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The Twilight of Comity

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The Twilight of Comity

SPENCER WEBER WALLER*

This article analyzes one of the most contentious issues over the past fifty years in international economic law—the extent to which a nation may apply its law on an extraterritorial basis and the limits, if any, posed by the doctrine of international comity. This article, based on Professor Waller’s paper presented at the 1999 Wolfgang Friedmann conference, examines the reasons why the doctrine of international comity once represented the primary battleground for conflict over the extent of permissible extraterritoriality in United States antitrust law but no longer represents the forefront of current thought on this important issue. The article argues that the retrenchment of United States enforcement policy in foreign commerce antitrust cases, the diminution of comity in private antitrust cases, the failure of United States courts to apply comity during its heyday on a coherent and principled basis, the spread of extraterritoriality to foreign competition systems, the rise of more practical concerns in foreign commerce antitrust cases, and the emergence of new issues relating to competition law in transition economies and the potential role of the World Trade Organization in the competition field all contributed to the demise of comity as a controversial issue. This article concludes that the proponents of a broad role for international comity achieved a partial, but important, victory that laid the groundwork for the future agenda of the international competition law and policy community.

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Over the course of my lifetime, two generations of legal academics and policy makers have debated endlessly the desirability and parameters of the doctrine of international comity as a means to temper the extraterritorial application of United States antitrust law. Comity as a doctrine of limitation was first proposed as the “jurisdictional rule of reason” by Kingman Brewster.¹ The doctrine of international comity reached its high point in 1976 when the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America* declared that a comity analysis was required before exercising jurisdiction to prescribe under the Sherman Act.² Since then, comity has remained the darling of the majority of academic commentators, but has received an ambivalent reception in the courts and uniform rejection from American legislators.³

The United States Supreme Court in 1993 dealt comity a near death blow in *Hartford Fire Insurance Co. v. California*⁴ by limiting comity considerations in most situations to those conflicts where one sovereign has compelled the very conduct which the other sovereign forbids. This pronouncement, along with the treatment of comity by

1. KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958).

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

3. The United States Congress has never required the consideration of comity in the exercise of jurisdiction under any aspect of the antitrust laws despite numerous opportunities to do so. Moreover, the Congress has enacted numerous pieces of legislation operating on an extraterritorial basis without any incorporation of comity considerations. The most prominent example in recent years has been the Helms-Burton Act imposing sanctions on firms anywhere in the world which do business in Cuba or traffic in United States assets which were expropriated without compensation by the Castro regime. See Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785, (codified as amended at 22 U.S.C. §§ 6021-91).

4. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

the lower courts following *Hartford Fire*, suggests that comity as a legal doctrine in the courts has seen better days and will rarely be successful in dismissing antitrust litigation brought either by the United States government or by private plaintiffs.⁵

This article examines six of the factors leading to the twilight of comity. They are:

1. the retrenchment of United States government enforcement policy in foreign commerce antitrust cases;
2. the diminution of the legal significance of comity in private antitrust cases;
3. the utter failure of the United States courts to apply a comity analysis in a consistent manner based on record evidence as opposed to vague rhetoric claims;
4. the eclipse of comity by other more practical litigation concerns in foreign commerce antitrust litigation;
5. the acceptance of extraterritorial jurisdiction by other leading competition enforcers outside of the United States; and
6. the emergence of new concerns that have captured the imagination of the competition law and policy community.

Despite these developments, the concept of comity should not be undervalued. It played a particularly important role in restraining the worst excesses of United States post-war antitrust imperialism. It also represented one of the finest theoretical constructs in thinking about how international law affects, and constrains, the reach of national regulatory statutes.

At one level, comity is no longer important because its advocates won. The United States government now acts cautiously, and considers foreign interests before it seeks to investigate or challenge conduct abroad by foreign nationals that allegedly produces anticompetitive effects in the United States. At another level, the advocates of comity lost because neither the United States government nor courts in private antitrust litigation are *required* to engage in a comity interest balancing analysis before proceeding in a foreign commerce case.

In a final sense, it has ceased to matter. Comity was the burning issue of the day for nearly fifty years while the United States

5. See, e.g., *Filetech S.A. v. France Telecom*, 157 F.3d 922, 932 (2d Cir. 1998); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998); *Virgin Atlantic Airways v. British Airways PLC*, 972 F. Supp. 52 (S.D.N.Y. 1994).

was the world's antitrust policeman and U.S. national law sought to regulate nearly alone most anticompetitive conduct in foreign and global markets. Now we stand poised on the brink of a new world in which dozens of jurisdictions police their own markets for anticompetitive conduct and abusive market structures and the United States debates with its trading partners the creation of truly global rules to police global markets. Traditional comity concerns have little role to play in this debate.

This does not mean the fight was not worth it. It just means that it is time to let go of one set of historically contingent issues that reflected one era, prepare for the debates of the new era upon us, and say goodnight to an old friend.

I. FORCING THE GOVERNMENT TO EMBRACE A VERSION OF COMITY

As late as 1982, it was necessary for government attorneys to plead their case that they really did consider comity before bringing matters under the federal antitrust laws.⁶ Today it is clear that both the Justice Department and the Federal Trade Commission (FTC) routinely consider comity factors in the exercise of their prosecutorial discretion. Comity has been part of the published international antitrust guidelines in all three versions since 1977 with both the FTC and the Antitrust Division as authors of the most recent 1995 Guidelines in the area.⁷

These guidelines moreover appear to reflect the actual practice of both agencies. The Justice Department as early as 1978 indicted only a United States corporation in the Uranium grand jury investigation and choose not to proceed against the foreign targets as a result of the careful consideration of the position of the affected foreign governments.⁸ Similarly, the Justice Department did not bring

6. See William C. Holmes, *Government Antitrust Actions and Remedies Involving Foreign Commerce: Procedural and Substantive Limitations*, 4 NW. J. INT'L L. & BUS. 105, 121-22 (1982).

7. See U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.2 (Apr. 6, 1995) [hereinafter 1995 INTERNATIONAL GUIDELINES]; U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 5 (Nov. 10, 1988) [hereinafter 1988 INTERNATIONAL GUIDELINES]; U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (Jan. 26, 1977).

8. See *United States v. Gulf Oil Corp.*, Crim. No. 78-123 (W.D. Pa. filed May 9, 1978). The case was terminated by a plea of nolo contendere and an agreed fine of \$40,000.

criminal indictments in the Laker Airways investigation as a result of foreign policy and other comity considerations.⁹

The FTC had fewer opportunities to enforce the antitrust laws via the effects doctrine but appears to have heeded the requirements of comity in the vast majority of its civil enforcement actions and many merger decisions. In the dozens of high profile merger decisions taken by the FTC, the agency has given few grounds for offense based on comity. The most glaring omission in recent times perhaps has been the FTC's decision in the Merieux merger investigation to impose a remedy in a consent decree requiring divestiture of assets in Canada without apparently consulting with, or even informing, the Canadian authorities in advance.¹⁰ Fortunately, even this omission did not create much of an international incident and had the helpful effect of highlighting to the FTC how important consultation and consideration of comity factors were for subsequent matters.

Perhaps the best proof that the enforcement agencies have learned the comity lesson is found in the recent flurry of criminal grand jury investigations by the Justice Department of international cartel activity and a similar flurry of international merger investigations by both the Justice Department and the FTC. Dozens of criminal and civil investigations and enforcement actions have produced only one serious, on the record assertion that the United States has failed to adequately consider the issue of comity in its enforcement decisions.¹¹

At the same time, the enforcement agencies have tried to have it both ways with respect to comity. While pledging to take comity fully into account in its enforcement decisions, the Antitrust Division, and now the FTC, contend in the 1988 and 1995 International Guidelines that comity has no role to play once the agencies have decided to take action in the international arena.¹² This attitude is one of arrogance and is wrong, particularly for the adjudication of liability under the antitrust laws of the United States, which has been

9. U.S. Dep't of Justice (Nov. 19, 1984) (press release) (announcing the termination on foreign policy grounds of grand jury investigation into passenger air travel between the United States and Great Britain).

10. See Institut Merieux, 55 Fed. Reg. 38854 (1990); Deborah Owen & John Parisi, *International Mergers and Joint Ventures: A Federal Trade Commission Perspective*, 1990 FORDHAM COMP. L. INST. 1, 5-7.

11. See Brief of Amicus Curiae for The Government of Japan at 7-19, *United States v. Nippon Paper Indus. Co.*, 109 F.3d (1st Cir. 1997) (No. 96-2001).

12. See 1995 INTERNATIONAL GUIDELINES at § 3.2; 1988 INTERNATIONAL GUIDELINES at § 5.0 n. 171.

committed by statute to the courts for resolution.¹³ As Professor Andreas Lowenfeld so aptly notes, it treats an issue of law as if it were an issue of politics.¹⁴ As yet, this issue remains unlitigated. This issue is likely to remain a theoretical, rather than a practical, concern since the government does a good job in considering comity factors and a defendant would be hard pressed to convince the court that the government had botched this job.

This still poses the challenge to the United States government to demonstrate the relative weight of the national interests at stake in the actions it brings, and not merely to assert that the predominance of our interests is shown by the fact it brought suit. The government should welcome this burden since it does such an excellent job in considering comity factors in the exercise of its prosecutorial discretion. There is the further challenge to the government in private antitrust suits to participate and express the interests of the United States at the earliest possible point in the litigation, except in those limited circumstances where such participation would jeopardize important economic, political, or foreign policy interests of the United States. In both cases, a court should give substantial weight to the government's position, but in no case excuse the government from making its showing or excuse itself from the obligation to decide the issue on the merits.

II. THE RISE AND FALL OF COMITY IN PRIVATE ANTITRUST LITIGATION

Since the 1970s, the rise and fall of comity has been centered in the area of private antitrust litigation. The need for comity in this context arose primarily because private litigants otherwise lacked the incentive to consider the broader national interest in deciding whether to bring treble damages or injunctive actions against foreign defendants.¹⁵ It was a private antitrust case, *Timberlane Lumber Co. v. Bank of America*,¹⁶ which required a comity test for the assertion of

13. See Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 *FORDHAM INT'L L.J.* 353, 381-84 (1994).

14. See Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 *AM. J. INT'L L.* 42, 52 (1995).

15. See, e.g., *Int'l Assoc. Machinists & Aero. Workers v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (dismissing of private antitrust seeking injunction against alleged antitrust violations in pricing and sales of petroleum in world markets).

16. 549 F.2d 59, 613 (9th Cir. 1976).

extraterritorial jurisdiction under the Sherman Act, relying on the jurisdictional rule of reason set forth in Kingman Brewster's classic treatise *Antitrust and American Business Abroad*.¹⁷ Since *Timberlane*, the doctrine has developed through a handful of decisions in the lower courts and through academic commentary and the work of the American Law Institute.¹⁸ In the absence of direct Supreme Court precedent, the courts and commentators endlessly debated whether comity was an appropriate, required, or optional aspect of the assertion of extraterritorial jurisdiction and precisely what factors should be included in the analysis.¹⁹

Just when it appeared that comity had entrenched itself in the lower courts, the Supreme Court virtually eliminated it as a meaningful restraint on the extraterritorial application of the Sherman Act. The Supreme Court finally dealt directly with the issue of comity in its 1993 opinion in *Hartford Fire*.²⁰ The Supreme Court held, by a 5-4 margin, that a defendant must demonstrate a "true conflict" before the court would balance any conflict between foreign interests and policies against those of the United States.²¹ The majority only accepted as a true conflict those rare situations where the foreign government actually required what United States law forbade.²² While the Supreme Court hedged its bets as to whether any other aspect of the *Timberlane* comity analysis could be used without a showing of such foreign compulsion,²³ the majority of subsequent lower court decisions have taken the Supreme Court at its word and severely restricted the role of comity where a direct substantial and reasonably foreseeable effect on United States commerce has been shown.²⁴

17. See BREWSTER, *supra* note 1.

18. See RESTATEMENT (THIRD) FOREIGN RELATIONS OF THE UNITED STATES § 403 (1987); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). See generally JAMES R. ATWOOD, KINGMAN BREWSTER & SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 6 (3d ed. 1997).

19. A search of the Law Review library of LEXIS on April 20, 1999 indicated more than 330 articles since 1980 containing the words "extraterritoriality" and "comity." This search dramatically understates the volume of commentary since the database does not contain books, monographs, older material, and omits certain American law reviews and most foreign law reviews.

20. 509 U.S. 764 (1993).

21. *Id.* at 798-99.

22. *Id.*

23. *Id.*

24. See Spencer Weber Waller, *From the Ashes of Hartford Fire: The Unanswered Questions of Comity*, in 1998 FORDHAM CORP. L. INST. 33.

III. NEVER GETTING COMITY RIGHT

Even if a full comity interest balancing approach was the best approach from a theoretical perspective, the United States courts have proved incapable of applying such a test in a consistent and principled manner. Typically U.S. courts have either given great offense to foreign nations by ignoring or denigrating their legitimate interests or they have uncritically deferred to the assertion of allegedly important foreign interests. In neither case has there been any serious attempt to construct an evidentiary record.

For example, the courts in the *International Uranium Antitrust Litigation* gave great and unnecessary offense to the affected foreign governments in a private treble damage action against foreign uranium producers. The district court initially granted default judgments against the foreign defendants, rejecting any requirement of a comity-based balancing of interests test.²⁵ The Seventh Circuit added fuel to the fire in upholding the default judgments and excoriating the foreign governments for “subserviently” acting as “surrogates” for the defaulters.²⁶

More frequently, the problem has been the mirror image issue of courts not holding defendants to their burden of proof. This has been the case both before and after *Hartford Fire*.

The district court’s opinion in *Rivendell Forest Products*²⁷ was particularly disappointing in the way the court uncritically deferred to Canadian interests. The district court in *Rivendell* concluded that Canada’s interests in the regulation of its lumber industry outweighed those of the United States in enforcing its antitrust laws on the basis of a scanty record without the benefit of significant discovery. In essence, the court found that the existence of an on-going trade dispute between the U.S. and Canada involving that industry made jurisdiction inappropriate, even though the antitrust dispute was not directly connected to the trade dispute.²⁸

In *Filetech S.A.R.L. v. France Telecom*, the plaintiff sued a publicly owned French telecommunication company for monopolizing markets for the sale of subscriber information.²⁹ The

25. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

26. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1256 (7th Cir. 1980).

27. *Rivendell Forest Prods., Ltd. v. Canadian Forest Prods., Ltd.*, 810 F. Supp. 1116 (D. Colo. 1993).

28. *Id.* at 1119–20.

29. 978 F. Supp. 464 (S.D.N.Y. 1997).

district court had no difficulty holding that subject matter jurisdiction was present as a result of the direct, substantial and foreseeable effects of the defendant's conduct in the United States.³⁰

Judge Haight then addressed whether *Hartford Fire* changed the application of *Timberlane*.³¹ In light of the language of *Hartford Fire* and the subsequent holdings on comity within the Second Circuit, Judge Haight concluded that "a party seeking the dismissal of a Sherman Act case on the ground of international comity must first demonstrate that a true conflict exists between the Sherman Act and relevant foreign law."³² He then concluded that only once that threshold of a true conflict was passed, would the court examine the familiar *Timberlane* factors.³³

Judge Haight believed it to be a question of first impression how to determine whether or not a true conflict existed within the meaning of *Hartford Fire*.³⁴ He then held that it was sufficient that French law *may* require what the Sherman Act *may* forbid and then proceeded to undertake the full comity balancing of interests analysis under *Timberlane*.³⁵ The court held "that France Telecom's substantial claim, consistently asserted in France and not yet finally adjudicated there," was sufficient to support dismissal as a true conflict between the policies of the United States and France.³⁶ Judge Haight also concluded without further elaboration that the other *Timberlane* factors favored dismissal as well.³⁷

Both the reasoning and the result of *Filetech* were particularly disappointing.³⁸ While neither survived appellate review,³⁹ *Filetech*

30. *Id.* at 483.

31. He also considered whether the Foreign Trade Antitrust Improvements Act required any change in the *Timberlane* analysis but concluded that it did not. 15 U.S.C. § 6a (1999). *See id.* at 479.

32. 978 F. Supp. at 478.

33. *See id.*

34. In *Hartford Fire*, the parties agreed that no such conflict was present. *See* 509 U.S. at 798. In *Maxwell Communications Corp. v. Barclays Bank*, the parties agreed that there was such a conflict. *Maxwell Commun. Corp. v. Barclays Bank (In re Maxwell Commun. Corp.)*, 170 B.R. 800, 818 (Bankr. S.D.N.Y. 1994).

35. 978 F. Supp. at 478-79.

36. *Id.* at 480. In addition to being questionable antitrust law, Judge Haight's decision appears to ignore and contravene the requirements of Federal Rule of Civil Procedure 44.1, which govern proof of foreign law. FED. R. CIV. P 44(1).

37. 978 F. Supp. at 481.

38. Judge Haight struggled with the concept of comity in another prominent foreign commerce antitrust case. *See Trugman-Nash, Inc. v. New Zealand Dairy Board*, 954 F. Supp 733 (S.D.N.Y. 1997), *reh'g granted*, 942 F. Supp. 905 (S.D.N.Y. 1996).

39. In *Filetech*, the Second Circuit reversed in a pointed rebuke to the district court.

best illustrates how often district courts mangle both *Timberlane* and *Hartford Fire* beyond recognition.

This is unfortunately representative of what comity has become in the U.S. courts. The federal judiciary, as a result of the background and experiences of the typical judge, and the infrequency and difficulty of foreign commerce antitrust cases, has little chance of success. Whether the problem is too little or too much sensitivity to foreign concerns, one can rarely point to a case in which the degree of deference and the extent of reasoned elaboration was arguably just right.⁴⁰

IV. WHY EXTRATERRITORIALITY AND COMITY MATTERS LESS THAN YOU WOULD THINK

Both advocates and critics have always overestimated the practical importance of extraterritoriality and the accompanying restraint of comity. As any litigator quickly realizes, extraterritoriality is only the beginning of a long and tortuous path that culminates when any judgment or injunction is fully satisfied. Along this path lie many hurdles including service of process, venue, personal jurisdiction, motion practice, myriad discovery disputes, creating a persuasive record at trial, surviving appellate review, and enforcing any resulting judgment. In addition, many private antitrust cases have been deterred or defeated by substantive changes in the antitrust laws that have replaced *per se* antitrust offenses with a more daunting rule of reason analysis and imposed more stringent rules of standing, antitrust injury, and direct purchaser requirements.⁴¹ In most foreign commerce antitrust cases, these hurdles far exceed the question of whether the United States courts have jurisdiction to prescribe anticompetitive conduct done abroad by foreign nationals.

The Second Circuit not only questioned the existence of subject matter jurisdiction in the first place, it also held in the alternative that the district court had done precisely what *Hartford Fire* forbids in proceeding to a comity analysis before making the necessary findings about the existence of a true conflict. 157 F.3d at 932.

40. Even *Timberlane* itself was hardly a success in that the Ninth Circuit ultimately affirmed the dismissal of the case on comity grounds nearly a decade after the district court had originally dismissed the case based on a lack of effects on the United States market. See *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n*, 574 F. Supp. 1453, (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985). Cf. *Laker Airways, Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984)(analyzing why United States court should be not be required to perform comity analysis).

41. See generally SPENCER WEBER WALLER, *INTERNATIONAL TRADE AND U.S. ANTITRUST LAW* §§ 1-4 (1998).

For example, personal jurisdiction has frustrated periodic attempts to enforce the United States antitrust laws against the DeBeers diamond syndicate.⁴² Even when portions of the DeBeers empire have come within the personal jurisdiction of the United States courts, other more prosaic concerns have defeated enforcement efforts as in the case of the recent unsuccessful prosecution of General Electric Corporation, DeBeers, and several individual foreign defendants. The indictment alleged an international cartel in industrial diamonds between United States, European and other producers and distributors. The indictment alleged that much of the alleged conduct took place in Europe. Prosecutors believed that much of the evidence also was located in Europe, but were almost entirely unsuccessful in obtaining access to documents or witnesses located outside the United States.⁴³ The lack of ability to obtain evidence was probably outcome determinative in that the United States trial court dismissed all charges against the American defendant, specifically citing the inability of the government to obtain more complete evidence from abroad.⁴⁴

The United States government has learned from these lessons. In recent times both the Antitrust Division and the FTC have spent far more time negotiating cooperation agreements with foreign enforcement agencies and working with those agencies to discover the necessary evidence to obtain convictions and effective relief and very little time worrying about unilateral assertions of extraterritorial jurisdiction, with or without comity.⁴⁵

42. See, e.g., *United States v. DeBeers Consol. Mines, Ltd.*, 1948-49 Trade Cas. (CCH) ¶ 62, 248 (S.D.N.Y. 1948).

43. *United States v. General Electric Co.*, 869 F. Supp. 1285, 1293 (S.D. Ohio 1994). While this case undoubtedly was the subject of discussions between the Antitrust Division and EU Commission, the only publicly known assistance came from the Belgian national police, who searched the files of one of the alleged conspirators. See also JOEL I. KLEIN, A NOTE OF CAUTION WITH RESPECT TO WTO AGENDA ON COMPETITION POLICY, ADDRESS AT THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, (Nov. 18, 1996), reprinted at 1996 WL 666205; William M. Carley, *Fatal Flaws: How the Federal Case Against GE, De Beers Collapsed So Quickly*, WALL ST. J., Dec. 28, 1994, at A1.

44. *General Electric*, 869 F. Supp. at 1300.

45. See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 376 (1998).

V. OTHER COUNTRIES JOIN THE EXTRATERRITORIAL ANTITRUST GAME

Comity was a cause célèbre when the United States stood alone as the sole extraterritorial enforcer of competition law and enforcement was at its most aggressive. Today, the United States has pledged to carefully consider comity in an ever expanding series of bilateral and multilateral treaties dealing with antitrust cooperation and many other nations apply versions of extraterritoriality themselves.⁴⁶ The European Union applies its own version of extraterritoriality, using slightly different terminology.⁴⁷ Germany has statutory authority to apply extraterritorial jurisdiction in its national competition law.⁴⁸ A host of other nations have applied their competition law on an extraterritorial basis regardless of the position they take when the United States applies its laws to their citizens.⁴⁹

The current attitudes toward extraterritoriality are best exemplified in the merger area. At present more than 50 countries have antitrust regimes with merger provisions. Most of these countries have some form of either voluntary or mandatory premerger notification.⁵⁰ As a result most major transnational mergers or acquisitions end up filing for antitrust review in multiple jurisdictions, including many countries in which they have little or no actual operations or sales.⁵¹ The current record appears to be the Exxon-Mobil merger, which may ultimately involve the filing of up to 40

46. See generally *id.*

47. See Joined Cases 89, 104, 114, 116–17 & 125–29/85, *A. Ahlstrom Osakeyhtiö Oy v. Comm'n*, 1988 E.C.R. 5193 (holding that EU competition law applies as long as anticompetitive activity implemented within EU); Case 48/69, *Imperial Chemical Indus., Ltd. v. Comm'n*, 1972 E.C.R. 619 (discussing the expansive use of parental responsibility for anticompetitive activities by subsidiaries within EU). Most recently, the majority of EU use of extraterritoriality has come in the area of merger control. See generally Andre Fiebig, *The Extraterritorial Application of the European Merger Control Regulation*, 5 COLUM. J. EUR. L. 79 (1998/99).

48. § 130 (2) Gesetz gegen Wettbewerbsbeschränkungen (GWB) v. 26.8.1998 (BGBl I S. 2546) [Statute against non-competitive behavior], reprinted at <http://www.bundeskartellamt.de/part_v.html> (english translation).

49. Spencer Weber Waller, *Bringing Meaning to Interest Balancing in Transnational Litigation*, 23 VAND. J. TRANSNAT'L L. 925, 960–62 (1991).

50. For a survey of the principal jurisdictions with merger control regimes see J. WILLIAM ROWLEY & DONALD I. BAKER, *INTERNATIONAL MERGERS: THE ANTITRUST PROCESS* (2d ed. 1996 & Supp.).

51. For a series of case studies of these types of transactions, see ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *MERGERS CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PROCEDURES* (1994).

premerger notifications in different jurisdictions.⁵² In some of these transactions, the various competition agencies have cooperated with each other, and on occasion, deferred to each other's judgment and exercised restraint, if not true comity, in structuring remedies when a violation is found under one or more systems.⁵³

The 1990s multiple jurisdiction merger review game is more often applied by a variety of non-U.S. competition authorities aimed at American firms. While occasionally controversial,⁵⁴ there is substantial convergence in actual practice with the United States and its foreign counterparts meeting somewhere in the middle, agreeing on the need to police foreign transactions for their competitive impact in one's own market. At the same time the antitrust authorities are searching for ways not to impose undue burdens on the private parties or to interfere with the important national interests of other governments where the firms are headquartered or do business.

While the bar and policy makers work to streamline or harmonize this bewildering array of procedural and substantive requirements, it is clear that the rest of the world has caught up to the United States in the areas of extraterritoriality and the need for comity.⁵⁵ What is fascinating is that most commentators either view the current overlapping international merger regulation system, based on effects and/or trivial presence in a market, as a mere transaction cost that can be reduced through greater coordination.⁵⁶ Few, if any, characterize this any longer as a controversial principle of international law.

VI. WHAT MATTERS TODAY

Most contemporary commentators and policy makers are not particularly concerned about either extraterritoriality or comity. They accept both principles as inextricably linked facts of life that have to be dealt with in terms of individual cases or investigations, but not as

52. William E. Kovacic, *Can Exxon Mobilize?* (visited Apr. 13, 1999) <<http://www.lawnewsnetwork.com/opencourt/stories/A516-1999Apr6.html>>.

53. See *Hearings Before the Panel on Information Sharing and Procedural Harmonization of the International Competition Policy Advisory Committee*, November 3, 1998, (visited Apr. 12, 1999) <<http://www.usdoj.gov/atr/icpac/2232-b.htm>> [hereinafter *ICPAC Hearings*].

54. *U.S. is Concerned Over EU Opposition to Boeing-McDonnell Douglas Consolidation*, 73 ANTITRUST & TRADE REG. REP. 43 (1997).

55. See *ICPAC Hearings*, *supra* note 53.

56. See *id.*

big picture issues driving the international antitrust agenda. The evolution of the mainstream antitrust agenda in the international area can be gleaned from three blue ribbon panels that were convened at different times in the United States to examine antitrust issues.

Extraterritoriality was a significant part of the international section of the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws.⁵⁷ Extraterritoriality was the first and primary of the three international topics dealt with in the report with the Committee ultimately recommending that the Sherman Act only apply to conduct abroad by foreign nationals that produced substantial anticompetitive effects in the United States.⁵⁸

The agenda of the 1979 National Commission for the Review of Antitrust Laws and procedures similarly emphasized the concerns of its era.⁵⁹ The 1979 National Commission was charged with examining the increasing complexity of antitrust litigation and the scope of antitrust exemptions.⁶⁰ The only international topic that the 1979 Commission dealt with was the scope of the export exemption to the antitrust laws.⁶¹ At a time of increasing concern over the export competitiveness of the United States, the Commission split over whether the Webb-Pomerene Act exempting certain export associations should be abolished, limited, or expanded.⁶²

Today's agenda for the United States is being debated in the The International Competition Policy Advisory Committee (ICPAC) of the Antitrust Division of the United States Department of Justice. ICPAC consists of representatives of law, industry, and academia,⁶³

57. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (Mar. 31, 1955).

58. *See id.* at 76. The report also dealt with whether the substantive standards of the Sherman Act should be different for foreign commerce cases and certain defense and export exemptions. *See id.* at 80-91 & 108-114.

59. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (Jan. 22, 1979).

60. *See id.* at 320.

61. *See id.* at 295-316.

62. *See id.* at 295, 302-04. *See also id.* at 393-401 (Separate Statement of Commissioner Javits). It should be noted that the Commission's work was followed shortly by extensive Congressional Hearings culminating in the passage of both the Foreign Trade Antitrust Improvements Act and the Export Trading Company Act, which eased the application of antitrust laws to export activity. *See* Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1999); Export Trading Company Act, 15 U.S.C. §§ 4011-21 (1991).

63. For a description of ICPAC's members and executive director, see INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, (visited Apr. 24, 1999) <<http://www.usdoj.gov/atr/icpac/icpac3.htm>>.

formed to "address the global antitrust problems of the 21st Century."⁶⁴

Although ICPAC's agenda is broad, extraterritoriality and comity are not a major part of the issues under consideration. ICPAC has been asked to consider three distinct but related topics: 1) The Interface of International Trade and Competition Policy; 2) Multijurisdictional Merger Review; and 3) Enforcement Cooperation.⁶⁵ Lengthy hearings have been conducted on these topics and formal papers have been solicited addressing many different facets of these topics.⁶⁶ Few of these topics have much to do with either extraterritoriality or comity and little time has been spent on these issues at the hearings themselves.⁶⁷ While ICPAC's final report remains unwritten, there is little reason to believe that extraterritoriality or comity will be a major topic of interest.

A quick survey of the principal fora for the development of competition policy outside of the United States shows a somewhat broader agenda than ICPAC, but again little attention to the traditional aspects of extraterritoriality and comity. The European Union ("EU") has focused its efforts on bilateral and multilateral cooperation and the development of competition policy in the new market economies of the Central and Eastern European countries.⁶⁸ In addition, the EU is on record for supporting the use of the WTO to develop and enforce multilateral competition rules for the world trading system.⁶⁹

64. INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, (visited Apr. 9, 1999) <<http://www.usdoj.gov/atr/icpac/icpac.htm>>.

65. INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, REQUEST FOR INPUT, (visited Apr. 9, 1999) <<http://www.usdoj.gov/atr/icpac/1981.htm>>. ICPAC has excluded the relationship of antitrust principles and specific trade remedies such as dumping from its consideration. *See id.*

66. INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, REQUEST FOR PAPERS, (visited Apr. 9, 1999) <<http://www.usdoj.gov/atr/icpac/1982new.htm>>.

67. ICPAC is considering the role of so-called positive comity. Positive comity is a relatively recent series of provisions in antitrust cooperation agreements in which one country initially requests its partner to take action against a person in the requested country's territory in lieu of using its own laws on an extraterritorial basis. *See* Agreement on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, June 4, 1998, U.S.-E.U., 37 I.L.M. 1070 (1998). Properly understood, positive comity is more closely related to the issues of enforcement cooperation that ICPAC is studying rather than the classical issues of comity, now sometimes referred to as negative comity.

68. The mission of the international section of Directorate General IV of the European Commission can be found at EUROPEAN COMMISSION, DIRECTORATE GENERAL IV, COMPETITION, INTERNATIONAL-OVERVIEW, (visited Apr. 12, 1999) <<http://europa.eu.int/comm/dg04/interna/overview.htm>>.

69. *See Commission Proposes Building World Competition Instrument*, European Commission Press Release, IP (96)523 (June 18, 1996), *reprinted at*

The Organization for Economic Cooperation and Development ("OECD") is the primary multilateral organization with an active competition policy agenda. The OECD is currently focused on the relationship between trade and competition, devising better procedures for the multijurisdictional review of mergers and acquisitions, promoting enforcement cooperation, and the development of limited core principles of antitrust banning so-called hard cartels.⁷⁰ The remaining organizations that deal with competition policy are all either focused on regional problems or are at too preliminary a stage of their work to chart their future course of action.⁷¹ None as yet have focused on comity as anything other than a small part of the quotidian task of antitrust enforcement in a world economy.

VII. CONCLUSION

The twilight of comity is upon us because the war has long since been fought to a draw. The United States government uses extraterritoriality sparingly and uses comity extensively, at least as a matter of prosecutorial discretion. Private parties use extraterritoriality more frequently, and courts use comity in these cases more sparingly, all with the blessing of the United States Supreme Court. More practical litigation concerns restrain aggressive plaintiffs who would otherwise jeopardize the interests of the United States in favor of private gain. Foreign governments use extraterritoriality more frequently than ever before, taking the sting out of their occasional complaints about its misuse in the United States. In the absence of a vertical hierarchical method of international law-making, one could not hope for a much improved outcome.

<<http://www.europa.eu.int/rapid/start/welcome.htm>>; Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules from the Group of Experts of the Commission of the European Communities, COM(95)359 final, *reprinted at* <<http://www.europa.eu.int/comm/dg04/interna/en/streng.pdf>>.

70. A representative idea of the OECD's current and recent work can be found in the publications section of the OECD website which can be accessed at OECD, FINANCE, INVESTMENT, TAXATION AND COMPETITION, (visited Apr. 12, 1999) <<http://www.oecd.org/daf/clp/index.htm>>.

71. For example, the competition policy group of the Free Trade of the Americas negotiations had only its third meeting in May of 1999. *See* FTAA, COMPETITION POLICY, (visited Apr. 12, 1999) <http://www.ftaa-alca.org/ngroups/ngcomp_e.asp>. The work of competition policy group of the Asia Pacific Economic Cooperation is at an even more preliminary stage. *See* APEC, ACTIVITIES BY GROUPS: COMPETITION POLICY, (last modified Mar. 4, 1999) <<http://www.apecsec.org.sg/committee/competition.html>>.

The stage is set for a different generation of issues to come to the fore. There will be great attention in the foreseeable future on problems such as: advising new regimes on the creation of their own competition policies, negotiating regional trading arrangements with competition components, creating and enforcing bilateral and multilateral cooperation agreements, and resolving the controversy over whether the world needs, or is ready for, true international antitrust rules.

These issues will undoubtedly prove just as contentious as extraterritoriality and comity, and they are just as important. In the end, we have merely arrived at new aspects of the familiar and important problem of how fairly to apply national competition laws to international markets and whether there is a better way.

