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Federal Judicial and Legislative Jurisdiction over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions beyond the Timberlane/Restatement Comity Approach

Michael G. McKinnon

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**Federal Judicial and Legislative Jurisdiction
Over Entities Abroad:
the Long-Arm of U.S. Antitrust Law
and Viable Solutions Beyond
the *Timberlane/Restatement*
Comity Approach**

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I. INTRODUCTION

Perhaps the most well known economic trend in the 1990s is the exponential growth of international trade and foreign investment.¹ A

1. *Foreign Direct Investment in a Global Economy*, DEP'T ST. BULL., June 1989, at 32; James E. Ellis, *Why Overseas? 'Cause That's Where the Sales Are*, BUS. WK.,

recent snapshot of the U.S. economy provides the most striking example of the tremendous flow of goods and money crossing American borders. United States merchandise exports grew tenfold between 1970 and 1992 to \$448.2 billion.² From 1987 to 1992, U.S. direct investment overseas rose 35%, to \$776 billion, exceeding foreign direct investment in the United States by \$84 billion in 1992.³

The increasing importance of foreign markets is exhibited on the micro-economic level as well. Foreign direct investment by United States corporations increased dramatically in recent years, and as a result, more and more domestic firms receive their income from abroad.⁴ Overseas subsidiaries of U.S. corporations generate sales representing about three times the value of all U.S. exports.⁵ General Electric's lighting division, for example, earned more than forty percent of its 1993 sales outside the United States.⁶

This trend is driven in part by the growing scarcity of economic opportunities at home, but also by the birth of new markets abroad. The economic and political rebirths of Eastern Europe, Latin American, and South East Asia have opened doors to vast populations of eager consumers.⁷ In response, both large and small corporations in the United States are venturing abroad, vis-a-vis branch offices, foreign wholly-owned subsidiaries, or joint ventures incorporated in foreign countries.⁸

Jan. 10, 1994, at 62; Thomas A. Stewart, *The New Era; Welcome to the Revolution*, FORTUNE, Dec. 13, 1993, at 66. For a detailed account of world trade and foreign direct investment figures see generally *Trade and Foreign Direct Investment*, OECD ECON. OUTLOOK, June 1992, at 35.

2. Ellis, *supra* note 1, at 62.

3. Stewart, *supra* note 1, at 66.

4. *Id.* One recent example of aggressive movement overseas of U.S. corporations is Anheuser-Busch's purchase of a 5% stake in China's Tsingtao brewery. *Anheuser-Busch to Buy 5-percent Stake in China's Tsingtao Brewery*, BUS. WIRE, June 28, 1993. August A. Busch III, chairman and president of Anheuser-Busch, noted that the move has "significant strategic importance for our international business efforts because of the rapid growth and enormous potential of the Chinese beer market." *Id.*

5. Stewart, *supra* note 1, at 66.

6. *Id.*

7. *Id.*; Albert Fishlow, *Latin America Transformed: An Accounting*, NEW PERSP. Q., Fall 1993, at 19. The move to Latin America has already begun. During 1991 and 1992, capital flowing to this region exceeded that flowing out by more than \$50 billion. *Id.* at 19. This represents more than the total net flow from 1983 to 1989. *Id.*

8. See Glenn R. Sarno, *Haling Foreign Subsidiary Corporations into Court Under the 1934 Act: Jurisdictional Bases and Forum Non Conveniens*, 55 LAW & CONTEMP. PROBS. 379, 381 (Autumn 1992) (discussing the legal and non-legal consideration guiding U.S. corporations to establish subsidiaries abroad).

These subsidiaries in turn either reexport their products to other foreign markets or take advantage of the domestic market where they reside.⁹

An additional impetus for foreign investment is the birth of free trade areas, such as that established by the North American Free Trade Agreement, which will encourage trade in goods and capital not just between the United States and Mexico,¹⁰ but throughout all of Latin America.¹¹

As goods and financial assets cross the United States border with increasing frequency, so does the long-arm of United States law. This is especially the case with federal antitrust law in which the government interest in regulating anticompetitive activity overseas is most compelling.¹² In introducing the International Fair Competition Act of 1993,¹³ Senator Metzenbaum explained one of the primary goals of international antitrust enforcement:

[Although] we cannot impose our high regard for fair competition on the rest of the world . . . [we can] help encourage fairness and strong competition in international markets by preventing foreign companies based in countries that do not foster free and open competition from exploiting American consumers and producers.¹⁴

The focus of the Clinton Administration on international enforcement was evidenced by Assistant Attorney General Anne Bingaman, who called it one of the Antitrust Division's top priorities.¹⁵

Resolving the conflicts arising out of the enforcement of United States laws governing foreign conduct falls ultimately to United States courts. Although determining the extraterritorial reach of U.S. law is only a matter of statutory construction,¹⁶ most federal statutes are silent or give only cryptic clues as to their scope.¹⁷ Judges, therefore, have formulated

9. *See id.*

10. Mexico is already the United States' third largest trading partner. *NAFTA Facts*, BUS. AM., Oct. 18, 1993, at 31. In 1992, U.S. exports to Mexico increased 22%, but they only grew by 5% to the rest of the world. *Id.*

11. Fishlow, *supra* note 7, at 19. In addition to Mexico, as of 1990 six other countries have negotiated bilateral framework agreements with the United States. These nations are Bolivia, Chile, Colombia, Costa Rica, Ecuador and Honduras. *Id.*

12. *See infra* notes 196, 418-35, 451-70.

13. S. 99, 103d Cong., 1st Sess. (1993).

14. 139 CONG. REC. S195-02, S534 (1993) (statement of Sen. Metzenbaum).

15. Bingaman Details Division Priorities in International Antitrust Enforcement, 65 Antitrust & Trade Reg. Rep. (BNA) 568 (Oct. 28, 1993).

16. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991), superseded by statute, as stated in *Stender v. Lucky Stores*, 780 F. Supp. 1302 (N.D. Cal. 1992); GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 591 (2d ed. 1992).

17. The Sherman Act, the mainstay of antitrust law, prohibits conduct in "restraint

their own federal common law rules to decipher the intended reach of various statutes.¹⁸ As U.S. business has expanded globally, these jurisdictional rules have changed significantly during their 200-year history.¹⁹ During the nineteenth century, the courts, in accord with then-prevailing notions of international law, severely limited the reach of U.S. law to conduct that occurred in U.S. territory.²⁰ But with the growing power and complexity of business organizations in the twentieth century, the nation's regulatory needs also increased.²¹ As a result, courts have abandoned the nineteenth century territorial approach in favor of analyses that, like the business organizations they regulate, do not limit themselves to the national borders.²² Thus, courts have readily adopted an expansive approach in areas of antitrust, securities, and certain export regulations.²³

Despite the logical progression of these jurisdictional rules, their standards remained unpredictable and were not uniformly applied among the

of trade or commerce." 15 U.S.C. § 1 (1988). Although the Act does not specifically define the boundaries of its extraterritorial reach, it defines commerce as commerce "among the several States, or with foreign nations." *Id.* This broad language has been repeatedly interpreted to indicate that Congress intended the Act to apply to both domestic and foreign conduct. *See, e.g.,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952); United States v. Sisal Sales Corp., 274 U.S. 268, 275-76 (1927); United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

18. Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 681-82 (1990) (arguing that when Congress enacted the 1933 and 1934 Securities Acts, it was aware of the international nature of securities markets, and thus the protection of those Acts should be limited to domestic trade).

19. *See* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POLY INT'L BUS. 1, 2-54 (1992) (exploring in detail the historical progression of legislative jurisdiction of U.S. law).

20. *See* *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21-22 (1968); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 290 (1949); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909), *overruled by* *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); BORN & WESTIN, *supra* note 16, at 574.

21. Born, *supra* note 19, at 1.

22. One example of the modern approach is the judicially created "effects doctrine," which allows extraterritorial application of U.S. law when the defendant's conduct abroad has had a substantial and foreseeable effect within the United States. *See* *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945); BORN & WESTIN, *supra* note 16, at 591-92.

23. *See generally* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310 (1985) (discussing the extraterritorial reach of antitrust, securities and foreign trade controls).

federal circuits. For example, although courts have universally adopted an expansive view in the antitrust arena, in other seemingly important areas, such as environmental or employment law, the courts have adopted a far more restrictive view by presuming that the law was intended to apply only within United States territory.²⁴ In addition, even with respect to antitrust law, where there is apparent consensus, there is still disagreement among several circuits on the proper scope of the applicable legal standard.²⁵

The resulting problems caused by unpredictable and ambiguous rules are clear. To the business community, uncertainty wrecks havoc on effective business planning.²⁶ To the international community, such far reaching and unpredictable rules are repugnant to stable foreign relations. Extraterritorial application of one nation's law to conduct that occurs entirely within another nation violates the most fundamental tenets of territorial sovereignty.²⁷ Frictions arise when a foreign government entity usurps the power of the domestic regulatory agency to regulate activity within its own borders.²⁸ In response to the intrusive nature of United States regulatory interests, foreign governments retaliate by applying their law extraterritorially to entities located in the United States. Foreign courts may also retaliate by refusing to recognize U.S. judgments that might be enforced within their borders.²⁹ Other more drastic measures, such as secrecy laws or blocking statutes, can be erected by for-

24. See generally Born, *supra* note 19, at 54-59; Harry H. Almond, *The Extraterritorial Reach of United States Regulatory Authority over the Environmental Impacts of Its Activities*, 44 ALBANY L. REV. 739 (1980).

25. BORN & WESTIN, *supra* note 16, at 597-98. For instance, courts in determining the legitimate reach of U.S. law, commonly disagree on what constitutes a cognizable "effect" on United States commerce. See *infra* notes 214-40 and accompanying text.

26. Deana Conn, Note, *Assessing the Impact of Preferential Trade Agreements and New Rules of Origin on the Extraterritorial Application of Antitrust Law to International Mergers*, 93 COLUM. L. REV. 119, 170 (1993).

27. BORN & WESTIN, *supra* note 16, at 601.

28. JAMES R. ATWOOD & KINGMAN BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* §§ 4.01-19 (2d ed. 1981 & Supp. 1993).

29. See Sarno *supra* note 8, at 397 n.116 (explaining the failure of the United States and Great Britain to establish a more liberal recognition of each others' judgments); *British Nylon Spinners Ltd. v. Imperial Chem Indus.*, [1953] Ch. 19, 26 (declaring that an order of a United States court enforcing an antitrust decree by enjoining the English defendant from performing its contracts to assign to English plaintiffs exclusive manufacturing and marketing rights is "an assertion of an extraterritorial jurisdiction which we do not recognize.")

eign legislatures to make the discovery of the activities of domestic interests impossible.³⁰

Recognizing the difficulties created by far-reaching application of United States law, federal courts have more recently sought solutions such as presuming territoriality, or engaging in a balancing of interests between nations.³¹ In addition, the executive branch has negotiated several bilateral treaties to reduce international tension by reconciling conflicting regulatory obligations and agreeing to certain terms of cooperation in enforcement.³² However, none of these approaches has achieved the degree of certainty or predictability sought by the international community.³³

This Comment examines the problem of extraterritorial reach of United States law, otherwise known as legislative jurisdiction. As a preliminary discussion, Part II provides an overview of the common jurisdictional issues presented when one of the parties before the court is a foreign corporation.³⁴ This is a necessary precursor since questions of judicial jurisdiction, *forum non conveniens* and venue, are generally raised in

30. Both secrecy laws and blocking statutes make it a crime for a requested party to respond to a foreign discovery request. BORN & WESTIN, *supra* note 16, at 602-03. Legislation may also quash the coercive effect of foreign regulations by retroactively restoring the civil penalties paid by the defendant corporation. The Protection of Trading Interests Act, enacted by Great Britain in 1980 largely in response to the United States' extraterritorial application of its antitrust laws, is an example of such legislation. The "Clawback Act" enables British corporations to recover all or part of anti-trust treble damage awards. See The Protection of Trading Interests Act, 1980, ch. 11, § 6; Erika Nijenhuis, Comment, *Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform*, 135 U. PA. L. REV. 1003, 1007 (1987).

31. For a discussion of these types of cases, see Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992); Note, *supra* note 23, at 1310 (criticizing the balancing of interests analysis approach adopted by § 403 of the Third Restatement of Foreign Relations Law); see also discussion *infra* notes 250-301 and accompanying text.

32. BORN & WESTIN, *supra* note 16, at 632 (noting the United States has signed four recent agreements regarding antitrust enforcement with the European Community, Australia, Canada, and West Germany, respectively); Seung Wha Chang, *Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts Within the Pacific Community*, 16 HASTINGS INT'L & COMP. L. REV. 295, 309-19 (1993) (proposing model treaties of antitrust enforcement). For further discussion of these agreements see discussion *infra* notes 437-50 and accompanying text.

33. See Note, *supra* note 23, at 1318.

34. See *infra* notes 39-154 and accompanying text.

conjunction with the defense of lack of legislative jurisdiction, and therefore are indirect limitations on the extraterritorial reach of U.S. law. Moreover, the tests adopted by courts concerning judicial jurisdiction often involve the same elements used in the legislative jurisdictional analysis. Part III focuses on legislative jurisdiction in particular, giving a historical overview of its progression to the present day.³⁵ Part IV then looks historically at the legislative jurisdictional rules in the area of anti-trust law.³⁶ This part also examines the most recent pronouncements towards extraterritorial antitrust from the Supreme Court, Congress, and the Justice Department, and includes the current debate among scholars and courts as to whether notions of international comity should limit the reach of U.S. antitrust law. Part V explores the various solutions proposed by modern legal scholars, including treaty based solutions to the legislative jurisdictional problem.³⁷ Finally, Part VI concludes this Comment by arguing in favor of a legislative solution which would compel courts to presume extraterritorial jurisdiction because this is the best way to ensure predictability for the international community without interfering with the legitimate reach of U.S. antitrust law.³⁸

II. U.S. COURTS' JURISDICTION OVER CORPORATIONS IN THE INTERNATIONAL CONTEXT

In an attempt to provide a context for the discussion of jurisdictional issues, this part introduces three common international business scenarios and analyzes the jurisdictional issues arising from them.

Scenario one: A U.S. parent corporation that establishes a branch office, wholly owned subsidiary, or joint-venture in a foreign country.

Scenario two: A foreign-based parent corporation that establishes a branch office, wholly owned subsidiary, or joint-venture within the U.S..

Scenario three: A foreign corporation is headquartered abroad with absolutely no presence in the United States, except perhaps the incidental presence of its goods or services.

35. See *infra* notes 155-95 and accompanying text.

36. See *infra* notes 196-435 and accompanying text.

37. See *infra* notes 436-94 and accompanying text.

38. See *infra* notes 495-507 and accompanying text.

In each scenario, the issue of *legislative jurisdiction* is clear: Can U.S. law permissibly proscribe the conduct of that part of the entity located overseas? The simple answer in all three scenarios is "yes." Depending on the factual circumstances of the case, U.S. law will apply to the conduct of these entities even though they are situated outside U.S. territory.³⁹

However, these scenarios raise other important jurisdictional issues. Notwithstanding the extraterritorial reach of U.S. law, does a U.S. court have the power to assert *in personam jurisdiction* over the foreign entity in the dispute? If so, are there other reasons the court would decline to exercise jurisdiction?

The impact that the resolution of these issues has on legislative jurisdiction is twofold. First, because they go to the power of the court even to hear the dispute, they may preempt the application of U.S. law before legislative jurisdiction is discussed. Second, the analyses adopted by U.S. courts to resolve different jurisdictional issues are often the same and highly interrelated. Thus, the arguments used to support a court's judicial jurisdiction are often the same arguments used to support legislative jurisdiction. Because of the important impact other jurisdictional issues may have on the legislative jurisdiction analysis, a brief discussion of these issues as applied to the above corporate scenarios is necessary.

A. *In Personam Jurisdiction Over Foreign Corporate Defendants*

First, it is possible under any of the three scenarios that the U.S. court will be unable to exercise *in personam jurisdiction* over the corporate defendant, in which case the foreign entity will be free from the application of U.S. law.⁴⁰ A court may not exercise *in personam jurisdiction* unless permitted by both the applicable long-arm statute and the United States Constitution.⁴¹

39. See *infra* notes 176-90 and accompanying text.

40. *In personam jurisdiction* is "the power of the court to adjudicate a claim against the defendant's person and to render a judgment enforceable against the defendant and any of its assets." BORN & WESTIN, *supra* note 16, at 28. By contrast, legislative or prescriptive jurisdiction is the authority of a state to make its laws generally applicable to persons or activities. *Id.* at 27. A third type of jurisdiction, "enforcement jurisdiction," . . . is the authority of a state to induce or compel compliance, or punish noncompliance with its laws." *Id.*

41. BORN & WESTIN, *supra* note 16, at 28-34; 2 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 4.41-1[4] (2d ed. 1993); 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 235,

1. Applicable Long-Arm Statute

Assuming the action is brought in a federal court,⁴² Rule 4 of the Federal Rules of Civil Procedure directs federal courts to use the service provisions contained in any applicable federal statute,⁴³ or to “borrow” the long-arm statute enacted by the state in which the federal court is located.⁴⁴ For example, federal antitrust and securities laws have service provisions allowing for service “wherever the defendant may be found or transacts business.”⁴⁵ This provision is generally interpreted to authorize “worldwide” service of process.⁴⁶ Absent a service provision in the applicable statute, courts are required, in both diversity and federal question cases, to adopt the long-arm statute of the state in which they are located.⁴⁷ Most modern state long-arm statutes are open ended, allowing ser-

at 256-60 (1978 & Supp. 1992); ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 3.02[1] (2d ed. 1991).

42. Suits brought under federal antitrust laws fall under the federal courts' federal question jurisdiction. BORN & WESTIN, *supra* note 16, at 543; *see also* U.S. CONST. art. III (granting federal courts jurisdiction to hear cases “arising under . . . the Laws of the United States”).

43. FED. R. CIV. P. 4(e) & 4(f).

44. FED. R. CIV. P. 4(e). Rule 4(e) provides:

Whenever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons . . . upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

Id.

45. 15 U.S.C. § 22 (1988) (Clayton Act); 15 U.S.C. §77v (1988) (federal securities laws); 2 MOORE, *supra* note 41, ¶ 4.33 (2d ed. 1988); BORN & WESTIN, *supra* note 16, at 99-100. Section 12 of the Clayton Act provides:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (1988).

46. *See, e.g.*, Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1413 (9th Cir. 1989); BORN & WESTIN, *supra* note 16, at 99. Other statutes are limited to “nationwide” service within the United States. *Id.* (citing 18 U.S.C. § 1965 (1988) (RICO)).

47. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 107-08 (1987) (holding that when the terms of the Louisiana long-arm statute were not met, service of process was unauthorized pursuant to FRCP 4(e)). Federal courts are bound by state court decisions in interpreting state long-arm statutes. *See Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1154 (6th Cir. 1990); *Gold Kist, Inc. v. Baskin Robbins Ice Cream Co.*, 623 F.2d 375, 377 (5th Cir. 1980); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 415 (9th Cir. 1977); *George v. Strick Corp.*, 496 F.2d 10, 13 (10th Cir. 1974). *But see United Rope Distrib. Inc. v. Seatrump Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991) (holding that although the Wisconsin long-arm statute permits jurisdiction, the due process clause precludes it because the defendant had

vice to the fullest extent permitted by the Constitution.⁴⁸ The language in some statutes, however, limits their reach to non-residents "engage[d] in business" in the state.⁴⁹ A third set of statutes specifies in exhaustive detail a "laundry list" of circumstances in which personal jurisdiction can be asserted over non-resident defendants.⁵⁰ Nonetheless, all such statutes extend jurisdiction to foreign corporations "transacting business" in the forum state.⁵¹

Assuming that the applicable long-arm statute permits service of process on the foreign corporate defendant, the assertion of jurisdiction must also be consistent with due process, as discussed below.

2. General Jurisdiction

A court's judicial jurisdiction is typically broken into two categories: (1) "general" jurisdiction and (2) "limited" or "specific" jurisdiction.⁵² If a plaintiff asserts general jurisdiction, the court may adjudicate *any* claim against the defendant, even if the claim arises out of activities unrelated to the forum.⁵³ General jurisdiction is ordinarily asserted when the defendant corporations are incorporated or registered to do business in the state.⁵⁴ A second basis for general jurisdiction is when the defendant engages in "continuous and systematic" activities in the forum.⁵⁵ General

no contacts with the state).

48. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1973); ILL. REV. STAT. ch. 110, para. 2-209 (1989); N.J. REV. STAT. 4:4-4(e) (1988).

49. See, e.g., ARIZ. REV. STAT. ANN., 4(e)(2) (1973 & Supp. 1993); HAW. REV. STAT. § 634-35 (1985); MO. ANN. STAT. §§ 351.633 & 506.500 (Vernon Supp. 1993); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986).

50. See, e.g., ALA. CODE § 9.05-15 (1983); FLA. STAT. ANN. § 48.193 (West 1968); GA. CODE ANN. § 9-10-91 (1982 & Supp. 1993); MICH. COMP. LAWS ANN. §§ 600.705 & 600.715 (West 1981); N.Y. CIV. PRAC. L & R § 302(a) (McKinney 1990); W. VA. CODE § 56-3-33 (1990 Supp.).

51. See CASAD, *supra* note 41, at § 4.02[1].

52. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). The distinction was formulated in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-64 (1966).

53. BORN & WESTIN, *supra* note 16, at 34.

54. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 892-93 (1988); RESTATEMENT (SECOND) CONFLICT OF LAWS § 41 (1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 421(2)(e) (1987); CASAD, *supra* note 41, § 3.02[1]; BORN & WESTIN, *supra* note 16, at 39.

55. See *Helicopteros*, 466 U.S. at 415 (reasoning that "due process is not offended by a state's subjecting the corporation to its *in personam* jurisdiction when there are

jurisdiction may also be based on the defendant's physical presence in the forum.⁵⁶ On this basis, general jurisdiction has been established by service upon corporate officers or directors found temporarily within the state, otherwise known as "tag service."⁵⁷ Federal courts are presently divided on whether due process permits jurisdiction over a foreign corporation based on tag service.⁵⁸

Applying the general principles outlined above to the three scenarios, when the corporation is incorporated in the forum state, as in scenarios one and two, the exercise of jurisdiction over that part of the entity located within the United States is clearly constitutional.⁵⁹ Whether jurisdiction also extends to the parent, subsidiary, or joint venture located overseas is another matter. Clearly, if the foreign entity has sufficient contacts with the forum state in its own right, independent of its relationship with the local entity, jurisdiction would be proper.⁶⁰ This might occur, for example, if the foreign parent or subsidiary corporation is continuously conducting business for its own account in the forum state.⁶¹ However, if the foreign entity's only contact with the forum state is its relationship with the local entity, jurisdiction will not be sustained, unless permitted under the agency or "alter ego" doctrines, discussed below.⁶²

sufficient contacts between the state and the foreign corporation"); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) (reasoning that it is fair and reasonable to subject a corporation to personal jurisdiction when the corporation has engaged in continuous and systematic activities in that state).

56. *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality); *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1971).

57. BORN & WESTIN, *supra* note 16, at 50. A plurality of the *Burnham* Court suggested that tag service on high-ranking corporate officers was sufficient to confer jurisdiction. *Burnham*, 495 U.S. at 610 n.1 (plurality). Earlier language of the Court seems to disagree. See, e.g., *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 122 (1927) (holding that jurisdiction over a corporation cannot be acquired simply by serving process upon an executive temporarily in a state if there are no other business ties in the forum).

58. Compare *Amusement Equip. Inc. v. Mordelt*, 779 F.2d 264, 271 (5th Cir. 1985) (finding that transient service on a general manager of a non-resident defendant corporation justified the assertion of general jurisdiction); *Aluminal Indus. v. Newtown Commercial Assoc.*, 89 F.R.D. 326, 329 (S.D.N.Y. 1980) (same) with *Scholz Research & Dev., Inc. v. Kurzke*, 720 F. Supp. 710, 712 (N.D. Ill. 1989) (finding that the due process clause does not permit jurisdiction over a company based upon tag service on corporate officer); *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1, 2-3 (M.D.N.C. 1960) (same).

59. BORN & WESTIN, *supra* note 16, at 39.

60. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

61. CASAD, *supra* note 41 at § 3.02[2][b].

62. CASAD, *supra* note 41 at § 3.02[2][b][ix]. These doctrines, which allow the court to pierce the local entity to reach an affiliated subsidiary or joint venture abroad, are

Similarly, in scenario three, absent a showing that the foreign entity is "engaging in business" in the state, general jurisdiction cannot be asserted when the corporate defendant has no office or agent in the United States.

3. Specific Jurisdiction

Specific jurisdiction alone limits the court to hearing claims related to or arising out of the defendant's contacts with the forum state.⁶³ According to the United States Supreme Court, due process requires: (1) that the defendant have sufficient minimum contacts with the forum state resulting from an affirmative act of the defendant; and (2) that the assertion of jurisdiction is "fair" under the circumstances.⁶⁴

According to the Court's more recent opinions, a defendant has sufficient minimum contacts when it "purposefully avails itself of the privilege of conducting [business] within the forum State."⁶⁵ Federal courts have interpreted this standard rather strictly. For instance, when a foreign corporation merely enters into a contractual relationship with an American party in the forum state,⁶⁶ or purchases goods or services

not generally considered constitutional in origin. *See infra* notes 83-109 and accompanying text.

63. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984); *von Mehren & Trautman, supra* note 52, at 1136-44; *BORN & WESTIN, supra* note 16, at 69-95.

64. 2 MOORE, *supra* note 41, ¶ 4.41-1[6]. If the defendant's contacts are more than minimal, to the point of being "continuous and systematic," the court may assert general jurisdiction. As mentioned, general jurisdiction allows the court to adjudicate *any* claims arising from the defendant's activities, even if they are unrelated to the forum state. *BORN & WESTIN, supra* note 16, at 34.

65. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Four Supreme Court Justices have interpreted this to mean that the defendant must engage in conduct "purposefully directed toward the forum State," and that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality). In contrast, four other Justices adopted the "stream of commerce" theory, under which a court may assert jurisdiction when the defendant places goods in the stream of commerce that eventually find their way into the forum state. *Id.* at 116-17 (Brennan, J., concurring in part and in the judgment).

66. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) ("If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot.") (emphasis added). The Court in *Burger King* up-

from the United States,⁶⁷ or manufactures goods abroad that are then sold or brought into the United States, courts have found these contacts insufficient to establish minimum contacts.⁶⁸ Courts have also held that a manufacturer's advertising in trade magazines circulated worldwide is insufficient.⁶⁹ Similarly, courts have denied jurisdiction when the foreign executives or employees make isolated trips to the United States, either to negotiate a contract with an American party or to attend a trade association meeting.⁷⁰

With regard to the second due process requirement, what is "fair" may depend on a number of factors, the most important of which is "the burden on the defendant."⁷¹ Other factors include:

held jurisdiction over the foreign defendants based not on the contract relationship alone, but on the extensive relationship between the parties in negotiating, drafting, and performing the contract. *Id.* at 482, 487; *see also Helicopteros*, 466 U.S. at 418 (finding that negotiating a contract for transportation services in Texas was insufficient to establish jurisdiction over the Peruvian defendant); *Stuart v. Spademan*, 772 F.2d 1185, 1193 (5th Cir. 1985) ("[A]n exchange of communications between a resident and a non-resident in developing a contract is insufficient of itself to be characterized as purposeful activity invoking the benefits and protection of the forum state's laws.").

But see Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1364 (7th Cir. 1985) (upholding jurisdiction over a foreign buyer who contracted with U.S. seller to have goods delivered to and inspected by the buyer's agent in the forum state); *Taubler v. Giraud*, 655 F.2d 991, 994 (9th Cir. 1981) (upholding jurisdiction over a foreign seller when seller traveled to California, contracted to sell wines exclusively to the plaintiff, and actually shipped one parcel to him).

67. *See, e.g., Wolf-Tec, Inc. v. Miller's Sausage Co.*, 899 F.2d 727, 728 (8th Cir. 1990) (rejecting long-arm jurisdiction when the defendant's only contact with the forum state consisted of ordering goods by mail or telephone); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1239 (6th Cir.) (holding that the purchase of an unspecified volume of American parts by a foreign corporation alone was insufficient contact for personal jurisdiction), *cert. denied*, 454 U.S. 893 (1981).

68. *Asahi*, 480 U.S. at 112 (plurality). *Id.* (plurality).

69. *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co.*, 499 F. Supp. 829, 841 (D. Or. 1980); *see also Albert Levine Assocs. v. Bertoni & Cotti*, 309 F. Supp. 456, 460 (S.D.N.Y. 1970) (nationwide advertising program insufficient to justify jurisdiction in New York).

70. *See, e.g., Cascade Steel*, 499 F. Supp. at 841 (declining to exercise jurisdiction when employees made isolated trips); *Javelin Corp. v. Uniroyal, Inc.*, 360 F. Supp. 251, 252 (N.D. Cal. 1973) (holding that attendance at trade association meetings was insufficient contact); *Easter Pre-Cast Corp. v. Giant Portland Cement Co.*, 311 F. Supp. 896, 898 (E.D. Pa. 1970) (concluding that isolated purchases did not satisfy minimum contacts); *see also Stuart*, 772 F.2d at 1194 ("The random use of interstate commerce to negotiate and close a particular contract, the isolated shipment of goods to the forum at the instigation of the resident plaintiffs, and the mailing of payments to the forum, do not constitute the minimum contacts necessary to constitutionally exercise jurisdiction over [defendant].")

71. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

[1] the forum State's interest in adjudicating the dispute . . . ; [2] the plaintiff's interest in obtaining convenient and effective relief . . . ; [3] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; [4] and the shared interest of the several States in furthering fundamental substantive social policies.⁷²

It is also important to note that when jurisdiction is asserted over an alien defendant, as in all three scenarios, there is an implied presumption against the finding of jurisdiction. As the Supreme Court advised in *Asahi Metal Industry Co. v. Superior Court*,⁷³ “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”⁷⁴ The *Asahi* court offered two explanations for this “reserved” approach: first, there are “unique burdens placed upon one who must defend oneself in a foreign legal system;”⁷⁵ second, assertions of personal jurisdiction over foreigners may arouse foreign resentment or interfere with U.S. foreign relations.⁷⁶ Therefore, it appears that a corporate entity's mere status as a foreigner, as depicted in scenario three, may itself be grounds to prevent the assertion of jurisdiction.

4. Counting National Versus State Contacts

Typically, courts only consider the foreign defendant's contacts with the forum state to determine whether general or specific jurisdiction lies.⁷⁷ However, when a party files suit pursuant to a federal statute that authorizes nationwide or worldwide service of process, a number of federal circuits have considered both in-state contacts as well as the defendant's contacts within the territory of the United States.⁷⁸ Thus,

72. *Id.* (citations omitted).

73. 480 U.S. 102 (1987).

74. *Id.* at 115 (plurality) (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

75. *Id.* at 114 (plurality). To a foreign corporation, the American forum might be greatly inconvenient and burdensome, particularly in light of liberal U.S. rules regarding pretrial discovery. BORN & WESTIN, *supra* note 16, at 92-93. Such considerations should not weigh heavily in favor of the multi-national corporation, because in many cases the court may conclude that it assumed the risk of such burdens.

76. *See Asahi*, 480 U.S. at 115 (plurality). For further commentary on the foreign relations impact of assertions of jurisdiction over foreigners, *see generally* Born, *supra* note 19.

77. *See* BORN & WESTIN, *supra* note 16, at 34.

78. *Id.* at 96-123; *see, e.g., Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1413 (9th Cir. 1989) (holding that the worldwide service provisions of § 12 of the Clayton Act authorize the consideration of national contacts); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985) (holding that the worldwide ser-

when a plaintiff alleges violations of federal antitrust or securities laws, courts have interpreted the worldwide service provisions of those statutes as authorizing personal jurisdiction when the foreign corporation has sufficient minimum contacts with the United States rather than any particular state.⁷⁹ One justification proffered for this approach is that in federal question cases, the sovereign seeking enforcement of the statute is the United States government, and thus the relevant territorial scope of jurisdiction is the nation as a whole.⁸⁰ Courts have generally held that such an expansive reach of federal power is consistent with the Due Process Clause of the Fifth Amendment.⁸¹ The argument, however, has

vice provisions of § 27 of the Securities Exchange Act authorize national contacts analysis); *Herbstein v. Bruetman*, 768 F. Supp. 79, 81 (S.D.N.Y. 1991) (holding that RICO's nationwide service provisions authorize a national contacts test); *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 564 (S.D.N.Y. 1985) (same).

79. *See, e.g., Go-Video*, 885 F.2d at 1413 (holding that worldwide service provisions of § 12 of the Clayton Act authorize the consideration of national contacts); *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 402 F. Supp. 262, 329-30 (E.D. Pa. 1975) (finding that worldwide service of process and the venue provision in § 12 of the Clayton Act are sufficient to satisfy personal jurisdiction over a foreign corporation). *But see Sportmart, Inc. v. Frisch*, 537 F. Supp. 1254, 1259 (N.D. Ill. 1982) (rejecting worldwide service of process because of the failure of the plaintiff to establish a "jurisdictional nexus between the cause of action alleged and the transaction of business by [the defendant]").

For national contacts analysis in securities suits, see *e.g., Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985) (holding that a national contacts analysis is appropriate in a suit under Securities Exchange Act); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979) (same); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972) (holding that use of the word "wherever" rather than "where" demonstrates an intention by Congress to authorize worldwide service of process).

80. *Go-Video*, 885 F.2d at 1413; *FTC v. Jim Walter Corp.*, 651 F.2d 251, 256-57 (5th Cir. 1981).

81. *See Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956, 959 (1st Cir. 1984) (finding that due process only requires sufficient contacts within the United States as a whole); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1238 (6th Cir.) (same), *cert. denied*, 454 U.S. 893 (1981); *Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (2d Cir. 1974) (same); *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381, 389 (S.D. Ohio 1967) (same); *see also United States v. Union Pac. R.R.*, 98 U.S. 569, 603-04 (1878) (holding that nationwide service of process provided by federal statute is consistent with due process).

A minority of courts have held that due process requires greater scrutiny than mere national contacts. These courts have proposed a basic "fairness" test that considers both state and national contacts. *See, e.g., Kinsey v. Nestor Exploration, Ltd.*, 604 F. Supp. 1365, 1373 (E.D. Wash. 1985) (refusing to apply nationwide contacts when contacts with the forum state were so marginal as to offend basic fairness); *GRM v. Equine Inv. & Mgmt. Group*, 596 F. Supp. 307, 314 (S.D. Tex. 1984) ("no compelling reason to equate traditional fair play . . . to minimum contacts with the nation as a whole"); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203 (E.D. Pa. 1974) (determining that nationwide "service power is not unlimited").

not been successful when the federal statute fails to provide for at least national service of process.⁸²

When a federal statute does not provide for service, Federal Rule of Civil Procedure 4(e) directs the court to borrow the long-arm statute of the state in which the court sits. Most federal courts have narrowly construed state long-arm statutes as not permitting jurisdiction based on national contacts.

Thus in summary, a plaintiff will be allowed to count a foreign defendant's national contacts only if a federal statute is involved that authorizes national or worldwide service of process.

5. Subsidiary Jurisdiction

As noted above, when examining scenarios one and two, a branch office, subsidiary, or parent incorporated within the forum state subjects that locally based entity to the jurisdiction of local courts.⁸³ The real question is whether jurisdiction can also extend to that part of the entity located abroad by virtue of the corporate relationship alone. Whether the

82. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 103 & n.5 (1987) (refusing to address national contacts issue because no provision of the Commodity Exchange Act authorized nationwide service); *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1154 (6th Cir. 1990) (finding no personal jurisdiction because of the absence of nationwide service); *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 296 n.8 (3d Cir.) (stating that the Pennsylvania statute allows for personal jurisdiction only on the basis of contacts within the state), *cert. denied*, 474 U.S. 980 (1985); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 286 (3d Cir.) (allowing for personal jurisdiction on the basis of a treaty authorizing nationwide service), *cert. denied*, 454 U.S. 1085 (1981); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (rejecting use of national contacts test where Lanham Act does not provide for service of process).

See, e.g., Chandler, 898 F.2d at 1154 (rejecting nationwide service of process absent some authorization within the patent laws); *Max Daetwyler Corp.*, 762 F.2d at 296 n.8 (reasoning that the Pennsylvania long-arm statute limits jurisdiction to contacts with the state); *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985) (determining that California's expansive long-arm statute still requires minimum contacts with the state); *Wells Fargo*, 556 F.2d at 419 (holding that Nevada long-arm statute, which required tortious acts have taken place "within" Nevada, did not permit jurisdiction based on defendant's national contacts). *But see Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287, 288 (D. Conn. 1975) (holding that Connecticut's long-arm statute requiring tortious acts to take place "in" the state permitted use of a national contacts test).

83. *See CASAD, supra* note 41, § 3.01[1].

court can “pierce the corporate veil” to reach the foreign corporation depends upon the common law rules of agency.⁸⁴

When the parent corporation establishes a branch office—an unincorporated affiliate—as in scenario one and two, in personam jurisdiction over the entire corporation, both at home and abroad, clearly exists. Courts obtain jurisdiction because the branch office is not distinguishable from the parent corporation itself; that is, they are legally regarded as the same entity. Thus, the presence of one in the forum is regarded as presence of the other.⁸⁵

By contrast, where the parent corporation establishes a wholly-owned subsidiary or joint venture abroad, as in scenario one and two, it is not clear whether the entire corporate group is subject to in personam jurisdiction of the local courts.⁸⁶ Legally, the parent and subsidiary are separate entities and each are “citizens” of different countries. Each entity presumably has their own set of directors, officers, and corporate books making them totally separate corporations. Therefore, jurisdiction over one corporation should not automatically confer jurisdiction over the other.⁸⁷ However, if the domestic or foreign subsidiary acts as the agent of its foreign parent or merely acts as the alter ego of the parent, a United States court may assert jurisdiction over the foreign entity.⁸⁸

84. See generally *id.* § 3.02[2][b][ix]; 2 MOORE, *supra* note 41, ¶ 4.41-1[6]; BORN & WESTIN, *supra* note 16, at 136-50.

85. CASAD, *supra* note 41, § 3.02[1]. Courts regard service on the branch office of a foreign corporation as service on the defendant's agent. *Id.* Even if there is no branch office, if the foreign corporation has registered to do business in the state, service can be made on the secretary of state or some other person authorized by law to receive service of process. *Id.* Virtually all states require foreign corporations to appoint a registered agent as a condition of conducting business within the state. BORN & WESTIN, *supra* note 16, at 39. In either case, the assertion of jurisdiction over a properly served foreign defendant is constitutional. RESTATEMENT (SECOND) CONFLICT OF LAWS § 44 (1971); BORN & WESTIN, *supra* note 16, at 39.

86. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925) (holding that judicial jurisdiction over a wholly-owned subsidiary does not alone confer jurisdiction over the foreign parent).

87. The Second Restatement of Conflict of Laws describes the basic rule:

Judicial jurisdiction over a subsidiary corporation does not of itself give a state judicial jurisdiction over the parent corporation. This is true even though the parent owns all of the subsidiary's stock. So a state does not have judicial jurisdiction over a parent corporation merely because a subsidiary of the parent does business within its territory Judicial jurisdiction over a parent corporation does not of itself give the state judicial jurisdiction over a subsidiary corporation

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52, cmt. b (1971).

88. BORN & WESTIN, *supra* note 16, at 136-37. The Second Restatement also recognizes the alter ego exception:

Judicial jurisdiction over a subsidiary corporation will . . . give the state judi-

a. *The "alter ego" doctrine*

Under the alter ego doctrine, jurisdiction extends to the foreign entity when the parent corporation disregards the separate existence and corporate formalities of its subsidiary to such an extent that, in reality, there exists just a single corporation.⁸⁹ This would be true, for example, if the corporations failed to maintain separate boards of directors, books of account, or offices.⁹⁰ Nevertheless, 100 percent stock ownership and commonality of corporate personnel alone are not sufficient to establish an alter ego relationship.⁹¹ Most courts generally require "proof of con-

cial jurisdiction over the parent corporation [and vice versa] if the parent so controls and dominates the subsidiary as in effect to disregard the latter's independent corporate existence.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52, cmt. b (1971).

A determination that the foreign corporation is liable does not necessarily subject its individual officers and directors to jurisdiction. 2 MOORE, *supra* note 41, ¶ 4.41-1[6]. Jurisdiction over these actors must be predicated on some separate basis, such as showing that they acted in their personal interest. *Id.*

89. See *Cannon Mfg. Co.*, 267 U.S. at 336; see also *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983) (establishing that an alter ego relationship between two corporations requires "proof of control by the parent over the internal business operations and affairs of the subsidiary"); BORN & WESTIN, *supra* note 16, at 137; CASAD, *supra* note 41, § 4.03[5][a]; 2 MOORE, *supra* note 41, ¶ 4.41-1[6]. Courts have also used the alter ego theory to extend jurisdiction to a foreign subsidiary through the contacts of a local sister subsidiary. CASAD, *supra* note 41, § 4.03[5][c]. In such a case, the plaintiff must show that the affiliated corporations are merely elements of a single entity. *Id.*

90. See, e.g., *Dickson v. Hertz Corp.*, 559 F. Supp. 1169, 1174, 1176 (D.V.I. 1983) (upholding jurisdiction over a foreign corporation based on license agreements with two local entities that controlled the licensees to such a degree that it disregarded their independent existence). But see *Cannon*, 267 U.S. at 337 (refusing to impute the activities of wholly-owned subsidiary to a parent when the books were separate and the companies otherwise dealt with each other at arm's length); BORN & WESTIN, *supra* note 16, at 142-43.

Other factors considered besides the sharing of books and personnel may include (1) how extensively and intensively does the parent control the subsidiary's day-to-day operations; (2) how have the two corporations previously described their relationship; (3) whether the two companies enter into separate contractual relations with third parties; (4) to whom the two corporations account and pay for goods and services rendered to each other; (5) and whether the companies are separately and adequately capitalized. BORN & WESTIN, *supra* note 16, at 143.

91. See *Miller v. Honda Motor Co.*, 779 F.2d 769, 772 (1st Cir. 1985) (refusing to impute the contacts of an in-state subsidiary to the foreign parent based on 100% ownership or the commonality of two directors because the subsidiary's business activities were sufficiently independent); *Hargrave*, 710 F.2d at 1160 (refusing to ex-

trol by the parent over the internal business operations and affairs of the subsidiary" to an extent which is "greater than that normally associated with common ownership and directorship."⁹²

When federal antitrust violations are alleged, the United States Supreme Court has permitted a less rigorous standard than the alter ego doctrine.⁹³ In *United States v. Scophony Corp. of America*,⁹⁴ the Court allowed jurisdiction even though separate corporate formalities were observed.⁹⁵ The Court justified jurisdiction on the grounds that the foreign parent was highly involved in the activities of the U.S. subsidiary and had exercised a *significant degree* of direct control and supervision over its operations.⁹⁶ Other federal courts have followed the *Scophony* approach

tend jurisdiction to the British parent corporation when despite 100% ownership, the two companies shared only one common director, no common officers, and maintained separate bank accounts); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 493 (5th Cir. 1974) ("Even were we to assume the existence of a parent-subsidiary relationship, we can find no evidence that the parent exercised the type of control necessary to ascribe it the activities of the subsidiary."); *Peterson v. U-Haul Co.*, 409 F.2d 1174, 1182-83 (8th Cir. 1969) (finding that a subsidiary doing business in one state does not alone give a court jurisdiction over a parent corporation in another state); *Berkman v. Ann Lewis Shops*, 246 F.2d 44, 48 (2d Cir. 1957) (reasoning that a court does not have jurisdiction over a foreign corporation solely because the corporation owns stock in a subsidiary corporation "doing business" in that state); *Blount v. Peerless Chem. (P.R.) Inc.*, 316 F.2d 695, 699 (2d Cir.) (rejecting jurisdiction because the activities of the corporation's president were related to intra-corporate affairs rather than business with New York residents), *cert. denied*, 375 U.S. 831 (1963); *Federal Deposit Ins. Corp. v. Milken*, 781 F. Supp. 226, 230 (S.D.N.Y. 1991) (rejecting jurisdiction based merely on the foreign defendant's status as a parent or its minority representation on the local entity's board); *Schmid v. Roehm GmbH*, 544 F. Supp. 272, 274 (D. Kan. 1982) (rejecting jurisdiction over a German corporation under alter ego theory, despite commonality of directors, financial assistance, and occasional failure to observe formal legal requirements).

92. *Hargrave*, 710 F.2d at 1160 (citations omitted); see also *Product Promotions*, 495 F.2d at 493; *Allen v. Toshiba Corp.*, 599 F. Supp. 381, 389 (D.N.M. 1984); *Schmid*, 544 F. Supp. at 274. The analysis provided in *Hargrave* is instructive:

In terms of [the subsidiary's] internal affairs, it appears that [the British parent] had complete authority over general policy decisions at [the subsidiary], including such matters as selection of product lines, hiring and firing of [the subsidiary's] officers, and approval of sizable capital investments. Day-to-day business and operational decisions, however, were made by [the subsidiary] officers. [The subsidiary] had sole responsibility for operation and management of its manufacturing facilities, research and development of new products, and marketing and sales strategies.

Hargrave, 710 F.2d at 1160.

93. BORN & WESTIN, *supra* note 16, at 142-43; 2 MOORE, *supra* note 41, ¶ 4.41-1[6] n.39 (noting a split of opinion as to whether *Scophony* overruled *Cannon* by implication in the context of antitrust litigation).

94. 333 U.S. 795 (1948).

95. *Id.* at 803-05.

96. *Id.* at 813-16. The Court noted that the relationship at issue had "the character

in the antitrust context.⁹⁷

Courts also consider the international character of the litigation in determining alter ego status.⁹⁸ Apparently, some courts have exercised jurisdiction in "border-line" cases in which dominance and control were less pronounced on the grounds that the U.S. plaintiff should not bear the burden of litigating abroad.⁹⁹

b. Agency theory

Under an agency theory, by contrast, courts may obtain jurisdiction over the foreign parent or subsidiary even when the two corporations are totally independent and no pervasive control by one over the other is shown.¹⁰⁰ This situation occurs when the domestic entity has transacted business on behalf of, or at the direction of, the foreign entity.¹⁰¹ The

of a common enterprise" and "requir[ed] constant supervision and intervention beyond normal exercise of shareholders' rights by the participating companies' representatives." *Id.* at 816.

97. See, e.g., *Chrysler Corp. v. General Motor Corp.*, 589 F. Supp. 1182, 1201 (D.D.C. 1984) (holding that Toyota had significant control over its subsidiary because Toyota held the rights to the import agreements, regularly sent representatives to the subsidiary, and demanded that the subsidiary comply with certain standards set forth by the Toyota corporation); see also *King v. Johnson Wax Assocs.*, 565 F. Supp. 711, 715 (D. Md. 1983); *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 402 F. Supp. 262, 327-28 (E.D. Pa. 1975); *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 850 (S.D. Fla. 1975); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 372-73 (D. Md. 1975), *aff'd in part and rev'd in part*, 554 F.2d 623 (4th Cir.), and *cert. denied*, 434 U.S. 923 (1977); *Flank Oil Co. v. Continental Oil Co.*, 277 F. Supp. 357, 365 (D. Colo. 1967). *But see* *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1547 (W.D. Pa. 1984) (denying jurisdiction based on the *Cannon* standard); *Frito-Lay, Inc. v. Procter & Gamble Co.*, 364 F. Supp. 243, 250 (N.D. Tex. 1973) (holding that the stricter standard of *Cannon* is still good law).

98. BORN & WESTIN, *supra* note 16, at 144; 2 MOORE, *supra* note 41, ¶ 4.42-1[6].

99. See, e.g., *Frito-Lay*, 364 F. Supp. at 250 (noting that when the parent is an alien, courts are more lenient in establishing an alter ego relationship because otherwise the plaintiff would be denied a forum in which to litigate the claim); *Tokyo Boeki (USA) v. S.S. Navarino*, 324 F. Supp. 361, 366 (S.D.N.Y. 1971) (finding jurisdiction over the parent when the subsidiary is essentially a branch of the parent).

100. BORN & WESTIN, *supra* note 16, at 144-50; CASAD, *supra* note 41, § 3.02[2][b][v]. Jurisdiction based on an agency relationship has been allowed even in the absence of any corporate affiliation between the foreign corporation and local entity. See, e.g., *Great Am. Ins. Co. v. Katani Shipping Co.*, 429 F.2d 612, 614 (9th Cir. 1970); *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135, 138-41 (5th Cir.), *cert. denied*, 379 U.S. 915 (1964); *I. Oliver Engerbretson, Inc. v. Aruba Palm Beach Hotel & Casino*, 587 F. Supp. 844, 851 (S.D.N.Y. 1984).

101. See, e.g., *Massey-Ferguson Ltd. v. Intermountain Ford Tractor Sales Co.*, 325

relationship necessary to establish agency must be more than incidental; rather, courts generally require a significant delegation of power to the local entity.¹⁰² Although a parent-subsidiary relationship is not required, a greater degree of corporate affiliation increases the chance that courts will exercise jurisdiction over the foreign entity.¹⁰³ If the business transacted through the domestic agent is “continuous and systematic,” the foreign corporation will be subject to general jurisdiction and can be sued there for any action against it.¹⁰⁴ In contrast, when the defendant’s

F.2d 713, 714 (10th Cir. 1963) (holding that a subsidiary was transacting business in the United States on behalf of Canadian parent), *cert. denied*, 377 U.S. 931 (1964); *see also* Ginter v. Swedish Match, A.B., 755 F. Supp. 545, 546 (E.D.N.Y. 1990); Larball Publishing Co. v. CBS, Inc., 664 F. Supp. 704, 707 (S.D.N.Y. 1987); Brunswick Corp. v. Suzuki Motor Corp., 575 F. Supp. 1412, 1421 (E.D. Wis. 1983); Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1334 (E.D.N.Y. 1981); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmbH, 505 F. Supp. 200, 202 (W.D.N.C. 1981); Crucible, Inc. v. Stora Kopparbergs Bergslags AB, 403 F. Supp. 9, 13 (W.D. Pa. 1975); *Credito e Inversiones de San Miguel v. B.F. Goodrich Co.*, 289 F. Supp. 854, 856 (D.P.R. 1968); *Frummer v. Hilton Hotels Int’l, Inc.* 227 N.E. 2d 851, 854, *cert. denied*, 389 U.S. 923 (1967).

The Second Restatement of Conflict of Laws summarizes the agency theory as:

If the subsidiary corporation does an act, or causes effects, in the state at the direction of the parent corporation or in the course of the parent corporation’s business, the state has judicial jurisdiction over the parent to the same extent that it would have had jurisdiction if the parent had itself done the act or caused the effects.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52 cmt. b (1971).

102. *Gottlieb v. Sandia Am. Corp.*, 452 F.2d 510, 513 (3d Cir.) (stating that the general agent must “have broad executive responsibilities and that his relationship [must] reflect a degree of continuity”), *cert. denied*, 404 U.S. 938 (1971); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967) (requiring that the defendant’s in-state representative provide services beyond “mere solicitation” and that the services be of such importance to the foreign corporation that if it did not have a representative to perform them, it would have had its own officials provide the services), *cert. denied*, 390 U.S. 996 (1968).

103. *See, e.g.*, *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492 (5th Cir. 1974) (concluding that negotiations and contractual agreements established an agency relationship); *see also* *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 n.26 (6th Cir. 1972); *Engine Specialties, Inc. v. Bombardier Ltd.*, 454 F.2d 527, 529-30 (1st Cir. 1972). The Second Restatement of Conflict of Laws states:

Even in the absence of a stock relationship between a local and foreign corporation, jurisdiction over the foreign corporation has sometimes been exercised on the basis of activities that the local corporation has conducted in the state as the agent of the foreign corporation. The existence of an agency relationship may be found when the foreign corporation consigns goods to the local corporation and exercises control over the latter with respect to price, merchandising or advertising.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52 cmt. b (1971).

104. *See, e.g.*, *Frummer v. Hilton Hotels Int’l, Inc.*, 227 N.E.2d 851, 854 (N.Y. 1967) (upholding jurisdiction even though defendant’s business contacts with its reservations

contacts are based on a more tenuous agency relationship, the court may assert special jurisdiction and thus be limited to hearing claims arising from or related to the relationship.¹⁰⁵ In reality, few cases have found a foreign subsidiary or parent corporation subject to jurisdiction because of the activity of a local entity absent an alter ego relationship.¹⁰⁶

c. Conspiracy theory

One other basis for jurisdiction, related to the agency theory, is conspiracy jurisdiction.¹⁰⁷ The conspiracy theory permits a court to assert jurisdiction over all co-conspirators, both resident and nonresident, based on their involvement in a conspiracy occurring partially within the forum.¹⁰⁸ Specifically, the plaintiff must (1) "make a *prima facie* factual showing of a conspiracy; (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) show that the defendant's co-conspirator committed a tortious act pursuant to the conspiracy" in the forum.¹⁰⁹

agent in New York were totally unrelated to plaintiff's personal injury claim), *cert. denied*, 389 U.S. 923 (1967).

105. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

106. *CASAD*, *supra* note 41, § 4.03[5][b].

107. *BORN & WESTIN*, *supra* note 16, at 150.

108. See, e.g., *American Land Program v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1454 (10th Cir. 1983) (stating that a nonresident publisher of a newspaper was not a co-conspirator with the author of a libelous article for jurisdictional purposes unless the publisher had involvement in the forum state); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1343 (2d Cir. 1972) (finding that a mere partnership alone could not support jurisdiction based on conspiracy because the plaintiff failed to show that the absent partner had knowledge of the wrongdoing or had delegated authority); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 782 F. Supp. 215, 220-23 (S.D.N.Y. 1992) (upholding jurisdiction over Australian banks having no other connection with the forum than involvement in a securities fraud conspiracy).

See generally Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 *FORDHAM L. REV.* 234 (1983); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 *CAL. L. REV.* 1 (1986); Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 *COLUM. L. REV.* 506 (1984).

109. *Allstate Life Ins. Co. v. Linter Group Ltd.*, 782 F. Supp. 215, 221 (S.D.N.Y. 1992). To prove the conspiracy, itself the plaintiff must show (1) there was an agreement between the defendants to violate U.S. law, (2) that one of the defendants committed an "illegal or fraudulent act" in furtherance of the conspiracy, and (3) that as a result, the plaintiff, or someone outside the conspiracy, was injured or damaged. See *id.*

If a plaintiff proves a conspiracy, even a foreign defendant with no real contact with the forum state and no direct business relations, as in scenario three, would be subject to the local court's jurisdiction.

B. Venue

Assuming that the personal jurisdiction requirements are satisfied, federal venue statutes specify the judicial district in which an action may be brought.¹¹⁰ For example, federal antitrust suits filed under section 12 of the Clayton Act may be brought in any district in which a corporate defendant "is an inhabitant," "transacts business," or "may be found."¹¹¹ However, when the defendant is a foreign corporation, the terms of the Alien Venue Act would seem to permit suit in any district, even if the defendant had no contact with the state.¹¹² Courts have reached this conclusion despite the narrower venue provisions of the Clayton Act, arguing that Congress intended the Alien Venue Statute to override other specific venue provisions.¹¹³ The perceived unfairness toward foreigners may be alleviated by the federal venue transfer statute,¹¹⁴ or by the common law doctrine of *forum non conveniens* discussed below. Moreover, for suits against U.S. and foreign defendants jointly, as in a conspiracy claim, courts suggest that the residence of the U.S. defendant constitutes the sole relevant criteria for venue purposes, notwithstanding the Alien Venue Act.¹¹⁵

110. See BORN & WESTIN, *supra* note 16, at 342-44.

111. 15 U.S.C. § 22 (1988).

112. See 28 U.S.C. § 1391(d) (1988). The Alien Venue Act provides that "[a]n alien may be sued in any district." *Id.* The statute has been held to apply to both individual and corporate alien defendants. See *Brunette Mach. Works, Ltd. v. Kockum Indus.*, 406 U.S. 706, 710-11 (1971); *Ohio Reinsurance Corp. v. British Nat'l Ins. Co.*, 587 F. Supp. 710, 711 (S.D.N.Y. 1984); *Brunswick Corp. v. Suzuki Motor Co., Ltd.*, 575 F. Supp. 1412, 1425 (E.D. Wis. 1983); *Mowrey v. Johnson & Johnson*, 524 F. Supp. 771, 774 (W.D. Pa. 1981); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354, 357 (W.D. Mich. 1973).

113. *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1408-10 (9th Cir. 1989) (allowing plaintiffs to pursue antitrust claims because narrow venue statutes should not be a "shield against suit"); see also *Brunette Mach. Works v. Kockum Indus., Inc.* 406 U.S. 706, 714 (1972) (Alien Venue Statute overrides venue provisions of patent statute). The justification put forth by the Supreme Court in *Brunette* was that "§ 1391(d) is properly regarded, not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special." *Brunette*, 406 U.S. at 714. If the rule were otherwise, it would be possible that a foreign defendant would be subject to jurisdiction based on substantial national contacts, but immune to suit in any district because of a failure to meet the venue requirements of the federal statute. BORN & WESTIN, *supra* note 16, at 343; AREEDA & TURNER, *supra* note 41, at 294-95.

114. 28 U.S.C. § 1404(a) (1988) (used for transfers within the United States).

115. See, e.g., *Mowrey v. Johnson & Johnson*, 524 F. Supp. 771, 774 (W.D. Pa.

C. *Forum Non Conveniens*

The doctrine of *forum non conveniens* is the final jurisdictional issue that may exempt the foreign entities in the above three scenarios from U.S. law.¹¹⁶ This judicially created doctrine permits a court with in personam jurisdiction over a defendant to send the action to an alternative forum bearing a greater relationship to the dispute.¹¹⁷

Accordingly, the first inquiry in *forum non conveniens* analysis is whether an "alternative" forum exists. The Supreme Court determined that this inquiry involved a relatively easy determination in *Piper Aircraft Co. v. Reyno*.¹¹⁸

Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirements may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.¹¹⁹

The Court found that "rare circumstances" do not include situations in which the foreign law is merely unfavorable to the plaintiff.¹²⁰ Rather, it

1981); *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219, 225 (D.N.J. 1966); BORN & WESTIN, *supra* note 16, at 342.

116. 28 U.S.C. § 1404(a), which governs venue transfers between federal courts within the United States, permits a district court to transfer "any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988). In general, §1404(a) has been interpreted as requiring an analysis similar to that applicable under the *forum non conveniens* doctrine. BORN & WESTIN, *supra* note 16, at 277; 1A MOORE, *supra* note 42, ¶ 4.02; CASAD, *supra* note 41, § 5.06[2]. Section 1404(a) only applies to transfers between different federal courts, and not to dismissal in favor of foreign forums, which are governed solely by *forum non conveniens* doctrine. BORN & WESTIN, *supra* note 16, at 277. One other significant difference is that under § 1404(a), a court may properly grant a transfer upon a lesser showing of inconvenience than is necessary under the common law doctrine. 1A MOORE, *supra* note 41, ¶ 4.02.

117. BORN & WESTIN, *supra* note 16, at 276. The increased use of *forum non conveniens* in recent years is due largely to the expanding reach of judicial jurisdiction over foreign defendants. *Id.*

118. 454 U.S. 235, 255 n. 22 (1981).

119. *Id.*

120. *Id.* (criticizing the Third Circuit for considering the fact that Scottish law does not recognize strict liability in tort, while plaintiff's choice of forum, California, does); *Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572, 575 (5th Cir. 1987) (holding that the lack of a contingent fee system in England was not a controlling factor); *De Melo v. Lederle Lab.*, 801 F.2d 1058, 1061 (8th Cir. 1986) (absence of punitive damages in Brazil does not make it an inadequate alternative forum).

must be shown that the foreign law fails to provide for any remedy at all.¹²¹

The second part of the *forum non conveniens* inquiry focuses solely on convenience. The Supreme Court suggested two sets of convenience factors for determining whether dismissal is appropriate in *Gulf Oil Corp. v. Gilbert*.¹²² These factors include the “private interest of the litigant[s],”¹²³ which relate to the parties’ practical inconvenience in litigating the suit locally, and “[f]actors of public interest,”¹²⁴ which concern the administrative burdens placed on the local court in hearing the suit.¹²⁵ If the balance of these factors weighs strongly in favor of the defendant, and if an appropriate alternative forum exists, then *forum non conveniens* may apply, thus defeating the plaintiff’s choice of forum.¹²⁶

Although there is generally a strong presumption in favor of the plaintiff’s choice of forum, this presumption applies with less force for

121. *Piper Aircraft*, 454 U.S. at 254; see also *Lake v. Richardson-Merrell, Inc.* 538 F. Supp. 262, 268 (N.D. Ohio 1982) (implying that an action would be dismissed under Quebec law on the grounds of prescription, a non-waivable “substantive bar to a cause of action”); *In re Air Crash Disaster Near Bombay, India*, 531 F. Supp. 1175, 1180-81 (W.D. Wash. 1982) (statute of limitations had run in India and there was a substantial possibility that the Bombay court would not accept defendant’s waiver of the statute); *Canadian Overseas Ores, Ltd. v. Compania De Acero Del Pacifico S.A.*, 528 F. Supp. 1337, 1342 (S.D.N.Y. 1982) (court feared that fair trial could not be had in Chile); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 455-56 (Del. 1978) (refusing to dismiss when it was unclear whether the alternative forum would recognize the unjust enrichment and tort claims asserted).

122. 330 U.S. 501, 508 (1947), superseded by statute as stated in *Cowan v. Ford Motor Co.*, 713 F.2d 100 (5th Cir. 1983).

123. *Gilbert*, 330 U.S. at 508. The specific factors lying under the “private interests” include:

[1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] the possibility of view of premises, if view would be appropriate to the action[;] . . . [4] all other practical problems . . . [;][5] the enforceability of a judgment . . . [;] and [6] whether the plaintiff [has sought to] “vex,” “harass” or “oppress” the defendant.

Id.

124. *Id.* at 508-09. The specific factors of “public interest” include: (1) the administrative burden on a busy court in hearing another case; (2) if the dispute has little relation to the forum, the burden imposed on jurors in hearing a case with little import to their community; (3) the burden on the court in interpreting and applying foreign law if the conflict of law provisions require the application of foreign law, and; (4) the interests of the local versus the foreign forum in deciding the dispute. *Id.*; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259-60 (1981). For further discussion on the appropriateness of governmental interest analysis in *forum non conveniens*, see BORN & WESTIN, *supra* note 16, at 299-300.

125. *Gilbert*, 330 U.S. at 508-09.

126. *Piper Aircraft*, 454 U.S. at 254; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971).

foreign plaintiffs.¹²⁷ For purposes of this Comment, because antitrust statutes are regulatory in nature, the plaintiff in many cases is the United States government making it unlikely that a court will overturn the presumptive validity of the U.S. forum.¹²⁸ Furthermore, because of the strong public interest factors favoring the U.S. forum, particularly the strong U.S. interest in enforcing its economic regulations coupled with the unlikelihood that the foreign jurisdiction will hear such claims, *forum non conveniens* is not a strong defense for foreign defendants.¹²⁹

D. Enforcement Jurisdiction

1. Quasi in rem/Attachment Jurisdiction

In the international business context, when corporate defendants are able to move financial assets quickly and safely to foreign locations, the issue of enforcement is especially problematic.¹³⁰ To forestall such tactics, plaintiffs often seek provisional relief to prevent the transfer of the defendant's assets pending the adjudication of the case on the merits.¹³¹

127. *Piper Aircraft*, 454 U.S. at 255-56 ("[T]he plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum . . . [because] [w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." (citation omitted)). This differential treatment by the Court seems driven by the assumption that a foreign plaintiff's choice of a U.S. forum is motivated by substantive law, jury verdicts, and better discovery opportunities, rather than by "convenience" of the parties. BORN & WESTIN, *supra* note 16, at 288; CASAD, *supra* note 41, § 5.06[2].

128. Generally, few reported decisions have actually relied on the *forum non conveniens* doctrine to dismiss a U.S. plaintiff's claims. BORN & WESTIN, *supra* note 16, at 287.

129. *See id.* at 305. Some lower courts have concluded that *forum non conveniens* is not available in antitrust actions. *See, e.g., Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983); *Laker Airways Ltd. v. Pan Am. World Airways*, 568 F. Supp. 811, 817 (D.D.C. 1983).

But see *Shepard Niles Crane & Hoist Corp. v. Fiat, S.p.A.*, 84 F.R.D. 299, 306 (W.D.N.Y. 1979) (finding Italy an adequate alternative forum for an antitrust action); John B. Sandage, Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693 (1985) (arguing that *forum non conveniens* should apply to antitrust claims).

130. BORN & WESTIN, *supra* note 16, at 125. "The risk of such evasion is especially great in international cases, because assets can be removed to distant foreign countries where locating the property is difficult and where U.S. judgments may be unenforceable." *Id.*

131. *Id.* at 129. If the court has *in personam* jurisdiction over the defendant, it can

This raises the final jurisdictional issue of the power of the court to secure the plaintiff's remedy, otherwise known as attachment jurisdiction.¹³²

Whether the attachment is sought before or after the entry of judgment, two basic requirements must be met for attachment jurisdiction to be valid: first, the relevant state or federal statute must authorize the attachment; and second, that attachment must accord with due process.¹³³ As the Court announced in *Shaffer v. Heitner*,¹³⁴ "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*," including *in rem* and *quasi in rem* actions.¹³⁵ Thus, the presence of the defendant's assets in the forum, without more, is not enough to permit the court to assert jurisdiction.¹³⁶

issue security orders preventing the transfer of the defendant's assets present within the forum as well as those assets in other forums as well. *Id.*; *see, e.g.*, *United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965) (upholding extraterritorial security orders).

132. Attachment jurisdiction is one form of a court's *quasi in rem* jurisdiction. Whereas *in rem* jurisdiction concerns the court's power to adjudicate interests in "a specific property as against the whole world," *quasi in rem* jurisdiction concerns the power to adjudicate interests in the specific property as to specific persons. BLACK'S LAW DICTIONARY 1121 (5th ed. 1979). *Quasi in rem* jurisdiction consists of two types, known as strict *quasi in rem* and attachment jurisdiction: in the former, the court is entertaining a claim of a proprietary interest in a specific property; in the latter the court entertains a personal claim against a defendant based solely on the presence of the defendant's property in the forum. BORN & WESTIN, *supra* note 16, at 125; CASAD, *supra* note 41, § 1.01[3].

133. "As with personal jurisdiction, federal courts will apply state jurisdictional statutes, borrowed pursuant to the Federal Rules of Civil Procedure 4(e) and 64, in attachment and garnishment suits." BORN & WESTIN, *supra* note 16, at 125. These statutes typically require that the defendant be notified either personally or by posting and publication for a prescribed number of days. *Id.*; 2 MOORE, *supra* note 41, ¶ 4.41-1[5]. They also dictate the permissible boundaries of attachment jurisdiction, which under some statutes extend to defendant's property located in other forums. BORN & WESTIN, *supra* note 16, at 134-35.

134. 433 U.S. 186 (1977).

135. *Id.* at 212 (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

136. *Id.* at 208-09. In reference to the future treatment of *in rem* and *quasi in rem* cases under the *International Shoe* standard, the Court noted that for *in rem* actions, where the source of the controversy is a claim to the property itself, "it would be unusual for the State where the property is located not to have jurisdiction." *Id.* at 207. As the Court explained, this is because of the benefit received by the parties from the State's protection of their potential interests and the State's strong interests in assuring marketability of property and in providing a procedure for resolving such disputes within its borders. *Id.* at 207-08. As for *quasi in rem* actions, particularly attachment suits, the mere presence of the property within the forum will not alone satisfy the *International Shoe* standard. *Id.* at 208. This is because

the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the

However, *Shaffer* allows the presence of the defendant's assets to count towards "minimum contacts,"¹³⁷ and in response, the lower courts, in interpreting the fairness standard, uphold jurisdiction when the plaintiff's claims are in some way related to the property within the forum.¹³⁸

Shaffer also seems to provide an exception for a court's assertion of "pure" attachment jurisdiction, that is, when the plaintiff seeks only to secure property within the forum while the dispute is litigated on the merits in another forum where *in personam* jurisdiction exists.¹³⁹ If the

presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction.

Id. at 208-09.

137. *Id.* at 207-08. The definition of defendant's assets is an expansive one. It includes not only tangible and intangible assets that are registered in the corporation's name, but also debts owed to the corporation. BORN & WESTIN, *supra* note 16, at 124 n.152.

138. See, e.g., *Tampimex Oil Ltd. v. Latina Trading Corp.*, 558 F. Supp. 1201, 1202 (S.D.N.Y. 1983) (ordering the attachment of the oil buyer's property held in a New York bank account even though the buyer had no offices or employees in the state); *Baker v. Young*, 798 P.2d 889, 892-93 (Colo. 1990) (upholding the attachment of the insurer's obligation to defend and indemnify to provide *quasi in rem* jurisdiction over an Australian defendant in a suit arising out of an accident in Colorado); *Consumers United Ins. Co. v. Syverson*, 738 P.2d 110, 113 (Mont. 1987) (holding sufficient minimum contacts existed to confer jurisdiction over nonresident defendant in Montana courts because the funds deposited by defendant in Montana banks were the subject of the controversy); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (rejecting jurisdiction over defendant in tort action based solely on the contacts of defendant's liability insurer in the forum state). *But see* *Papendick v. Bosch GmbH*, 389 A.2d 1315, 1318 (Del. Super. Ct. 1978) (declining *quasi in rem* jurisdiction over shares of local subsidiary of a German company, where plaintiff's claims were unrelated to shares and were unliquidated), *rev'd*, 410 A.2d 148 (Del. 1979) and *cert. denied*, 446 U.S. 909 (1980); BORN & WESTIN, *supra* note 16, at 129.

139. See *Shaffer*, 433 U.S. at 210 (acknowledging that mere presence of defendant's assets in the forum is not enough to support jurisdiction on the merits but might be enough to allow "jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*"); *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1048 (N.D. Cal. 1977) (upholding attachment jurisdiction over an \$85 million debt owed to the defendant which had no relation to the dispute, pending the plaintiff's filing of a suit in another forum that has *in personam* jurisdiction); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. d (1986 Rev. Apr. 15, 1986) ("[A] court may in proper circumstances assert control over local property in aid of . . . proceedings elsewhere."). *But see* *Stephens v. Walker*, 743 F. Supp. 670, 672 (W.D. Ark. 1990) (refusing to permit attachment of Arkansas property

plaintiff shows that the presence of the defendant's property is not merely fortuitous, and that there are no other assets within the United States from which the plaintiff could satisfy a potential judgment, courts generally uphold attachment jurisdiction.¹⁴⁰ At least one lower court, in seeming contradiction to *Shaffer*, has gone so far as to assert attachment jurisdiction over the defendant's property and allowed litigation to proceed even though *in personam* jurisdiction did not exist.¹⁴¹ The critical factor that the court relied on was that the defendant was a foreigner with no other contacts with the United States and thus was not subject to the jurisdiction of any U.S. forum.¹⁴² The special treatment in such extreme cases is not completely groundless, given footnote thirty-seven of the *Shaffer* opinion, which expressly leaves open the possibility of jurisdiction "by necessity."¹⁴³

as security for action pending in Massachusetts).

140. See, e.g., *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1048 (N.D. Cal. 1977); RESTATEMENT (SECOND) CONFLICT OF LAWS § 66 cmt. d (1986 Rev. Apr. 15, 1986).

[A] court may in proper circumstances assert control over local property in aid of . . . proceedings elsewhere [P]roper circumstances [include] when dissipation of a fund is imminently threatened . . . [or when] . . . a court in this country could not otherwise afford an adequate remedy to a plaintiff who should be allowed to sue here.

Id. As the Restatement explains, permitting such attachment addresses the concern that "[s]ome foreign countries will not recognize certain kinds of judgments rendered in this country, for example, a judgment for taxes or penalties or a judgment based on contacts [of the defendant] that the foreign country does not regard as a sufficient bases for *in personam* jurisdiction." *Id.*

141. See *Louring v. Kuwait Boulder Shipping Co.*, 455 F. Supp. 630, 633 (D. Conn. 1977) (holding that a Connecticut plaintiff could depend solely on *quasi in rem* jurisdiction over a Kuwait citizen without satisfying personal jurisdiction if no other forum existed for the plaintiff); see also BORN & WESTIN, *supra* note 16, at 134; CASAD, *supra* note 41, § 4.06[3]; Steven H. Becher, Note, *The Applicability of Shaffer to the Quasi-In-Rem Attachments of Foreigners' Assets*, 12 VAND. J. TRANSNAT'L. L. 393 (1979).

142. *Louring*, 455 F.Supp. at 633.

143. *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977) ("This case does not raise, and we therefore do not consider, the question whether the presence of defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."). Under jurisdiction "by necessity," a court could exercise jurisdiction in the absence of sufficient minimum contacts if it is shown that no other forum for the plaintiff exists. BORN & WESTIN, *supra* note 16, at 49; see also *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 419 n.13 (1984) (refusing to consider the plaintiffs' argument that Colombian courts did not provide an adequate alternative forum, and, therefore, that Texas courts could exercise "jurisdiction by necessity.").

2. Recognition and Enforcement of U.S. Judgments Abroad

In those cases where attachment jurisdiction is insufficient to satisfy the plaintiff's judgment, such as when the presence of the defendant's assets is fortuitous or when no assets exist in any U.S. forum, the plaintiff's only hope is to seek recognition and enforcement of its U.S. judgment in another forum.¹⁴¹ When the defendant's assets are located in another state, the plaintiff can enforce the judgment against those defendant's assets via the Full Faith and Credit Clause.¹⁴⁵ This constitutional provision requires state courts, as a matter of federal constitutional law, to recognize any valid final judgment rendered in another state of the Union.¹⁴⁶ Where defendant's assets are located in a foreign jurisdiction, recognition and enforcement of the judgment will be less certain. Currently, there are no treaties between the United States and other nations that would permit assured recognition and enforcement of U.S. judgments abroad.¹⁴⁷ Thus, each country's own rules guide the enforce-

144. See generally BORN & WESTIN, *supra* note 16, at 739-88. The distinction between recognition and enforcement is well explained there:

The "recognition" of a foreign judgment occurs when a . . . court relies upon a foreign judicial decision to preclude litigation of a particular claim, or factual dispute, on the ground that it has been previously litigated abroad. Recognition is akin to the domestic U.S. doctrines of *res judicata* and collateral estoppel. In contrast, the "enforcement" of a foreign judgment occurs when a court uses its coercive powers to compel a defendant ("judgment debtor") to satisfy a judgment rendered abroad.

Id. at 740; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. b (1987).

145. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (1971); BORN & WESTIN, *supra* note 16, at 740; see U.S. CONST., art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.").

146. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93. A necessary precursor to the application of Full Faith and Credit clause is that the rendering court had *in personam* and subject matter jurisdiction to hear the case. BORN & WESTIN, *supra* note 16, at 740.

147. BORN & WESTIN, *supra* note 16, at 743. The United States and the United Kingdom unsuccessfully sought to conclude a bilateral agreement on mutual recognition and enforcement of foreign judgments between 1975 and 1976. See United Kingdom-United States Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, 16 I.L.M. 71 (1977). Britain resisted the agreement, complaining of excessive American tort damage awards and treble-damage antitrust judgments. BORN & WESTIN, *supra* note 16, at 743 n.21; A. LOWENFELD, CONFLICT OF LAWS 745-47 (1986).

By contrast, there has been widespread agreement on the enforcement of inter-

ment of foreign judgments.¹⁴⁸

As a general rule, if one can be defined, U.S. judgments will not have extraterritorial effect unless the foreign court finds that they were rendered in conformity with standards recognized in international law.¹⁴⁹ This essentially requires that the foreign court be satisfied that the U.S. court asserted valid *in personam* and subject matter jurisdiction, and that the judgment was final and conclusive.¹⁵⁰

But even if jurisdiction was proper, most foreign courts refuse to enforce U.S. penal or tax judgments and any other judgment deemed repugnant to the public policy of the forum, otherwise known as the *ordre public*.¹⁵¹ This defense is most likely to be raised against U.S. antitrust judgments, because unlike regulatory law of most countries, U.S. antitrust law permits private citizens a cause of action against wrongdoers and the enables the recovery of treble damages.¹⁵² Reporter's note 4 of the *Restatement (Third) of the Foreign Relations Law of the United States* illustrates this point:

Some states appear to follow the rule that only the compensatory portion of a judgment for multiple damages (if otherwise enforceable) will be enforced. Thus, if a United States court in an antitrust action determined that the plaintiff had been damaged to the extent of \$100,000 and entered judgment for \$300,000 in accordance with 15 U.S.C. § 15 [providing for treble damages], a foreign court might

national arbitration awards. More than 90 nations, including the United States, signed the New York Convention, which requires courts of member nations to enforce arbitration agreements and to recognize arbitral awards. See Convention on the Recognition and Enforcement of Arbitral Awards, 1959, 21 U.S.T. 2517; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 487 (1987) (reporting on the Convention).

148. See ENFORCEMENT OF MONEY JUDGMENTS ABROAD (Philip R. Weems ed. 1988) (detailing the procedural rules followed in various nations). State practice varies widely. Some states refuse to recognize foreign judgments without a binding treaty or proof of reciprocity, while others, like many U.S. states, will unilaterally recognize foreign judgments as long as the proceedings afforded the parties are the equivalent of due process. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 8. (Introductory Note), at 591-92 (1987).

In the United States, recognition and enforcement of foreign judgments is a matter of state law. BORN & WESTIN, *supra* note 16, at 743. For further discussion of the recognition of foreign judgments within the United States, see *id.* at 739-88.

149. FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW § 792 (Kay & Bro. 1872).

150. A.W. SCOTT, PRIVATE INTERNATIONAL LAW 103-04 (M & E Handbook Series 1979); ARTHUR K. KUHN, COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW OR CONFLICT OF LAWS 103-04 (Fred B. Rothman & Co. 1981). As might be expected, the validity of jurisdiction is typically examined under the jurisdictional rules as applied by the foreign court.

151. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 8 (Introductory Note) & § 483 (1987).

152. See *id.* § 483 & Reporter's Note 4.

enforce only \$100,000 of the judgment. Some foreign courts might regard the entire judgment as penal and decline enforcement, both because the judgment is much larger than required for reparation, and because the plaintiff had acted as a "private attorney general," i.e., had sued to enforce a public law.¹⁵³

In some cases, the foreign court imposes an additional requirement of reciprocity, refusing to recognize an otherwise valid U.S. judgment if U.S. courts refuse to recognize judgments of the foreign court.¹⁵⁴

Thus, if the plaintiff is unable to secure its judgment as outlined above, a new action in the country where the defendant is incorporated is the only alternative. As previously mentioned, when the basis for the cause of action is U.S. regulatory statutes, such as antitrust and securities regulations, the foreign court will most likely not apply U.S. law.

III. HISTORICAL BACKGROUND ON THE EXTRATERRITORIAL REACH OF U.S. LAW GENERALLY

The extraterritorial reach of a country's law is typically a problem of legislative or prescriptive jurisdiction.¹⁵⁵ The *Restatement of Foreign Relations Law* defines legislative jurisdiction as the authority of a state to make its substantive law applicable to conduct, relationships, or status.¹⁵⁶ It is distinguishable from judicial jurisdiction, discussed above,

153. *Id.* Great Britain has taken the latter, more extreme view with respect to foreign antitrust judgments. The British Protection of Trading Interests Act, aimed primarily at U.S. antitrust actions, renders unenforceable any part of a foreign antitrust judgment for multiple damages or compensatory damages. See Protection of Trading Interests Act, 1980, ch. 11 §§ 5, 6. (Eng.), reprinted in ANTITRUST & TRAD. REG. REP. (BNA) No. 959, at F-1 (Apr. 10 1980). The statute even provides retroactive relief for antitrust defendants doing business in Great Britain that have incurred treble damages as a result of a foreign judgment. See *id.* § 6. This "clawback" provision creates a cause of action permitting the antitrust defendant to recover the amount paid under the judgment in excess of actual compensation. See *id.*

154. The U.S. Supreme Court took this position in *Hilton v. Guyot*, 159 U.S. 113 (1895), refusing to enforce a French judgment because French courts would not reciprocally enforce a U.S. judgment in reverse circumstances. *Id.* at 227-28. The majority of states have rejected the reciprocity principle, instead adopting a policy of unilateral recognition subject to certain exceptions that roughly parallel those in international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. d & Reporter's Note 1 (1987).

155. See generally BORN & WESTIN, *supra* note 16, at 541-645; Born, *supra* note 19; Willis L.M. Rees, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978); Symposium, *Extraterritoriality of Economic Legislation*, 50 LAW & CONTEMP. PROBS. 1 (Summer 1987); Note, *supra* note 23.

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

which is the power of a court to subject particular individuals or property to its judicial process. It is also distinguishable from subject matter jurisdiction, which refers to the power of a court to entertain specified classes of cases without regard to the applicable substantive rules of law.¹⁵⁷ For example, United States federal courts, have limited subject matter jurisdiction and may hear only those cases that involve a federal question or diversity of citizenship.¹⁵⁸

In litigation,¹⁵⁹ legislative jurisdiction and subject matter jurisdiction are often confused because the former is typically challenged in a motion to dismiss due to a court's lack of subject matter jurisdiction.¹⁶⁰ Other times, courts address the issue as a question of dismissal for failure to state a claim under the relevant statute.¹⁶¹ The concepts, however, are conceptually different and stand on different legal grounds. Most significantly, unlike judicial or subject matter jurisdiction, the limits on legisla-

§ 401(a) (1987).

157. BORN & WESTIN, *supra* note 16, at 541-42.

158. *See generally* 1 MOORE, *supra* note 41, ¶ 0.60[2.-1]; BORN & WESTIN, *supra* note 16, at 542-71; CASAD, *supra* note 41, § 1.01[1]; *see also* U.S. CONST. art. III.

159. There are two procedural ways to challenge the extraterritorial application of antitrust laws: The defendant may file a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), BORN & WESTIN, *supra* note 16, at 616, or for failure to state a claim under Rule 12(b)(6). The advantage of a 12(b)(1) motion is that it can be made at any time during the proceedings, even on appeal. 2A MOORE, *supra* note 41, ¶ 12.07[2.-1]. Under 12(b)(6), by contrast, the motion must generally be made within 20 days after service. *Id.* ¶ 12.06[1]. Moreover, a defendant may be at a tactical disadvantage under a 12(b)(6) motion because the judge is required to draw all factual inferences in favor of the non-moving party. BORN & WESTIN, *supra* note 16, at 616; *see* 2A MOORE, *supra* note 41, ¶ 12.07[2.-5]. In contrast, under 12(b)(1), the "judge has greater freedom to weigh the evidence and discount the weight of the plaintiff's allegations and evidence." BORN & WESTIN, *supra* note 16, at 616; *see* 2A MOORE, *supra* note 41, ¶ 12.07[2.-5].

160. Most lower courts have concluded that challenges to the extraterritorial application of the antitrust laws should be treated as attacks on subject matter jurisdiction under Rule 12(b)(1). *See, e.g., In re Insurance Antitrust Litig.*, 938 F.2d 919, 934 (9th Cir. 1991), *aff'd in part and rev'd in part*, 113 S. Ct. 2891 (1993); *Alpha Lyracom Space Communications, Inc., v. Communications Satellite Corp.*, No. 89 Civ. 5021, 1993 WL 97313, at *6, (S.D.N.Y. March 30, 1993); *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 500 n.5 (M.D.N.C. 1987); *Papst Moteren GmbH & Co. v. Kanematsu-Goshu (U.S.A.), Inc.*, 629 F. Supp. 864, 868 (S.D.N.Y. 1986); *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 931 (E.D.N.Y. 1985); *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 494 F. Supp. 1161, 1171-78 (E.D. Pa. 1980).

161. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959) (holding that no claim was available under the Jones Act); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909) (holding that a complaint based upon foreign conduct "alleges no case under the [Sherman Act]"), *overruled by United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

tive jurisdiction do not derive from the U.S. Constitution but from customary international law as interpreted by U.S. courts.

A. *Constitutional Authority to Apply United States Law Overseas*

Nothing in the Constitution expressly forbids Congress from passing legislation that reaches beyond U.S. borders.¹⁶² On the contrary, it is generally held that Congress' broad power under the Constitution to regulate commerce with foreign nations tacitly permits Congress to regulate conduct abroad.¹⁶³ Accordingly, the United States Supreme Court has consistently upheld Congress' power to make laws applicable to persons or activities beyond our territorial boundaries when U.S. interests are affected.¹⁶⁴

Some commentators have suggested that the Constitution may pose an obstacle to the extraterritorial application of U.S. law in certain circumstances, such as when the conduct at issue has only *de minimis* contact with the United States. The origins of this theory stem from the Court's pronouncements concerning the due process limits on a state applying its substantive law to some disputes, otherwise known as choice-of-law issues.¹⁶⁵ In *Allstate Insurance Co. v. Hague*,¹⁶⁶ the Court held that the Due Process Clause of the Fourteenth Amendment limits the power of a State to apply its substantive law to disputes that have no reasonable connection with the state.¹⁶⁷ Specifically, the state must have "a signifi-

162. BORN & WESTIN, *supra* note 16, at 574.

163. U.S. CONST. art. I, § 8, cl. 3. Congress has broad power "[t]o regulate Commerce with foreign Nations." *Id.*

164. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (applying the Sherman Act to conduct occurring primarily in Canada); *Lauritzen v. Larsen*, 345 U.S. 571, 579 n.7, 593 (1953) (upholding application of Jones Act to conduct occurring at a foreign port); *Steel v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952) (rejecting a constitutional challenge to the application of the Lanham Act to conduct occurring in Mexico); *Ford v. United States*, 273 U.S. 593, 621-23 (1927) (applying prohibition laws to conduct occurring beyond territorial waters of the United States); *United States v. Bowman*, 260 U.S. 94, 98-99 (1922) (upholding extraterritorial application of legislation concerning fraud on the U.S. government); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818) ("The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.").

165. *See* Born, *supra* note 19, at 5-6 & n.16.

166. 449 U.S. 302 (1981).

167. *Id.* at 320.

cant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law [is] neither arbitrary nor fundamentally unfair.”¹⁶⁸ This contacts requirement is generally regarded as a relatively low due process hurdle.¹⁶⁹ Though the Court has not addressed whether due process also restricts Congress’ ability to enact legislation that may apply overseas, it is assumed that the same limitation applies.¹⁷⁰

Some courts have also asserted that due process may limit Congress’ prescriptive power when the application would be in violation of public international law.¹⁷¹ The prevailing rule, however, is that the norms of international law are not binding on federal courts in applying a federal statute.¹⁷² Federal courts consult international law only “[w]here there is . . . no controlling executive or legislative act or judicial decision.”¹⁷³ Therefore, even if Congress enacts legislation in violation of international law, U.S. courts are bound to apply the domestic statute.¹⁷⁴ Nonetheless, federal courts have been admonished to avoid conflicts between international law and domestic law by presuming that the two are consistent.¹⁷⁵

168. *Id.*

169. Weintraub, *supra* note 31, at 1805.

170. Born, *supra* note 19, at 6 n.16. The Fifth Amendment’s Due Process Clause appears to restrict the federal courts in the same manner as the Fourteenth Amendment restricts state courts. *Id.*

171. *See, e.g.*, *Tamari v. Bache & Co.*, 730 F.2d 1103, 1108 n.11 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984).

172. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1) (1987).

173. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

174. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945) (“[W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States [A]s a court of the United States, we cannot look beyond our own law.”); *see also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Committee v. U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1) (1987).

175. *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21-22 (1963) (adopting rule of construction in favor of international law); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (same); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (reasoning that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

B. *Traditional Bases of Legislative Jurisdiction*

1. International Law

a. *The presumption of territoriality*

During the nineteenth century, the prevailing view in international law was that a nation had the power to prescribe laws only within its own boundaries.¹⁷⁶ This territoriality principle derives from states' sovereignty over their own national territory, and is therefore the most common and well recognized basis of jurisdiction.¹⁷⁷ The United States Supreme Court openly adopted this doctrine by holding that absent an affirmative indication by Congress that a statute has extraterritorial reach, federal legislation will be presumed to apply only to conduct within U.S. territory.¹⁷⁸ The Court often justified its use of the doctrine out of respect for foreign sovereignty, thus exercising what is known as "international comity."¹⁷⁹ Today, although territoriality is no longer the only basis for jurisdiction, it is still applied when the extraterritorial reach of U.S. legislation is in doubt.¹⁸⁰

176. Born, *supra* note 19, at 10-21.

177. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19 (1st ed. 1834) (adopting a territorial approach from principles of public international law); see also *American Banana v. United Fruit Co.*, 213 U.S. 347, 357 (1909); *Research in International Law of the Harvard Law School—Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 480-508 (Supp. 1935) [hereinafter *Harvard Research*] (discussing the legitimacy of the "territoriality principle").

178. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) ("It is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), *superseded by statute*, as stated in *Stender v. Lucky Stores*, 780 F. Supp. 1302 (N.D. Cal. 1992); see also *New York Cent. R.R. v. Chisholm*, 268 U.S. 29, 31 (1925); *American Banana*, 213 U.S. at 356-57 (1909).

179. See, e.g., *American Banana*, 213 U.S. at 356 (referring to the "comity of nations"). The Court defines international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); accord BLACK'S LAW DICTIONARY 267 (6th ed. 1990); see also *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("[C]omity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability.").

180. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2149 (1992) (Stevens, J., concurring) (relying on *Aramco's* territoriality presumption in refusing to apply the

b. Nationality

International law also recognizes the nationality of the defendant as an additional basis for jurisdiction, thus permitting a state to exercise legislative jurisdiction over its nationals and citizens, even when outside national territory.¹⁸¹ In U.S. courts, nationality jurisdiction was regarded as the one exception to the canon of statutory construction that presumed territoriality.¹⁸² The rise of nationality jurisdiction became most notable in the field of federal taxation, where the court has held that tax liability attaches to all U.S. citizens wherever they reside.¹⁸³

c. Birth of objective territoriality/the effects doctrine

With the arrival of the industrial age, business relationships became more complex and more international. This was particularly true after World War II, when the business community witnessed a wave of foreign investment and the birth of a new entity—the multinational organization. As a result, the principle of strict territoriality gave way to more far-reaching concepts that permit economic regulation to extend to relationships outside the boundaries of the regulating state.¹⁸⁴ Under what has become known as the “effects doctrine,” a state can exercise legislative jurisdiction over conduct occurring outside the state, provided that the

Endangered Species Act overseas); *Aramco*, 499 U.S. at 249 (applying a presumption of territoriality to ambiguous “boilerplate” language of Title VII); *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21-22 (1963) (rejecting the extraterritorial application of the National Labor Relations Act); *Benz v. Compania Naviera Hildalgo*, 353 U.S. 138, 147 (1957) (disallowing the application of the Labor Management Relations Act for conduct occurring on a foreign ship by foreign seamen); *Foley Bros.*, 336 U.S. at 285 (denying the extension of the Eight-Hour Day Act to construction work in Iran and Iraq); *New York v. Chisholm*, 268 U.S. 29, 32 (1925) (refusing a claim under the Federal Employers’ Liability Act for a tort that occurred in Canada).

181. BORN & WESTIN, *supra* note 16, at 573; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987); STORY, *supra* note 177, at 21-22 (“[N]o state or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects or others . . . [but] every nation has a right to bind its own subjects by its own laws in every other place.”); Harvard Research, *supra* note 177, at 519-39 (discussing nationality principle).

182. *See, e.g.*, *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.”); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (“It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.”), *overruled by Hudson & Smith v. Gruestier*, 10 U.S. (6 Cranch) 281 (1810)); *see also* STORY, *supra* note 177, at 19.

183. *See Cook v. Tait*, 265 U.S. 47, 62 (1924); 26 C.F.R. § 1.1-1(b) (1992).

184. Born, *supra* note 19, at 21.

conduct has sufficiently substantial and foreseeable effects with the state's territory.¹⁸⁵ The effects doctrine gained wide acceptance in U.S. courts, especially in antitrust and securities cases.¹⁸⁶

Modern U.S. decisions, however, have shortened the reach of the effects doctrine by requiring a balancing of governmental interests before permitting a law to apply beyond U.S. borders.¹⁸⁷ This modified approach came in the face of substantial criticism that U.S. courts were overreaching in applying antitrust and securities laws.¹⁸⁸

d. Passive personality principle

A final but rarely invoked basis of jurisdiction recognized by international law is the passive personality or protective principle, which permits the regulation of foreign conduct that threatens national security or is aimed to harm U.S. nationals.¹⁸⁹ The protective principle was employed, for example, in justifying the much criticized enforcement of the

185. BORN & WESTIN, *supra* note 16, at 573; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987). The birth of the effects doctrine in public international law is often associated with the *Lotus* case, a decision of the Permanent Court of International Justice (PCIJ), now the World Court. The S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7). *Lotus* addressed whether public international law forbade Turkey from applying its criminal law to the conduct of a French officer allegedly responsible for a collision between French and Turkish vessels in Turkish waters resulting in the deaths of several Turkish sailors. *Id.* at 28. The PCIJ held that Turkish courts were not barred from exercising jurisdiction because no rule in international law prohibited a state from applying its laws to conduct outside of its borders. *Id.* at 45. To the contrary, the court pointed out that the prevailing view in many countries was that their respective criminal laws could apply to individuals even when the acts are committed in the territory of another state, "if one of the constituent elements of the offense, and more especially its effects, have taken place" in the offended state. *Id.* at 38.

186. See BORN & WESTIN, *supra* note 16, at 20 & 45-48 (securities laws) & 29-39 (antitrust). For a further discussion of the development of the effects doctrine in antitrust jurisprudence, see *infra* notes 214-40 and accompanying text.

187. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-98 (3d Cir. 1979) (adopting a ten factor test for the effects doctrine); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614 (9th Cir. 1976) [hereinafter *Timberlane I*] (injecting a seven-factor test into the effects doctrine). For further commentary on the comity doctrine in legislative jurisdiction, see *infra* notes 250-381 and accompanying text.

188. BORN & WESTIN, *supra* note 16, at 600-02.

189. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (1987); see also Harvard Research, *supra* note 177, at 543-61 (discussing the protective principle).

Export Administration Act against foreign European corporations that traded with the Soviet Union during the 1970s.¹⁰⁰

2. Legislative Jurisdiction in U.S. Courts

The foregoing bases of jurisdiction, as developed under international law, have been extremely influential in guiding U.S. courts faced with the legislative jurisdiction issue. Although the issue of legislative jurisdiction is theoretically governed by U.S. rather than international law, courts often adopt the cannon of statutory construction that Congress, in drafting legislation, did not intend to violate international law limits on jurisdiction.¹⁹¹ Thus, absent any legislative directive, courts will commonly choose from the aforementioned standards.

The question remains, which standard do courts apply most frequently and when? Judicial authority is in serious conflict. In some cases courts adopt the long-standing cannon of statutory construction that presumes "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."¹⁹² In other cases, the more expansive doctrines of nationality or effects are employed.¹⁹³ The only reliable predictor appears to be the subject mat-

190. See generally Note, *Extraterritorial Subsidiary Jurisdiction*, 50 LAW & CONTEMP. PROBS. 71 (1987) (discussing in depth the Soviet pipeline incident); *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891, 891-904 (1982). Other examples of the protective principle are visible in the international criminal law field, which recognizes that some crimes, such as war-crimes, are so universally condemned that any nation which has custody of a perpetrator has jurisdiction to punish him. See *In re Demjanjuk*, 612 F. Supp. 544, 555-56 (N.D. Ohio 1985); *Attorney General v. Eichmann*, 36 I.L.R. 5, 50-57 (D.C. Jerusalem 1961) (holding that despite official protests from Argentina, Israeli courts retained jurisdiction because the defendant committed international crimes), *aff'd*, 36 I.L.R. (S. Ct. Israel 1962).

191. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2919 (1993) (Scalia, J., dissenting) (discussing the canon of construction that legislation should not violate international law); *The Apollon*, 22 U.S. (9 Wheat.) 362, 371 (1824) ("It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations."); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.")

192. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)), *superseded by statute* as stated in *Stender v. Lucky Stores*, 780 F. Supp. 1302 (N.D. Cal. 1992)). In *Aramco* the Court held that the existing version of Title VII of the Civil Rights Act of 1964 did not reach outside U.S. territory even though the statute contained broad provisions extending its prohibitions to "any activity, business or industry in commerce." *Id.* at 248 (citing 42 U.S.C. § 2000e(g) (1964)). The Court reasoned that such "boilerplate language" was an insufficient indication to override the presumption against extraterritoriality. *Id.* at 248-49.

193. See, e.g., *Société Internationale v. Rogers*, 357 U.S. 197, 212 (1958) (allowing

ter at issue. In antitrust and securities cases, for instance, courts have favored extraterritorial application, and thus have commonly interpreted the statutes to incorporate an effects doctrine.¹⁹¹ In employment and environment cases, by contrast, the courts are far more likely to revert to the age-old canon of statutory construction presuming territoriality.¹⁹⁵

extraterritorial discovery under the Federal Rules of Civil Procedure); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952) (holding that court has jurisdiction under the Lanham Act in a case against a U.S. citizen for trademark infringement and unfair competition abroad); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (finding extraterritorial jurisdiction under the Securities Exchange Act of 1934), *cert. denied*, 395 U.S. 906 (1969); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 424 (2d Cir. 1945) (upholding application of the Sherman Antitrust Act overseas).

194. BORN & WESTIN, *supra* note 16, at 590-91. The adoption of the effects doctrine in the antitrust field began with *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), holding that appellees who became parties to a conspiracy intending to restrain trade were within the jurisdiction of U.S. courts. *Id.* at 276. The doctrine reached its most pronounced acceptance in *Alcoa*, in which the court argued that an agreement was unlawful if it intended to affect imports and did in fact affect them. *Alcoa*, 148 F.2d at 444. *See also* *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962).

In the securities field, see *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (adopting the effects test for the first time), *cert. denied*, 395 U.S. 906 (1969); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987) (adopting the effects test put forth by the second circuit); *Tamari v. Bache & Co. (Lebanon)*, 730 F.2d 1103, 1105-06 (7th Cir.) (adopting the effects test and the conduct test), *cert. denied*, 469 U.S. 871 (1984).

195. For an example of the resurgence of the territoriality presumption in the employment and environmental fields, see *Aramco*, 499 U.S. at 250-51 (rejecting extraterritorial application of Title VII to a Delaware corporation doing business in Saudi Arabia); *Independent Union of Flight Attendants v. Pan Am. World Airways*, 923 F.2d 678, 682-83 (9th Cir. 1991) (holding that the Railway Labor Act does not apply to collective bargaining agreements allegedly breached by the hiring of foreign nationals for intra-European flights), *vacated*, 966 F.2d 457, 458-60 (9th Cir. 1992) (withdrawing the opinion for mootness and remanding to the district court to determine whether the judgment that the Act did not apply overseas should be vacated for mootness); *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 124-25 (8th Cir. 1990) (noting that Congress could not have intended for one provision of the Endangered Species Act of 1973 to apply only to domestic projects while extending another provision to foreign projects), *rev'd on other grounds*, 112 S. Ct. 2130 (1992) (both NEPA and the Endangered Species Act apply only to U.S. gov't agencies); *Cleary v. United States Lines*, 728 F.2d 607, 610 (3d Cir. 1984) (holding that Age Discrimination in Employment Act applies only within U.S. borders). Congress overturned the results of *Aramco* in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (1991), and *Cleary* by the Older American Act Amendments of 1984, Pub. L. No. 98-459, § 802(a).

IV. ANALYSIS OF THE EXTRATERRITORIAL REACH OF U.S. ANTITRUST LAW

U.S. antitrust law includes a number of different federal and state laws regulating the methods by which business enterprises compete with one another and deal with their customers, suppliers, and others.¹⁹⁶ The two U.S. antitrust provisions most frequently invoked are sections 1 and 2 of the Sherman Act. Section 1 declares illegal “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations.”¹⁹⁷ Section 2 specifically forbids any person to “monopolize any part of the trade or commerce among the several [s]tates, or with foreign nations.”¹⁹⁸

Most governments today have similar provisions prohibiting such anticompetitive activity,¹⁹⁹ but the U.S. approach to antitrust differs markedly in several important respects. In the United States, for example, antitrust law is enforced both by the government and by private individuals, whereas in most other nations, enforcement is left to the government.²⁰⁰ Section 4 of the Clayton Act authorizes private actions in federal court for treble damages for injuries suffered as a result of violations of sections 1 and 2 of the Sherman Act.²⁰¹ Section 26 also provides for injunctive relief in federal courts.²⁰² And, perhaps most significantly, antitrust enforcement in other nations has been less stringent than in the United States, at least until very recent times.²⁰³

98 Stat. 1792 (1984).

196. See generally AREEDA & TURNER, *supra* note 41. The major federal antitrust laws, located throughout Title 15 of the United States Code, consist of the Sherman, Federal Trade Commission, Clayton, and Robinson-Patman Acts. See 15 U.S.C. §§ 1-7 (1988) (Sherman Act); §§ 41-58 (FTC Act); § 12-27 (Clayton Act); § 13 (Robinson-Patman Act). These laws are principally aimed at regulating the business relationships among firms, both competitors and those within a chain of distribution. The main thrust of these laws is to prohibit contracts, combinations or conspiracies which harm or threaten to harm competitive markets. See 1 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW*, P 103 (1978) (listing a variety of antitrust objectives both political and economic). Such threats can come in various forms, including direct or indirect price fixing among competitors, as well as other predatory activity. See *generally id.*

197. 15 U.S.C. § 1 (1988).

198. 15 U.S.C. § 2 (1988).

199. For a brief analysis of the antitrust laws of other nations, see *infra* notes 497-504 and accompanying text.

200. BORN & WESTIN, *supra* note 16, at 602.

201. 15 U.S.C. § 15(a) (1988).

202. 15 U.S.C. § 26 (1988).

203. See Chang, *supra* note 32, at 296 n.6. For a commentary on the enhanced antitrust enforcement among other nations, see *infra* notes 497-507 and accompanying text.

A. *A Presumption of Territoriality*

Although provisions of the various U.S. antitrust statutes contain language making those laws applicable to "trade as commerce . . . with foreign nations,"²⁰⁴ the statutes are silent on the specific question of extraterritorial application. In its early decisions, the Court refused to give an expansive meaning to these words, stating that they were merely "[w]ords having universal scope."²⁰⁵

Thus, without any clear guidance in the text of the statutes, early judicial decisions applied a presumption of territorial application to U.S. antitrust law, in line with the prevailing view in international law.

The Supreme Court's decision in *American Banana Co. v. United Fruit Co.*²⁰⁶ clearly expressed this view. *American Banana* arose when one U.S. company sued another for alleged predatory practices by the defendant designed to drive the plaintiff from the Central American Banana market.²⁰⁷ Among other things, the defendant, United Fruit, allegedly persuaded the Costa Rican government to use the Costa Rican militia to wrongfully evict the plaintiff, American Banana, from American Banana's properties.²⁰⁸ In holding that the plaintiff's action should be dismissed, the Court announced its adoption of the rule of territoriality: "[I]n case of doubt [courts should adopt] a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."²⁰⁹

This narrow approach was consistent, the Court explained, with the prevailing rules in both public and private international law.²¹⁰ Under private international law, also known as "choice of law," the "almost

204. See, e.g., 15 U.S.C. § 1 (1988) ("Every contract, combination . . . or conspiracy in restraint of trade or commerce . . . with foreign nations.") (emphasis added); 15 U.S.C. § 2 (1988) ("Every person who shall monopolize, or attempt to monopolize . . . any part of trade or commerce . . . with foreign nations.") (emphasis added).

205. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909), *overruled by* *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). Not until passage of the Foreign Trade Antitrust Improvements Act (FTAIA) in 1988 did Congress specifically address extraterritoriality. Pub. L. No. 97-290, § 402, 96 Stat. 1246 (1982) (codified as amended at 15 U.S.C. §§ 6(a), 45(a)(3) (1988)). For further discussion of the FTAIA see *infra* notes 234 & 282 and accompanying text.

206. 213 U.S. 347 (1909).

207. *Id.* at 354.

208. *Id.*

209. *Id.* at 357.

210. *Id.* at 355-56.

universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."²¹¹ Under notions of public international law, or "the law of nations," to permit the application of U.S. law to conduct occurring in a foreign nation would "not only . . . be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations."²¹² Although the Court also relied on the "act of state doctrine" to justify dismissal,²¹³ the clear implication was that U.S. antitrust law could not be applied to conduct taking place outside the United States.

B. *The Rise of the Effects Doctrine*

The reign of *American Banana's* territorial approach quickly subsided, however. As U.S. corporations became bigger, more powerful, and more international, U.S. government regulation grew more aggressive and far-reaching.²¹⁴ In this business environment, the need to control the activities of U.S. corporations whose anti-competitive conduct abroad could affect domestic commerce forced judges to reform old doctrines to keep up with the new age.²¹⁵

The beginnings of change could be seen as early as 1927 when the Supreme Court in *United States v. Sisal Sales Corp.*,²¹⁶ decided to uphold the extraterritorial application of the Sherman Act to a conspiracy between U.S. and Mexican firms to monopolize the production and import of a Mexican rope into the United States. The Court attempted to distinguish *American Banana* by noting that a few of the agreements in the conspiracy took place in the United States and that the conspiracy was funded by U.S. banks.²¹⁷ Yet the departure from the doctrine of strict territoriality was apparent from the Court's assertion that the conspiracy "brought about forbidden results within the United States."²¹⁸

211. *Id.* at 356 (citing *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904)).

212. *Id.*

213. *Id.* at 357-58. The act of state doctrine, derived from the international law doctrine of sovereign immunity, is invoked to prohibit U.S. judicial inquiry into the legality of foreign sovereign acts committed on foreign territory. *See generally* BORN & WESTIN, *supra* note 16, at 647-738.

214. *See* Born, *supra* note 19, at 31.

215. *Id.*

216. 274 U.S. 268, 274-76 (1927). Actually, the turn away from strict territoriality could be seen earlier in decisions involving transportation companies accused of conspiring to monopolize railway or shipping routes to or from the United States. *See* *United States v. American Tobacco Co.*, 221 U.S. 106, 108 (1911); *United States v. Pacific & Arctic Ry. & Navigation*, 228 U.S. 87, 106 (1913); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917).

217. *Id.* at 275-76.

218. *Id.* at 276.

The break was most apparent in *United States v. Aluminum Co. of America (Alcoa)*,²¹⁹ in which Judge Learned Hand, writing for the Second Circuit, explicitly rejected the strict territoriality presumption and instead adopted an expansive formulation of the "effects doctrine."²²⁰ In *Alcoa*, the government accused a Canadian affiliate of a United States company of violating the Sherman Act by setting up and executing an international aluminum cartel abroad.²²¹ The Second Circuit, sitting as the court of last resort because the Supreme Court lacked a quorum, held that the Sherman Act reached the Canadian corporation's participation in the cartel, even though most of the conduct at issue occurred outside the United States.²²² Judge Hand, in embracing an "effects doctrine," stated that as long as the conduct in question (1) was intended to affect U.S. commerce; and (2) actually did affect U.S. commerce, it could be regulated.²²³ As in *American Banana*, the *Alcoa* court drew exclusively upon contemporary concepts in both private and public international law which, in the court's view, had come to recognize a state's right to "impose liabilities, even upon persons not within its allegiance," if their conduct "has consequences within its borders which the state reprehends."²²⁴

219. 148 F.2d 416 (2d Cir. 1945).

220. *Id.* at 443-44.

221. *Id.* at 421. The government's antitrust suit sought to break up Alcoa's U.S. aluminum holdings and to prohibit the participation of Alcoa and Aluminum Limited in an international cartel involving several major European aluminum companies. *Id.* Aluminum Limited, a Canadian corporation, had been a division of Alcoa in the past, and, at the time of the government's suit, continued to be controlled by Alcoa shareholders. *Id.*

222. *Id.* at 444.

223. *Id.* at 443-44. Notably, such an effects doctrine does not apply to conduct that may have unintended repercussions in the United States, nor to agreements that are intended to affect U.S. trade, but that have no such effect. *Id.* at 443-44. It does, however, apply to agreements that have the *intended effect* of adversely impacting U.S. commerce. *Id.* Once the plaintiff proves that the defendant intended to affect commerce, then the burden of proving no effect on U.S. commerce shifts to the defendant. *Id.* at 444. Applying this new standard, the court found that the Canadian defendants specifically intended to affect U.S. commerce by agreeing to a quota system for imports, and that the import trade was indeed affected. *Id.*

224. *Id.* About the same time, private international law began to shed the old hard and fast rules derived from notions of territoriality. See e.g., RESTATEMENT OF CONFLICT OF LAWS § 378 (1934) ("The law of the place of the wrong determines whether a person has sustained a legal injury."). Newer, more flexible rules looked instead to the forum with the most "significant relationship" to the transaction, and permitted the extraterritorial reach of domestic laws by adopting an effects doctrine. See RE-

The *Alcoa* effects doctrine rapidly gained acceptance in U.S. jurisprudence.²²⁵ The Supreme Court, while approving of the *Alcoa* effects test in subsequent opinions,²²⁶ has provided relatively little guidance regarding the precise meaning of the "intent/effects" test set out by Judge Hand. Lower courts have, in turn, taken several roads of interpretation.²²⁷

As for the intent prong of the test, some courts have taken a more expansive view by simply omitting the intent requirement and adopting a pure effects test.²²⁸ Other courts, by contrast, have required a showing of specific intent to affect U.S. commerce,²²⁹ and in some cases relaxed the requirement to one of general intent.²³⁰

As for the effects prong, lower courts disagree over the magnitude of the effect on U.S. commerce necessary to sustain jurisdiction.²³¹ Nonetheless, it is generally agreed that when the anticompetitive effects with-

STATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1965); RESTATEMENT OF CONFLICT OF LAWS § 65 (1934). In *Alcoa*, Judge Hand cited § 65 of the Restatement of Conflict of Laws, which, as noted above, recognized an effects doctrine. *Alcoa*, 148 F.2d at 443.

225. See, e.g., RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (citing *Alcoa* to justify effects test as basis for legislative jurisdiction). The ALI modified the doctrine in the Second Restatement of Foreign Relations Law by requiring that the challenged conduct have a direct, substantial, and reasonably foreseeable effect to amount to an antitrust violation. *Id.*; see also Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1988) (adopting "direct, substantial and reasonably foreseeable effect" test).

226. See, e.g., *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 113 n.8 (1969) (noting that it chooses not to disturb the *Alcoa* decision, as well as others); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962) (same).

227. See BORN & WESTIN, *supra* note 16, at 597.

228. See, e.g., *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 889 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983); *Sabre Shipping Corp. v. American President Lines*, 285 F. Supp. 949, 953 (S.D.N.Y. 1968), *cert. denied*, 395 U.S. 922 (1969); *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504, 592 (S.D.N.Y. 1951).

229. See, e.g., *United States v. National Lead Co.*, 63 F. Supp. 513, 524-25 (S.D.N.Y. 1945), *aff'd* 332 U.S. 319 (1947).

230. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 494 F. Supp. 1161, 1184 (E.D. Pa. 1980); *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 226-27 (S.D.N.Y. 1975); *United States v. General Elec. Co.*, 82 F. Supp. 753, 889-91 (D.N.J. 1949).

231. See, e.g., *Power E. v. Transamerica Delaval, Inc.* 558 F. Supp. 47, 49 (S.D.N.Y.), *aff'd mem.*, 742 F.2d 1439 (2d Cir. 1983); *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 9 (2d Cir. 1981); *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979); *United States v. The Watchmakers of Switz. Info. Ctr.*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (N.D. Ohio 1949).

in the United States are merely "speculative" or "de minimis," extraterritorial reach is inappropriate.²³² The most widely recognized and most restrictive test requires a "substantial and reasonably foreseeable" effect on U.S. commerce.²³³ Congress also adopted this heightened standard in enacting the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA),²³⁴ which attempted to spell out more clearly for lower courts the extraterritorial reach of the Sherman and Federal Trade Commission Acts.²³⁵ Although the more rigorous FTAIA standard was not intended

232. *See, e.g.*, *Montreal Trading v. Amax, Inc.*, 661 F.2d 864, 870 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *El Cid v. New Jersey Zinc Co.*, 551 F. Supp. 626, 629 (S.D.N.Y. 1982), *aff'd mem.*, 770 F.2d 157 (2d Cir.), *cert. denied*, 474 U.S. 1021 (1985); *Dominicus Americana Bohio v. Gulf & W. Ind., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

233. U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (1977) (adopting "direct, substantial and reasonably foreseeable effect" test) [hereinafter *1977 Antitrust Guidelines*]; U.S. DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, 87-91 (1988), *reprinted in* 53 Fed. Reg. 21584, 21595 (1988) [hereinafter *1988 Antitrust Guidelines*]; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (same); Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1988) (same).

234. Foreign Trade Antitrust Improvement Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (1982) (codified as amended at 15 U.S.C. §§ 6a, 45(a)(3) (1988)). The Act provides that the Sherman Act:

shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

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

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

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

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section

15 U.S.C. § 6a (1988) (emphasis added). Congress' primary motive in enacting the FTAIA was "to improve the competitiveness of U.S. firms in overseas markets, by freeing them from antitrust restraints on activities in 'export trade.'" BORN & WESTIN, *supra* note 16, at 599; *see also* H.R. REP. NO. 97-686, 97th Cong., 2d Sess. 2-33, 9-10 (1982).

235. Some authority contends that the FTAIA also covers Clayton Act claims. *See* BORN & WESTIN, *supra* note 16, at 599 (citing U.S. DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 91 (1988)).

The heightened standard adopted by the Act has resulted in a number of lower court opinions dismissing antitrust actions altogether. *See, e.g.*, *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813 (9th Cir. 1988); *McElderry v. Cathay Pac. Airways*, 678 F. Supp. 1071, 1078 (S.D.N.Y. 1988); *The 'In' Porters, S.A. v. Hanes Printables, Inc.*,

to apply to conduct involving import trade, the House report on the Bill indicated that it could apply to a wholly foreign transaction that affected domestic commerce or a domestic competitor.²³⁶ Cases involving import trade they remain subject to the more expansive, far reaching rules adopted by various circuits.²³⁷ The Justice Department's *1988 Antitrust Enforcement Guidelines for International Operations* similarly endorsed a "direct, substantial, and reasonably foreseeable effect" test to use in evaluating anticompetitive conduct abroad.²³⁸ Besides requiring a greater magnitude of effects, some lower courts have made extraterritorial reach more difficult by placing on the plaintiff the burden of showing anticompetitive effects on U.S. export trade. This prevents foreign companies from "piggy backing" on the injury suffered by other U.S. companies not involved in the suit.²³⁹

Putting aside the disagreements among courts as to what version of the effects test to apply, the impact of *Alcoa* was clear. After *Alcoa*, the U.S. filed dozens of major actions against international cartels created partially or entirely abroad.²⁴⁰

663 F. Supp. 494, 500 (M.D.N.C. 1987); *Papst Moteren GmbH & Co. v. Kanematsu-Goshu (USA), Inc.*, 629 F. Supp. 864, 869 (S.D.N.Y. 1986); *Liamuiga Tours v. Travel Impressions Ltd.*, 617 F. Supp. 920, 922-24 (E.D.N.Y. 1985); *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1107 (S.D.N.Y. 1984).

The FTALA did not attempt to change the ability of courts to decline the exercise of prescriptive jurisdiction based on international comity. H.R. REP. NO. 686, 97th Cong., 2d Sess. 13 (1982). For a discussion of the comity doctrine, see *infra* notes 250-381 and accompanying text.

236. H.R. REP. NO. 97-686, 97th Cong., 2d Sess. 9-10.

237. BORN & WESTIN, *supra* note 16, at 600.

The International Unfair Competition Act of 1993, pending before Congress, would take an aggressive stance to certain types of "unfair" import trade. The Act would essentially create a cause of action against foreign entities that extract monopoly profits at home and then import their goods into the United States for below cost. See generally S. REP. NO. 99, 103d Cong., 1st Sess. (1993).

238. *1988 Antitrust Guidelines*, *supra* note 233, at 21595.

239. *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 499-500 (M.D.N.C. 1987). This more restrictive approach was echoed in 1988 when the Justice Department's Antitrust Division revised its guidelines and suggested that it would enforce the antitrust laws only where U.S. consumers were harmed. See *1988 Antitrust Guidelines*, *supra* note 233, at 21595.

240. See *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298, 318-19 (D.D.C. 1960) (denying sovereign immunity to Philippine government so United States could pursue antitrust violations of the shipping industry); *United States v. Watchmakers of Switz. Info. Ctr.*, 133 F. Supp. 40, 47 (S.D.N.Y. 1955) (holding that Swiss corporations were present in the United States for purposes of service of process); *United States v. Imperial Chem. Indus.*, 105 F. Supp. 215, 230 (S.D.N.Y. 1952) (failing to grant immunity for a British corporation); *United States v. General Elec. Co.*, 80 F. Supp. 989, 1004 (S.D.N.Y. 1948) (holding a German corporation subject to U.S. antitrust law); *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013, 1021 (S.D.N.Y. 1947) (finding that a Canadian cor-

C. Foreign Reaction

The reaction among academics and foreign governments was not positive. Great Britain, for example, quickly criticized the doctrine as too far-reaching, arguing that it threatened to interfere with foreign sovereignty interests.²⁴² This is a chronic problem in matters of antitrust because one state's economic policy may conflict sharply with another's antitrust policy.²⁴³ Criticism was also spurred by the unique U.S. procedural framework, which permits private individuals to enforce U.S. antitrust law and obtain treble damages.²⁴⁴ There were also complaints among foreigners that the United States did not apply antitrust law with consistency and that the enforcement often sought to advance the commercial interests of U.S. companies.²⁴⁵

In retaliation, several countries enacted "blocking statutes," prohibiting compliance with U.S. discovery in antitrust cases, with the goal of confining the extraterritorial reach of U.S. antitrust law.²⁴⁶ There are two

poration was doing business in the United States).

242. See *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.* [1952] 2 All E.R. 780, 782 (holding that a U.S. district court restraining order against a British company is an inappropriate assertion of extraterritorial jurisdiction); Roger P. Alford, *The Extraterritorial Application of Antitrust Law: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 10 (1993) (questioning the notion of extraterritorial jurisdiction). Regulating economic affairs is a vital aspect of national sovereignty, and thus it is widely held abroad that foreign law, not U.S. law, should govern the economic activity occurring within a foreign state's boundaries. BORN & WESTIN, *supra* note 16, at 601.

243. See *Rio Tinto Zinc v. Westinghouse Elec. Corp.* [1978] 1 All E.R. (H.L.) 434, 448 (Lord Wilberforce).

244. BORN & WESTIN, *supra* note 16, at 602. Enforcement of antitrust laws is generally regarded as a task for the government, and thus the U.S. policy permitting private individuals to initiate suits that can effect local regulatory interests has generated strong resistance abroad. *Id.*

245. BORN & WESTIN, *supra* note 16, at 601 n.80; see also Beckett, *Transnational Litigation-Part II: Perspectives from the U.S. and Abroad (United Kingdom)*, 18 INT'L LAW. 773, 774 (1984).

246. Chang, *supra* note 32, at 296; Alford, *supra* note 242, at 10; P.C.F. Pettit & C.J.D. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697, 707-14 (1982). Such "blocking statutes" include the Australian Foreign Proceedings Act, Austl. Acts 121 (1976); the Canadian Foreign Extraterritorial Measures Act, ch. 49, S.C. 1863 (1984); a French blocking statute, *Journal Officiel de la Republique Francaise [J.O.]* 1799 (1980) (No. 80-538, ed. Lois et Decrets); South Africa's Protection of Businesses Act (1978), reprinted in 18 I.L.M. 127 (1979); and the United Kingdom's Protection of Trading Interests Act, 1980, ch. 11.

kinds of blocking statutes. First, "discovery blocking statutes" restrict the extent to which U.S. litigants can obtain evidence or compel production of commercial documents abroad for use in U.S. antitrust proceedings.²⁴⁷ Second, "judgment blocking statutes" restrict, directly or indirectly, the enforcement of U.S. judgments.²⁴⁸ Great Britain has enacted both types of statutes, and even went so far as to provide a "clawback" provision under which firms making treble damage payments under U.S. antitrust law could bring suit to recover two-thirds of treble damages assessed against them.²⁴⁹

D. Comity-Based Limitations on the Extraterritorial Reach of U.S. Law

1. The Rise and Fall of International Comity-Based Interest Balancing in Legislative Jurisdiction

In part because of negative foreign reaction and academic criticism, U.S. courts and regulatory authorities sought to moderate the extraterritorial reach of the Sherman Act and other federal antitrust laws.²⁵⁰ The first forms of modification came in the form of requiring that the effects in the United States be "substantial," or "foreseeable."²⁵¹ These efforts, however, did not address the central concern of foreign governments that their regulatory interests and sovereignty were being ignored. As a result, legal scholars proposed that courts consider, in addition to the effects on U.S. commerce, factors reflecting the regulatory goals of other interested nations.²⁵² In essence, these factors would add a "reasonable-

247. Chang, *supra* note 32, at 296.

248. *Id.*

249. United Kingdom Protection of Trading Interests Act, 1980 ch. 11 § 6. These provisions apply regardless of whether the anticompetitive conduct giving rise to the U.S. antitrust award took place in the United Kingdom, in the United States, or in some third country, and regardless of whether the party seeking relief is a U.K. national. For further commentary on the act, see generally A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act 1980*, 75 AM. J. INT'L L. 257 (1981); Carl A. Circa, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982).

250. BORN & WESTIN, *supra* note 16, at 603-04.

251. See, e.g., *United States v. Watchmakers of Switz. Info. Ctr.*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962) (requiring "substantial" effects); *United States v. General Elec. Co.*, 82 F. Supp. 753, 889-91 (D.N.J. 1949) (emphasizing foreseeable effects); see also *1977 Antitrust Guidelines*, *supra* note 234, at E2 to E3 (discussing substantial and foreseeable effects); *1988 Antitrust Guidelines*, *supra*, note 234, at 21595 (advocating direct, substantial, or reasonably foreseeable standard).

252. See JAMES R. ATWOOD & KINGMAN BREWSTER, *ANTITRUST & AMERICAN BUSINESS ABROAD* 446 (1958) (proposing that courts adopt a "jurisdictional rule of reason" which would consider the sovereign interests of foreign nations in the extraterritorial application of U.S. antitrust laws); see also RESTATEMENT (SECOND) OF THE FOREIGN

ness" or "comity" prong to the legal equation of the effects doctrine.²⁵³

*Timberlane Lumber Co. v. Bank of America*²⁵⁴ represents one of the earliest and best-known cases implementing the "comity" approach. In *Timberlane*, a private U.S. plaintiff operating a lumber company in Honduras charged several U.S. companies with violating sections 1 and 2 of the Sherman Act by allegedly conspiring to drive the plaintiff out of the Honduran lumber market.²⁵⁵ The defendants sought to dismiss the complaint, arguing that their alleged actions did not have any direct or substantial effect on U.S. foreign commerce, and therefore, pursuant to *Alcoa*, the court lacked subject matter jurisdiction.²⁵⁶ The *Timberlane* court first declined to embrace a pure *Alcoa* "effects" test,²⁵⁷ stating that when considering the application of U.S. law overseas, a court must also consider the regulatory concerns of the other countries involved.²⁵⁸

RELATIONS LAW OF THE UNITED STATES, § 40 (1965). The factors in the Second Restatement were limited to situations in which two states, each having jurisdiction to prescribe rules of law, required inconsistent conduct by a person or corporation. In such a case, international law requires a state to moderate the exercise of its enforcement jurisdiction, in the light of such factors as:

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

Id.

253. See Born, *supra* note 19, at 33-34.

254. 549 F.2d 597 (9th Cir. 1976) [hereinafter *Timberlane I*], 749 F.2d 1378 (9th Cir. 1984), *cert. denied* 472 U.S. 1032 (1985) [hereinafter *Timberlane II*].

255. *Timberlane I*, 549 F.2d at 600-01.

256. *Id.*

257. *Id.* at 610. The *Timberlane I* court concluded that the *Alcoa* effects test was an inadequate formula for determining when the antitrust laws should be applied overseas. *Id.* at 611-12. In particular, the court reasoned that the *Alcoa* test failed to take into account the interests of other nations or the relationship between the litigants and the United States. *Id.* at 612.

258. *Id.* The court explained the necessity of this third, "interest-balancing" prong as follows:

That American law covers some conduct beyond this nation's borders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusion into their own spheres, broad assertions of authority by American courts. Our

Thus, in addition to deciding whether the foreign conduct has “some” actual or intended effect,²⁵⁹ the court must also weigh at least seven factors that examine the regulatory interests of other nations in comparison to U.S. regulatory interests.²⁶⁰ The seven factors are:

[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 foreseeability of such effect, and [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.²⁶¹

courts have recognized this concern and have, at times, responded to it, even if not always enough to satisfy all the foreign critics. In any event, it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.

Id. at 609 (citations omitted).

259. The *Timberlane I* court split the “effects” aspect of the *Alcoa* test into two prongs: The first prong requires proof that the defendant’s conduct had “some effect—actual or intended—on American foreign commerce.” *Id.* at 613. The second prong requires that the magnitude of these effects be sufficient to amount to a “civil antitrust violation, *i.e.*, conduct that has a direct and substantial anticompetitive effect.” *Id.* In *Timberlane II*, the court observed that the plaintiff’s alleged “ability and willingness to supply cognizable markets with lumber” in competition with the defendant, satisfied the first prong of the test. *Timberlane II*, 749 F.2d 1378, 1383 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985). The court further noted that the plaintiff’s complaint, alleging a conspiracy to prevent the plaintiff from milling lumber in Honduras for export to the United States, stated a cognizable injury, thus satisfying the second prong of the test. *Id.*

260. *Timberlane I*, 549 F.2d 597, 614 (9th Cir. 1976). In the court’s words, the purpose of the third interest-balancing prong is to determine “whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, *vis-à-vis* those of other nations, to justify an assertion of extraterritorial authority.” *Id.* at 613.

261. *Id.* at 614. The “interest-balancing” aspect of this approach mirrors the approach taken in the choice of law area, otherwise known as governmental interest analysis. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969). Under governmental interest analysis, courts weigh

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id.

This interest balancing approach parallels the balancing approaches adopted in the personal jurisdiction and the *forum non conveniens* context. See discussion *supra* notes 40-109 and accompanying text (*in personam* jurisdiction) & notes 116-29 and

The court justified its so-called "rule of reason" on the doctrine of international comity, emphasizing the need for courts to respect "the prerogatives of other nations."²⁶²

The court then remanded the case for application of the rule of reason, and the lower court dismissed the action on the grounds that the assertion of jurisdiction would offend the comity and fairness prong of the test.²⁶³ The Ninth Circuit affirmed the dismissal, supplying its own version of how the "fairness" test should be applied to the particular facts.²⁶⁴ The factors that seemed to weigh most heavily against jurisdiction were the degree of conflict between enforcement of U.S. antitrust law with the foreign law or policy and the insignificant effects that the alleged anticompetitive conduct had on U.S. commerce.²⁶⁵ In stark contrast to U.S. antitrust law, Honduran laws permitted competitors to make agreements restricting or dividing commercial activity.²⁶⁶ Thus, the enforcement of United States antitrust law would lead to a significant conflict with Honduran law and policy.²⁶⁷ The court also observed that the

accompanying text (*forum non conveniens*).

262. *Timberlane I*, 549 F.2d at 612. International comity, or the comity of nations, is generally defined as one nation's unilateral recognition of the laws or judicial acts of another nation, arising out of a sense international duty and convenience. *Hilton v. Guyot*, 159 U.S. 113, 191 (1895); *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544 n.27 (1987); see also BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

263. *Timberlane II*, 749 F.2d 1378, 1386 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

264. *Id.* at 1384. In *Timberlane II*, the Ninth Circuit engaged in *de novo* review of the district court's comity analysis. *Id.* Other circuits, classifying the issue as a matter of law, have taken the same approach. See, e.g., *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982), *vacated*, 460 U.S. 1007, *holding reinstated*, 704 F.2d 785 (5th Cir.), and *cert. denied*, 464 U.S. 961 (1983) (explaining that application of interest balancing is a question of law and thus subject to *de novo* review). *But see In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255-56 (7th Cir. 1980) (arguing that such an approach is an abuse of discretion).

265. *Timberlane II*, 749 F.2d at 1383-84. The court seemed to lay special emphasis on the degree of conflict with foreign law and policy, indicating that a significant conflict with foreign law and policy, "unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction." *Id.* at 1384. Compare *Timberlane II*, 749 F.2d at 1384, with *In re Insurance Antitrust Litig.*, 938 F.2d 919, 933 (9th Cir. 1991) (extending antitrust laws overseas to activities of various British insurance companies in Britain even though the court perceived a conflict between U.S. and British law), *aff'd* 113 S. Ct. 2891 (1993).

266. *Timberlane II*, 749 F.2d at 1384.

267. *Id.*

actual effect of Timberlane's potential operations on United States foreign commerce was insubstantial when compared with the effects of its activity in the Honduran lumber market.²⁶⁸ Moreover, the allegedly unlawful acts occurred solely on Honduran territory.²⁶⁹ While factors such as the nationality of the parties and the enforceability of any U.S. judgment rendered pointed in favor of jurisdiction, these factors did not outweigh the high potential for conflict with Honduran economic policy and the minimal effect the alleged violations had on U.S. foreign commerce.²⁷⁰

Timberlane's rule of reason was heartily adopted by scholars drafting the *Restatement (Third) of Foreign Relations Law of the United States*.²⁷¹ Sections 402 and 403 of the third *Restatement* set forth, in essence, a two-step approach justifying the exercise of extraterritorial jurisdiction in a manner closely tracking the *Timberlane* model.²⁷² Section 402 first sets out the traditional basis of prescriptive jurisdiction under public international law: (1) the territoriality principle; (2) the effects doctrine; (3) the nationality principle; and (4) the protective principle.²⁷³ Even where jurisdiction can be found under section 402, section 403 further requires that the exercise of jurisdiction be reasonable.²⁷⁴ Reasonableness is determined by considering "all relevant factors,"²⁷⁵ in-

268. *Id.* at 1385. "During the years 1970 through 1972, the amount of lumber imported from Honduras expressed as a percentage of total United States lumber imports was [never in excess of .1%]." *Id.*

269. *Id.* at 1334.

270. *See id.*

271. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) (citing *Timberlane I*, 549 F.2d 597, 614 (9th Cir. 1976)).

272. *Id.* §§ 402-03.

273. *Id.* § 402. The Restatement explains:

Subject to § 403, a state has jurisdiction to prescribe law with respect to:

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interest in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id.

274. *Id.* § 403. The reasonableness requirement works as a limitation on the extension of prescriptive jurisdiction in much the same way as the reasonableness requirement in judicial jurisdiction. *See, e.g., Asahi Metal Indus. v. United States*, 480 U.S. 102, 113 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *see also supra* notes 40-76 and accompanying text.

275. *Id.* § 403(2). The Restatement explains:

cluding the location of the challenged conduct, the effects in the regulating state, the nationalities of the parties, the importance of the regulation to the regulating state, the likelihood of conflict with another state's laws, and the extent to which the regulation is consistent with, and important to, the international system.²⁷⁶

Section 415 of the *Restatement* applies section 403's reasonableness requirement in the antitrust context.²⁷⁷ Section 415 permits U.S. anti-

- (1) Even when one of the bases for jurisdiction under §402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
- (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including where appropriate:
 - (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
 - (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
 - (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
 - (d) the existence of justified expectations that might be protected or hurt by the regulation;
 - (e) the importance of the regulation to the international political, legal, or economic system;
 - (f) the extent to which the regulation is consistent with the traditions of the international system;
 - (g) the extent to which another state may have an interest in regulating the activity; and
 - (h) the likelihood of conflict with regulation by another state.
- (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors. Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Id.

276. See *id.* Like the *Timberlane* analysis, the Restatement's approach closely parallels the governmental interest balancing of modern day choice of law analysis. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).

277. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED

trust law application to: (1) anticompetitive conduct that occurs entirely or partially within the United States;²⁷⁸ (2) conduct that occurs outside the United States but has some intended effect on U.S. Commerce;²⁷⁹ and (3) any other anti-competitive conduct that does not fall within (1) or (2) if there is a substantial effect on U.S. commerce “and the exercise of jurisdiction is not unreasonable.”²⁸⁰ The accompanying comment makes clear, however, that “[all exercise] of jurisdiction under this section is subject to the requirement of reasonableness” as set forth in section 403.²⁸¹

The Department of Justice’s 1988 *Antitrust Enforcement Guidelines for International Operations* also adopted *Timberlane’s* comity-based approach to the extraterritorial reach of antitrust law.²⁸² The Guidelines listed six factors to be considered by the Department in determining whether to bring an antitrust lawsuit:²⁸³ 1) comparison of the relative significance of the conduct within the United States as compared to conduct abroad; 2) nationality of the parties; 3) whether a purpose to affect U.S. commerce existed; 4) relative significance and foreseeability of effects on the U.S. as compared to effects abroad; 5) reasonable ex-

STATES § 415 (1987). Section 415, entitled “Jurisdiction to Regulate Anti-Competitive Activities,” provides:

(1) Any agreement in restraint of United States trade that is made in the United States, and any conduct or agreement in restraint of such trade that is carried out in significant measure in the United States, are subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or the participants in the conduct.

(2) Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

Id.

278. *Id.* § 415(1).

279. *Id.* § 415(2).

280. *Id.* at § 415(3) (emphasis added). Comment (a) notes that subsections (2) and (3) are intended to be consistent with case law since *Alcoa*. *Id.* § 415 cmt. a.

281. *Id.*

282. See 1988 *Antitrust Guidelines*, *supra* note 233, at 21595.

283. *Id.* For in depth commentary on the 1988 Guidelines, see generally Wilbur L. Fugate, *The New Justice Department Antitrust Enforcement Guidelines for International Operations—A Reflection of Reagan and, Perhaps, Bush Administration Antitrust Policy*, 29 VA. J. INT’L L. 295 (1989).

pectations furthered or defeated by the antitrust action; and, 6) the degree of conflict with foreign law or policy.²⁸⁴

In Congress, the *Timberlane* approach was recognized, but not admired so much as to be legislated. When Congress enacted the Foreign Trade Antitrust Improvement Act of 1982,²⁸⁵ it left unchanged courts' discretion to consider international comity in exercising jurisdiction.²⁸⁶ A Senate Bill introduced in 1987, however, intended to amend the FTAIA by codifying a "jurisdictional rule of reason," similar to that proposed by *Timberlane*.²⁸⁷ Section 103 of the bill listed six factors for the courts to rely on in determining whether to dismiss an action:

- (1) [T]he relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
- (2) the nationality of the persons involved in or affected by the conduct;
- (3) the presence or absence of a purpose to affect United States consumers or competitors;
- (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad;
- (5) the existence of reasonable expectations that would be furthered or defeated by the action; and
- (6) the degree of conflict with foreign law or articulated foreign economic policies.²⁸⁸

As of yet, Congress has not mandated such an approach on the courts.²⁸⁹

284. 1988 Antitrust Guidelines, *supra* note 233, at 21595.

285. 15 U.S.C. § 6(a) (1988).

286. See H.R. REP. No. 686, 97th Cong., 2d Sess. 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court[s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction.").

287. S. 572, 100th Cong., 1st Sess. § 103 (1987). An earlier version of the bill proposed to eliminate the treble damage remedy in antitrust suits brought against foreign defendants. S. 397, 99th Cong., 1st Sess. § 6 (1985). Senate bills 572 and 397 are discussed in detail in Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 LAW & CONTEMP. PROBS. 197, 213-19 (Summer 1987).

288. S. 572, 100th Cong., 1st Sess. § 103(a) (1987). The bill excluded some obvious political factors contained in other tests, such as that proposed by *Mannington Mills*, thus inviting courts to consider the possible effect on foreign relations if jurisdiction were exercised. Compare *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3rd Cir. 1979) with S. 572, 100th Cong., 1st Sess. § 103 (1987).

289. The Senate bill was more recently reintroduced as S. 50, and entitled the "Foreign Trade Antitrust Improvements Act of 1989." S. 50, 101st Cong., 1st Sess. (1989). Senator DeConcini expressed the underlying purposes of the bill:

Congressional indecisiveness in adopting a balancing test has not discouraged a number of federal circuits from following *Timberlane*.²⁹⁰ Some courts have modified the balancing test either by adding additional factors or by tailoring existing ones to enhance the accuracy of the analysis in weighing the respective interests. In *Mannington Mills, Inc. v. Congoleum Corp.*,²⁹¹ for example, the Court of Appeals for the Third Circuit declared that one of the factors it would evaluate was the “[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief.”²⁹² Other circuits, by contrast, have not ventured so far into the foreign relations arena, perhaps intentionally limiting themselves simply to evaluating the “relative importance”²⁹³ or “degree of conflict”²⁹⁴ between U.S. and foreign law.²⁹⁵

The extraterritorial application of U.S. antitrust law has had a significant adverse impact on the climate for international trade and investment by U.S. firms. U.S. companies are currently caught between a rock and a hard place. They face the demands of domestic antitrust law and the opposing pressure of the international marketplace for cooperative agreements This bill will provide for more harmonious legal rules for international trade, and put U.S. business on more equal footing in international trade and commerce.

135 CONG. REC. S289-301, S344 (1989) (statement of Sen. DeConcini).

290. See, e.g. *In re Insurance Antitrust Litig.*, 938 F.2d 919, 932 (9th Cir. 1991) (following the factors enumerated in *Timberlane*, cert. denied 113 S. Ct. 3034 (1993); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana*, 830 F.2d 449, 457 (2d Cir. 1987) (same), cert. denied 488 U.S. 923 (1988); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (same); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) (same). But see *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949-51 (D.C. Cir. 1984) (rejecting the interest balancing approach adopted by *Timberlane*); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255 (7th Cir. 1980) (same).

291. 595 F.2d 1287 (3d Cir. 1979).

292. *Id.* at 1297. The approach in *Mannington* also differed from *Timberlane* by first deciding whether subject matter jurisdiction existed under the effects test, and then deciding whether jurisdiction should be exercised by looking at factors of international comity. *Id.* at 1297-98; accord *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 n.24 (1993) (“[C]oncerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.”) (citations omitted). *Timberlane*, by contrast, combined effects and international comity as a single question of prescriptive jurisdiction. *Timberlane I*, 549 F.2d 597, 613-14 (9th Cir. 1976); accord *Hartford Fire*, 113 S. Ct. at 2921 (Scalia, J., dissenting) (“It is evident from what I have said that the Court’s comity analysis, which proceeds as though the issue is whether the courts should ‘decline to exercise . . . jurisdiction,’ rather than whether the Sherman Act covers this conduct is simply misdirected.”).

293. See *Timberlane I*, 549 F.2d at 614.

294. See *id.*

295. The comity analysis introduced by the Ninth Circuit, and in particular the test adopted by the Third Circuit in *Mannington Mills*, explicitly considering the foreign relations impact of asserting jurisdiction, has been criticized as a violation of the “po-

Regardless of which test is adopted, the policy justification for adopting an "interest-balancing" approach is always the same: portrayal of an atmosphere of judicial fairness and respect for foreign sovereign interests in light of the modern realities of international commerce.²⁸⁶ Ironically, however, despite the quick popularity of the comity analysis, courts have rarely used the doctrine to divest themselves of jurisdiction.²⁸⁷ This is largely due to the courts' inherent tendency to discount the strength of the foreign regulatory interests involved.²⁸⁸ In those few cases where interest-balancing was employed to favor a foreign jurisdiction, the anti-competitive effects on United States commerce were either non-existent or speculative.²⁸⁹ In essence, therefore, courts are merely paying "lip

litical question doctrine." See Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 485-86 (1993). For further discussion of this and other criticisms, see *infra* notes 376-41 and accompanying text.

296. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-98 (3d Cir. 1979). The court observed: "When foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction." *Id.* at 1296. See also *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869-71 (10th Cir. 1981), *cert. denied* 455 U.S. 1001 (1982); *Pacific Seafarers, Inc. v. Pacific Far E. Lines, Inc.*, 404 F.2d 804, 814 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

297. See *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909-10 (1993); *In re Insurance Antitrust Litig.*, 938 F.2d 919, 932-34 (9th Cir. 1991), *cert. denied* 113 S. Ct. 3034 (1993); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 950-51 (D.C. Cir. 1984); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1290-91 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255-56 (7th Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 431 (9th Cir. 1977); *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, No. 89 Civ. 5021, 1993 WL 97313, at *6 (S.D.N.Y. 1993); *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. ¶ 64,774 (N.D. Cal. 1982); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

298. See, e.g., *Uranium Antitrust Litig.*, 617 F.2d at 1255-56. This tendency was most accurately discussed by Judge Wilkey in *Laker Airways*, 731 F.2d at 948-54, when he explained that "courts inherently find it difficult neutrally to balance competing foreign interests." *Id.* at 954; see also Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983).

299. See, e.g., *National Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6, 8-9 (2d Cir. 1981) (finding that effects were not sufficiently anticompetitive to come within purview of antitrust laws); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 870 (10th Cir. 1981) (where effects were found to be "speculative and insubstantial"), *cert. denied*, 455 U.S. 1001 (1982); *Vespa of Am. Corp. v. Bajaj Auto Ltd.*, 550 F. Supp. 224, 229 (N.D. Cal. 1982) (finding no effects); *Conservation Council of W.*

service” to the comity factors, because once it is determined that there is no effect on U.S. commerce, interest-balancing is no longer necessary.³⁰⁰ It appears that as long as there is more than a *de minimis* United States regulatory interest, courts have refused to allow interest-balancing to defeat an otherwise legitimate antitrust claim.³⁰¹

a. *Hartford Fire: The Supreme Court's most recent treatment of comity in legislative jurisdiction*

The waning influence of comity and interest-balancing in limiting the jurisdiction of U.S. antitrust law was most recently apparent in *Hartford Fire Insurance Co. v. California*,³⁰² in which the Supreme Court affirmed, 5-4, the extraterritorial application of the Sherman Act to reinsurers in London.³⁰³ In *Hartford Fire*, nineteen states and numerous private parties brought antitrust suits against foreign reinsurers in London alleging violations of section 1 of the Sherman Act in conspiring to coerce primary insurers in California to eliminate pollution liability coverage.³⁰⁴ The defendants conceded that their conduct was intended substantially to affect the U.S. insurance market, therefore establishing a minimal basis for jurisdiction.³⁰⁵ They contended, however, that international comity barred the application of U.S. antitrust law.³⁰⁶

In *Hartford Fire*, the Court affirmed the Ninth Circuit's decision to apply the Sherman Act to the foreign defendants.³⁰⁷ The Court first reaffirmed the long standing “effects” doctrine with a reference to *American Banana*, noting that “although the proposition was perhaps not always free from doubt . . . it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”³⁰⁸ Applying this doctrine to the present case, the Court affirmed that the Sherman Act reached British defendants who allegedly “engaged in unlawful conspiracies to affect the market for insurance in the United States.”³⁰⁹

Austl. v. Aluminum Co. of Am., 518 F. Supp. 270, 275-76 (W.D. Pa. 1981) (finding no effects).

300. *Laker Airways*, 731 F.2d at 950-51.

301. See *supra* note 297 (citing cases).

302. 113 S. Ct. 2891 (1993).

303. *Id.* at 2911.

304. *Id.* at 2908.

305. *Id.* at 2909 n.21.

306. *Id.* at 2909. In particular, the defendants argued that since their conduct was perfectly consistent with British law and policy, applying the Sherman Act in this instance would “conflict significantly with British law.” *Id.* at 2910.

307. *Id.* at 2911.

308. *Id.* at 2909 (citations omitted).

309. *Id.* at 2909 (citations omitted).

As to the defendants' argument that international comity dictated against the exercise of jurisdiction, the Court, although recognizing that comity has its place in jurisdictional analysis, held that the friction between U.S. and British law did not rise to a level necessary to invoke comity concerns.³¹⁰ The Court noted that, in enacting the Foreign Trade Antitrust Improvements Act, Congress did not intend to affect courts' ability to employ notions of comity to limit the extraterritorial reach of the Sherman Act.³¹¹ However, even if the Court were to apply comity analysis, "[it] would not counsel against exercising jurisdiction in the circumstances alleged here."³¹²

The Court then proceeded to engage in its own comity analysis, and surprisingly applied a test entirely different from that proposed in *Timberlane* or the third *Restatement*. The Court boiled the comity analysis down to one simple question: "whether 'there is in fact a true conflict between domestic and foreign law.'"³¹³ The court concluded that there was no "true conflict,"³¹⁴ reasoning that although English law permitted the defendants' conduct, it did not prohibit the defendants from complying with U.S. antitrust law.³¹⁵ Defendants could have complied with the

310. *Id.* at 2910.

311. *Id.* ("If a court determines that requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court[s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction." *Id.* (quoting H.R. REP. NO. 97-686)).

312. *Id.*

313. *Id.* (quoting *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring and dissenting)).

314. *Id.* Although not citing *Timberlane*, the Court found only one factor in the *Timberlane* interest balancing approach was worth discussing—the degree of conflict with foreign law or policy. See *id.*; *Timberlane I*, 549 F.2d 597, 615. (9th Cir. 1976). In *Timberlane II*, the Ninth Circuit also stressed the importance and perhaps dominant nature of this factor: "A conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction." *Timberlane II*, 749 F.2d 1378, 1384 (9th Cir. 1984), *cert. denied* 472 U.S. 1032 (1985). This factor is also mentioned in the *Restatement* as "the likelihood of conflict with regulation by another state." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(h) (1987).

315. *Hartford Fire*, 113 S. Ct. at 2910 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1987) (stating that no conflict exists "where a person subject to regulation by two states can comply with the laws of both"). The court also cited comment j of § 415, which specifically addresses the prescriptive jurisdiction of antitrust laws. *Id.* ("[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED

law of *both* countries, therefore making the comity analysis unnecessary.³¹⁶ The Court did not consider any other factors in its comity analysis.³¹⁷

The Ninth Circuit's opinion, in *Hartford Fire*, by contrast, thoroughly examined all the *Timberlane* factors.³¹⁸ Nonetheless, in keeping with the majority of other courts that have employed the balancing test, the court refused to permit "comity" to defeat an otherwise legitimate anti-trust claim.³¹⁹ The court found all but one factor, the degree of conflict with foreign law,³²⁰ pointed in favor of jurisdiction.³²¹ The crucial point of the court's analysis was the resolution of the second factor of the *Timberlane* analysis—the nationality or allegiance of the parties.³²² The court deftly diminished the importance of the foreign nationality of many of the defendants by noting that although some of the defendant corporations are located in London, some are subsidiaries of U.S. corporations.³²³ Thus, on balance, the court concluded that "the presence of the American plaintiffs, many American defendants and some American subsidiaries is a factor pointing towards the exercise of jurisdiction."³²⁴

STATES § 415 cmt. j. (1987)).

316. Justice Scalia, in his dissent, criticized the Court's narrow definition of conflict as unsupported by existing law. *See id.* at 2922 (Scalia, J., dissenting). According to earlier Supreme Court cases and academic commentary in the area of choice-of-law, a "conflict" exists in those circumstances "[w]here applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute." *Id.* (Scalia, J., dissenting) (citing Russell J. Weintraub, *Commentary on Conflicts of Laws*, 2-3 (1980); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 1 cmt. c, illus. (1934)). Under this broader approach, a conflict may exist and foreign interests may be considered, even if the defendants are not compelled by any foreign law to take actions that violate American law. *Id.* (Scalia, J., dissenting).

317. Justice Scalia noted that the Court failed to examine the comity factors of § 403(2) and instead relied exclusively on comments to §§ 403(3) and 415 of the Restatement. *Id.* at 2922 n.11 (Scalia, J., dissenting). Justice Scalia also noted that the Court failed to consider the express directive in § 415 that "[a]ny exercise of [legislative] jurisdiction under this section is subject to the requirement of reasonableness set forth in § 403(2)." *Id.* at 2922 n.11 (Scalia, J., dissenting) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 415 cmt. a (1987)).

318. *In re Antitrust Litig.*, 938 F.2d 919, 932-34 (9th Cir. 1991).

319. *Id.*

320. Unlike the Supreme Court, the district court and Ninth Circuit found that the application of U.S. antitrust laws "would lead to significant conflict with English law and policy." *Id.* at 933. The court reached this conclusion based on an amicus brief filed by the British government that quoted several regulations specifically exempting certain insurance services from domestic antitrust laws. *Id.* at 932-33.

321. *Id.* at 933-34.

322. *See id.* at 933.

323. *Id.*

324. *Id.* The appellate court's attribution of the domestic subsidiary's contacts to the foreign parent, which the Supreme Court seemingly approved, contradicts prevailing doctrines of *in personam* jurisdiction. *See supra* notes 40-109 and accompanying text.

In contrast to both the Supreme and appellate court decisions, Justice Scalia employed interest-balancing to reach the opposite conclusion in his dissent.³²⁵ Using the third *Restatement* factors,³²⁶ Justice Scalia found that the comity-analysis led away from application of U.S. law.³²⁷ In examining the contacts, Justice Scalia noted that the relevant activity occurred "primarily" in the United Kingdom, and that the defendants were British corporations and subjects "having their principle place of business or residence outside the United States."³²⁸ Justice Scalia found the Ninth Circuit's argument that foreign interests were diminished because some of the British corporations were U.S. subsidiaries improper: "In effect, the Court of Appeals pierced the corporate veil in weighing the interests at stake."³²⁹ Moreover, with respect to the importance of the regulation to the regulating states, Justice Scalia found that Britain, had a comprehensive regulatory scheme in the reinsurance area. Given the significant exceptions in antitrust law Congress has carved out for state insurance regulation, Britain argued Justice Scalia, had the superior regulatory interest.³³⁰ Justice Scalia concluded that the assertion of pre-scriptive jurisdiction would be unreasonable, and therefore, that antitrust law should not reach these foreign defendants.³³¹

b. Analysis of Hartford Fire

The Court's decision, while not attempting to express a view on the validity of comity-based interest-balancing,³³² effectively rejected the doctrine by applying a comity analysis that significantly differed from *Timberlane*, the third *Restatement*, or those proffered in the various circuits. In the Court's view, the comity analysis consists of one question: is there a direct conflict between U.S. and foreign law so that the defen-

Under either an alter ego or agency theory, the mere existence of a parent-subsidiary relationship alone is not enough to confer jurisdiction. *Antitrust Litig.*, 938 F.2d at 933; *see also Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2921 n.10 (1993) (Scalia, J., dissenting).

325. *Hartford Fire*, 113 S. Ct. at 2920-21 (Scalia, J., dissenting).

326. Justice Scalia chose the more exhaustive analysis of § 403 of the Restatement because, in his view, the standard best reflected the Court's decisions in construing international choice-of-law principles. *Id.* at 2920 (Scalia, J., dissenting).

327. *Id.* at 2921 (Scalia, J., dissenting).

328. *Id.* (Scalia, J., dissenting).

329. *Id.* at 2921 n.10 (Scalia, J., dissenting).

330. *Id.* at 2921 (Scalia, J., dissenting).

331. *Id.* (Scalia, J., dissenting).

332. *Id.* at 2910.

dant is *required* by the foreign state to engage in illegal conduct.³³³ In adopting this narrow test, the Court cited Justice Blackmun's concurrence in *Société Nationale v. United States District Court*.³³⁴ A summary of the majority and concurring opinion in *Société Nationale* is necessary to understand the nature of the Court's comity analysis.

Société Nationale asked whether federal courts are bound to apply the Hague Evidence Convention as the exclusive means of discovery between U.S. litigants and litigants in nations that are treaty partners.³³⁵ Defendants, two French corporations that sought to invoke the Convention, argued, *inter alia*, that international comity mandated the treaty's application before the parties could turn to the Federal Rules of Civil Procedure.³³⁶ The Court, in a 5-4 decision, held that the Convention was not mandatory and that international comity did not support a blanket rule of first resort to the Convention.³³⁷ In the Court's view, the principle of comity requires a more "particularized analysis of the respective interests of the foreign nation and the requesting nation."³³⁸

The court cited section 437(1)(c) of the 1986 tentative draft of the third *Restatement* as a guide to the factors relevant to comity analysis.³³⁹ Section 437, which was intended to govern discovery between U.S. and foreign litigants, proposed that courts consider a balancing of interests similar to that proposed by *Timberlane*.³⁴⁰ For example, among other factors, courts should consider "the extent to which non-compliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located."³⁴¹

Justice Blackmun disagreed with the Court's individualized-interest balancing approach to the comity analysis.³⁴² In his opinion, such an ad hoc approach invited analysis that courts were neither capable nor competent to make.³⁴³ He found courts generally "ill-equipped" for case-by-case balancing of sovereign interests because of a lack of information to

333. *Id.*

334. 482 U.S. 522, 547 (1987) (Blackmun, J., concurring and dissenting).

335. *Société Nationale*, 482 U.S. at 524.

336. *Id.* at 543.

337. *Id.* at 543-46.

338. *Id.* at 543-44.

339. *Id.* at 544 n.28 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 437(1)(c) (Tentative Draft No. 7, 1986) (approved May 14, 1986)).

340. *Id.*

341. *Id.*

342. *Id.* at 554 (Blackmun, J., concurring and dissenting).

343. *Id.* at 551-54 (Blackmun, J., concurring and dissenting).

balance accurately government interests.³⁴⁴ Secondly, balancing would typically result in parochial bias because courts unfamiliar with foreign interests cannot give them adequate weight.³⁴⁵ Finally, the individualized approach, by second-guessing government interests, ignores compromises made in the treaty-making process and thus invades the exclusive domain of the executive and legislative branches.³⁴⁶

In Justice Blackmun's opinion, international comity would best be served by general presumption that the Convention procedures should control.³⁴⁷ A balancing approach, by contrast, should only be employed when "there is in fact a true conflict between domestic and foreign law."³⁴⁸ Only then should a court balance "foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime."³⁴⁹ The existence of the Hague Convention eliminated direct conflicts between procedural rules of the member countries, and therefore there was no need to resort to comity principles.³⁵⁰ The best result, in Justice Blackmun's opinion, in terms of both international comity and predictability in litigation, was to find a general presumption favoring use of the Convention.³⁵¹

Justice Blackmun's view of the comity analysis was adopted in whole by the Court in *Hartford Fire*.³⁵² According to the Court, there is no

344. *Id.* at 552 (Blackmun, J., concurring and dissenting).

345. *Id.* at 553 (Blackmun, J., concurring and dissenting).

346. *Id.* at 551-52 (Blackmun, J., concurring and dissenting).

347. *Id.* at 548-49 (Blackmun, J., concurring and dissenting).

348. *Id.* at 555 (Blackmun, J., concurring and dissenting).

349. *Id.* (Blackmun, J., concurring and dissenting). Justice Blackmun modeled his comity analysis on the choice-of-law principles of the Second Restatement of Conflict of Laws. *See id.* at 555 n.11. Section 6 provides that, absent any statutory directive of its own state on choice of law, a court should consider seven factors in deciding the applicable law:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).

350. *Soci t  Nationale*, 482 U.S. at 556 (Blackmun, J., concurring and dissenting).

351. *Id.* at 568 (Blackmun, J., concurring and dissenting).

352. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2910 (1993).

need to balance interests unless a “true” or direct conflict exists between domestic and foreign law.³⁵³ The Court, however, took a narrow view of the term “conflict” not expressed in Blackmun’s dissent: it held that what is required is a situation in which the illegal conduct of the defendants is not just permitted, but is *required* by the foreign state.³⁵⁴ For support, the Court relied on comment e of section 403 and comment j of section 415, which it interpreted as setting out a precondition that the regulations of the two states be in direct conflict before the balancing of interests provided in section 403(2) could apply.³⁵⁵ As Justice Scalia correctly observed, the Court erroneously interpreted those provisions.³⁵⁶ Comment e of section 403, entitled “Conflicting exercises of jurisdiction,” is directed exclusively to section 403(3), which is intended to apply only in those cases in which “it would not be *unreasonable* for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict.”³⁵⁷ As the first clause of subsection (3) makes abundantly clear, it applies only after a court has determined that the exercise of jurisdiction “would not be unreasonable” for both states.³⁵⁸ Whether the exercise of jurisdiction is reasonable can be answered only by first applying the eight-factor balancing test provided in subsection (2), which must be analyzed in every circumstance, *even when the two regulations are not in conflict*.³⁵⁹ Comment d of section 403 supports this interpretation by noting that the “[e]xercise of jurisdiction by more than one state may be reasonable—for example, when one state exercises jurisdiction on the basis of territoriality and the other on the basis of nationality In such situations, the [balancing] factors in subsection (2) apply to both states.”³⁶⁰ Comment a of section 415 also provides that “[a]ny exercise of jurisdiction under this section is subject to the requirement of reasonableness.”³⁶¹

Moreover, Justice Scalia noted, the term “conflict” as it is traditionally understood in the field of conflicts-of-law, encompasses more than simply cases of where the regulations of two states impose inconsistent obligations on the parties, but also any case where the applicable substantive rules of decision are different.³⁶² Even under the modern

353. *Id.*

354. *See id.*

355. *See id.*

356. *See id.* at 2922 (Scalia, J., dissenting).

357. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3) (1987).

358. *Id.*

359. *Id.*

360. *Id.* § 403 cmt. d.

361. *Id.* § 415 cmt. a.

362. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2922 (1993) (Scalia, J.,

choice-of-law analysis, known as governmental interest methodology, the term "true conflict" is not given the narrow definition adopted by the Court. As modernly used, "true conflict" exists when foreign and domestic law cannot be reconciled, not only because the laws are different on their face, but because the policy interests behind them are opposed.³⁶³ When, however, the court finds that local and foreign policies are the same, there exists a "false conflict," and local law will apply despite the facial differences between the two laws.³⁶⁴

Applying this definition of "true conflict" to the Court's in the *Hartford Fire* case, it is apparent that the Court's analysis was misguided. Instead of examining the substantive policies behind the British insurance law, as modern conflicts analysis requires, the Court focused solely on the obligations imposed on the face of the British statute and found no "true conflict." As the Ninth Circuit noted, the policy behind British insurance law relied on by the defendants was to exempt specifically certain insurance services from antitrust liability and to encourage indirectly the defendants' anti-competitive conduct.³⁶⁵ By contrast, U.S. insurance regulations, although exempting some anticompetitive conduct in insurance services, did not seek to immunize the defendants' activities.³⁶⁶ As a result, there is a significant conflict between English and U.S. law and policy, and therefore, a "true conflict."³⁶⁷

Had the Court found a conflict, as it arguably should have, a comity analysis would have been necessary. Even under the approach of Justice

dissenting) (citing RUSSELL J. WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS 2-3 (1980)); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 1 cmt. c, illus. (1934)); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. a and illus. (1969) (choice-of-law analysis occurs whenever a suit involves "foreign elements").

363. *See* ROBERT A. LEFLAR, ET AL., AMERICAN CONFLICTS LAW § 92 (4th ed. 1984); WILLIS L. REESE, ET AL., CONFLICT OF LAWS, CASES AND MATERIALS 488 (9th ed. 1990). Professor Brainerd Currie first proposed this technique of identifying "true conflicts" in his article *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 (1959); *see also* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). Currie's approach has gained considerable ground in United States courts, but has come under fire from other conflicts scholars as circular and easily manipulated to achieve a predetermined result. *See generally* Robert A. Leflar, *True "False Conflicts," Et Alia*, 48 B.U. L. REV. 164 (1968); Peter K. Westen, *False Conflicts*, 55 CAL. L. REV. 74 (1967).

364. *See* REESE, ET AL., *supra* note 363, at 487-88.

365. *See In re Insurance Antitrust Litig.*, 938 F.2d 919, 933 (9th Cir. 1991).

366. *Id.* at 928.

367. *See id.* at 933; *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2921 (1993) (Scalia, J., dissenting).

Blackmun's concurrence in *Société Nationale*, the analysis would consist of weighing "foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal system."³⁶⁸ As Justice Scalia noted, if the Court had properly applied the test it adopted, Britain's significant interest in this case clearly outweighed U.S. interests so that legislative jurisdiction would be unreasonable.³⁶⁹

c. *The impact of Hartford Fire on interest balancing*

Given the problems with the Court's analysis of the comity issue, the precedential effect of *Hartford Fire* will probably be slight. The court indicated that it did not intend to rule out the lower court's use of comity factors, but only to reverse the appellate courts' conclusion that there was substantial conflict between U.S. and British law.³⁷⁰ On the conflict issue, it appears that the Court prefers a narrow definition of the term "conflict" that closely resembles the scope of the "foreign sovereign compulsion" defense. This defense, recognized in most U.S. courts, immunizes a defendant from the extraterritorial application of U.S. law only if the conduct sought to be prohibited is *required* by foreign law.³⁷¹ Although the justification for limiting the "conflict" factor to this narrow scope is unclear, the practical effect is certain. It will result in more expansive extraterritorial reach of the Sherman Act,³⁷² and perhaps, as Justice Scalia predicts, raise protests from U.S. trading partners.³⁷³ Whether or not this effect is desirable is a separate question that will be discussed in Part IV below.

2. Another Comity-Based Limitation: Foreign Sovereign Compulsion

The doctrine of foreign sovereign compulsion, like the comity analysis, is a judicially-created tool that limits the extraterritorial reach of U.S. law.³⁷⁴ It applies, however, only in those situations in which the conduct

368. *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring and dissenting).

369. See *Hartford Fire*, 113 S. Ct. at 2921 (Scalia J., dissenting).

370. See *id.* at 2910. The Court clearly left untouched the ability of lower courts to consider other factors in determining whether they should abstain from jurisdiction on comity grounds: "[w]e have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 2911.

371. BORN & WESTIN, *supra* note 16, at 623-31. For further discussion of the foreign sovereign compulsion defense, see *infra* 374-81

372. See *Hartford Fire*, 113 S. Ct. at 2920 n.9 (Scalia, J., dissenting).

373. *Id.* at 2922 (Scalia, J., dissenting).

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

sought to be prohibited is required by foreign law.³⁷⁵ The doctrine is thus far narrower in scope than the *Timberlane* analysis, which purports to apply to all cases that involve foreign interests. The courts employing the doctrine justify its use on grounds of international comity and notions of territorial sovereignty.³⁷⁶ In *Interamerican Refining Co. v. Texaco Maracaibo, Inc.*,³⁷⁷ the district court noted:

It requires no precedent . . . to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations.³⁷⁸

Additionally, courts must interpret the Sherman Act to adapt to the

§ 441(1) (1987).

375. *Id.*; ATWOOD & BREWSTER, *supra* note 28, §§ 8.14-8.23; BORN & WESTIN, *supra* note 16, at 623-31. Section 1 of the Third Restatement provides:

- (1) In general, a state may not require a person
 - (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or
 - (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 441(1) (1987). The Justice Department formally recognized the doctrine in its 1988 INTERNATIONAL GUIDELINES. See *1988 International Guidelines*, *supra* note 234, at 21596 ("The Department will not prosecute anticompetitive conduct that has been compelled by a foreign sovereign.").

376. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292-94 (3d Cir. 1979); *Interamerican Ref. Corp. v. Texaco Maracaibo*, 307 F. Supp. 1291, 1298 (D. Del. 1970). These same concerns underlie the policies behind the act of state doctrine prohibiting U.S. courts from judging the validity of the public acts of foreign sovereigns within their own territory. See *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964); see generally BORN & WESTIN, *supra* note 16, at 647-738.

377. 307 F. Supp. 1291 (D. Del. 1970).

378. *Id.* at 1298. In *Interamerican*, two Venezuelan corporations, entered into a series of transactions in which plaintiff purchased crude oil from defendant and then exported the oil for refining in the United States. *Id.* at 1292-93. After a few initial transactions, the defendants allegedly refused to sell additional oil to plaintiff because the government of Venezuela prohibited such sales. *Id.* at 1293. The plaintiff brought suit under the Sherman Act, alleging an illegal boycott. *Id.* at 1292. The district court held that defendants were compelled by Venezuelan authorities to boycott the plaintiff and that such compulsion was a complete defense to an action under the antitrust laws based on that boycott. *Id.* at 1303-04.

realities of international business. For example, multinational corporations must often comply with foreign business regulations far different from our own as a condition of doing business overseas. If the Sherman Act were extended to impose liability for obedience to foreign law, the result would be to punish multinational corporations by limiting their choices as to where to do business.³⁷⁹

Although the foreign sovereign compulsion defense appears to be an attractive escape device from U.S. antitrust law, the doctrine's application is limited. Courts have employed the doctrine only when foreign law requires the corporation to engage in certain activity that would be deemed anti-competitive at home.³⁸⁰ Moreover, most authorities hold that this defense does not apply to conduct or sales occurring in the United States.³⁸¹

E. Criticism of Comity-Based Interest Balancing in the Courts

Numerous criticisms have been aimed at the balancing test introduced by *Timberlane* and expanded by the third *Restatement*.³⁸² One common objection is unpredictability in that the test fails to assign any priority to the various factors or to the relevance of additional factors.³⁸³ This

379. *Id.* at 1298.

380. The foreign government's mere recognition or approval of private conduct does not amount to the "compulsion" necessary to evoke the doctrine. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (holding that the Canadian government's appointment of a corporation as its exclusive purchasing agent did not "compel" the corporation to monopolize production and sales). Also excluded are cases in which the antitrust defendant invited compulsion by requesting the foreign government to compel it to take certain actions to gain antitrust immunity. *See Interamerican*, 307 F. Supp. at 1297 (suggesting that foreign sovereign compulsion would not be available if defendants had procured the government order not to sell to the plaintiffs).

381. *See, e.g.*, *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (finding jurisdiction despite existence of foreign legislation granting the defendant a monopoly when the conspiracy was entered into and overt acts performed in the United States); *Linseman v. World Hockey Ass'n.* 439 F. Supp. 1315, 1324-25 (D. Conn. 1977) (noting that the doctrine "shields only conduct which is perpetrated within the . . . foreign country"); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 263 (N.M. 1980) (determining that an American company is not immunized from U.S. antitrust laws even if compelled by a foreign state to act, as long as that action is adverse to trade within the U.S.), *cert. denied*, 451 U.S. 901 (1981); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 cmt. b (1987).

382. *See, e.g.*, Steven A. Kadish, *Comity and the International Application of the Sherman Act: Encouraging Courts to Enter the Political Arena*, 4 NW. J. INT'L L. & BUS. 130 (1982); Garvey, *supra* note 295; James M. Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 395 (1983).

383. BORN & WESTIN, *supra* note 16, at 613; Garvey, *supra* note 295, at 485. Even

problem is particularly evident when different factors point in different directions. Moreover, evaluating the factors may strain judicial resources because doing so involves significant judicial fact-finding, including evaluation of complex and controversial political information, if such information is even available.³⁸¹ In general, critics, many of them judges, argue that courts lack the expertise and institutional capacities to ascertain the questions of national interests and foreign relations that certain factors of section 403 raise.³⁸⁵ For example, how are judges to assess such factors such as "the importance of the regulation to the international political, legal, or economic system?"³⁸⁶

The U.S. Court of Appeals for the District of Columbia most aptly discussed these criticisms in *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*.³⁸⁷ In *Laker Airways*, the British airline filed an antitrust action against U.S. and European airlines alleging that the defendants conspired to drive Laker out of the North Atlantic market.³⁸⁸ Several European defendants obtained anti-suit injunctions in English court against Laker's U.S. antitrust action.³⁸⁹ The defendants relied in part on the British Protection of Trading Interests Act—a blocking statute prohibiting persons conducting business in England from complying with

the Third *Restatement* concedes that under its balancing approach "[n]o priority or other significance is implied in the order in which the factors are listed. Not all considerations have the same importance in all situations; the weight to be given to any particular factor or group of factors depends on the circumstances." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. b. (1987).

384. See *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 950 (D.C. Cir. 1984) (discussing the inherent difficulty with balancing contradictory factors).

385. See *Garvey*, *supra* note 295, at 485-86; *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 29-30 (D.C. Cir. 1987); *Laker Airways*, 731 F.2d at 949; *Reinsurance Co. of Am. v. Administration of State Insurance*, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979). On interest balancing, Judge Easterbrook remarked:

I would be most reluctant to accept an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste. Although it is easy to identify many relevant considerations, as the ALI's *Restatement* does, a court's job is to reach judgments on the basis of rules of law rather than to use a different recipe for each meal.

Reinsurance Co., 902 F.2d at 1283 (Easterbrook, J., concurring).

386. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(e) (1987).

387. 731 F.2d 909 (D.C. Cir. 1984).

388. *Id.* at 917.

389. *Id.* at 918.

certain foreign judicial or regulatory provisions.³⁹⁰ Laker sought counter-injunctions in the United States to prevent the remaining defendants from obtaining similar English anti-suit injunctions.³⁹¹

The district court granted the counter-injunctions and the defendants appealed, arguing in part that “international principles of comity” preclude issuance of the U.S. injunctions.³⁹² The court of appeals affirmed, holding that the antitrust laws could properly be exercised against the European defendants and that the U.S. injunction would stand.³⁹³ According to the court, the United States’ assertion of prescriptive jurisdiction in this case was justified under the “effects” doctrine.³⁹⁴ Citing *Alcoa*, the court acknowledged that in the antitrust context, the defendant’s conduct must be intended to produce and result in substantial effects in the United States.³⁹⁵ Here, the defendants’ alleged predatory pricing of fares and other conduct was “designed specifically to drive Laker out of business and eventually to raise the fares paid by transatlantic passengers, the bulk of whom are American.”³⁹⁶ The court observed that English courts also had prescriptive jurisdiction, but that the existence of concurrent jurisdiction, as a general rule, did not require a court to curtail its own jurisdiction.³⁹⁷ In the court’s view, international comity, albeit an important doctrine in U.S. jurisprudence, does not require a court to ignore domestic interests.³⁹⁸ Where Congress has enacted laws to proscribe certain anticompetitive conduct, the use of any discretionary

390. *Id.* at 920.

391. *Id.* at 918-19.

392. *Id.* at 921.

393. *Id.* at 915.

394. *Id.* at 922. “The prescriptive application of United States antitrust law to the alleged conspiracies between KLM, Sabena, and the other antitrust defendants is founded upon the harmful effects occurring within the territory of the United States as a direct result of the alleged wrongdoing.” *Id.* These effects included the negative impact of the predatory pricing conspiracy on American consumers traveling to Europe as well as Laker’s principle creditors which were American. *Id.* at 924. In addition, the court added, to the extent that the defendant airlines had landing rights in the United States and conduct their business in the United States, they have subjected themselves to the regulation of U.S. laws. *Id.* at 925.

395. *Id.* 925; see also *supra* notes 214-40 and accompanying text.

396. *Laker Airways*, 731 F.2d at 925.

397. *Id.* at 926.

The sufficiency of jurisdictional contacts with both the United States and England results in concurrent jurisdiction to prescribe. Both forums may legitimately exercise this power to regulate the events that allegedly transpired as a result of the asserted conspiracy The mere existence of dual grounds of prescriptive jurisdiction does not oust either one of the regulating forums.

Id.

398. *Id.* at 937.

doctrine to prevent that application would "amount to an unjustified evasion of United States law injuring significant domestic interests."³⁹⁹

In the case of U.S. antitrust law, "[l]egitimate United States interests in protecting consumers . . . and regulating economic consequences of those doing substantial business in our country are all advanced under the congressionally prescribed scheme."⁴⁰⁰ Moreover, despite Congressional awareness of the controversy surrounding the assertion of prescriptive jurisdiction over foreign entities, Congress has not sought to limit that reach except to require that the effects on U.S. export trade be "direct, substantial and foreseeable."⁴⁰¹ In the court's view, the fact that the defendants invoked the British Protection of Trading Interests Act, intended specifically to cancel out the effective enforcement of U.S. antitrust law, only heightens the court's duty to carry out the policies enacted by Congress.⁴⁰²

Given the direct conflict in regulatory interests between the two states, the court explained, any attempt at interest balancing as suggested by *Timberlane* or the third *Restatement* would be improper.⁴⁰³ While the

399. *Id.* at 938. However, an exception lies in those limited circumstances when the defendant falls under the category of "foreign sovereign compulsion." *See id.* at 953-54 (discussing courts' inability to review conduct falling within the act of state or sovereign immunity doctrines). Under the sovereign compulsion defense, the party is forced to violate the law of one nation to comply with that of another. *See supra* notes 374-81 and accompanying text. Because this exception is easily identified and applies only in a limited context, it arguably should be retained as a legitimate escape from the application of domestic laws.

400. *Laker Airways*, 731 F.2d at 945-46.

401. *Id.* at 946 (citing the Foreign Trade Antitrust Improvements Act of 1982, 96 Stat. 1246 (1982) (codified as amended at 15 U.S.C. §§ 6a & 45(a) (1982)). For more detailed commentary on the FTALIA, see *supra* notes 233-36 & 286.

402. *Laker Airways*, 731 F.2d at 945-46. The court most aptly described the conflict as follows:

[T]he government of the United Kingdom is now and has historically been opposed to most aspects of United States antitrust policy insofar as it affects business enterprises based in the United Kingdom. The British Government objects to the scope of the prescriptive jurisdiction invoked to apply the antitrust laws; the substantive content of those laws, which is much more aggressive than British regulation of restrictive practices; and the procedural vehicles used in the litigation of the antitrust laws, including private treble damage actions, and the widespread use of pretrial discovery. These policies have been most recently and forcefully expressed in the Protection of Trading Interests Act.

Id. at 946.

403. *Id.* at 948.

court did not dismiss the propriety of balancing government interests altogether when domestic and foreign interests are not inconsistent,⁴⁰⁴ it sharply criticized the balancing process in several respects. First, factors such as “the extent to which another state may have an interest in regulating the activity” and “the likelihood of conflict with regulation by other states”⁴⁰⁵ are inherently difficult to quantify with any accuracy, and in the end, will fail to persuade a court to choose a single jurisdiction.⁴⁰⁶ Second, the court explained, those factors that “do purport to provide a basis for distinguishing between competing bases of jurisdiction . . . generally incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing.”⁴⁰⁷ The court specifically referred to the impossibility of evaluating “the degree to which the desirability of such regulation is generally accepted,”⁴⁰⁸ a factor put forth by the third *Restatement*. This is because the courts cannot question “desirability of antitrust law.” In the court’s words, “An English or American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary.”⁴⁰⁹ Similarly, requiring a court to weigh the “importance of the regulation to the regulating state,” is an improper invitation for judicial activism.⁴¹⁰

We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom. It is the crucial importance of these policies which has created the conflict. A proclamation by judicial fiat that one interest is less “important” than the other will not erase a real conflict.⁴¹¹

The court also doubted whether domestic courts could realistically be

404. *Id.* at 948 n.144 (quoting *Natural Resources Defense Council v. Nuclear Regulatory Comm’n*, 647 F.2d 1345, 1357 (D.C. Cir. 1981) (“Some balancing or recognition of latent conflict of laws, would seem judicious to reconcile the separate but not inconsistent national interests.”)). Judge Wilkey’s “recognition” of balancing interests in certain contexts seems less than genuine. It is difficult to see how balancing would be more appropriate in a context when the interests are consistent than when they are opposed. It is precisely in those contexts, where sovereign interests point against each other, that there exists what is known in the choice-of-law arena as a “true conflict.” *See supra* notes 347-69 and accompanying text. In no other context would balancing seem to be more appropriate.

405. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403(2)(g) & (h) (1987).

406. *Laker Airways*, 731 F.2d at 949.

407. *Id.*

408. *Id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403(2)(b) (1987)).

409. *Laker Airways*, 731 F.2d at 949 (emphasis omitted).

410. *Id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403(2)(c) (1987)).

411. *Id.*

expected to weigh domestic and foreign policies impartially.⁴¹²

Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws. The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests. This partially explains why there have been few times when courts have found foreign interests to prevail.⁴¹³

Finally, the court attacked the legitimacy of the balancing approach, noting that in addition to "intensified" scholarly criticism against its use,⁴¹⁴ "[c]ourts are increasingly refusing to adopt the approach."⁴¹⁵ Therefore, because of its inadequacy and questionable validity as a means of resolving the conflicting regulatory interests, the court refused to adopt the balancing test.⁴¹⁶

It is interesting to note that the Supreme Court, in citing Justice Blackmun's concurrence in *Société Nacional* within *Hartford Fire*, indirectly approved the foregoing criticisms. As discussed above, Justice Blackmun's rationale in rejecting a case-by-case interest balancing approach mirrors that of Judge Wilkey's in *Laker Airways*.⁴¹⁷

*F. Recent Pronouncements of Congress and the Executive:
Current Trend Toward More Vigorous Extraterritorial Enforcement*

In addition to the waning influence of "comity" as an accepted limitation to prescriptive jurisdiction, and the Supreme Court's permissive attitude towards the extraterritorial reach of U.S. antitrust law, there are

412. *Id.* at 949-50.

413. *Id.* at 951 (footnotes omitted).

414. *Id.* at 950 (citing Grippando, *supra* note 382; Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984); Kadish, *supra* note 382; Maier, *supra* note 298; James A. Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336, 362-64 (1980)).

415. *Id.* (citing *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981); *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980)).

416. *Id.*

417. *See Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993) and compare *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 551-55 (1987) (Blackmun J., concurring in part and dissenting in part), with *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949-51 (D.C. Cir. 1984). *See supra* notes 302-73 and accompanying text.

signs from the Clinton Administration that the Justice Department will vigorously pursue international antitrust enforcement.

International antitrust policy in the Reagan and Bush years was generally consistent with *Timberlane's* cautious approach toward the extraterritorial application of antitrust law. This is reflected in the Justice Department's 1988 *Antitrust Guidelines for International Operations*,⁴¹⁸ which attempted to bring enforcement policy up to date with antitrust decisions then in force.⁴¹⁹ The Guidelines stated that "[t]he reach of the U.S. antitrust laws is not limited solely to conduct and transactions that occur within the United States."⁴²⁰ As for the potential reach of antitrust law, the Department adopted a milder version of the *Alcoa* doctrine, stating that the effects on U.S. commerce must be "direct, substantial, and reasonably foreseeable."⁴²¹ In addition, the Guidelines adopted six factors, like those introduced by *Timberlane*, which the Department would consider in determining whether to bring an antitrust lawsuit.⁴²² The Guidelines' reserved approach, however, was most apparent in the statement that the Department would not enforce the Sherman Act unless there was a U.S. consumer interest at stake.⁴²³ As a result, the Department denied protection to U.S. exporters victimized by collusive foreign buyers.⁴²⁴

The Clinton Administration's stance toward international antitrust enforcement appears far more aggressive than in previous administrations.⁴²⁵ First on the list of priorities of newly appointed Assistant Attorney General Anne Bingaman was the enhancement of international anti-

418. 1988 *Antitrust Guidelines*, *supra* note 233, at 21584.

419. *Id.*

420. *Id.* at 21594.

421. *Id.* at 21595. This was the version of the effects test adopted by the ALI in drafting section 18 of the Restatement (Second) of Foreign Relations Law of the United States. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES *supra* note 44, § 18. The Restatement (Third), by contrast, relied an effects test requiring only "substantial effects" subject to the reasonableness balancing test in section 403. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 415(3).

422. 1988 *Antitrust Guidelines*, *supra* note 233, at 21595.

423. *Id.* This cautious approach reflects "the only time in U.S. history that the Justice Department has restricted itself to initiate extraterritorial antitrust suits only when there are adverse effects on U.S. consumers." *Experts Foresee Increased Prominence of International Issues in Enforcement*, [Jan.-June] 62 *Antitrust & Trade Reg. Rep.* (BNA) No. 1556, at 316 (Mar. 12, 1992) [hereinafter *Experts*].

424. *New Leniency Policy May Spur Criminal Docket*, 3 No. 10 *Dep't of Just. Alert* 4 (Aug. 16, 1993) [hereinafter *DOJ Alert*].

425. *Bingaman Details Division Priorities in International Antitrust Enforcement*, [July-Dec.] 65 *Antitrust & Trade Reg. Rep.* (BNA) No. 1637, at 568 (Oct. 28, 1993) [hereinafter *Bingaman*]; *Experts*, *supra* note 423.

trust enforcement.⁴²⁶ In public statements, Ms. Bingaman stressed increased cooperation with foreign governments in gathering evidence against anti-competitive conduct abroad.⁴²⁷ These efforts are expected to lead to negotiations for bilateral agreements facilitating the exchange of information between U.S. and foreign government enforcers.⁴²⁸ In a further show of the Department's intention to step up international enforcement, Ms. Bingaman stated that she would no longer follow the restriction in the 1988 International Guidelines limiting Sherman Act enforcement to cases in which a U.S. consumer interest is at stake.⁴²⁹ This statement only reinforced an earlier Justice Department pronouncement on April 3, 1992, that it would begin to enforce antitrust law on the basis of harm to United States exports, irrespective of whether or not there is harm to U.S. consumers.⁴³⁰ The result is a more aggressive stance against anticompetitive activity abroad, particularly price-fixing cartels overseas that threaten U.S. exporters.⁴³¹ The Justice Department did note, however, that it would continue to consider "principles of international comity when making antitrust enforcement decisions that may significantly affect another government's legitimate interests."⁴³²

Congress has also recently introduced legislation enhancing the extra-territorial bite of antitrust law. The bill known as the International Fair Competition Act of 1993,⁴³³ would create a cause of action against any

426. *Bingaman*, *supra* note 425.

427. *Id.* at 569.

428. *DOJ Alert*, *supra* note 424.

429. *Id.*; see also *1988 Antitrust Guidelines*, *supra* note 233, at 21595.

430. See Lori B. Morgan & Helene S. Rosenbaum, *Recent Developments, U.S. Department of Justice Antitrust Enforcement Policy*, 34 HARV. INT'L L. J. 192, 192 (1993) (citing U.S. Dep't of Just. Pub. No. 92-117, *Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws 1* (1992) [hereinafter DOJ Release]).

431. *DOJ Alert*, *supra* note 424.

432. See *Morgan & Roosenbaum*, *supra* note 430, at 197 (citing DOJ Release, at 3) ("The DOJ's intention to respect foreign sovereignty is borne out by the new 1992 policy statement in which the DOJ agrees to notify and consult with foreign governments in antitrust proceedings.")

433. S. 99, 103d Cong., 1st Sess. (1993). The Act's general purpose is to "combat foreign cartels that are exploiting American producers and consumers." 139 CONG. REC. S195-02, S534 (1993) (statement of Sen. Metzenbaum). In introducing the bill, Senator Metzenbaum made specific reference to a "Japanese price-fixing cartel for consumer electronics that operated in our markets in the 1960's and 1970's." *Id.*

The cartel included the biggest brand names in the business such as Matsushita, Hitachi, Sony, Sharp, and Sanyo. There is strong evidence that this cartel used the monopoly profits that it earned in Japan by fixing high

foreign entity engaged in a cartel or monopoly that exports goods to the United States and sells them below cost.⁴³⁴ The bill, if enacted, would have a serious effect on extending existing antitrust law concerning predatory-pricing to entities in foreign countries, particularly Japan, where price-fixing cartels are an entrenched way of life.⁴³⁵

V. WHAT SHOULD THE INTERNATIONAL BUSINESS COMMUNITY LOBBY FOR AS A SOLUTION?

With the increasing extraterritorial reach of United States antitrust law, U.S. and foreign firms operating abroad must reassess the risks and benefits of antitrust litigation. This task, however, is made unusually difficult by the wide differences in opinion among federal circuits on the precise reach of antitrust law and whether international comity will be used in limiting that reach. The recent Supreme Court decision discussing antitrust prescriptive jurisdiction utterly failed to clarify or reconcile existing approaches.⁴³⁶ Rather than expend resources on researching and litigating in this state of confusion, U.S. business should perhaps exert greater efforts in lobbying Congress for the passage of a legislative solution to the jurisdictional problem. There are a variety of possible approaches, from creating a statutory presumption favoring jurisdiction to calling for bilateral or multilateral agreements that harmonize domestic and foreign law.

A. *Theoretical Goal—Predictability*

Above all, the approach chosen should meet the specific concerns of the business and international community. First and foremost, it should be predictable so that multinational and foreign entities can take into account the risks of litigation in their business planning. To ensure such predictability, there must be a uniform standard imposed by the legislature and applied by the courts in all antitrust cases.

prices to subsidize below cost selling in this country. Their U.S. competitors, who could not collude or fix prices, were driven out of business by the cartel.

Id.

434. *Id.* Under the bill, private firms, U.S. antitrust authorities and consumers may bring suit upon a showing that "goods were sold in [U.S.] markets at a price below the manufacturer's cost and were exported from a home market that is closed to international competition because it is cartelized or monopolized." *Id.*

435. *Id.* at §535.

436. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993).

B. Treaties

Predictability and certainty would be most effectively served if bilateral or multilateral treaties governed all assertions of extraterritorial jurisdiction. Such agreements would spell out with precision the cases in which United States antitrust law would apply and would ensure foreign enforcement agencies cooperation in the discovery process. In addition, by calling on the respective nations' regulatory agencies to cooperate in fact-finding and enforcement, the regulatory process could make substantial gains in effectiveness. Treaties provide a unique opportunity to merge existing rules into a harmonized, predictable structure that would serve the interests of all parties—both public and private entities.

Currently, the United States has entered into several cooperative agreements with other countries, including Canada, Australia, Germany, and the European Community.⁴³⁷ The E.C.-U.S. agreement "Regarding the Application of Their Antitrust Laws," for example, provides for notification of enforcement activities that may affect important interests of the other party,⁴³⁸ and most importantly, the exchange of information, cooperation, and coordination of enforcement activities.⁴³⁹ In the event that the enforcement activities of one party appear to "adversely affect important interests of the other Party," the treaty requires the antitrust authorities to engage in an interest-balancing analysis similar to that proposed by section 403 of the third *Restatement*.⁴⁴⁰ Comparative law

437. See Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, E.C.-U.S., *reprinted in* 30 I.L.M. 1487, 1499-1501 (1991); Memorandum of Understanding as to Notification, Consultation and Application of National Antitrust Laws, Mar. 9, 1984, U.S.-Can., *reprinted in* 23 I.L.M. 275, 278-79 (1984); Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 34 U.S.T. 388; Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956, 1958-59; Alford, *supra* note 242, at 44-49; Chang, *supra* note 32, at 309-19.

438. E.C.-U.S. Antitrust Agreement, *supra* note 437, at 1493.

439. *Id.* at 1499-1500, 1495-96.

440. *Id.* at 1499-1500. The factors to be considered, "in addition to any other factors that appear relevant in the circumstances," include:

- (a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;
- (b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;
- (c) the relative significance of the effects of the anticompetitive activities on

scholars note that the convergence of antitrust policy in the United States and Europe will reduce regulatory conflict and probably make unnecessary the balancing of interests the treaty required.⁴⁴¹ One such significant development abroad was the EEC's promulgation in 1989 of merger control rules reversing earlier policy, which under U.S. merger standards, was considered anticompetitive.⁴⁴²

The North American Free Trade Agreement also seeks to facilitate cooperation between Mexican, U.S., and Canadian antitrust authorities. Article 1501, entitled "Competition Law," imposes general obligations on member nations of enforcement and cooperation in antitrust matters:

1. Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct, and shall take appropriate action with respect thereto

2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.⁴⁴³

Articles 1502 and 1503 of the treaty specifically immunize certain government and privately owned monopolies that are designated by the state, but impose obligations on members to control and supervise such entities so that such monopolies do not adversely affect other markets.⁴⁴⁴ Probably the most significant step toward cooperation lies in article 1504, which establishes a trilateral Working Group on Trade and Competition "to report, and to make recommendations" on "relevant issues concerning the relationship between competition laws and policies

the enforcing Party's interests as compared to the effects on the other Party's interests;

- (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- (e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and
- (f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

Id. See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

441. See Friedrich K. Juenger, *Constitutional Control of Extraterritoriality?; A Comment on Professor Brilmayer's Appraisal*, 50 LAW & CONTEMP. PROBS., 39, 46 (1987) (noting the convergence of United States and foreign substantive policies, including antitrust and insider trading).

442. For a detailed discussion of these Guidelines, see generally Otto Sandrock & Elke van Arnheim, *New Merger Control Rules in the EEC*, 25 INT'L L. 859, 860 (1991).

443. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 1501.

444. *Id.* arts. 1502, 1503.

and trade in the free trade area."⁴⁴⁵ The findings and recommendations of the Working Group must be submitted to the treaty's Trade Commission by 1998.⁴⁴⁶

Although the cooperative agreements mentioned above are a step in the right direction, they serve only to reduce the likelihood of conflict, not eliminate it. Notification, communication, and careful consideration of sovereign interests by antitrust authorities will discourage, but cannot prevent, overreaching by U.S. antitrust authorities, nor will they eliminate the imposition of inconsistent antitrust obligations on entities abroad. Commentators, therefore, propose that the treaties be amended with rules that allocate jurisdiction among the interested nations.⁴⁴⁷ Another suggestion is to exempt foreign entities from the specter of treble damages in private antitrust suits.⁴⁴⁸ Because treble damages are regarded as a principle catalyst for international antitrust disputes and retaliatory legislation by other nations,⁴⁴⁹ elimination of this remedy could reduce much existing conflict.⁴⁵⁰

As the foregoing illustrates, existing treaties have not yet solved the problems of conflicts in extraterritorial application of antitrust law. In the meantime, unilateral legislative and judicial solutions must be considered.

445. *Id.* art. 1504.

446. *Id.* The Free Trade Commission, a trilateral body established by the treaty, was created to supervise NAFTA's implementation, modification and interpretation. *Id.* art. 2001 (Institutional Arrangements and Dispute Settlement Procedures).

447. Chang, *supra* note 32, at 313; Diane P. Wood, *Conflicts of Jurisdiction in Antitrust Law: A Comment on Ordover and Atwood*, 50 LAW & CONTEMP. PROB., Summer 1987 at 179, 182 (discussing hierarchical rules which give top priority to the "country where the activities took place," then to "the country that wishes to prescribe rules for its nationals," and finally to "the country wishing to protect itself against adverse effects from abroad").

448. Chang, *supra* note 32, at 315-18.

449. For commentary on the various "blocking statutes" enacted to forestall U.S. antitrust enforcement, see *supra* notes 246-49 and accompanying text.

450. See, e.g., Chang, *supra* note 32, at 315-18. But see Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 LAW & CONTEMP. PROB., Summer 1987, at 197, 216-18 ("[T]he disincentives [to private litigants] associated with a detrebling scheme may damage the U.S. policy of punishing anticompetitive conduct that has direct, substantial, and reasonably foreseeable effects in the United States.").

C. Choice-of-Law Approach

Some scholars propose that courts view prescriptive jurisdiction as essentially a choice of law problem.⁴⁵¹ Under such an approach, judges would apply modern conflicts rules, like those expressed in the *Restatement (Second) of Conflict of Laws*, to choose foreign or domestic law.⁴⁵² The second *Restatement* instructs courts to choose the law of the forum with the “most significant relationship” to the occurrence and the parties.⁴⁵³ Section 6 then provides seven choice-of-law factors to be weighed in determining which forum has the most significant relationship. These include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.⁴⁵⁴

The above principles are then applied to the facts of each case, taking into account the parties’ contacts and relationship with the forum.⁴⁵⁵

451. See ATWOOD & BREWSTER, *supra* note 252, at 446; Andreas Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for Their Interaction*, 163 R.C.A.D.I. 311, 328-29 (1979); Born, *supra* note 19, at 81-94.

452. Born, *supra* note 19, at 88-89; see also Weintraub, *supra* note 31, at 1802-03 (categorizing § 403 of the Third Restatement of Foreign Relations Law as an example of a “choice-of-law” approach).

453. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(1), 188(1) (1971) (covering tort and contract scenarios respectively). Other modern choice-of-law theories include governmental interest analysis, discussed *supra* notes 342-69 and accompanying text. For a brief survey of other theories see REESE, ET AL., *supra* note 363, at 485-95.

454. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

455. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(2), 188(2) (1971) (tort and contract scenarios, respectively). Subsection 2 of § 145 provides:

- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 145(2).

Proponents of this approach contend that by considering the aggregation of contacts between the parties and the relative policy interests at stake, a fair and predictable result will occur.⁴⁵⁶ Moreover, that under such an analysis, U.S. law would only be applied where domestic regulatory interests are objectively greater, and would ultimately reduce the likelihood of foreign protests.⁴⁵⁷

These appraisals, however, overlook the inherent limitations of a choice-of-law analysis when applied to the prescriptive jurisdictional setting. First, conflict of law analysis, while admittedly less likely to invade the sensitive issues of foreign relations, fails to bring any greater degree of predictability than the balancing approach of *Timberlane* and the third *Restatement*. Indeed, this is not surprising because the balancing approach adopted by the drafters of section 403 of the third *Restatement* was modeled after the analysis proposed in the *Restatement (Second) of Conflict of Laws*.⁴⁵⁸

Second, choice-of-law rules are too limiting because they choose the law of one nation—and only one nation—to govern a particular event or transaction. It is clear, however, that public international law recognizes the possibility of “concurrent jurisdiction” where both nations may legitimately claim control of the defendant’s activity.⁴⁵⁹ The third *Restatement* explicitly recognizes that states may legitimately exercise concurrent jurisdiction consistently with international law.⁴⁶⁰ Adopting a

456. See ATWOOD & BREWSTER, *supra* note 252, at 446; Lowenfeld, *supra* note 451, at 328-29; Born, *supra* note 19, at 87.

457. Born, *supra* note 19, at 86-88.

458. Born, *supra* note 19, at 84; Weintraub, *supra* note 31, at 1802-03; see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); see also Margaret Holthusen, *U.S. Courts: Walking the Tightrope Between American Trade Interests and International Comity—Do the Factors Presented in Section 403 of the Restatement (Third) of Foreign Relations Law of the United States Facilitate the Determination of Extraterritorial Jurisdiction of United States Antitrust Law?*, 4 N.Y. INT’L L. REV. 60 (1991); HERBERT F. GOODRICH & EUGENE F. SCHOLLES, HANDBOOK OF THE CONFLICT OF LAWS 168 (4th ed. 1964).

459. *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 952 (D.C. Cir. 1984) (citing M. WHITEMAN, 5 DIGEST OF INTERNATIONAL LAW 218-19 (1965)).

460. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. d (1987). Comment d, entitled “Reasonable exercise of jurisdiction by more than one state,” provides in relevant part:

Exercise of jurisdiction by more than one state may be reasonable—for example . . . when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory The fact that one state has exercised jurisdiction with respect to a given

choice-of-law analysis would further limit the reach of U.S. law in addition to the existing limitations imposed by international law.⁴⁶¹ This could result in leaving a significant amount of anticompetitive activity totally unregulated—a result that the legislature could not have intended.

Third, in the antitrust context, it is questionable whether choice-of-law rules can be legitimately used to prevent the assertion of jurisdiction.⁴⁶² Most choice-of-law rules, including the *Second Restatement of Conflict of Laws*, are premised on the notion that “[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”⁴⁶³ Only when there is no clear statutory directive to apply domestic law are courts permitted to proceed to choice-of-law analysis.⁴⁶⁴ Although most United States antitrust statutes are silent as to their territorial reach,⁴⁶⁵ courts,⁴⁶⁶ as well as the executive⁴⁶⁷ and legislative branches,⁴⁶⁸ have repeatedly construed the statutes to apply to both domestic and extraterritorial activities.⁴⁶⁹ This special treatment stems from the notion that when economic regulation such as antitrust law is being asserted, the domestic “interests” are of a higher order than when local rules of contract or tort are invoked.⁴⁷⁰

person or activity is relevant . . . but is not conclusive that it is unreasonable for the other state to do so.

Id.

461. See Born, *supra* note 19, at 88 (noting that the choice-of-law notion of “most significant relationship” would preclude jurisdiction in far more cases than the comity analysis employed in § 403 of the Third Restatement).

462. See Weintraub, *supra* note 31, at 1818-19.

463. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971).

464. *Id.* § 6(2).

465. See *supra* notes 196-203 and accompanying text.

466. See *supra* notes 204-40 and accompanying text.

467. See *supra* notes 418-32 and accompanying text.

468. See *supra* notes 433-35 and accompanying text.

469. See Weintraub, *supra* note 31, at 1819.

470. See *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 955 (1984); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 289 (1982); Weintraub, *supra* note 31, at 1819. The *Laker Airways* court, in analyzing the “heightened” nature of conflict between British and American antitrust laws, noted that

[t]he conflict in jurisdiction we confront today has been precipitated by the attempts of another country to insulate its own business entities from the necessity of complying with legislation of our country designed to protect this country’s domestic policies. At the root of the conflict are the fundamentally opposed policies of the United States and Great Britain regarding the desirability, scope, and implementation of legislation controlling anticompetitive and restrictive business practices.

No conceivable judicial disposition of this appeal would remove that underlying conflict.

Therefore, because a choice-of-law approach does not adequately address the unique nature of the sovereign interests at stake in the antitrust context, and because it also has the same disadvantages of unmanageability and unpredictability as the *Timberlane/Restatement* analysis, other models must be considered.

D. Rebuttable Presumption Favoring Jurisdiction

Perhaps the best way to ensure predictability in result and accord due weight to domestic regulatory interests is to establish a rebuttable presumption favoring jurisdiction.⁴⁷¹ The presumption would be raised upon showing that the anticompetitive conduct, wherever it occurred, had a "direct, substantial and reasonably foreseeable" effect on United States commerce.⁴⁷² This standard would be met, for example, when the foreign corporation has engaged in anticompetitive activities aimed at U.S. producers or consumers. The burden of proof would then shift to the defendant corporation to show that Congress did not intend the Sherman Act to apply to this particular transaction or conduct. The presumption would be rebutted, for example, if the defendant corporation were able to show that the provisions of a bilateral treaty exempted the allegedly anticompetitive activity, or if it could establish a defense under the act of state, foreign sovereign compulsion doctrine, or sovereign immunity doctrines.⁴⁷³ Comity analysis, like that proposed in *Timberlane* or in the third *Restatement*, would not be available. Any foreign protests resulting from the conflict caused by the extraterritorial reach of U.S. law would have to be resolved via the diplomatic process.

Laker Airways, 731 F.2d at 955.

471. See Weintraub, *supra* note 31, at 1805, 1816-19 (discussing the efficacy of a presumption of jurisdiction).

472. This modified "effects" test is consistent with precedent upholding the application of the Sherman Act to foreign conduct. See *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 (1993) (noting that there must be some "substantial effect" in the United States) (emphasis added). It is also consistent with the standard set forth by Congress in the Foreign Trade Antitrust Improvement Act of 1982. See 15 U.S.C. §§ 6a, 45(a)(3) (1988) (effect on U.S. commerce must be "direct, substantial, and reasonably foreseeable"). But see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 415(2) (1987) (requiring only that the agreement or conduct have "some" effect on U.S. commerce). Comment a of § 415 of the Restatement defines "some effect" as "not insignificant." *Id.* at § 415 cmt. a.

473. For discussion of courts' modern treatment of the act of state and sovereign immunity doctrines see generally Garvey, *supra* note 295, at 463-82.

1. Procedural and Substantive Reasons for Adopting a Presumption Favoring Jurisdiction

Procedurally, this model would be superior to a balancing test in several ways. Balancing, while purporting to promote fairness by taking into account the interests of all the parties, is highly unpredictable.⁴⁷⁴ This uncertainty results from both the difficulty in accurate measurement of the factors, and the ease with which courts can manipulate certain factors to arrive at a predetermined result they feel is “fair” in a particular case.⁴⁷⁵ These difficulties in balancing were discussed thoroughly in *Laker Airways*.⁴⁷⁶ In particular, Judge Wilkey noted that such factors as “the importance of the regulation to the regulating state” or “the likelihood of conflict with regulation by other states” are both practically impossible to quantify and can be easily distorted to reach a conclusion favoring jurisdiction.⁴⁷⁷ The weighing of so many factors also consumes precious judicial resources in the discovery and the decision making processes.⁴⁷⁸ Adopting a simple presumption in favor of jurisdiction, by contrast, reduces the ambiguity of the prescriptive jurisdiction issue. Corporations can count on being responsible for their anticompetitive conduct, which is intended to and does in fact harm U.S. commerce. In turn, litigation on the issue will be reduced and the judicial process streamlined as courts and parties are forced to recognize a uniform and simplified jurisdictional standard.⁴⁷⁹

Substantively, an approach presuming jurisdiction accords with the realities of modern international business and congressional intent. Corporations are increasingly “going international” with their services and products. The trend is not just in trade but also in foreign direct investment, which has taken the form of joint-ventures, wholly-owned subsidiaries or branch offices abroad. Given the increased interdependence, it is clear that business activities abroad can have enormous domestic consequences. Accordingly, U.S. antitrust authorities should be concerned with global rather than national activities.⁴⁸⁰

474. See Note, *supra* note 23, at 1323-25.

475. See generally Garvey, *supra* note 295 at 482-91.

476. See discussion of *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949 (D.C. Cir. 1984), *supra* notes 387-417 and accompanying text.

477. See *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d at 949 (D.C. Cir. 1984). Such distortion is most evident in the Supreme Court’s opinion in *Hartford Fire*, in which Justice Souter concluded that “no true conflict existed” between British and American law, despite provisions in British insurance regulations that permitted London reinsurers to engage in activity that would be labeled anticompetitive under American law. See *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2910 (1993).

478. *Laker Airways*, 731 F.2d at 950.

479. *Id.*

480. Born, *supra* note 19, at 62-63. The legitimacy of extraterritoriality is substan-

As for congressional intent, it is undisputed that Congress intended U.S. antitrust law to apply to anticompetitive conduct abroad having significant effects in the United States.⁴⁸¹ The United States Supreme Court has repeatedly confirmed this view.⁴⁸²

2. The Loss of International Comity

The absence of comity factors from the foregoing analysis is essential. Predictability will be furthered as a result. Indeed the goals of comity themselves will also be furthered. In its present form, the doctrine of international comity is a non-doctrine. While many courts have sought to avoid international conflict by referring to comity, in reality the doctrine is almost never employed to divest a court of jurisdiction.⁴⁸³ This feigned embrace of comity probably does more harm to U.S. foreign relations than an approach paying no attention to the interests of foreign nations.⁴⁸⁴

Additionally, from a constitutional perspective, it is doubtful that weighing foreign government interests is a suitable task for U.S. courts.⁴⁸⁵ A well-known constitutional restraint on a court's ability to

tiated not just by American case law, but by foreign and public international law as well. *Id.* at 69-70; *see also* discussion *supra* notes 176-80 and *infra* notes 495-507 and accompanying text.

481. *See* discussion of Antitrust Improvements Act of 1982, *supra* notes 47-48 and accompanying text; *see also* *Laker Airways*, 731 F.2d at 945-46.

482. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 (1983) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American Commerce.") (citing *Continental Ore. Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962)).

483. *See* *Laker Airways*, 731 F.2d at 951. As Judge Wilkey explained, courts are inherently incapable of weighing domestic and foreign interests evenly. *Id.*

Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws. The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus courts inherently find it difficult neutrally to balance competing foreign interests.

Id. (footnotes omitted). *But see* *Born*, *supra* note 19, at 95 ("[T]he charge of parochial bias is both over-broad and, as yet, not established by the evidence.").

484. *Weintraub*, *supra* note 31, at 1817.

485. *See* *Laker Airways*, 731 F.2d at 955; *Garvey*, *supra* note 295, at 485-86 (dis-

consider foreign policy implications is the "political question doctrine," which holds that certain difficult and sensitive issues are "nonjusticiable," or more appropriately decided by the executive or legislative branches.⁴⁸⁶ The primary reason for taking these questions away from the judiciary is that courts lack "the necessary informational resources, the ability to adjust to diplomatic nuance and timing, and the remedial resources to respond to the international political dynamic."⁴⁸⁷

Accordingly, the relevant indicia of a nonjusticiable political question are (1) the issue involves resolution of questions omitted by text of the Constitution to other coordinate branches of government; (2) the resolution of the question demands that the court move beyond areas of judicial expertise, for instance, when there is a lack of judicially discoverable and manageable standards for resolving the issue; and (3) other prudential considerations counsel against judicial intervention.⁴⁸⁸ No-

curring the impracticality and questionable validity of the comity balancing test); Weintraub, *supra* note 31, at 1817 (same).

486. *Baker v. Carr*, 369 U.S. 186, 211 (1962). While every case that touches on foreign relations is not a nonjusticiable political question, those questions which "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature," should be avoided by the judiciary. *Id.* The doctrine derives from the separation of powers principle, which recognizes that each branch has a limited and sometimes exclusive sphere in which to exercise authority. *Id.* Foreign relations, for example, is most often within the realm of the executive and legislative branches. See U.S. CONST. art. I, § 8 (Congress's exclusive right to regulate foreign commerce; to define and punish offenses against the Law of Nations); art. II, § 2 (granting the executive's treaty making power); *Zemel v. Rusk*, 381 U.S. 1, 15-17, (1965) (noting executive authority over matters of foreign affairs); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948) (stating that the nature of executive decisions as to foreign policy is political rather than judicial, and such decisions are outside the domain of judicial inquiry).

487. Garvey, *supra* note 295, at 462 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-33 (1964)); *Laker Airways*, 731 F.2d at 949-50 ("Given the inherent limitations of the Judiciary, which must weigh [the balancing factors] in the limited context of adversarial litigation, we seriously doubt whether we could adequately chart the competing problems and priorities that inevitably define the scope of any nation's interest in a legislated remedy.").

488. *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 452 (D.C. Cir. 1982), *aff'd sub nom.* 463 U.S. 1216 (1983); see also *Baker v. Carr*, 369 U.S. at 217 (stating that the relevant indicia of a nonjusticiable political question are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the issue; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one ques-

where are the foregoing indicia more pronounced than in the comity analysis adopted by the third *Restatement* and the court in *Timberlane*. First, the texts of Articles I and II of the United States Constitution make clear that resolving international conflict and conducting foreign relations are within the exclusive realm of the executive and legislative branches.⁴⁸⁹ Second, by curtailing the legitimate reach of U.S. law, thereby reducing the executive's leverage in negotiating treaties to harmonize extraterritorial enforcement, a comity analysis diminishes the respect due to those coordinate branches of government.⁴⁹⁰ Third, such factors as "the importance of the regulation to the regulating state, . . . the degree to which the desirability of such regulation is generally accepted, . . . [and] the existence of justified expectations that might be protected or hurt by the regulation,"⁴⁹¹ are demonstrably unmanageable legal standards for resolving controversies.⁴⁹² Finally, if the general intent of the political question doctrine is to prevent judicial overreaching, it should certainly apply to an analysis that essentially grants judges a discretionary veto-power over the otherwise legitimate reach of U.S. law.⁴⁹³

Thus as a practical matter, and perhaps even as a constitutional matter, the comity analysis and its weighing of political immeasurables is better left to the diplomatic rather than the judicial process.⁴⁹⁴

tion").

489. See *supra* note 486.

490. Weintraub, *supra* note 31, at 1817.

491. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(c)-(d) (1987).

492. *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-50 (D.C. Cir. 1984) ("We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom."); see also Garvey, *supra* note 295, at 485-86; Weintraub, *supra* note 31, at 1817. But see Alford, *supra* note 242, at 14-15 (arguing that the comity approach satisfies the standards of justiciability).

493. See generally Garvey, *supra* note 295 (noting the general trend of U.S. courts in international civil litigation to engage in foreign policy-making which arguably violates the separation of powers). But see Born, *supra* note 19, at 96-97 (arguing that the courts' use of comity factors of § 403 of the Third Restatement is not in reality an intrusion into political or foreign policy issues, but rather the identification of "true" conflicts between the laws of different nations).

494. See *Laker Airways*, 731 F.2d at 955.

Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realiza-

VI. CONCLUSION

A presumption favoring jurisdiction, free of the comity analysis, is the best way to ensure predictability for the international community without interfering with the legitimate reach of U.S. antitrust law.

Opponents of a presumption of jurisdiction unimpeded by comity considerations will claim that such an approach will bring the Sherman Act into sharp conflict with the legitimate interests of other countries, particularly our closest trading partners.⁴⁹⁵ Admittedly, such an expansive approach may eventually lead to retaliation. Following the adoption of the *Alcoa* effects doctrine in the U.S., foreign legislatures enacted "blocking statutes" to hamper U.S. antitrust actions on their soil.⁴⁹⁶ There are several reasons, however, for believing that such retaliation is less likely to occur now than before.

First, America's largest trading partners, including the European Economic Community,⁴⁹⁷ NAFTA members,⁴⁹⁸ and Japan,⁴⁹⁹ have adopted

tion of national interests within the sphere of international association. These forums should and, we hope, will be utilized to avoid or resolve conflicts caused by contradictory assertions of concurrent prescriptive jurisdiction.

Id. (footnotes omitted).

495. See Born, *supra* note 19, at 88.

496. See *supra* notes 246-49 and accompanying text (discussing foreign reaction to the use of the "effects" doctrine in U.S. courts).

497. Articles 85 and 86 of the Treaty Establishing the European Economic Community, which sets forth the basic rules on competition law among its member states, are directly analogous to sections one and two of the Sherman Act. See Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85, 86, 298 U.N.T.S. 11, 47-48 [hereinafter EEC Treaty]; Sherman Act, 15 U.S.C. §§ 1, 2 (1988). Article 85 prohibits "any agreements between enterprises, any decisions by associations . . . [and] concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition with the Common Market." EEC Treaty, *supra*, art. 85. Article 86, aimed at monopoly conduct, provides that "action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited." EEC Treaty, *supra*, art. 86.

In the EEC equivalent of *Alcoa*, the Court of Justice of the European Communities in the *Wood Pulp Case* adopted a rather strong version of the "effects" doctrine. Joined Cases 89, 104, 114, 116, 117 & 125 to 129/85, A. Ahlstrom Osakeyhtio v. Commission, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988). Specifically, the Court held that EEC competition laws applied to overseas activity of non-EEC entities conspiring to fix prices affecting EEC consumers. *Id.* at 5243-44; see also Grosfillex-Fillistorf, 1964 J.O. (58) 915, 3 C.M.L.R. 237 (1964) (earlier holdings by the European Commission). For further commentary on the development of Antitrust law in the European Community, see generally Alford, *supra* note 242, at 27-37.

498. Canadian antitrust legislation has closely tracked that of the United States. Canada's first antitrust statute, enacted in 1889, prohibited contracts, trusts, and combinations formed in restraint of trade. An Act for the Prevention and Suppression of

aggressive antitrust laws similar to our own. Indeed, the standards set in U.S. antitrust law have proven a model for many developing nations.⁵⁰⁰

Second, significant areas of antitrust enforcement have been covered by treaty mechanisms that limit the exercise of prescriptive jurisdiction among treaty members, and provide measures for dispute resolution in the event a conflict in policies arises.⁵⁰¹

Combinations Formed in Restraint of Trade, R.S.C., ch. 41 (1889). The regulation of monopolies and mergers began in 1910. Combines Investigation Act, R.S.C., ch. 9 (1910). Legislation enacted in 1986 substantially updated Canadian antitrust law and established a specialized Competition Tribunal. Competition Act, C.R.C. ch. 34 (1985). See generally Christopher J. Maule & Thomas W. Ross, *Canada's New Competition Policy*, 23 GEO. WASH. J. INT'L L. & ECON. 59 (1989); Craig Marquiz, *The North American Free Trade Agreement & The Extraterritorial Application of United States Antitrust Legislation: A Proposal for Change*, 10 ARIZ. J. INT'L & COMP. L. 139, 146 n.24 (1993).

Although, article 28 of the Mexican Constitution provides that "there shall be no monopolies or restrictions to free competition of any kind," antitrust enforcement has not been a top priority of the Mexican government. Marquiz, *supra*, at 146 n.25. This lack of attention to antitrust enforcement was due largely to the existence of large state owned monopolies in a variety of industries. *Id.* Recently, however, Mexico's federal legislature enacted additional antitrust measures to streamline the NAFTA transition and minimize trade disputes. *Id.* (citing Secretaria de Comercio y Fomento Industrial, Ley Federal de Competicion Economica, D.O. 9-15 (Dec. 24, 1992)). These regulations incorporate key provisions of the Sherman, Federal Trade Commission, Robinson-Patman, and Clayton Acts. *Id.*

499. The history of antitrust law in Japan began with the enactment of the Antimonopoly Act, intended to emulate U.S. antitrust law, after World War II. Richard L. Thurston, *Japan—The Antimonopoly Act and Japanese Fair Trade Commission Enforcement*, 27 INT'L LAW. 533, 534-35 (1993). Subsequent revisions of the Act diluted its provisions and made many anticompetitive practices, including horizontal and vertical restraints, legal. *Id.* Antitrust enforcement by the Japanese government was considered lax. *Id.* After years of pressure from the West, particularly the United States, Japan initiated antitrust reform measures, including greater regulatory supervision, enforcement, and the issuance of Antimonopoly Guidelines outlining various unfair trade practices. *Id.* The reforms, to date, seem to have resulted in tougher antitrust enforcement. *Id.*

500. See Joel Davidow, *The Relevance of Antimonopoly Policy for Developing Countries*, ANTITRUST BULL., Spring 1992, at 277 (noting adoption of competition legislation in former socialist countries of Eastern Europe).

501. Garvey, *supra* note 295, at 490-91. The antitrust cooperation agreement between the United States and the European Community is a prime example. Under its framework, members must investigate anticompetitive behavior alleged by the enforcement authorities of the other member to have occurred. E.C.-U.S. Antitrust Agreement, *supra* note 437, arts. II, III & IV. Moreover, the agreement requires enforcement authorities to consider various comity factors in the event policies between the two members are brought into conflict, thus placing a positive limitation on the

Finally, even where no cooperative agreement exists and a conflict between sovereign interests is present, the executive and legislative branches are fully capable of limiting the prescriptive reach of antitrust law on their own initiative. For example, in 1982, Congress passed the Foreign Trade Antitrust Improvement Act, which "exempt[ed] from United States antitrust law conduct that lacks [a direct, substantial, and reasonably foreseeable] domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad."⁵⁰² Further, in 1988, the Antitrust Division of the Department of Justice announced its investigations would consider factors similar to the *Restatement* factors.⁵⁰³ Such non-judicial mechanisms are the most appropriate means of resolving the serious conflicts between sovereign interests in the antitrust context. Courts simply lack the institutional resources, timing, and skill to solve such politically sensitive problems.⁵⁰⁴

Courts, however, are not entirely without the ability to dismiss cases involving foreign interests. The procedural issues discussed in Part II of this article, judicial jurisdiction⁵⁰⁵ and *forum non conveniens*,⁵⁰⁶ are almost always raised in cases involving foreign defendants. These questions do not engage judges in impractical and unpredictable balancing of sovereign interests required in the *Timberlane/Restatement* analysis. By contrast, they focus on the quantifiable contacts of the parties and transactions to determine the relative "fairness" or "convenience" in hearing the dispute in the chosen forum.⁵⁰⁷ Rather than being concerned with the potential impact the assertion of jurisdiction will have on foreign relations, judges in these issues are concerned with judicial efficiency and practicality within the interstate and international system. These are, by themselves, weighty concerns and ones that courts are well able to undertake because the necessary knowledge and information are within the court's well-established domain. But when judges venture beyond

exercise of jurisdiction. *See id.* art. VI.

502. *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1106 (S.D.N.Y. 1984). For further commentary on the FTAIA, see *supra* notes 233-36 & 287 and accompanying text.

503. *See supra* notes 282-84 and accompanying text.

504. *See supra* notes 382-417 & 483-94 and accompanying text.

505. *See supra* notes 40-109 (*in personam*) & notes 130-43 and accompanying text (*quasi in rem*).

506. *See supra* notes 116-29 and accompanying text.

507. *See supra* notes 71-76 (fairness factors in *personam* jurisdiction), notes 122-26 (convenience factors in *forum non conveniens*), & notes 131-36 (fairness in *quasi in rem*).

that territory into the battleground of governmental interests, their efforts, though well-intended, do more harm than good.

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