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In this article, Mr. Kadish discusses the comity analysis of Timberlane Lumber Company v. Bank of America, *and examines what it involves, what is accomplishes, whether it is justified, and whether there are preferable alternatives to it. He concludes that the* Timberlane *analysis should be rejected, or at least limited because its use to determine United States' court jurisdiction is at best questionable, because it violates traditional abstention doctrine and current Supreme Court and Congressional treatment of foreigners' activities, because there may be insurmountable practical difficulties in applying the analysis, and because the analysis encourages courts to enter the political arena.*

INTRODUCTION

The application of the Sherman Act's foreign commerce provision[1] has stimulated debate among commentators and practitioners,[2] and has

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[1] Sections 1 and 2 of the Sherman Act state, in pertinent part:

> [§ 1] Every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, *or with foreign nations*, is declared to be illegal . . . .
>
> [§ 2] Every person who shall monopolize, or attempt to monopolize . . . the trade or commerce among the several States, *or with foreign nations*, shall be deemed guilty of a misdemeanor . . . .

15 U.S.C. §§ 1, 2 (1976) (emphasis added).

[2] K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973); B. HAWK, UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (1979); J. RAHL, COMMON MARKET AND AMERICAN ANTITRUST chs. 2, 4 (1970); PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J.P. Griffin ed. 1979) [hereinafter cited as

created friction between the United States and many of its historic allies.[3] Judge Learned Hand's pronouncement in *Alcoa*[4] that the Sherman Act embraces actions taken by foreigners wholly within a foreign country if these actions were intended to affect, and did affect, the import or export commerce of the United States[5] has contributed greatly to the extraterritorial fireworks.[6] Until 1976, *Alcoa*'s "intended effects" test, relating to foreign defendants acting totally within a foreign country, and the "effects" test, relating to extraterritorial jurisdiction in general,[7] remained the standards defining the scope of the Sherman Act's subject matter jurisdiction in foreign commerce cases.[8]

In 1976, the United States Court of Appeals for the Ninth Circuit, speaking through Judge Choy in *Timberlane Lumber Co. v. Bank of America,*[9] announced a new approach to extraterritorial application of the Sherman Act. The Timberlane Company and two of its Honduran subsidiaries, Danli Industrial and Maya Lumber, alleged that the Bank of America and other defendants had violated the Sherman Act and the Wilson Tariff Act. The defendants had allegedly conspired to prevent Timberlane from milling lumber in Honduras, thereby preventing Timberlane from importing this lumber into the United States. The defendants had tied up the assets of Timberlane's subsidiaries by en-

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PERSPECTIVES]; Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519 (1971); Ongman, *"Be No Longer a Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 NW. U.L. REV. 733 (1977); Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1 (1974).

3 *See* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 365-72 (2d ed. 1970); PERSPECTIVES, *supra* note 2; Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165 (1978); Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 CORNELL INT'L L.J. 195 (1978).

4 United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (Court of Appeals for the Second Circuit sitting as a special court of last resort because of the inability to achieve a quorum in the United States Supreme Court) [hereinafter cited as *Alcoa*].

5 *Id.* at 443-44.

6 PERSPECTIVES, *supra* note 2, at 9-10.

7 *See, e.g.*, Occidental Petroleum v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (direct or substantial effect); United States v. Imperial Chem. Indus., 100 F. Supp. 504, 592 (S.D.N.Y. 1951) ("a conspiracy . . . which affects American commerce"); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949), *modified and aff'd.*, 341 U.S. 593 (1951) ("a direct and influencing effect on trade"). *See also* 1 J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 5.02[2], at 5-120 (1969 & Supp. 1981).

8 B. HAWK, *supra* note 2, at 26; Fortenberry, *supra* note 2, at 528. For a detailed discussion of the extraterritorial scope of the Sherman Act, see W. FUGATE, *supra* note 2, at 29-87; J. RAHL, *supra* note 2, at 50-89.

9 549 F.2d 597 (9th Cir. 1976).

forcing claims which had arisen against these companies' predecessor. Even though Maya made a substantial cash offer to buy these security interest claims, the Bank of America refused to sell and ultimately transferred these claims, for "questionable consideration," to a "front man" who used the Honduran judicial processes to paralyze Timberlane's business.[10] In his analysis of the extraterritorial application of the Sherman Act, Judge Choy expanded upon *Alcoa* to include explicit analysis of considerations of comity and fairness before jurisdiction could be exercised.[11]

The *Timberlane* test has been accepted or commented upon favorably by many sources, including the United States Court of Appeals for the Third Circuit,[12] two United States District Courts,[13] the former head of the Justice Department's Antitrust Division,[14] and the *Antitrust Guide for International Operations*.[15] Unfortunately, all of these sources embrace *Timberlane* without any meaningful analysis as to what the test involves; whether such a test is justified; what, if anything, the test accomplishes; and whether there are alternatives preferable to the *Timberlane* formulation. This article hopes to fill these analytical gaps.

Comity: Definitions and Historical Meaning

The concept of comity is entwined with notions of mutual consideration and respect. Comity has been defined as "courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will."[16] Comity has also been considered to be "kindly, courteous behavior; friendly civility; mutual consideration between or as if equals."[17]

More significantly, judicial pronouncements[18] and legal commen-

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10 *Id.* at 603-05.

11 *Id.* at 613.

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

13 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).

14 Perspectives, *supra* note 2, at 22-24 (remarks of John H. Shenefield, then Assistant Attorney General in charge of the Justice Department's Antitrust Division).

15 United States Department of Justice, Antitrust Guide for International Operations 6-7 (1977) [hereinafter cited as The Guide].

16 Black's Law Dictionary (4th ed. 1968).

17 Webster's Third New International Dictionary (1966).

18 Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964); Hilton v. Guyot, 159 U.S. 113 (1895); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 518, 588-91 (1839); Second Russian Ins. Co. v. Miller, 297 F. 404, 409 (2d Cir. 1924); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 259, 139 N.E. 259, 260 (1923); People v. Rushworth, 294 Ill. 455, 463, 128 N.E. 555, 558 (1920).

tary[19] concerning comity focus not only on notions of respect, but also on comity's nonmandatory character and the view that a court should not exercise comity if doing so would be contrary to its own nation's interests or policies. In his *Commentaries on the Conflict of Laws*,[20] Joseph Story remarked on the discretionary nature of comity:

> [A]ssuming that such a moral duty [to exercise comity] does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded.[21]

The Supreme Court reinforced these notions in *Bank of Augusta v. Earle*,[22] an action contesting a bill of exchange. When discussing whether a corporation established in one state should be given legal existence in a foreign state, Justice Taney, speaking for the Court, stated:

> The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. . . . It is not the comity of the courts, but the comity of the nation, which is administered . . . .[23]

In *Russian Socialist Federated Soviet Republic v. Cibrario*,[24] Judge Andrews of the New York Court of Appeals addressed the limitation on the exercise of comity by the courts, particularly with regard to foreign relations:

> This rule [of comity] is always subject, however, to one consideration. There may be no yielding [to comity], if to yield is inconsistent with our public policy. . . . Such public policy may be interpreted by the courts. It is fixed by general usage and morality or by executive or legislative declaration. Especially is the definition of our relations to foreign nations confided not to the courts, but to another branch of government. That branch determines our policy toward them. It only remains for the courts to enforce it.[25]

Comity, as historically defined and applied and as indicated by the above cases and commentary is, therefore, governed by three factors: (1) respect, (2) mutual consideration, and (3) discretionary application such that comity will not be invoked if doing so would give rise to a result contrary to the nation's interests or policy.

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19 J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 32-39 (8th ed. 1883).
20 *Id.*
21 *Id.* at 32.
22 38 U.S. (13 Pet.) 518 (1839).
23 *Id.* at 589.
24 235 N.Y. 255, 139 N.E. 259 (1923).
25 *Id.* at 259.

DEALING WITH FOREIGN GOVERNMENT PRESENCE

Prior to *Timberlane*'s addition of comity to the extraterritorial picture, American courts relied on the doctrines of foreign sovereign immunity,[26] act of state,[27] and foreign sovereign compulsion[28] to deal with foreign government interests affected by the application of the Sherman Act. Although both foreign sovereign immunity and the act of state can be justified on the grounds of comity and respect for the foreign sovereign, the courts and Congress have moved away from the comity rationale as justification for these doctrines.[29] The doctrine of foreign sovereign compulsion could also be based on a comity foundation, but the courts instead have based the doctrine on fairness to the litigant rather than on respect for the foreign sovereign.[30] Consequently, Judge Choy introduced comity into questions of extraterritorial jurisdiction even though other doctrines dealing with foreign government presence, which arguably could be based on comity, do not rely on this concept. Nonetheless, comity can be better understood after these other doctrines have been discussed.

Sovereign Immunity

Historically, sovereign immunity was a judicially derived doctrine of indefinite scope.[31] At its broadest, the traditional doctrine provided immunity for foreign states regardless of the character of the activity on which the cause of action was based.[32] By contrast, the alternative restrictive theory limited immunity only to those actions in which the sovereign acted in its governmental capacity, as distinct from those activities where the government acted as a commercial participant.[33] In *Republic of Mexico v. Hoffman*,[34] the United States Supreme Court limited the judiciary's discretion as to which theory of immunity to apply when it held that the courts should rely on the State Department's determination of whether immunity should be granted.[35] The Court

26 *See infra* text accompanying notes 31-48.

27 *See infra* text accompanying notes 49-57.

28 *See infra* text accompanying notes 58-66.

29 *See infra* text accompanying notes 35-48 and 51-56.

30 *See infra* text accompanying notes 59-66.

31 B. HAWK, *supra* note 2, at 178. For a general discussion of sovereign immunity, see W. FUGATE, *supra* note 2, at 111-14; B. HAWK, *supra* note 2, at 178-86.

32 *See, e.g.*, Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); Oliver Am. Trading Co. v. Mexico, 5 F.2d 659, 663-65 (2d Cir. 1924), *cert. denied*, 267 U.S. 596 (1925); B. HAWK, *supra* note 2, at 178-79.

33 B. HAWK, *supra* note 2, at 179.

34 324 U.S. 30 (1945).

35 *Id.* at 35-36.

grounded its holding on the premise that sovereign immunity developed because of the judiciary's reluctance to intrude on the executive branch's conduct of foreign affairs, rather than out of respect for the foreign sovereign.[36] Consequently, in cases where the State Department filed a suggestion of sovereign immunity, the courts exercised their discretion by accepting this recommendation without further analysis.[37] If the State Department chose not to file a suggestion, the court made its own determination of whether immunity should be granted.[38] In 1976, Congress overhauled this approach to granting sovereign immunity.

The Foreign Sovereign Immunity Act of 1976[39] considerably changed prior law[40] by defining standards for finding jurisdiction, granting immunity, and awarding remedies.[41] The courts are now to make the determination of immunity without input from the State Department,[42] but the courts' discretion to find immunity has been circumscribed because the Act defines more clearly the situations in which immunity may be applied.[43]

The Act establishes that immunity is the general rule[44] and then provides numerous exceptions to the rule.[45] Of special significance in the antitrust area, the Act codifies the restrictive theory, withholding immunity when the sovereign is engaged in a commercial activity.[46] Section 1605(a)(2) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or the States in any case . . .
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> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

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36 *Id.*

37 *Id.*

38 *Id.* at 34-35.

39 Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602-11 (Supp. IV 1980)).

40 For a discussion of the Foreign Sovereign Immunity Act, see Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunity Act of 1976*, 18 HARV. INT'L L.J. 429 (1977); Comment, *Proposed Draft Legislation of the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts with a Judicial Function*, 69 NW. U.L. REV. 302 (1974); Note, *Judicial Immunities of Foreign States*, 23 DE PAUL L. REV. 1225 (1974).

41 Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602-11 (Supp. IV 1980)).

42 28 U.S.C. § 1602 (Supp. IV 1980); B. HAWK, *supra* note 2, at 181.

43 28 U.S.C. § 1605(a)(1)-(a)(5) (Supp. IV 1980).

44 28 U.S.C. § 1604 (Supp. IV 1980).

45 28 U.S.C. § 1605(a)(1)-(a)(5) (Supp. IV 1980).

46 28 U.S.C. § 1602 (Supp. IV 1980).

. . . .[47]

Section 1603(d) defines "commercial activity" as:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[48]

If comity considerations were deemed important by Congress, one would have expected that they would be raised in the commercial activity context where it is clear that the foreign sovereign has an interest at stake. Congress, however, did not include the concept of comity in the determination of immunity and did not even mention comity in the statute.

Act of State

Even if a foreign government is not a party to a law suit, the plaintiff may bring an act of the foreign government into issue. For example, if the defendant is a government-related entity, it may assert that its conduct is the protected political act of a foreign state. Alternatively, if the defendant is a private enterprise, it may contend that the plaintiff's claim requires judicial inquiry into the specific acts of a foreign government. A finding of sovereign immunity is not applicable here because the foreign government is not being sued. Nonetheless, the court is being asked to pass judgment on the action of a foreign sovereign. The Supreme Court developed the act of state doctrine in order to deal with this situation. In *Underhill v. Hernandez*[49] the Court stated:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[50]

Thus, the Court reasoned that respect for the foreign sovereign required that the government's acts not be questioned. This justification for the act of state doctrine closely resembles comity. The Court, however, greatly modified this rationale in *Banco Nacional de Cuba v. Sabbatino*.[51]

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47 28 U.S.C. § 1605(a)(2) (Supp. IV 1980).

48 28 U.S.C. § 1603(d) (Supp. IV 1980).

49 168 U.S. 250 (1897).

50 *Id.* at 252.

51 376 U.S. 398 (1964) (expropriation of sugar corporation's assets by Cuban government held

In *Sabbatino*, the Court held that the act of state doctrine arose out of separation of powers concerns; it was not mandated by international law. According to Justice Harlan:

> That international law does not require the application of the [act of state] doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments, . . . and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation. . . .
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> * * * *
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> The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.
>
> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. . . . The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[52]

This same rationale was echoed by Justice White in *Alfred Dunhill, Inc. v. Cuba*:[53] "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations."[54]

Following *Sabbatino*, Congress enacted legislation which both restricted the act of state doctrine and shifted from the courts to the executive the discretion to determine the doctrine's applicability in certain cases.[55] This provision, which was added to the Foreign Assistance Act of 1965, states that the courts shall not allow the act of state doctrine to be asserted in property confiscation cases unless

> (1) [the] act of a foreign state is not contrary to international law . . . , or (2) . . . the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in

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to be an act of state despite allegations that the expropriation violated international and Cuban law).

52 *Id.* at 421-23.

53 425 U.S. 682 (1976).

54 *Id.* at 697 (plurality opinion of Part III).

55 22 U.S.C. § 2370(e)(2).

that case with the court.[56]

In sum, the Court's recent statements have diverged considerably from the underlying rationale of *Underhill* that respect for the foreign sovereign dictated the act of state doctrine. In fact, both *Sabbatino* and *Dunhill* recall the Court's reasoning to justify sovereign immunity in *Republic of Mexico v. Hoffman*,[57] namely, that the Court's major consideration is the executive branch's conduct of foreign relations rather than respect for the foreign sovereign. Furthermore, in the Foreign Assistance Act of 1965, Congress took a position based on the preeminence of the executive branch's concerns. Congress could have explicitly required that the courts look to comity considerations, but, instead, Congress removed the foreign relations decision from the courts and made the executive's determination in the matter dispositive.

Foreign Sovereign Compulsion

A related doctrine, and to some extent a corollary, to the act of state doctrine is the antitrust defense of foreign sovereign compulsion.[58] At its most basic, this doctrine insulates parties from liability under the antitrust laws when the challenged activity was compelled or required by a foreign government.[59]

In *Interamerican Refining Corp. v. Texas Maracaibo, Inc.*,[60] the only case to date where the decision actually turned on this doctrine, the court held that the defendants' refusal to supply oil to the plaintiff was ordered by the Venezuelan government, and, therefore, this compulsion was "a complete defense to an action under the antitrust laws based on that boycott."[61] The court characterized dicta in two earlier cases[62] and language in certain consent decrees[63] as "scant authority" to establish this defense.[64] Rather, the court reasoned that trade activities which are compelled by a government effectively become the acts

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56 *Id.*

57 324 U.S. 30 (1945).

58 *See* B. HAWK, *supra* note 2, at 152; THE GUIDE, *supra* note 15, at 50-52 (foreign sovereign compulsion defense of *Texas Maracaibo* not recognized to the extent that compelled conduct is to take place in the United States).

59 *Id.* at 148.

60 307 F. Supp. 1291 (D. Del. 1970).

61 *Id.* at 1296.

62 Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. The Watchmakers of Switz. Information Center, Inc., 1963 Trade Cases (CCH) ¶ 70,600 (S.D.N.Y.).

63 *See* United States v. Gulf Oil Corp., 1960 Trade Cas. (CCH) ¶ 69,851, at 77,349 (S.D.N.Y.); United States v. Standard Oil Co., 1960 Trade Cas. (CCH) ¶ 69,849, at 77,340 (S.D.N.Y.).

64 *Texas Maracaibo*, 307 F. Supp. at 1298.

of the sovereign itself, and, under the act of state doctrine, these foreign governmental acts may not be questioned by the courts.[65] The court also based its decision on considerations of fairness to the defendant. It stated:

> Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.[66]

Thus, the court did not justify its holding on the comity grounds of respect and fairness to the foreign sovereign, but rather on act of state considerations and notions of fairness to the compelled defendant.

Historically, therefore, the courts have applied the doctrines of foreign sovereign immunity, act of state, and foreign sovereign compulsion to cases involving foreign sovereign interests. Judge Choy, in *Timberlane*, formulated a new test for dealing with the presence of a foreign government when none of these doctrines are available. This new analysis would deny the application of the Sherman Act in cases where the foreign harmony concerns of comity and fairness outweigh the United States interest in fostering competition.

TIMBERLANE AND ITS PROGENY

Timberlane

In *Timberlane*,[67] Judge Choy criticized the effects test[68] as "incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country."[69] Accordingly, Judge Choy proposed a three-part analysis for determining whether to exercise extraterritorial Sherman Act jurisdiction.[70] This analysis was posed in the form of three questions:

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65 *Id.*

66 *Id.*

67 549 F.2d 597 (9th Cir. 1976). Timberlane alleged that the Bank of America and other defendants violated the Wilson Tariff Act and the Sherman Act. The defendants, allegedly, had conspired to prevent Timberlane from milling lumber in Honduras, thereby preventing Timberlane from importing this lumber into the United States. The alleged purpose of the defendants' actions was to maintain control over the Honduran lumber industry and restrain trade in exports to the United States.

68 *Id.* at 610.

69 *Id.* at 611-12.

70 *Id.* at 613.

1. Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?
2. Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?
3. As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[71]

Judge Choy outlined the factors to be considered when answering the third question. He said that a balancing test was required,[72] and that the elements to be weighed include:

1. the degree of conflict with foreign law or policy,
2. the nationality or allegiance of the parties and the locations or principal places of business of corporations,
3. the extent to which enforcement by either state can be expected to achieve compliance,
4. the relative significance of effects on the United States as compared with those elsewhere,
5. the extent to which there is explicit purpose to harm or affect American commerce,
6. the forseeability of such effect,
7. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[73]

The trial court in analyzing these factors was to identify the potential conflict if the Sherman Act were applied and "then determine whether in the face of [this conflict] the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction."[74] In addition, Judge Choy suggested that the "field of the conflict of laws presents the proper approach" to this analysis.[75]

At first glance, Judge Choy's formulation may appear focused and workable, but further analysis indicates that many of the factors are undefined and the weight to be given each factor is unstated. Additionally, invoking the conflict of laws approach does not clarify the analysis because it is not at all clear what this approach involves, or whether it is even appropriate. Furthermore, the court did not address the practical difficulty of conducting this analysis. Perhaps most importantly, however, the court did not explain on what basis of authority it could find jurisdiction under the Sherman Act and then refuse to exercise it, or, alternatively, on what basis of authority it could include comity as part

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71 *Id.* at 615.

72 *Id.* at 613-14 ("What we prefer is an evaluation and balancing of the relevant considerations in each case . . . . The elements to be weighed include . . . .").

73 *Id.* at 614.

74 *Id.* at 614-15.

75 *Id.* at 613.

of a jurisdictional determination. Each of these issues shall be discussed below.

Other Courts' Decisions

Three other courts have adopted *Timberlane*'s comity analysis. In *Mannington Mills, Inc. v. Congoleum Corp.*,[76] a Sherman Act case alleging that foreign patents were secured by fraud, the United States Court of Appeals for the Third Circuit held that "in deciding whether jurisdiction should be exercised the district court should weigh the enforcement of the antitrust laws against the interests of comity and international relations."[77] The court proposed ten factors to be considered in the comity analysis for each of the twenty-six foreign nations where Congoleum held patents.[78] The court recognized that this analysis might yield different results for different nations, yet, nonetheless, ordered that the analysis be undertaken.[79]

An opinion from the Southern District of New York also adopted the *Timberlane* comity formulation. In *Dominica Americana Bohio v. Gulf & Western Industries*,[80] Judge Carter criticized the effects test as "inadequate because it fails to take into account potential problems of

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[76] 595 F.2d 1287 (3d Cir. 1979). Mannington, an American manufacturer of floor covering, brought a Sherman Act action against Congoleum, another American manufacturer, alleging that patents in 26 foreign countries were secured by fraud. Had these alleged actions occurred in securing a domestic patent, the Sherman Act allegedly would have been violated. Mannington urged that the domestic standards be extended into the foreign arena and sought damages and injunctive relief.

[77] *Id.* at 1290.

[78] *Id.* at 1297-98. These factors are:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

Id. Factors 1, 2, 3, 5, and 8 are practically identical to factors 1, 2, 3, 5, 6, and 7 in *Timberlane*. *See supra* text accompanying note 73.

[79] *Mannington Mills*, 595 F.2d at 1298.

[80] 473 F. Supp. 680 (S.D.N.Y. 1979) (plaintiffs, composed of both United States and foreign corporations and individuals, alleged that defendant, Gulf & Western, and many of its subsidiaries, monopolized tourist facilities in part of the Dominican Republic by engaging in acts illegal under the Sherman Act).

international comity."[81] In *Bohio*, the plaintiffs alleged that the defendants had violated the Sherman Act by conspiring to monopolize tourist facilities in the Dominican Republic.[82] The court held that the proper standard for determining whether the Sherman Act was applicable was a balancing test which "weighs the impact of the foreign conduct on United States commerce against the potential international repercussions of asserting jurisdiction."[83] The court refrained from determining if considerations of international comity should enter the threshold question of whether Sherman Act jurisdiction exists or if these considerations, instead, go to the question of whether Sherman Act jurisdiction should be exercised. The court held that in either case the record was inadequate to consider properly many of the factors raised in *Timberlane* and *Mannington Mills* and, consequently, ordered further discovery on these issues.[84]

The international comity balancing test was most recently required in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*[85] In *Zenith*, the plaintiffs alleged that the defendants had conspired to destroy the United States consumer electronics product industry by artificially lowering export prices to the United States.[86] Judge Becker of the District Court for the Eastern District of Pennsylvania recognized that he was bound by the Third Circuit's decision in *Mannington Mills*, yet went beyond mere acceptance of the comity test to comment favorably upon *Timberlane*.[87] The court concluded that "the *Alcoa* plus comity test applied in *Mannington Mills* is equally appropriate for the case at bar."[88]

Timberlane and Comity: Jurisdiction *Vel Non* or Abstention?

As previously noted, Judge Choy formulated a tripartite analysis in *Timberlane* to resolve the issue of the extraterritorial application of

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81 *Id.* at 687.

82 *Id.* at 684-86.

83 *Id.*

84 *Id.* at 688.

85 494 F. Supp. 1161 (E.D. Pa. 1980) (plaintiffs allege that the defendants have conspired to destroy the United States domestic consumer electronics product industry by artificially lowering export prices, thereby violating sections 1 and 2 of the Sherman Act and section 73 of the Wilson Tariff Act).

86 *Id.* at 1164.

87 *Id.* at 1187. Judge Becker stated: "The most thorough and thoughtful analysis of the concerns relevant to the assertion of extraterritorial jurisdiction was provided by Judge Choy in *Timberlane*. . . ."

88 *Id.* at 1189.

the Sherman Act.[89] It is not clear, however, if this analysis goes to the question of whether jurisdiction exists or the question of whether a court should abstain from exercising jurisdiction once it has been found to exist. As will be discussed below, each alternative possesses different implications with regard to whether there is a valid basis of authority for establishing the test, how the proof is to be developed, and whether the Constitution may have been violated.

Jurisdiction

Congress would have to have intended that considerations of comity be included in the determination of Sherman Act jurisdiction in order for Judge Choy properly to pursue his comity analysis. Although he recognized that *Alcoa*'s analysis of effects was based upon presumed legislative intent,[90] Judge Choy did not explicitly base his analysis on this foundation. John Will Ongman, however, when discussing the scope of the Sherman Act's foreign commerce jurisdiction, has suggested that Congress may be presumed to have incorporated doctrines of international law into the Sherman Act.[91] Consequently, he states, the courts should interpret the Sherman Act to be consistent with international law because Congress did not explicitly direct otherwise.[92]

Applying this argument, courts would have authority to pursue a comity analysis if comity were considered a principle of international law. Both case law and commentary, as has already been demonstrated, indicate that comity is a discretionary doctrine—not to be applied if doing so would be contrary to the nation's interest or policy.[93] The discretionary nature of comity and its resultant uncertainty would seem to preclude it from rising to the status of a principle of international law, even though it may be a concept frequently referred to in the international field. Mr. Ongman appeared to recognize this distinction when he stated: "Although in a particular factual situation it may be permissible under public international law to apply the Sherman Act, still it might be unwise from the point of view of international comity."[94] Judge Choy in *Timberlane* also mentioned comity as if it were distinct and separate from international law when he spoke in terms of "comity, international law, and good judgment."[95]

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89 *Timberlane*, 549 F.2d at 613; *see supra* text accompanying note 71.
90 *Id.* at 609.
91 Ongman, *supra* note 2, at 735-38.
92 *Id.* at 737.
93 *See supra* notes 11-25 and accompanying text.
94 Ongman, *supra* note 2, at 738.
95 *Timberlane*, 549 F.2d at 610.

Despite the difficulty of establishing implied congressional intent to include comity in Sherman Act extraterritorial jurisdiction analysis, it is, nonetheless, useful to follow the reasoning and determine how the jurisdictional component would affect constitutional considerations and the burden of proof. If comity were found to be part of the jurisdictional test, no cause of action could accrue unless the comity hurdle were surmounted. Consequently, the due process problem of depriving a person of a vested property interest (i.e., a cause of action) would be avoided. Burden of proof problems, however, may accrue.

Normally, jurisdiction must be pleaded and proved by the plaintiff.[96] If comity were an element of jurisdiction, then Sherman Act plaintiffs in cases involving a foreign element might be required to plead that comity concerns need not block a finding that the court has jurisdiction. The court would have to determine which allegations are sufficient to allow the plaintiff to survive a motion to dismiss for lack of subject matter jurisdiction. Alternatively, the court could presume that no comity problems exist, eliminating the need for formal allegations in the complaint. If the defendant offers proof that comity concerns are involved, however, the court must then decide whether the plaintiff needs to prove counterbalancing interests which outweigh the comity concerns raised by the defendant.

To include comity as an element in finding jurisdiction, therefore, would force a court to make the tenuous argument that Congress intended comity to be included in the jurisdictional analysis. Even if that hurdle is surmounted, the courts must then decide the procedures for pleading and proving this jurisdictional element.

Abstention

The second interpretation of *Timberlane*'s Sherman Act extraterritoriality test assumes that jurisdiction has been found and that comity concerns enter the analysis to determine whether jurisdiction should be exercised. This interpretation may be characterized broadly as an abstention doctrine in the international context. Because abstention does not generally depend upon a grant of power from Congress, but rather is within the inherent discretion of the judiciary, problems of finding legislative intent do not exist.[97] Similarly, because this practice is dis-

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[96] FED. R. CIV. P. 8(a)(1).

[97] *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 233 (1980) ("Under the label of 'abstention,' the Supreme Court has developed a number of complex . . . doctrines to justify either rejection or postponement of the assertion of federal court power even though Congress has vested jurisdiction in the federal courts to hear the cases in

cretionary, the courts have the flexibility to determine whether the plaintiff should be required to plead the absence of comity concerns in his complaint. Abstention in the international Sherman Act context is severely weakened, however, because it diverges from the rationale for applying abstention in other contexts and because it may raise a significant constitutional problem.

Traditionally, abstention does not deprive a litigant of a cause of action, but rather forces the litigant either to take his cause to another forum or to get a definitive interpretation of the law in another forum and then return to federal court.[98] In *Pullman* abstention, for example, where a state action is being challenged in federal court as contrary to the federal Constitution and there are questions of state law that may determine the case, the federal court will abstain from deciding the case until the parties obtain a state court decision on the state issue.[99] According to Martin Redish:

> Under the label of "abstention," the Supreme Court has devised a number of complex, often interrelated doctrines to justify either rejection or postponement of the assertion of federal court power even though Congress has vested jurisdiction in the federal courts to hear the cases in question. The common factor shared by most of the forms of federal abstention is the presence of an uncertain or ambiguous issue of state law. . . . But the presence of an uncertain issue of state law, standing alone, has never constituted a sufficient basis for abstention; each branch of the doctrine requires the presence of one or more additional factors before abstention will be allowed.[100]

Abstention in the Sherman Act context, therefore, differs considerably from state/federal notions of abstention because the antitrust litigant is not being sent to another forum. Rather, he is being deprived of his cause of action entirely. If this path is followed, the possibility of constitutional due process problems must be considered. At the least, a court's refusal to exercise Sherman Act jurisdiction does not fall neatly or persuasively within traditional notions of abstention.

The Views of Other Courts and Commentators

Other courts and commentators have disagreed as to whether Judge Choy intended comity considerations to enter as part of the

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question."); D. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 163-64 (1976) ("There is nothing in the statute [28 U.S.C. § 1331 (1976)] about abstention, and the doctrine is not easy to reconcile with § 1331, which gives the federal courts jurisdiction of all cases arising under federal law.").

98 *See generally* M. REDISH, *supra* note 97, at 233-58; C. WRIGHT, LAW OF FEDERAL COURTS 218-29 (1976).

99 C. WRIGHT, *supra* note 98, at 218-19 (1976).

100 M. REDISH, *supra* note 97, at 233.

threshold jurisdictional test or, instead, as part of the decision whether to exercise jurisdiction. In fact, Judge Carter of the United States District Court for the Southern District of New York, in *Dominicus Americana Bohio v. Gulf & Western Industries*,[101] explicitly refrained from deciding this issue. Proponents of the jurisdictional test interpretation include: Judge Adams, in his concurring opinion in *Mannington Mills*;[102] Judge Becker of the United States District Court for the Eastern District of Pennsylvania, in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*;[103] John Shenefield, former head of the Department of Justice Antitrust Division;[104] and Barry Hawk, author of a treatise in this field.[105]

Judge Adams made it particularly clear that he believed that comity entered the threshold jurisdictional question in *Timberlane*. He stated that "*Timberlane* . . . demonstrate[s that] . . . considerations [of international comity] have been incorporated into an expanded jurisdictional test."[106] Judge Adams also strongly criticized the abstention approach adopted by the *Mannington* majority:

> The majority apparently is of the view that the existence of jurisdiction is to be determined solely under an "effects" standard, but that a court may then decline to exercise jurisdiction because of considerations of international comity. As I understand it, however, a court may not abstain where jurisdiction properly lies unless abstention is warranted under a recognized abstention doctrine. . . . And to my knowledge no abstention doctrine exists with respect to considerations of international comity.[107]

By contrast, other courts and writers have taken equally strong positions that *Timberlane* expresses an abstention doctrine, i.e., although jurisdiction exists, the court, in its discretion, refuses to exercise this jurisdiction. The United States Court of Appeals for the Seventh Circuit clearly interpreted *Timberlane* as standing for abstention: "The clear thrust of the *Timberlane* Court is that once a district judge has determined that he has jurisdiction, he should consider additional factors to determine whether the exercise of jurisdiction is appropriate."[108] The court reinforced this contention in a footnote, where it stated:

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101 473 F. Supp. 680 (S.D.N.Y. 1979).

102 Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1299 (3d Cir. 1979).

103 494 F. Supp. 1161 (E.D. Pa. 1980).

104 Remarks before the A.B.A. Section of International Law, *reprinted in* PERSPECTIVES, *supra* note 2, at 22 ("[Judge Choy] held that where considerations of comity do not weigh heavily in favor of applying U.S. law, our courts, as a matter of *law*, not merely as a matter of discretion, lack subject matter jurisdiction.").

105 B. HAWK, *supra* note 2, at 39-44.

106 *Mannington Mills*, 595 F.2d at 1301-02 n.9 (Adams, J., concurring).

107 *Id.*

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

"While the *Timberlane* Court appears to have grafted the adjective 'substantial' to Learned Hand's intended effects test, the *Alcoa* standard emerges from *Timberlane* essentially intact."[109]

Ongman has also adopted the abstention characterization of *Timberlane*, stating: "Judge Choy seems to have presented his 'international setting' element as a basis on which a federal court, which has acquired full subject-matter jurisdiction over the cause of action, may nonetheless abstain for reasons of 'international comity and fairness' from deciding the case."[110]

Finally, the *Mannington Mills* majority seems to have interpreted *Timberlane* as finding jurisdiction and then asking whether or not to exercise it.[111] After the *Mannington* court found jurisdiction by applying the effects test, it stated: "In *Timberlane* . . . , the Court of Appeals for the Ninth Circuit adopted a balancing process in determining whether extraterritorial jurisdiction should be exercised, an approach with which we find ourselves in substantial agreement."[112]

There are numerous differing opinions as to whether Judge Choy in *Timberlane* was formulating a new jurisdictional test, or propounding a new abstention doctrine. Perhaps this uncertain situation is best summed up by the succinct statement of a note writer in the *Northwestern Journal of International Law & Business*: "*Timberlane*, itself, is not clear about the question whether the tripartite analysis is to be one test for subject matter jurisdiction."[113]

Parsing the Timberlane *Opinion*

Judge Choy proposed his tripartite analysis as a result of his dissatisfaction with the effects test for finding jurisdiction.[114] Although Judge Choy appeared to intend to broaden the effects test and its corrollaries when he argued that "[a] more comprehensive inquiry is necessary" and labeled his approach "a jurisdictional rule of reason,"[115] the words he chose to broaden the jurisdictional test could just as reasonably apply to an abstention analysis. For example, he stated:

> [I]t is evident that at some point the interests of the United States are too weak and the foreign harmony incentive too strong *to justify an extraterri-*

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109 *Id.* at 1255 n.25.

110 Ongman, *supra* note 2, at 743 n.34.

111 *Mannington Mills*, 595 F.2d at 1297.

112 *Id.*

113 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, 260 (1980).

114 *Timberlane*, 549 F.2d at 610-12.

115 *Id.* at 613.

torial assertion of jurisdiction.[116]

* * * *

An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine *whether American authority should be asserted* in a given case.[117]

* * * *

Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient *to support the exercise of extraterritorial jurisdiction*.[118]

* * * *

As a matter of international comity and fairness, *should the extraterritorial jurisdiction of the United States be asserted* to cover it?[119]

Using phrases such as "to justify an assertion," "to support the exercise," and "should be asserted" imply that extraterritorial jurisdiction exists and that the appropriate question becomes whether this jurisdiction should be exercised or asserted.

Perhaps the jurisdiction/abstention confusion can be illuminated by viewing the totality of Judge Choy's analysis. Recalling the other two elements of *Timberlane's* tripartite investigation,[120] Judge Choy was attempting to take a broad overview of the extraterritorial picture and force these elements into a jurisdictional analysis. The first factor was somewhat broader than *Alcoa*'s effects test: "Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?"[121] This statement of the effects test presents a lower hurdle for the plaintiff than *Alcoa* because it is phrased in the disjunctive, whereas *Alcoa* required both intent and effect.[122] Judge Choy's second factor introduces the magnitude of the alleged harm into the analysis.[123] Normally, injury would enter an antitrust analysis as a necessary element for stating a private cause of action under the Sherman Act, not as an element of jurisdiction.[124] And finally, Judge Choy introduced into his jurisdictional analysis comity considerations and balancing of international interests through the use of abstention-like

116 *Id.* at 609 (emphasis added).

117 *Id.* at 613 (emphasis added).

118 *Id.* at 614 (emphasis added).

119 *Id.* at 615 (emphasis added).

120 *See supra* text accompanying notes 70-73.

121 *Timberlane*, 549 F.2d at 615.

122 *See* B. HAWK, *supra* note 2, at 42.

123 "Is [the alleged restraint] of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?" *Timberlane*, 549 F.2d at 615.

124 *See* B. HAWK, *supra* note 2, at 43-44.

language. Neither the second nor third factors enter a traditional jurisdiction *vel non* determination.

Perhaps Judge Choy was attempting to force the courts to look at the total picture at an early stage in antitrust litigation involving elements of foreign sensitivity in order to resolve the dispute as quickly as possible.

Asserted Authority for Applying Comity

The Ninth Circuit and the three other courts which have adopted the comity analysis justified their approach on the grounds that the effects test was inadequate for failing to consider the foreign nation's interests before applying the Sherman Act to activities outside of the United States.[125] Although this conclusion may justify dissatisfaction with the effects test, it does not provide a principled basis of authority for restricting the statutory language of the Sherman Act. Theoretically, mere judicial dissatisfaction with a legislative enactment does not give the judiciary the authority to rewrite the law.

Judge Choy attempted to support his comity analysis by invoking two beguiling sources of authority, the conflict of laws and section 40 of the *Restatement (Second) of Foreign Relations Law*,[126] and concluded, with an equally beguiling label, a "jurisdictional rule of reason."[127]

Conflict of Laws

With regard to conflict of laws, Judge Choy stated:

> We believe that the field of conflict of laws presents the proper approach, as was suggested, if not specifically employed, in *Alcoa* in expressing the basic limitation on application of American laws:
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> > [We] are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."[128]

Regrettably, Judge Choy omitted the critical next sentence from the *Alcoa* opinion: "We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."[129] It here appears that Judge Hand

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125 *Timberlane*, 549 F.2d at 611-12; Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d at 1296-98; Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. at 687; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. at 1187.

126 *Timberlane*, 549 F.2d at 613.

127 *Id.*

128 *Id.*

129 *Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945).

grounded his conclusion in *Alcoa* on presumed legislative intention, and took a tack very similar to the rule of reason analysis in *Standard Oil*.[130] In *Standard Oil*, the Court held that even though the Sherman Act is framed in very broad language, Congress could not have intended to get at *every* restraint of trade; rather, the Court read in a presumed intent of Congress to apply common law principles and reach only those restraints which *unduly* restrict competition.[131] In *Alcoa*, Judge Hand reasoned analogously to the approach taken in *Standard Oil*, and presumed that Congress did not intend to get at all restraints of trade by foreigners anywhere in the world which might have some effect on United States commerce, unless those restraints also were *intended* to have effects in the United States.[132] Both the *Alcoa* and *Standard Oil* limitations are generalized and based on presumed legislative intent. *Timberlane*'s limitation, however, is based on the specific comity circumstances of each case and is not grounded expressly in notions of legislative intent.[133]

Where Judge Hand explicitly concluded that presumed legislative intent provided the authority for *Alcoa's* narrowing of the Sherman Act, Judge Choy did not point explicitly to any similar basis of authority for his potentially far more restrictive limitation—allowing the judiciary the discretion to balance competing national interests on a case-by-case basis.

Furthermore, using a conflict of laws approach in the Sherman Act context is inherently misleading. Conflicts problems arise when a court is faced with a law which does not address directly whether the law should be applied extraterritorially.[134] The court must determine whether its jurisdiction's law should apply to a case in which another jurisdiction's law may also be applicable and in which the court's own legislature failed to state expressly that its law should apply. By contrast, if the court's state (or national) legislature expressly states that its

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130 Standard Oil Co. v. United States, 221 U.S. 1 (1911).

131 *Id.* at 58-66.

132 *Alcoa*, 148 F.2d at 443-44.

133 *See infra* text accompanying notes 165-184.

134 In his COMMENTARIES ON THE CONFLICT OF LAWS (1841), Joseph Story stated:

> § 23. III. [W]hatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter . . . . A state may prohibit the operation of all foreign laws, and the rights growing out of them, within its own territories. It may prohibit some foreign laws, and it may admit the operation of others. . . . When its code speaks positively on the subject, it must be obeyed by all persons, who are within reach of its sovereignty. When its customary, unwritten, or common law speaks directly on the subject, it is equally to be obeyed. . . . *When both are silent, then, and then only, can the question properly arise, what law is to govern in the absence of any clear declaration of the sovereign will*. . . .

(emphasis added).

act is to apply extraterritorially, then, *from the court's point of view*, no conflict of laws problem exists. Assuming the law was a valid exercise of legislative power, the court is obligated to enforce that law.[135] Theoretically, only when the law is silent on extraterritorial application does the court have discretion to pursue a choice of law analysis.[136] *Timberlane* takes the choice of law balancing approach despite the Sherman Act's foreign commerce provision which provides for extraterritorial application. In order to limit the Sherman Act's application on a principled basis, a court should not apply conflicts principles as if the foreign commerce provision was not there; rather the court should work within the language and interpret congressional intent.

Restatement

Judge Choy also cited section 40 of the *Restatement (Second) of Foreign Relations Law* as authority for *Timberlane*'s comity approach.[137] He stated that "[t]his section was obviously fashioned with trade regulation problems in mind, for all five illustrations presented in the comment to this section involve such regulation."[138] The language of section 40 and its illustrations, even though they relate to trade regulation, do not support *Timberlane*'s balancing of national interests test.

Section 40 of the *Restatement (Second) of Foreign Relations Law* 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 . . . .[139]

The word "require" is critical to the understanding of this section. In *Timberlane*, only the United States *required* conduct, that is, behavior consistent with the Sherman Act. Honduras, by contrast, simply enforced a security interest.[140] The bringing of the secured transaction suit was totally *discretionary* with the plaintiffs (defendants in the *Timberlane* action). The *Timberlane* opinion recognized the absence of any mandatory Honduran requirement when it found that neither the

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135 *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) ("if Congress has expressly prescribed a rule with respect to conduct outside the United States, . . . a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment").

136 *See supra* note 134.

137 *Timberlane*, 349 F.2d at 613.

138 *Id.* at 613 n.27.

139 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965).

140 *Timberlane*, 349 F.2d at 608.

act of state nor foreign sovereign compulsion defenses were available.[141] Consequently, the *Timberlane* facts do not fit within the section 40 characterization that "the rules [the two states] may prescribe *require* inconsistent conduct."[142]

The five illustrations to section 40 go directly to the issue of inconsistent mandates from the two nations, rather than to the *Timberlane* situation where the conduct inconsistent with the Sherman Act was discretionary with the defendants. In Illustration 1,[143] state A has restrictive trade practice legislation whereas state B does not. X, a national of A, and Y, a national of B, agree not to sell in each other's home markets. Although this agreement violates the law of state A, it is enforceable in state B. Consequently, Y may bring a breach of contract action in state B if X is ordered by state A to compete with Y in state B. The illustration concludes: "The court in A is required to consider whether under the circumstances the jurisdiction of A should be exercised and, if exercised, whether the court's decree should require conduct within B inconsistent with the law of that state requiring the performance of contracts."[144]

The facts in this illustration, thus, vary considerably from those in *Timberlane*, where the defendants maintained complete discretion over whether to sue to enforce their security interest. In the illustration, X did not initiate the judicial action which might require conduct inconsistent with the laws of another state. In *Timberlane*, by contrast, there was no third party petitioning the courts to force the defendants to take specific actions, the discretion to use the courts rested entirely with the *Timberlane* defendants. Consequently, the *Timberlane* defendants, unlike X, could not argue that they might be forced to violate the Sherman Act because they sought the order allowing the violative conduct.

Furthermore, the illustration's conclusion is directed more at the remedy than at the jurisdictional question. Actually, rather than referring to questions of subject matter jurisdiction, this illustration seems to be pointed at cases such as *United States v. Imperial Chemical Industries*,[145] where the court ordered conduct which violated the contract

141 *Id.* at 606-08, ("Here, the allegedly 'sovereign' acts of Honduras consisted of judicial proceedings which were initiated by Caminals, a private party and one of the alleged co-conspirators, not by the Honduran government itself.").

142 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965) (emphasis added).

143 *Id.* § 40, comment a, illustration 1.

144 *Id.*

145 105 F. Supp. 215 (S.D.N.Y. 1952) (antitrust decree ordering compulsory licensing of patents in Great Britain even though such order would force Imperial Chemicals to breach its exclusive patent license to British Nylon Spinners, a British corporation not doing business or otherwise present in the United States).

law of another nation.

Similarly, in Illustration 2,[146] the focus is on remedy and required conduct. Here, the court of state A requires X to compete actively in state B or face imprisonment for civil contempt. The illustration concludes that the court of B, on a suit by Y for the enforcement of the agreement, "should . . . take into account the exercise of jurisdiction by A, as by according X a defense or by mitigating damages."[147]

Unlike the first two illustrations, the Honduran court in *Timberlane* did not *require* any specific conduct. Rather, the court only granted the *Timberlane* defendants the power to enforce their security interest after these defendants *chose* to petition the court. The defendants were not compelled to exercise this interest. Nor could a third party force the defendants to exercise their security interest. By contrast, in the above illustrations, a party other than the antitrust defendant could force conduct inconsistent with the laws of another state in order to enforce the agreements. As a result, these illustrations based on mandatory conduct provide little support for the more discretionary situation of *Timberlane*.

Nor do Illustrations 3, 4, or 5 support the court's analysis in *Timberlane*. Illustrations 3 and 4 are examples of the effects test of section 18[148] (based in major part on the *Alcoa* decision). In Illustration 3,[149] state A has restrictive trade legislation. Both states A and B use a particular commodity for defense purposes. B's only source of this commodity is state C. Nationals of C, acting in B and C, secure a monopoly in the commodity in order to control its distribution in B. The agreement giving rise to the monopoly is enforceable in C. The illustration concludes that A does not have jurisdiction to apply its antitrust law,[150] although the basis for this conclusion is not stated.

Illustration 4[151] makes it clear that Illustration 3's conclusion is not based on comity, but, rather, on there being no intended or actual effects in state A.[152] Illustration 4 adds that the commodity is also imported into A from C and that the monopoly affects these imports. The illustration concludes that "A, having jurisdiction on the territorial basis to apply its law to the monopoly under the rule stated in § 18, may

146 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40, comment a, illustration 2 (1965).
147 *Id.*
148 *Id.* § 18.
149 *Id.* § 40.
150 *Id.*
151 *Id.* § 40, comment b, illustration 4.
152 *Id.*

be expected to exercise its jurisdiction in view of the relationship of the exercise to its vital national interest."[153] No mention of comity or balancing competing interests is made. In fact, the failure to consider these issues in this context, where the agreement is enforceable in C, actually undermines the *Timberlane* analysis.

Finally, Illustration 5[154] also fails to support *Timberlane's* comity analysis. This illustration assumes the same facts as Illustration 4 but adds that "the monopoly is *required* by the law of B."[155] The illustration concludes: "Even though A has jurisdiction on the territorial basis under the rule stated in § 18, to apply its law to the monopoly, it must also apply the rule stated in this Section, and take into consideration the resulting hardship on the participants in the monopoly."[156] This conclusion is based on foreign sovereign compulsion reasoning rather than on comity considerations. The rationale for the conclusion is fairness to the participants, as in *Texas Maracaibo*,[157] rather than respect for a foreign sovereign. Once again, the absence of comity considerations in a situation where they might have been appropriate cuts against the *Timberlane* analysis rather than in support of it.

Jurisdictional Rule of Reason

Judge Choy concluded that "what we prefer is an evaluation and balancing of the relevant considerations in each case—in the words of Kingman Brewster, a 'jurisdictional rule of reason.' "[158] This phrase lends an aura of legitimacy to the balancing approach because it appears to be associated with the foundation concept of the rule of reason as first stated in *Standard Oil*.[159] This jurisdictional rule of reason, however, bears little doctrinal resemblance to *Standard Oil's* rule of reason.[160] In fact, the balancing concept conflicts directly with historical rule of reason analysis.[161]

In *Standard Oil*, the Court was faced with the Sherman Act's abso-

153 *Id.*

154 *Id.* § 40, comment b, illustration 1.

155 *Id.* (emphasis added).

156 *Id.*

157 *See* text accompanying notes 59-66 *supra*.

158 *Timberlane*, 549 F.2d at 613.

159 Standard Oil Co. v. United States, 221 U.S. 1 (1911).

160 This fact was explicitly recognized by Kingman Brewster. He stated: "Unlike antitrust's rule of reason developed in interstate commerce, . . . [the components of the jurisdictional rule of reason] are a response to essentially political rather than economic and business considerations." K. BREWSTER, *supra* note 2, at 446.

161 L. SULLIVAN, LAW OF ANTITRUST 165-97 (1977). *But see* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1932); Chicago Board of Trade v. United States, 246 U.S. 231 (1917).

lutely restrictive language that "[e]very contract, combination . . . , or conspiracy in restraint of trade . . . is illegal."[162] Read literally, this language could prohibit virtually all commercial agreements.[163] Consequently, the Court limited the application of the Sherman Act only to those agreements which had an *undue* restraint on competition.[164] Although given the discretion to determine whether a particular restraint was undue, the courts are limited to analyzing only the competitive effects of the agreement. The analysis does not allow for balancing other societal interests against the effect on competition to determine if the restraint was reasonable, and thus not a violation of the Sherman Act.

This seminal statement of the rule of reason has been echoed in more recent cases. Justice Stevens, writing for the Supreme Court in *National Society of Professional Engineers v. United States*[165] stated:

> Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.
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> * * * *
>
> The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." . . . [T]he inquiry is confined to a consideration of impact on competitive conditions.
>
> * * * *
>
> . . . [T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest . . . . Subject to exceptions defined by statute, that policy decision has been made by the Congress.[166]

Thus, traditional rule of reason analysis identifies competitive effect as the only variable to be measured when determining whether an agreement falls within the Sherman Act. By contrast, the "jurisdictional rule of reason" explicitly broadens the jurisdictional analysis to factors outside of competitive effect. As a result, the use of this label, which raises associations with traditional rule of reason analysis, seems inappropriate and misleading. This balancing test is more a rule of *reasonableness* based on non-competitive interests[167]—a standard

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162 15 U.S.C. § 1 (1976) (emphasis added).

163 *Standard Oil*, 221 U.S. at 63.

164 *Id.*

165 435 U.S. 679 (1978).

166 *Id.* at 690-92.

167 The American Law Institute (ALI) has adopted the reasonableness concept in its Tentative Draft No. 2 of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (RE-

which the Supreme Court has repeatedly rejected.[168]

THE *TIMBERLANE* TEST: APPLICATION AND IMPLICATION IN PRACTICE

In *Timberlane*, the court set out a list of factors to be considered as part of the comity analysis.[169] These factors are to be weighed and then balanced against the interests of the United States to determine whether extraterritorial jurisdiction is supported.[170] Although the court stated these factors in a straightforward fashion, assessing the content of these elements and their respective weights is anything but simple. Furthermore, the court spoke of United States interests as if these interests were self-evident.[171] Once again, this implied straightforwardness of the interest analysis is a serious over-simplification.

Judge Choy derived the elements of his comity analysis in *Timberlane* from the *Restatement (Second) of Foreign Relations Law*, section 40, and from Kingman Brewster's *Antitrust and American Business Abroad*.[172] Judge Choy stated the first factor as "the degree of conflict with foreign law or policy."[173] The "foreign law" aspect of this factor lends itself to discrete analysis because the foreign nation either does or does not have laws which regulate trade and, if it does, these laws may be objectively ascertained. The analysis then takes an uncertain tack, however, if the foreign nation does not have trade regulation comparable to that of the United States. The foreign nation's inaction may be an affirmative rejection by that government, a general lack of interest or a simple delay. A United States court is generally not equipped to decide which possibility occurred.

The "policy" aspect of this factor is even more confusing. It is unclear whether this "policy" is that of the foreign government or the foreign policy of the United States. Assuming Judge Choy was refer-

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VISED). The ALI has formulated a new approach to the extraterritorial application of United States laws in general, § 403, and antitrust laws in particular, § 415. The reasonableness analysis was drawn in part from sections 7, 17, 18, and 40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW (1965); section 6 of the RESTATEMENT (SECOND) OF CONFLICT OF LAW; and the comity analysis of *Timberlane* and *Mannington Mills*.

After only a superficial investigation of this draft, many of the criticisms of *Timberlane*'s comity analysis, e.g., authority, practical difficulties, and political questions, seem to apply equally to the ALI formulation.

168 *See* L. SULLIVAN, *supra* note 161, at 165-97.

169 *Timberlane*, 549 F.2d at 614; *see supra* text accompanying notes 67-75.

170 *Timberlane*, 549 F.2d at 613-14; *see supra* text accompanying notes 72-75.

171 *Timberlane*, 549 F.2d at 614.

172 *Id.* at 614 n.31.

173 *Id.*

ring to the foreign nation's policy, determining the content of that policy will be difficult. Should the parties seek to question foreign officials? Should the court admit testimony of political science experts? Should the court assume that the foreign nation's policy is determined by the interests expressed in its trade regulation laws, or, if there are no laws, by the conclusions which may be drawn from their absence? Judge Choy supplied no answers to these questions.

The second factor, "the nationality or allegiance of the parties and the locations or principal places of business of corporations,"[174] is easily ascertainable. Judge Choy recognized that "[w]hether the alleged offender is an American citizen . . . may make a big difference; applying American laws to American citizens raises fewer problems than application to foreigners."[175] Kingman Brewster, however, complicates the straightforward assessment of this factor by stating: "[F]oreign resentment may be aroused because, despite formal American nationality, local business is expected to feel a local allegiance."[176] Consequently, it appears that the parties must also ascertain the foreign nation's attitude toward local business.

The third factor, "the extent to which enforcement by either state can be expected to achieve compliance,"[177] is practically identical to an element found in section 40 of the *Restatement*.[178] It is not at all clear, however, how the effectiveness of enforcement to achieve compliance enters into a comity analysis. In fact, the *Restatement* addressed this factor in the context of a state's choice of the proper forum to accomplish its own objectives; not in the context of affording the foreign state comity.[179]

The consideration of a state's accomplishing its own objectives by resolving the trade regulation dispute in another forum is inapposite to the jurisdictional question in a private antitrust action and provides no

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174 *Id.*

175 *Id.* at 612.

176 K. BREWSTER, *supra* note 2, at 447.

177 *Timberlane*, 549 F.2d at 614.

178 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40(e) (1965) states that one part of its comity analysis is "the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."

179 *Id.* Comment (e) to section 40 states, in pertinent part:

In some situations, where a state has jurisdiction under the rule stated in § 18 [basically the effects test], . . . it may not be reasonable to expect that the initiation of proceedings against a defendant found within the jurisdiction and the application to him in that proceeding of the regulatory law of the state will really be effective to attain the objectives of that law. Where this is so, more effective means for the attainment of the state's objectives may be sought. In some instances these may be efforts to unify substantive law. . . . In still other situations, diplomatic negotiations leading to an international agreement may be the best route.

support for the *Timberlane* analysis. Presumably, the antitrust plaintiff will have considered the effectiveness of enforcement by means of a judicial proceeding before bringing suit. Regardless of whether the effectiveness of enforcement was considered or not, however, this element is misplaced in a comity analysis. A feeling of mutual consideration and respect is not the motive for refusing a judicial forum in this instance. Rather, when the state is faced with the prospect that its enforcement attempt will not accomplish anything, the *Restatement* suggests that the state should look elsewhere to accomplish its *own* objectives.

The fourth factor introduces "the relative significance of effects on the United States as compared with those elsewhere."[180] If the effects on the United States are limited to the amount of commerce involved in the alleged restraint, this element has been subsumed under the second leg of Judge Choy's tripartite analysis, considering whether the magnitude of the restraint is sufficiently large to be cognizable as a civil violation of the Sherman Act.[181] If the "effects" elsewhere are not limited to harmful effects, then the more effective the restraint, probably the more beneficial the effect to the foreign country because that country's commerce is likely being increased, at least in the short run, as a result of the restraint on United States commerce. Even if this factor were limited to harmful effects, it is not clear what significance this should have for a jurisdictional analysis. If effects in the United States were great, but the effects elsewhere were much greater, this cannot support the conclusion that the United States should defer to another country's laws.

The fifth and sixth factors, extent and foreseeability of explicit purpose to affect American commerce,[182] go to the state of mind of the defendant, not to comity considerations. Conceptually, if comity is the goal, then the actions of the individual participants should be irrelevant since the interests of the sovereign are the focus of the analysis, not the wrongdoing of the defendant. To cloud the comity analysis by examining the intent behind the defendant's conduct defeats the comity purpose because foreign interests are thereby ignored. The first step of *Timberlane*'s tripartite analysis considered the nature of the defendant's conduct.[183] Perhaps these fifth and sixth factors are more appropriate to the tripartite analysis than to the comity investigation.

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180 *Timberlane*, 549 F.2d at 614.
181 *Id.*
182 *Id.*
183 *Id.* at 613, 615.

The seventh factor, "the relative importance to the violations charged of conduct within the United States as compared with conduct abroad,"[184] also lends very little to the comity analysis. This element simply restates the conditions under which a foreign interest analysis is appropriate. If there were allegedly illegal conduct in the United States as well as abroad, the courts would have no problem exercising jurisdiction. This conclusion was expressly accepted by Kingman Brewster[185] when he stated that a court would be justified in enforcing the antitrust laws in this context because "[t]o rule otherwise would impair our ability to effectively maintain the integrity of the competitive policy at home."[186] This result leaves us with a restatement of the problem—little or no conduct in the United States and substantial conduct abroad. It does not aid the analysis.

Once these factors are analyzed, *Timberlane* directs that the court must balance these interests against the interests of the United States.[187] Before any balancing can be done, however, the court must first determine the respective weights of each factor in the balancing calculus, and then the interests of the United States. *Timberlane* offered no guidance as to the relative weights of these elements. In addition, *Timberlane* did not analyze United States interests, thereby leaving the trial court with numerous unanswered questions. Is the magnitude of the competitive restraint determinative of the interest involved? Does the executive branch express the interest of the United States? Does the congressional expression of intent to regulate anticompetitive activity dominate the interest question? The trial court must confront and answer these questions before *Timberlane*'s comity determination can be made.

After delving beneath the apparent certainty of the *Timberlane* factors, three additional questions remain:

1. What are the practical difficulties of conducting a *Timberlane*-type analysis?
2. Does the *Timberlane* analysis accomplish the apparent objectives which the court sought?
3. Is a court the appropriate forum for making the comity determination?

184 *Id.* at 614.
185 K. BREWSTER, *supra* note 2, at 447.
186 *Id.*
187 *Timberlane*, 549 F.2d at 614.

The Analysis in Practice

The theoretical difficulties pale beside the practical problems of pursuing a *Timberlane* analysis. At the most basic: who may bring the case? Judge Choy did not answer this question. If comity is to enter the jurisdictional question, then the burden is probably on the plaintiff to plead and prove these jurisdictional elements.[188] Kingman Brewster was clear as to who carries the burden: "The burden of establishing any one of these jurisdictional requirements should be borne by the plaintiff. Where more than one element is involved, proof of one of these should not operate to raise a presumption that the other exists."[189] Judge Carter of the United States District Court for the Southern District of New York, however, took the contrary position.[190] After holding that a *Timberlane*-type analysis must be made, the court stated: "Naturally, the defendants must bear the burden of demonstrating that foreign policy considerations outweigh the need to enforce the antitrust laws where the foreign commerce of the United States is affected."[191] Complicating the matter further, if a comity analysis is part of the subject matter jurisdiction determination, the court itself may be obligated under the *Federal Rules of Civil Procedure*[192] to raise the issue on its own motion.

The burden of proof question revolves around the issue of whether the *Timberlane* analysis is part of the jurisdictional determination or whether it arises as part of an abstention judgment.[193] Certainly the courts should answer this question clearly before the parties are obligated to develop the issue.

Once the burden of proof determination is made, the parties must confront the practical problems of developing the proof. Making the questionable assumption that the parties understand what proof the various factors require, they must, at minimum, begin studying the law of the foreign nation. Possibly, if the nation has antitrust laws, it will also have some form of legislative history. If no antitrust laws exist, the parties apparently must determine the significance of this absence; determine the policy of the foreign nation; ascertain how the foreign nation would react to its nationals or non-national residents being sued under the United States antitrust laws; and determine the interests of

188 FED. R. CIV. P. 8(a)(1).

189 K. BREWSTER, *supra* note 2, at 448.

190 Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680 (S.D.N.Y. 1979).

191 *Id.* at 688.

192 "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(3).

193 *See supra* text accompanying notes 93-100.

the United States. The difficulty of such an analysis in the simplest case of one foreign nation is considerable, but where numerous foreign nations are involved, the complexity appears overwhelming.

A series of hypothetical examples may better illustrate the practical difficulties of a *Timberlane* analysis. Assume a defendant company incorporated and having its principal place of business in a developing nation that encourages, but does not compel, restraints of trade. A private plaintiff sues the defendant under the Sherman Act for conspiring with other corporations, which are residents of other developing nations, to fix quantities and prices of a commodity exported to the United States. How does the court determine the depth of the foreign nation's interest? Is this one of the restraints encouraged by the developing nation? If so, how deeply does the foreign country support this restraint? Assume that the foreign country files an *amicus* brief and claims that it is deeply interested in this company and an action against the company would greatly offend this nation. In the face of this strong expression of concern, allowing the suit to go forward may do more to hurt foreign harmony than if the comity question had never been asked. To complicate matters further, assume the State Department expresses great interest in fostering harmonious relations with this country. If the court then decides not to apply the Sherman Act, it would not be clear if it so decided out of the court's own determination of comity to a foreign sovereign or out of deference to the executive branch's conduct of foreign relations. To complete the confusion, assume that the foreign companies were also sued, but the State Department was not interested in improving relations with some of the host countries of these other defendants. This scenario might result in one corporation escaping liability while the others are held liable—even though all the companies participated in the same restraint of trade.

As a second hypothetical example, assume that an advanced nation with a well-developed system of trade regulation protests greatly the United States extraterritorial assertion of the Sherman Act. It would be tempting for the court to look at the reasons behind the protest, but, according to Judge Choy, such an investigation would violate the act of state doctrine.[194] How should the court balance this sincere concern against the United States' interest? Once again, unless the court agrees not to apply the Sherman Act, more harm than good may be accomplished by introducing comity into the analysis.

Finally, assume hypothetically that a foreign nation's automobile

194 *Timberlane*, 549 F.2d at 615 n.34.

manufacturers voluntarily agree to restrain exports to the United States, not only at the urging of their government, but also at the urging of the United States government. How can the court assess the United States interest? Is the executive branch's policy determinative, or is the pro-competitive policy of the Sherman Act dominant? What if a congressional committee also urged the restraints, but Congress as a whole did not act on the matter?

These examples illustrate the great difficulty which a court must face when it undertakes the *Timberlane* comity analysis. The goals of *Timberlane*, moreover, do not actually require this complex analysis.

Did Timberlane *Ask the Right Questions?*

In order to determine whether the *Timberlane* factors are the most useful for resolving the comity issue, the objectives which *Timberlane* sought to accomplish must be identified. The theme of sensitivity to foreign interests appeared frequently in the opinion. Judge Choy used the phrase "comity and fairness" to highlight these concerns.[195] In addition, Judge Choy stated another objective of his extraterritoriality analysis:

> The act of state doctrine discussed earlier demonstrates that the judiciary is sometimes cognizant of the possible foreign implications of its action. Similar awareness should be extended to the general problems of extraterritoriality. Such acuity is especially required in private suits, like this one, for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed.[196]

Thus, the concern for the executive's conduct of foreign affairs, raised in *Sabbatino*[197] and *Alfred Dunhill*,[198] once again becomes relevant.

With regard to comity and fairness, the court is concerned with the foreign nation's involvement and concern with the pending matter.[199] The court is not, however, questioning the validity of these interests.[200] Judge Choy explicitly stated this limitation:

> [T]here is an important distinction between examining the validity of the "public interests" which are involved in a sovereign policy decision amounting to an "act of state" and evaluating the relative "interests" which each state may have "in providing the means of adjudicating disputes or claims that arise within its territory." Our "jurisdictional rule of

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195 *Id.* at 613.
196 *Id.*
197 376 U.S. 398 (1964).
198 425 U.S. 682 (1976).
199 *See supra* text accompanying notes 65-70.
200 *Timberlane*, 549 F.2d at 615 n.34.

> reason" does not in any way require the court to question the "validity" of "foreign law or policy." Rather, *the legitimacy of each nation's interests is assumed*. It is merely the relative involvement and concern of each state with the suit at hand that is to be evaluated in determining whether extraterritorial jurisdiction should be exercised by American courts as a matter of comity and fairness.[201]

Such a limitation is appropriate in a comity context. Otherwise, the court could be placed in the position of finding substantial involvement and concern by a foreign nation, while holding that the court will not recognize this concern because it is based on the "wrong" reasons. Not only is this determination impermissible under the act of state doctrine,[202] but it would also stand comity on its head. If comity is the goal, then the analysis must assume that each nation's interests are legitimate. Thus, the court's objective is to determine the level of the foreign nation's involvement and interest in the case, not whether the interest and involvement are justified.[203]

Given a goal of determining the magnitude of the foreign nation's concern, the most direct route might be to request an *amicus* brief from the foreign nation,[204] rather than attempting to divine this interest through a complicated and confused analysis of the *Timberlane* factors. If the foreign country is unwilling to file an *amicus* brief, then either the *Timberlane* analysis could go forward or the court could presume that

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201 *Id.* (emphasis added).

202 *Id.*

203 *Id.* This objective places a great burden on the court. For example, assume that a private party urged the foreign government to take a very strong position protesting the extraterritorial application of the Sherman Act. If the court is not able to look behind the foreign state's interest to determine its validity, then there is little protection against foreign private parties enlisting the aid of their government to defeat the purposes of the Sherman Act. However, if a court allows this investigation on the grounds that it is trying to determine the depth of the foreign government's concern in the matter, then it is merely changing the label and is, nonetheless, viewing the legitimacy of the foreign nation's interest, especially if that nation filed an *amicus* brief in which it expressed its concern. Such an investigation in the name of comity would probably decrease, rather than increase, foreign harmony.

The question of analyzing the validity of an act of state has arisen in several cases. *See, e.g.*, Continental Ore Co. v. Union Carbide, 370 U.S. 690, 705-06 (1962); United States v. Sisal Sales Corp., 274 U.S. 268, 271-76 (1927); American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909); Hunt v. Mobil Oil, 550 F.2d 68, 76 (2d Cir.), *cert. denied*, 432 U.S. 904 (1977); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 109-13 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). *See also* B. HAWK, *supra* note 2, at 134-48.

204 A procedure for filing such an *amicus* brief already exists. In a diplomatic circular, dated August 17, 1978, to Chiefs of Mission in Washington, the State Department requested that foreign governments present their views directly to the United States courts by filing *amicus curiae* briefs, thereby discontinuing the previous policy of the foreign governments' transmitting their views through diplomatic notes. Nash, *Contemporary Practice of the United States Relating to International Law*, 73 AM. J. INT'L L. 122, 124-25 (1979).

the foreign nation's interest in this case is insignificant.[205] In the effort to show respect for a foreign nation, the most efficient method for determining a sovereign's interest is to approach the source, the foreign nation itself.

Similarly, if *Timberlane* sought to protect the executive's freedom to conduct foreign affairs, then the court should follow a path more direct than the *Timberlane* analysis. As done prior to the passage of the Foreign Sovereign Immunities Act of 1976, the court could request a suggestion from the State Department directly,[206] rather than have the litigants and the court guess at what the State Department's position would be.[207]

In this time of dramatic scarcity of judicial resources, compelling a court to follow a test which takes an inefficient, indirect route to yield, at best, highly uncertain answers is counterproductive when a far more efficient and less wasteful method is available.

Is A Court the Appropriate Forum for Making the Comity Determination?

In contrast to the judiciary's historic reluctance to address political questions,[208] the *Timberlane* analysis requires the courts to confront political issues and perhaps even to create political questions where otherwise they would not exist. Kingman Brewster recognized explicitly that the components of his jurisdictional rule of reason "are a response to essentially political rather than economic and business considerations."[209] Consequently, the courts are obligated to seek out the political issues as an initial step in the Sherman Act analysis, stand-

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205 A test which is based on a foreign nation's filing a brief in a United States court may be considered unreasonable in that it requires the foreign nation to respond in the judicial proceedings of another sovereign. However, if the motivation of the United States court is to obtain information in order to make a comity determination, then it may not be unreasonable to expect the foreign government to exercise comity of its own and participate in the United States judicial proceeding.

206 Precedent for this type of participation by the State Department may be found in the sovereign immunity cases prior to the enactment of the Foreign Sovereign Immunities Act of 1976. In these cases, the State Department would file a suggestion as to whether immunity should be granted. *See supra* text accompanying notes 31-38.

207 This approach may appear to contradict the congressional termination of the suggestion procedure in the foreign sovereign immunity context. However, the uncertainty in the Sherman Act extraterritoriality area is similar to the uncertainty in the immunity area prior to the enactment of the Foreign Sovereign Immunity Act of 1976. Consequently, unless Congress clarifies its Sherman Act position, as it did in the immunity area with the Act of 1976, this suggestion procedure seems to be sound.

208 *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 100-11 (1978).

209 K. BREWSTER, *supra* note 2, at 446.

ing many of the concepts underlying the political question doctrine on their heads.

Unlike the traditional political question doctrine, where the subject matter of the cause of action is held inappropriate for judicial consideration,[210] the application of the Sherman Act in the international context is justiciable because Congress expressly provided a foreign commerce provision in the statute and, as historically interpreted, the elements of the statute fell within matters of traditional judicial concern. The *Timberlane* analysis, however, seems to require the court to address issues which fall within the nonjusticiability criteria of the political question doctrine. In *Baker v. Carr*,[211] the United States Supreme Court reviewed the political question doctrine in detail, stating:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or a lack of judicially discoverable and manageable standards for resolving it*; *or the impossibility of deciding without an initial policy determination of a kind clearly not for judicial discretion*; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; *or the potentiality of embarrassment from multifarious pronouncements by various departments on one question*.[212]

The *Timberlane* analysis raises questions under the three emphasized factors from *Baker v. Carr*. The elements discussed in *Timberlane* are neither easily discoverable nor manageable; the court is forced to make an initial determination of the political policies of the United States and foreign governments; and a court's pronouncements of these policies might embarrass the executive or legislative branches, when their policy considerations differ from the court's finding.

D. Gordon Blair, a Justice of the Court of Appeal, Supreme Court of Ontario, explicitly questioned the judiciary's ability to make these political determinations:

> We have considerable apprehension about the *Timberlane* decision. The *Alcoa* decision was understandable in basing extraterritorial intervention on an assertion of fact that American commercial interests were being interfered with. The *Timberlane* decision removes that safeguard and plunges the American courts into the realm of diplomacy. I suppose everybody else here is too polite to ask how it is that a judge . . . can decide what is the proper balance of international interests. . . . I feel

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210 J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 208, at 100.

211 369 U.S. 186, 209 (1962).

212 *Id.* at 217 (emphasis added).

that this is not a good area for the judiciary.[213]

It is not the subject matter of the international application of the Sherman Act which is nonjusticiable, therefore, rather it is that the *Timberlane* analysis forces consideration of issues which are likely to be nonjusticiable. By balancing the United States interest against a foreign government's interests, the court would have to make a political decision even if these interests were clearly defined. Where these interests are undefined, the court must also analyze political factors in order to determine the nature and weight of the respective interests. As a result, the *Timberlane* analysis inevitably forces the courts to make political judgments.

As presently formulated, the *Timberlane* analysis embroils the courts in political issues *ab initio*, when confronting the jurisdictional question. Whether the analysis can be modified to avoid unnecessary judicial determinations of political issues while remaining loyal to the objective of international comity, or, alternatively, whether the comity analysis should be abandoned altogether in the Sherman Act context now must be investigated.

TIMBERLANE: MODIFICATION OR REJECTION

Modifying Timberlane

The subject matter jurisdiction analysis in *Timberlane* may be modified to avoid unnecessary political determinations. Putting aside whether the analysis is applied in the jurisdiction *vel non* context or the abstention context, the comity investigation need not be undertaken unless the potentially affected foreign government affirmatively expresses an interest in the outcome of the case sufficient to exceed some threshold level. This level might be the filing of an *amicus* brief in which the foreign nation communicates the depth of its interest in the pending matter.[214] Once this threshold of concern is satisfied, the court may decide to undertake a comity analysis.

This threshold test may be justified because, in a balancing of interests analysis, the United States will always begin with an interest which must be outweighed, namely, the congressional assessment that competition is in the public interest. Consequently, if the foreign government is unwilling to express an interest in the case, then it may be presumed, absent a sufficient showing to the contrary, that the defend-

213 PERSPECTIVES, *supra* note 2, at 67.

214 For the prescribed method to be used by a foreign government when filing an *amicus*, see *supra* note 204.

ant will not be able to establish a foreign government interest great enough to outweigh this congressional statement.

If the foreign government does express an interest, the court need not require that the analysis be further developed by the parties. Once the foreign nation speaks, the court could request a brief from the State Department in order to obtain the policy position of the executive branch. This brief, however, should not be viewed as the dispositive expression of the United States interests. Rather, it should be viewed in conjunction with the pre-existing statement in the Sherman Act of congressional interest in fostering competition. As a result, the State Department response might either increase or decrease the United States interest in applying the Sherman Act to the case at hand. If the State Department chooses not to file a brief, the court could reasonably conclude that State is indifferent in the matter.

Once the *amicus* briefs are filed, the court need not require input from the parties as comity embraces the concerns of the sovereign states; it transcends the interests of individual litigants. Perhaps the plaintiff may be given the opportunity to argue the depth of the pro-competitive interest, but neither party can actually add anything meaningful to the political interest inquiry once the respective governments have spoken. Consequently, after this information is communicated, the court is ready to make its political determination. Although this method does not relieve the court from ultimately making a political judgment, it does remove from the court and the parties much of the burden of developing and analyzing the political factors and political analysis. And, if the foreign country does not satisfy the threshold test, this method forecloses the political analysis entirely.

Rejecting Comity in the Subject Matter Jurisdiction Area

Another judicial alternative to *Timberlane* would be rejecting comity as a factor in determining or exercising subject matter jurisdiction, but applying the concept to other aspects of the case where the judiciary has historically exercised discretion or spoken in terms of fairness—specifically, the areas of personal jurisdiction, discovery, and remedy.

The concept of personal jurisdiction is built around notions of fundamental fairness,[215] and, consequently, judges are experienced in pursuing a fairness analysis in this context. In a matter involving sensitive foreign relations questions, the court might increase the minimum con-

215 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

tacts hurdle out of a showing of comity and fairness toward the affected foreign state. As in the subject matter jurisdiction area,[216] it is not clear what basis of authority the court could assert to justify this use of comity. For present purposes, however, it is sufficient to point out that courts have considered fairness when conducting personal jurisdiction analyses, and, consequently, this area is arguably more appropriate than the subject matter area for considering concepts of international comity and fairness. Interestingly, the Department of Justice, which has commented favorably upon considering comity factors in the subject matter jurisdiction area,[217] has taken a hard line in relation to personal jurisdiction. In its *Antitrust Guide for International Operations*, the Department stated that it will "seek to exercise the fullest permissible jurisdiction over those who cartelize our markets."[218] Perhaps the Justice Department should rethink its position given that comity considerations are more appropriate in a context traditionally marked by a fairness analysis.

The courts might also introduce comity considerations into the resolution of discovery disputes, an area in which the courts have already exercised discretion in the international context.[219] In *Societé Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,[220] the Supreme Court reversed the trial court's decision, affirmed by the Second Circuit, to dismiss the plaintiff's complaint for failure to comply with a discovery order even though compliance would have exposed the plaintiff to criminal sanctions in Switzerland. The Court called for a case-by-case analysis to determine whether a party acted in good faith in its attempt to comply with a discovery order. If good faith is found, then dismissal of the complaint is not warranted.[221] As to the plaintiff in the case, the Court stated:

> The findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. . . . Plaintiff asserts only its *inability* to comply because of foreign law. . . . [W]e think that Rule 37 should not

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216 *See supra* text accompanying notes 125-168.

217 THE GUIDE, *supra* note 15, at 6-7.

218 *Id.* at 8.

219 For a discussion of problems in the discovery area, see Rahl, *Enforcement and Discovery Conflicts in Foreign Trade*, in INTERNATIONAL ANTITRUST, FIFTH ANNUAL FORDHAM CORPORATE INSTITUTE 343-57 (Hawk ed. 1980).

220 357 U.S. 197 (1958).

221 *Id.* at 211-12.

be construed to authorize dismissal of this complaint.[222]

Although the Court's reasoning in *Societé* revolved around fairness to the litigant, its willingness to pursue such an analysis indicated flexibility and discretion in resolving discovery disputes.

In *In re Westinghouse Electric Corp. Uranium Contracts Litigation*,[223] the Tenth Circuit built upon *Societé* and introduced notions of the foreign government's interests, as well as fairness to the litigant, when determining what should be done when a party fails to comply with a discovery order.[224] Rio Algom, a Delaware corporation doing business in Utah, was ordered by the District Court to produce documents located in Canada. A Canadian regulation prohibited such disclosure. The court held Rio Algom in civil contempt for failing to comply even though Rio Algom had unsuccessfully sought a waiver from Canadian authorities.[225] After applying the good faith analysis of *Societé*, the Tenth Circuit stated:

> In our view *Societe* holds that, though a local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions in the foreign country, still the fact of foreign illegality may prevent the imposition of sanctions for subsequent disobedience to the discovery order. We also believe it to be implicit in *Societe* that foreign illegality does not necessarily prevent a local court from imposing sanctions when, due to the threat of prosecution in a foreign country, a party fails to comply with a valid discovery order. In other words, *Societe* calls for a "balancing approach" on a case-by-case basis. As this Court recently said . . . , "The dilemma is the accommodation of the principles of the law of the forum with the concepts of due process and international comity."[226]

The court then cited Section 40 of the *Restatement (Second) of Foreign Relations Law* as a guide for the elements to be considered in a balancing of interests analysis.[227] The court concluded:

> We proceed now to a consideration of . . . the interests of Canada and the United States which place Rio Algom under contradictory demands. The records which Westinghouse seeks to examine are physically located in Canada. Such being the case, it would not seem unreasonable that the Canadian Government should have something to say about how those records will be made available to outsiders.
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> * * * *
>
> Canada has a legitimate interest in the disclosure of these documents

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222 *Id.*
223 563 F.2d 992 (10th Cir. 1977).
224 *Id.* at 997.
225 *Id.* at 994-97.
226 *Id.* at 997.
227 *Id.*

> and the district court erred in failing to consider such interest. There is nothing to indicate that the district court conducted any balancing of interests. . . . Such approach is not in accord with *Societe*.[228]

Thus, the Tenth Circuit moved beyond the good faith analysis of *Societé*, and interpreted that case to require a balancing of interests on a case-by-case basis, similar to the analysis in *Timberlane*.

A final area where the courts may readily consider comity factors is in fashioning a remedy. In his concurring opinion in *Mannington Mills*,[229] Judge Adams explicitly recognized this option. He stated that problems in formulating relief should not enter the threshold jurisdictional question, but rather should be addressed at a subsequent stage in the litigation.[230] The Southern District of New York exercised this discretion fourteen years earlier in the *Swiss Watchmakers*[231] case, where it fashioned a relief order providing that the parties would not be required to violate Swiss law. This discretionary flexibility can be expanded to include considerations of international comity.

In conclusion, even if the courts reject the comity analysis in their subject matter jurisdiction determinations, but they may continue to give attention to notions of foreign harmony by applying comity in the areas of personal jurisdiction, discovery, and remedy.

Congressional Options

Congress may take various paths if it should determine that the negative aspects of enforcing the Sherman Act in the international context are sufficiently great. The private right of action could be abolished in cases with international elements or, alternatively, a private right of action might be conditioned on a successful public action. In addition, the treble damages remedy might be done away with in the international sphere. Besides considering equal protection issues, Congress should answer two questions before so amending the Sherman Act. First, under what circumstances are these international context limitations to be triggered? Second, how can these limitations be reconciled with the economic rationale of the Sherman Act that competition provides the most efficient allocation and utilization of resources?

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228 *Id.* at 998-99.

229 595 F.2d 1287 (3d Cir. 1979).

230 *Id.* at 1302.

231 United States v. Watchmakers of Switz. Information Center, Inc., 1965 Trade Cas. ¶71,352, at 80,491 (S.D.N.Y. 1965).

CONCLUSION

Timberlane and its progeny, although expressing the laudatory goal of increasing foreign harmony, raise serious questions as to the appropriateness and practical manageability of a comity analysis. The authority for introducing comity considerations into a jurisdictional analysis is questionable at best.[232] Similarly, treating comity as a factor in an abstention analysis diverges considerably from historic abstention doctrines.[233] Both Congress and the Supreme Court have moved away from concepts of comity in the foreign sovereign immunity and act of state areas.[234] Additionally, the practical difficulties of pursuing the comity analysis as expressed by Judge Choy may be insurmountable.[235] And finally, *Timberlane* forces the courts to enter the political arena[236]—a forum for which the courts are ill-suited.

The *Timberlane* analysis should be rejected or, at a minimum, limited to application in appropriately justiciable areas. The Sherman Act's foreign commerce provision can be enforced within the scope of a traditional fact analysis. If this enforcement gives rise to problems in the international sphere, then these difficulties are best handled by the political branches of government, not the courts.

232 *See supra* text accompanying notes 90-96.
233 *See supra* text accompanying notes 97-100.
234 *See supra* text accompanying notes 31-57.
235 *See supra* text accompanying notes 169-207.
236 *See supra* text accompanying notes 208-213.