The Extraterritorial Jurisdiction Analysis in Light of *Hartford Fire Insurance Co. v. California*: How Peripheral Has the International Comity Notion Become?

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I. INTRODUCTION

Hartford Fire Insurance Co. v. California,[1] which was brought by several states to challenge the insurance industry's right to McCarran-Ferguson Act immunity, arguably represents the most important case ever under the McCarran-Ferguson Act.[2] The case reached the United States Supreme Court for the first time on appeal from the circuit court's decision to reinstate the states' complaint, and on June 28, 1993, the Supreme Court resolved three issues that affect the entire insurance industry enormously. The Supreme Court held, first, that domestic insurance companies do not automatically forfeit their McCarran-Ferguson antitrust immunity by acting together with foreign reinsurers to obtain industrywide changes to standard insurance policy forms.[3] The Supreme Court nonetheless refused to reinstate the district court's dismissal order on the basis of its second holding, that the complaint sufficiently alleges a "boycott" which would forfeit the insurers' McCarran-Ferguson Act immunity.[4] A five-justice majority concluded, third, that principles of international comity do not preclude U.S. courts from exercising extraterritorial antitrust jurisdiction over the British reinsurers.

The Supreme Court's resolution to the "boycott" issue strikes the appropriate delicate balance with respect to the scope of McCarran-Ferguson

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[1] Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

The lower courts consolidated complaints filed by nineteen states and several private plaintiffs into *In re Insurance Antitrust Litigation. In re* Insurance Antitrust Litig., 723 F. Supp. 464 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom.* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993). The Supreme Court, upon granting certiorari, treated *Hartford Fire Insurance Co. v. California* as representative of one line of complaints and *Merret Underwriting Agency Management Limited v. California* as representative of a separate and distinct second line of complaints. The Supreme Court consolidated these two complaints under the case name *Hartford Fire Insurance Co. v. California.*

[2] Professor Geoffrey P. Miller, a commercial law scholar at the University of Chicago Law School, asserts that the cases are, in fact, the most important cases ever. *See* Marcia Coyle, *Down to Business*, NAT'L L.J., Dec. 7, 1993, at 1.

[3] *Hartford*, 113 S. Ct. at 2903.

[4] *Id.* at 2917.

immunity by simultaneously demanding insurance industry accountability while ensuring the widespread availability of insurance. By finding sufficient allegations of a boycott, the Supreme Court has given the states' attorneys general the green light to proceed with the suit and consequently sent a signal to the insurance industry that it does not have blanket immunity under the McCarran-Ferguson Act from Sherman Act antitrust liability. On the other hand, the Supreme Court defined boycott narrowly enough to maintain for the insurance industry a "safe harbor" where the industry can pursue efforts toward standardization of insurance policy forms to the extent these efforts benefit consumers.

The Supreme Court majority's ruling on extraterritorial application of the Sherman Act, on the other hand, missed the mark. By defining "true conflict" narrowly enough to support a finding that no true conflict exists under the facts in *Hartford*, a five-justice majority reversed inroads made over almost twenty years by U.S. jurisprudence toward establishing the notion of international comity as an integral factor in the extraterritorial jurisdiction analysis. As evidenced by the British government's persistent assertions against extraterritorial application of U.S. antitrust laws and as emphasized in a dissent authored by Justice Scalia, the majority's holding impedes diplomatic relationships with foreign countries. Significantly, the ruling has this detrimental diplomatic effect without providing any benefits to U.S. consumers beyond the protections that are inherent in the Supreme Court's rulings on the boycott issue. The British reinsurers maintain a presence in the U.S. insurance market exclusively through their contractual dealings with U.S. primary insurers. Any restrictions placed by the Supreme Court on domestic primary insurers' conduct necessarily proscribes by extension, therefore, the conduct of the British reinsurers, even if the British reinsurers never appear in U.S. courts. The Supreme Court's rulings on the boycott issue were therefore sufficient to ensure that U.S. antitrust laws achieve their intended benefit of protecting U.S. consumers *without* the Supreme Court's extraterritoriality ruling.

The dissent would have achieved a better result. As recognized by the dissent, a proper extraterritorial jurisdiction analysis into the scope of the Sherman Act takes into account principles of international comity, and those principles are violated by an assertion of jurisdiction over the British reinsurers. As the dissent warns, extraterritorial application of U.S. antitrust laws "will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners."[5]

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[5] *Id.* at 2922 (Scalia, J., dissenting).

II. CASE HISTORY

Both the district court and the Ninth Circuit found that the international comity factor weighed against the assertion of extraterritorial antitrust jurisdiction.[6] Solely the Supreme Court held that this consideration did not weigh against assertion of jurisdiction. In 1984, Insurance Services Office, Inc. (ISO)[7] proposed two new standard insurance forms to the state departments of insurance as replacements for its 1973 form.[8] After the changeover, nineteen states accused several insurers and several reinsurers, including Lloyds of London, of violating the Sherman Antitrust Act.[9] The states alleged that the agreement between the primary insurers and the reinsurers that resulted in the modified policy forms constituted a boycott.[10]

The district court dismissed the suit based on its finding that the challenged activity fell within the scope of McCarran-Ferguson immunity from antitrust liability.[11] The British reinsurers had moved for dismissal, however, not only on the basis of the McCarran-Ferguson Act but also for lack of subject matter jurisdiction or on the basis of international comity.[12] The British reinsurers based this motion on the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA)[13] and on the doctrine of international comity as stated in *Timberlane*

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[6] Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

[7] The result of a 1971 merger of eleven insurance rating bureaus and currently licensed in all fifty states, ISO is a licensed association of over fourteen hundred insurance companies that develops standardized policy forms, collects statistical data, estimates risks relevant to the standard policy forms and, where required, presents the forms to state regulators for approval. *See In re* Insurance Antitrust Litig., 723 F. Supp. 464, 468-69 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919, 923 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom.* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

[8] *In re Insurance Antitrust Litig.*, 938 F.2d at 924. The proposed forms allegedly substantially modified coverage. Once the states approved the new forms, ISO withdrew its data collection and statistical risk-analysis support for the replaced form. *Id.* Without the statistical support, insurers cannot effectively assess the risks associated with a given insurance policy.

[9] *In re Insurance Antitrust Litig.*, 723 F. Supp. at 468.

[10] *Id.*

[11] *Id.* at 491.

[12] *Id.* at 484.

[13] Act of Oct. 8, 1982, Pub. L. No. 97-290, 1982 U.S.C.C.A.N. (96 Stat.) 1246. The FTAIA removes from the scope of the Sherman Act "'conduct involving trade or commerce (other than import trade or import commerce) with foreign nations . . .' unless that conduct has a 'direct, substantial, and reasonably foreseeable effect' on commerce within the United

Lumber Co. v. Bank of America.[14] As a result of a three-step analysis, the district court agreed with the British reinsurers and declined to exercise jurisdiction.[15] The district court concluded that the London reinsurance business "takes place in a regulatory and competitive framework established by the British government" and that "the evidence of conflict between [U.S.] antitrust laws and English law and policy is substantial" so that the conflict with British law and policy which would result from the extraterritorial application of the antitrust laws outweighed the remaining *Timberlane* factors.[16]

The Ninth Circuit reversed the district court.[17] On the issue of extraterritorial jurisdiction specifically, the Ninth Circuit expressly applied the *Timberlane* analysis, acknowledging its "wide following."[18] The Ninth Circuit nonetheless concluded that the comity analysis of *Timberlane* indicated that subject matter jurisdiction over the British reinsurers "must" be exercised.[19]

States, import trade into the United States, or export trade engaged in by a person within the United States. 15 U.S.C. Section 6a." *In re Insurance Antitrust Litig.*, 723 F. Supp. at 486.

[14] 549 F.2d 597, 614 (9th Cir. 1976) ("Timberlane I"), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) ("Timberlane II"), *cert. denied*, 472 U.S. 1032 (1985).

[15] The district court first held that the FTAIA did not apply. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 486. The district court then applied the two-part *Timberlane* analysis. First, the district court concluded that the allegations establishing a direct effect in the United States were sufficient to establish subject matter jurisdiction. *Id.* The district court nonetheless declined to exercise jurisdiction on the basis of the second part of the *Timberlane* analysis, which allows a court to decline to exercise jurisdiction in consideration of international comity. *Id.* at 487.

[16] *Id.* at 487–90.

[17] *In re Insurance Antitrust Litig.*, 938 F.2d 919, 922 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom.* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993). The Ninth Circuit ruled that state regulation of the British reinsurers was insufficient to support McCarran-Ferguson immunity for the British reinsurers and that the domestic insurers forfeited their own McCarran-Ferguson immunity by conspiring with the nonexempt British reinsurers. *Id.* at 928. The Ninth Circuit held that the insurers forfeited their McCarran-Ferguson immunity for the second, independent, reason that the insurers' alleged conduct constituted a "boycott." *Id.*

[18] *Id.* at 932.

[19] *Id.* at 934. According to the Ninth Circuit's interpretation, the FTAIA affected the *Timberlane* analysis without eliminating entirely the comity notion. *Id.* at 932. Applying the analysis, the Ninth Circuit determined as follows:

> A single factor points toward abstention: the conflict with a long-established British policy toward a venerable British trade, the underwriting of insurance. Every other factor—nationality, likelihood of compliance, the significance of the effects on

On a different rationale, the Supreme Court affirmed the Ninth Circuit's reinstatement of the complaint.[20] On the issue of extraterritorial antitrust jurisdiction,[21] Justice Souter wrote for the majority to reject the British reinsurers' argument that the circumstances warranted restraint with respect to the exercise of jurisdiction.[22] Without deciding whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on the basis of international comity,[23] Justice Souter concluded that international comity did not counsel against the exercise of jurisdiction because no true conflict exists between domestic and foreign law.[24] In reaching this conclusion, Justice Souter rejected the argument that a conflict existed because the British reinsurers' conduct was "perfectly consistent with" British law and policy.[25] Justice Souter rejected this proposed definition in favor of a narrower definition of true conflict as the inability to comply with both domestic and foreign law.[26]

American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction.

Id. at 934.

[20] Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2917 (1993). In one of two separate opinions, Justice Souter wrote for a unanimous Court that the domestic primary insurers did not forfeit their McCarran-Ferguson Act immunity from antitrust liability by acting in concert with the foreign reinsurers. *Id.* at 2895, 2902. The Supreme Court nonetheless reinstated the complaint on the justices' unanimous conclusion that most claims fell within the McCarran-Ferguson boycott exception to immunity. *Id.* at 2917.

[21] The Supreme Court had framed the question as follows: "Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?" *Id.* at 2900 n.9.

The Supreme Court split five-to-four on this issue. Chief Justice Rehnquist and Justices White, Blackmun, and Stevens joined in the majority opinion over a dissent written by Justice Scalia and joined by Justices O'Connor, Kennedy, and Thomas. *Id.* at 2895.

[22] *Id.* at 2911.

[23] *Id.*

[24] *Id.* at 2910. According to Justice Souter, even if the London reinsurers' conduct was lawful under British law, "[n]o conflict exists . . . 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403, cmt. e (1987)).

[25] *Id.*

[26] *Id.* at 2910.

III. ANALYSIS

The Supreme Court's rulings come during an intense debate over the continuing viability of McCarran-Ferguson immunity. The insurance industry argues traditionally that standardizing insurance policy forms permits insurance agents and customers to compare insurance policies and make informed choices so that the benefits of industrywide cooperation outweigh any restraint on trade. Consumer advocates, however, have become skeptical about alleged consumer benefits from McCarran-Ferguson immunity and correspondingly vocal about a need to limit—or to eliminate entirely—McCarran-Ferguson Act immunity.[27] The Supreme Court responded to this debate with a decision that partially favors each side. In a victory for the insurance industry, a five-justice majority adopted a relatively narrow definition of what constitutes a boycott sufficient to forfeit McCarran-Ferguson immunity.[28] The majority's guidelines consequently diminish the states' chances of an ultimate victory. In a victory for the states' attorneys general on the other hand, the Supreme Court found, notwithstanding the narrow definition of boycott, that the complaints' allegations were in fact sufficient to defeat a motion for summary judgment and therefore allowed the nineteen states to proceed with their antitrust suit against the insurance industry.[29]

The Supreme Court majority's ruling on the issue of extraterritorial antitrust jurisdiction, however, benefits neither side of the debate significantly. Congress enacted the Sherman Act and the McCarran-Ferguson Act as protections for U.S. consumers.[30] And the presence of British reinsurers in the U.S. insurance market occurs entirely through their dealings with U.S.

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[27] *See, e.g.*, Eddie Correia, Antitrust Policy After the Reagan Administration, 76 GEO. L.J. 329, 332 (1987).

[28] *Hartford*, 113 S. Ct. at 2917.

[29] *Id.*

[30] H.R. REP. NO. 873, 78th Cong., 1st Sess. 8 (1943). The Report notes:

> Congress should not permit a broadening of the antitrust laws which will result in rendering insurance open to the caprices of free competition, for it is a matter of common knowledge to those who are informed that insurance is something quite different from the ordinary commercial transaction. . . . *Uniformity, as to rates, forms of policies and the like, is not only desirable in insurance, but is necessary if the business of insurance is to be conducted to meet the needs and requirements of all businesses and persons.*

Id. (emphasis added).

domestic insurers.[31] To the extent the Supreme Court's guidelines restrict the conduct of the U.S. domestic insurers for the benefit of U.S. consumers, the guidelines necessarily restrict the conduct of the British reinsurers. The Supreme Court's boycott guidelines therefore achieve the consumer protection goal of U.S. antitrust laws—by permitting cooperative procedures that benefit consumers—while reminding the insurance industry that not all cooperative conduct will be protected from antitrust liability. Significantly, the boycott guidelines achieve *all* of this whether or not the British reinsurers defend themselves in U.S. courts. U.S. courts should therefore decline to exercise extraterritorial jurisdiction over the British reinsurers, notwithstanding the U.S. courts' subject matter jurisdiction, to the extent consumers accrue no benefit from a British presence in U.S. courts, at least to the extent U.S. law permits the courts some discretion in exercising jurisdiction. And U.S. jurisprudence does in fact give the courts discretion over the exercise of jurisdiction.

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, *or with foreign nations* . . . ."[32] Although Congress subsequently enacted the McCarran-Ferguson Act to provide an exemption from the Sherman Act,[33] the McCarran-Ferguson Act does not derive from

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[31] In a reinsurance transaction, a reinsurer agrees contractually to assume part of the risk of the primary insurer (the insurance company). *See generally* J. BUTLER & R. MERKIN, REINSURANCE LAW § A.1.1 (1992).

[32] 15 U.S.C. § 1 (1988).

[33] The McCarran-Ferguson Act states as follows:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
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> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ; Provided, That . . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012 (1988).

> (b) Nothing contained in this Act . . . shall render the . . . Sherman Act . . . inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Id. § 1013.

congressional concern over extraterritorial application of U.S. antitrust law.[34] The McCarran-Ferguson Act therefore does not provide per se protection to the British reinsurers from having to defend themselves in U.S. courts, and the Sherman Act applies to govern the conduct of the British reinsurers to the extent its scope extends extraterritorially.

Supreme Court precedent defining the extraterritorial application of the Sherman Act makes clear that the Sherman Act does in fact have extraterritorial application so that U.S. courts do have jurisdiction over the British reinsurers in the states' Sherman Act claims. The Supreme Court initially refused to apply U.S. antitrust laws extraterritorially.[35] The initial analysis was superseded, however, in 1945 when the Second Circuit, acting for the Supreme Court in *United States v. Aluminum Co. of America* (*Alcoa*), established an "effects" test of jurisdiction under the Sherman Act and sanctioned extraterritorial application of U.S. antitrust laws if the foreign conduct was intended to and did have consequences in the United States.[36]

Alcoa and the principle of stare decisis would, without more, require U.S. courts to exercise jurisdiction over the British reinsurers. The states allege that the British reinsurers expressly intended to affect the U.S. insurance market and that their conduct had substantially all "effects" in the United States. *Alcoa* does not stand alone, however, to provide the sole analytical approach to determining whether to assert antitrust jurisdiction extraterritorially.

Simultaneously with establishing the effects test in *Alcoa*, Judge Learned Hand expressed his concern that the effects test, by including remote or

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[34] The McCarran-Ferguson exemption from antitrust liability represents congressional recognition that standardizing insurance policy forms is a valid and important goal of state regulation over the insurance industry and therefore offers an antitrust exemption for the "business of insurance" to the extent it is "regulated by State law." *See* H.R. REP. NO. 873, 78th Cong., 1st Sess. 8 (1943).

[35] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[36] United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). In *Alcoa*, the U.S. government sued primarily to end Alcoa's domestic aluminum monopoly but also contested business arrangement allegedly involving both Alcoa and foreign companies. The federal court ultimately found that Alcoa had not participated in the international agreements. *Id.* at 442. The federal court therefore was required to address whether the Sherman Act reached an agreement between solely foreign companies that was negotiated and entered into abroad. *Id.* at 443.

The Supreme Court has never addressed the exact facts in *Alcoa*, with solely foreign violators whose acts occurred entirely outside the territorial United States. *Alcoa* is good authority, however, insofar as the Second Circuit acted for the Supreme Court in *Alcoa*. *See id.* at 421. The Supreme Court itself has noted that *Alcoa* "was decided under unique circumstances which add to its weight as a precedent." American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).

speculative effects, threatened unlimited jurisdiction.[37] Similar concerns have led U.S. courts, the *Restatement (Third) of Foreign Relations Law*, and Congress in the FTAIA to advocate approaches that consider not only *Alcoa*'s effects test but also the notion of international comity. These jurisprudential developments at the very least complicate the seemingly easy conclusion that *Alcoa* requires the Supreme Court to assert jurisdiction over the British reinsurers in this instance. These developments at most should have compelled the Supreme Court to recognize that a proper analysis into the exercise of extraterritorial application of the Sherman Act does not end with *Alcoa* but instead requires a two-part analysis. A court must determine first whether it has subject matter jurisdiction. That subject matter jurisdiction exists, however, does not end the analysis. The court should then continue by factoring the notion of international comity into its decision whether ultimately to exercise—or to decline to exercise—jurisdiction.[38]

Perhaps because the Supreme Court's avoidance of the extraterritoriality issue since the 1945 *Alcoa* decision caused a conspicuous absence of any guidance from the Supreme Court on the continuing viability of *Alcoa* and on the extraterritorial scope of the Sherman Act, circuit court decisions began in 1976 to call the effects test of *Alcoa* into question. In *Timberlane Lumber Co. v. Bank of America*,[39] the Ninth Circuit reasoned in 1976 that the effects test established in *Alcoa* to determine whether to exercise jurisdiction is "by itself incomplete because it fails to consider other nations' interests" and because it does not "take into account the full nature of the relationship between the actors and this country."[40] The Ninth Circuit therefore proceeded to adopt in *Timberlane* a "jurisdictional rule of reason" test for determining the extent of federal jurisdiction in cases alleging illegal antitrust behavior abroad.[41] The

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[37] *See Alcoa*, 148 F.2d at 443 ("Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two.").

[38] Admittedly Justice Souter does not factor international comity out of the jurisdiction analysis entirely. *See* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2910 (1993). Justice Souter does not recognize *Timberlane* in this part of his opinion, however, and summarily states only that no conflict exists here and that the Court has "no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 2911.

[39] Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976) ("Timberlane I"), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) ("Timberlane II"), *cert. denied*, 472 U.S. 1032 (1985).

[40] *Id.* at 611–12.

[41] *Id.* at 613. The lumber company alleged that the Bank of America conspired with several Honduran companies to prevent Timberlane from milling lumber in Honduras and

Timberlane test balances seven factors to determine whether a court should assert extraterritorial jurisdiction. The test introduces the notion of comity into the jurisdictional analysis.[42]

Although the Supreme Court never expressly approved (or disapproved) the *Timberlane* analysis, the notion of comity remained within the extraterritorial jurisdiction analysis as the Third, Fifth, and Tenth Circuits followed the *Timberlane* analysis to varying degrees. The Third Circuit noted its "substantial agreement" with *Timberlane* and then fashioned its own ten-factor test before remanding the case with instructions for the district court to apply the balancing test to determine the propriety of extraterritorial jurisdiction.[43] The Fifth Circuit responded to the defendants' request for a *Timberlane* analysis by applying the *Timberlane* factors and concluding, in part, that the defendants had not demonstrated any "'conflict with [the] law or policy' of the [foreign government] or any potential difficulty in enforcing a district court decree."[44] Finally, the Tenth Circuit expressly applied the *Timberlane* analysis to conclude that "[c]omity concerns outweigh any effect on United States commerce" so that "[j]urisdiction in the courts of the United States would be unjustified."[45]

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exporting it to the United States. The district court dismissed the case for lack of jurisdiction. *Id.* at 601.

In *Timberlane I*, the Ninth Circuit established the jurisdictional rule of reason, vacated the lower court's denial of jurisdiction, and remanded the case for additional discovery and further findings in light of the new jurisdictional rule of reason. *Id.* at 615. On remand, the district court eventually dismissed the case for lack of subject matter jurisdiction which the Ninth Circuit subsequently affirmed in *Timberlane II*. Timberlane Lumber Co. v. Bank of Am., 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, *Timberlane II*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied.*, 472 U.S. 1032 (1985).

[42] The court outlined seven factors that should be considered when applying the effects/comity test: (1) the degree of conflict with foreign law or policy; (2) the nationality of the parties; (3) the extent to which enforcement by either state will result in compliance; (4) the impact within the United States versus the impact elsewhere; (5) the degree of the intent to affect U.S. commerce; (6) the foreseeability of the effect; and (7) the gravity of the violation within the United States vis-à-vis its gravity elsewhere. *Timberlane I*, 549 F.2d at 611–12.

[43] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979).

[44] Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 885 (5th Cir. 1982) (quoting *Timberlane I*, 549 F.2d at 614), *cert. denied*, 464 U.S. 961 (1983).

[45] Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869–71 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982). The Tenth Circuit explicitly followed *Timberlane*'s two-part analysis. *Id.* at 869 (quoting *Timberlane I*, 549 F.2d at 613).

Legislative developments subsequent to the *Timberlane* ruling do not expressly adopt or even endorse *Timberlane*'s comity analysis. At the very least, however, Congress has acknowledged that the issue of extraterritorial antitrust jurisdiction raises concerns regarding international comity. Although Congress has not altered the language of the Sherman Act since its passage in 1890, Congress did pass the FTAIA, and specifically section 402(1), in 1982 in part to amend the Sherman Act.[46] Without more, the absence of any express reference in section 402, which fully defines subject matter jurisdiction under the Sherman Act, to the notion of comity or to the seven-factor balancing test established in *Timberlane* might imply that Congress did not intend to integrate international comity into the extraterritorial jurisdictional analysis. In addition, at least one scholar has recognized that the lack of any express reference to the balancing test "certainly allows a court to decline to employ such analysis, and indeed may embolden a court to so decline on the theory that Congress does not consider it important."[47] In fact, however, the legislative history behind the FTAIA makes clear that Congress took at most a neutral position on the comity factor and in no way undermined its validity. First, the legislative history describes the codified jurisdictional statement as a clarification of prior case law,[48] which includes not only *Alcoa* but also *Timberlane*. Second, the legislative history makes clear that although Congress did not intend for the comity notion to enter the analysis as part of the first-step determination regarding subject matter jurisdiction, Congress did intend for the courts to take international comity into account as part of the second step in the ultimate extraterritoriality determination.[49]

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[46] 15 U.S.C. §§ 1 (note), 6a, 45(a) (1988). The FTAIA consists of two sections. Section 402 amends the Sherman Act. As codified in § 402(1) of the FTAIA, the Sherman Act shall not apply to conduct involving trade with foreign nations, other than import commerce, "unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations." *Id.* § 6a.

[47] Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 813 (1986).

[48] H.R. REP. No. 2326, 97th Cong., 1st Sess. (1981).

Several scholars believe that the FTAIA represents no significant change from prior case law. *See, e.g.*, Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201 (1983); Murphy, *supra* note 47 at 806-07.

[49] The House Report states that "[i]f a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity . . . ." H.R. REP. No. 686, 97th Cong., 2nd Sess. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498.

The *Restatement (Third) of Foreign Relations Law* (*Restatement*) also advocates a test whose factors include the notion of comity.[50] The *Restatement* adopted a *Timberlane* approach in 1987.[51] According to the *Restatement*, decisionmakers must not only examine national and territorial links[52] but also consider whether exerting jurisdiction is reasonable.[53] The analysis requires a two-step test, with the notion of comity again entering as part of the second step. First, a court should determine whether the dispute has a sufficient nexus—territorial or national—to justify the assertion of jurisdiction.[54] If a sufficient nexus does exist, the court should then continue by asking whether, on the basis of several factors, an assertion of jurisdiction would be reasonable in light of general principles of international fairness and competing national interests.[55] Finally, as the Ninth Circuit recognized in its *Hartford* opinion, scholars also advocate an approach that includes comity.[56]

At least two circuits have declined to adopt the *Timberlane* analysis. The Seventh Circuit refused to read *Timberlane* as undermining the continuing viability of the *Alcoa* effects test as the standard of extraterritorial jurisdiction of the Sherman Act.[57] The D.C. Circuit expressly stated that the *Timberlane* analysis was "not useful in resolving the controversy" before summarizing the potential problems with a balancing approach.[58] Justice Scalia's dissent in *Hartford* however, recasts the *Timberlane* approach in such a way as to eliminate effectively the D.C. Circuit's stated concerns. As Justice Scalia makes clear "the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence,"[59] and an approach that considers comity is rooted in these jurisprudential principles so that the approach is in no way a balancing of subjective factors. Justice Scalia

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Professor and scholar Barry Hawk suggests that § 402 does not intend to reject the balancing test established in *Timberlane*. *See* BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 22-23 (Supp. 1982).

[50] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402-03 (1987).

[51] *See id.*

[52] *See id.* § 402.

[53] *See id.* § 403.

[54] *See id.* § 402(1)-(2).

[55] *See id.* § 403(2).

[56] *In re* Insurance Antitrust Litig., 938 F.2d 919, 932 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom.* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

[57] *In re* Uranium Antitrust Litigation, 617 F.2d 1248, 1255 (7th Cir. 1980).

[58] Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-49 (D.C. Cir. 1984).

[59] *Id.* at 2920 (Scalia, J., dissenting).

summarizes the relevant principles[60] by resurrecting two principles of statutory construction relevant to a determination whether Congress intended to assert regulatory power extraterritorially over the challenged conduct: first, "the 'long-standing principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States;"'"[61] and, second, the principle that "'[a]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'"[62]

IV. CONCLUSION

Justice Souter defined "true conflict" for the majority in *Hartford* so narrowly as to effectively eliminate the international comity consideration from the extraterritoriality analysis. U.S. jurisprudence and especially developments over the last twenty years that replace the one-step *Alcoa* approach with a two-step analysis that integrates comity considerations suggest that the majority's ruling on this issue is misplaced. An additional argument exists as to why U.S. courts should not assert extraterritorial jurisdiction, at least under the facts in *Hartford*. Congress enacted the Sherman Act as protection for U.S. consumers. In this instance, however, hailing the British reinsurers into U.S. courts can

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[60] Justice Scalia severed the extraterritoriality issue into two parts: whether the district court had jurisdiction; and, second, whether the Sherman Act reached the extraterritorial conduct alleged by the states. Justice Scalia conceded that the district court had subject matter jurisdiction over the Sherman Act claims against all the defendants, including the British reinsurers. According to Justice Scalia, the states asserted nonfrivolous claims under the Sherman Act, and 28 U.S.C. § 1331 vests district courts with subject matter jurisdiction over cases "arising under" federal statutes. Justice Scalia recognized, however, that "[t]he second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts" but rather "turn[s] on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct." *Hartford*, 113 S. Ct. at 2918.

[61] *Id.* at 2918 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)). Justice Scalia implies that absent precedent including *Alcoa*, he would have applied this first principle to Sherman Act "boilerplate language" construed in other contexts not to outweigh the presumption against extraterritoriality to find that Congress did not intend extraterritorial application. *See id.* at 2918-22. Justice Scalia nowhere suggests that he would overturn *Alcoa*. His analytical framework however, at least in this case, makes express reversal unnecessary. Justice Scalia can rely on the second principle to reach an outcome that instead supplements the effects test with basic principles of statutory construction. *See infra* note 62 and accompanying text.

[62] *Id.* at 2919 (quoting Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

provide no protection to U.S. consumers that is not already provided by way of the Supreme Court's two initial rulings on the boycott issue. Because the British reinsurers have a presence in the U.S. insurance market only through their dealings with U.S. domestic insurers, the Supreme Court necessarily restricts the conduct of the British reinsurers by restricting the conduct of the domestic insurers. The Supreme Court majority's decision to reverse inroads made in U.S. jurisprudence toward re-establishing international comity as a central consideration in the jurisdictional analysis thus severely harms U.S. diplomatic relationships—and harms them unnecessarily: the exercise of jurisdiction over the British reinsurers accrues no independent benefits for U.S. consumers.