

1997

## Antitrust Considerations in International Airline Alliances

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### Recommended Citation

Scott Kimpel, *Antitrust Considerations in International Airline Alliances*, 63 J. AIR L. & COM. 475 (1997)  
<https://scholar.smu.edu/jalc/vol63/iss2/7>

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# ANTITRUST CONSIDERATIONS IN INTERNATIONAL AIRLINE ALLIANCES

SCOTT KIMPEL

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I. INTRODUCTION

“GLOBALIZATION” HAS become a common buzzword in the business world. Technological and telecommunications breakthroughs have contributed to the growing trend towards defining markets not in terms of cities or states, but rather in terms of nations, continents, or even the entire planet. In such a global landscape, mergers and joint ventures between multinational business entities have become commonplace. The international air transportation industry is no stranger to this trend. The nature of air travel—the transportation of people and goods over long distances—dictated long ago that the airline industry develop an international approach to operations, financing, and marketing. Air carriers increasingly use joint ventures to take full advantage of the economies of scale that internationalization offers.

The goal of most international airline alliances is the creation of an integrated network of products, services, and standards between two or more carriers.<sup>1</sup> Ideally, through alliances, carriers are able to operate more efficiently by eliminating unnecessary duplication of costs, thereby providing better service to their customers.<sup>2</sup> There are two general categories of alliances: “equity alliances” and “joint venture alliances.”<sup>3</sup> In an equity alliance, one airline acquires equity or part ownership of another. Joint venture alliances do not include any change in ownership, but instead exist to advance the carriers’ specific objectives, such as increased access to certain airports.<sup>4</sup> Joint venture alliances are necessarily narrower in scope than equity alliances because there is no change in ownership, but both types of alliances usually involve some form of joint-marketing by the carriers.<sup>5</sup>

The proposed alliance between British Airways and American Airlines has drawn attention to the subject of international airline alliances. The British Airways/American Airlines arrange-

<sup>1</sup> See Michael S. Simons, *Aviation Alliances: Implications for the Qantas-BA Alliance in the Asia Pacific Region*, 62 J. AIR L. & COM. 841, 843 (1997).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

ment exemplifies the typical joint venture alliance. It includes provisions that coordinate the two carriers' passenger and cargo services between the United States and Europe, establish full reciprocity between frequent flier programs, and introduce extensive code-sharing provisions across each other's networks.<sup>6</sup> Under a code-sharing agreement, an airline assigns its own code to flights operated by another carrier, enabling passengers to fly across the two carriers' networks as if they traveled on one airline for the entire trip.<sup>7</sup> However, the entire alliance is contingent on the establishment of an open skies agreement between the United States and the United Kingdom.<sup>8</sup>

Equity alliances were especially popular in the early 1990s, as foreign airlines purchased minority stakes in American carriers as a means of penetrating the U.S. passenger market, the largest in the world.<sup>9</sup> Carriers such as Swissair, KLM, and British Airways each acquired considerable percentages of their American counterparts' stock.<sup>10</sup> Cross-ownership agreements between two or more foreign carriers were also popular during this time period.<sup>11</sup> Though some of these equity alliances enjoyed success, most investment in U.S. airlines has been an economic disaster for foreign carriers.<sup>12</sup>

Instead, most carriers now favor joint venture alliances. Despite the attention given to the British Airways/American Airlines arrangement, other airlines have had similar agreements for years.<sup>13</sup> Historically, alliances between foreign carriers and U.S. carriers began in the 1980s.<sup>14</sup> Alliances currently exist between many airlines, including: Northwest and KLM; Delta and Swissair; and Sabena, Austrian, United, and Lufthansa.<sup>15</sup> Air

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<sup>6</sup> See Press Release, *American Airlines and British Airways to Create Worldwide Alliance* (June 11, 1996) <[http://www.amrcorp.com/amr/aa\\_ba\\_news.html](http://www.amrcorp.com/amr/aa_ba_news.html)> [hereinafter Press Release].

<sup>7</sup> See *id.* For a detailed discussion of code-sharing agreements, see generally Simons, *supra* note 1, at 844-59. Typically, code-sharing agreements must be reported to the Department of Transportation. See 14 C.F.R. § 217.10 app. (1997).

<sup>8</sup> See Press Release, *supra* note 6. For a discussion of open-skies agreements, see *infra* notes 271-86 and accompanying text.

<sup>9</sup> See PAUL DEMPSEY ET AL., *AVIATION LAW & REGULATION* 10-76 (1992).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 10-77.

<sup>12</sup> See *id.*

<sup>13</sup> See Diana Bentley, *The European Union Has Become Antitrust Player*, NAT'L L.J., OCT. 14, 1996, at B1; *United Requests Inquiry into American-British Air Alliance*, DALLAS MORNING NEWS, OCT. 10, 1996, at 4D.

<sup>14</sup> See DEMPSEY ET AL., *supra* note 9, at 10-75.

<sup>15</sup> See *United Requests Inquiry*, *supra* note 13, at 4D.

France also recently announced separate alliances with Delta and Continental; however, both are contingent on a not-yet-ratified open skies agreement between France and the United States.<sup>16</sup> In fact, by one estimate there are now over 400 airline alliances worldwide, with more than a quarter of those involving intercontinental agreements.<sup>17</sup>

Antitrust enforcement agencies often scrutinize these alliances because of their potential impact on competition within the airline industry. Disgruntled competitors are also quick to bring private antitrust actions challenging these alliances.<sup>18</sup> Moreover, the fact that joint venture airline alliances fall short of being outright mergers does not mean that they are automatically immune from antitrust scrutiny.<sup>19</sup> Furthermore, the international dimension of airline alliances means that more than one government's enforcement agency may engage in antitrust review of a given alliance. For example, the British Airways-American Airlines agreement is being scrutinized by officials from the United States, the United Kingdom, and the European Union.<sup>20</sup>

This Comment will address the various substantive laws and regulations implicated in an international airline alliance. Rather than providing specific analysis keyed to the terms of any one agreement, this Comment will serve as a broad introduction to the basic antitrust issues that are raised in any international airline alliance. Particular attention will be given to the laws of the United States and the European Union because many current alliances exist between airlines within these two jurisdictions.<sup>21</sup> Although this Comment concentrates on issues pertinent to the international airline industry, many of the relevant antitrust laws are applicable to all international joint ven-

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<sup>16</sup> See *Air France Forms Alliances with Delta, Continental*, DALLAS MORNING NEWS, Oct. 17, 1996, at 2D.

<sup>17</sup> See Simons, *supra* note 1, at 843-44.

<sup>18</sup> See *Judge Dismisses Part of Lawsuit Against BA-American Alliance*, DALLAS MORNING NEWS, Oct. 26, 1996, at 2F; see also *infra* notes 41-43 and accompanying text.

<sup>19</sup> See *infra* notes 50-52 and accompanying text. The associate general counsel for American Airlines' parent company, AMR, expressed surprise over the European Commission's decision to examine the British Airways/American Airlines alliance, because it technically is not a merger. See Bentley, *supra* note 13, at B1. However, joint ventures are indeed covered under EU competition law. See *infra* notes 170-211 and accompanying text.

<sup>20</sup> See *British Airways/American Airlines Alliance Raises Problems*, EUROPEAN REPORT No. 2152, July 27, 1996; see also Bentley, *supra* note 13, at B1.

<sup>21</sup> The Pacific Rim, however, is also fertile ground for international airline alliances. See Simons, *supra* note 1, at 862-67.

tures. Thus, antitrust practitioners in other industries should also find this Comment helpful.

## II. AMERICAN ANTITRUST LAW AND AIR TRANSPORTATION

### A. SUBSTANTIVE LAW: AN OVERVIEW

The three primary U.S. antitrust laws are the Sherman Act,<sup>22</sup> the Clayton Act,<sup>23</sup> and the Federal Trade Commission (FTC) Act.<sup>24</sup> However, air carriers are specifically exempted from coverage under the FTC Act.<sup>25</sup> Thus, for purposes of airline alliances, the Sherman Act and Clayton Act are the most relevant statutes. The ultimate goal of U.S. antitrust law is to maintain the integrity of the free market by protecting competition, not individual competitors.<sup>26</sup> Accordingly, an antitrust plaintiff must allege economic injury to the market as a whole or to industry competition in general, not merely injury to the competitor himself.<sup>27</sup>

Basic liability under the antitrust laws begins with the Sherman Act. Section 1 prohibits "every contract, combination . . . [and] conspiracy in restraint of trade or commerce . . . ."<sup>28</sup> Section 1 applies to both interstate commerce and commerce with foreign nations.<sup>29</sup> Interestingly, the statute does not actually define "restraint of trade."<sup>30</sup> A literal reading of the statute might cripple the economy, because it indicates that "every" contract that restrains commerce is illegal. Instead, the Supreme Court has interpreted the phrase "restraint of trade" to prohibit only those contracts, combinations, and conspiracies that *unduly* restrain trade.<sup>31</sup>

Section 2 of the Sherman Act governs unilateral conduct and prohibits the act of monopolization, as well as the attempt to

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<sup>22</sup> Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

<sup>23</sup> Act of Oct. 15, 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12-27 (1994)).

<sup>24</sup> Act of Sept. 26, 1914, ch. 311, 38 Stat. 717 (codified as amended in scattered sections of 15 U.S.C.).

<sup>25</sup> See 15 U.S.C. § 45(a)(2) (1994).

<sup>26</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

<sup>27</sup> See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 815 (9th Cir. 1988).

<sup>28</sup> 15 U.S.C. § 1 (1994).

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911).

monopolize.<sup>32</sup> It too applies to both interstate commerce and commerce with foreign nations.<sup>33</sup> Notably, section 2 prohibits the act of monopolization, not mere monopolies themselves.<sup>34</sup> The act of unlawful monopolization is defined as any purposeful conduct to acquire, maintain, or obtain a monopoly, except when the monopoly is attained by superior skill or foresight, or it is thrust upon the monopolist by a thin market.<sup>35</sup> Similarly, an illegal attempt to monopolize requires the following: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success.<sup>36</sup>

The penalties for violating the antitrust laws are severe. The Antitrust Division of the Department of Justice (DOJ) is empowered to seek injunctive relief for violations of the Sherman Act.<sup>37</sup> Furthermore, the DOJ is empowered to convene a grand jury with subpoena powers when it intends to bring a criminal action.<sup>38</sup> Any violation of the Sherman Act is a felony punishable by a fine of up to \$10 million for corporations or up to three years in prison and a fine not to exceed \$350,000 for other persons.<sup>39</sup> Rather than risk these harsh penalties, most defendants opt to settle government antitrust cases through an instrument known as a consent decree—essentially a court-approved settlement in which the defendant agrees to stop its questionable behavior.<sup>40</sup>

The Clayton Act also allows civil damages for violations of the antitrust laws. Consequently, the DOJ can bring a civil suit on behalf of the United States.<sup>41</sup> Similarly, the attorneys general of all fifty states are individually able to bring direct actions on be-

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<sup>32</sup> See 15 U.S.C. § 2 (1994).

<sup>33</sup> See *id.*

<sup>34</sup> See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428-30 (2d Cir. 1945) (hearing appeal by virtue of a certificate of the Supreme Court). "The successful competitor, having been urged to compete, must not be turned upon when he wins." *Id.* at 430.

<sup>35</sup> See *id.* at 429-30.

<sup>36</sup> See *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993); see also *William Inglis & Sons v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

<sup>37</sup> See 15 U.S.C. § 4 (1994 & Supp. 1995).

<sup>38</sup> See *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 680-84, (1958).

<sup>39</sup> See 15 U.S.C. §§ 1-2 (1994).

<sup>40</sup> See WILLIAM R. ANDERSEN & C. PAUL ROGERS III, *ANTITRUST LAW: POLICY & PRACTICE* 43 (2d ed. 1992 & Supp. 1995).

<sup>41</sup> See 15 U.S.C. § 15a (1994).

half of their respective states, as well as actions *parens patriae* for natural persons residing in the state.<sup>42</sup> Individual claimants are also empowered to bring direct actions for injuries sustained because of another party's violation of the antitrust laws, without waiting for government action.<sup>43</sup> As an incentive for these private actions, individual plaintiffs may recover attorneys' fees and treble damages.<sup>44</sup>

Because of the inherent vagueness of the antitrust statutes, federal courts have liberally interpreted them to supply needed specificity.<sup>45</sup> In general, the courts have developed two types of tests for determining whether conduct violates the antitrust laws. Some conduct is so anticompetitive that it is illegal *per se*.<sup>46</sup> Other types of conduct are subject to a case-by-case balancing test, known as the "rule of reason," in which the court balances the pro- and anticompetitive elements of the suspicious transaction.<sup>47</sup> Usually, when the likely purpose or effect of an agreement is to raise prices, it is *per se* illegal.<sup>48</sup> On the other hand, when purpose or effect is unclear, or when the defendant is able to make a plausible argument that the suspicious agreement enhances competition or increases market efficiency, the rule of reason analysis is most appropriate.<sup>49</sup>

Joint ventures between competitors have the potential to inhibit competition by driving other competitors out of the marketplace, eventually allowing the survivors to raise prices. Thus, because joint ventures involve combinations and agreements between competitors, they are subject to scrutiny under the antitrust laws.<sup>50</sup> Airline alliances typically resemble joint ventures between competitors. Namely, two or more alliance members, by agreeing to certain conduct that may restrain aeronautical

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<sup>42</sup> See *id.* § 15c.

<sup>43</sup> See *id.* § 15.

<sup>44</sup> See *id.* For a discussion of the controversial nature of these provisions in international circles, see *infra* notes 88-91 and accompanying text.

<sup>45</sup> A complete survey of every case is inappropriate for this Comment. See generally ANDERSEN & ROGERS, *supra* note 40 (providing an exhaustive survey of U.S. antitrust law).

<sup>46</sup> See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972). "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *Id.* at 607-08.

<sup>47</sup> See, e.g., *Standard Oil*, 221 U.S. at 64-67.

<sup>48</sup> See *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48-50 (1990).

<sup>49</sup> See *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23-24 (1979).

<sup>50</sup> See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 169-71 (1964); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-99 (1951).



competition, may violate section 1 of the Sherman Act.<sup>51</sup> Insofar as one of the alliance members may acquire a monopoly at a certain airport or over a certain route as a result of the conduct, the alliance may also violate section 2 of the Sherman Act. Accordingly, the government or a competing carrier may sue alliance members under the federal antitrust laws by alleging monopolization, an attempt to monopolize, or conspiracy to monopolize an area of interstate or foreign air transportation, as well as by alleging the existence of an unlawful contract, combination, or conspiracy to restrain trade in interstate or foreign

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<sup>51</sup> See, e.g., *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977). In this criminal case, the DOJ charged defendant Braniff with various violations of section 1 of the Sherman Act. See *id.* at 584-85 n.5. Although not directed at an airline alliance, the indictment included many elements that could just as easily be applied to one. See *id.* Moreover, a civil action could also mirror the tone of the indictment. The indictment read in relevant part:

10. Air carrier service among the major Texas cities involves and affects substantial amounts of interstate commerce . . . .

12. The aforesaid combination and conspiracy [between Braniff and Texas International Airlines] has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been:

(a) to prevent and exclude Southwest [Airlines] from operating as an air carrier among the major Texas cities;

(b) to impair the ability of Southwest to operate as an air carrier. . . .

13. In furtherance of the aforesaid combination and conspiracy, the defendants . . . :

(a) used tactics whose purpose and effect were to impede and delay Southwest's entry as a competitor and to increase the cost of such entry;

(b) exchanged and acted upon information regarding schedules, fares and other matters in order to disadvantage and injure Southwest; and

(c) jointly undertook a boycott of Southwest by measures designed to prevent passengers from cancelled Braniff and TI flights . . . from traveling on Southwest flights. . . .

14. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Southwest's entry into the transportation of passengers by air . . . was delayed;

(b) Southwest was denied the opportunity to compete freely in the transportation of passengers by air . . . ;

(c) Competition generally in the transportation of passengers by air . . . has been unreasonably and arbitrarily suppressed; and

(d) The public has been denied the benefits of free and open competition in the transportation of passengers by air among the major Texas cities.

*Id.* at 585.

air transportation.<sup>52</sup> Rather than face the substantial penalties detailed above, many alliance members instead apply for anti-trust immunity.<sup>53</sup>

## B. ANTITRUST IMMUNITY

The Department of Transportation may exempt intercarrier cooperative agreements from the federal antitrust laws when "it is required by the public interest."<sup>54</sup> However, the mere existence of any public benefit does not, by itself, require that the DOT grant immunity.<sup>55</sup> Instead, the Department must consider whether the agreement "is necessary to meet a serious transportation need or to achieve important public benefits (including international comity and foreign policy considerations)," and whether less anticompetitive alternatives are available.<sup>56</sup> Thus, immunity is appropriate only "when antitrust litigation poses a serious threat to the continued operation of an agreement that produces important public benefits."<sup>57</sup> At any rate, the grant of immunity is a defense to any suit under the federal antitrust laws to the extent that the complained-of conduct was approved by the DOT.<sup>58</sup>

An antitrust exemption must be secured in the precise manner prescribed by Congress.<sup>59</sup> Consequently, the grant of antitrust immunity is subject to certain limitations. To evaluate whether behavior that allegedly violates the antitrust laws is expressly immunized, one must determine: (1) whether the conduct was approved by a specific order of the DOT or clearly contemplated by such an order; and (2) that the DOT moni-

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<sup>52</sup> See, e.g., *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199, 203 (D.N.J. 1952), *appeal dismissed*, 204 F.2d 230, *cert. denied*, 346 U.S. 806 (1953).

<sup>53</sup> See Asra Q. Nomani, *U.S. Aide's Drive to Make Airline Pacts Immune from Anti-trust Laws is Assailed by Justice Agency*, WALL ST. J., Jan. 3, 1997, at A10. The DOT has already granted immunity to the Delta-Swissair-Sabena-Austrian Airlines alliance, the United-Lufthansa alliance, the KLM-Northwest alliance, and the American Airlines-Canadian Airlines alliance. See *id.* British Airways and American Airlines have also applied for immunity. See *id.*; Charles Goldsmith, *American Airlines, British Airways To File for Alliance*, WALL ST. J., Jan. 10, 1997, at B3A.

<sup>54</sup> 49 U.S.C. § 41308 (1994).

<sup>55</sup> See *Republic Airlines, Inc. v. Civil Aeronautics Bd.*, 756 F.2d 1304, 1317 (8th Cir. 1985).

<sup>56</sup> 49 U.S.C. § 41309(b)(1)(A) (1994 & Supp. 1995).

<sup>57</sup> *Republic Airlines*, 756 F.2d at 1317.

<sup>58</sup> See *Slick Airways*, 107 F. Supp. at 209.

<sup>59</sup> See *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940).

tored and supervised the suspicious conduct.<sup>60</sup> In no event can the DOT approve predatory conduct that has as its dominant purpose the elimination of a competitor.<sup>61</sup> Furthermore, the DOT's grant of immunity applies only to conduct involving the airline industry.<sup>62</sup> Consequently, the antitrust exemption for an airline alliance would not apply beyond air travel if, for example, the alliance members expanded into the hotel or ground tour business.<sup>63</sup>

### III. EXTRATERRITORIAL APPLICATION OF AMERICAN ANTITRUST LAW

Before a court can adjudicate a claim, it must have jurisdiction over the subject matter before it. In a typical antitrust case involving two domestic carriers with an agreement regarding business in the United States, there is little controversy over the application of American antitrust law. However, in an international airline alliance, where travel across international flight routes, conduct in foreign hubs, and even flights between two foreign cities can be part of allegedly anticompetitive effects in the United States, the applicability of U.S. law is less certain. In a private antitrust action, this lack of certainty can be the cause of considerable controversy.<sup>64</sup> In fact, few subjects in international law are as controversial and highly disputed as the extraterritorial application of U.S. antitrust law.<sup>65</sup>

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<sup>60</sup> See *United States v. Braniff Airways, Inc.*, 453 F. Supp. 724, 727 (W.D. Tex. 1978) (citing *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 387 (1973)). *Accord Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124 (5th Cir. 1976); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974).

<sup>61</sup> See *Aloha Airlines*, 489 F.2d at 211-12.

<sup>62</sup> See *Foremost Int'l Tours, Inc. v. Qantas Airways Ltd.*, 525 F.2d 281, 286 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

<sup>63</sup> See *id.* at 285-86.

<sup>64</sup> See *infra* notes 92-105 and accompanying text for a discussion of one such case.

<sup>65</sup> See Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1 (1992). Despite this controversy, the U.S. has increased its international enforcement efforts in recent years. See John R. Wilke, *Hunting Cartels: U.S. Trust-Busters Increasingly Target International Business*, WALL. ST. J., Feb. 5, 1997, at A1.

## A. SUBSTANTIVE LAW

Initially, American courts were reluctant to give the antitrust laws effect beyond the United States's geographic boundaries.<sup>66</sup> The first major change came in *United States v. Aluminum Co. of America*,<sup>67</sup> in which Judge Learned Hand concluded that American antitrust law permitted the regulation of certain conduct outside the United States, since "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."<sup>68</sup>

Judge Hand analyzed three different scenarios. First, the mere effect on imports and exports to or from the United States is insufficient grounds for the extension of jurisdiction when an agreement is made outside the United States by parties who do not intend to affect U.S. commerce.<sup>69</sup> Second, jurisdiction is also improper if parties outside the United States form an agreement with the intent to unlawfully inhibit U.S. commerce, and yet do not actually achieve their desired effect.<sup>70</sup> Finally, the only scenario under which Judge Hand found that the U.S. antitrust laws properly have extraterritorial effect is where a foreign agreement is both intended to affect U.S. commerce and its performance is shown to actually have had that effect.<sup>71</sup>

*Alcoa's* "effects test" caused a significant expansion of antitrust jurisdiction.<sup>72</sup> Courts usually interpret *Alcoa* to mean that the activities of foreigners within a foreign territory may still be governed by U.S. antitrust law, so long as intent and effect on U.S. commerce exist.<sup>73</sup> Nevertheless, "no subsequent decision has applied the . . . [effects] test to exclusively foreign conduct of foreign parties. Instead, cases dealing principally with foreign activities have continued to emphasize participation by an American party."<sup>74</sup> Parties to an international airline alliance, particu-

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<sup>66</sup> See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (refusing to extend the Sherman Act to conduct occurring outside the United States). But see *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927) (distinguishing *American Banana* and allowing the extraterritorial application of U.S. law under a narrow set of circumstances).

<sup>67</sup> 148 F.2d 416 (2d Cir. 1945) (Hand, J.).

<sup>68</sup> *Id.* at 443.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* at 443-44.

<sup>71</sup> See *id.* at 444.

<sup>72</sup> See ANDERSEN & ROGERS, *supra* note 40, at 918.

<sup>73</sup> See *id.* at 919.

<sup>74</sup> *Id.*

larly one involving an American airline, should be aware of *Alcoa* and its implications.

By the late 1970s, foreign commentators vehemently contested *Alcoa* as conflicting "with international law, comity, and good judgment."<sup>75</sup> Domestic commentators also expressed uncertainty over the extent of the effects test.<sup>76</sup> Concerned with issues of international comity, the Ninth Circuit in *Timberlane I* modified the *Alcoa* test by balancing the relevant considerations of each case, thereby adopting a "jurisdictional rule of reason."<sup>77</sup>

Numerous commentators praised this jurisdictional rule of reason as a necessary limitation on the "jurisdictional excesses arising from" *Alcoa*.<sup>78</sup> Under the rule, courts should consider:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted . . . . Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.<sup>79</sup>

## B. FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

Some circuits expressly rejected the *Timberlane I* test,<sup>80</sup> whereas other circuits openly embraced it.<sup>81</sup> Consequently,

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<sup>75</sup> *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 610 (9th Cir. 1977) [hereinafter *Timberlane I*].

<sup>76</sup> *See id.*

<sup>77</sup> *Id.* at 612-14.

<sup>78</sup> ANDERSEN & ROGERS, *supra* note 40, at 923.

<sup>79</sup> *Timberlane I*, 549 F.2d at 614-15 (footnote omitted).

<sup>80</sup> *See, e.g., National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8-9 (2d Cir. 1981).

<sup>81</sup> *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). The *Mannington Mills* court put its own spin on *Timberlane I*, enunciating 10 factors a court should weigh:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;

Congress passed the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA),<sup>82</sup> in part to address the inconsistent treatment in the various circuits.<sup>83</sup> Under the FTAIA, the Sherman Act does not apply to trade or commerce with foreign nations, unless:

1) such conduct has a direct, substantial, and reasonably foreseeable effect—

A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

2) such effect gives rise to a claim under the provisions of [the Sherman Act].<sup>84</sup>

This provision explicitly applies to the transportation industry.<sup>85</sup>

Thus, in order for a court to have the requisite subject matter jurisdiction over an international antitrust claim, the alleged anticompetitive action must have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce, import trade, or export trade of an American party, regardless of whether the anticompetitive conduct occurred in the United States.<sup>86</sup> Consequently, courts will likely dismiss a plaintiff’s antitrust claims if

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3. Relative importance of the alleged violation of conduct here compared to that abroad;

4. Availability of a remedy abroad and the pendency of litigation there;

5. Existence of intent to harm or affect American commerce and its foreseeability;

6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

8. Whether the court can make its order effective;

9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10. Whether a treaty with the affected nations has addressed the issue.

*Id.* at 1297-98.

<sup>82</sup> Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 (1982) (codified in scattered sections of 15 U.S.C.).

<sup>83</sup> See *McGlinchy*, 845 F.2d at 814 n.8.

<sup>84</sup> 15 U.S.C. § 6a (1994).

<sup>85</sup> See *id.* § 4002(a)(2).

<sup>86</sup> *McGlinchy*, 845 F.2d at 815 (citing 15 U.S.C. § 6a(1)(A)).

they only involve foreign commerce without the requisite domestic effect.<sup>87</sup> In an airline alliance, the FTAIA appears to extend subject matter jurisdiction to foreign airlines operating in the United States, but not to foreign airlines suffering injury in a foreign state in which the anticompetitive conduct involved service between two foreign cities.

### C. *LAKER AIRWAYS*

In response to the extraterritorial jurisdiction exercised by American courts, many foreign countries have passed blocking or "clawback" statutes.<sup>88</sup> Often targeting the treble damage provisions of the Clayton Act, these statutes prohibit corporations from cooperating with other countries' courts under various conditions.<sup>89</sup> Though largely symbolic,<sup>90</sup> a British blocking statute became the focus of an infamous international airline antitrust case: *Laker Airways Ltd. v. Sabena, Belgian World Airlines*.<sup>91</sup>

Laker Airways, a foreign carrier nearing bankruptcy, brought an antitrust action in a United States district court against four domestic and four foreign companies, alleging that they conspired to set rates at a predatory level in order to drive Laker Airways out of its transatlantic flight business.<sup>92</sup> Invoking the British blocking statute, several of the foreign defendants quickly obtained a preliminary injunction in the English High Court of Justice prohibiting Laker Airways from taking any further action in U.S. court against the foreign defendants.<sup>93</sup> To prevent the American defendants from following this course of action, Laker first obtained a restraining order from the district

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<sup>87</sup> See *id.*; accord *McElderry v. Cathay Pac. Airways, Ltd.*, 678 F. Supp. 1071, 1077 (S.D.N.Y. 1988).

<sup>88</sup> See ANDERSEN & ROGERS, *supra* note 40, at 931-32.

<sup>89</sup> See, e.g., Protection of Trading Interests Act, 1980, ch. 11 (Eng.); Foreign Extraterritorial Measures Act of 1984, R.S.C., ch. 49 (1985) (Can.); Foreign Anti-trust Judgments (Restriction of Enforcement) Act, 1979, No. 13 (Austl.). Other countries that have enacted similar statutes include France, Germany, the Netherlands, New Zealand, the Philippines, and South Africa. See RALPH H. FOLSOM, EUROPEAN COMMUNITY BUSINESS LAW 345-48 (1994).

<sup>90</sup> See ANDERSEN & ROGERS, *supra* note 40, at 932.

<sup>91</sup> 731 F.2d 909 (D.C. Cir. 1984).

<sup>92</sup> See *id.* at 917. The domestic companies included Pan American World Airways, Trans World Airlines, McDonnell Douglas Corp., and McDonnell Douglas Finance Corp. See *id.* The foreign companies included British Airways, British Caledonian Airways, Lufthansa, and Swissair. See *id.*

<sup>93</sup> See *id.* at 918. The English Court of Appeal then issued a permanent injunction. See *id.* See also *British Airways Bd. v. Laker Airways Ltd.*, [1983] 3 All E.R. 375, 377.

court.<sup>94</sup> Laker then filed a second antitrust suit in the United States against KLM and Sabena, both of whom the court enjoined from using the foreign courts to block the litigation.<sup>95</sup>

The D.C. Circuit had the unenviable task of resolving this conflict. The court reasoned that the United States had sufficient jurisdiction under *Alcoa* and its progeny because the controversy involved flights to and from the United States.<sup>96</sup> Furthermore, the intent to affect U.S. commerce was clear because the alleged predatory pricing scheme was designed specifically to drive Laker Airways out of the market.<sup>97</sup> If Laker Airways' allegations were true, the requisite "intended and actual effect in the United States" would be present because Laker Airways was eventually forced into liquidation.<sup>98</sup> Thus, the United States could indeed exercise subject matter jurisdiction.<sup>99</sup>

The court also addressed the competing interests of the United States and the United Kingdom. In passing the FTAIA, Congress had an opportunity to clarify the applicability of American antitrust laws to international commerce, but Congress did not alter the ability of courts "to exercise comity or otherwise recognize the peculiar problems associated with antitrust actions involving international transactions."<sup>100</sup> Consequently, the court declined to perform an international interest balancing test.<sup>101</sup> The court decided that the English injunction was not entitled to international comity.<sup>102</sup> It observed that the "English injunction is purely *offensive* [and not intended to] protect English jurisdiction," but rather was granted "to quash the practical power of the United States courts" out of different national assessments of the desirability of antitrust law.<sup>103</sup> The entire Laker Airways suit was therefore allowed to proceed.<sup>104</sup>

<sup>94</sup> See *Laker Airways*, 731 F.2d at 918.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 916, 945-46.

<sup>97</sup> See *id.* at 925.

<sup>98</sup> *Id.* at 955-56.

<sup>99</sup> See *id.* at 956.

<sup>100</sup> *Id.* at 946 n.137.

<sup>101</sup> See *id.* at 948-50. "This court is ill-equipped to 'balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate.'" *Id.* at 950 (quoting *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1978)) (alteration in original).

<sup>102</sup> See *id.* at 938.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.* at 956. Eventually, the British House of Lords withdrew the English Court of Appeals' injunction. See *British Airways Bd. v. Laker Airways Ltd.*, [1984] 3 All E.R. 39, 40.



*Laker Airways* illustrates one example of "foreign resistance to the assertions of United States antitrust jurisdiction."<sup>105</sup> One commentator has observed that the D.C. Circuit decision was a necessary affirmation of the United States' right to properly adjudicate an antitrust suit without foreign interference.<sup>106</sup> While the result in *Laker Airways* was not controversial, the court's rationale and its rejection of any kind of balancing test was.<sup>107</sup> Thus, foreign commentators may view this decision as "another example of United States antitrust provincialism and zealotry."<sup>108</sup>

#### D. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES

The drafters of the *Restatement (Third) of the Foreign Relations Law of the United States*<sup>109</sup> have tried to synthesize the current case law and provide solutions to the dilemma of extraterritorial enforcement of U.S. law.<sup>110</sup> A common theme in the *Restatement (Third)* is reasonableness.<sup>111</sup> Section 402 contains the general rules regarding extraterritorial jurisdiction and provides that a state may prohibit conduct or activity that "wholly or in substantial part, takes place within its territory."<sup>112</sup> A state may also regulate conduct that occurs outside its territory as long as the conduct substantially affects the state's interests or relations within its territory.<sup>113</sup> Most notably, a state may also regulate conduct outside its territory by persons who are not its nationals if their conduct somehow affects the security of the state or its interests.<sup>114</sup> Therefore, in addition to endorsing nationality, territoriality, and protective principles, the *Restatement (Third)* also adopts an effects test.<sup>115</sup>

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<sup>105</sup> C. Paul Rogers III, *Still Running Against the Wind: Comment on Antitrust Jurisdiction and Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 50 J. AIR L. & COM. 931, 966 (1985).

<sup>106</sup> See *id.*

<sup>107</sup> See *id.* at 967.

<sup>108</sup> *Id.*

<sup>109</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)].

<sup>110</sup> Although it is somewhat theoretical, courts are sometimes inclined to consider the *Restatement* in their analysis of international disputes. See, e.g., *Laker Airways*, 731 F.2d at 952-53 nn.165-69, 172.

<sup>111</sup> See Alford, *supra* note 65, at 23.

<sup>112</sup> RESTATEMENT (THIRD), *supra* note 109, § 402(1)(a).

<sup>113</sup> See *id.* § 402(1)(c)-(2).

<sup>114</sup> See *id.* § 402(3).

<sup>115</sup> See Alford, *supra* note 65, at 24.

Nevertheless, section 403 serves to limit section 402.<sup>116</sup> Even if the requirements of jurisdiction under section 402 are satisfied, a state is still prohibited from applying its laws if doing so would be unreasonable.<sup>117</sup> Reasonableness is determined by evaluating eight broad criteria.<sup>118</sup> Although the test for reasonableness may be met, a conflict with the legitimate exercise of jurisdiction of another state may still arise. In such a case, each state would have an obligation to weigh its own interests against those of its counterpart.<sup>119</sup> The state with the lesser interest should yield to the state with the "clearly greater" interest.<sup>120</sup> The *Restatement (Third)* is of little help, however, as to what the proper procedure would be when two states cannot agree upon whose interest is "clearly greater."<sup>121</sup>

Although sections 402 and 403 lay out the general framework for the extraterritorial application of a state's law, section 415 specifically addresses issues that are unique to the enforcement of U.S. antitrust law in international transactions.<sup>122</sup> The exercise of extraterritorial antitrust jurisdiction is proper if an agreement in restraint of trade is made or "carried out in significant

<sup>116</sup> See RESTATEMENT (THIRD), *supra* note 109, § 403.

<sup>117</sup> See *id.* § 403(1).

<sup>118</sup> Section 403(2) lists the eight factors that one must weigh:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity . . . ;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

<sup>119</sup> See *id.* § 403(3).

<sup>120</sup> *Id.*

<sup>121</sup> See *id.* § 403 cmt. e (suggesting that in this situation "states often attempt to eliminate the conflict so as to reduce international friction and avoid putting those who are the object of the regulations in a difficult situation").

<sup>122</sup> See *id.* § 415.

measure in the United States," irrespective of the parties' nationalities.<sup>123</sup> For conduct occurring largely outside the United States, jurisdiction is still proper if the "principal purpose of the [suspicious] conduct or agreement is to interfere with [or have some effect on] the commerce" inside the United States.<sup>124</sup> Under both scenarios, the extension of jurisdiction must still be reasonable.<sup>125</sup> Presumably, one can turn to the eight factors in section 403(2) to make this determination. The *Restatement (Third)* thus allows "jurisdiction . . . based on territoriality or the effects doctrine."<sup>126</sup>

#### E. 1995 DOJ/FTC ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS

Because U.S. enforcement authorities have recognized that commerce between U.S. and foreign companies involves issues of concurrent jurisdiction, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have formulated enforcement guidelines for interested parties. The newest guidelines place a greater emphasis than their predecessors on an "interest in international cooperation."<sup>127</sup> The guidelines also have fourteen illustrative examples that apply the various antitrust laws to hypothetical situations in international commerce. These examples are particularly helpful because they include insight into how the agencies will respond to a particular situation. However, the government is quick to caution that:

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<sup>123</sup> *Id.* § 415(1).

<sup>124</sup> *Id.* § 415(2).

<sup>125</sup> *See id.* § 415(3).

<sup>126</sup> Alford, *supra* note 65, at 25.

<sup>127</sup> *See* ANDERSEN & ROGERS, *supra* note 40, supp. at 84. Additionally, the DOJ has stated that:

Although the federal antitrust laws have always applied to foreign commerce, that application is particularly important today. Throughout the world, the importance of antitrust law as a means to ensure open and free markets, protect consumers, and prevent conduct that impedes competition is becoming more apparent . . . [T]he federal agencies charged with the responsibility of enforcing the antitrust laws . . . have made it a high priority to enforce the antitrust laws with respect to international operations and to cooperate wherever appropriate with foreign authorities regarding such enforcement. In furtherance of this priority, the Agencies have revised and updated the [DOJ]'s 1988 Antitrust Enforcement Guidelines for International Operations, which are hereby withdrawn.

Antitrust Enforcement Guidelines for International Operations, 4 Trade Reg. Rep. (CCH) ¶ 13,107, at 20,589-2 (Apr. 5, 1995) [hereinafter Antitrust Guidelines].

As is the case with all guidelines, users should rely on qualified counsel to assist them in evaluating the antitrust risk associated with any contemplated transaction or activity. . . . Persons seeking more specific advance statements of enforcement intentions with respect to the matters treated in these Guidelines should use the [DOJ]'s Business Review procedure . . . .<sup>128</sup>

#### IV. DEFENSES TO THE APPLICATION OF AMERICAN LAW

##### A. FOREIGN SOVEREIGN IMMUNITY

The Foreign Sovereign Immunities Act of 1976 (FSIA)<sup>129</sup> governs "[t]he scope of immunity of a foreign government or its agencies and instrumentalities . . . from the jurisdiction of the U.S. courts for all causes of action, including antitrust."<sup>130</sup> Many carriers outside the United States are owned, at least in part, by their respective national governments.<sup>131</sup> Therefore, an airline owned by a foreign government might claim sovereign immunity to U.S. antitrust laws.<sup>132</sup> A foreign government is immune from suit in the United States<sup>133</sup> unless it has waived its immunity, engaged in a commercial activity in the United States, taken property in violation of international law, acquired rights to U.S. property, committed certain torts within the United States, or agreed to arbitration.<sup>134</sup>

The commercial activities exception is frequently invoked as an exception to sovereign immunity in order to allow a suit against a foreign government to continue in the United

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<sup>128</sup> *Id.* (citation omitted).

<sup>129</sup> Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1602-1605 (1994)).

<sup>130</sup> Antitrust Guidelines, *supra* note 127, at 20,589-14.

<sup>131</sup> See Simons, *supra* note 1, at 860-61. Many European airlines, including Lufthansa, Sabena, Swissair, Alitalia, and Air France are at various stages in the process of privatization. See *id.*

<sup>132</sup> See *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 287 (5th Cir. 1989) (concluding that Saudi Arabian Airlines was an agency or instrumentality of Saudi Arabia under FSIA). The courts have not resolved conclusively the extent of sovereign immunity when the foreign government owns less than 100% of the airline. See generally Michael M. Baylson & Clare Ann Fitzgerald, *Courts Disagree on the Extent to Which the Foreign Sovereign Immunities Act Permits Pooling of Interests and Tiering of Subsidiaries by Foreign Governments*, NAT'L L.J., Feb. 3, 1997, at B7.

<sup>133</sup> See 28 U.S.C. § 1604 (1994).

<sup>134</sup> See *id.* § 1605(a).

States.<sup>135</sup> Under the FSLA, a foreign government is not immune when

the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.<sup>136</sup>

To determine whether an activity is commercial or sovereign, courts usually examine whether the challenged conduct is ordinarily performed for profit and whether the conduct is of a type that only a sovereign government can perform.<sup>137</sup> Consequently, most activities of a foreign government-owned airline flying in U.S. airspace will be subject to U.S. antitrust laws to the same extent as its privately owned counterparts.<sup>138</sup> Thus, by flying in and out of the United States, the foreign defendants in *Laker Airways* implicitly waived any possible objections to the use of United States law insofar as it may have conflicted with any foreign sovereign immunity.<sup>139</sup>

#### B. ACT OF STATE DOCTRINE

The act of state doctrine is a rule of judicial abstention that balances international comity and separation of powers.<sup>140</sup> It applies only if the specific conduct complained of is a public act of a foreign government within its own territorial jurisdiction and relates to its governmental sovereignty.<sup>141</sup> Therefore, the doctrine only arises when a U.S. court must adjudicate the official act of a foreign sovereign.<sup>142</sup> U.S. courts are understandably re-

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<sup>135</sup> See Antitrust Guidelines, *supra* note 127, at 20,589-14.

<sup>136</sup> 28 U.S.C. § 1605(a)(2) (1994).

<sup>137</sup> See Antitrust Guidelines, *supra* note 127, at 20,589-14 (citations omitted).

<sup>138</sup> See *id.*

<sup>139</sup> See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 925 (D.C. Cir. 1984). In fact, the foreign defendants chose not to invoke the defense at all. See *id.* at 942.

<sup>140</sup> See Antitrust Guidelines, *supra* note 127, at 20,589-16 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-22 n.21 (1964)).

<sup>141</sup> See *id.* (citing *W.S. Kirpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990)).

<sup>142</sup> See *id.*

luctant to adjudicate cases that would require them to evaluate the legality of the sovereign act of a foreign state.<sup>143</sup>

The act of state doctrine is relevant in an airline alliance when a restraint of trade arises directly from the act of a foreign sovereign. For example, the controversial act might include the grant of a license, the award of a contract, or the expropriation of property.<sup>144</sup> The U.S. government may refrain from bringing an enforcement action based on the act of state doctrine. Accordingly, the DOJ usually will not challenge "foreign acts of state if the facts and circumstances indicate that: (1) the specific conduct complained of is a public act of the sovereign, (2) the act was taken within the territorial jurisdiction of the sovereign, and (3) the matter is governmental, rather than commercial."<sup>145</sup> Because these criteria were not satisfied, the foreign defendants in *Laker Airways* chose not to invoke the act of state doctrine.<sup>146</sup>

### C. FOREIGN SOVEREIGN COMPULSION

An international airline may find itself subject to conflicting requirements when U.S. law differs from the law of other countries, as is common with antitrust regulations.<sup>147</sup> The Supreme Court has held that when it is possible to satisfy both the foreign law and the U.S. antitrust laws, the foreign law does not excuse actions that violate U.S. law.<sup>148</sup> Conversely, a direct conflict may arise when a foreign law requires behavior that the U.S. antitrust laws proscribe.<sup>149</sup> The DOJ may in this case recognize a foreign sovereign compulsion defense to U.S. antitrust law.<sup>150</sup>

Nevertheless, the DOJ will only recognize this defense under very narrow circumstances. First, the foreign government must order the anticompetitive behavior under circumstances in which refusal to comply with the foreign government's command would involve the imposition of criminal or other punitive

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<sup>143</sup> See *id.* (citing *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982)).

<sup>144</sup> See *id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *Laker Airways*, 731 F.2d at 942.

<sup>147</sup> See Antitrust Guidelines, *supra* note 127, at 20,589-14 to 20,589-15 (citations omitted).

<sup>148</sup> See *id.* at 20,589-15 (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)).

<sup>149</sup> See *id.* at 20,589-15.

<sup>150</sup> See *id.* (citing *Interamerican Refining Corp. v. Texaco Maracaibo Inc.*, 307 F. Supp. 1291 (D. Del. 1970)).

sanctions.<sup>151</sup> Second, the U.S. government will not recognize the defense if the conduct occurs solely in the United States.<sup>152</sup> Finally, the federal government will not recognize the defense if the anticompetitive behavior would otherwise fall under the FSIA commercial activity exception.<sup>153</sup>

#### D. NOERR-PENNINGTON DOCTRINE

To facilitate the complex process that accompanies an international joint venture, partners typically lobby their respective legislatures or administrative agencies. For example, in an international airline alliance, the carriers may push for an open skies agreement between their respective governments. At first glance, such activities may themselves appear to be prohibited anticompetitive behavior. Nevertheless, the U.S. Supreme Court has concluded that such efforts to influence government entities are generally immune from antitrust scrutiny.<sup>154</sup>

The Noerr-Pennington doctrine is applicable even if action is intended to destroy competition or is part of a larger scheme that violates the antitrust laws.<sup>155</sup> The doctrine is based on constitutional free speech protections<sup>156</sup> and applies to all lobbying efforts, irrespective of the branch of government lobbied.<sup>157</sup> The doctrine has also been extended to include joint efforts to influence foreign governments.<sup>158</sup> However, the Noerr-Pennington doctrine does not protect a defendant who, while engaged in private commercial activities, conspires with the agency

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<sup>151</sup> See *id.*

<sup>152</sup> See *id.* (citing *Linseman v. World Hockey Assoc.*, 439 F. Supp. 1315, 1325 (D. Conn. 1977)).

<sup>153</sup> See *id.* See also *supra* notes 135-38 and accompanying text.

<sup>154</sup> See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1961); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>155</sup> See *Pennington*, 381 U.S. at 669-70.

<sup>156</sup> See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-12 (1972).

<sup>157</sup> See *Noerr*, 365 U.S. at 136 (extending protection to legislative and executive lobbying); *Pennington*, 381 U.S. at 669-70 (following *Noerr*); *California Motor*, 404 U.S. at 510-11 (extending protection to lobbying of administrative agencies and judicial bodies).

<sup>158</sup> See *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1366 (5th Cir. 1983). But see *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

of a foreign government to restrain competition in foreign commerce.<sup>159</sup>

The Noerr-Pennington doctrine may also affect airline antitrust litigation when that litigation is itself part of an alleged action in contravention of the antitrust laws. In *United States v. Braniff Airways, Inc.*,<sup>160</sup> the DOJ charged defendant Braniff with several antitrust violations, including instituting "a pattern of litigation . . . that was repetitive, inconsistent, undertaken without regard to the merits, with knowledge of its adverse impact, and with the intent to harass, injure, or destroy Southwest [Airlines]."<sup>161</sup> Braniff invoked the Noerr-Pennington doctrine in defense of these alleged activities.<sup>162</sup> The court left the ultimate resolution of this issue to the subsequent trial, but it noted that if litigation is used as part of a plan to destroy competition, then the litigation can lose its First Amendment protection.<sup>163</sup> Consequently, the plaintiff is at least entitled to an opportunity at trial to prove the extent to which the defendant's actions exceed the law.<sup>164</sup>

## V. CONTROL OF AIRLINE ALLIANCES IN THE EUROPEAN UNION

Authorities within the European Union are quick to scrutinize airline alliances that may have an impact on European air travel.<sup>165</sup> Articles 85 and 86 of the EC Treaty<sup>166</sup> provide the general framework for antitrust regulation in the European Union. Neither article, however, explicitly addresses mergers or joint ventures.<sup>167</sup> To fill this gap, the European Court of Justice (ECJ) assumed an activist role, invoking Articles 85 and 86 to

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<sup>159</sup> See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962).

<sup>160</sup> 453 F. Supp. 724 (W.D. Tex. 1978).

<sup>161</sup> *Id.* at 730.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.* at 731.

<sup>164</sup> See *id.*

<sup>165</sup> See Bentley, *supra* note 13, at B1. The recent difficulty with European regulators that Boeing experienced in trying to clear its merger with McDonnell Douglas is further evidence of the growing role that the European Union now plays in the international business arena. See Jeff Cole et al., *Boeing-McDonnell Merger Clears Hurdle as Europeans Give Tentative Clearance*, WALL ST. J., July 24, 1997, at A2.

<sup>166</sup> TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, arts. 85-86, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC TREATY].

<sup>167</sup> See PAUL CRAIG & GRAINNE DE BURCA, EC LAW: TEXT, CASES, & MATERIALS 978 (1995).



cover mergers under narrow sets of circumstances.<sup>168</sup> The uncertainty of the ECJ's case law, as well as the basic need for a comprehensive merger regulation, led to the final passage in December 1989 of Regulation 4064/89 (the "Merger Regulation"), which took effect in September 1990.<sup>169</sup> Depending on how an international airline alliance is structured, it will be evaluated under either the Merger Regulation or Article 85. Generally speaking, most airline alliances are still scrutinized under the latter.

### A. MERGER REGULATION

The Mergers Task Force within the European Commission has the authority to administer the Merger Regulation.<sup>170</sup> The Merger Regulation applies to all "concentrations" that have a "community dimension."<sup>171</sup> A concentration exists when "two or more previously independent undertakings merge."<sup>172</sup> A concentration also exists when one or more undertakings acquire, by any means, direct or indirect control of all or part of one or more undertakings.<sup>173</sup> The community dimension prong is satisfied when the aggregate worldwide profits of all the undertakings is more than ECU 5 billion (approximately \$6.25 billion) and the aggregate community-wide profit is more than ECU 250 million (approximately \$312 million), unless more than two-thirds of the aggregate community-wide profit is in only one Member State.<sup>174</sup> Once all of these criteria are satis-

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<sup>168</sup> See *id.* at 978-79 (citing Joined Cases 142 and 156/84, *British American Tobacco Co. v. Commission*, 1987 E.C.R. 4487).

<sup>169</sup> See *id.* at 979; Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, *amended by* 1990 O.J. (L 257) 14 [hereinafter *Merger Regulation*]. The name is somewhat deceptive because the Merger Regulation also covers certain joint ventures.

<sup>170</sup> See CRAIG & DE BURCA, *supra* note 167, at 981; Merger Regulation, *supra* note 169, art. 2.

<sup>171</sup> See Merger Regulation, *supra* note 169, art. 1(1).

<sup>172</sup> *Id.* art. 3(1)(a). In European parlance, an undertaking can be any entity engaged in commercial activity, including a corporation, an individual, a trade association, a state-owned company, or a cooperative. See CRAIG & DE BURCA, *supra* note 167, at 889 (citations omitted).

<sup>173</sup> See Merger Regulation, *supra* note 169, art. 3(1)(b).

<sup>174</sup> See *id.* art. 1(2). At the time this Comment went to press, the EU regulatory bodies were considering several measures that would reduce significantly these threshold amounts. The Council recently adopted Council Regulation 1310/97, which amends the Merger Regulation and takes effect on March 1, 1998. See generally John Grayston, *EU Megamerger Approval Process Set to Improve*, NAT'L L.J., Oct. 27, 1997, at B7.

fied, the Commission evaluates whether the concentration has any anticompetitive effects on the common market.<sup>175</sup>

Inevitably, conflicts will arise between application of the Merger Regulation and a Member State's own antitrust laws. The Merger Regulation handles such conflicts by instituting a principle of "one-stop shopping."<sup>176</sup> If the Merger Regulation's threshold criteria are satisfied, then only the Commission should scrutinize the transaction.<sup>177</sup> Otherwise, a Member State is free to apply its own law to mergers having only a national effect.<sup>178</sup> This system works best when there are effects in more than one Member State, since the Commission can scrutinize the competitive effects on the whole community.<sup>179</sup>

Transactions involving joint control raise many questions as to what extent the Merger Regulation applies to joint ventures such as those involved in international airline alliances.<sup>180</sup> Article 3(2) addresses this issue in cryptic form. A cooperative joint venture, where two undertakings remain independent but coordinate competitive behavior, is excluded from coverage under the Merger Regulation.<sup>181</sup> On the other hand, the Merger Reg-

<sup>175</sup> See *id.* art. 2.

In making this appraisal, the Commission shall take into account:  
(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith [sic] the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

*Id.* art. 2(1).

<sup>176</sup> See CRAIG & DE BURCA, *supra* note 167, at 1000.

<sup>177</sup> See *id.* (citing Merger Regulation, *supra* note 169, arts. 9, 21.).

<sup>178</sup> See Mario Siragusa, *Merger Control and State Aids Panel: Merger Control in the European Community*, 9 CONN. J. INT'L L. 535, 547 (1994). The necessity for review of mergers and joint ventures by national authorities when the Merger Regulation's threshold is not satisfied has triggered an explosion of national merger control laws. These national laws vary widely in both their substantive and procedural requirements. See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> See CRAIG & DE BURCA, *supra* note 167, at 984.

<sup>181</sup> See Merger Regulation, *supra* note 169, art. 3(2). However, cooperative joint ventures may still be subjected to analysis under Article 85 of the EC Treaty.

ulation does cover a concentrative joint venture, which is essentially its own autonomous economic entity.<sup>182</sup> Thus, "only those joint ventures that will independently and permanently perform all of the functions of an autonomous economic entity," without "coordination of the competitive behavior of the parties amongst themselves or between them and the joint venture," will constitute a concentration.<sup>183</sup>

A joint venture airline alliance does not seem to fit the definition of a covered concentrative joint venture.<sup>184</sup> Instead, that type of airline alliance will likely be scrutinized under the competition laws in the EC Treaty.<sup>185</sup> Conversely, the Merger Regulation seems to apply when one carrier acquires the assets of another.<sup>186</sup> To determine compatibility with the common market, the Commission weighs "market share resulting from the concentration and the importance of the other competitors in the market [and whether] the proposed concentration . . . cre-

<sup>182</sup> See Merger Regulation, *supra* note 169, art. 3(2).

<sup>183</sup> Siragusa, *supra* note 178, at 551.

<sup>184</sup> To help clarify the treatment given to joint ventures, the Commission has issued a Notice on the distinction between concentrative and cooperative joint ventures. See Commission Notice on the Distinction Between Concentrative and Cooperative Joint Ventures Under Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1994 O.J. (C 385) 1. This Notice goes into considerable detail on the elements of joint control, structure, cooperation, product market, and geographic markets. See *id.* ¶¶ 10-20. It also includes examples and citations to relevant case law. See *id.*

<sup>185</sup> See Commission Notice Concerning the Assessment of Cooperative Joint Ventures Pursuant to Article 85 of the [EEC] Treaty, 1993 O.J. (C 43) 2 ¶¶ 4, 11. Three types of cooperative joint ventures can be scrutinized under the European Union's conventional antitrust law, Article 85:

- all JVs, the activities of which are not to be performed on a lasting basis, especially those limited in advance by the parents to a short time period,
- JVs which do not perform all the functions of an autonomous economic entity, especially those charged by their parents simply with the operation of particular functions of an undertaking (partial-function JVs),
- JVs which perform all the functions of an autonomous economic entity (full-function JVs) where they give rise to coordination of competitive behaviour by the parents in relation to each other or to the JV.

*Id.* ¶ 10. See also *infra* notes 197-99 and accompanying text.

An alliance under the British Airways-American Airlines model seems to have all the characteristics of a partial-function joint venture.

<sup>186</sup> See, e.g., Commission Decision of Sept. 13, 1991, Declaring a Concentration to Be Compatible with the Common Market, 1991 O.J. (C 289) 14. There, the Commission approved Delta's purchase of bankrupt Pan Am's North Atlantic-European operations.

ate[s] or strengthen[s] a dominant position.”<sup>187</sup> If competition in the EU is not significantly impeded by an alliance, the Commission will likely approve it.<sup>188</sup>

Any transaction with a community dimension, including concentrative joint ventures, must be reported to the Commission within one week of the conclusion of the agreement.<sup>189</sup> Failure to comply with the duty to notify the Commission (or intentionally or negligently supplying false or misleading information regarding the transaction) is punishable by a fine of up to ECU 50,000 (approximately \$62,500).<sup>190</sup> Airline alliance members therefore have a considerable incentive to comply with the Merger Regulation, if it is applicable to their alliance.

Furthermore, the Commission has broad investigative powers under the Merger Regulation, including the ability to request information,<sup>191</sup> to examine or copy books and other business records,<sup>192</sup> to ask “for oral explanations on the spot,”<sup>193</sup> and to conduct on-site investigations.<sup>194</sup> Finally, the Commission also has broad powers to levy fines for noncompliance or failure to cooperate during the investigative process.<sup>195</sup>

## B. COMPETITION LAW UNDER THE EC TREATY

Airline alliances that fall outside the scope of the Merger Regulation are governed by Article 85’s residual jurisdiction.<sup>196</sup> Article 85 prohibits “all agreements between undertakings [i.e., firms or enterprises], decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market” unless the undertaking improves “the production or distribution of goods or” promotes “technical or economic progress, while allowing consumers a fair share of the resulting ben-

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<sup>187</sup> *Id.*

<sup>188</sup> *See id.*

<sup>189</sup> *See* Merger Regulation, *supra* note 169, art. 4(1).

<sup>190</sup> *See id.* art. 14(1).

<sup>191</sup> *See id.* art. 11.

<sup>192</sup> *See id.* art. 13(1)(a),(b).

<sup>193</sup> *Id.* art. 13(1)(c).

<sup>194</sup> *See id.* art. 13(1)(d).

<sup>195</sup> *See id.* art. 14.

<sup>196</sup> *See* Michael Reynolds & Elizabeth Weighman, *European Economic Community*, in *INTERNATIONAL MERGERS: THE ANTITRUST PROCESS* 3, 4 (J. William Rowley & Donald I. Baker eds., 1991).

efit . . . .”<sup>197</sup> Article 85 is substantively very similar to the American scheme of antitrust regulation.<sup>198</sup> Furthermore, since the Merger Regulation does not govern concentrative joint ventures, Article 85 may limit joint venture airline alliances, as well as those joint equity alliances where one airline acquires a majority share in another.<sup>199</sup>

Article 86 prohibits “[a]ny abuse by one or more undertakings of a dominant position within the common market . . . in so far as it may affect trade between member-States.”<sup>200</sup> An abuse is likely to occur through an airline alliance if a dominant airline strengthens its position and the result is a reduction in competition.<sup>201</sup> Although there is no set rule, a dominant position generally exists once a carrier obtains a market share in excess of forty percent.<sup>202</sup>

Articles 88 and 89 provide temporary arrangements in the absence of appropriate regulations implementing the competition provisions of the EC Treaty.<sup>203</sup> To date, the Council of Ministers has not implemented regulations for air service outside the European Union, though it has done so for air transport within the EU.<sup>204</sup> Each Member State has a duty to determine whether an international alliance not covered by an implementing regulation is prohibited by Articles 85 and 86.<sup>205</sup>

Article 89 also lays out a procedure for cooperation between a Member State and the Commission in conducting an investigation.<sup>206</sup> Because the procedure is rather vague, it can often lead to controversy. For instance, in the ongoing feud between the U.K. and the European Commission over the legality of the British Airways/American Airlines alliance, the EU Competition Commissioner has remarked that British approval of the alliance would “constitute a failure of the U.K. to fulfill its duty of cooperation” under Article 89.<sup>207</sup>

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<sup>197</sup> EC TREATY, *supra* note 166, arts. 85 (1), (3).

<sup>198</sup> See *supra* notes 28-36 and accompanying text.

<sup>199</sup> See Reynolds & Weightman, *supra* note 196, at 4.

<sup>200</sup> EC TREATY, *supra* note 166, art. 86.

<sup>201</sup> See Reynolds & Weightman, *supra* note 196, at 4.

<sup>202</sup> See *id.*

<sup>203</sup> See EC TREATY, *supra* note 166, arts. 88-89.

<sup>204</sup> See *infra* notes 212-24 and accompanying text.

<sup>205</sup> See EC TREATY, *supra* note 166, arts. 87-88.

<sup>206</sup> See *id.* art. 89.

<sup>207</sup> Paul Ames, *EU Threatens Britain with Lawsuit over BA-American Airlines Alliance*, AP, Jan. 13, 1997, available in 1997 WL 4851577 (quoting EU Competition Commissioner Karel Van Miert).

Attorneys familiar with the European Union's antitrust investigative process have mixed reactions to it. One attorney described the process as "a colossal paper chase."<sup>208</sup> On the other hand, the process has also been described as "more user friendly—it's easier to find out what they're really concerned about—while the American procedures are more of a sterile economic exercise."<sup>209</sup> At any rate, U.S. attorneys should be aware that in a Commission investigation, the EU does not recognize any attorney-client privilege for in-house counsel.<sup>210</sup> Furthermore, the attorney-client privilege does apply to outside counsel, but only if the attorney is qualified to practice in the European Union.<sup>211</sup>

### C. REGULATION OF AIR TRANSPORTATION

The Council adopted its first "package" of measures that govern air transportation in 1987.<sup>212</sup> The measures explicitly restrict themselves to apply only to international air transport between EU airports.<sup>213</sup> Flights between airports within a Member State and those between a Member State and a non-member country are excluded. However, the ECJ has ruled that the Commission can regulate anticompetitive behavior of European

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<sup>208</sup> Bentley, *supra* note 13, at B1 (quoting Robert Peters, Deputy General Counsel, Imperial Chemical Industries PLC).

<sup>209</sup> *Id.* (quoting Ted Killheffer, Associate General Counsel, E.I. du Pont de Nemours & Co.).

<sup>210</sup> See *id.* at B2.

<sup>211</sup> See *id.* As the EU relaxes its regulations and begins allowing American attorneys more leeway to practice in Europe, this will likely change.

<sup>212</sup> See Council Regulation 3975/87 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector, 1987 O.J. (L 374) 1, *as amended*, 1992 O.J. (L 240) 18; Council Regulation 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector, 1987 O.J. (L 374) 9, *as amended*, 1992 O.J. (L 240) 19; Council Directive 87/601 on Fares for Scheduled Air Services Between Member States, 1987 O.J. (L 374) 12; Council Decision 87/602 on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services Between Member States and on Access for Air Carriers to Scheduled Air-Service Routes Between Member States, 1987 O.J. (L 374) 19. For a more detailed discussion of all three aviation liberalization packages, see Benoit M.J. Swinnen, Comment, *An Opportunity For Trans-Atlantic Civil Aviation: From Open Skies to Open Markets*, 63 J. AIR L. & COM. 249 (1997).

<sup>213</sup> See Council Regulation 3975/87, *supra* note 212, art. 1(2); Council Regulation 3976/87, *supra* note 212, art. 1; Council Directive 87/601, *supra* note 212, art. 1; Council Decision 87/602, *supra* note 212, art. 1.

airlines not only under its aviation rules, but also under its competition rules.<sup>214</sup>

Regulation 3975/87 empowers the Commission to investigate and sanction any inter-carrier agreements that violate Articles 85 and 86.<sup>215</sup> This regulation also contains several provisions relating to collaboration between the Commission and the authorities in the Member States in an investigation, and establishes fines and periodic penalty payments for violators.<sup>216</sup> Finally, Regulation 3975/87 details a special "objections" procedure, whereby undertakings and associations of undertakings can apply for antitrust immunity.<sup>217</sup>

Directive 87/601 establishes criteria for the approval of air fares by authorities in the Member States.<sup>218</sup> It also establishes procedures for air carriers to submit air fares for approval.<sup>219</sup> The directive is based on the idea that air carriers should be free to propose air fares individually or after consultation with other air carriers for the specific purpose of fixing the terms of inter-carrier agreements.<sup>220</sup>

Similarly, Regulation 3976/87 allows the Commission to exempt other agreements and concerted practices from Article 85.<sup>221</sup> The preamble states that this regulation is structured with the observation that the air transport sector is governed by a network of international agreements, bilateral agreements between states, and bilateral and multilateral agreements between carriers.<sup>222</sup> Consequently, Regulation 3976/87 allows gradual changes to the system that ensure increased competition, while at the same time allowing the air transport sector to adapt.<sup>223</sup>

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<sup>214</sup> See Cases 209-213/84, *Ministere Public v. Lucas Asjes*, 1986 E.C.R. 1425.

<sup>215</sup> See Council Regulation 3975/87, *supra* note 212, arts. 3-8.

<sup>216</sup> See *id.* arts. 8-18.

<sup>217</sup> See *id.* arts. 5-7.

<sup>218</sup> See Council Directive 87/601, *supra* note 212, arts. 3-7.

<sup>219</sup> See *id.* art. 4.

<sup>220</sup> See *id.* pmbl. Under the U.S. antitrust laws, such an agreement setting prices is usually per se illegal, unless the DOT grants an exemption. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 395-402 (1927); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940). See also *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984) (imposing liability for an attempt to monopolize where the chairman of American Airlines called the chairman of Braniff to discuss prices).

<sup>221</sup> See Council Regulation 3976/87, *supra* note 212, arts. 1-2.

<sup>222</sup> See *id.* pmbl. For a discussion of the relevance of these types of agreements to airline alliances, see *infra* notes 262-70 and accompanying text.

<sup>223</sup> See Council Regulation 3976/87, *supra* note 212, pmbl.

Under its Regulation 3976/87 power, the Council subsequently has adopted several more specific regulations.<sup>224</sup>

#### D. EXTRATERRITORIAL JURISDICTION

The EC Treaty and the Merger Regulation are silent as to whether the Commission has extraterritorial jurisdiction.<sup>225</sup> Historically, the application of the European Union's competition rules has not been limited to the territory of the Member States.<sup>226</sup> For example, the "economic unit doctrine" has been applied to establish jurisdiction over parent companies based in third countries and having EU subsidiaries, by imputing the behavior of the subsidiary to the parent.<sup>227</sup> This rule allowed an American parent company to be held liable for the actions of its subsidiary when those actions affected the European market.<sup>228</sup>

Other decisions of the ECJ and Commission also suggest that the EU is extending the extraterritorial reach of its competition law.<sup>229</sup> Paradoxically, the ECJ stopped short of adopting an *Alcoa*-type effects test in *Wood Pulp*, which involved the infringement of Article 85.<sup>230</sup> Nevertheless, the ECJ upheld fines imposed upon U.S., Canadian, Swedish, and Finnish companies that fixed prices, thereby affecting EU trade and competition, despite the fact that none of the firms had substantial EU opera-

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<sup>224</sup> See, e.g., Council Regulation 2671/88 on the Application of Art. 85(3) of the Treaty to Certain Categories of Agreements Between Undertakings, Decisions of Associations of Undertakings and Concerted Practices Concerning Joint Planning and Coordination of Capacity, Sharing of Revenue and Consultations on Tariffs on Scheduled Air Services and Slot Allocation at Airports, 1988 O.J. (L 239) 9; Council Regulation 2408/92 on Access for Community Air Carriers to Intra-Community Air Routes, 1992 O.J. (L 240) 8. Regulation 2408/92 even allows EU airlines to engage in cabotage, which is the right to fly domestic routes in other EU countries, by April 1, 1997. See *id.* art. 3. This cabotage provision may conflict with the Chicago Convention, which requires parties "not to enter into any arrangements which specifically grant . . . privilege[s] on an exclusive basis." Convention on International Civil Aviation, Dec. 7, 1944, art. 7, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

<sup>225</sup> See Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353, 360 (1994).

<sup>226</sup> See Reynolds & Weightman, *supra* note 196, at 8.

<sup>227</sup> See *id.*; see also Cases 48, 49, 51-57/69, Imperial Chem. Ind., Ltd. v. Commission, 1972 C.M.L.R. 557 [hereinafter *Dyestuffs*].

<sup>228</sup> See Case 6/72, Europemballage Corp. v. Commission, 1973 E.C.R. 215.

<sup>229</sup> See FOLSOM, *supra* note 89, at 345.

<sup>230</sup> See Joined Cases 89, 104, 114, 116, 117, 125-129/85, Åhlström Osakeyhtiö v. Commission, 1988 E.C.R. 5193, 5241-43 [hereinafter *Wood Pulp*].



tions at the time.<sup>231</sup> The Court of Justice reasoned that jurisdiction was proper because the implementation of the infringing agreement occurred in the EU.<sup>232</sup>

In an airline alliance where the parties have European operations, the jurisdictional problem is minimal. However, two non-European airlines could conceivably form an alliance that meets the requirements of either the Merger Regulation or Articles 85-89. Relying on *Wood Pulp*, several Commission officials believe that the Commission would still have jurisdiction to evaluate such an alliance.<sup>233</sup> Therefore, an alliance between two non-EU carriers, so long as their sales in at least two Member States is above the threshold figure, will likely be subject to Commission scrutiny, whether or not they have subsidiaries in the European Union.<sup>234</sup> Notably, the Court of Justice has approved the extra-territorial reach of Articles 85 and 86 to extend to airfares both within and outside of the EU.<sup>235</sup>

#### E. INVESTIGATING AIRLINE ALLIANCES

The Commission recently issued two Notices detailing its procedure for the investigation of suspect airline alliances.<sup>236</sup> The Commission noted that in one instance, the U.S. Department of Transportation had already granted immunity from the U.S. antitrust laws to the alliance members.<sup>237</sup> Nevertheless, in this case, the Commission commenced an Article 89 procedure based on air service between the U.S. and Europe.<sup>238</sup> Those parts of the respective alliances that concerned intra-EU travel were investigated under Regulation 3975/87.<sup>239</sup> For those parts of the alliances not directly related to air travel, the Commission

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<sup>231</sup> See *id.* Note that this case was decided in 1988, seven years before Sweden and Finland joined the EU.

<sup>232</sup> See *id.*

<sup>233</sup> See Griffin, *supra* note 225, at 360-61.

<sup>234</sup> See Reynolds & Weightman, *supra* note 196, at 9.

<sup>235</sup> See Case 66/86, *Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, 1989 E.C.R. 838.

<sup>236</sup> See Commission Notice Concerning the Alliance Agreements Between Delta, Sabena, Swissair, and Austrian Airlines, 1996 O.J. (C 289) 6; Commission Notice Concerning the Lufthansa, United Airlines and Scandinavian Airlines System Alliances, 1996 O.J. (C 289) 8. For the benefit of interested parties, both notices contain detailed information regarding the structures of the respective alliances.

<sup>237</sup> See Commission Notice, 1996 O.J. (C 289) at 8, 10.

<sup>238</sup> See *id.* at 6, 8, 10.

<sup>239</sup> See *id.* See *supra* notes 215-17 and accompanying text for a discussion of Regulation 3975/87.

began an investigation under Regulation 17/62.<sup>240</sup> Finally, the Commission also reserved the right to invoke Article 85 at a later time.<sup>241</sup>

## VI. RESOLVING INTERNATIONAL DISPUTES

The resolution of international antitrust disputes in airline alliances requires a twofold approach. First, the involved parties should look to existing antitrust cooperation treaties for guidance. Second, international air treaties may also be helpful in resolving conflicts. Still, neither type of agreement completely resolves the jurisdictional disputes that are almost sure to arise as airline alliances continue to gain popularity.

### A. ANTITRUST COOPERATION AGREEMENTS

The United States has taken an active role in negotiating treaties with other nations to promote enforcement cooperation between the U.S. and foreign governments, as well as to reduce the tensions that often arise in individual antitrust cases.<sup>242</sup> The United States regularly consults with antitrust authorities from Japan, Canada, and the EU.<sup>243</sup> The United States has also negotiated formal bilateral cooperation agreements with several countries, including Germany, Australia, and Canada.<sup>244</sup> The United States and the EU had also formalized a cooperation agreement,<sup>245</sup> but the ECJ later struck it down, ruling that the

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<sup>240</sup> See Commission Notice, 1996 O.J. (C 289) at 6, 8, 10. See Commission Regulation 17/62 Implementing Arts. 85 and 86 of the EC Treaty, 1959-62 O.J. SPEC. ED. 87, as amended, 1995 O.J. (L 1) 1.

<sup>241</sup> See Commission Notice, 1996 O.J. (C 289) at 13.

<sup>242</sup> See Antitrust Guidelines, *supra* note 127, at 20,589-7.

<sup>243</sup> See *id.*

<sup>244</sup> See Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,501; Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,502 [hereinafter U.S.-Australia Agreement]; Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.-Can., reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,503 [hereinafter U.S.-Canada Agreement]. The United States and the United Kingdom do not have any kind of antitrust agreement. See FOLSOM, *supra* note 89, at 351. Some commentators have suggested that the United States enact its own blocking statute against the EU! See *id.*

<sup>245</sup> See Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application

Commission had exceeded its authority in negotiating the accord.<sup>246</sup> Finally, NAFTA compels the United States, Canada, and Mexico to cooperate on antitrust matters.<sup>247</sup>

The U.S.-Australian agreement is typical of bilateral cooperation agreements. The Australian government believes that U.S. courts are not the proper institutions to weigh the interests of international parties during private antitrust litigation.<sup>248</sup> Whenever the Australian government is concerned about a private antitrust proceeding in a U.S. court involving an Australian party, the Australian government can require the United States to report the outcome of consultations between the two governments to the court.<sup>249</sup> The court is under no obligation to even consider these views; it merely receives a report.<sup>250</sup> In return for this courtesy, Australia has indicated its willingness to be more receptive to discovery requests in U.S. antitrust litigation.<sup>251</sup> Furthermore, Australia will consult the U.S. before invoking its blocking statute.<sup>252</sup>

Mutual legal assistance treaties (MLTAs) are another means of facilitating international antitrust cooperation.<sup>253</sup> Under MLTAs, the United States and a foreign country agree to assist one another in investigating criminal antitrust violations.<sup>254</sup> The DOJ has the authority to negotiate such treaties under the International Antitrust Enforcement Assistance Act of 1994.<sup>255</sup> MLTAs are currently in force with well over a dozen countries, with others in the process of negotiation or ratification.<sup>256</sup>

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of Their Competition Laws, Nov. 23, 1990, U.S.-European Community, *reprinted* in 61 Antitrust & Trade Reg. Rep. (BNA) 382.

<sup>246</sup> See French Republic v. Commission, No. C-327/91, E.C.R. Aug. 9, 1994, available in LEXIS, Intlaw library, ECcase file.

<sup>247</sup> See North American Free Trade Agreement, ch. 15, 32 I.L.M. 605, 663 (Dec. 8-17, 1992).

<sup>248</sup> See FOLSOM, *supra* note 89, at 350.

<sup>249</sup> See *id.*; U.S.-Australia Agreement, *supra* note 244, art. 2.

<sup>250</sup> See FOLSOM, *supra* note 89, at 350.

<sup>251</sup> See *id.*; U.S.-Australia Agreement, *supra* note 244, art. 5.

<sup>252</sup> See FOLSOM, *supra* note 89, at 350.

<sup>253</sup> See Antitrust Guidelines, *supra* note 127, at 20,589-7.

<sup>254</sup> See *id.*

<sup>255</sup> Pub. L. No. 103-48, 108 Stat. 4597 (codified at 15 U.S.C. §§ 6201-6212 (Supp. 1995)).

<sup>256</sup> See Antitrust Guidelines, *supra* note 127, at 20,589-7. See, e.g., Treaty with Canada on Mutual Legal Assistance in Criminal Matters, S. Treaty Doc. No. 28, 100th Cong. (1988).

Nonetheless, the effectiveness of antitrust cooperation agreements remains questionable.<sup>257</sup> Diplomatic accords typically have very little influence on either the U.S. judiciary or private litigants.<sup>258</sup> The U.S.-Canada Agreement, for instance, is one of several similar treaties that the countries have entered into since 1959.<sup>259</sup> Yet a bitter antitrust dispute between the Canadian and U.S. governments still arose in *United Nuclear Corp. v. General Atomic Co.*<sup>260</sup> In light of cases such as this one, it is unlikely that cooperation agreements, despite their good faith intent, will effectively cool tempers in matters of antitrust extraterritoriality.<sup>261</sup>

#### B. THE CHICAGO CONVENTION AND BILATERAL AIR AGREEMENTS

With the growth of international air travel following World War II, the nations of the world met to develop a regulatory framework for this growing industry.<sup>262</sup> The product of these meetings was the Chicago Convention, which opened for signature in 1944.<sup>263</sup> The Chicago Convention did not, however, establish a multilateral system of regulating international flights.<sup>264</sup> Instead, Article 6 stated that "[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or authorization of that State, and in accordance with the terms of such permission or authorization."<sup>265</sup>

The International Air Transport Agreement (IATA), which was annexed to the Chicago Convention, envisioned a multilateral approach to airline regulation. However, many signatories of the Chicago Convention were reluctant to sign on to the

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<sup>257</sup> See ANDERSEN & ROGERS, *supra* note 40, at 933.

<sup>258</sup> See *id.* at 936.

<sup>259</sup> See *id.* at 933.

<sup>260</sup> 629 P.2d 231 (N.M. 1980), *cert. denied*, 451 U.S. 901 (1981); see generally ANDERSEN & ROGERS, *supra* note 40, at 933-35 (discussing the controversy).

<sup>261</sup> See ANDERSEN & ROGERS, *supra* note 40, at 935.

<sup>262</sup> See Adam L. Schless, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 EMORY INT'L L. REV. 435, 438 (1994).

<sup>263</sup> See Chicago Convention, *supra* note 224.

<sup>264</sup> See Schless, *supra* note 262, at 438.

<sup>265</sup> Chicago Convention, *supra* note 224, art. 6.

IATA.<sup>266</sup> Consequently, this reluctance led to "the creation of the modern bilateral system of aviation relations."<sup>267</sup>

More than 4000 bilateral air agreements currently exist.<sup>268</sup> Though the Bermuda I agreement between the United States and the United Kingdom was the model for these treaties in the first thirty years after the Chicago Convention, the last twenty years have seen a tremendous diversification in the terms and scope of these agreements.<sup>269</sup> Nevertheless, bilateral air agreements almost always include provisions restricting routes, capacities, and fares.<sup>270</sup>

### C. OPEN SKIES AGREEMENTS

The existing bilateral air agreements are often too narrow in their scope to be of any assistance to airlines contemplating an alliance. The current bilateral aviation treaty between the United States and the United Kingdom, for example, only allows four airlines to operate out of Heathrow International Airport: British Airways, Virgin Atlantic, United Airlines, and American Airlines.<sup>271</sup> Flight frequencies and routes are highly restricted, and other airlines—including potential alliance partners—are effectively shut out of Heathrow by this agreement.<sup>272</sup> An airline commission appointed by President Clinton declared in 1993 "that the bilateral system of international aviation agreements has run its course . . . ."<sup>273</sup> Consequently, the United States is pursuing a policy of establishing much broader treaties with foreign nations, including the United Kingdom. These treaties are commonly referred to as open skies agreements.

Open skies refers to the policy of bilaterally deregulating international air transportation in all areas except safety and security.<sup>274</sup> A typical open skies agreement allows for greater

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<sup>266</sup> See Andras Vamos-Goldman, *The Stagnation of Economic Regulation Under Public International Air Law: Examining its Contribution to the Woeful State of the Airline Industry*, 23 TRANSP. L.J. 425, 434 (1996).

<sup>267</sup> Schless, *supra* note 262, at 439.

<sup>268</sup> See Vamos-Goldman, *supra* note 266, at 435.

<sup>269</sup> See *id.* at 434.

<sup>270</sup> See *id.* at 435.

<sup>271</sup> See Greg Mahlich, *BA/American Faces European Political Battle*, REUTERS EUR. BUS. REP., Jan. 17, 1997.

<sup>272</sup> See *id.*

<sup>273</sup> Ruwantissa I. R. Abeyratne, *Would Competition in Commercial Aviation Ever Fit Into The World Trade Organization?*, 61 J. AIR L. & COM. 793, 817 (1996).

<sup>274</sup> See Michele Kayal, *U.S. to Open Air Talks with Four Asian Nations*, J. OF COM., Jan. 14, 1997, at 1B.

cooperation between U.S. airlines and foreign carriers, particularly in the coordination of prices and schedules.<sup>275</sup> These agreements usually require the complete removal of restrictions on flights and routes, including those involving third nations, and often contain provisions for code-sharing and charter arrangements.<sup>276</sup> Generally, open skies agreements are much broader than most existing bilateral air agreements.

The United States negotiated its first successful open skies agreement in 1978 with the Netherlands.<sup>277</sup> Since that time, the United States has also established open skies agreements with Canada, Germany, and ten smaller European nations.<sup>278</sup> The tremendous growth in the Pacific Rim market has motivated the United States to begin negotiating open skies agreements with Brunei, Malaysia, New Zealand, Singapore, South Korea, Taiwan, and Japan.<sup>279</sup> Moreover, the United States is in the process of negotiating similar treaties with France, the United Kingdom, and the European Union.<sup>280</sup> The European Commission has taken the position that it, and not an individual Member State, is the proper authority to negotiate such agreements on behalf of the European Union.<sup>281</sup> Consequently, the European Commission has brought suit against all Member States who have agreed to open skies treaties with the United States.<sup>282</sup>

Current DOT policy prohibits antitrust immunity in global alliances unless an open skies agreement exists between the contracting parties' respective governments.<sup>283</sup> Both British Airways and American Airlines acknowledge that an open skies agree-

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<sup>275</sup> See *id.*

<sup>276</sup> See Kohei Murayama, *U.S. Eyes "Open Skies" Pact with Five Asia-Pacific Nations*, JAPAN ECON. NEWswire, Jan. 9, 1997.

<sup>277</sup> See Vamos-Goldman, *supra* note 266, at 455-56.

<sup>278</sup> See *id.*; Alexander MacLeod, *Europe Protests British Air Alliance*, CHRISTIAN SCI. MONITOR, Jan. 15, 1997, at 8.

<sup>279</sup> See Murayama, *supra* note 276; Kayal, *supra* note 274, at 1B. Singapore is the first Asian nation to successfully negotiate an open skies agreement with the United States. See *U.S. and Singapore Lift Limits on Airline Access*, WALL ST. J., Jan. 24, 1997, at A16.

<sup>280</sup> See *Amicable French Talks End with Little Progress*, AVIATION DAILY, Dec. 18, 1996, at 447; Elizabeth Wise, *EU Threatens Court Action in BA Alliance*, USA TODAY, Jan. 14, 1997, at 1A; see also Asra Q. Nomani & Charles Goldsmith, *U.S., U.K. Are Close on Open Skies Pact*, WALL ST. J., Jan. 29, 1997, at A6.

<sup>281</sup> See Wise, *supra* note 280, at 1A.

<sup>282</sup> See *id.*

<sup>283</sup> See Fauziah Ismail, *Open Skies Talks with U.S.*, NEW STRAITS TIMES, Jan. 16, 1997, at 1.

ment is essential to the approval of their alliance.<sup>284</sup> Furthermore, the European Commission's initial criticism of the British Airway/American Airlines alliance is largely due to the absence of any U.S.-U.K. open skies agreement.<sup>285</sup> Consequently, many aviation analysts see open skies agreements as a necessary step in establishing effective airline alliances.<sup>286</sup>

## VII. CONCLUSION

International airline alliances rapidly are becoming a major part of the international air transportation industry. Because the alliances necessarily involve cooperation between competing carriers, they may run afoul of antitrust laws promulgated by one or more governing bodies. While it is clear that the United States, the European Union, and other national governments have a valid interest in regulating these alliances, it is not so clear how the relevant parties will resolve their respective jurisdictional disputes.

All agree that the extraterritorial application of one government's laws to parties outside its borders is controversial and possibly even undesirable. However, current statutes and treaties do not completely resolve this dispute. The Chicago Convention and most other bilateral air treaties were negotiated long before airline alliances became prevalent. Furthermore, although antitrust cooperation agreements are couched in terms of "consultation," "mutual respect," and "resolution,"<sup>287</sup> they typically carry little weight in the courts that ultimately must interpret them. Moreover, the current bilateral air agreements do not always specifically address the central legal controversies involved in airline alliances. Thus, the current bilateral system cannot readily support the growing number of airline alliances and the accompanying expansion of international air transportation.

Open skies agreements are a necessary step in the right direction,<sup>288</sup> although they can create even more controversy. Nevertheless, the explosion of international airline alliances, as well as

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<sup>284</sup> See MacLeod, *supra* note 278, at 8.

<sup>285</sup> See Chris Godsmark, *Brussels Warns of Legal Action over BA Alliance*, INDEP., Jan. 14, 1997, at 14.

<sup>286</sup> See Kayal, *supra* note 274, at 1B.

<sup>287</sup> U.S.-Australia Agreement, *supra* note 244, pmbl.

<sup>288</sup> See generally Bruce Stockfish, *Opening Closed Skies: The Prospects for Further Liberalization of Trade in International Air Transport Services*, 57 J. AIR L. & COM. 599 (1992).

the billions of dollars in revenue at stake each year, requires a quick and well-reasoned solution to this dilemma. The governments of the world must reevaluate their current policies if airline alliances are to succeed.





# Articles

