.

<sup>141</sup> Sassen, Saskia, "The Global Economy: its necessary instruments and cultures", URL: <http://www.georgetown.edu/faculty/irvinem/CCT510/Sources/Sassen-TheGlobalEconomy-1997.html>, page 1.

<sup>142</sup> Ibid, page 8.

<sup>143</sup> See for example, Slaughter, Anne-Marie, *The Real New World Order*,

<sup>144</sup> Raustiala, supra footnote 31 at 17.

<sup>145</sup> Gerber, David J., "Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems," Paper Presented at the Conference on Transnational Business Transactions, Barcelona, Spain, June 1-3, 2003, p. 22.

in response to economic ... circumstances that global markets have changed and are likely to continue to change”<sup>146</sup>. The presumption of international law is that that “jurisdiction is territorial”<sup>147</sup>, and it is clear from the above that states have the authority to exercise jurisdiction within their own territories. In the global economy the situation is very different. For instance, multiple states may claim jurisdiction over a particular antitrust matter (as was the situation in the *Boeing/McDonnell Douglas*<sup>148</sup> case where both the US and the EU claimed jurisdiction); and secondly, a state may attempt to establish jurisdiction extraterritorially. The seminal case regarding the question of jurisdiction was *The Lotus*<sup>149</sup>, a case whereby a French vessel collided into a Turkish vessel on the high seas killing several sailors on the latter’s vessel. Turkey claimed jurisdiction and the French opposed. In deciding the matter, the PCIJ stated

Far from laying down a general prohibition to the effect that states may not extend the application of their laws and jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion...<sup>150</sup>

The critical issue about the Court’s ruling in *The Lotus*, is that it “rejected any notions of strict territorial limit on national legislative jurisdiction.”<sup>151</sup> The importance of this as it relates to international antitrust and competition law matters may be found in the fact that jurisdiction is used to determine which state is authorized to regulate such matters,<sup>152</sup> in particular because it is the combination of sovereign authority and territoriality that bestow states with their jurisdiction. More so considering that, “jurisdiction refers to particular aspects of the general legal

---

<sup>146</sup> Ibid, p. 22

<sup>147</sup> Brownlie, op cit, page 301.

<sup>148</sup> [1997] OJ L336/16

<sup>149</sup> *The S.S. Lotus (France v. Turkey)*, P.C.I.J. Ser. A, No. 10 (1927)

<sup>150</sup> P.C.I.J., Ser. A, No. 10, at 19 (1927)

<sup>151</sup> Born, op cit, page 500.

<sup>152</sup> Gerber argues that “the basic doctrines of international jurisdictional law ... are the tools used to determine which polities are authorized to prescribed norms for economic conduct.” See supra footnote 143 at 22.

competence of states”.<sup>153</sup> Whish however sees states as having two elements to their jurisdiction: “to make laws... (this is known as legislative, prescriptive, or subject matter jurisdiction)...and to enforce laws... (this is known as enforcement jurisdiction)”<sup>154</sup>. The authority for prescriptive or subject matter jurisdiction is, according to Gerber, distributed by the international community but “the state must have a jurisdictional base... one of which is territory”<sup>155</sup>. The territoriality principle “has long been the central pillar in the jurisdictional system”<sup>156</sup> and may be further divided into subjective territoriality (jurisdiction is held only over acts committed within the state’s own physical territory); and objective territoriality (where acts are committed abroad but the effects are felt within a state’s own territory)<sup>157</sup>. As Whish notes, these were usually “sufficient to comprehend a great number of infringements of competition law”<sup>158</sup>. Enforcement jurisdiction on the other hand, follows from prescriptive jurisdiction and in Johansson’s view, is “concerned with the fundamental function of public international law, which is to regulate and delimit the competencies of States”<sup>159</sup>. In other words, “the focus is on the State’s rights under international law to regulate conduct in matters not exclusively of domestic concern”<sup>160</sup>. If enforcement jurisdiction follows from prescriptive jurisdiction, then it means that its scope is likewise territorially limited. In this regard then, regulatory authority was historically limited to the geographical boundaries of the state.

With the advent of global markets, and given their reach and presence however, it is not unusual today for the question of “which state or regulatory authority has the legitimate power to set the rules...for the

---

<sup>153</sup> Brownlie, Ian, *Principles of Public International Law* (Fifth Ed.), p. 301

<sup>154</sup> Whish, page 428. See also Brownlie, Ian, *Principles of Public International Law* (5<sup>th</sup> ed.), Oxford University Press,

<sup>155</sup> Gerber, op cit, page 22.

<sup>156</sup> Ibid, page 24.

<sup>157</sup> Gerber, op cit, page 429. See also Johansson, Maria, “Extraterritorial Jurisdiction in Competition and Anti-trust Matters”, URL: [http://www.elsa.org/pdf/SPEL03\\_2\\_Johansseon.pdf](http://www.elsa.org/pdf/SPEL03_2_Johansseon.pdf).

<sup>158</sup> Whish, op cit, page 429.

<sup>159</sup> Johansson, op cit, page 118.

<sup>160</sup> Ibid, page 118.



particular activity within the territory in question”<sup>161</sup> to be raised when attempting to address the issue of jurisdiction. In fact, this is the question posed most adamantly and tantalizingly by globalization, particularly where it concerns global markets and antitrust regulation, in large part because “the territorial principle of jurisdiction organizes...regulatory frameworks through the use of clearly defined spatial borders”<sup>162</sup>. This was the prevailing legal spatiality. In other words, to borrow a description, sovereignty “...was built for an international world, but [it is] now... a global world”<sup>163</sup>. The current regulatory framework as evident in the policy options and mechanisms of states employed in the area of antitrust reflect this reality. The effects doctrine for instance, emerged as the cornerstone of extraterritoriality in US antitrust matters because (i) there was an absence of an overarching global regulatory framework and therefore the US reverted to use of its national laws to address antitrust matters that arose at the international level or at the level of the global market; but also because (ii) the legal spatiality of the time was one whereby “Westphalian sovereignty...created a system in which legal jurisdiction was congruent with sovereign territorial borders”<sup>164</sup> and therefore regulatory authority resided at the level of the state. This was why Dianne P. Wood as U.S. Deputy Assistant Attorney General was able to state back in 1995, that the U.S. “will ... enforce [*its*] antitrust law against conduct that harms U.S. markets to the fullest extent of [*their*] ability”<sup>165</sup>.

Over the years however, given the changes resulting from globalization and trans-nationalization, the “strict conception of legal spatiality [premised on physical territory] gradually gave way to a more flexible, functional understanding”<sup>166</sup> – i.e. the need for jurisdiction arguably shifted from territories to markets. Slaughter’s view on the matter

---

<sup>161</sup> Hudson, op cit, page 9.

<sup>162</sup> Hudson, op cit, page 9.

<sup>163</sup> Jackson, op cit, page 4. The author was referring here to a statement made by UN Secretary General Kofi Anan in his 1999 annual report to the UN General Assembly.

<sup>164</sup> Raustiala, supra footnote 31 at 12.

<sup>165</sup> Woods, op cit, page 13. My emphasis.

<sup>166</sup> Raustiala, supra footnote 31 at 21.

is that in a globalized world marked by interconnected and transnational identities, “tidy circles demarcating national jurisdiction, become either impossible or meaningless”<sup>167</sup> and hence, national jurisdiction must necessarily be understood as only a step towards transnational regulatory governance.<sup>168</sup> This is exactly the point made earlier by Berman that ‘assertions of jurisdiction on an [extraterritorial] basis will almost inevitably tend toward a system of universal jurisdiction because so many activities will have effects far beyond their immediate geographical boundaries’<sup>169</sup>. Here again the concept of spatiality<sup>170</sup>, by looking at the issue through the optic of the national-global regulatory dichotomy as it relates to jurisdiction in antitrust and competition law matters, offers an opportunity for examining why this is so.

According to Yeung, “globalization is an inherently geographic phenomenon” and therefore its “processes are conceived as spatial tendencies consistent on ... [amongst other things] geography”<sup>171</sup>. This is why the trans-nationalization of business, and the free flow of capital, and the increased mobility of investments across states and borders are seen as symptomatic of globalization. Interpreted from Hudson, globalization engenders the “stretching of...relations across space and time to processes which are not hindered or prevented by territorial or jurisdictional boundaries”<sup>172</sup>. As one study describes

Globalization means global production, a world in which Mazda’s Miata was designed in Los Angeles and financed from Tokyo and New York; its prototype was created in England, and it was assembled in Michigan and Mexico using advanced electronic equipment made in New Jersey and produced in Japan...it means profound inter-

---

<sup>167</sup> Slaughter *et al*, op cit, page 2.

<sup>168</sup> Ibid, page 2.

<sup>169</sup> Supra, footnote 76.

<sup>170</sup> For a discussion of this see Yeung, Henry Wai-chung, “The Limits of Globalization Theory: A Geographic Perspective on Global Economic Change,” *Economic Geography*, pp. 285-305. Also, Alan Hudson, “Beyond the Borders: Globalization, Sovereignty and Extraterritoriality,” *Geopolitics* (1998), Vol.3, No.1, pp.89-105.

<sup>171</sup> Yeung, op cit, page 286.

<sup>172</sup> Hudson, op cit, page 91. This definition of globalization is adopted here because this writer feels that it provides an appropriate framework from which to further discuss the thrust of this essay.

connectedness in which identities become truly transnational...and national policy cannot be fully implemented without transnational repercussions<sup>173</sup>

In short, the conduct of business is no longer territorially tied and has moved into the global realm (though it may be argued that business has always operated internationally). If business or the conduct of business has moved beyond states' territorial boundaries then arguably the regulatory frameworks must necessarily follow as that is in fact where business, at least in the case of multinational corporations, enterprises, and firms operate. Put differently, the "proliferation of cross-border production, trade, and investment activities spearheaded by global corporations and international financial institutions..."<sup>174</sup> and which characterized globalization however, meant that economic activity now transcended the local scale as manifested in territorial jurisdictional boundaries and therefore it was imperative that the regulatory framework similarly move from the national scale (e.g. extraterritorial application of domestic laws) to the global scale (international cooperation).

Slaughter sees this as already happening and points to the "network of government officials...that increasingly exchange information and coordinate activity...to address problems on a global scale"<sup>175</sup> as proof that they "are creating links across national borders and between national and supranational institutions"<sup>176</sup>. Raustiala believes this is evidence that the "state is not disappearing" but is instead adjusting by disaggregating in order to facilitate transitioning of the regulatory framework (i.e. jurisdiction) to the global level. This response by states is seen by Yeung as a spatial reorganization of sorts and proof positive that states have in fact retained their sovereignty and decision making authority. His argument is that "the spatiality of globalization is an outcome

---

<sup>173</sup> Slaughter *et al*, page 1.

<sup>174</sup> Yeung, *op cit*, page 287.

<sup>175</sup> Slaughter, *A New World Order*, page 1.

<sup>176</sup> *Ibid*, page 6.

of social constructions of space that are mediated through historically specific political, economic, and technological forces”<sup>177</sup>, and he uses the concept of scales (e.g. local vs. global scales) to illustrate his point. From this position he sees economic globalization as “an integrating set of tendencies that operate on the global scale...”<sup>178</sup>, as opposed to operating on a national scale which was presumably the situation pre-globalization. Because the processes which operated at and therefore supported the local scale can explain the pre-globalization period, the geographical linkage therefore, becomes more explicit as a result of synthesized recent thinking “about geographic scales ... in understanding global economic change”<sup>179</sup>.

Extrapolating this to the legal realm, it is possible to make the connection between the type of regulatory framework and jurisdictional and policy instrument employed and the economy of the day – i.e. the type of legal spatiality. Extraterritoriality as a jurisdictional and policy tool for instance, grew out of a period whereby the economic activity necessarily operated at the national level (i.e. the local scale) and where the state was unchallenged in its “jurisdiction over all issues arising within its territory”<sup>180</sup>. To give an example, Justice Holmes ruled in *American Banana* that “US courts lacked jurisdiction because US law did not reach into the territories of other sovereign states”<sup>181</sup>. Over the decades however the US “conception of legal spatiality articulated in *American Banana* has shifted radically”<sup>182</sup>, and in *United States v Aluminum Co of America (Alcoa)*<sup>183</sup> in 1945 it was held that the U.S. may impose liabilities for conduct which had consequences within its borders but were conducted outside of it – the effects test. Whereas the decision in *American Banana* was premised on

---

<sup>177</sup> Yeung, op cit, page 286.

<sup>178</sup> Ibid, page 288.

<sup>179</sup> Ibid, page 289.

<sup>180</sup> Jones, R.J. Barry, *The World Turned Upside Down: Globalization and the Future of the State*, Manchester University Press (2000), page 4.

<sup>181</sup> Raustiala, supra footnote 31 at 20.

<sup>182</sup> Ibid, page 20.

<sup>183</sup> 148 F.2d 416 (2d Cir. 1945)

the territoriality presumption, Alcoa “held that it was settled law...that any state may impose liabilities...for conduct outside its borders that has consequences within its borders”<sup>184</sup>. The effects doctrine or a variant of it, the implementation doctrine, is now also part of European Union jurisprudence as evidenced by the Court’s rulings in both the *Dyestuffs*<sup>185</sup> and the *Wood Pulp*<sup>186</sup> cases.

From this position of logic then, and using Yeung’s constructs, the challenge facing the regulatory framework of international antitrust and competition law may be understood in terms of legal spatiality changes as it affects the jurisdictional reach of states. Because the legal spatiality of the contemporary international legal system was premised on territorially defined sovereign states, this meant that the jurisdiction for regulating antitrust and competition law matters was necessarily predicated on the laws of the states which comprised that international system. Extraterritorial exercise of states national laws in antitrust and competition law therefore, was the ‘natural’ regulatory mechanism employed by states to “catch up with their economic activity or to prevent competitive deregulation”<sup>187</sup>, because economic activity tended to be bounded by the state (i.e. it operated on the local scale). The global economy however, demands a regulatory approach which operates at the global level. To clarify, extraterritoriality involves ‘spatial switching’, or what Yeung refers to as “the substitutability of [[legal] processes within the same geographical scales”<sup>188</sup>. Put in context, the legal regime and laws of one state are used to resolve antitrust matters that might arise in another state. That is, the authority of one state is merely substituted for that of another. Spatial switching however leads to ‘regulatory’ misfit for a couple of reasons. One is that other states have their own national legal regimes

---

<sup>184</sup> Born, “Application of Federal Statutes in International Cases”, in *International Civil Litigation in United States Courts*, page 583.

<sup>185</sup> Cases 48/69 *ICI v Commission* [1972] ECR 619 CMLR 557.

<sup>186</sup> Cases 114/85 *A Alström Oy v Commission* [1988] ECR 5193, [1988] 4 CMLR 901.

<sup>187</sup> Hudson, op cit, page 97.

<sup>188</sup> Yeung, op cit. page 291.

and laws and therefore extraterritorial application of one state's laws onto another not only leads to jurisdictional overlapping but is tantamount to an infringement of that state's sovereignty and therefore "conflicts among jurisdictional claims"<sup>189</sup> arise. And two is that the regulatory environment has now changed, and consequently a different approach is required, one of "scalar switching" - understood as "the substitutability of processes between different geographic scales"<sup>190</sup>. In Gerber's analysis however, "the current tools of international...jurisdiction are inadequate to meet the challenge of global markets"<sup>191</sup>. Perhaps this is because as Slaughter and Zaring's assert that "the doctrines defining extraterritorial jurisdiction have not yet assimilated [the] changes"<sup>192</sup> brought about by globalization.

As discussed earlier in this essay, economic globalization has ushered in an era of 'borderless-ness' characterized by "the rapid proliferation of cross-border production and trade, and investment activities spearheaded by global corporations and international financial institutions"<sup>193</sup>. This resulted in increased competition of firms operating at the global level and consequently, "gave rise to the need for an increasingly integrated and [still] evolving legal system"<sup>194</sup> for international competition law. As states became increasingly 'borderless' firms consequently sought to extend their operations across the globe seeking out, as well as establishing new markets. Globalization however, is not limited to being a market phenomenon, and also represents a "qualitative transformation of the international system...including changes in the nature of the legal processes and structures that shape the relationships and interactions among states"<sup>195</sup>. The increased global reach of firms

---

<sup>189</sup> Gerber, op cit, page 21.

<sup>190</sup> Yeung, op cit, page 291.

<sup>191</sup> Gerber, op cit, page 22.

<sup>192</sup> Slaughter et al, op cit, page 2.

<sup>193</sup> Yeung, op cit, page 287.

<sup>194</sup> Hamner, Kenneth J., "The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China," *Journal of Transnational Law & Policy*, Vol.11:2, page 385.

<sup>195</sup> Reinicke *et al*, op cit,

necessarily meant that they were more powerful than before and when their activities and conduct started having an impact on domestic economies, states sought to curb the powers of the new multi-national corporations and enterprises by applying their national anti-trust and competition laws extraterritorially. This is particularly true of the United States of America (U.S.), one of the first states to enact anti-trust legislation.<sup>196</sup> Because “processes [are no longer] hindered or prevented by territorial or jurisdictional boundaries”<sup>197</sup> this means that “the economic effects of cartels, mergers, and anti-competitive behavior of firms with market power, are not constrained by national boundaries”<sup>198</sup> and hence national economies are now exposed more than ever to the principles of the market. If it is true that ‘the doctrines defining extraterritorial jurisdiction have not yet assimilated [these] changes’, then States must now necessarily adopt approaches and strategies to regulate trans-national business activities, especially where such activities are understood to have anti-competitive effects.

Such regulatory reform at the global level is not something new. In the 1990s for example, international telecommunications services was faced with a similar challenge, except that in that case interstate cooperation already existed, occurring within an established regime with accepted norms and principles. Any reform therefore took place within the regime itself. There the whirlwind technological revolution embracing the industry in the 1990s demanded profound and comprehensive changes within its regulatory framework and this required that the previous regulatory pillars underpinning the regime be broken down and new ones be subsequently erected but without causing the collapse of the entire

---

<sup>196</sup> See the Sherman Anti-Trust Act of 1890 (Sherman Act), which holds that ‘domestic antitrust laws may be applied to foreign firms if they engage in unfair trade practices that have adverse effects on domestic consumers’.

<sup>197</sup> Hudson, *op cit*, page 92.

<sup>198</sup> Whish, Richard, *Competition Law* (Fifth Edition), UK: LexisNexis Butterworth (2003), page 427.

regime, a *Jenga-ing* process of sorts.<sup>199</sup> The changes entailed moving from a paradigm of bilateral relations to one based on global competition.

Although the regulatory framework in international anti-trust and competition law is different than that which faced the international telecommunications services industry (i.e. antitrust is not an economic sector and no formal global regulatory regime exists), the process of globalization has dictated a similar need for regulatory reform but this time away from the unilateral approach where extraterritoriality is the hallmark of conduct, and towards an appropriate structure for global cooperation. In short, regulatory decision-making authority in antitrust and competition matters would be transposed from the national realm to the global realm. This gives rise to the question of the utility of extraterritoriality as a jurisdictional and policy tool at the global level.

#### 4. Extraterritoriality: Exercise & Limits

According to Professor Edward F. Sherman,

the current phenomenon of extraterritoriality can be viewed on a continuum. On one end is the voluntary relinquishment of sovereignty to regional or international bodies...on the other end is the unilateral application of another country's laws extraterritorially through political or economic power or pressure...In between are the plethora of relations between countries that have trade and political relationships under which they may be willing for pragmatic reasons, to accommodate to the extraterritorial application of, or harmonization with, another's country's or entity's laws. The two ends of the continuum are not necessarily good or bad, although the manner in which extraterritoriality is accomplished may affect both the amicability of relations between countries and the effectiveness of the laws sought to be enforced.<sup>200</sup>

---

<sup>199</sup> See Gomez, David "*Regulatory Jenga?: Challenges in the Transition from Monopoly to Open Markets in International Telecommunications Services*," M.A. Dissertation, University of Kent, Canterbury, 1998. Here the process of regulatory reform in the international telecommunications industry was likened to the game of Jenga.

<sup>200</sup> Sherman, Professor Edward F., "Special Methods and tools for Educating the Transnational Lawyer", Tulane Law School, URL: [www/aals.org/international2004/Papers/Sherman.pdf](http://www/aals.org/international2004/Papers/Sherman.pdf), page 3.



Extraterritoriality finds its legitimacy in and is a function of the structure of the contemporary international legal system and as such, is itself rooted in a jurisdictional nature. This means that extraterritoriality is necessarily predicated on the base concepts of jurisdiction, namely authority and territoriality. In other words, “jurisdiction refers to particular aspects of the general legal competence of states”.<sup>201</sup> To recall, the point is made above that states can base their jurisdiction “on the nationality principle and on the territoriality principle”<sup>202</sup>; and also that the two elements to state jurisdiction are prescriptive or subject-matter authority and enforcement authority.<sup>203</sup> As such, prescriptive or subject matter jurisdiction and enforcement jurisdiction are limited by the conceptual bases of jurisdiction. Because international antitrust and competition law matters transcended national territories however, states had to find a way to link the economic activity which they attempted to regulate with their territories. In other words, it was “essential that a sufficient link [be] shown between the state and the situation over which it wants to have jurisdiction”<sup>204</sup>. According to Torremans, once that link can be demonstrated “that state’s exercise of jurisdiction is legitimate under international law”<sup>205</sup>. This is known as the ‘effects’ doctrine and “it permits a state to exercise legislative jurisdiction over conduct occurring conducted outside”<sup>206</sup> its territory. In 1927 for example, the Permanent Court of International Justice handed down a judgment in the *Lotus*<sup>207</sup> case holding that “international law contained no rules which forbid the exercise of criminal jurisdiction under the facts of the case”. The *Lotus* decision opened the issue of “the legality and limits of extraterritoriality

---

<sup>201</sup> Supra footnote 151 at 301.

<sup>202</sup> Torremans, Paul L.C., “Extraterritorial Application of E.C. and U.S. Competition Law,” E.L. Rev. 1996, 21(4), 208-293, p. 284.

<sup>203</sup> Supra, note 152.

<sup>204</sup> Torremans, op cit, page 284.

<sup>205</sup> Ibid, page 284.

<sup>206</sup> Born, op cit, page 506.

<sup>207</sup> (1927), PCIJ, Ser.A, No. 10, 23

under international law...and has continued to provide analytical grist for both sides of the debate”<sup>208</sup>.

The effects doctrine was the basis of decisions by the Courts in the case of *United States v. American Tobacco Co.*<sup>209</sup>, and in the case of *United States v. Sisal Sales Corporation*<sup>210</sup>; however, the doctrine was not fully embraced until the *United States v. Aluminum Company of America (Alcoa)*<sup>211</sup> case.<sup>212</sup> The case concerns an international price fixing market for aluminum producers based in Switzerland, Germany, and Canada. The cartel attempted to fix a quota on the production of aluminum in order to maximize prices. Although the activities occurred outside of the US, Judge Learned Hand held that it was “settled law...that any state may impose liabilities, even on persons not within its allegiance, for conduct outside its borders which has consequences within its borders”.<sup>213</sup> The ruling in *The Alcoa* was significant in that it established that the Sherman Act did in fact apply to agreements concluded outside of the US and which were intended to or actually affected US imports.<sup>214</sup> Moreover, *The Alcoa* put forward two conditions for the effects test, that “the performance of the foreign agreement must be shown to have some effect in the US”<sup>215</sup> and two, that the effect must have been intended.

US extraterritoriality in antitrust matters has been built around and on the basis of the effects test but this has caused widespread concern and rebuttals. Perhaps it is in cognizance of this that the Court required some proof of intent in *Industrial Investment Development Corp. v. Mitsui*

---

<sup>208</sup> Waller, Spencer Webber, “Extraterritorial Jurisdiction in Theory and Practice”, by Karl M. Meessen (ed.), London, The Hague, Boston: Kluwer Law International, Book Review and Note, 91 *Am. J. Int’l L.* 575.

<sup>209</sup> (1911) 221 U.S. 106, 31 S. Ct. 632, 55 L. Ed. 663

<sup>210</sup> (1927) 274 U.S. 268

<sup>211</sup> 148 F. 2d 416 (2d Cir. 1945)

<sup>212</sup> Torremans, op cit, page 280.

<sup>213</sup> *US Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)

<sup>214</sup> “Extraterritoriality, International Aspects, and Globalization,” in Jones, Alison and Brenda Sufrin, *EC Competition Law: Text, Cases, And Materials* (Second ed.), Oxford University Press 2004, page 1236.

<sup>215</sup> Johansson, op cit, page 140.

& Co.<sup>216</sup>. The case concerns allegations of anticompetitive conduct by Mitsui & Co., Ltd., which included its American subsidiary, Mitsui & Co. (U.S.A.) Inc., aimed at preventing the Industrial Investment Development Corporation and its two subsidiaries from harvesting and exporting logs and lumber from Borneo. Here the Court “refused to grant summary judgment and dismissed the plaintiff’s claims on jurisdictional grounds but “held that the plaintiffs might succeed in showing that the defendants’ foreign conduct had sufficiently substantial effects on U.S. commerce to permit application of the antitrust laws”<sup>217</sup>.

In an effort to ‘moderate’ the expansive nature of *The Alcoa’s* effects test, the U.S. attempted to “balance conflicting U.S. and foreign interests in regulating particular [antitrust] conduct”.<sup>218</sup> One measure undertaken by the US may be found in its *Restatement (Second) Foreign Relations Law*, where it states (Section 40), that ‘balancing’ would be attempted where it was felt that “a state would decline to enforce its legislative jurisdiction in cases where its interests were clearly outweighed by foreign interests”.<sup>219</sup> This would be interpreted as a conscious effort on the part of the US to attempt to begin to ‘coordinate’ regulation over international antitrust matter, by taking into consideration the jurisdiction of other states. This new approach was evident in *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*<sup>220</sup> where it was held that “exercise of extraterritorial jurisdiction in antitrust actions [on the part of the US] should always be reasonable”.<sup>221</sup> The concerns an allegation by Timberlane that the Bank of America had conspired with lumber operators in Honduras to exclude and eliminate it from the business of exporting Honduran lumber. Timberlane had purchased a lumber mill and tracts of Honduran forest land that had been received by creditors after one of the Honduran lumber

---

<sup>216</sup> 671 F.2d 876 (5th Cir. 1982)

<sup>217</sup> Supra note 183 at 584.

<sup>218</sup> Born, op cit, page 587

<sup>219</sup> Ibid, page 587.

<sup>220</sup> 549 F.2d 597 (9th Cir. 1976)

<sup>221</sup> Johansson, page 140

companies had gone bankrupt. Timberlane had brought the case alleging that it violated §§ 1 and 2 of the Sherman Act.<sup>222</sup> The district court dismissed for lack of any direct effect on the US. Timberlane appealed, but the appeals court upheld stating that “the effects test itself is incomplete because it fails to consider other nations interests. Nor does it take into account the full nature of the relationships between the actors and this country.”<sup>223</sup> The Court subsequently set up a tri-partite test for determining jurisdictional power of the Sherman Act having argued that *The Alcoa’s* effect test was inadequate. The new tripartite test reaffirmed one, that there be some effect, either actual or intended, on US foreign commerce “before the courts may legitimately exercise subject matter jurisdiction under [the Sherman Act]”.<sup>224</sup> Two, that a “cognizable injury exists to which US antitrust laws should apply”.<sup>225</sup> And three that it had to be established that “the interests of, and links to, the United States...are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”<sup>226</sup> Johansson puts it succinctly in writing that “international comity concerns have to be regarded”<sup>227</sup>. In setting out the third criteria in *Timberlane* Judge Choy stated that certain factors needed to be taken into account, including:

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, the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.<sup>228</sup>

---

<sup>222</sup> Born, op cit, pae 588

<sup>223</sup> 549 F.2d at 610-11

<sup>224</sup> Born, op cit, page 590

<sup>225</sup> Johansson, op cit, page 140

<sup>226</sup> Born, op cit, page 590

<sup>227</sup> Johansson, op cit, page 140

<sup>228</sup> Jones *et al*, op cit, page 1237

The list of factors set out under the *Timberlane* case was later expanded in the case of *Mannington Mills Inc. v Congoleum Corp.*<sup>229</sup> to include, inter alia, “the possible effect on foreign relations if the court exercised jurisdiction; and ...whether a treaty with the affected nations has addressed the issue”.<sup>230</sup>

The comity premise established in the *Timberlane/ Mannington Mills* cases was later narrowed down and the application of extraterritoriality in US antitrust was clarified<sup>231</sup> in another case, *Hartford Fire Insurance Co. v. California*<sup>232</sup>. In that case the Supreme Court held that “even assuming that a U.S. court could ever withhold the exercise of its jurisdiction based on comity, the only relevant inquiry would be whether a defendant was compelled by foreign law to violate U.S. law”.<sup>233</sup> *Hartford Fire Insurance* was a case wherein a number of insurance companies across nineteen US states alleged that there was a conspiracy on the part of certain London reinsurers to force the primary insurers to conform to certain policies as it related to the commercial and general liability insurance, and that this was a violation of § 1 of the Sherman Act. Initially the case was dismissed by the District Court which applied the decision in *Timberlane* and invoked international comity stating, “there are certain circumstances, and this is one of them, in which the interests of another State are sufficient that the exercise of ... jurisdiction should be restrained”. The case was appealed and the US Appeals Court reversed the earlier decision of the District Court. The Appeals Court looked at the issue of comity in the case but felt that because there was “express purpose to affect U.S. commerce and the substantial nature of the effect produced, outweighed the supposed conflict and [therefore] required the

---

<sup>229</sup> 595 F.2D 1287 (3rd Cir. 1979)

<sup>230</sup> Jones, *et al*, op cit, page 1237.

<sup>231</sup> Torremans, op cit, page 281

<sup>232</sup> 509 US 764, 113 S. Ct 2891 (1993)

<sup>233</sup> Mehra, Salil, “Extraterritorial Antitrust enforcement and the Myth of International Consensus,” *10 Duke J. of Comp. & Int’l L.* 191, page 192.

exercise of jurisdiction”.<sup>234</sup> The decision of the Court was arrived at in light of the Foreign Trade Antitrust Improvements Act (FTAIA) which amended the Sherman Act and which “exempted export transactions from the Sherman Act unless they injure the US economy”.<sup>235</sup>

Some four years after *Hartford Fire Insurance* the effects test was again applied, in *United States v. Nippon Paper Industries Co. (Nippon Paper)*<sup>236</sup>, a case alleging a cartel fixing the price of fax paper by a Japanese company. Here the First Circuit Court looked at the ‘jurisdictional rule of reason’ established, but given that the conduct was illegal under Japanese law felt that the “undertaking should not be sheltered from the prosecution by the principles of comity”<sup>237</sup> and hence held that US courts did have jurisdiction.

Historically, the United States has been the most aggressive country in applying its laws in an extraterritorial manner. U.S. extraterritoriality has its roots in the Sherman Act 1890<sup>238</sup>, § 1 of which states that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Although the Sherman Act 1890 is only the center piece of US antitrust law and, there are a number of other supporting legislations and instruments including The Clayton Act (1914) which was enacted to support the Sherman Act 1890, and the Robinson-Patman Act (1936) enacted in turn to support the Clayton Act 1914. The Clayton Act is the primary US legislation governing mergers and acquisitions and applies to those with “immediate anticompetitive effects and those that have a future probability of substantially reducing competition.”<sup>239</sup>

---

<sup>234</sup> Born, op cit, page 597

<sup>235</sup> Jones *et al*, op cit, page 1238.

<sup>236</sup> 109 F.3d (1st Cir. 1997)

<sup>237</sup> Jones *et al*, op cit, page 1240

<sup>238</sup> 15 U.S.C. §§ 1-7

<sup>239</sup> Hamner, Kenneth J, “The Globalization of Law: International Merger Control and Competition Law in the United States, the European union, Latin America and China,” J. Transnational Law & Policy, Vol. 11:2, Spring 2002, page 391.

More recently however the European Union has also taken to extraterritorial application of its competition laws. The E.U.'s Competitions Laws are enshrined in "Chapter 1 of Part III of the Treaty of Rome which consists of Articles 81 to 89"<sup>240</sup> and where the EU asserts extraterritoriality, it is usually as a result of violations of its laws. In *Imperial Chemical Industries Ltd. v. Commission of the European Communities (Dyestuffs)*<sup>241</sup> the European Court of Justice (ECJ) had an "opportunity to rule on the extraterritorial application of its competition law"<sup>242</sup>. *Dyestuffs* involved three non EC undertakings who had participated in illegal price fixing within the EC thereby infringing Articles 81(85) of the Treaty of Rome, but it had done so through its subsidiary companies within the EC. In looking at the matter the court held that the undertakings in fact formed a single economic entity and therefore the EC had jurisdiction. The respondents, whose office were not registered inside the community had claimed that that "the commission is not empowered to impose fines on it by reason merely of the effects produced in the common market by actions which it is alleged to have taken outside the community".<sup>243</sup>

The ECJ then had an opportunity to review its position in the *Dyestuffs* some sixteen years later in the *Wood Pulp*<sup>244</sup> a case whereby two wood pulp producers situated outside of the Community was found to have infringed Art. 81(85) by adopting agreements and concerted practices which resulted in higher prices for wood pulp than would normally have been in a competitive environment, and therefore the ECJ imposed fines. Article 85 (1) of the EEC Treaty

---

<sup>240</sup> Whish, op cit, page 51. See also Jones Alison, and Brenda Surfin, *EC Competition Law: Text, Cases, and Materials* (Second ed.), Oxford University Press (2004).

<sup>241</sup> *ICI v Commission*, Cases 48/69 [1972] ECR 619 CMLR 557.

<sup>242</sup> Torremans, op cit, page 282. See also, Banks, J.D., "The Development of the Concept of extraterritoriality Under European Merger Law and its Effectiveness Under the Merger Regulation Following the Boeing/McDonnell Douglas Decision 1997," *E.C.L.R.* 1998, 19(50, 306-311; and Ezrachi, Ariel, "Limitations on the Extraterritorial Reach of the European Merger Regulation," *E.C.L.R.* 2001, 22(4), 137-146.

<sup>243</sup> Case 48/69

<sup>244</sup> 85/202 (1985) OJ L85/1

prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions and those which share markets or sources of supply.<sup>245</sup>

The producers appealed, arguing that the ECJ did not have jurisdiction.<sup>246</sup> In the appeal case, *A Ahlstrom Oy and Others v. Commission (Wood Pulp)*<sup>247</sup>, the Commission stated that according to Article 85 of the EEC Treaty, 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 practices in question also affect markets outside the EEC’.<sup>248</sup> The ECJ’s ruling here reflected a variant of the effects doctrine, or what became known in EU law as ‘the implementation requirement’. As Torremans puts it “the whole construction [which established jurisdiction] was that if the effects of the agreements and concerted practice in the Community were intended, direct and substantial, Article 85 would apply to undertaking outside the Community.”<sup>249</sup> In Johansson’s opinion, the ECJ’s ruling in the case “seemed to show that Art 81(85) only applies to non-Community undertakings if there is an actual effect in the Community”.<sup>250</sup>

The difference between the *Dyestuffs* and the *Wood Pulp* cases is that in the case of the former, the undertakings were found to constitute a

---

<sup>245</sup> Art. 81(85) Treaty of Rome

<sup>246</sup> See Torremans, Paul L.C., “Extraterritorial Application of E.C. and U.S. Competition Law,” *European Law Review* 1996, 21 (4), 280-293; also Johansson, Maria, “Extraterritorial Jurisdiction in Competition and Anti-Trust Matters,” *ELSA PEL* 2003 (2), URL: [http://www.elsa.org/pdf/SPEL03\\_2\\_JOHANSSON.pdf](http://www.elsa.org/pdf/SPEL03_2_JOHANSSON.pdf); Whish, Richard, *Competition Law* (Fifth Ed.), Lexis-Nexis Butterworth (2003), Chapter 12.

<sup>247</sup> *A Alström Oy v Commission*, Cases 114/85 [1988] ECR 5193; [1988] 4 CMLR 901.

<sup>248</sup> Art. 81(85) of Treaty of Rome

<sup>249</sup> Torremans, op cit, page 284

<sup>250</sup> Johansson, op cit, page 136.



single economic entity and therefore the territorial link with the Community was established; while in the case of the latter it was the conduct of the undertakings (trading directly inside the Community) which created the effect and therefore the link. This is what distinguishes EC competition law from US antitrust law – the fact that “the EC courts have tried to maintain a ... link with the territoriality principle by requiring implementation in the Community”.<sup>251</sup>

By way of a background, the effects test has over the years been subject to limitations, in particular by the limits placed by international law on state’s jurisdiction, and by comity concerns. To take the first, the limitations of international law for extraterritoriality in international antitrust and competition law may be found within the two elements of state jurisdiction, namely prescriptive or subject matter jurisdiction, and enforcement jurisdiction. As regards enforcement jurisdiction, that is for all intents and purposes bound by the territoriality principle. If it is a matter of subjective jurisdiction then jurisdiction extends only to those acts committed within the physical territory. And if it is a matter of objective jurisdiction then it is still ‘linked’ to the territory albeit through the effects which are felt within the physical territory. Prescriptive jurisdiction is, in my view, where the problem originates and resides. To be sure, enforcement jurisdiction is only legitimate if it is premised on established laws. This is precisely why all of the decisions on extraterritoriality by the U.S. refer back to terms and conditions set out under the Sherman Act 1890, why there is a presumption of territoriality as it relates to that very Act; and why extraterritoriality by the E.U., invariably refers back to the terms and conditions set out under Articles 81 to 89 of the Treaty of Rome.

Torremans sees the problem as one emanating from the lack of clarity surrounding the basis of prescriptive jurisdiction.<sup>252</sup> The question is who and how is the state authorized to prescribe? According to Gerber, “a

---

<sup>251</sup> Johansson, *op cit*, page 142.

<sup>252</sup> Torremans, *op cit*, page 284.

state may not prescribe norms for conduct occurring within another state, except where authorized to do so.”<sup>253</sup> There is nothing within the law and or the case to reveal that either the US and or EU were authorized to prescribe laws which regulate antitrust activities in other states, including in each other. Yet this is the case. Hence the question of which law applies arises? This was the crux of the issue in *Hartford Fire Insurance*, where the defendants agreed that their conduct probably had effects in the US, but argued that it was legal in the U.K.<sup>254</sup> The ‘exercise of jurisdiction to prescribe’ is an unsettled one in US antitrust jurisprudence, and is perhaps why *Hartford Fire Insurance* “reestablished Learned Hand’s original formulation in *The Alcoa* ... [that] “it is well established ...that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”<sup>255</sup> It did not help moreover, that the Foreign Trade Antitrust Improvements Act of 1982 did not clarify “whether a court with Sherman Act jurisdiction should ever decline or exercise such jurisdiction on ground of international comity”.<sup>256</sup> The confusion about “what standards would bring foreign claims under the jurisdiction of US courts”<sup>257</sup> is perhaps what led to “foreign plaintiffs bringing treble damages antitrust actions in U.S. Courts for certain damages sustained abroad”<sup>258</sup> – the *Empagran*<sup>259</sup> case.

Given the conflicts that arise as a result of the above, the US for one, has invariably resorted to the consideration of comity in deciding international antitrust cases. In *United States v. Alcoa* Judge Learned Hand cautioned against reading the Sherman Act “without regard to the

---

<sup>253</sup> Gerber, op cit, page 23.

<sup>254</sup> See for example Lowenfeld, Andreas F., “Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case,” 89 *Am. J. Int’l L.* 42, page 1.

<sup>255</sup> Slaughter and Zaring, op cit, page 9. The authors were quoting Judge Learned Hand’s ruling in the *Alcoa* here 113 S. Ct. at 2909.

<sup>256</sup> Born, op cit, page 597

<sup>257</sup> “U.S. Jurisdiction Over Foreign Antitrust Claims After *Empagran*: Many Questions Remain Open,” *Client Alert*, Number 399, July 8, 2004, Latham & Watkins Global Antitrust and Competition Practice, URL: [http://www.lw.com/resource/Publications/\\_pdf/pub1032\\_1.pdf](http://www.lw.com/resource/Publications/_pdf/pub1032_1.pdf), page 1.

<sup>258</sup> *Ibid*, page 1.

<sup>259</sup> 315 F.3d 338 (DC Cir. 2003)

limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'"<sup>260</sup> This was diametrically opposite from the decision of the court in the earlier case of *American Banana v. United Fruit Co.* where the Sherman Act's jurisdiction over foreign conduct was rejected. The confusion over the Sherman Act's jurisdiction over foreign antitrust matters emerged when in *Timberlane* "the Ninth Circuit Court expressed concerns that the Alcoa effects test failed to account adequately for other nations' interests."<sup>261</sup> The issue has now been brought full circle by *Hartford Fire Insurance*, and, it is submitted, moreover creates another situation of confusion about how the issue of US jurisdiction in international antitrust cases should be resolved. According to Born, the matter of comity in this regard is one of "prescriptive comity: the respect sovereign nations afford each other by limiting the reach of their laws."<sup>262</sup> Perhaps this is a result of the 'compliance pull' exerted by the international system whereby state sovereignty and authority is ascribed by the other states in the international system. Judging from the E.U. imposition of jurisdiction in the *GE/Honeywell*<sup>263</sup> case, whereby the Commission "prohibited a merger between two US companies which had already been approved"<sup>264</sup> by the US Antitrust authorities, the E.U. doesn't seem much concerned by consideration of comity in attempting to regulate international antitrust matters. Having said that however, in *IBM v. Commission*<sup>265</sup>, a case whereby the U.S. had requested that the EC not impose remedies against IBM, and where IBM had appealed that the courts decision be overturned citing lack of consideration of international comity on the part of the Court,

---

<sup>260</sup> 148 F.2d 416 (2<sup>nd</sup> Cir. 1945)

<sup>261</sup> 549 F.2d 597 (9<sup>th</sup> Cir. 1976)

<sup>262</sup> Born, op cit, page 601

<sup>263</sup> Case No. COMP/M.2220.

<sup>264</sup> Jones et al, op cit, page 1265.

<sup>265</sup> Case 60/81, *IBM v. EC Commission*, 1981 E.C.R. 2639, 3 C.M.L.R. 635 (1981)

the ECJ rejected “holding that issues of international comity should not even be considered until after a “decision “had been made.”<sup>266</sup>

A third limitation may also exist. This may be in the form of, as one study suggests, “the effects test, though originally a test of prescriptive jurisdiction, [having] come to be viewed as a test of subject matter jurisdiction.”<sup>267</sup> Subject matter jurisdiction in this sense, “concerns the authority or competence of a court to decide a particular category of case.”<sup>268</sup> In other words, “Courts have limited authority to decide only certain types of cases.”<sup>269</sup> This may be understood as different from legislative jurisdiction which is the authority to prescribe laws. The question of subject matter jurisdiction has been at the center of conflicts in international antitrust, and in fact many have held that “the U.S. lacks subject-matter jurisdiction in cases based on the “effects” doctrine.”<sup>270</sup> In the *Empagran* case for example, “the Supreme Court held that there is no U.S. subject matter jurisdiction over international antitrust claims where the plaintiffs’ injury flows from “independent foreign harm” or otherwise lacks a sufficient nexus with U.S. commerce”.<sup>271</sup> Subject matter jurisdiction was a main point of disagreement between the sitting judges in the *Hartford Fire Insurance* case.<sup>272</sup> The issue is really whether the Sherman Act provides authority for US courts to exercise jurisdiction in international antitrust matters.

In summary, extraterritorial application of antitrust and competition laws in both the E.U. and the U.S. started from a “relatively territorial

---

<sup>266</sup> Sugden, William, “Global Antitrust and the Evolution of an International Standard,” URL: <http://law.vanderbilt.edu/journal/35-03/Sugden2.pdf>, page 1011.

<sup>267</sup> Trenchard, op cit, page 34.

<sup>268</sup> Restatement (Second)

<sup>269</sup> Trenchard, op cit, page 34

<sup>270</sup> Griffin, Joseph P., “Foreign Governmental Reactions to US Assertions of Extraterritorial Jurisdiction,” E.C.L.R. 1998, 19(2), 64-73, page 6

<sup>271</sup> Gowdy, Jonathan, and W. Stephen Smith, “U.S. Supreme Court Limits the Reach of U.S. Antitrust Laws, but Permits U.S. Discovery for Use in Foreign Tribunal,” *Morrison Foerster: Legal Updates & News*, July 2004, URL: <http://www/mofo.com/news/updates/files/update1252.html>, page 1.

<sup>272</sup> Born, op cit, page 605

approach to enforcement jurisdiction.”<sup>273</sup> This approach evolved to one which adopted an ‘effects test’ and or ‘implementation doctrine’. At the end of the day, the effects test did not reduce interstate tension, and instead may have only succeeded in creating more conflicts. The E.U. and the U.S. turned to international comity as a possible way of reducing such conflicts but it is evident that despite its consideration in US Courts, the national interest prevailed and therefore “there has been a consequent narrowing of their consideration of international comity.”<sup>274</sup> Perhaps, as Mehra puts it, “if there were an international consensus as to regulation and extraterritorial scope the interests of [all states] could be served by a doctrine that encourages courts to restrain the exercise of antitrust jurisdiction in response to comity concerns”.<sup>275</sup> There is yet to be such a consensus, and the failure of regulatory tools employed thus far only serve to further legitimize the need for realizing some form of formal international cooperation.

## 5. International Cooperation or Regime Formation?

Perhaps it was in cognizance of the perceived need for antitrust and competition law to follow economic activity into the global level, that gave rise to the question of whether this could “reasonably be achieved by [the] extraterritorial application of national antitrust legislation or whether it requires the establishment of an international competition policy”<sup>276</sup>. That question in my view, warrants refocusing, to determine whether or not a formal regime at the international or global level is what is in fact really required or if only formal international cooperation will suffice. This question takes on increased validity in view of the fact that

---

<sup>273</sup> Sugden, op cit, page 1013.

<sup>274</sup> Ibid, page 1013.

<sup>275</sup> Mehra, op cit, page 206

<sup>276</sup> Klodt, Henning, “Conflicts and Conflict Resolution in International Antitrust,” *Keil Working Paper* No. 979, May 2000, page 1.

extraterritoriality “cannot generally correct distortions in the [global] economy”<sup>277</sup>.

In Krasner’s view, “effective management [and regulation] of the increasingly trans-nationalized [economy] requires higher levels of cooperation”<sup>278</sup>; and Berman in similar vein, but more pointedly, argues that, “assertions of jurisdiction on an [extraterritorial] basis will almost inevitably tend toward a system of universal jurisdiction because so many activities will have effects far beyond their immediate geographical boundaries”<sup>279</sup>. In fact, in 2000 then US Assistant Attorney General Joel Klein, at the time in charge of the Antitrust Division of the Justice Department “called for the creation of a global organization similar to the Organization for Economic Cooperation and Development (OECD) to help coordinate international competition law convergence and enforcement”.<sup>280</sup> This view is shared by Professor Sherman who feels that extraterritoriality must be seen as a continuum at one of which is “the voluntary relinquishment of sovereignty to regional and international bodies”<sup>281</sup>.

The truth of the matter is that the ‘tilt’ towards international cooperation is probably because nation states realize that “economic or other exogenous circumstances render [those] that act unilaterally ineffective, thus manifesting a greater need for international approaches”<sup>282</sup> to cooperation. This issue of international cooperation however is not a new one, and in fact there have been numerous attempts dating back to the Havana Charter in the 1940s to the recent WTO Doha Ministerial Conference. Bi-lateral agreements have also played an

---

<sup>277</sup> Falvey, R., “An Economic Analysis of Extraterritoriality”, URL: [http://www.economics.unimelb.edu.au/research/workingpapers/wp97\\_99/675.pdf](http://www.economics.unimelb.edu.au/research/workingpapers/wp97_99/675.pdf), page 3.

<sup>278</sup> Supra note 62 at 112.

<sup>279</sup> Supra note 63 at 14.

<sup>280</sup> Sugden, William, “Global Antitrust and the Evolution of an International Standard,” *Vanderbilt Journal of Transnational Law*, Vol. 35:989, URL: <http://law.vanderbilt.edu/journal/35-03/sugden2.pdf>, p. 990.

<sup>281</sup> Supra note 196 at 3.

<sup>282</sup> Jackson, op cit, page 9.

important role in fostering international cooperation, and as it relates to EC-US antitrust cooperation as manifested first in the 1991 EC-US Agreement and later in the 1998 EC-US Agreement, “achieved the result of creating a framework to develop contact between the two side..., to provide a forum for exchange of views and discussion, and ultimately to facilitate mutual understanding and cooperation in the broader sense.”<sup>283</sup> As a matter of point, the 1991 EC-US Agreement is widely believed to have contributed to “closer cooperation and coordination between enforcement authorities placed in different countries,”<sup>284</sup> and the subsequent 1998 Agreement attempted to build on that by broadly redefining the positive comity principle to “contemplate the possibility of requesting the other country’s authorities to investigate and remedy anticompetitive activities which might have a negative impact on the requesting country.”<sup>285</sup>

The bi-lateral approach however has met with some with shortcomings (for example the EU imposed its jurisdiction in GE Honeywell despite the fact that there was the EC-US bilateral agreement), and as a result, more recently, considerations have been put forward by both the U.S. and the E.U. as to possible ways forward in terms of ‘international cooperation’ in antitrust and competition law matters. The E.U.’s preference is to subsume regulatory control for international antitrust under the World Trade Organization. The U.S. on the other hand had suggested the International Competition Network (ICN), and favors the bilateral and regional agreements as a way of negotiating and arriving at an international competition policy.<sup>286</sup> Tarullo seems to support the U.S. position that the WTO is not the appropriate forum for handling international antitrust matters, and sees that approach as one which would

---

<sup>283</sup> Montini, *op cit*, page 10.

<sup>284</sup> *Ibid*, page 8.

<sup>285</sup> *Ibid*, page 9.

<sup>286</sup> Guzman, Andrew, “Antitrust and International Regulatory Federalism,” 76 *N.Y.U. L. Rev* 1142, October 2001.

“force the square peg of competition policy into the round hole of trade policy [thereby changing] the shape of the peg.”<sup>287</sup>

According to Tarullo, although the WTO has been successful as a post World War II international organization, and perhaps represents the “best extant case of what might be called statutory/adjudicatory type of governance”<sup>288</sup> it is not appropriate for dealing with international antitrust matters for a number of reasons. For one, the WTO is designed to eliminate certain types of government practices (i.e. those that establish barriers to trade) and not to “help governments act more effectively to address a shared regulatory problem.”<sup>289</sup> Two, it is a trade organization and not a competition law one.<sup>290</sup> Three, it “seems an inappropriate forum for... reduce[ing] duplicative or unnecessarily burdensome national enforcement policies;”<sup>291</sup> and four, the “common-law, case specific approach [of international competition law] contrasts sharply with the usual efforts in WTO negotiations to specify rules as precisely as possible.”<sup>292</sup> However, there are some advantages to using the WTO including (a) its ability to overcome the divergent national incentives created by international trade and local regulatory objectives;<sup>293</sup> (b) its dispute settlement system;<sup>294</sup> and (c) its “features of universal membership.”<sup>295</sup>

Globalization and its attendant processes and outcomes however, have been known to generate a “powerful tension between...traditional core sovereignty and the international institution”<sup>296</sup>. Hence, the problem with placing regulatory authority under an international institution is that, as Dianne P. Wood put it, “it is unlikely ...that the United States will

---

<sup>287</sup> Tarullo, Daniel K. “Norms and Institutions in Global Competition Policy,” 94 *Am. J. Int’l L.* 478, July 2000, page 1.

<sup>288</sup> *Ibid*, page 6.

<sup>289</sup> *Ibid*, page 7

<sup>290</sup> *Ibid*, pages 6-7

<sup>291</sup> *Ibid*, page 8

<sup>292</sup> *Ibid*, page 8

<sup>293</sup> Guzman, note 282 at 7

<sup>294</sup> *Ibid*, page 8.

<sup>295</sup> *Ibid*, page 8.

<sup>296</sup> Jackson, *op cit*, page 2.



become party to a ...organization whose laws takes precedence over U.S. law, and which has its own fully independent set of courts.”<sup>297</sup> In this regard, the U.S. has already done so in a number of different areas including most prominently the WTO. But their reluctance serves to highlight the fact that a statist approach necessarily imbues “differences in objective and ... theories about ... what rules are necessary for the protection of competition.”<sup>298</sup> This is why “the coexistence of different competition laws should be seen as a permanent feature of an international system of competition laws.”<sup>299</sup>

But that doesn’t mean that all is lost. In my opinion, and Guzman argues similarly, the current approach already establishes some form of regulatory cooperation, albeit, in procedural issues, and in areas of information sharing, as well as through bi-lateral agreements.<sup>300</sup> Although bi-lateral agreements provide an opportunity for information sharing and for alternative approaches for enforcement action, Guzman sees them as limited in scope because “states are allowed to decide if they wish to cooperate.”<sup>301</sup> On the other hand, formal regime formation is unlikely because as a former US Assistant Director for International Antitrust stated, “although some envision a worldwide antitrust code with some kind of global enforcement mechanism, such a regime is neither realistic nor necessarily desirable in the foreseeable future.”<sup>302</sup>

Against such a backdrop, the recommendation that perhaps “the solution should not be sought in centralized global competition rules but be based primarily upon national competition laws and authorities”<sup>303</sup> takes on increasing attraction and legitimacy, and in this way efforts at international cooperation could focus on “better international enforcement

---

<sup>297</sup> Wood, op cit, page 7

<sup>298</sup> Kerber, Wolfgang, “An International Multi-Level System of Competition Laws: Federalism in Antitrust,” *German Working Papers in law and Economics*, Volume 2003 paper 13, page ii.

<sup>299</sup> Ibid, page ii.

<sup>300</sup> See Guzman, note 282 at 2.

<sup>301</sup> Ibid, page 2.

<sup>302</sup> Tritell, op cit, page 4.

<sup>303</sup> Kerber, op cit, page i.

of [such] laws.”<sup>304</sup> Such an approach however, would suffer from “horizontality”.<sup>305</sup> Perhaps the solutions lie in supporting those initiatives which have proven useful, such as bilateral agreements, but with a view to identifying and addressing any weaknesses. Given the plethora of states now interested in the ‘regulation’ of antitrust and competition law matters the next step would be to “connect their networks”<sup>306</sup> and formulate modalities for strengthening the regulatory cooperation between and amongst the ‘disaggregated elements of the state’ – the courts, lawyers, etc.,<sup>307</sup> in particular as it relates to enforcement. Professor Fox suggests a similar approach, one aimed at “building upon and working synergistically with horizontal networks of deep cooperation”<sup>308</sup> because as she sees it, “it would incorporate the basic consensus substantive antitrust principles into a framework directive approach.”<sup>309</sup> Here the positive comity principle espoused in the 1991 EC-US Agreement may prove useful. The positive comity principle “consists in positive acts of cooperation and reciprocal assistance between national antitrust authorities placed in different countries.”<sup>310</sup> In this regard, it may serve as “the cornerstone of broad schemes of cooperation between national antitrust authorities located in different countries.”<sup>311</sup> This is qualitatively different than a negative comity approach which only requires basic deference to another state’s laws and to the ability of that state to apply its own laws.

In the final analysis however it may be inevitable that states will have to concede some of their sovereignty in order to achieve jurisdiction over antitrust and competition law matters which arise at the global level. If

---

<sup>304</sup> Ibid, page i.

<sup>305</sup> Fox, Eleanor, “International Antitrust and the Doha Dome,” 43 *Va. J. Int’l L.* 911 (2003), page 925. See also First, Harry, “Evolving Towards What? The Development of International Antitrust,” URL: <http://www.law.nyu.edu/kingsburyb/spring03/globalization/First.pdf>.

<sup>306</sup> First, op cit, page 11

<sup>307</sup> See Slaughter, op cit,

<sup>308</sup> Fox, op cit, page 928

<sup>309</sup> Ibid, page 928.

<sup>310</sup> Montini, Massimiliano, “Globalization and International Antitrust Cooperation,” Paper Presented at the International Conference Trade and Competition in the WTO and Beyond, Revised Draft, March 31, 1999, page 7.

<sup>311</sup> Ibid, page 7.

for no other reason than the fact that as long as there is no overarching international regulatory authority states will revert to extraterritorial use of their own national laws.

## 6. Conclusion:

The current tension in international antitrust regulation may be understood as resulting from states' extraterritorial use of national laws (spatial switching) to regulate economic activity in the global economy, when in fact international cooperation (scalar switching) is what is required. Any changes to the regulatory framework for international antitrust and competition law however may prove challenging to states.

For one, liberal theories in international political economy have impacted on the international legal system by introducing of non-state actors into the international system, and by transposing regulatory control over economic decisions and activities beyond the territorially defined state, often into the hands of international regulatory regimes. Whereas the international legal system previously was one merely for 'aggregating' the interests of states, it is now a system for disaggregating the common interests of other actors in the international society.<sup>312</sup> Indeed it seems that "in the face of globalization the state is disaggregating into its component institutions...where the traditional actors continue to play a role but where there are also new non-state actors."<sup>313</sup> The emergence of non-state actors in the international system means for international law that the "traditional forms of international law making...are less appropriate to shape the relations of the various actors...reflecting the changing roles"<sup>314</sup> in the international system of both states and non-state actors. If the traditional

---

<sup>312</sup> Ibid, page 80. Here Allot argues that one of the leading characteristics of the international system is the "disaggregating for the common interests of all humanity".

<sup>313</sup> See Slaughter, Anne-Marie, "Governing Through Government Networks", in *The Role of Law in International Politics: Essays in International Relations and International Law*, by Michael Byers (ed.) Oxford University Press 2001, page 178. Also Anne-Marie Slaughter, *A New World Order*, Princeton University Press 2004.

<sup>314</sup> Reinicke, *et al*, op cit, page 3.

forms of law making in international law are no longer appropriate it is probably because globalization and the resulting transnationalization are profoundly impacting on the conceptual bases of jurisdiction and sovereignty.

Two is that globalization has re-conceptualized the basis for sovereignty and in so doing has rendered “the current tools of international legislative jurisdiction are inadequate to meet the challenges of global markets”<sup>315</sup> because it has rendered strict territorial limits on jurisdiction increasingly unworkable”<sup>316</sup>. Such tools were in reality “developed in response to economic...circumstances that global markets have changed and are likely to continue to change”<sup>317</sup>. When therefore states choose to exercise particular antitrust national laws extraterritorially they are arguably exercising both the sovereign powers vested in them through their office of public authority, as well as seeking to preserve their autonomy. States now have to contemplate conceding some of their sovereignty and jurisdiction by transferring regulatory responsibility to supra-national bodies.

And three is that the ‘effects test’, the cornerstone of US extraterritoriality, has over the years been subject to limitations, in particular by the limits placed by international law on state’s jurisdiction, and by comity concerns. A third limitation may have also affected extraterritoriality. That is because the effects test, though originally a test of prescriptive jurisdiction, has come to be viewed as a test of subject matter jurisdiction. Hence, questions have arisen with regard to the competence of the U.S. courts in particular, in adjudicating matters in international antitrust which are conducted beyond their borders.

The combination of the above suggests that extraterritoriality has for all intents and purposes been rendered a square peg in the round hole

---

<sup>315</sup> Gerber, David J., “Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems,” Paper Presented at the Conference on Transnational Business Transactions, Barcelona, Spain, June 1-3, 2003, p. 22.

<sup>316</sup> Raustiala, *supra* footnote 31 at 17.

<sup>317</sup> *Ibid*, p. 22

of globalization as it is unable to address antitrust and competition matters which arise at the global level. The continued use of extraterritoriality as a regulatory policy tool therefore must be understood for what it is, that is: the inability of states to adopt, at the pace of globalization, “the legal norms, processes, and structures that are necessary to suitably continue to shape and dictate interstate interaction”<sup>318</sup>. Given the persistence of the state as the primary policy maker within the global society of states however, despite the increasing role of non-state actors such as firms and multinational corporations, it is very likely that any resulting framework will still be predicated on notions of sovereignty albeit in its re-conceptualized form.

The recent successful bid for Gillette by Proctor & Gamble, and the SBC merger with its former parent company the telecommunications giant AT&T, is a reflection of the pressures for trans-nationalization that competition places on firms, and have inevitably led to a need for states to look for higher levels of international regulatory cooperation. Such a shift in power away from the state and onto “institutions above the level of the state, [but is] driven by the need to solve common problems in an increasingly interdependent world”<sup>319</sup>. Several options have been put forward to date, but the two main actors, the E.U. and the U.S. have divergent views on the matter. The former wants for competition to be placed under the WTO, but the U.S. prefers an alternative approach. Although creation of a global regime at this juncture seems unlikely, formal international cooperation seems very much a possibility, as nations are beginning to shrug their traditional legal and regulatory cocoons to explore new global institutions and legal norms in international antitrust and competition law matters.

---

<sup>318</sup> See Reinicke *et al*, *op cit*, page 2.

<sup>319</sup> Hurrell, Andrew, “The Global Environment”, in *International Relations Theory Today*, by Ken Booth and Steve Smith (ed.), Cambridge: Polity Press, 1995, page 137.

## Bibliography

\_\_\_\_\_. A survey of Principal Decisions of the European Court of Justice Pertaining to International Law: I. Wood Pulp. URL: <http://www.ejil.org/journal/vol1/no1/sf2.html>.

\_\_\_\_\_. Competition Law Supplementary Materials. Newcastle: Northumbria University, 28 November 2002.

Albert, Matias Dr. Legalisation or Global law Formation? On the Evolution of Law in World Society, October 2001, URL: [http://www.uni-bielefeld.de/soz/iw/pdf/albert\\_2.pdf](http://www.uni-bielefeld.de/soz/iw/pdf/albert_2.pdf).

Amato, *Antitrust and the Bounds of Power*. Hart Publishing, 1997.

Baker & McKenzie, U.S. Supreme Court to Review Two Significant Antitrust Cases Involving Patents and Joint Ventures, Antitrust Law Newsletter, July 2005, URL: [www.bakernet.com/NR/rdonlyres/7ADBEIOC-E239-4435-87BB-7C4A36/EF09/0/July2005northamericanantitrustlaw.pdf](http://www.bakernet.com/NR/rdonlyres/7ADBEIOC-E239-4435-87BB-7C4A36/EF09/0/July2005northamericanantitrustlaw.pdf)

Banks, J.D. The Development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation Following the Boeing/McDonnell Douglas Decision 1997, (1998). *European Competition Law Review* 1998, 19(5), 306-311.

Bavasso, Antonio F. "Boeing/McDonnell Douglas: Did the Commission Fly Too High." *European Competition Law Review* 1998, 19(4), 243-248.

Berman, Paul Schiff. "From International Law to Law and Globalization." 43 *Columbia Journal Transnational Law* 485, (2005).

Bilder, Richard B., Falk, Richard A., *Beyond Westphalia? State Sovereignty and International Intervention*, (1996), *American Journal of International Law*, 90 Am. J. Int'l L. 523.

Born, Gary. *International Civil Litigation in United States Courts*, (Third ed.). The Hague, Netherlands.: Kluwer Law International, 1996.

Brownlie, Ian. *Principles of Public International Law*. (Fifth Ed.). Oxford, U.K.: Oxford University Press, 1998.

Buzan, Barry. "The Primary Institutions of International Society." December 2002, URL: [www.leeds.ac.uk/polis/englishschool/buzan02b.doc](http://www.leeds.ac.uk/polis/englishschool/buzan02b.doc).

Carthy, Anthony. "Critical International Law: Recent Trends in the Theory of International Law." *European Journal of International Law*, 2 1, (1991). URL: [www.ejil.org/journal/Vol2/No1/art4.pdf](http://www.ejil.org/journal/Vol2/No1/art4.pdf).

Connor, "John M. Extraterritoriality of the Sherman Act and Deterrance of Private International Cartels." 2004, URL: <http://law.bepress.com/expresso/eps/263>.

Coudert Brothers LLP. *Antitrust Guidelines for International Operations*. URL: <http://library.findlaw.com/1999/Jun/1/131302.html>.

Craig, Paul and Gráinne De Búrca. *EU Law: Text, Cases, and Materials*, (Third ed.). Oxford U.K.: Oxford University Press, 2003.

Dam, Kenneth W. *Testimony Before the Federal Trade Commission, Hearings on Global and Innovation-Based Competition*, (1995). URL: [http://www.ftc.gov/opp/global/dam\\_kw.htm](http://www.ftc.gov/opp/global/dam_kw.htm).

D'Amato, Anthony. Customary International Law: A Reformulation, November 2000, <http://anthonydamato.law.northwestern.edu/Papers-1/A983-CL1-article.html>.

Dabbah. Maher M. "The Internationalisation of Antitrust Policy". *European Competition Law Review* . 2004,25 (12), 789.

Doern & Wilks (Eds.). *Comparative Competition Policy*. UK: Open University Press, 1996.

Epstein, Richard A., and Greve, Michael S. "Introduction: The Intractable Problem of Antitrust Jurisdiction." *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy*. URL: [http://www.aei.org/doclib/20040430\\_book770introduction.pdf](http://www.aei.org/doclib/20040430_book770introduction.pdf).

Ezrachi, Ariel. "Limitations on the Extraterritorial Reach of the European Merger Regulation". *European Competition Law Review*. 2001, 22(4), 137-146.

Fairhurst, John, and Christopher Vincenzi. *Law of the European Community* (4<sup>th</sup> ed.). Pearson Longman, 2003.

Falvey, R., and Lloyd P.J. "An Economic Analysis of Extraterritoriality." URL: <http://www.economics.unimelb.edu.au/research/workingpapers/wp97-99/675.pdf>. 21 May, 2005.

Ferry, John E. "Towards Completing the Charm: The Woodpulp Judgment." *European Competition Law Review*. 1989, 10(1), 58-73.

First, Harry. "Evolving Toward What? The Development of International Antitrust." URL: <http://www.law.nyu.edu/kingburgh/spring03/globalization/First.pdf>. 22 June, 2005.

Foster, Nigel. *Blackstone's EC Legislation 2003-2004*, (14<sup>th</sup> Ed.). Oxford, UK: Oxford University Press, 2003.

Fox, Eleanor. "International Antitrust and the Doha Dome." 43 *Virginia Journal of International Law*. 911, (2003). URL: <http://www.antitrustinstitute.org/recent2/274.pdf>. 18 May, 2005.

Fox, Eleanor. "Global Problems in a World of National Law." URL: <http://www.nesl.edu/lawrev/vol34/1/fox.pdf>.

Gerber, David J. "Prescriptive Authority: Global Markets as A Challenge To National Regulatory Systems." *Paper prepared for presentation at the Conference on Transnational Business Transactions sponsored by the Association of American Law Schools and the European Law Faculties Association. Barcelona, Spain: June 1-3, 2003*. URL: <http://www.aals.org/profdev.international/gerber.pdf>. 13 July, 2005.

Gowdy, Jonathan, and Smith, W. Stephen. "U.S. Supreme Court Limits the Reach of U.S. Antitrust Laws but Permits U.S. Discovery for Use in Foreign Tribunals". *Morrison & Foerster: Legal Updates & News*. July 2004. URL: <http://www.mofo.com/news/updates/files/update1252.html>.

Griffin, Joseph P. "Foreign Governmental Reactions to US Assertions of Extraterritorial Jurisdiction." *European Competition Law Review*. 1998, 19 (2), 64-73.

Guzman, Andrew T. "Is International Antitrust Possible?" *New York University Law Review* (1998), 73: 1501.

Guzman, Andrew T. "Antitrust and International Regulatory Federalism." *New York University Law Review*. 2001: 76, 1142.

Haigh, Stephen Paul. "Globalization and the Sovereign State: Authority and Territoriality Reconsidered." URL: [http://rspas.anu.edu.au/ir/oceanic/ocis\\_papers/haigh.pdf](http://rspas.anu.edu.au/ir/oceanic/ocis_papers/haigh.pdf). 3 July , 2005.

Hamner, Kenneth J. "The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China." *Journal of Transnational Law and Policy*. Vol.



11:2, Spring 2002. URL: <http://www.globalpolicy.org/globaliz/law/intlaw/2002/2002intlcomplan.pdf>

Holthoefter, Anne. "A Procrustean Bed? International Law and the Shaping of International Order." URL: <http://ptw.uchicago.edu/Holthoefter.pdf>.

Hudson, Alan. "Beyond the Borders: Globalisation, Sovereignty and Extra-Territoriality." URL: <http://www.alanhudson.org.uk/borders.pdf>. 23 May, 2005.

Inayatullah, Naeem and David L. Blaney. "Realizing Sovereignty." *Review of International Studies*. (1995) 21, 3-20.

Jackson, John H. "Sovereignty-Modern: A New Approach to an Outdated Concept." 97 *American Journal of International Law* 782, (2003).

Jain, Hitesh S. Emerging Trends in the Competition Laws and Policies from the International Trade Prospective.

Johansson, Maria. "Extraterritorial Jurisdiction in Competition and Anti-trust Matters." *ELSA SPEL* 2003, URL: <http://www.elsa.org/pdf/SPEL03-2-Johansson.pdf>.

Johnson, Jennifer R. "It's a Small World After All: Proposed Solutions for Global Antitrust in a System of National Laws." *Santa Clara Journal of International Law*. (2003) Vol. 1. URL: <http://www.scu.edu/scjil/archive/V1-Johnsonarticle.pdf>. 15 July, 2005.

Jones, Alison and Brenda Surfin. *EC Competition Law; Text, Cases, and Materials*, (Second ed.). Oxford U.K.: Oxford University Press, 2004.

Jones, Clifford A, Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market, Art8 – Jones, 5/24/04 5:30 pm.

Kaczorowska, Alina, *International Competition Law in the Context of Global Capitalism*, (2000), *European Competition Law*, E.C.L.R., 2000, 21(2), 117-127.

Kahler, Miles. "Territoriality and Conflict in an Era of Globalization." University of California, San Diego, [check other reference info]

Kennedy, David. Some Reflections on 'The Role of Sovereignty in the NIO, State Sovereignty: The Challenge of a Changing World Order – New Approaches and Thinking in International Law.' *Proceedings of the 21<sup>st</sup> Annual Conference of the Canadian Council on International Law at Ottawa, Canada, October 1992*.

Klodt, Henning, "Conflicts and Conflict Resolution in International Antitrust." *Kiel Institute of World Economics*. Germany, May 2000.

Kobrin, Stephen J. "Sovereignty@Bay: Globalization, Multinational Enterprise and the International Political System." URL: <http://www.management.wharton.upenn.edu/kobrin/research/Oxford%20rev2%20print.pdf>.

Kojima Takaaki, International Conflicts over the Extraterritorial Application of Competition law in a Borderless Economy, Weatherhead Center for International Affairs (Harvard University), 2001-2002, [http://www.wefia.harvard.edu/fellows/papers\\_01-02/kojima.pdf](http://www.wefia.harvard.edu/fellows/papers_01-02/kojima.pdf).

Kovacic, William, Extraterritoriality, Institutions and Convergence in International Competition Policy, [http://www.ftc.gov/speeches/other/031210\\_kovacic.pdf](http://www.ftc.gov/speeches/other/031210_kovacic.pdf). (6/5/05)

Krasner, Stephen D., Globalization, Power And Authority, Paper prepared for presentation at the American Political Science Association Annual Meeting, San Francisco, August 29-Sept 2, 2001. URL: <http://www.reformwatch.net/filters/66.pdf>.

Latham&Watkins Client Alert, U.S. Jurisdiction Over Foreign Antitrust Claims After Empagran: Many Questions Remain Open, URL: [http://www.1w.com/resource/publications/\\_pdf/pub1032\\_1.pdf](http://www.1w.com/resource/publications/_pdf/pub1032_1.pdf).

Lockhart, James M., U.S. Supreme Court To Decide Global Reach of American Antitrust Laws, the bullet "iln" Newsletter, International Lawyers Network, volume three issue one, January 16, 2004, URL: [http://www.iln.com/bullet\\_iln\\_three\\_one/lommen\\_articles.htm](http://www.iln.com/bullet_iln_three_one/lommen_articles.htm).

Lowenfeld, Andreas F., Conflict, Balancing of Interests, And the Exercise of Jurisdiction To Prescribe: Reflections On The Insurance Antitrust Case, (1995), *American Journal of International Law*, 89 AM. J. Int'l L. 42.

Malley, Robert and Jean Manas. "Constructing the State-Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms." *Harvard Law Review*. 103, 1273 (1990).

Mehra, Salil K., Extraterritorial Antitrust Enforcement and the Myth of International Consensus, *Duke Journal of Competition and International Law*, 10 *Duke J. of Comp. & Int'l L.* 191.

Melamed, A. Douglas, International Antitrust In an Age of International Deregulation, (1998) *George Mason Law Review*, 6 *Geo. Mason L. Rev.* 437).

Miller Arthur, R. "In the Supreme Court of the United States, F. Hoffmann-La Roche, Ltd. et.al., Petitioner and Empagran, S.A, et. al., Respondent. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit No. 03-724." *Brief of Amici Curiae Law Professors Ralf Michaels, Hannah Buxbaum and Horatia Muir Watt in Support of Respondents, March 15, 2004.* URL: [www.findlaw.com](http://www.findlaw.com)

Montini, Massimiliano, Globalization and International Antitrust Cooperation, (revised draft, March 1999), International Conference on Trade and Competition in the WTO and Beyond, Venice, December 1998, <http://www.tum.H/NR/rdonlyms/C88FEC05-642E-41EA-BB3E-6CEFEA827662/304/6999.pdf>.

Paulus, Andreas L., From territoriality to Functionality? Towards a Legal Methodology of Globalisation, URL: <http://cpogg.org/paper%20amerorg/Andreas%20Paulus.pdf>.

Picciotto, Sol, International Law: The Legitimation of Power In World Affairs, URL: <http://www.lanacs.ac.uk/staff/lwasp/crit2.pdf>.

Raustiala, Kal, The Evolution of territoriality: International Relations & American Law, URL: <http://www.law.georgetown.edu/LegalTheory/documents/territoriality.doc>.

Reinicke, Wolfgang H., Witte, Jan Martin, Interdependence, Globalisation and Sovereignty: The Role of Non-Binding International Legal Accords, URL: <http://www.loccum.de/materialien/globalisierung/Reinicke-Witte.pdf>.

Rill, James F., Schechter, Mark C. "Challenges Presented by Globalization to Competition Policy." Paper presented to Conference June 2001, Toronto, Ontario. URL: <http://www.ivey.ca/competitionconference2001/proceedings2/Jameshill.pdf>.

Rosenberg, Justin. "A Non-Realist Theory of Sovereignty?: Giddens' The Nation State and Violence." *Millenium Journal of International Studies*. Vol. 19, No. 2, 1990, pp. 249-259.

Sassen, Saskia, The Global Economy: its necessary instruments and cultures, URL:

<http://www.georgetown.edu/faculty/irvinem/CCT510/Sources/Sassen-THEGLOBALECONOMY-1997.html>.

Schachter, Oscar, *The Decline Of The Nation-State And Its Implications for International Law*, (1997) *Columbia Journal of Transnational Law*, 36 *Colum. J. Transnat'l L.* 7.

Schreuer, Christoph, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?* (1993) *European Journal of International Law*, 4 *EJIL* (1993) 447-471 URL: <http://www.ejil.org/journal/Vol4/No4/art1.pdf>.

Shaw, Malcolm M. *International Law*, (Fourth ed.). Cambridge, U.K.: Cambridge University Press, 1997.

Sherman, Edward, *Special Methods and Tools for Educating the Transnational Lawyer*, URL: <http://www.aals.org/international2004/papers/Sherman.pdf>.

Shotwell, Charles B., *International Law and Institutions: A Post-Westphalian Landscape, The Global Century; Globalization and National Security*, Chapter 36, URL: [http://www.ndu.edu/inss/books/Books\\_2001/Global%20Century%20-%20June%202001/C36Shotw.pdf](http://www.ndu.edu/inss/books/Books_2001/Global%20Century%20-%20June%202001/C36Shotw.pdf).

Slaughter, Anne-Marie, *A New World Order*, 2004, Princeton University Press, URL: <http://www.pupress.princeton.edu/chapters/i77212.pdf>.

Slaughter, Anne-Marie, Zaring David T., *Extraterritoriality In a Globalized World*, URL: <http://ssrn.com/abstract=39380>.

Slaughter, Anne-Marie, *International Law in a World of Liberal States*, (1995), *European Journal of International Law*, 6 *EJIL* (1995) 1-538.

Spiro, Peter J., *Globalization, International Law And the Academy*, (2000), *Journal of International Law and Politics*, 32 *N.Y.U. J. Int'l L&Pol* 567 (2000), URL: <http://www.nyu.edu/pubs/jilp/main/issues/32/pdf/32i.pdf>.

Sugden, William, *Global Antitrust and the Evolution of an International Standard*, <http://law.vanderbilt.edu/journal/35-03/Sugden2.pdf>.

Synder, Francis, *Economic Globalization and the Law in the 21<sup>st</sup> Century*, 2002, [www.lse.ac.uk/collection/european\\_institute/articles/synder2.pdf](http://www.lse.ac.uk/collection/european_institute/articles/synder2.pdf).

Tay, Abigail, and Gerald Willmann, "Why No Global Competition Policy is a Tough Choice", *The Quarterly Review of Economics and Finance*, 45 (2005) 312-324.

Thompson, Grahame, The Limits to 'Globalization': Taking Economic Borders Seriously,  
<http://www2.ucsc.edu/cjirs/publications/cpapers/grahame.pdf>.

Torremans, Paul L.C., Extraterritorial Application of E.C. and U.S. Competition Law, (1996), *European Law Review*, E.L. Rev. 1996, 21(4), 280-293.

Trebilcock Michael, Iacobucci, Edward, National Treatment And Extraterritoriality: Defining The Domains of Trade and Antitrust Policy, URL: <http://www.unisc.it/lawandeconomics/stile2004/trebilcock/pdf>.

Trenchard, Robert W., The Scope of Antitrust Jurisdiction Abroad: A Classic Conflicts-Of-Law Problem, URL: [http://ssrn-id533462\[1\].pdf](http://ssrn-id533462[1].pdf)

Ukpanah, Emma, OPEC as a Cartel: Can U.S. Antitrust Laws be Applied Extraterritorially? URL:  
[www.dundee.ac.uk/cepmlp/car/assets/images/Emma.pdf](http://www.dundee.ac.uk/cepmlp/car/assets/images/Emma.pdf).

Vagts, Detlev F., Extraterritoriality And the Corporate Governance Law, (2003) *American Journal of International Law*, 97 Am. J. Int'l L. 289.

Vernon, Raoumond. Sovereignty at Bay: Ten Years After. *International Organization*, 35, 3, Summer 1981, 517-529.

Von Meibom, Wolfgang, Geiger, Andreas, A World Competition Law as an Ultima Ratio (2002), *European Competition Law Review*, E.C.L.R. 2002, 23(9), 445-453.

Wai-chung Yeung, Henry, The Limits to Globalization Theory: A Geographic Perspective on Global Economic Change, URL:  
[http://courses.nus.edu.sg/course/geoywc/publication/EG\\_2002.pdf](http://courses.nus.edu.sg/course/geoywc/publication/EG_2002.pdf).

Whish, Richard. *Competition Law*, (Fifth ed.). U.K.: Lexis Nexis Butterworth, 2003.

Wintraub, Russell J., Globalization's Effect on Antitrust Law,  
<http://www.nesf.edu/lawrev/vol34/1/weintraub/pdf>.

Y-C Chao, G San, C Lo & J Ho (Eds), *International and Comparative Competition Laws and Policies* (2001).

Zanettin, Bruno. "Cooperation Between Antitrust Agencies at the International Level." *European Law Review*. (2003), 28(4), 570-572.

