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Wood Pulp- The European Economic Community and Effects Doctrine Jurisdiction: The Community's New Weapon

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Note

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I. INTRODUCTION

For the past eighteen years, the European Economic Community (EEC)[1] has been indecisive regarding the extension of jurisdiction over non-EEC companies in violation of the Community's anti-competition rules in Articles 85 and 86 of the EEC's Treaty.[2] Article 85 allows the assertion of jurisdiction whenever "any activity is directed at the Community."[3] The problem until now has been the European Court of Justice's (ECJ) reluctance to sustain the Community's use of "effects" jurisdiction.[4] In 1972,

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1. *See* Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, (*entered into force* Jan. 1, 1958) 298 U.N.T.S. 11 [hereinafter Treaty]. This Treaty is also known as the Treaty of Rome. For an excellent discussion of the history and development of the EEC, see generally Slynn, *Aspects of the Law of the European Economic Community*, 18 CORNELL INT'L L.J. 1 (1985) [hereinafter Slynn]. For a more recent comprehensive analysis of the EEC, see generally Hoffman, *The European Community and 1992*, 68 FOREIGN AFFAIRS 27 (Fall 1989). The members of the EEC are France, the Federal Republic of Germany, Italy, Belgium, the Netherlands, Luxembourg, Denmark, Ireland, the United Kingdom, Greece, and Spain. Portugal joined the Community bringing the membership current. *See* Slynn, *supra*.

2. *See, e.g.*, Europemballage and Continental Can v. Comm'n, 1973 E. Comm. Ct. J. Rep. 215, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8171 (applying articles 85 and 86 to non-EEC defendants); Isituto Chemioterapico Italiano & Commercial Solvents v. Comm'n, 1974 E. Comm Ct. J. Rep. 223 [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8209 (Article 86 applies to commercial and industrial activities supplying the member states); Imperial Chemical Indus. v. Comm'n, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 (imputing liability on foreign parent through EEC subsidiary) [hereinafter *Dyestuffs*].

Note for most cases, the Commission imposed fines for anti-competition violations which are contained in Articles 85 and 86 of the European Economic Community Treaty.

The Community defines concerted practice as: A concerted practice by its nature, does not contain all of the elements of an agreement, but it could result from a coordination that is manifested in the conduct of the participants . . . where parallel conduct makes it possible for the enterprises to achieve price equilibrium at a level other than the level that would have resulted from competition . . . , Back reference ¶ 2021.05, Treaty at art. 85, *supra*, note 1.

3. *See* Treaty at art. 85, *supra*, note 1.

4. The "effects" doctrine is a term of art referring to subjective or objective territoriality. The subjective territorial principle recognizes jurisdiction when the conduct creating the effect occurs inside the boundaries of the country asserting jurisdiction.

Objective territoriality is some form of effect that occurs within the boundaries of a country, while the physical conduct producing the outcome occurred outside the boundaries. For a detailed discussion, see A.D. NEALE & M.L. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION (1988). For a good comparison of different approaches to objective territoriality, see also, Boyer, *Form as Substance: A Comparison of Antitrust Regulation by Consent Decrees in the*

the ECJ decided a landmark group of cases on this issue. The lead case was *Imperial Chemical Industries v. Commission.*[5] In this case, the ECJ recognized the potential for the future use of "effects" jurisdiction. However, the court in *Dyestuffs* found jurisdiction without having to adopt the "effects" doctrine. Nevertheless, *Dyestuffs* represented the EEC's first major step in the adoption of "effects" jurisdiction.

In 1988, the European Court of Justice had the opportunity in *A. Ahlstrom Oy and Others v. Comm'n (Wood Pulp II),*[6] to utilize "effects" jurisdiction previously examined in *Dyestuffs.* In *Wood Pulp II,* the ECJ validated the Community's earlier action of imposing fines on wood pulp producers located outside the EEC.[7] Jurisdiction over the producers was upheld for the first time based on the "effects" doctrine. The Court stated that the focus for violations of Articles 85 and 86[8] and the correlative jurisdiction over anti-competitive actions stem from the conduct producing those effects.[9] The court concluded that the correct focus for anti-competitive conduct in violation of the Treaty is where the agreements were performed and not where they were formed.[10]

This note examines the decision in *Wood Pulp.* Part II analyzes the initial decision in 1984 by the European Economic Commission asserting authority over and levying fines against the addressees. Further, the Commission's answers to questions posed by the European Court of Justice on appeal, the Advocate General's Opinion, and the Court's final conclusions are examined. Part III

USA, Reports of the Monopolies and Mergers Commission in the UK, and Grants of Clearance by the European Commission, 32 INT'L & COMP. L.Q. 904 (1983) [hereinafter Boyer]. *See generally,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §§ 402, 403 (1987).

5. [1972] Comm. Mkt. L.R. 557, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161; J.R. Geigy v. Comm'n, 1972 E. Comm. Ct. J. Rep. 787, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8164; Sandoz v. Comm'n, 1972 E. Comm. Ct. J. Rep. 845, [1971-1973 Transfer binder] Common Mkt. Rep. (CCH) ¶ 8165.

6. 127 O.J. EUR. COMM. 6 (Cases 89/85, 104/85, 114/85, 116-117/85 & 125-129/85), [1988] 4 Comm. Mkt. L.R. 901 [hereinafter *Wood Pulp II*].

7. The case took four years for the appeal by the wood pulp producers and various cartels to reach the ECJ, to be argued, and then finally decided in 1988.

8. *See* Treaty, *supra* note 1.

9. *Wood Pulp II* at 941.

10. *Id.*

reviews the historical development of the EEC before the decision in *Wood Pulp*. Finally, the implications of the court's decision are addressed. The article concludes that the ECJ's broad definition of conduct in *Wood Pulp* may lead to protectionistic policies in pursuit of a unified Common Market in 1992.[11] The definition of conduct is simply too expansive to permit the Community's equitable application of "effects" jurisdiction.

II. *IN RE WOOD PULP* -- THE CASE

A. Procedural Background

1. Commission's Conclusions in 1984

In 1984, the European Economic Commission (Commission) announced its decision (*Wood Pulp I*) to impose sanctions against undertakings which engaged in anti-competitive conduct, specifically price-fixing.[12] The Commission, acting in its administrative capacity, investigated the suspected undertakings for over eight years before announcing its findings. In *Wood Pulp I*, the Commission concluded that forty-one wood pulp producers[13] and two trade associations, Fincell and KEA,[14] engaged in anti-competitive price regulating between 1973 and 1981 in violation of Articles 85 and 86 of the EEC Treaty.[15] Over 800 paper

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11. *See Single European Act of Feb. 17, 1986*, 30 O.J. EUR. COMM. (No. L 169) 1 [1987] Common Mkt. Rep. (CCH) ¶ 21,000.

12. Comm'n Decision, *Wood Pulp*, 28 O.J. EUR. COMM. (No. L 85) 1 (1985), [Jan. 1982-June 1985 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,654 [hereinafter *Wood Pulp I*].

13. Joined cases 89, 104, 114, 116, 117 and 125 to 129/85: (A. Ahlstrom Oy (Case 89/85); Bowater Inc. (Case 104/85); Pulp, Paper and Paperboard Export Assoc. (Case 114/85); St. Anne-Nackawic Pulp and Paper Co. (Case 116/85); Int'l Pulp Sales (Case 117/85); Westar Timber (Case 125/85); Weldwood of Canada (Case 126/85); Macmillan Bloedal (Case 127/85); Canadian Forest Products (Canfor) (Case 128/85); and British Columbia Forest Products (Case 129/85) v. Comm'n, 1988 E. Comm. Ct. J. Rep. ____, [1988] 4 Comm. Mkt. L.R. 901.

14. KEA is now called Pulp, Paper and Paper Board, but is still referred to as KEA which is registered under exceptions contained in the Webb-Pomerene Act, (15 U.S.C. §§ 61-65 (1976)).

15. For the purposes of this article, the focus will be on the two biggest violators, the KEA and Fincell cartels.

manufacturers exist within the EEC which generally[16] are supplied with wood pulp[17] from outside sources in order to produce paper products.[18] The Commission found approximately two-thirds of sales and sixty percent of the wood pulp used by the paper manufacturers within the Community had been affected by the anti-competitive conduct of producers located outside the Community. The Commission asserted jurisdiction over the undertakings in question based on this effect, regardless of whether the undertakings in question were actually located within the Community itself.

The producers and cartels were charged with and ultimately held responsible for, promulgating and carrying out price-fixing procedures.[19] The Commission found offending producers had set controlling sale prices standing for a minimum of three months while also including prohibitions against re-sale of wood pulp in all sales contracts.[20] The Commission concluded in *Wood Pulp I* that the restrictions placed upon the paper manufacturers ultimately affected the Common Market. In *Wood Pulp I*, two specific types of conduct were found to be anti-competitive. The first type, prevented the re-sale of wood pulp within the Community by paper manufacturers.[21] The second type, prevented manufacturers within the Community from enjoying competition for wood pulp

16. Approximately 60% of all the wood pulp utilized for production of paper products comes from sources outside the EEC. *Id.* at 908. Further, the other wood pulp producers distributing their product within the EEC were not fined because the commission concluded that they had not engaged in anti-competitive practices. *See* Comm'n Decision, *Wood Pulp*, 28 O.J. EUR. COMM. (No. L 85) 1 (1985), [Jan. 1982-June 1985 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,654. Comm'n Press Release, No. IP (84) 468, Brussels, Dec. 20, 1984, [Jan. 1982-June 1985 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,654 at 11,547-34.

17. *Id.* at 902. "Wood pulp" is a chemical pulp known as "bleached sulphate pulp." Of all the pulps, this type is the highest quality and can be used for a wide variety of paper products. *Id.* at 906.

18. *Wood Pulp II* at 902.

19. *Id.* at 901.

20. *Id.* at 915.

21. *Id.* Natural market and sales conditions would always produce excesses or declines in an individual manufacturer's demand for wood pulp thereby making it necessary to obtain or re-re-sell wood pulp previously purchased based on anticipated demand.

purchased for manufacture through the concertation of prices by offending producers situated outside the community.[22]

The Commission found that KEA and Fincell had also engaged in anti-competitive conduct producing effects within the EEC. The principle activity complained of was the open discussion of price setting and the free flow of information between the cartel's members resulting in the violation of anti-competition rules contained in the Articles.[23] The KEA cartel was a trade association registered and maintained in the United States. KEA is a non-profit association, promoting the commercial interests of its members in the exportation of their products.[24] However, KEA did not itself engage in the manufacturing, selling, or distribution of wood pulp.[25]

2. *1984 Commission's Analysis of "Effects" Doctrine In Wood Pulp I*

(a) Analysis and Findings

In *Wood Pulp I*, the Commission expressly adopted the "effects" doctrine by focusing on the effect of trade within the member states.[26] The Commission asserted jurisdiction notwithstanding the fact that the completed activity took place outside the Community and affected additional markets other than those located within the Community.[27] The assertion of jurisdiction was partially based on the Commission's conclusion that all addressees to this decision were doing business within the

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22. *Wood Pulp I* at 11,547-12. The nature of the production of paper products requires that manufactures rely on one type or grade of pulp for production purposes. Switching companies and thus grades can be done. However, the process is costly and time consuming. Accordingly, manufacturers were essentially limited to their current suppliers. *Id.*

23. *Wood Pulp II* at 915. *See* Treaty at art. 85.

24. *Id.* at 942.

25. *Id.*

26. *See id* at 915-16.

27. *Wood Pulp I* at 11,547-23-24. The Commission expressly extended jurisdiction in this case to cover violations of Article 85(1).

EEC[28] and that "the concertation on prices, the exchange of sensitive information relative to prices, and the clauses prohibiting export or resale all concerned shipments made directly to buyers in the EEC or sales made in the EEC to buyers there."[29] The Commission focused on shipments coming into the Community as the requisite effect triggering Article 85(1).

Based on the above analysis, the Commission found that the producers violated Article 85(1) "since they knowingly and deliberately concerted with regard to their announced transaction prices, exchanged . . . information . . . which was relevant to competition, and arranged for export and re-sale bans, thereby affecting trades within the Member States."[30] In *Wood Pulp I*, the Commission's expression of the scope of Community law was broad indeed: "Community law covers any agreement or any practice which is capable . . . [of] affecting the structure of competition within the Common Market."[31] It would have been difficult for the ECJ to have affirmed such a broad expression of authority in its 1988 decision, *Wood Pulp II*.

The Commission's decision to extend jurisdiction was based on explicit findings that "the effect of the agreements and practices [charged to customers] within the EEC was therefore not only substantial but intended, and was the primary and intended result[32] of the agreements and practices."[33] Once the Commission concluded that the anti-competitive conduct was intentional and had indeed occurred in violation of Article 85(1), the Commission then

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28. *Id.* at 11,547-24.

29. *Id.*

30. *Id.* at 11,547-34.

31. *Id.* at 11,547-32-33. Here the Commission was relying on *Hugin v. Comm'n* to justify such an expansive statement of the scope of community jurisdiction. [1979] E. Comm. Ct. J. Rep. 1869, [1979] 3 Comm. Mkt. L.R. 345.

32. The Commission conducted an exhaustive investigation which is contained in the Commission's Report. *See Wood Pulp I, supra* note 12.

The Commission's conclusions that the resulting anti-competitive effects experienced in the EEC were violative of the treaty were based on oral and written correspondences between the producers. Further, the Commission analyzed the economic outcome of the price quotations coupled with market conditions to determine that the outcome was not by chance but was rather controlled and intended. *See generally id.* at 11,547-24-11,547-30.

33. *Id.* at 11,547-24.

proceeded to impose fines based on the individual actor's participation.[34]

The producers and the two trade associations were all registered outside the Community[35] and appealed[36] the Commission's decision to the European Court of Justice after the Commission levied fines[37] in excess of four million ECU against "36 of the 43 addressees of [their] decision including Fincell and KEA."[38] The fines[39] were based on the Commission's conclusion that anti-competitive practices had occurred within the EEC in violation of Articles 85 and 86 of the Treaty.[40]

(b) Issues on Appeal

The ECJ collectively listed issues presented by the producers and cartels for its consideration:[41] 1) Does the earlier *Dyestuffs* decision preclude the extension of territorial jurisdiction over undertakings outside the Community except when activity occurs through a subsidiary or agent of an undertaking performed within the EEC; 2) whether international law precludes the Commission's extension of jurisdiction based on competition outside the EEC with mere repercussions within the EEC;[42] 3) whether the Finnish

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34. *See id.* at 11,547-24-27.

35. *Wood Pulp II* at 938.

36. The appeal was brought in connection with Article 173(2) of the Treaty to vacate the earlier Commission with respect to its assertion of jurisdiction under Article 85(1) and the fines that were imposed. *Id.*

37. In *Wood Pulp I*, fines totalled in excess of 4 million ECU. For specific allocations among undertakings, see *Wood Pulp I* at 11,547-37.

38. *Wood Pulp II* at 907.

39. Under Article 15(2)(a) of Regulation No. 17, the Commission may by decision impose on undertakings fines of from one thousand to one million ECU, or in some excess thereof but not exceeding 10 percent of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1). *Wood Pulp I* at 11,547-34.

40. *Wood Pulp II* at 907. Note that appeal was taken to the European Court of Justice via Article 173(2) of the Treaty after a hostile decision by the Commission.

41. *Wood Pulp II* at 912-13. The author has restated all the claims into five clear statements of the issues presented.

42. *Id.* at 939-40.

addressees contentions that the Free Trade Agreement[43] enacted between Finland and the Community precludes the Commission's application of Article 85(1) of the Treaty; 4) whether KEA should be immune from jurisdiction based on the non-interference principle with respect to the Webb-Pomerene Act.[44] The ECJ addressed all these issues in its 1989 decision, *Wood Pulp II.* For the purposes of its decision, the Court assumed all the factual findings obtained by the Commission in *Wood Pulp I.*[45] In its decision, the Court was aided by a persuasive opinion by an Advocate General, M. Marco Darmon. Further, the ECJ in an attempt to better clarify the jurisdictional issues, submitted several questions to the Commission.[46]

B. Commission's Analysis in 1988 Wood Pulp II

1. Question Posed by the ECJ on Appeal

The Commission's analysis began with an answer to several questions posed by the ECJ. The first question simply asked the Commission to clarify what type of conduct is required and where does the conduct have to occur in order to trigger Community jurisdiction.[47] The Commission begins by referring to Article 3(f) of the Treaty, which notes the objective of the Community, "economic activity within the Community should not be distorted."[48] The Commission contended that the above rationale justifies the broad interpretation of effects within the Community.

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43. *See* Agreement Between the European Economic Community and the Republic of Finland, Nov. 22, 1973, European Economic Community - Finland, O.J. EUR. COMM. (No. L 328) 28.11. (1973) [hereinafter FTA].

44. *Wood Pulp II* at 940. The United Kingdom also intervened on behalf of KEA with respect to this jurisdictional issue. The U.K.'s argument against the assertion of jurisdiction will be analyzed *infra* at notes 158-71.

45. *Wood Pulp II* at 940.

46. *See infra* notes 47-52 and accompanying text.

47. The question was: Does the Commission maintain that it has jurisdiction in these cases by reason of conduct which has taken place within the Community and, if so, what is that conduct? Or does it base its jurisdiction on the effects within the Community of conduct which took place outside the Community and, if so, what is the conduct and what are its effects? *Wood Pulp II* at 914.

48. *Id.*

Second, the Commission responded that the relevant focus for determining what conduct triggers Article 85 of the Treaty is the implementation of such a concerted practice, agreement or decision.[49] The Commission continued by noting three corollaries to the above proposition. First, for the purposes of jurisdiction, the relevant conduct must be where the effect or object of an agreement occurred and not where the agreement was formed.[50] Second, relevant conduct includes that of an undertaking's subsidiaries or agents.[51] Third, the conduct by each party in a concerted practice indicates that a requisite effect was intended.[52]

In *Wood Pulp II*, the ECJ began by discussing the difficulty in distinguishing the effects of conduct from the conduct itself.[53] In doing so, the Court noted the Commission's attempt to define effects as "the direct and perceivable consequences of certain conduct."[54] However, the ECJ went on to expound that the distinction is clarified when conduct that distorts competition within the Community is contrasted with conduct that does not itself produce distortion, but rather its effect within the Community is distortion.[55] In other words, the rationale for effects jurisdiction is enhanced by analyzing the end effect and tracing its cause rather than beginning with the cause and then attempting to trace the effects occurring within the Community.

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49. *Id.*

50. *Id.*

51. This would seem to extend the first focus by including the relevant conduct of the agent or subsidiaries acting within the Community.

52. *Id.*

53. *Wood Pulp II* at 914.

54. *Id.*

55. *Id.* This author believes that "effects" jurisdiction was adopted by the ECJ in *Wood Pulp II*. However, the ECJ does validate the Commission's extension of jurisdiction without using express language adopting the "effects" doctrine. Due to the ECJ's failure to use this language, some believe that the Court only redefined producer conduct in order to allow for jurisdiction under the Treaty in this case alone. By doing this, some argue that the ECJ has not expressly adopted the "effects" doctrine.

2. Specific Conduct Violating the Treaty

Specifically, the ECJ noted the Commission's conclusions with respect to the conduct in violation of Article 85(1). First, the announcement of prices by producers was made in the Community and the actual prices were then utilized by either the producers themselves or some other agent.[56] This is the conduct that the Commission argues took place within the Community. The Commission contends that this was the conduct producing a "substantial, foreseeable and direct effect within the Community."[57] The illustrated effect was then a restriction on competition within the Common Market.[58]

Further, the Commission argues that the KEA cartel was responsible for promulgating "concerted practices on prices"[59] and strengthening the position of its members that ultimately led to the conduct of the producers and their agents.[60] The Commission argued that while KEA did not sell wood pulp or maintain offices within the EEC, the cartel did produce "effects" through the concertation of prices within the EEC sufficient to justify jurisdiction for violations of Article 85 of the Treaty.[61]

The Commission attempted to avoid the major hurdles of "effects" jurisdiction arguing that the conduct in question actually occurred within the Community.[62] Accordingly, the Commission argued that international law is not violated when the Community is not attempting to regulate conduct outside its borders.[63] The

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56. *Id.*

57. *Id.* at 915.

58. *Wood Pulp II* at 915.

59. *Id.*

60. *Id.*

61. This is accomplished by focusing on the conduct of the KEA members. The Commission argued that the Cartel's activities directed the producers to charge the concerted prices within the EEC. Thus, the activity by the individual producers could then be attributed to the Cartel whose conduct did occur outside the Community.

62. *Id.* at 915.

63. Only exercises of jurisdiction by a state outside its territorial boundary requires a specifically permissive rule of international law. *Wood Pulp II* at 915. Based on this analysis, the only effects produced within the Community would be those sales by producers attributable to the Cartel's activities. In arguing the Commission's jurisdiction over this effect, the debate centers on the practices of other states within the Community and the argument that the EEC's jurisdictional

Commission continued to justify jurisdiction based on the intended, direct and substantial effects which were actually produced within the Common Market.[64] Thus, the Commission argued that it had not violated any international doctrines by sanctioning only that conduct occurring within the Community.[65]

In *Wood Pulp II*, the Commission contends that all the conduct occurred within the community. The Commission could conclude that these producers were not outside the jurisdiction of the Community, although their headquarters were based outside the EEC.[66] The Commission points to the language in Article 85 of the Treaty dealing with restrictive practices that expressly uses the word "any" to modify conduct allowing for jurisdiction over anti-competitive conduct affecting the member states.[67] Accordingly, the Commission argues that the jurisdiction over producers maintaining offices outside the Community as well as KEA and Fincell was allowable under the Treaty and not violative of international laws.

C. *The Advocate General's Opinion in* Wood Pulp II

The Advocate General's opinion was given by M. Marco Darmon. He began by restating the issue raised by the addressees on appeal:

> Neither Community Law nor international law authorizes the application of the Community competition rules to undertakings established outside the Community solely by the reason of the effects produced within the Community.[68]

The Advocate General continued by addressing six areas of focus. First, the existence of "effects" doctrine jurisdiction in light of

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limits are dictated by those of its member states. *Id.*

64. *Id.* at 916.

65. *Id.* at 914.

66. *Wood Pulp I* at 11,547-24.

67. The author is not sure whether the intent of the drafters was to provide a vehicle whereby the Commission would be capable of utilizing "effects" doctrine jurisdiction. Instead, the term "any" may have simply been a word inserted into the Treaty which could be limited by later amendments or judicial interpretation.

68. *Wood Pulp II* at 917.

Community law.[69] This is accomplished by analyzing the relevant passages from Article 85 in addition to Community case law on the topic.[70] Second, he considers the "effects" doctrine in light of international law.[71] Third, he examines the principles behind "effects" jurisdiction within the United States.[72] Fourth, the Advocate General suggests a criterion for the exercise of "effects" jurisdiction by the Community.[73] Fifth, the matter concerning the KEA cartel is analyzed.[74] Finally, the Advocate General examined the Finnish concerns and the Fincell argument that the FTA precludes enforcement under Article 85 of the Treaty.[75] Accordingly, the following discussion begins with the Advocate General's analysis of "effects" jurisdiction with respect to Community law.

1. The Effects Doctrine With Respect to Community Law

The Advocate General begins his analysis by examining the addressees two main objections. First, nothing in the language of Article 85 should be construed as granting jurisdiction over undertakings established outside the Community solely on "effects" produced within the Community.[76] Second, the addressees argued that prior case law produced by ECJ rejected the existence of "effects" doctrine jurisdiction.[77] The Advocate General rejected both of these objections raised by the addressees. However, in his decision, the Advocate General also recommends to the Court that it not follow the Commission's recommendations.

The Advocate General explored the essence of the wording of the Treaty and specifically Article 85 reflecting the idea that Community competition law is applicable whenever anti-

69. *See id.* at 917-20.
70. *Id.* at 918-20.
71. *Id.* at 920-24.
72. *Id.* at 924-28.
73. *Wood Pulp II* at 928-32.
74. *Id.* at 932-34.
75. *Id.* at 934-38.
76. *Id.* at 918.
77. *Id.*

competitive effects are produced within the Community.[78] Commentators have noted that the relevant focus for the above proposition is the location of effects which were the object of the anti-competitive conduct.[79] Accordingly, the Advocate General interprets the scope of the Community's jurisdiction as including "any" effects produced within the Community which effect the Common Market.

The Advocate General continued by recognizing that the ECJ had never formally adopted "effects" jurisdiction; even though, the Court had never formally rejected it either.[80] *Dyestuffs* has been commonly cited for the proposition that the ECJ had rejected "effects" jurisdiction.[81] In *Dyestuffs*, the Advocate General, A.G. Mayras, argued for the adoption of a "qualified effects" test in order to provide jurisdiction over undertakings outside the Community.[82] However, the court expressed a more traditional "unity of undertaking" approach. The Advocate General clarified that the ECJ's silence in its *Dyestuffs* decision as to "effects" jurisdiction should not be considered a rejection of the doctrine.[83]

Another case cited as justification for "effects" jurisdiction is *Walrave v. Union Cycliste International*.[84] While the case focused on the existence of legal relationships, the Court did analyze the existence of relationships by "reason either of the place where they were entered into or the place where they take effect. . . ."[85] Thus, while the ECJ has never formally adopted "effects" jurisdiction as evidenced by *Dyestuffs*, the Advocate General

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78. *Wood Pulp II* at 918. The Advocate General continues by noting it is agreements, decisions, and concerted practices which have as their effect the restriction or distortion of competition within the Common Market. *Id.*

79. The Advocate General cites many scholarly articles in support of this point.

80. *Id.* at 918-19.

81. *Id.*

82. *Id.* For a detailed discussion of the Advocate General Mayra's opinion in *Dyestuffs*, see *infra* notes 150-57 and accompanying text (analyzing *Dyestuffs*).

83. This author believes that the court knew that use of "effects" jurisdiction by the Community might not be well received in the international economic community. Thus, it waited 16 years for an obvious factual need for the "effects" jurisdiction. The situation presented itself in *Wood Pulp* because a majority of the undertakings have no other conduct within the Community.

84. 1974 E. Comm. Ct. J. Rep. 1405, [1975] 1 Comm. Mkt. L.R. 277 [hereinafter *Walrave*].

85. *Wood Pulp II* at 919.

believed that the Court would not hesitate to endorse the doctrine.[86]

2. *The Effects Doctrine and International Law*

Traditionally, state jurisdiction is based on either nationality, jurisdiction over nationals of a state, or territoriality, where the event in question takes place within the borders of the state.[87] The Advocate General explained that there are two distinct and recognized applications of territoriality: subjective and objective.[88] The Advocate General defines subjective territoriality as permitting a state to deal with acts which originated within its territory, even though they were completed abroad. Conversely, objective territoriality, permits a state to deal with acts originating abroad but which were completed, at least in part, within its territory.[89] It is objective territoriality and not subjective territoriality from which "effects" doctrine jurisdiction flows. Jurisdiction based on objective territoriality has had an important impact on a state's ability to control conduct outside its borders.[90] Accordingly, objective territoriality has been useful to states seeking jurisdiction when effects are produced within the state from conduct occurring outside its borders.[91]

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86. *Id.* at 920. Here, the Advocate General assumed transposing the analysis of legal relationships to that of competition law would not be a problem.

87. The Advocate General cites Higgins, *The Legal Basis of Jurisdiction In Olmstead*, EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO, (1984). For the purposes of this note, the focus will be on territoriality.

88. *Wood Pulp II* at 920.

89. *Id.*

90. *Id.* The classic example of objective territorial jurisdiction is the transnational murder. When a person fires a gun from one state into another, the state with the dead citizen is thought to have jurisdiction over the act. The conduct, firing the gun, was then completed when the bullet hit its target in the affected state. This obvious result becomes less obvious when the conduct focused on changes from the act of firing the gun to the conduct of the gun shop for selling the gun in the first place. The argument being that it was the conduct of selling the gun which allowed the harmful conduct of the user to produce effects within the affected state. It is this extension with respect to relevant conduct which is of particular concern in the area of anti-competitive conduct and why traditionally, objective territoriality jurisdiction has been limited to criminal conduct.

91. *Id.* at 920.

The problem of asserting "effects" jurisdiction in the context of international law is one of location. If "effects" jurisdiction is defined as power over activity within a state's own borders, then the sovereignty of that state justifies its actions. However, if "effects" jurisdiction is defined as exercise of jurisdiction over activity outside the asserting state's borders, then a state seeking to exercise such jurisdiction must be able to point to a permissive rule of international law.[92]

(a) International Case Law

In *Lotus*,[93] the Permanent Court of International Justice (PCIJ) noted that international law allows a state to exercise jurisdiction over conduct outside its borders despite the absence of a permissive rule of international law.[94] The ability to exercise jurisdiction over conduct outside its borders would only be limited by issues of sovereignty.[95] The PCIJ then concluded that artificial restrictions to sovereignty (permissive rules of international law) cannot be presumed.[96]

In *Barcelona Traction*,[97] the International Court of Justice (ICJ) sought to clarify previous interpretations of the earlier *Lotus* decision. The Court stated that there were limits to assertions of jurisdiction when such jurisdiction is more reasonably or appropriately exercised by another state.[98] The Court's analysis focused on the inseparability of the relevant acts and the correlative effects produced within the particular state.[99] With respect to anti-competition violations of Article 85, the Advocate General concluded in *Barcelona* that the effect, prevention, restriction, or

92. *Id.* at 921.
93. 1927 P.C.I.J. (ser. A) No. 10 [hereinafter *Lotus*].
94. *Lotus* at 19.
95. *Id.*
96. *Id.* at 18.
97. [1970] I.C.J. Rep. 65.
98. *Id.* at 105.
99. *Wood Pulp II* at 922.

distortion of the Common Market should be considered a constituent element.[100]

(b) Conflicts of Community Effects Jurisdiction With International Law

Writers analyzing *Lotus* and *Barcelona* have concluded that the location of effects within the asserting state is a valid basis for jurisdiction under international law.[101] The Advocate General based his analysis on the assumption that justified assertions of jurisdiction by Member States validate the Community's use of similar doctrines.[102] Based on the above conclusions, the issue arises whether the Community's power to enforce fines levied by the Commission is prescriptive or enforcement jurisdiction.[103] The Advocate General concluded that the Community's attempt to enforce fines levied by the Commission in *Wood Pulp I* was analogous to prescriptive jurisdiction.[104]

3. Principles of United States Case Law

The United States began its development of jurisdictional analysis with the basic premise stated by Oliver Wendell Holmes in 1909, "[A]ll legislation is primarily territorial."[105] However, the Advocate General pointed out that it was not until 1945, in *United States v. Aluminum Co. of America* (Alcoa),[106] that the U.S. gave a clear expression of the "effects" doctrine jurisdiction.[107] The case involved the violation of U.S. antitrust

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100. *Id.*
101. *Id.* at 923.
102. *Wood Pulp II* at 923.
103. *Id.*
104. *Id.*
105. American Banana v. United Fruit, 213 U.S. 347 (1909).
106. 148 F.2d 416 (2d Cir. 1945) [hereinafter *Alcoa*].
107. This signalled the rejection of *American Banana* and the beginning of "effects" jurisdiction within the U.S. *But cf.* Kelso, *Review of the Supreme Court's 1989-90 Term and Preview of the 1990-91 Term for the Transnational Practitioner*, 3 TRANSNAT'L LAW. 4-13 (1990) (indicating that the United States Supreme Court in Burnham v. Superior Court of California appears to be reverting back to the 19th century, Holmes-type approach); Burnham v. Superior Court of California, 110 S.

legislation.[108] In Judge Learned Hand's opinion, the court recognized that the U.S. was capable of legislating rules to govern conduct outside this country producing effects within the borders of the U.S.[109]

(a) *The Judiciary's Approach to Effects Doctrine Jurisdiction*

The United States' utilization of "effects" doctrine jurisdiction was both a necessary and foreseeable development, similar to that of the EEC. However, the EEC's entrance into the "effects" jurisdiction arena is softened by the fact that the U.S. has already extended "effects" jurisdiction to non-criminal cases. The EEC also will benefit from the refinement of the assertion of such jurisdiction, learning from its successes and failures.

In 1945, Judge Hand set down the traditional "intended effects" test in *United States v. Aluminum Co. of America.*[110] Judge Hand determined that U.S. antitrust legislation was intended to be, and was capable of being, utilized to control foreign business activity intending to and affecting domestic economic activity within the U.S.[111]

The U.S. added a reasonableness standard in *Timberlane Lumber v. Bank of America*[112] to be applied by courts in asserting jurisdiction. In *Timberlane*, one federal appellate court, the Ninth Circuit Court of Appeals liberalized the original standard in *Alcoa* by creating a three part weighing or balancing test to be applied by a court in determining whether to assert jurisdiction based on the

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Ct. 2105 (1990).

108. For a more detailed discussion of the *Alcoa* decision and its ramifications, see *infra* notes 110-29 and accompanying text.

109. *Wood Pulp II* at 925.

110. 148 F.2d 416, 443-45 (2d Cir. 1945).

111. A stricter view was adopted in 1951 requiring a direct and influencing effect on trade. *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

112. 549 F.2d 597 (9th Cir. 1977), *cert. denied*, 472 U.S. 1032 (1985) [hereinafter *Timberlane*]. Timberlane alleged that Bank of America had conspired to prevent it from milling and exporting Honduran lumber to the United States. The district court dismissed Timberlane's complaint for lack of subject matter jurisdiction. The court of appeals vacated the dismissal and remanded for reconsideration on the issue of jurisdiction in light of international comity and fairness. *Id.* at 615.

"effects" doctrine. The *Alcoa* court noted the need for other courts asserting "effects" doctrine jurisdiction to go beyond simply determining whether or not a "direct and substantial impact" occurred upon American commerce.[113] Factors considered in asserting "effects" jurisdiction are: 1) Degree of conflict with foreign law; 2) place of business or nationality of the party; 3) degree with which enforcement can be expected; 4) relative significance of effects in the U.S. with respect to elsewhere in the world; 5) existence of a specific purpose to harm or affect American commerce; 6) foreseeability of such an event; 7) relative importance of violations within the U.S. as compared to conduct abroad.[114] The court utilized these factors in determining when to assert jurisdiction even after the "effects" of any unlawful action have already been determined.[115]

Two years after the *Timberlane* decision, the Third Circuit attempted to answer problems faced by courts in applying the *Timberlane* factors in *Mannington Mills v. Congoleum Corp.*[116] The court in *Mannington* found the *Timberlane* decision incomplete and unworkable for courts wrestling with the problem of asserting "effects" jurisdiction. The court decided three additional factors were necessary to make the *Timberlane* decision-making criterion workable. First, is there currently pending litigation somewhere else? Second, a court should determine the existence of an antitrust treaty applicable to the activity. Third, can the court point to some form of inconsistent behavior in justifying its assertion of jurisdiction?[117] The court in *Mannington* believed these factors were necessarily added to the other factors in order to further

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113. *Id.*

114. *Id.* at 614. The court determined these factors by analyzing two other sources. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1985) at §40 [hereinafter RESTATEMENT]; *see also*, K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958). *See generally* Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK. L. REV. 187 (1966); Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*; 28 STAN. L. REV. 1005 (1976); Note, *Extraterritorial Application of the Antitrust Laws; A Conflict of Laws Approach*, 70 YALE L.J. 259 (1960) (analyzing the connection between the Sherman Act and "effects" jurisdiction).

115. *Timberlane* at 614.

116. 595 F.2d 1287 (3d Cir. 1979) [hereinafter Mannington].

117. *Id.* at 1297-98.

legitimize judicial exercises of "effects" jurisdiction with respect to comity.[118]

The U.S. faced a similar situation to the *Wood Pulp* scenario in *Daishowa International v. North Coast Export.*[119] In *Daishowa*, both parties were wood chip manufacturers. The suit was based on the Webb-Pomerene Act[120] that provides associations involved purely in the export trade with an exception to registration under the Sherman Antitrust regulation. The issue presented to the court was whether the U.S. courts were capable of using the Sherman Antitrust Act to obtain jurisdiction over foreign corporations producing effects within the U.S.[121]

The court combined the *Timberlane* and *Mannington* tests, concluding that the Japanese corporation did not receive reciprocal protection to the antitrust laws of the U.S.[122] But the *Daishowa* court did not stop there, the court extended the effects principle with respect to comity considerations, noting that "United States courts may exercise jurisdiction whenever there is any effect on United States commerce."[123]

In 1982, the Fifth Circuit also faced the problem of resolving *Timberlane* and *Mannington* in *Industrial Investment Development Corp. v. Mitsui & Co.*[124] Here, an American corporation and its two Hong Kong subsidiaries[125] sued an Indonesian corporation alleging a conspiracy to keep IIDC out of the Indonesian lumber business by interfering with the contract rights of the U.S. corporation with interests in Indonesia.[126] Mitsui argued that U.S. commerce was not affected because prior to the attempted entry into the Indonesian lumber market by Industrial Investment, all the

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118. Note, *Reasonableness as a Limit to Extraterritorial Jurisdiction*, 62 WASH. U.L.Q. 681, 683 (1985).

119. 1982-2 TRADE CAS. (CCH) ¶ 64,774 (N.D. Cal. 1982) [hereinafter *Daishowa*].

120. Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1988).

121. *See generally* 15 U.S.C. §§ 1-7 (1988) (Sherman Antitrust Act); *id.* §§ 12-27 (1988) (Clayton Act)(a 1914 amendment to the Sherman Antitrust Act).

122. The court in *Daishowa* was unable to apply the comity factors laid down in *Timberlane* evidenced by the *Daishowa* court's expansive holding.

123. *Daishowa* at 71,788.

124. 671 F.2d 876 (5th Cir. 1982) [hereinafter *Mitsui*].

125. International Investment Development Corp. [hereinafter IIDC].

126. *Mitsui* at 881.

lumber in question was currently being shipped to Japan.[127] Nevertheless, the court after looking at the activities in Indonesia alone, concluded there would be no effect on U.S. commerce.[128] However, the court continued to say that any overt anti-competitive activities committed against U.S. corporations abroad does have an effect on domestic U.S. commerce through its negative effect on the individual corporation.[129]

The extension of "effects" doctrine jurisdiction in *Mitsui* extends the ability of U.S. courts to address any anti-competitive acts committed by foreign corporations upon the United States. The Fifth Circuit's identification of "effects" or, injury to an American corporation, seems limitless. Given this extreme application, one might wonder what course of action, if any, the Fifth Circuit may take in the future to limit extensions of "effects" jurisdiction for such singular activity.

(b) The Restatement of Foreign Relations and "Effects" Doctrine Jurisdiction

The *Restatement (Second) of Foreign relations Law of the United States* was formerly adopted in the United States as a model analysis for the assertion of "effects" doctrine jurisdiction.[130] The two major concerns visible throughout much of the U.S. legislation on the topic of "effects" jurisdiction, comity and reasonableness, generally have been adopted by most courts in the United States.[131] The first consideration underlying any test created for "effects" jurisdiction is "reasonableness." The problem, however, has been that courts have been unable to find a workable test that can be applied to more than one case.[132] Second, the courts also must consider notions of international

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127. *Id.* at 883-84. Here, Mitsui contended that the Sherman Act was inapplicable because all the lumber in question was destined for Japan and would not have made it to the U.S.

128. *Mitsui* at 884.

129. *Id.*

130. *See* RESTATEMENT, *supra* note 114, at § 40.

131. Note that *Mitsui* serves as an exception to this rule with an almost limitless application of "effects" doctrine jurisdiction.

132. *See supra* notes 110-29 and accompanying text.

comity. Respecting foreign law while attempting to exercise jurisdiction over activity of foreign corporations has presented a rather grave problem for judiciaries.[133] In 1985, the *Restatement* was adopted to provide some guidelines for courts to follow.

The *Restatement* concentrated on three basic factors. First, conduct and its correlative effect must be constituent elements such that the effect was foreseeable or intended in the plan or scheme.[134] Second, the effect within the U.S. must be "substantial."[135] Third, there must be an intended and primarily intended result.[136] The factors listed in the *Restatement* can be found to be derived from prior case law.[137] However, these are essentially the same criterion the courts have struggled with in the past.[138] Therefore, it is difficult to understand how the *Restatement* will offer much help to the courts, except by providing such general criterion that courts may avoid future conflicts like those present in *Daishowa.*

4. *The Advocate General's Suggested Criterion in* Wood Pulp II

(a) Suggested Approaches

The Advocate General began in *Wood Pulp II* by recognizing three approaches suggested through commentary by writers on the

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133. The problem arises when some courts confuse the "effects" with international comity issues. That an effect occurred on U.S. commerce should be independent of considerations of comity. Unfortunately, courts have limited their analysis solely to the existence of effects. *See generally,* Indus. Inv. Dev. v. Mitsui 671 F.2d 876 (5th Cir. 1982). Here, the court remanded because the lower court failed to address other issues besides the existence of "effects."

134. *See infra* notes 150-57 and 203-20 and accompanying text (analyzing *Dyestuffs*); *see also* RESTATEMENT, *supra* note 114, at § 40.

135. The problem here has been that courts have had a hard time defining what is required to meet the substantial requirement in the Restatement. Unfortunately, the comments on this element are not very illuminating.

136. RESTATEMENT, *supra* note 114, at § 40.

137. *See generally Timberlane*; *Mannington*; *supra* notes 112-18 and accompanying text (discussing the application of "effects" jurisdiction).

138. *See Timberlane* factors.

subject of extraterritorial jurisdiction.[139] The first approach, proffered by Professor Jennings, expressed the idea that all extraterritorial jurisdiction is valid for legitimate purposes, so long as the use of such jurisdiction is not abused.[140] The second approach, provided by Professor Mann, argued that a state's assertion of extraterritorial jurisdiction must be "fair and reasonable."[141] To produce such an outcome, Professor Mann advocates the "closeness of connection test:"

> [A] state has legislative jurisdiction, if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practices of states, the principles of non-interference and reciprocity and the demands of interdependence).[142]

A third approach suggested by other writers is that of the "primary effect."[143] This test is satisfied when the primary effect produced within the asserting state is "more direct and more substantial than that produced in other states."[144] The Advocate General concluded that the above approaches to "effects" jurisdiction all contain elements of reasonableness and necessarily include respect of sovereignty.

The Advocate General prefaced his comments when he noted that the showing of "effects" in the above approaches may be different than the concept of effects contained within Article 85.[145] The term "effects" has been interpreted by scholars as having two essential elements with respect to Community law. First, the effect produced within the Community must be "perceptible"[146] or "appreciable."[147] Second, the effect must be either direct or

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139. *See generally Wood Pulp II* at 928-30 (discussing suggested approaches to the "effects" doctrine).

140. *Id.* at 929.

141. *Id.*

142. Mann, *The Doctrine of Jurisdiction in International Law*, [1964] R.C.A.D.I. 7, 49 (quoted in *Wood Pulp II* at 929).

143. *See Wood Pulp II* at 929.

144. *Id.*

145. *Id.* at 930.

146. J. Megret, J. V. Louis, D. Vignes & M. Waelbrock, LE DROIT DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE, (1972), 4 Concurrence at 20 (cited in *Wood Pulp II* at 930).

147. *Id.* at 21.

indirect and either objectively or reasonably foreseeable.[148] However, he rejects the above tests as too expansive with respect to "indirect effects" in favor of the "qualified effects" test.[149]

(b) *The Qualified Effects Test*

In *Dyestuffs*, the Advocate General, Mayras, defined "effects" as the "direct and immediate, reasonably foreseeable and substantial effect"[150] produced within the Community. The Advocate General, Darmon, in *Wood Pulp II* suggests that the ECJ adopt the test offered in 1972 by former Advocate General Mayras.[151] The "qualified effects" test has been substantively adopted by other entities asserting "effects" jurisdiction.[152] As an example, the Advocate General refers to the U.S. model for the assertion of "effects" jurisdiction contained within the *Restatement*[153] which contains similar language to that of the "qualified effects" test.[154]

The *Restatement* parallels the "qualified effects" test espoused in *Dyestuffs*. Article 5 of the *Restatement* asserts that a state can extend jurisdiction when conduct outside its borders produces effects within its borders, provided three conditions are met:

1) The conduct and its effect are constituent elements of a restrictive practice;
2) The effect within the territory is substantial; and
3) The effect occurs as a direct and primarily intended result of the conduct outside the territory.[155]

These criterion also have been referred to simply as the direct, substantial, and foreseeable effect.

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148. B. GOLDMAN & A. LYON-CAEN, DROU COMMERCIAL EUROPEEN 551 (Dalloz, 4th ed.) (*cited* in *Wood Pulp II* at 930).

149. *Wood Pulp II* at 930.

150. [1972] E.C.R. 619, 694, [1972] Comm. Mkt. L.R. 557, 604 (cited in *Wood Pulp II* at 931).

151. *Wood Pulp II* at 931.

152. *Id.*

153. *See* RESTATEMENT, *supra* note 114.

154. *Id.* In its 55th conference, the International Law Association adopted the qualified effects doctrine instead of rejecting completely the concept of "effects" jurisdiction. *Id.*

155. *See* RESTATEMENT, *supra* note 114, at § 402.

The Advocate General recommends that the above criterion be adopted by the ECJ as an expression of the criterion required for the Community's assertion of "effects" jurisdiction.[156] The Advocate General's recommendation to the Court is also based on the "appropriateness" of the use of "effects" jurisdiction by the Community in defending the Common Market.[157]

5. *The Advocate General's Position on Jurisdiction Over The KEA*

The Advocate General begins his analysis here in *Wood Pulp II* by reviewing the conclusions stated by the Commission in their 1984 decision, *Wood Pulp I*.[158] Specifically, the 1984 Commission alleged that the members of the KEA cartel made price recommendations that were then followed by other members of the cartel which in turn encouraged concertation of prices by producers who were not members of the KEA cartel. This activity allowed the KEA to serve as the structure in which the price concertation was implemented by the producers of wood pulp.[159] Accordingly, the Advocate General ultimately concluded that the KEA cartel falls within the scope of the "qualified effects" doctrine.

The United Kingdom intervened on behalf of the KEA cartel arguing that the Community should be prevented from asserting jurisdiction over the KEA. The U.K. recognized only the territorial application of "effects" jurisdiction. Whereby, jurisdiction is exclusively permissible when the individual has some territorial connection with the Community.[160] In *Wood Pulp II*, the KEA cartel had no branches, subsidiaries, or agencies within the

156. *See Wood Pulp II* at 932. Also implicit in the Advocate General's conclusion and expressly stated in the text is that: 1) [n]o rule of international law prohibits the exercise of jurisdiction; and 2) that issues of international comity do not preclude the Community's use of "effects" doctrine jurisdiction. *Id.*

157. *Id.*

158. *See Wood Pulp I, supra* note 12.

159. *Wood Pulp II* at 932.

160. *Id.* at 933.

Community.[161] However, the Advocate General disagreed with the U.K. with respect to the singularity of the "effects" doctrine application. The Community's assertion of jurisdiction is not limited by its borders. Rather, jurisdiction is only limited by the criterion contained in the "effects" doctrine.

The addressees argued that the KEA cartel did not, itself, trade within the EEC.[162] However, the Advocate General found this reasoning unpersuasive, concluding that when an association's members engage in anti-competitive conduct, while the association itself does not, this does not insulate the association as an entity from "effects" jurisdiction.[163] In support of this conclusion, the Advocate General relies on two recent ECJ decisions.[164] In *Van Landewyck v. Commission*,[165] the Court attributed Article 85 violations to a non-profit organization which made binding anti-competitive recommendations to its members, " . . . Article 85(1) also applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress."[166] However, in *Wood Pulp II*, the ECJ concluded the recommendations made by the KEA were not binding upon its members.

The ECJ recently addressed the application of Article 85 to recommendations that are not required to be followed by an association's members.[167] Here, the Court concluded that even when the recommendations made by an association to its members are non-binding, the recommendations still trigger the anti-competition rules contained in Article 85.

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161. *Id.*

162. *Id.* Note that this concept was the specific activity complained of by the Commission which argued that the cartel's function constituted a violation of Article 85.

163. *Id.*

164. *See Van Landewyck v. Comm'n*, [1980] E. Comm. Ct. J. Rep. 3125, [1981] 3 Comm. Mkt. L.R. 134; *see also, Iaz v. Comm'n*, [1983] E. Comm. Ct. J. Rep. 3369, [1984] 3 Comm. Mkt. L.R. 276 (cited in *Wood Pulp II* at 933).

165. [1980] E.C.R. 3125, [1981] Comm. Mkt. L.R. 134.

166. *Id.*

167. *See Verband Der Sachversicherer*, [1988] 4 Comm. Mkt. L.R. 264.

In *Wood Pulp II*, the Advocate General addresses KEA's registration under the Webb-Pomerene Act[168] by reiterating the general proposition that "effects" jurisdiction is not precluded by the existence of concurrent jurisdiction.[169] Further, it is pointed out that the registration requirement under Webb-Pomerene does not limit the cartel's ability to export goods from the U.S.[170] The Advocate General concluded his analysis by noting that the permissive nature of registering cartels does not immunize those cartels from states asserting jurisdiction over them when there are substantial effects produced within that state.[171]

D. The European Court of Justice's Decision

1. The Court's Analysis of Infringements in Wood Pulp II

The Court in *Wood Pulp II* began by addressing the producer's infringements[172] recognized by the Commission in *Wood Pulp I*.[173] First, the Court notes the concertation on prices charged to Community customers by foreign producers.[174] Second, the actual transaction prices charged to purchasers within the Community were examined for an effect in violation of the treaty.[175] Here, the Court distinguished the two violations of Article 85. The first focuses on violations occurring outside the territory of the Community through price setting communications between producers. The second focuses on conduct occurring inside the

168. Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1988).

169. *See generally Wood Pulp II* at 936 (containing the Advocate General's analysis of the effect of the Webb-Pomerene Act on the Community's ability to assert "effects" doctrine jurisdiction).

170. *Wood Pulp II* at 934.

171. *Id.* (citing *Application of Competition Laws to Foreign Conduct: Appropriate Resolution of Jurisdictional Issues*, conference at Fordham Corporate Law Institute Oct. 3-4, 1985).

172. *See generally Wood Pulp I*; Treaty at arts. 1(1) and 2.

173. For the purposes of this note, the focus will be on those infringements relevant to the ECJ's adoption of "effects" jurisdiction. Accordingly, the analysis concerning Fincell and the Free Trade Agreement are excluded.

174. *Wood Pulp II* at 938. *See supra* notes 12-46 and accompanying text (discussing *Wood Pulp I* and analyzing the Commission's findings regarding specific violations).

175. *Wood Pulp II* at 938.

Community attributed to the actual act of selling at concerted prices.

The Court with respect to the KEA cartel accepts the facts as true when given by the Commission's decision in *Wood Pulp I.* Specifically, the Court notes the conduct of the KEA with respect to the price recommendations made to its members.[176] While the recommendations were not mandatory, they were followed, creating as its ultimate effect the concertation of prices within the Community.

The Court recognized that all the addressees were either doing business[177] in the Community or exporting wood pulp directly to purchasers within the Community. The Court, moreover, acknowledged that the concertation affected a "vast majority of the sales of those undertakings to and in the Community."[178] The Court finally noted the Commissions conclusion that the concertation occurring "within the EEC was not only substantial but intended, and was the primary and direct result of the agreements and practices."[179]

2. *The ECJ's Placement of Conduct*

The ECJ began here by agreeing with the Commission's assessment of the scope of Community jurisdiction for violations of Article 85 of the Treaty.[180] In justifying its conclusion, the Court relies on the placement of conduct within the Community. It concludes that there were actually two distinct areas of focus for which the Community asserts "effects" jurisdiction. First, the court concludes that the formation of the agreement to concert prices within the Community was conduct occurring outside the Community. However, the secondary and equally relevant conduct,

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176. *Id.*

177. Business was conducted through subsidiaries, agencies, or other establishments within the Community. *Id.* at 939.

178. *Id.* 60% of wood pulp purchased within the Community was affected by the concertation in prices. *Id.* The Court's factual findings are based on the Commission's conclusions in *Wood Pulp I.*

179. *Id.*

180. *Wood Pulp II* at 939.

consisted of actual sales made to producers within the Community, this can be interpreted as the implementation of the plan to affect the Common Market.[181]

The ECJ concluded that the decisive factor with respect to the application of anti-competition rules contained in the Treaty is the place where the anti-competitive conduct is implemented.[182] Accordingly, undertakings implementing anti-competitive conduct within the Community will now be subject to "effects" jurisdiction regardless of whether those undertakings have agents or maintain subsidiaries within the Community.[183] In *Wood Pulp II*, the Court concludes that it is immaterial how the undertakings implemented their pricing scheme within the Community.[184] Accordingly, once the Commission showed the concertation scheme, the only connection that a foreign undertaking need have with the Community to trigger "effects" jurisdiction is that they actually made sales within the Community.

Given the prior analysis by the Court in *Wood Pulp II*, the Court concluded that the relevant conduct occurred within the Community because sales were made by foreign producers to purchasers within the Community. This is conduct which occurs within the borders of the state, thus granting to that state the power to legislate over them. Therefore, the Court concluded that there simply was no violation of the international rule of law regarding territoriality.

The Court agreed with the Commission's findings[185] that individual producers outside the Community did indeed take part in concertation which had as its intended effect the restriction of competition within the Common Market as defined in Article 85 of the Treaty.[186] Accordingly, based on the Court's analysis of the

181. *See id.*
182. *Id.*
183. *Id.* at 941.
184. *Id.*
185. For a detailed discussion, see *Wood Pulp I, supra* note 12.
186. *Wood Pulp II* at 941.

location of conduct, the Commission was correct in utilizing the territorial scope of Article 85.[187]

3. Jurisdiction Over the KEA Cartel

The Court, agreeing with both the Commission and the Advocate General concluded no conflict existed between the assertion of jurisdiction based on Article 85 violations and the KEA's registration under the Webb-Pomerene Act.[188] The Webb-Pomerene Act only excludes cartels from registration under U.S. law. The Court concludes that this in no way prevents the Community's jurisdiction over the KEA.

The Court focused on several explicit facts to reach the conclusion that KEA did not play a separate role in the concertation of prices affecting the Common Market. First, the Court notes that KEA is a non-profit organization whose purpose is the promotion of the commercial interests of its members.[189] Second, the KEA consists of resident groups representing specified interests within the pulp industry, and the only way to become an individual member of the KEA is to belong to one of these groups. Third, the bylaws of the KEA state that each group within the KEA will enjoy full independence in the management of its affairs. Accordingly, the Court concluded that because of the nature and apparent independence of the cartel's members, the KEA's price recommendations cannot be separated from those concluded by its members. The KEA did not participate in the individual conduct required for the Community's use of "effects" doctrine jurisdiction. Based on the above analysis, the Court was compelled to affirm the Commission's exercise of territorial jurisdiction under Article 85 and to reverse the Commission's decision to assert jurisdiction over the KEA cartel for lack of the requisite conduct necessary to assert "effects" jurisdiction.[190]

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187. *Id.*
188. For a more detailed discussion, see *supra* notes 158-71 and accompanying text.
189. *Wood Pulp II* at 942.
190. *Id.* at 944.

III. FACTORS LEADING UP TO *WOOD PULP*

A. Historical Forces Behind The Creation of the EEC

The EEC was born out of economic conflicts that generally were the result of two World Wars.[191] The original concerns of the EEC were largely economic in that it sought economic stabilization and establishment of a common market that would permit a balanced expansion of economic activities and a higher standard of living within the member states.[192] In order to carry out these principles, decision-making power was shifted from the member states to the Community.[193] Member states were relegated to trustees of EEC policy acting only after consultation and agreement by the Commission.[194]

The creation of the European Court of Justice was a necessary corollary to the creation of the Community in order to insure compliance with directives[195] from the legislative and policy making body of the Community.[196] The Court is empowered to review Commission decisions to insure compliance with Treaty directives and to insure that no abuse of Commission authority exists.[197] The Treaty has been interpreted with great pliancy by the ECJ to allow it to change with the times.[198] Customary interpretation of the Treaty as well as policy directives adopted by

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191. SLYNN, *supra note 1. See* Hoffman, *The European Community and 1992*, 68 FOREIGN AFFAIRS 27 (Fall 1989).

192. *See* Treaty, *supra* note 1, at art. 2.

193. SLYNN, *supra* note 1, at 4.

194. *Id.* at 7. Internal policy is retained by the individual member states. However, many decisions which seem to be inherently, internal have external ramifications and therefore come under the purview of the Commission's authority.

195. In order to ensure compliance with the policies embodied by the Community, the Community has power to issue directives to the member states requiring compliance, see Treaty, *supra* note 1, at arts. 85-94.

196. SLYNN, *supra* note 1, at 4.

197. This was the means utilized by the producers of wood pulp to appeal from the Commission's decisions, see Treaty, *supra* note 1, at arts. 173, 175.

198. SLYNN, *supra* note 1, at 5. Slynn notes that while the ECJ has used pliancy in interpreting the Treaty, it also has continued to recognize longstanding beliefs held by individual member states. *Id.* It is important here to point out the correlation to the United States Constitution with respect to its interpretation.

the EEC has led the Court, through interpretation of the Treaty, to take a protective stance with respect to competition among the member states and placing outside restrictions on the activities of the various member states.[199]

The original purpose behind the EEC was the establishment of an economic and political[200] entity capable of protectionist activities enabling its individual members to expand their individual economies for greater prosperity among Members participating in the Common Market. However, the scope of the decision-making power of the Court increased such that decisions concerning individual transactions would extend over many different types of activity involving similar transactions.[201] The ECJ must continually balance the need to protect the free movement of goods within the Community against the interests of the individual member states.[202]

B. The EEC's Prior Exercise of Jurisdiction

1. Dyestuffs Case

In *Dyestuffs*,[203] the ECJ faced the problem of defining the extent of the Community's exercise of legitimate jurisdiction. The Court recognized that it had two choices for defining the available extent of jurisdiction exercisable by the Commission. First, it could affirm jurisdiction based on activities by the parent

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199. *See* Case 804/79 Comm'n v. United Kingdom, 1981 E. Comm. Ct. J. 1045, [1981] 33 Comm. Mkt. L.R. 543. Here, the Court limited the power of the United Kingdom to regulate fishing areas stating that all member states must be considered in actions even when there is no express Community policy for the questioned activity.

200. There were other fundamental social aspects contained in the Treaty: Equal pay for equal work, social law provisions, National's action against their respective member states, professional freedom, social security and human rights. *See generally* SLYNN, *supra* note 1 (providing an excellent description of the forces behind the creation of the EEC).

201. *Id.*

202. This usually has the effect of invalidating restrictive limitations imposed by member states whenever actions would be contrary to EEC directives or implied policies as determined by the Court.

203. *See supra* notes 150-57. For the purpose of examining the *Dyestuffs* cases, reference will be made to Imperial Chem. Indus. v. Comm'n, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161.

corporation sending communications to its subsidiaries maintained within the EEC to establish the price for dyestuffs.[204] Second, the Court could recognize the Commission's assertion that jurisdiction was justified under the "effects" doctrine where activity, via concertation of prices, carried on outside the EEC affected the Community's "common market." The Court ultimately concluded that the Commission was justified in imposing fines based on the first doctrine.

The *Dyestuffs* case involved nine European manufacturers registered in non-EEC countries involved in a price fixing scheme.[205] The Commission sought to impose fines on the companies for their price-fixing scheme. The companies appealed to the ECJ on the basis that the Commission did not have the requisite jurisdiction to impose such fines.[206] The Court imposed jurisdiction based on the subsidiaries within the EEC.[207] However, the Court recognized that jurisdiction might be justified solely due to "effects" produced within the European Economic Community.[208] While the use of such jurisdiction was unnecessary in that case, the Court recognized a time might arise in the near future when the Commission might assert its jurisdiction based solely on the "effects" created within the Community absent any explicit conduct performed by the parties within the boundaries of the Community.[209]

The ECJ made a detailed analysis of the theoretical underpinnings of "effects" jurisdiction and potential utilization by the Community. The producers of dyestuffs, the appellants to the ECJ, asked that the opinion of Professor Jennings be made part of the record of the Court, thus requiring the Court to answer the

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204. The parent corporations maintained that sending telegrams to their subsidiaries in the EEC was not sufficient conduct within the EEC for the purposes of activating Article 85. For a detailed discussion of this argument, see *Imperial Chemical* at 8009.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *See Imperial Chemical* at 8009.

argument by Jennings against the extension of the "effects" jurisdiction by the EEC.[210]

2. *Professor Jenning's Analysis*

Professor Jenning's argument had two basic thrusts. First, he argued that "an offense must be regarded as having been committed within the national territory if one of the constituent elements of the offense, and more specifically its effects, has taken place there."[211] The classic "effects" doctrine jurisdiction had been limited to criminal law violations where one of the constituent elements was performed within the boundaries of the country attempting to assert jurisdiction.

Not until 1945, in *United States v. Aluminum Co. of America*[212] did the U.S. seek to extend this form of jurisdiction to non-criminal anti-trust cases establishing "objective territoriality" as a viable jurisdictional alternative. The Court, extended the *Lotus* case to non-criminal activity conducted outside the borders of the complaining state, having adverse effects within its territorial borders. At the time, many experts in the area of territoriality believed that the class of offense to be included under a *Lotus* rationale would only include those offenses that are generally considered to be punishable under the criminal and civil laws of the states having a well-developed legal system.[213]

Jenning's contention to the ECJ was that anti-competition laws do not belong in the class of laws that would be accepted as "punishable under criminal or civil law of states with well developed legal systems."[214] Following the United States in recognizing objective territoriality, the ECJ disagreed with Jennings, but limited its acceptance of "effects" jurisdiction to

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210. *Id.* at 8005.

211. This was the basic test laid down in *Lotus*. *Id.*

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

213. *Imperial Chemical* at 8005. This rationale would need to be quite malleable, changing with the times, so that what was considered a violation included in this category would be determined by surveying the laws of states having a well developed legal system at the time the violation took place.

214. *Id.*

cases of "direct effects."[215] However, the Court did limit its holding by noting that "effects" jurisdiction would only be available when the individual member states did not maintain laws which would invalidate "effects" jurisdiction over cartels. The Court concluded in this instance that none of the member states possessed laws which prevent the community from validly exercising "effects" doctrine jurisdiction.[216]

In 1972 the Court's decision not to adopt "effects" jurisdiction may have been influenced by the U.K.'s opposition. This factor becomes significant considering the U.K.'s planned entry into the Community the year following the *Dyestuffs* decision. Regardless of the U.K.'s opposition to the "effects" doctrine, the Court may have felt it had not yet amassed enough political and economic clout to make the assertion of "effects" doctrine jurisdiction a viable alternative. However, in 1988 the EEC exercised enough economic and political power to legitimize its use of "effects" jurisdiction.

The decision in *Wood Pulp II* represents the first time the Commission asserted jurisdiction based solely on "effects" doctrine jurisdiction.[217] On appeal, there were three main issues for the European Court of Justice to address. First, did the Commission have the power to impose fines upon producers? Second, can the EEC exert jurisdiction upon foreign corporations with conduct complained of outside the EEC, but with its intended effect within the EEC, and then apply its competition rules contained in Articles 85 and 86 based upon stated jurisdiction

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215. The Court recognized the Swiss court's interpretation of objective territoriality as also including the "protection principle" allowing states to insure economic and social order within the state free from interference. The Court further found that the above considerations were also recognized in *Lotus* and were thus justified.

216. *Id.* at 8009. The U.K. did not become a member of the EEC until 1973 after the Court had heard the case. Currently, the U.K. possesses reactionary laws commonly referred to as "blocking statutes" designed to counter the extension of "effects" jurisdiction by the United States. *See* Tittman, *Extra-territorial Application to U.S. Export Control Laws on Foreign Subsidiaries of U.S. Corporations: An American Lawyers View from Europe*, 16 INT'L LAW. 730 (1982); *see generally*, Comment, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11 GOLDEN GATE U.L. REV. 577 (1981).

217. Vollmer & Sandage, *Casenote: The Wood Pulp Case*, 23 INT'L LAW. 721 (1989).

contained in the Treaty of Rome?[218] Third, do the Articles of the EEC provide the proper forum for which to impose fines rather than the subsequently enacted Free Trade Agreement (FTA) between Finland and the EEC?[219] The Court answered all three issues in the affirmative.[220]

IV. PROBLEMS WITH THE EEC UTILIZING EFFECTS DOCTRINE JURISDICTION

A. Problems With The Political Entity Aspect of "Effects" Jurisdiction

Now that the EEC believes it is in a position to justify or legitimize the use of "effects" jurisdiction, will it be able to restrain the use of this doctrine? Restraint in this area is paramount to the legitimacy of its use. The following analysis points to the EEC's potential inability to properly confine the use of "effects" jurisdiction.

Recall that the Court in *Dyestuffs* did not expressly adopt "effects" doctrine jurisdiction. Rather the Court skirted the issue by simply recognizing the potential use for the "effects" doctrine and based jurisdiction on other grounds. At the time the *Dyestuffs* cases were decided in 1972, the U.K. was not yet a member of the EEC. The U.K. joined the Community the following year. However, at the time the *Dyestuffs* cases were decided,[221] the United Kingdom had "blocking statutes" on its books in response

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218. *See* Treaty, *supra* note 1.

219. This issue was specifically raised by Fincell which contended that the determination of any improper conduct and any remedial actions should take place under the auspices of the FTA rather than the Commission. Here the Court summarily concluded that concurrent jurisdiction existed between the Articles and the subsequently executed FTA which provides sanctions for similar conduct by offending producers located within the signing countries. *Wood Pulp II* at 935.

220. The second issue addressed by the Court examines the ability of the Commission to impose fines based on perceived violations of the Articles. For the purposes of this note, the Commission's ability to impose fines is assumed.

The third issue addressing the hierarchy between the EEC Articles and the FTA is not germane to this discussion. For the purposes of this note, it is assumed that the Articles are the correct body of law governing the Commission's decision to impose jurisdiction.

221. The *Dyestuffs* cases were decided between 1971-73. *See supra* note 2.

to the United States codification of "effects" doctrine jurisdiction in the Sherman Antitrust Act.[222] It would have been difficult indeed for the United Kingdom to join an economic body which had just adopted a legal doctrine which the U.K. opposed.

In *Wood Pulp II*, the ECJ officially adopted "effects" jurisdiction. On appeal, the U.K. expressed its disfavor as to the use of "effects" jurisdiction and intervened on behalf of the KEA. The U.K. argued against the application of the "effects" doctrine with respect to the cartel on the basis of the acts committed by the cartel's membership.[223] The Court overturned the Commission's original decision to extend jurisdiction over the cartel. In *Wood Pulp II*, it appears that the Court backed down from the U.K.'s challenge to its assertion of jurisdiction giving similar reasoning as that given in *Dyestuffs*.[224] Given the obvious influence the U.K. has previously enjoyed with respect to the use and adoption of this doctrine, what can we expect from the ECJ as it attempts to utilize this doctrine in the future?

The U.S. faced difficulties in utilizing "effects" jurisdiction during the developmental stage of its case law.[225] The U.S. eventually adopted a "qualified effects" test that was added to the existing *Timberlane* factors.[226] The U.S. courts determined that a "qualified effects" test was necessary in order to deal with the issues of comity and concurrent jurisdiction that became problem areas whenever the U.S. attempted an unqualified approach.[227]

Comity considerations demand a balancing analysis which the U.S. courts have struggled with when applying "effects" doctrine jurisdiction. The question arises whether the Commission will properly weigh asserting "competence" over only those cases which would pass a comity considerations test within the U.S. The

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222. *See supra* notes 119-21 and accompanying text.

223. *See supra* notes 160-62 and accompanying text.

224. Recall in *Dyestuffs*, the Court believed that it could not expressly adopt "effects" jurisdiction which also includes cartels the year before the U.K. was scheduled to join the Community. *See supra* notes 150-57 and 203-20 and accompanying text.

225. *See supra* notes 105-29 and accompanying text.

226. Note these additional factors came after *Timberlane* and were principly contained in *Mitsui* and *Daishowa*, see *supra* notes 112-29 and accompanying text.

227. For a good discussion of this conversion by U.S. courts see *Daishowa*, *supra* note 119.

ECJ has given the Commission broad discretionary "effects" jurisdiction[228] similar to that enjoyed by U.S. courts in deciding whether to assert jurisdiction. There is quite a difference between the application of comity considerations by these two bodies.[229]

Given the fact that the U.S. originally began using only an unqualified approach, but later abandoned it for the qualified approach, is it prudent for the Community to begin where the U.S. began, rather than learning from the mistakes of over forty years of caselaw? How long will it take the Community to re-evaluate its decision and ultimately adopt a "qualified effects" approach?

Further, the ECJ's vagueness concerning such a qualified test is indeed troubling. The Commission is the investigative body and the enforcing body of the articles contained in the EEC Treaty. Accordingly, the ECJ should have given specific guidelines or criterion to be utilized and followed by the Commission. One can only conclude that the purpose for avoiding such a strict delineation was that the ECJ was ensuring that it did not limit the Commission thereby allowing the underlying precepts of the EEC to continue. However, with the initial adoption of "effects" doctrine jurisdiction, the obvious need for strict controls upon its applications becomes evident. It will be interesting to see the impartial application by the Commission of such a balancing test in attempting to assert jurisdiction.[230]

B. Effects Jurisdiction as an Economic Weapon by the EEC

Finally, with the formal adoption of "effects" jurisdiction by the EEC, the concern exists that the use of such jurisdiction would

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228. Some argue that the ECJ decision is not overly broad in that the Court adopts a lesser standard than that urged by the Commission or the Advocate General. However, the only time limitations will manifest themselves is on appeal to the ECJ and where that appeal results in a reversal of a Commission decision.

229. This addresses the idea that the EEC may be incapable of utilizing "effects" doctrine jurisdiction due to the different natures of the United States and the EEC's economic and political mechanics.

230. Should the Commission exceed its authority, the affected party can always appeal to the ECJ. However, after *Wood Pulp II*, this author wonders whether foreign corporations will be inclined to attempt such a legal battle.

be used for economic advantage rather than for true international considerations. The EEC is in a unique position: the Commission, armed with "effects" jurisdiction, is now capable of reaching more actors than was once possible.[231] The decision making process of dealing with improper conduct comes from the Commission. It is the Commission which conducts an investigation of the anti-competitive activity and then responds with some type of remedial action.[232] The offending party would, of course, have the option to appeal such a decision to the ECJ.

In *Wood Pulp*, the ECJ never questioned that in the aggregate, the violative conduct's effect within the EEC was substantial. However, should it be relevant that the individual judiciaries of the member states within the Community might not have found an effect great enough to assert jurisdiction, or that the measure of that effect did not outweigh individual considerations of international comity, preventing the assertion of jurisdiction? Accordingly, conduct occurring within the borders of a member state, when considered individually, may be construed as insignificant, but when viewed in the totality as a Community, such inconsequential conduct multiplied by the number of member states may subject an undertaking to the Community's jurisdiction. The ECJ's refusal to adopt the "qualified effect" test, as proposed by the Advocate Generals in both *Dyestuffs* and *Wood Pulp*, withholds the means to temper the Community's perception of aggregate "effects."

The Commission could use the expanded power to affect previously unattainable changes in the Common Market. The intent of the Commission would never be an issue so long as there was a recognizable effect under the test handed down by the ECJ in *Wood Pulp*. Accordingly, while it would seem that the Commission could address harms creating effects within the EEC, its underlying motive could be strengthening the Community's

231. This, of course, assumes that the economic actors in some way violated one of the Articles or engaged in some sort of illicit conduct.

232. The response referred to here has a wide range of possibilities. Usually, such anti-competitive activity is accompanied by some monetary sanction as well as some type of remedial conduct controlling order within the EEC in order to eliminate any negative effects experienced by any of the member states from the conduct.

international economic position while also redressing violations of the Treaty. While this writer does not mean to imply that the Commission would act in such a manner, potential for abuse must be recognized in light of the original purpose behind the creation of the Commission as well as its recent activities regarding economic effects created within the EEC. Further, this raises the additional issue of examining the motives behind the use of "effects" doctrine jurisdiction and whether such motives are the product of political ideology.

Another problem that may arise is the unintentional use of "effects" doctrine jurisdiction on other economic actors outside the EEC. Assuming, the magnanimous intentions of the Commission, any economic actor outside the EEC who now affects the Community in an indirect way, will be subjected to the EEC economic policy. Unfortunately, economic actions are never universally accepted in the international arena. Accordingly, one economic viewpoint regarding competition may not be shared by another country or a corporation based within that country. Economic ideologies will make for interesting clashes between the EEC and outside states. Inevitably, the self-interested attitude of the EEC will clash with another economic body which also asserts economic influence over commercial pursuits of business within its borders. The Eastern Block countries are prime candidates for challenging the authority of the EEC to assert jurisdiction over business centered within the Eastern Block that produces effects within the EEC.[233]

Post-*Wood Pulp*, the Commission now has the power to impose its economic policies on other corporations outside the EEC without finding actual conduct within the EEC. Offending parties would then have to submit to jurisdiction in the EEC via the ECJ

233. With the increase in East-West relations, the idea that the U.S.S.R. has to enter the competitive market in some form or another will become self evident as the bread lines continue to grow within its borders and few other options are recognized other than to loosen the grip with which their hands hold up the wall between themselves and the western economy. Hopefully, the Soviets will learn from the example of their Eastern Block Comrades who have attempted or have already done the same.

in order to attempt to appeal such remedial action imposed by the Commission.

V. CONCLUSION

With the decision in *Wood Pulp*, the European Economic Community emerges as a political body capable of protecting its economic policies. Any undertaking, regardless how remote, will now potentially be subject to compliance with the Community's Articles. The legitimacy of such power will come through its use. While it would seem that the Commission is now armed with an invincible tool with which to establish its economic policy, such tools are always limited to their practical applications. It will be interesting to see how large a step the Community takes with its new form of jurisdiction and how this will affect the Unified Common Market.

The EEC collectively is more powerful than its individual parts allowing it to justify exercising "effects" doctrine jurisdiction. Paradoxically, this may be the very problem with utilizing "effects" jurisdiction in the future. Individual members may exercise influence over the Commission allowing a particular member to further its political agenda through the Community's use of the "effects" doctrine. Without guidelines similar to those adopted by the U.S. in the "qualified effects" approach, the Community may undoubtedly find it difficult to apply "effects" jurisdiction. Does the Community possess some unique quality which will allow it to succeed where the U.S. failed? Or is the Community destined to adopt a "qualified effects" approach in the near future in order to legitimize its use of "effects" doctrine jurisdiction?

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