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Government Antitrust Actions and Remedies Involving Foreign Commerce: Procedural and Substantive Limitations

*William C. Holmes**

In recent years, application of American antitrust laws to activities in foreign commerce has been a source of controversy. In this article, Mr. Holmes addresses criticisms directed at the application of the antitrust laws to commercial activities abroad, and argues that these criticisms, while not without some merit, often fail to recognize the procedural and substantive limitations which have recently been imposed upon government agencies. Mr. Holmes discusses these limitations at length.

Considerable controversy has arisen during recent years concerning the extraterritorial application of United States antitrust laws, as implemented by the two government agencies principally responsible for enforcing the laws: the Justice Department and the Federal Trade Commission. Critics argue that the threat of expansive government antitrust actions has severely undermined the ability of United States firms to compete effectively abroad. For example, one commentator has pointedly observed, "In markets where international trade exists or could exist, national antitrust laws no longer make sense. If they do anything, they only serve to hinder U.S. competitors who must live by a code that foreign competitors can ignore."¹ Other critics have argued just as vehemently that expansive applications of United States anti-

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¹ L. THUROW, *THE ZERO SUM SOCIETY* 146 (1980). See also Schwechter & Shepard, *The*

trust laws have strained our nation's relationships with foreign countries, by calling into question the actions of foreign sovereigns and their instrumentalities, and by subjecting foreign businesses to liability for acts deemed perfectly lawful in their home territories.²

The criticisms, while certainly not without merit, largely exaggerate the true extent of the problem. Recent judicial decisions and pronouncements by the agencies themselves have placed significant limitations upon the types of government actions that can be expected in the international arena during the years to come. While the narrowly territorial days of *American Banana Co. v. United Fruit Co.*³ have not returned, the pendulum has swung at least part way back from the expansionist period of *United States v. Aluminum Co. of America*.⁴ The result is a much more balanced approach to the initiation and prosecution of government antitrust actions involving American foreign commerce.

This article examines some of these principal limitations, which are both procedural and substantive in nature. Part I addresses limits on the government's authority to assert personal jurisdiction over persons and companies operating in foreign commerce. While these limitations are concededly minimal in comparison to some of the other restrictions that will be discussed, they nevertheless constitute potentially significant limits that should be kept clearly in mind when assessing the propriety of particular government action involving foreign commerce.

Part II of the article examines one of the most significant limitations that has evolved during recent years—special requirements concerning subject matter jurisdiction over foreign commerce. Recent developments in the prevailing test of subject matter jurisdiction will be examined, particularly with respect to government antitrust actions.

Part III of the article highlights the special immunities claims that frequently arise when jurisdiction is asserted over activities in foreign commerce. The defenses examined include the sovereign immunity de-

Effects of United States Antitrust Laws on the International Operations of American Firms, 1 NW. J. INT'L L. & BUS. 492 (1979).

² See, e.g., Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1 (1979); Note, *Antitrust: British Restrictions on Enforcement of Foreign Judgments*, 21 HARV. INT'L L.J. 727 (1980).

³ 213 U.S. 347 (1909) (holding that United States antitrust laws do not extend to activities conducted outside the United States). See *infra* notes 30-31 and accompanying text.

⁴ 148 F.2d 416 (2d Cir. 1945) (United States antitrust laws do extend to activities conducted outside the United States, if they are intended to affect American imports or exports and actually have such an effect). See *infra* notes 32-35 and accompanying text.

fense, the act of state defense, and the foreign sovereign compulsion defense.

Part IV of the article examines the doctrine of international comity that has taken on an expanded role in recent judicial decisions and agency pronouncements. As will be seen, expanded interpretations of this doctrine should come as welcome news to domestic and foreign companies operating abroad, since the doctrine has injected much needed flexibility into the resolution of antitrust cases involving foreign commercial activities.

Finally, Part V of the article examines the principal substantive limitations that the courts have placed upon the government's authority to seek and shape the antitrust remedies appropriate for particular cases. While many of these limitations are not unique to foreign commerce cases, it will be seen that the restrictions can take on special significance in antitrust proceedings affecting American foreign commerce.

I. PERSONAL JURISDICTION

A threshold issue in assessing the validity of any government antitrust action, particularly with respect to actions involving foreign commerce, is whether proper jurisdiction has been obtained over the defendant's person. As expressed by the Supreme Court, "one is not bound by a judgment . . . to which he has not been made a party by service of process."⁵ The basic limitations on securing personal jurisdiction are two-fold, one statutory and the other constitutional.

The statutory limits on personal jurisdiction in antitrust actions brought by the Justice Department are found in the Clayton Act, supplemented by the Federal Rules of Civil Procedure. If the defendant is a corporation,⁶ Clayton Act section 12 provides that it may be served with process in the district in which it is an "inhabitant" or wherever else it "may be found."⁷ Thus, section 12 explicitly authorizes extraterritorial service of process on corporate defendants, and the courts have accordingly upheld service on corporations, not only at their facilities within the United States, but even at facilities abroad.⁸

⁵ *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 110 (1969). Note that, under limited circumstances, jurisdiction may be asserted over the defendant's property present in the forum state, even though jurisdiction over the defendant's person is lacking. 15 U.S.C. § 6 (1976).

⁶ By its terms, Clayton Act section 12 applies only to service of process on corporations. Service on individuals and unincorporated entities follows the general requirements of the Federal Rules of Civil Procedure, discussed *infra* at notes 9-11 and accompanying text.

⁷ 15 U.S.C. § 22 (1976).

⁸ *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *Hoffman*

If the defendant is an individual, partnership, or corporation,⁹ process is served in accordance with the requirements of the Federal Rules of Civil Procedure, particularly Rules 4(e) and 4(i).¹⁰ Taken together, these rules authorize service "in the manner prescribed" by the appropriate long arm statutes of the state in which the court is located, or, in the case of service in a foreign country, by personal service, by specified registered mail service, or as prescribed by the laws of the foreign country in which service occurs.¹¹

The statutory requirements for service of process in antitrust proceedings brought by the Federal Trade Commission are found in section 5(f) of the Federal Trade Commission Act.¹² Service may be made by personally delivering a copy of the complaint to the respondent, by leaving a copy of the complaint at the respondent's principal office or place of business, or by mailing a copy of the complaint to the respondent by registered or certified mail.¹³ Thus, like the Clayton Act and the Federal Rules, section 5(f) of the Federal Trade Commission Act allows for extraterritorial service of process.

In addition to the statutory requirements for proper service of process, the courts have imposed significant constitutional limitations upon personal jurisdiction under the due process clause of the Constitution. These constitutional limitations mandate that the defendant's contacts with the forum be such that requiring the defendant to appear in the forum to defend itself will not offend "traditional notions of fair play and substantial justice."¹⁴ Procedural due process further requires that

Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70 (S.D.N.Y. 1965); United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962); United States v. Imperial Chem. Indus., 100 F. Supp. 504 (S.D.N.Y. 1951). See generally Victor & Hood, *Personal Jurisdiction, Venue and Service of Process in Antitrust Cases Involving International Trade: Amenability of Alien Corporations to Suit*, 46 ANTITRUST L.J. 1063, 1082-83 (1978).

⁹ While Clayton Act section 12 expressly authorizes extraterritorial service of process on corporate defendants, it does not specify the mechanics of such service. Courts, therefore, look to the Federal Rules of Civil Procedure for guidance on the proper treatment of corporate as well as non-corporate defendants.

¹⁰ FED. R. CIV. P. 4(e), 4(i).

¹¹ See, e.g., United States v. Field, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976); Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659 (D.N.H. 1977); Hunt v. Mobil Oil Corp., 410 F. Supp. 4 (S.D.N.Y. 1975), aff'd, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977). See generally Victor & Hood, *supra* note 8, at 1083.

¹² 15 U.S.C. § 45(f) (1976).

¹³ See, e.g., FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1311-13 (D.C. Cir. 1980), in which the District of Columbia Circuit held that the FTC cannot use registered mail service to serve an investigatory subpoena within a foreign country upon a foreign respondent, but indicated that extraterritorial service of a *complaint* by registered mail would be proper. The case is discussed *infra* at text accompanying notes 18-23.

¹⁴ See, e.g., United States v. Scophony Corp. of Am., 333 U.S. 795, 818 (1948); International

even if sufficient "minimum contacts" between the defendant and the forum are present, jurisdiction must be declined if the defendant has been given inadequate "notice" of the pendency of the proceeding.¹⁵ In making these determinations, the courts examine such factors as the nature and substantiality of the defendant's contacts with the forum; the extent of the defendant's contacts with the United States as a whole;¹⁶ the connection between the contacts and the cause of action; the availability of other forums; whether the defendant could reasonably have anticipated that its activities would have an effect on American domestic or foreign commerce; and whether the method of service used was reasonably calculated to inform the defendant of the nature and pendency of the proceeding.¹⁷

Not surprisingly, the constitutional requirements for personal jurisdiction constitute a more significant limitation upon government antitrust actions than do the statutory service requirements. This conclusion is clearly illustrated by a recent decision involving an extra-territorial antitrust investigation by the Federal Trade Commission, *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*.¹⁸ The Commission had served an investigatory subpoena upon a foreign company by registered mail service to the company's home office in France. While the method used was authorized by the Commission's rules of practice, the federal statute authorizing such rules was silent on the question of whether such a mode of service could be employed. Looking to the

Shoe Co. v. Washington, 326 U.S. 310, 320 (1945); United States v. Field, 532 F.2d 404, 409 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

¹⁵ See, e.g., Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1319 (D.C. Cir. 1980).

¹⁶ Some courts have held that when the defendant is an alien, rather than a domestic enterprise, the relevant question becomes whether the defendant's activities established sufficient contacts with the United States "as a whole," since United States sovereignty is nationwide. See, e.g., *Cyromedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975) (jurisdiction in a patent case found on this basis); *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972) (jurisdiction in a Federal Securities Act case found on this basis). Other courts consider such nationwide contacts as simply one factor to consider when determining whether it is "fair" to subject a defendant to suit in a particular forum. See, e.g., *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977).

¹⁷ See, e.g., *United States v. Scophony Corp. of Am.*, 333 U.S. 795 (1948); *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064, 1066 (9th Cir. 1974); *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1251 (7th Cir.), cert. den., 405 U.S. 1041 (1972); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 662 (D.N.H. 1977); *United States v. Watchmakers of Switz. Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962); *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951). See generally *Victor & Hood*, *supra* note 8, at 1076-82.

¹⁸ 636 F.2d 1300 (D.C. Cir. 1980).

Federal Rules of Civil Procedure for guidance, the Court noted that the Federal Rules draw a distinction between the service of investigatory subpoenas (the situation involved in the case) and the service of complaints; the latter can be served by mail, thereby providing the statutory foundation for personal jurisdiction,¹⁹ but the service of investigatory subpoenas must be in person.²⁰ The Court concluded that Congress intended for similar requirements to apply to the Commission and its use of investigatory, as opposed to complaint, subpoenas.²¹

In so holding, the Court was careful to distinguish between statutory and constitutional concerns. It observed that Congress amended the Federal Trade Commission Act in 1980 in a manner which arguably expands the modes of serving investigatory subpoenas available to the Commission.²² However, the Court then noted that, "even if expressly [now] authorized by statute," extraterritorial service of compulsory process by registered mail "might still be subject to a due process attack if the witness so served . . . lacked the requisite minimum contacts with the United States."²³ What is true for the service of investigatory subpoenas would be equally true for the assertion of personal jurisdiction; even if the statutory requirements for service of process have been satisfied, personal jurisdiction may still be foreclosed by constitutional restrictions.²⁴

II. SUBJECT MATTER JURISDICTION

Taken literally, the antitrust laws of the United States extend the same broad coverage to the nation's foreign commerce that applies to its domestic commerce. Thus, the principal antitrust law enforced by the Justice Department, the Sherman Act, broadly prohibits concerted restraints of trade and concerted and unilateral monopolizing acts "among the several States, or with foreign nations," without drawing any distinction between purely domestic commercial activities and ac-

¹⁹ See, e.g., *Hoffman Motors Corp. v. Alfa Romeo, S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965).

²⁰ *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d at 1312-13.

²¹ *Id.* at 1323.

²² The amendments authorize the Commission to serve civil investigative demands upon "any person who is not found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign nation." Federal Trade Commission Act, 15 U.S.C. § 576(c)(6)(B) (Supp. IV 1980).

²³ *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d at 1325.

²⁴ See, e.g., *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064 (9th Cir. 1974) (procedural due process precludes personal jurisdiction over a foreign company with insufficient contacts with the United States). See also *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

tivities abroad.²⁵ Similarly, the major source of the Federal Trade Commission's antitrust jurisdiction, the Federal Trade Commission Act, broadly proscribes unfair methods of competition "among the several States or with foreign nations," again without distinguishing between domestic and foreign trade.²⁶

So long as the acts being challenged occurred within the United States itself, no unique jurisdictional problems arise, since nations clearly have jurisdiction to regulate conduct that occurs within their own territorial limits.²⁷ Distinct problems arise, however, when the challenged activities occurred principally or entirely in another country. A literal application of the nation's antitrust laws to activities abroad that only marginally affect United States interests can place the judiciary in a serious quandary. Foreign policy, which is properly the province of the executive branch and not of the judiciary,²⁸ can be severely undermined by such judicial action. Moreover, courts may well find themselves in the anomalous position of rendering judgments that are, as a practical matter, unenforceable.²⁹

²⁵ 15 U.S.C. §§ 1-2 (1976).

²⁶ Section 5 of the Federal Trade Commission Act prohibits "[u]nfair methods of competition in or affecting commerce," while section 4 of the Act extends "commerce" to "commerce among the several States or with foreign nations." 15 U.S.C. §§ 44-45 (1976 & Supp. IV 1980).

See also section 1 of the Clayton Act, which defines "commerce" for purposes of that Act as encompassing "commerce among the several States and with foreign nations." 15 U.S.C. § 12 (1976). While this language seemingly gives the Clayton Act the same broad reach over the nation's foreign commerce as the Sherman and FTC Acts, limiting language is contained in the Clayton Act's specific offense provisions, effectively narrowing the scope of the Act. Thus, the "price discrimination" provisions of the Clayton Act apply only when the prohibited transactions involve commodities "sold for use, consumption, or resale within the United States." 15 U.S.C. § 13 (1976). The "tying" and "exclusive dealing" provisions of the Clayton Act are similarly limited to transactions involving commodities "for use, consumption, or resale within the United States." 15 U.S.C. § 14 (1976). The "mergers and acquisitions" section of the Act is somewhat more far-reaching, extending to mergers and other acquisitions between persons engaged "in commerce or in any activity affecting commerce," where the acquisition substantially may lessen competition or tend to create a monopoly in any "line of commerce" or "activity affecting commerce" in "any section" of the United States. 15 U.S.C. § 18 (1976 & Supp. IV 1980).

See also section 4 of the Webb-Pomerene Act, which explicitly construes section 5 of the Federal Trade Commission Act as proscribing "unfair methods of competition" affecting the export trade of the United States, "even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States." 15 U.S.C. § 64 (1976).

²⁷ *See, e.g.*, *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927); *United States v. Pacific & Arctic Ry. Navigation Co.*, 228 U.S. 87, 106 (1913); *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 688 (S.D.N.Y. 1979).

²⁸ *See, e.g.*, *Alfred Dunhill, Inc., v. Cuba*, 425 U.S. 682, 697 (1976); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981).

²⁹ *See, e.g.*, the case history of *United States v. Imperial Chem. Indus.*, 105 F. Supp. 215 (S.D.N.Y. 1952), discussed in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296-97 (3d Cir. 1979). After a British defendant was ordered to divest itself of certain British patents, a

Recognizing these problems, the Supreme Court early took a quite restrictive view of the extent to which American antitrust laws reach foreign commercial activities. In the 1909 opinion in *American Banana Co. v. United Fruit Co.*,³⁰ the Court held that the Sherman Act does not cover activities that occur solely outside the territorial limits of the United States. The Court reasoned:

[T]he acts causing the damage were done, so far as appears, outside the jurisdiction of the United States. . . . It is surprising to hear it argued that they were governed by the act of Congress. . . . [T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.³¹

By the mid 1940s, the pendulum had swung to the other extreme, and courts exhibited a marked willingness to exercise jurisdiction over activities abroad that in some way affected American domestic or foreign trade. The most extreme example of this expanded interpretation of the reach of the nation's antitrust laws is found in *United States v. Aluminum Co. of America*.³² In relevant part, the case involved an alleged conspiracy among foreign firms to allocate world markets, thereby inhibiting imports into the United States. The challenged conduct occurred solely outside the United States and involved only foreign companies. Nevertheless, Judge Learned Hand, writing for the Second Circuit, held that the Sherman Act applied to this purely extra-territorial conspiracy, since the evidence established that the conspirators' acts were "intended" to affect American foreign commerce and actually had such an "effect."³³ Judge Hand's analysis became known as the "intended effects" test of subject matter jurisdiction over foreign commercial activities, and was soon adopted by other lower federal courts³⁴ and cited with apparent approval by the Supreme Court.³⁵

During recent years, the pendulum has swung once again. While the law has not returned to the purely territorial construction of jurisdiction taken in *American Banana Co.*, it has moved towards a more flexible position than that taken in *Aluminum Co. of America*. The

British court enjoined the defendant from complying with the order, thereby effectively mooting the order of the American court.

³⁰ 213 U.S. 347 (1909).

³¹ *Id.* at 355-56.

³² 148 F.2d 416 (2d Cir. 1945) (on certification from the Supreme Court for lack of a qualified quorum).

³³ *Id.* at 443-44.

³⁴ *See, e.g.*, *United States v. Watchmakers of Switz. Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962); *United States v. R.P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957); *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

³⁵ *See* *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962).

middle ground that now prevails can be traced to the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*.³⁶ While *Timberlane* involved a private, rather than a government, antitrust lawsuit, it has had a definite impact upon the government sector, as reflected both in actual judicial holdings and in pronouncements by agency spokesmen. Hence, the decision warrants special attention, even in a discussion of government antitrust proceedings.

Timberlane involved an alleged conspiracy to prevent the plaintiff from milling lumber in Honduras for export to the United States. According to the plaintiff, Bank of America had conspired with lumber companies that it financed in Honduras to manipulate Honduran government officials into restricting the plaintiff's milling operations. The district court dismissed the complaint for lack of subject matter jurisdiction,³⁷ holding that the plaintiff failed to show that the claimed conspiracy had a "direct and substantial effect" on American foreign commerce.³⁸ The district court did not identify or consider other possibly relevant factors.

The Ninth Circuit reversed and remanded the case for further findings. The court reasoned that the "effects" test employed by the lower court was "incomplete" in its failure to consider other possible factors, including, in particular, "other nations' interests" and the "full nature of the relationship between the actors and this country."³⁹ The court instructed the district court to use instead a "tripartite analysis" that it referred to as a "jurisdictional rule of reason" standard. The first part of the test looked for proof that the challenged activity had "some effect—actual or intended—on American foreign commerce."⁴⁰ If not, then the complaint should be dismissed for lack of subject matter jurisdiction.

The second part of the test looked to evidence that the "effect" was "sufficiently large to present a cognizable injury" to American commerce.⁴¹ If not, then dismissal of the complaint would again be called for. The third component of the test incorporated considerations of

³⁶ 549 F.2d 597 (9th Cir. 1976). See generally Note, *Antitrust Law: Extraterritoriality*, 21 HARV. INT. L.J. 515 (1980); Note, *Antitrust Law: Extraterritoriality*, 20 HARV. INT'L L.J. 667 (1979); Note, *Mannington Mills, Inc. v. Congoleum Corp.: A Further Step Toward a Complete Subject Matter Jurisdiction Test*, 2 NW. J. INT'L L. & BUS. 241 (1980).

³⁷ The district court also dismissed the complaint under the "act of state" doctrine, discussed *infra* in text accompanying notes 55-58.

³⁸ *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 601 (9th Cir. 1976).

³⁹ *Id.* at 611-12.

⁴⁰ *Id.* at 613.

⁴¹ *Id.* Similarly, the Justice Department's ANTITRUST GUIDE requires a showing of "substantial" effect upon American foreign commerce. UNITED STATES DEPARTMENT OF JUSTICE, ANTI-

“international comity and fairness”⁴² and asked whether the “interest of, and links to” the United States were “sufficiently large, vis-a-vis those of other nations,” to “justify an assertion of extraterritorial authority.”⁴³

The tripartite analysis espoused by the Ninth Circuit in *Timberlane* has been generally well received by courts and commentators.⁴⁴ Its express incorporation of international comity factors requires courts to consider the possible international repercussions of exercising jurisdiction over commercial activities abroad, thereby meeting the objection of those critics who argue that American antitrust laws have been applied in an overly paternalistic manner, without regard to the interests of other nations. At the same time, the *Timberlane* approach avoids unnecessarily elaborate jurisdictional inquiries by requiring that a “sufficiently large” effect on American domestic or foreign commerce be shown before reaching the more difficult consideration of international comity issues.

The *Timberlane* “jurisdictional rule of reason” has already been extended to a government antitrust case, even though *Timberlane* itself arose in the specific context of a private lawsuit. The case, *United States v. Westinghouse Electric Corp.*,⁴⁵ in relevant part, involved allegations that a technology license between Westinghouse and a Japanese firm illegally restricted Westinghouse’s exportation of goods to Japan by granting the Japanese firm exclusive manufacturing rights in Japan. Since Westinghouse had expressly reserved the right to sell its United States manufactured equipment in Japan, the court easily concluded that the impact of the agreement on American exports was too “remote” and “trivial” to be cognizable under United States antitrust laws. The court cited *Timberlane* as holding that United States antitrust laws are implicated “only where the actual or intended effect of a foreign transaction is sufficiently large to cause a cognizable injury

TRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 7 (1977) [hereinafter cited as THE GUIDE].

⁴² See *infra* the discussion of “comity” considerations at text accompanying notes 71-86.

⁴³ *Timberlane*, 549 F.2d at 612.

⁴⁴ See, e.g., *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680 (S.D.N.Y. 1979); ABA ANTITRUST SECTION, MONOGRAPH No. 6, U.S. ANTITRUST LAW IN INTERNATIONAL PATENT AND KNOW-HOW LICENSING 5-6 (1981). But see *National Bank of Canada v. Interbank Card Assoc.*, 666 F.2d 6, 8 (2d Cir. 1981) (arguing that the *Timberlane* test may lead to unwarranted assertions of jurisdiction over activities that do not have “at least some anticompetitive effects” on “American commerce, either foreign or interstate;” i.e., there must not simply be an “effect,” but rather an effect which is in itself “anticompetitive.” Arguably, this requirement was already implicit in *Timberlane*).

⁴⁵ 471 F. Supp. 532 (N.D. Cal. 1978), *aff’d*, 648 F.2d 642 (9th Cir. 1981).

to United States commerce."⁴⁶

Timberlane has also been cited with apparent approval in a decision by the Federal Trade Commission.⁴⁷ In addition, spokesmen for both the Justice Department and the Federal Trade Commission have explicitly identified *Timberlane* as governing precedent.⁴⁸ While these statements are not binding as agency policy, they presumably do reflect current thinking at the Justice Department and the Commission. At the very least, the statements manifest an increasing willingness on the part of both agencies to consider not only the substantiality of the effect that a specific practice abroad has upon United States commercial interests, but, in addition, the many other international law factors that can influence the propriety of exercising jurisdiction in a particular case. Thus, in the future, we can expect to see *Timberlane*-type thinking entering into not only the ultimate resolution of government antitrust cases, but, of perhaps even greater significance, also into the initial selection of such cases.

III. JURISDICTIONAL DEFENSES INVOLVING THE ACTIONS OF FOREIGN SOVEREIGNS

Antitrust actions involving foreign commerce can directly or indirectly call into question the propriety of acts by foreign governments and those who represent them. For example, a defendant may assert that it is in actuality an agent or instrumentality of a foreign government; a defendant may be charged with anticompetitive behavior to which action by a foreign governmental body was a major contributing factor; or the defendant may seek to defend its actions as having been compelled by the legal requirements of a foreign nation.

Three closely related judicial doctrines have evolved for handling situations involving the actions of foreign sovereigns. The doctrines are the sovereign immunity defense, the act of state defense, and the

⁴⁶ *Id.* at 542.

⁴⁷ *Brunswick Corp.*, 94 F.T.C. 1174, 1265 n. 21 (1979). See also *SKF Industries*, 94 F.T.C. 6, 74 (1979) (approval of decision of law judge).

⁴⁸ See Remarks of John H. Shenefield, Associate Attorney General, before the International Law Institute and the American Bar Association's International Law Section, Washington, D.C. (Dec. 10, 1980), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,424; remarks of John H. Shenefield, Assistant Attorney General, Antitrust Division, before the American Bar Association's International Law Section, 1978 Annual Meeting, New York City (Aug. 9, 1978), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,386; remarks of Commissioner Robert Pitofsky, Federal Trade Commission, before the Cleveland Bar Association's Antitrust Compliance Seminar, Cleveland, Ohio (Apr. 28, 1981); remarks of Albert A. Foer, Assistant Director, Bureau of Competition, Federal Trade Commission, before the American Bar Association's Antitrust Section, Washington, D.C. (Apr. 1, 1981).

foreign sovereign compulsion defense. While the applicability of each varies, depending upon the precise nature of the sovereign's involvement in the case, the theoretical underpinning of each of the doctrines is much the same. Each reflects a judicial reluctance to assert jurisdiction over cases that challenge the actions of foreign governments taken on their own soil, since our nation's foreign relations can be seriously undermined by the mere adjudication of such lawsuits. The conduct of our foreign relations is properly the function of the executive branch, rather than the judiciary,⁴⁹ and the courts have accordingly declined jurisdiction over cases that would, in effect, set foreign policy by questioning the legality of public acts by foreign sovereigns taken within the confines of their own territorial limits.⁵⁰

The sovereign immunity doctrine applies if a foreign sovereign or one of its agents or instrumentalities is a named defendant in the lawsuit. Under the doctrine, foreign sovereigns and those that represent them are immune from suit in United States courts with respect to their public governmental acts occurring within their territorial limits, but not with respect to their commercial and purely proprietary acts.⁵¹ In 1976, Congress codified the doctrine by enacting the Foreign Sovereign Immunities Act.⁵² The Act grants general immunity to foreign sovereigns and their agents and instrumentalities from the jurisdiction of American courts.⁵³ This broad grant of immunity is, however, subject to various exceptions, of which the most important for antitrust purposes is an exception allowing suit as to the "commercial" activities of foreign sovereigns.⁵⁴

The doctrine of sovereign immunity applies only if the foreign

⁴⁹ See *supra* note 28 and accompanying text.

⁵⁰ See, e.g., *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682, 697 (1976); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981).

⁵¹ See, e.g., *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298 (D.D.C. 1960); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929). See generally Note, *International Ass'n of Machinists v. OPEC: The Demise of the Restrictive Theory of Sovereign Immunity and of the Extraterritorial Effect of the Sherman Act Against Foreign Sovereigns*, 41 U. PITT. L. REV. 841 (1980); Note, *Sovereign Immunity—Jurisdictional Problems Involving the Foreign Sovereign Immunities Act and Extraterritorial Application of United States Antitrust Laws*, 13 VAND. J. TRANSNAT'L L. 835 (1980).

⁵² 28 U.S.C. §§ 1300, 1602-11 (1976).

⁵³ 28 U.S.C. § 1604 (1976).

⁵⁴ 28 U.S.C. § 1605(a)(2) (1976). For a discussion of the meaning of the term "commercial activities," as used in the act, see Note, *Suing a Foreign Government Under the United States Antitrust Laws: The Need for Clarification of the Commercial Activity Exception to the Foreign Sovereign Immunities Act of 1976*, 1 Nw. J. INT'L L. & BUS. 657 (1979).

sovereign is a defendant in the lawsuit, either directly or through its agents or instrumentalities. However, where the action is against a private party, but still calls into question the propriety of acts by a foreign government, a closely related judicial doctrine applies—the “act of state” doctrine. Like sovereign immunity, the act of state doctrine forecloses the courts from adjudicating the legality of the public acts of foreign nations committed on their own soil.⁵⁵ Unlike sovereign immunity, however, the act of state doctrine is not a general grant of immunity from suit, but is instead a discretionary policy of “judicial abstention” to be decided on a case-by-case basis.⁵⁶ The act of state doctrine is further distinguished from sovereign immunity by the fact that it is available to private defendants.⁵⁷ The doctrine may even apply to the commercial, as well as the non-commercial, actions of a foreign sovereign, if the propriety of such actions would be brought into question and an affront to the foreign sovereign would thus result.⁵⁸

Closely related to the act of state doctrine is a further defense available to private parties commonly referred to as the “foreign sovereign compulsion” defense. As applied to antitrust cases specifically,⁵⁹ this doctrine shields the acts of private parties from antitrust liability if carried out within the territorial limits of a foreign nation in obedience to the legal requirements of the foreign government.⁶⁰ Under the doctrine, the critical inquiry is whether the legal mandates of the foreign sovereign actually *compelled* the defendant to take the particular action

⁵⁵ See, e.g., *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682, 697 (1976); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981). See generally Note, *Judicial Confirmation of Considerations of Comity and International Relations in the Exercise of Extraterritorial Jurisdiction of the Sherman Act*, 5 DEL. J. CORP. L. 292, 310-14 (1980) [hereinafter cited as Note, *Judicial Confirmation*]; Case Comment, *Outboard Marine Corp. v. Pezetel*, 6 BROOKLYN J. INT'L L. 111, 119-21 (1980); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247, 1250 (1977).

⁵⁶ *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979).

⁵⁷ See, e.g., *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680 (S.D.N.Y. 1979); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

⁵⁸ *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981). But see *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682, 695 (1976) (portion of opinion of White, J., in which Burger, C.J., and Powell and Rehnquist, JJ. join).

⁵⁹ Like the sovereign immunity and act of state doctrines, the foreign sovereign compulsion defense is not limited to antitrust cases, but can arise in any legal action that questions the motivations or legality of acts by a foreign sovereign or those that represent it.

⁶⁰ See generally Note, *Judicial Confirmation*, *supra* note 55, at 300-01; Case Comment, *supra* note 55, at 118-19; ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENT 365-67 (1975).

challenged as being illegal under United States law, or, instead, simply allowed such action to be taken.⁶¹ If the foreign law was obligatory, the doctrine applies. If, however, the foreign law was merely permissive, the doctrine is inapplicable.

During recent years, these three related defenses have come to play an increasingly important role in resolving international disputes involving commercial activities abroad. As other nations have actively extended their control over business activities within their territorial limits, a mechanism has been needed to distinguish those disputes that are properly the province of the judiciary from those that should, as a matter of separation of powers, be handled by the executive branch. The doctrines of sovereign immunity, act of state, and foreign sovereign compulsion have provided an important mechanism to meet these needs.

As an example, consider the following fact situation. Assume that a foreign sovereign orders a group of oil refiners within its territorial limits to stop selling oil to a firm engaged in the importation of oil into the United States. Further assume that the refiners did not induce the foreign government to issue the order, but that the discriminatory order resulted from a falling out between the government and the terminated buyer. Do the refiners have a valid defense under the act of state or sovereign compulsion doctrine? On very similar facts, a court has held that the foreign sovereign compulsion defense would apply.⁶² The court reasoned, correctly it seems, that "[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign."⁶³

Strangely, the 1977 Justice Department *Antitrust Guide for International Operations*⁶⁴ takes a much more restrictive view of this group of defenses. One of the illustrations contained in the *Guide* assumes es-

⁶¹ See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606-08 (9th Cir. 1976); *United States v. Watchmakers of Switz. Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,455 (S.D.N.Y. 1962).

⁶² *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

⁶³ *Id.* at 1298. See also *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977) (actions of the Libyan government in nationalizing the plaintiff's Libyan oil field were governmental actions exempt from an indirect challenge under the act of state doctrine); *International Ass'n of Machinists v. OPEC*, 447 F. Supp. 553 (D.C. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981) (price fixing activities of OPEC are governmental acts exempt from antitrust challenge under the sovereign immunity doctrine; the Ninth Circuit affirmed on the alternative ground that the activities were exempt state action).

⁶⁴ THE GUIDE, *supra* note 41.

sententially the same set of facts described above but concludes that neither the act of state doctrine nor the foreign sovereign compulsion defense would be available to the refiners in an antitrust suit,⁶⁵ thereby placing the refiners between the “rock and the hard place” of either disobeying the foreign sovereign or risking United States antitrust liability. The restrictive position taken in the *Guide* is hard to reconcile with the purpose that underlies the doctrines of sovereign immunity, act of state, and foreign sovereign compulsion. As recently described by the Ninth Circuit, these doctrines derive from the judiciary’s concern for its “possible interference” with the “conduct of foreign affairs by the political branches of the government.”⁶⁶ In particular, the doctrines recognize the inappropriateness of having the judiciary, as opposed to the executive branch, “challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action.”⁶⁷ The restrictive position taken in the Justice Department’s *Guide* would seem to invite just such an inquiry into the “wisdom” and “motivation” of another sovereign’s actions, which properly call for application of the act of state and sovereign compulsion doctrines.

A recent letter filed by the Justice Department in the “uranium cartel” case⁶⁸ suggests that what the Justice Department is unwilling to do under the sovereign immunity-related defenses, it may be willing to do under the “international comity” doctrine.⁶⁹ For the moment, it is enough to note that the Justice Department takes the position in the letter that defendants in a private antitrust suit should not be punished for failing to comply with court discovery orders where their non-compliance results from foreign legislation subjecting them to criminal liability if they comply.⁷⁰ While the Justice Department relied upon comity considerations in making its recommendation, the fact situation involved reads very much like a case of foreign sovereign compulsion.

⁶⁵ *Id.* at 50-52.

⁶⁶ *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 605 (9th Cir. 1976).

⁶⁷ *Id.* at 607. *See also* *International Ass’n of Machinists v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981).

⁶⁸ Formal Statement of Interest by the United States to The Honorable Prentice H. Marshall, United States District Court Judge, Northern District of Illinois (concerning Westinghouse, Inc. v. Rio Algom, Ltd., No. 76 C 3830 (N.D. Ill. May 6, 1980), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,416).

⁶⁹ This letter is discussed in greater detail in the following section of the article, which focuses specifically upon the doctrine of international comity. *See infra* notes 71-86 and accompanying text.

⁷⁰ *See also* *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1326 (D.C. Cir. 1980) (court observed that a French company’s non-compliance with an FTC investigatory subpoena “might” be excused by a French blocking statute making it a criminal offense for the company to comply).

Thus, the *Antitrust Guide* notwithstanding, it appears that the Justice Department remains receptive to sovereign compulsion type arguments under the alternative framework of the comity doctrine, to which this article now turns.

IV. CONSIDERATIONS OF INTERNATIONAL COMITY

The courts have shown a heightened sensitivity in recent years to the strains on international relations that can result from misplaced application of the United States antitrust laws. This heightened concern is reflected in expanded interpretations of the doctrine of international comity, according to which a court may, under appropriate circumstances, decline to exercise jurisdiction over a dispute involving foreign commerce even though personal and subject matter jurisdiction are present.⁷¹

The traditional interpretation of the comity doctrine was relatively narrow. The doctrine applied when two nations had jurisdiction over a matter and their governing rules of law actually conflicted. The doctrine allowed courts, in their discretion, to resolve the conflict by refraining from exercising jurisdiction. Basically, the test was a "balancing" test that deferred to the law of the jurisdiction with the most important stake in the matter, with a view to such considerations as where the activity in question occurred and the nationalities of the parties involved.⁷²

Recent judicial decisions reflect a more expansive interpretation of the doctrine. For example, *Timberlane Lumber Co. v. Bank of*

⁷¹ See, e.g., *United States v. Field*, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976); *United States v. Watchmakers of Switz. Information Center, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965); *United States v. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957). See generally ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 369-71 (1975); ABA ANTITRUST SECTION, MONOGRAPH NO. 6, U.S. ANTITRUST LAW IN INTERNATIONAL PATENT AND KNOW-HOW LICENSING 7-9 (1981); and Note, *Judicial Confirmation*, supra note 55.

⁷² See, e.g., RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965), which states:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

(emphasis added).

*America*⁷³ involved an alleged conspiracy among United States and Honduran businesses to shut down the plaintiff's operations in Honduras through a variety of harassing tactics, thereby adversely affecting the plaintiff's import business into the United States. While some of the tactics involved the manipulation of Honduran legal proceedings,⁷⁴ there was "no indication of any conflict with the law or policy of the Honduran government."⁷⁵ Thus, a true conflict of law, triggering traditional concepts of comity, was not present. Nevertheless, the Ninth Circuit held that the district court improperly failed to consider various factors bearing upon the question of whether American authority should have been asserted "as a matter of international comity and fairness."⁷⁶ Factors that the Court enumerated for possible consideration included: (1) the existence of a difference in law or policy between the nations affected by the dispute; (2) the nationality, locations and principal places of business of the parties; (3) the extent to which enforcement by either nation could be expected to achieve actual compliance; (4) the relative significance of the effects of the challenged practice on each of the nations involved; (5) the extent to which the parties actually intended to affect American domestic or foreign commerce; (6) the foreseeability of the effects on American commerce that occurred; and (7) the relative importance to the challenged practice of conduct within the United States itself, as opposed to conduct abroad.⁷⁷ The court specifically rejected a requirement that an actual conflict of international law be demonstrated, stating that while a "difference in law or policy is one likely sore spot," this consideration "may not always be present."⁷⁸ A similarly expansive treatment of comity—looking beyond situations in which a strict conflict of national laws is present—can be found in other recent judicial decisions.⁷⁹

The special importance of international comity considerations has been recognized not only by the judiciary but by the Justice Department and the Federal Trade Commission. Thus, spokesmen for both agencies have emphasized the potential importance of comity factors in the selection and resolution of government antitrust cases involving

⁷³ 549 F.2d 597 (9th Cir. 1976).

⁷⁴ The defendants had allegedly initiated harassing lawsuits and caused the manager of the plaintiff's facility in Honduras to be falsely arrested. *Timberlane*, 549 F.2d at 604-05.

⁷⁵ *Id.* at 615.

⁷⁶ *Id.* at 613.

⁷⁷ *Id.* at 614.

⁷⁸ *Id.*

⁷⁹ See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-98 (3d Cir. 1979); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161 (E.D. Pa. 1980); *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680 (S.D.N.Y. 1979).

foreign commerce.⁸⁰ The Justice Department's *Antitrust Guide for International Operations*⁸¹ similarly acknowledges that comity considerations can play an important role in determining whether United States antitrust laws should properly be applied to particular overseas transactions. Most significantly, the Justice Department actually employed comity arguments in a recent letter to the district court handling the "uranium cartel" antitrust litigation.⁸² In the letter, the Department argued that on "comity" grounds, it would be "inappropriate" to punish defendants involved in the case for their "inability" to comply with the court's discovery orders, where the inability resulted from blocking statutes enacted by foreign countries making it a criminal offense for the defendants to comply.⁸³ The Department will presumably apply similar comity reasoning in future antitrust cases brought or considered by the government.

The recent trend towards an expanded interpretation of concepts of international comity should come as welcome news to domestic and foreign companies operating abroad. Assuming that the trend continues, greater deference will be shown by the courts and government agencies to balancing foreign policy considerations before exercising jurisdiction over antitrust cases involving foreign commerce, even when the challenged practices satisfy the threshold issues of personal and subject matter jurisdiction. One important caveat should, however, be noted. Since the analysis of comity considerations is a matter of judicial discretion, companies should not simply assume that the courts will automatically engage in a full-blown comity inquiry. Some courts have shown a willingness to entertain such issues on their own.⁸⁴ Others, however, have concluded that an in-depth comity analysis is not necessary if the defendant simply sits back and refuses to enter an appearance or participate in pre-trial discovery.⁸⁵ Thus, companies that wish to raise the comity issue would be well advised, at the very

⁸⁰ See *supra* note 48.

⁸¹ THE GUIDE, *supra* note 41, at 6-7, 51-52.

⁸² Formal Statement of Interest by the United States to The Honorable Prentice H. Marshall, *supra* note 68, reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,416.

⁸³ See also *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1326 (D.C. Cir. 1980). The court suggested that a foreign company's refusal to comply with an investigatory subpoena "might" be excused by a foreign blocking statute making it a criminal offense for the company to comply. The court reasoned that "[p]rinciples of international comity require that domestic courts not take action that may cause the violation of another nation's laws." *Id.* at 1327 n. 150.

⁸⁴ See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). See also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976).

⁸⁵ See *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).

least, to enter a special appearance to contest the discretionary exercise of jurisdiction on comity grounds.⁸⁶

V. LIMITATIONS UPON THE GOVERNMENT'S REMEDIAL POWERS RESPECTING FOREIGN COMMERCE

This article has thus far examined the various threshold requirements that must be met before the government can properly initiate an antitrust action against activities in foreign commerce. One must now consider other factors that bear directly upon the propriety of the particular antitrust relief imposed. The remedial powers of the government are extremely far-reaching in their potential application to foreign, as well as domestic, commerce. The Sherman Act expressly empowers the Justice Department to enforce the Act through criminal sanctions, or through equitable proceedings to enjoin or otherwise prohibit violations of the Act.⁸⁷ The remedial powers of the Federal Trade Commission are likewise expansive, authorizing the Commission to issue cease-and-desist orders prohibiting violations of the various laws administered by the Commission.⁸⁸

In applying these remedial powers, the focus is upon achieving that relief which will be "effective to redress the violations" and "restore competition."⁸⁹ Appropriate relief can go far beyond simply forbidding a repetition of the specific illegal conduct in question, and can consist of such broader structural remedies as the divestiture of assets,⁹⁰

⁸⁶ For an example of a special appearance by a foreign corporation to contest jurisdiction, see *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 109-12 (1969).

⁸⁷ 15 U.S.C. §§ 1, 2, 4 (1976). See also Clayton Act section 15, empowering the Justice Department to initiate equitable proceedings to prevent violations of the Clayton Act. 15 U.S.C. § 25 (1976).

⁸⁸ Federal Trade Commission Act, 15 U.S.C. § 45(b) (Supp. IV 1980); Clayton Act, 15 U.S.C. § 21(b) (1976); Webb-Pomerene Act, 15 U.S.C. § 64 (1976).

Note that an early Supreme Court decision indicated that the remedial powers of the Federal Trade Commission are much more circumscribed than those of the Justice Department. *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927) (the Commission did not have the power to order divestiture as relief in a monopolization case brought under section 5 of the FTC Act). This early restrictive position has since been rejected by the Supreme Court and lower courts. See, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.4 (1966); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 311-13 (1963); *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971); *In re Golden Grain Macaroni Co.*, 78 F.T.C. 63, 178 (1971), *modified*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *In re Ekco Products Co.*, 65 F.T.C. 1163, 1213-14 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965). See generally 2 P. AREEDA & O. TURNER, *ANTITRUST LAW* § 305(e) (1978); S. KANWIT, *FEDERAL TRADE COMMISSION* § 15.05 (1979).

⁸⁹ *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961). See also *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).

⁹⁰ See, e.g., *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128 (1948); *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971).

compulsory licensing of technology,⁹¹ or a compulsory duty to deal in the sale or purchase of materials.⁹² These and other equally drastic antitrust remedies have been upheld, where necessary, to redress the proven law violations and restore effective competition.⁹³

The government's remedial powers in antitrust cases are not, however, without limitations. It must first be demonstrated that the particular relief selected is "necessary" to effectively terminate the proven law violations and restore competition.⁹⁴ The necessity of particular relief will vary from case to case, depending upon such variables as the structure of the industry, the barriers to entry within the industry, the relative competitive position of the defendants vis-a-vis actual and potential competitors, and the competitive consequences of the specific law violations.⁹⁵ Thus, the relief appropriate and necessary for one case need not be appropriate in even closely similar cases, depending upon precisely what is shown to be necessary to rectify the effects on competition of the particular law violations.

The requirement of "necessity" is illustrated by one of the leading cases on antitrust violations involving foreign commerce, *United States v. National Lead Co.*⁹⁶ National Lead and duPont had conspired with the leading foreign producers of titanium pigments to allocate world

⁹¹ See, e.g., *United States v. National Lead Co.*, 332 U.S. 319, 338 (1947); *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968), cert. denied, 394 U.S. 920 (1969).

⁹² See, e.g., *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 62-63 (1973); *Ford Motor Co. v. United States*, 405 U.S. 562, 576-77 (1972); *United States v. Grinnell Corp.*, 384 U.S. 563, 579 (1966).

⁹³ See generally Holmes, *Compulsory Patent and Trademark Licensing: A Framework for Analysis*, 12 LOY. U. CHI. L. J. 43, 44-46 (1980); 2 AREEDA & TURNER, *supra* note 88, § 305(e).

⁹⁴ See, e.g., *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 64 (1973); *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251-52 (1968); *Borden Inc.*, 92 F.T.C. 669, 806 (1978); *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 473 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973).

Note that a different standard than that of "necessity" applies to judicial review of an anti-trust order of the Federal Trade Commission, due to the Commission's status as an administrative agency. The courts will defer to the expertise and discretion of the Commission, so long as the relief imposed bears a "reasonable relationship" to the proven law violations and is confined to the "least drastic" alternative. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 23 (7th Cir. 1971); *Niresk Indus. v. FTC*, 278 F.2d 337, 343 (7th Cir.), cert. denied, 364 U.S. 883 (1960).

⁹⁵ See, e.g., *United States v. National Lead Co.*, 332 U.S. 319 (1947) (reasonable-royalty licensing of patents upheld, where necessary to enable competitors to compete more effectively; royalty-free patent licensing and divestiture of plants denied, where some existing competitors were already in the market and capable of paying a royalty); *United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953) (public dedication of patents imposed, where it appeared that prospective competitors would be unable to afford to pay royalties).

⁹⁶ 332 U.S. 319 (1947).

titanium pigment markets through the guise of pooled patent licenses. The conspiracy had quite effectively restricted domestic imports and exports, giving National Lead and duPont control over an estimated ninety percent of the domestic market. This control was not complete, however, for the domestic industry also included two other smaller but competitively vigorous producers not privy to the conspiracy.

Faced with these facts, the Supreme Court upheld antitrust relief requiring National Lead and duPont to license existing and certain future patents to competitors on a reasonable-royalty basis. The Court concluded that this relief was essential to improve competitive conditions within the industry since, when "added together," the patent control given to National Lead and duPont by the conspiracy gave them effective "domination and control" over the United States industry.⁹⁷ The Court declined, however, to require royalty-free patent licensing, as requested by the Justice Department. Since the evidence indicated that the existing domestic competitors not privy to the conspiracy could afford to pay reasonable royalties, the Court concluded that the Justice Department had failed to prove that the more drastic form of licensing was "necessary" to "enforce effectively the Antitrust Act."⁹⁸

Closely related to the requirement of necessity is the further limitation that the relief imposed be confined to the "least drastic" alternative remedy that will effectively offset the proven law violations.⁹⁹ If the same remedial objective can be achieved through a less drastic alternative remedy, the alternative relief must be employed. An illustrative case is *Timken Roller Bearing Co. v. United States*,¹⁰⁰ which involved a conspiracy to allocate world markets between Timken Roller Bearing Company and British and French firms in which Timken had a financial interest. The district court had not only enjoined repetitions of the specific conduct found illegal, but had further ordered Timken to divest itself of its stockholdings in the British and French firms.¹⁰¹ A majority of the Supreme Court concluded that the divestiture relief went too far, and, accordingly, struck the divestiture requirement from the order.¹⁰² Concurring, Justice Reed explained

⁹⁷ *Id.* at 327.

⁹⁸ *Id.* at 349.

⁹⁹ *See, e.g.,* *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603 (1951) (Reed, J. and Black, C.J., concurring); *Jacob Seigel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 424-26 (1945); *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933).

¹⁰⁰ 341 U.S. 593 (1951).

¹⁰¹ *Id.* at 600.

¹⁰² *Id.* at 601.

that harsh remedies such as divestiture are "not to be used indiscriminately, without regard to . . . whether other effective methods, less harsh, are available."¹⁰³ Justice Reed concluded that the absence of evidence of a "propensity toward restraint of trade" on the part of the defendants made complete divestiture overly harsh, and that the defendants' future compliance with the antitrust laws would be adequately assured by the threat of civil or criminal contempt proceedings if they violated the remaining injunctive provisions of the order.¹⁰⁴

A third limitation applicable to civil antitrust actions is that the relief imposed must be for truly remedial purposes and must *not* be imposed as "punishment" for violating the law. Punishment as relief is appropriate only if the case is a criminal action brought by the Justice Department, and is not appropriate in civil proceedings by the Justice Department or before the Federal Trade Commission. The non-punitive nature of civil antitrust remedies is stressed in several leading judicial decisions. For example, in *Timken Roller Bearing Co.*, Justice Reed additionally observed that "divestiture is a remedy to restore competition and not to punish those who restrain trade."¹⁰⁵ Similarly, in *National Lead Co.*, the Court noted that the case was a "civil, not a criminal" proceeding and, hence, that the "purpose of the decree" was "effective and fair enforcement, not punishment."¹⁰⁶

Antitrust remedies involving foreign commerce entail a further limiting factor unique to these types of cases. When shaping the antitrust relief appropriate for a case in foreign, as opposed to domestic, commerce, consideration may well have to be given to international "comity" concerns comparable to those bearing upon the exercise of jurisdiction.¹⁰⁷ Relevant variables can include such comity concerns as the nationality of the various defendants, the location of their principal operations, the extent of their involvement in the proven law violations, the applicable legal standards of other concerned countries, and the likelihood that particular order provisions will actually be enforceable.¹⁰⁸

A case that compellingly illustrates the possible hazards of failing

¹⁰³ *Id.* at 603 (Reed, J. and Black, C.J., concurring).

¹⁰⁴ *Id.* at 603-04 (Reed, J. and Black, C.J., concurring).

¹⁰⁵ *Id.* at 603 (Reed, J. and Black, C.J., concurring).

¹⁰⁶ *United States v. National Lead Co.*, 332 U.S. at 338 (1947). *See also* *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945); *FTC v. Gratz*, 253 U.S. 421, 432 (1920) (Brandeis, J., dissenting); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 351 (D. Mass. 1953).

¹⁰⁷ *See, e.g.*, Remarks of John H. Shenefield, *supra* note 48, *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,424.

¹⁰⁸ *See, e.g.*, *United States v. General Elec. Co.*, 115 F. Supp. 835, 852 (D.N.J. 1953).

to consider international comity factors when shaping antitrust remedies involving foreign commerce is *United States v. Imperial Chemical Industries*.¹⁰⁹ The case involved a Justice Department proceeding against a British company, Imperial Chemical Industries (ICI), and duPont for conspiring with other domestic and foreign firms to allocate world firearms and explosives markets. As part of the remedy, the British defendant, ICI, was ordered to divest itself of certain foreign patents that were involved in implementation of the conspiracy.¹¹⁰ However, ICI had already contracted to grant an exclusive license under the patents to another British firm. At the request of the other British firm, a court in England ordered ICI not to divest the patents, but, instead, to abide by the licensing agreement.¹¹¹ Thus, the English court quite effectively negated the divestiture remedy contained in the American court's decree.

The lesson of *Imperial Chemical Industries* was apparently not lost on the courts. In *United States v. General Electric Co.*,¹¹² another court was confronted with the similar problem of shaping appropriate antitrust relief for a foreign defendant. A Dutch company, Philips, had conspired with General Electric and other firms to allocate world incandescent lamp markets, largely through a network of patent licenses and cross-licenses.¹¹³ Philips neither manufactured lamps in the United States, nor imported them into the country. Furthermore, while its behavior was illegal under United States antitrust law, it was not illegal under Dutch law.¹¹⁴ Finally, the United States patents that it held, and that were involved in the illegal patent cross-licensing scheme, were merely ancillary to its foreign patents.¹¹⁵

The court ordered Philips to publicly dedicate the misused United States lamp patents, reasoning that absent such relief, the patents would thwart the entry of new competition, thereby perpetuating the prior illegal market allocation.¹¹⁶ The court declined, however, to order Philips to refrain from enforcing its matching foreign patents against exporters of products produced under the licensed United

¹⁰⁹ 100 F. Supp. 504 (S.D.N.Y. 1951).

¹¹⁰ *United States v. Imperial Chem. Indus.* 105 F. Supp. 215 (S.D.N.Y. 1952) (supplemental decision on remedies).

¹¹¹ *British Nylon Spinners, Ltd. v. Imperial Chem. Indus.*, 69 Pat. Cas. 288 (1952).

¹¹² 115 F. Supp. 835 (D.N.J. 1953) (relief decision).

¹¹³ 82 F. Supp. 753 (D.N.J. 1949) (violation decision).

¹¹⁴ *Id.* at 890.

¹¹⁵ *United States v. General Elec. Co.*, 115 F. Supp. 835, 851 (D.N.J. 1953).

¹¹⁶ *Id.* at 843-49.

States patents, a remedy which the Justice Department sought.¹¹⁷

The court's reasoning on the issue of matching foreign patents is especially illuminating. The court noted that Philips' contribution to the conspiracy principally involved its United States patents, with its foreign patents being merely ancillary.¹¹⁸ From this, the court concluded that the least drastic remedial alternative that would still counteract the effects of Philips' misconduct consisted simply of the ordered dedication and licensing of the United States patents, rendering further restrictions on the matching foreign patents unnecessary and inappropriate.¹¹⁹ Not stopping here, the court further emphasized several "comity" considerations to justify its holding, noting that Philips was not a United States citizen, did not manufacture or import goods within the United States, and operated in areas of the world "where different standards of industrial behavior prevail than are acceptable in this country."¹²⁰ The court accordingly rejected the foreign patent relief sought by the Justice Department, applying what amounted to an "international comity" analysis analogous to that applied in recent jurisdictional cases.¹²¹

VI. CONCLUSION

Government antitrust actions involving foreign commerce have been the source of considerable controversy during recent years. Critics have argued that overly expansive and paternalistic applications of American antitrust laws to commercial activities abroad have both undermined the ability of United States firms to compete effectively in foreign markets, and strained our nation's relationships with foreign sovereigns.

While the criticisms are certainly not without merit, they often fail to recognize that significant procedural and substantive limitations have been placed upon the government agencies during recent years, restricting the types of foreign commerce antitrust cases and remedies that can be expected in the future. Some of these restrictions have been mandated by judicial decisions. Others have been adopted by the agencies themselves. Many of the criticisms are, thus, directed at an historical problem that has already been largely rectified.

¹¹⁷ *Id.* at 852. The court did impose such a restriction on General Electric and the other United States defendants. *Id.* at 851.

¹¹⁸ *Id.* at 852.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 851-52.

This article has examined some of the principal limitations on antitrust remedies, including, in particular: statutory and constitutional limits on personal jurisdiction; apparent Justice Department and Federal Trade Commission approval of the “jurisdictional rule of reason” approach to subject matter jurisdiction; recent developments in the various sovereign immunity-related defenses, particularly with respect to the act of state and foreign sovereign compulsion doctrines; and apparent agency acceptance of the *Timberlane-Mannington Mills* framework for assessing “international comity” issues. The article has additionally examined key factors that bear upon the propriety of antitrust remedies directed at foreign commerce, especially concerns of “international comity” analogous to those highlighted in recent decisions and agency pronouncements concerning the exercise of jurisdiction.