Cornell International Law Journal

Volume 16
Issue 1 *Winter 1983*

Article 5

The Use of Interest Analysis in the Extraterritorial Application of United States Antitrust Law

Edward A. Rosic Jr.

THE USE OF INTEREST ANALYSIS IN THE EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAW

INTRODUCTION 147
I. HISTORY OF EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAW 149
A. THE ALCOA EFFECTS DOCTRINE AND THE TIMBERLANE JURISDICTIONAL RULE OF REASON ... 149
B. DEFENSES TO THE EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAWS 157
1. Sovereign Immunity 158
2. Act of State 159
3. Interface of the Defenses with the Jurisdictional Rule of Reason 161
C. FOREIGN OBJECTIONS TO THE EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAW. 163
II. INTEREST ANALYSIS IN THE INTERNATIONAL CONTEXT 165
A. THE CURRIE APPROACH 166
B. THE BAXTER COMPARATIVE IMPAIRMENT APPROACH 171
C. A COMPARISON OF THE JURISDICTIONAL RULE OF REASON WITH THE COMPARATIVE IMPAIRMENT APPROACH 174
D. THE COMPARATIVE IMPAIRMENT APPROACH APPLIED 180
1. False Conflict Example 180
2. Dominant Foreign Interest Example 182
3. Dominant United States Interest Example 185
4. Balanced Interest Example 187
III. INTEREST ANALYSIS AS A PRELUDE TO NEGOTIATION 190
CONCLUSION 191

In 1945, *United States v. Aluminum Corporation of America*[1] *(Alcoa)* established that the Sherman Act applied to foreign conspiracies solely because they affected U.S. commerce. Since that time,

1. 148 F.2d 416 (2d Cir. 1945).

the governments and commentators of the United States' principal trading partners have opposed this broad extraterritorial application of U.S. antitrust laws.[2] The "*Alcoa* effects test" permits the application of U.S. law to alleged activities occurring entirely outside the United States involving no U.S. actors.[3] It is generally believed within the United States that such a test is necessary to avoid the subversion of the U.S. antitrust laws by domestic corporations acting through foreigners and subsidiaries.[4] This broad application of the U.S. antitrust laws threatens the domestic sovereignty and economic policies of foreign nations. It conflicts with the regulation by other nations of their domestic economies,[5] denies access to American markets for foreign firms complying with their own domestic law, and creates an aura of American legal imperialism over the world economy. Thus, despite the need for an extraterritorial antitrust law, there is a more pressing need for a principled restraint of the *Alcoa* effects test.

Several doctrines temper the application of the *Alcoa* test. When a foreign government is a defendant in an antitrust claim, a U.S. court may lack jurisdiction under the Foreign Sovereign Immunities Act.[6] Further, the act of state doctrine, barring U.S. courts from hearing a claim against a private citizen acting on behalf of his own government, may preclude the court from hearing a claim otherwise satisfying the *Alcoa* test.[7] And finally, the courts have enunciated a wide-ranging list of factors which restrain the test's application.[8] The factors highlight foreign state interests and the executive pre-eminence in foreign policy. Even this jurisdictional rule of reason,[9] however, does not satisfy the *Alcoa* test's foreign opponents.

This Note assesses the present restraints on the *Alcoa* effects test and concludes that they do not adequately address the foreign inter-

2. *See infra* notes 88-97 and accompanying text. Lord Lloyd of Kilgerran, Esher Sury, England, stated that "[t]he United Kingdom is not alone in objecting. Some 20 countries have enacted blocking statutes primarily as a reaction to the unacceptable extension of [U.S.] jurisdiction." U.S. Import Weekly (BNA) 214 (Nov. 25, 1981). *See generally* Maechling, *Uncle Sam's Long Arm,* 63 A.B.A.J. 372 (1977).

3. *See infra* notes 18-33 and accompanying text.

4. *See* Petit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws,* 37 BUS. LAW 697, 697-99, 714-15 (1982).

5. *See infra* note 90 and accompanying text.

6. *See infra* notes 66-72 and accompanying text.

7. *See infra* notes 73-82 and accompanying text.

8. *See infra* notes 51, 60 & 65 and accompanying text.

9. Though the jurisdictional rule of reason is occasionally referred to as the "comity doctrine," the factors cited as composing it involve much more than notions of comity. The factors seek to measure fairness and the nexus of the alleged activity to the United States; therefore, the term "jurisdictional rule of reason" more accurately describes the test.

ests prompting its criticism. The restraints require judicial determinations in an area primarily reserved for the executive and the legislature. This Note proposes that the United States federal courts temper the *Alcoa* effects test using the comparative impairment interest analysis suggested by Assistant Attorney General William F. Baxter. Under this test, the court's examination of the factors to be used in determining whether to extend jurisdiction will be limited to those relevant to a comparison of the effects which the application of U.S. law will have on the internal objectives of the foreign nation and the effects which the application of foreign law will have on the internal objectives of the United States.[10] This approach will restrain the extraterritorial application of the U.S. antitrust laws, taking account of the foreign economic interests prompting the opposition to such application, and will prevent the federal judiciary from addressing issues beyond its competence.

I

HISTORY OF EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAW

A. THE ALCOA EFFECTS DOCTRINE AND THE TIMBERLANE JURISDICTIONAL RULE OF REASON

The Sherman Act expressly applies to commerce with foreign nations.[11] The Act's legislative history presents strong evidence that Congress intended its coverage to reach beyond United States borders.[12] Early cases, however, limited this application. In 1909, the Supreme Court first ruled on the extraterritorial effect of the Sher-

10. *See infra* notes 118-43 and accompanying text.

11. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations, is hereby declared to be illegal." Sherman Act § 1, 15 U.S.C. § 1 (1976).

Other trade regulation statutes similarly encompass foreign trade. The Federal Trade Commission Act defines commerce to include "commerce . . . with foreign nations." 15 U.S.C. § 44 (1976). The Wilson Tariff Act concerns persons "engaged in importing any article from any foreign country into the United States" when such importation restrains competition. 15 U.S.C. § 8 (1976). The Webb-Pomerene Act exempts from the Sherman Act certain associations of persons engaged in export trade. 15 U.S.C. § 62 (1976). Numerous other antitrust statutes explicitly affect foreign trade. *See generally* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973).

12. For a complete discussion of the legislative history indicating Congress' intention for the Sherman Act to have some extraterritorial application, see K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 18-21 (1958). Senator Hoar, author of the version of the Sherman Act that was enacted, stated: "The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States." *Id.* at 21.

Brewster summarizes the legislative history as follows:

man Act. In *American Banana Co. v. United Fruit Co.*,[13] the American Banana Company, a U.S. corporation, alleged that another U.S. corporation doing business in Costa Rica had engaged in predatory practices that violated the Sherman Act. Justice Holmes upheld a lower court dismissal on the ground that the Act did not extend to activities performed outside of the United States that were legal within the jurisdiction in which they occurred.[14] Read broadly, *American Banana* exhibits a strict view that a nation has exclusive jurisdiction over activity within its territory. The extraterritorial exercise of jurisdiction diminishes the sovereignty of the foreign nation, and gains validity only by that nation's consent.[15] Subsequent cases narrowed *American Banana,* allowing the extraterritorial reach of U.S. antitrust law when the complainant alleged that some activity occurred in the United States affecting U.S. commerce.[16] The territorial nexus necessary to invoke U.S. antitrust law eventually became more attenuated,[17] culminating in its abandonment in

---

> [I]t seems that there were at least two separate and distinct objects of legislative concern with foreign arrangements: an application of the relationship between imports and domestic competition, and a desire on the part of some at least to prevent the act's evasion by jurisdiction-hopping on the part of American concerns . . . . Competition within, or effects upon, foreign markets did not seem to be a matter of congressional concern.

Id. See also W. WALKER, HISTORY OF THE SHERMAN LAW (1910).

13. 213 U.S. 347 (1909).

14. *Id.* at 356-57, 359.

15. For a discussion of the territorial principle, as described by Chief Justice Marshall, see Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135-36 (1812).

16. In Thomsen v. Cayser, 243 U.S. 66 (1917), defendants alleged a combination in restraint of the shipping trade between New York and South Africa. The Court found that "the combination affected foreign commerce of [the United States] and was put into operation here." *Id.* at 88. In United States v. Sisal Sales Corp., 274 U.S. 268 (1927), the Court found a "conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein." *Id.* at 276. The Court felt justified in examining foreign conduct on the basis of both the unlawful acts performed in the United States and the intended and actual effect on U.S. imports and the U.S. sisal market. "[B]y their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States." *Id. See generally* Kintner & Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce—Variations on American Banana Since 1909,* 15 B.C. INDUS. & COM. L. REV. 343 (1973).

17. In United States v. 383,340 Ounces of Quinine Derivatives, Admiralty No. 98-242 (S.D.N.Y. 1928) and United States v. 5,898 Cases Sardines, Admiralty No. 105-37 (S.D.N.Y. 1930), imported commodities were sold in the United States pursuant to a foreign agreement in restraint of trade. This created a sufficient basis for the application of U.S. law because U.S. commerce in the commodities was substantially affected.

In Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944), an action brought under the Federal Trade Commission Act, the defendant circulated advertisements in Latin America which made false representations concerning correspondence courses offered through a U.S. mail-order school. According to the court, "Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States." *Id.* at 35. The

Alcoa.[18]

Alcoa was the first case to bring wholly foreign conduct within the ambit of the U.S. antitrust law based solely on effects within the United States or upon U.S. commerce with foreign nations. Six foreign aluminum producing corporations, including a wholly-owned Canadian subsidiary of Alcoa, formed a Swiss corporation, Alliance.[19] The court found that Alcoa, a U.S. corporation, was not a party to Alliance despite the participation of Aluminum Limited, its Canadian subsidiary.[20] The Alliance shareholders incorporated the U.S. market into a pre-existing quota arrangement.[21] The Alliance cartel[22] allocated a "free" quota to each shareholder, and charged a royalty for sales above that quota, graduated progressively according to the excess.[23] Alliance distributed the royalties as dividends to its shareholders.[24] The cartel allowed producers to charge any price, but evidence from past practices and implications in the agreement indicated that the arrangement effectively set a minimum price.[25] Judge Learned Hand, speaking for the court, held the Alliance agreement unlawful under Section One of the Sherman Act.[26]

To determine the applicability of the Sherman Act to an agreement among persons not in allegiance to the United States, Hand

---

primary unlawful activities occurred outside of the United States, however, they were planned in the United States and were performed by U.S. citizens.

The power of U.S. courts over U.S. citizens was also the basis for the extraterritorial application of U.S. law in Bulova Watch Co. v. Steele, 194 F.2d 567 (5th Cir.), *aff'd*, 344 U.S. 280 (1952). There, the Bulova Watch Company alleged trademark infringement and unfair competition in Mexico. Watches bearing the trademark "Bulova" were sold by Steele in Mexico and some found their way into U.S. commerce. Several watch parts were also purchased by Steele in the United States. The Fifth Circuit exercised jurisdiction and applied United States law to acts in Mexico because no conflict with Mexican sovereignty was apparent. The Supreme Court, affirming, distinguished *American Banana*, stating that "the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States." 344 U.S. at 288.

18. *See supra* note 1 and accompanying text. Because a quorum of the Supreme Court could not be obtained, the appeal was transferred to the Second Circuit Court of Appeals as a special statutory court, pursuant to Act of June 9, 1944, Pub. L. No. 332, 58 Stat. 272 (current version at 15 U.S.C. § 29 (1976)). United States v. Aluminum Co. of America, 322 U.S. 716 (1943).

19. 148 F.2d at 442.

20. *Id.*

21. *Id.*

22. In a passing reference, the court pierced the Swiss corporate veil and found that Alliance was an agreement or cartel, and not an independent corporation. *Id.* This finding brought Alliance within the contract, combination or conspiracy requirement of the Sherman Act, Section One.

23. *Id.* at 443.

24. *Id.*

25. *Id.*

26. *Id.* at 445.

considered congressional intent and the "limitations customarily observed by nations upon the exercise of their powers."[27] He concluded that, at a minimum, the Act prohibits agreements that both intend to affect and actually affect U.S. imports.[28] Because the Alliance quota system included the U.S. market for aluminum, the agreement clearly intended to affect United States imports.[29] The court then imposed the burden of proof on the defendant producers to show the absence of actual effect on United States imports.[30] Aluminum Limited failed to meet this burden, and the court found the Alliance agreement in violation of the Sherman Act.[31]

Alcoa departed from earlier cases in several respects: the actors were not U.S. citizens, the agreement was formed outside the United States, and the court did not require that the plaintiff identify U.S. agents.[32] *Alcoa* merely required that the plaintiff establish the defendants' intent to affect U.S. commerce,[33] and the activity's actual effect on such commerce. This test was subsequently labeled the *Alcoa* effects test. If the plaintiff could show that the defendants expressed the requisite intent in a contract, then the burden shifted to the defendants to show no actual effect on U.S. commerce.

Alcoa's requirement that the conduct or agreement have an effect on United States commerce is vague. Courts and commentators have described the standard in various ways.[34] None of them,

---

27. *Id.* at 443.
28. *Id.* at 444.
29. *Id.*
30. *Id.* at 444-45.
31. *Id.* at 445.
32. After citing earlier cases that had required plaintiffs to show a U.S. agent, the court stated:

> It is true that in those cases the persons held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means to executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell [aluminum] ingot.

Id. at 444.

33. At least one subsequent case weakened the intent requirement by finding constructive intent sufficient to satisfy the first half of the *Alcoa* test. In United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949), the court determined that the foreign company's activities were subject to U.S. law based on the *Alcoa* test because: (1) the Dutch firm knew or should have known its conduct furthered the General Electric Company's scheme to restrain foreign competition, and (2) there had been a significant effect on U.S. commerce. Though there was evidence that the foreign company was aware of U.S. antitrust laws, the court stated that specific intent to violate the law was not necessary to satisfy the "intent to affect U.S. commerce" component of the *Alcoa* doctrine. *Id.* at 891. Thus, the court found that a general intent, which might be inferred from acts or terms of an agreement, coupled with an actual effect on U.S. commerce, was sufficient for extraterritorial application of the Sherman Act.

34. *See, e.g.,* citations in Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). "In essence, . . . [t]here is no agreed black-letter rule articulating the Sherman Act's 'commerce' in the international context." *Id.* at 611, *quoting* Rahl, *For-*

however, has reduced the uncertainty in applying the law to borderline cases. Clearly, there is a need for an effects test. A strict territorial application of the U.S. antitrust laws would thwart the goals behind the laws, permitting foreign firms to engage in anticompetitive activity denied to U.S. concerns. On the other hand, the unmitigated application of the effects test places no substantial limits on the reach of U.S. laws. Congress did not purport to regulate the world economy when it enacted the U.S. antitrust law,[35] nor would such regulation be accepted by the international community.[36] Nevertheless, an unmitigated application of the effects test would regulate large sectors of the world economy.

The first case to directly confront the deficiency of the effects test was *Timberlane Lumber Co. v. Bank of America*[37] *(Timberlane)*. In *Timberlane,* the Ninth Circuit recast the effects doctrine to articulate the factors that the court found lurking behind decisions applying it.[38]

The Timberlane Lumber Company, an Oregon partnership that milled and exported lumber from Honduras,[39] alleged that the Bank of America and others conspired to interrupt Timberlane operations in order to retain control of the Honduran lumber business for individuals financed and controlled by the Bank.[40] The defendants effectuated their plan by enforcing claims against Timberlane's predecessor in the Honduran courts.[41] The Honduran court issued embargoes against Timberlane's subsidiaries and appointed an interventor, who allegedly received Bank payments to "cripple and, for a time, completely shut down Timberlane's milling operation."[42] Timberlane alleged that its inability to export Honduran lumber affected U.S. lumber imports.[43]

The *Timberlane* court found the effects doctrine inadequate for

---

eign Commerce Jurisdiction of the American Antitrust Law, 43 ANTITRUST L.J. 521, 523 (1974).

A "direct effect" standard was applied in United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (E.D. Ohio 1949), *modified and aff'd,* 341 U.S. 593 (1951). Rahl advocates extraterritorial application of U.S. antitrust law if a restraint "substantially affects" U.S. commerce. *See* Rahl, *supra,* at 523. The distinction between direct and indirect effects and the standard of substantial effect do not remedy the vagueness of the requirement of an actual effect on U.S. commerce.

35. *See supra* notes 11-12 and accompanying text.
36. *See infra* notes 88-97 and accompanying text.
37. 549 F.2d 597 (9th Cir. 1976).
38. *Id.* at 612.
39. *Id.* at 603-04.
40. *Id.* at 604.
41. *Id.*
42. *Id.* at 604-05.
43. *Id.* at 605.

determining whether to apply U.S. antitrust law to the case.[44] The court stated that the effects test was "incomplete" because it failed "to consider the other nation's interests . . . [and] the full nature of the relationship between the actors and this country."[45] The court, however, noted that United States courts, "even when professing to apply an effects test," have often considered "comity and the prerogatives of other nations" in their decisions to apply U.S. law.[46] To incorporate these concerns more fully into the court's decision, the court established a tripartite analysis.[47] First, the plaintiff must show some effect on U.S. commerce.[48] Second, the plaintiff must show that the alleged restraint produced sufficient effect to be cognizable as a Sherman Act violation.[49] And third, the court should weigh factors of fairness and comity to determine whether to apply U.S. law.[50] This tripartite analysis refined the examination of the effect on U.S. commerce that is sufficient to warrant extraterritorial antitrust law application. The long list of factors relevant to the third part of the test, however, created an extremely broad inquiry. The factors included:

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 to those elsewhere.
5. The extent to which there is explicit purpose to harm or affect American commerce.
6. The foreseeability of such effect.
7. The relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[51]

The court held that Timberlane satisfied the first and second tests,[52] but that the record below was insufficient to permit a decision on the test of international comity and fairness.[53] The court remanded for a consideration of the factors relevant to the third test, suggesting that the district court would have difficulty making a determination because "it is clear . . . that the most direct economic

44. *Id.* at 611-12.
45. *Id.*
46. *Id.* at 612. The court stated that, "[t]he failure to articulate these other elements . . . is costly, however, for it is more likely they will be overlooked or slighted in interpreting past decisions and reaching new ones." *Id.*
47. *Id.* at 613.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 614.
52. *Id.* at 615 (numbering added).
53. *Id.*

effect was probably on Honduras. However, there has been no indication of any conflict with the law or policy of the Honduran government."[54]

The *Timberlane* analysis is known as the jurisdictional rule of reason.[55] The Ninth Circuit further articulated this approach in *Wells Fargo & Co. v. Wells Fargo Exp. Co.*[56] There, the court reversed the district court, and applied U.S. antitrust law to foreign activities. The district court had required a substantial effect on U.S. commerce to apply the antitrust laws extraterritorially.[57] The Ninth Circuit cited *Timberlane* as eliminating the explicit concern for substantiality. The court stated that a consideration of the factors of comity and fairness incorporates the substantiality standard. Furthermore, the court explained that a court should balance the factors proposed in *Timberlane*. The absence of a single factor was not determinative.[58] Not all of the factors considered must weigh in favor of extraterritorial application of U.S. law. Instead, the factors must, on balance, indicate that application is appropriate.

The Third Circuit adopted the jurisdictional rule of reason in *Mannington Mills, Inc. v. Congoleum Corp. (Mannington Mills),*[59] restating many of the *Timberlane* factors and adding the following:

---

54. *Id.*

55. *Id.* at 613. The court borrowed the phrase from K. BREWSTER, *supra* note 12, at 446. The determination of whether to apply United States antitrust law is essentially a determination of whether to exercise jurisdiction. The Ninth Circuit applies the tripartite *Timberlane* analysis to determine if the court *should* exercise jurisdiction. Timberlane Lumber Co. v. Bank of America, 549 F.2d at 613; *accord* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1299-1300 (3rd Cir. 1979) (Adams, J., concurring). Other courts, however, apply a two-fold test: "(1) does subject matter jurisdiction exist; and (2) if so, *should* it be exercised?" Conservation Council of Western Australia v. Aluminum Co. of America, 518 F. Supp. 270, 274 (W.D. Pa. 1981). Thus, "the considerations of international comity [can be] reviewed as part of the threshold jurisdictional decision or in connection with a subsequent determination regarding abstention. . . ." Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680, 688 (S.D.N.Y. 1979). If the factors of fairness and comity are considered in determining whether jurisdiction *should* be exercised, the first two tiers of the *Timberlane* tripartite analysis would be used to decide whether jurisdiction even exists.

56. 556 F.2d 406 (9th Cir. 1977).

57. Wells Fargo & Co. v. Wells Fargo Exp. Co., 358 F. Supp. 1065, 1077 (D. Nev. 1973).

58. 556 F.2d at 428.

59. 595 F.2d at 1294-98. In *Mannington Mills,* both the plaintiff and defendant were United States manufacturers of floor coverings. The plaintiff alleged that the defendant secured foreign patents by fraud, which, if perpetuated in securing a domestic patent, would violate the antitrust laws. The patents allegedly secured by fraud were issued by twenty-six foreign countries. Although the plaintiff desired to resolve the matter as a unitary one, the court declined to treat it in that fashion. Rather, the court stated that on remand, the lower court would have to assess the involvement of each country against the principles of comity. The result in each case would not need to be identical with respect to the different nations or the different types of relief considered on the basis of each nation's patent issue. The plaintiff sought treble damages and an injunction to prevent Congoleum from enforcing the patents in their respective nations. Either or both

1. Availability of a remedy abroad and the pendency of litigation there.
2. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief.
3. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries.
4. Whether an order for relief would be acceptable in this country if made by a foreign nation under similar circumstances.
5. Whether a treaty with the affected nations has addressed the issue.[60]

In a confusing opinion, the Seventh Circuit failed to apply the jurisdictional rule of reason in a case where the defendants defaulted.[61] It upheld a District Court's extraterritorial application of the antitrust laws despite the lower court's failure to apply the *Timberlane* comity and fairness factors. The court stated, "the *Mannington Mills* factors are not the laws of this Circuit."[62] It rejected the *amici curiae*'s arguments that the *Timberlane* factors weighed against the application of U.S. law.[63] The court also found little value in remanding the case for a consideration of the factors, stating, "the District Court would be placed in the impossible position of having to make specific findings with the defaulters refusing to appear and participate in discovery."[64] Thus, despite the *amici*'s arguments, the court found the factors inapplicable, at least when foreign defendants default. It is unclear from the conflicting language in the opinion whether the Seventh Circuit rejected the jurisdictional rule of reason altogether or merely when defendants default.

Whether a court views the *Alcoa* effects doctrine in its original form, or as refined by the jurisdictional rule of reason, both the articulation of the standard and the relevant factors can vary greatly

---

of these types of relief could conceivably stand or fall after an analysis of the factors of comity and fairness.

60. *Id.* at 1297-98 (factors are renumbered).

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

62. *Id.* at 1255.

63. *Id.* at 1255-56.

64. *Id.* at 1256. *But see* Recent Development, *Antitrust Law: Extraterritoriality,* 21 HARV. INT'L L.J. 515, 522 (1980). The authors argue that the *amici curiae* could supply the necessary material since the majority of factors considered would involve matters external to the defaulter's alleged unlawful activities. The only factors in either *Timberlane* or *Mannington Mills* that would perhaps require discovery of information within the control of the defaulters are (1) intent to harm U.S. commerce and (2) the forseeability of the effect on such commerce. If the plaintiffs' allegations on these points are accepted for purposes of the balancing test, the analysis would not be significantly impaired. *Amici curiae,* including affiliates of the defaulters or their governments, could provide all other necessary discovery to the court.

The analysis proposed in this Note, *infra* notes 118-43 and accompanying text, can be performed in the absence of defaulting defendants.

from case to case.[65] In addition, it is unclear whether all of the Circuits accept the rule of reason. Nevertheless, it remains clear that *Alcoa* requires a finding that foreign actors intend to affect and actually do affect U.S. commerce. Once this finding is made, the courts usually assess factors in the case that may cause the court to decline application of U.S. antitrust laws. These factors are general in nature, and create a broad judicial inquiry.

B. Defenses to the Extraterritorial Application of United States Antitrust Laws

Before assessing whether the U.S. antitrust laws are applicable to foreign conduct under the *Alcoa* effects test or the jurisdictional rule of reason, a U.S. court will first consider two independent defenses to the extraterritorial application of U.S. law. Both defenses are invoked in cases involving foreign sovereigns. First, if a foreign government is an actor in the allegedly unlawful conduct, sovereign immunity may bar jurisdiction over the government in U.S. court. Second, if a foreign governmental act is part of the allegedly unlawful conduct, the act of state doctrine may prevent the application of U.S. law to foreign private defendants. This section explores the current scope of these two defenses and then discusses

---

65. The *Timberlane* factors, *see supra* text accompanying note 51, and the *Mannington* factors, *see supra* text accompanying note 60, for example, are not identical in coverage or language. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) provides a third statement of appropriate factors:

(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 prescribed by that state.

These factors were each examined by the Ninth Circuit in United States v. Vetco, Inc., 644 F.2d 1324, 1331 (9th Cir. 1981), in lieu of the longer list presented by the same court in *Timberlane,* 549 F.2d 597 (9th Cir. 1976).

Brewster states the jurisdictional rule of reason factors as follows:

(a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad;
(b) the extent to which there is explicit purpose to harm or affect American consumers or American business opportunities;
(c) the relative seriousness of effects on the United States as compared with those abroad;
(d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them;
(e) the degree of conflict with foreign law and policies; and
(f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

K. BREWSTER, *supra* note 12, at 446.

the interface of the defenses with the determination of the extraterritorial application of U.S. antitrust law.

1. Sovereign Immunity

In the Foreign Sovereign Immunities Act (FSIA),[66] Congress codified the long-standing doctrine that a foreign sovereign is immune from suit,[67] absent its consent, unless the activities prompting the suit are commercial in nature.[68] A court determines whether the activity is commercial based on the nature of the activity rather than its purpose.[69] A foreign sovereign may regulate economic activity without losing immunity from the antitrust laws;[70] a foreign

66. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 144(d), 1602-611 (1976)) [hereinafter referred to as FSIA].

67. Chief Justice John Marshall applied the doctrine in Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). In that case, the Court declined to exercise jurisdiction over a sovereign defendant, holding that a foreign state was absolutely immune from suit unless it consented. Marshall later modified this rule in Bank of the United States v. Planter's Bank, 22 U.S. (9 Wheat.) 904, 907 (1824), where he stated that "when a government becomes a partner in any trading company, it devests [sic] itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Planter's Bank* laid the foundation for the commercial activity exception to sovereign immunity in the FSIA. *See infra* note 69.

68. Prior to the passage of the FSIA, the Supreme Court expressed concern for United States foreign relations and the concept of separation of powers. *See, e.g., Ex parte* Republic of Peru, 318 U.S. 578 (1943), where the Court referred to "the policy, recognized both by the Department of State and the courts, that our national interest will be better served . . . if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Id.* at 589. Courts deferred to State Department judgments as to whether the defense of sovereign immunity ought to be allowed in a particular case. *See, e.g.,* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945). In 1952, the State Department adopted the "restrictive theory" of sovereign immunity, denying the defense to a sovereign in cases involving commercial activity. Letter from Acting Legal Adviser, Jack B. Tate, to Department of Justice (May 19, 1952) *reprinted in* 26 Dept'l State Bull. 984 (1952).

69. FSIA, *supra* note 66, at 28 U.S.C. § 1605(a) (1976), provides:

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

Commercial activity is defined as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose." *Id.* at § 1603(d).

70. *See* International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd,* 649 F.2d 1354 (9th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982) [hereinafter referred to as *IAM*]; Note, *Sovereign Immunity,* 13 VAND. J. TRANSNAT'L L. 835 (1980). The court in *IAM* determined that OPEC's activities were not "commercial" within the FSIA. The pricing mechanism was considered a means of controlling production of a prime natural resource. As such, the regulation was an activity in which only a sovereign may engage

sovereign operating a business through a corporation, however, is not immune.[71] The legislative history of the FSIA gives the courts wide latitude in characterizing activity as commercial or noncommercial.[72]

2. *Act of State*

In the seminal act of state case, *Underhill v. Hernandez,*[73] the Court held that, "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[74] This doctrine has always influenced the extraterritorial reach of U.S. antitrust law. The Court recently articulated the reasoning behind the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino,*[75] where it stated:

> The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further the country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[76]

Rejecting an inflexible rule, the Court stated that a "balance of relevant considerations" should determine whether United States courts should invoke the doctrine.[77] The import of the subsequent cases interpreting the act of state doctrine is that courts should avoid inter-

---

and therefore was non-commercial. *IAM* at 567. The court found support for this characterization in the United Nation's position that as a matter of international law a sovereign has the exclusive right to control its natural resources. *Id.* at 567-68.

U.S. courts have also preserved the foreign sovereigns' antitrust immunity by finding that it is not a "person" within the meaning of the Sherman Act, Section One. Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977); *IAM, supra* note 70, at 570-72; Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). *Cf.* Parker v. Brown, 317 U.S. 341 (1943) (a domestic state is not a "person" under the Sherman Act). *But cf.* Pfizer, Inc. v. India, 434 U.S. 308 (1978) (foreign sovereign may be a plaintiff "person" under the Sherman Act).

71. In Outboard Marine Corporation v. Pezetel, 471 F. Supp. 384, 395 (D. Del. 1978), the court held that Pezetel, an agency created by the People's Republic of Poland, was not immune from suit under the Sherman Act for allegedly unlawful activities in the manufacture and sale of electric golf carts. Such activity was commercial under the FSIA. Corporations and agencies created or authorized by foreign countries are explicitly covered by the Sherman Act. 15 U.S.C. §§ 7, 12 (1976).

72. H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 16 *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6615: "the courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if it were practicable."

73. 168 U.S. 250 (1897).

74. *Id.* at 252.

75. 376 U.S. 398 (1964). The Court stated that the doctrine was not compelled by international law, *id.* at 421, or by the Constitution, *id.* at 423. It derives from the concept of separation of powers in matters bearing on foreign policy. *Id.* at 427-28.

76. *Id.* at 428.

77. The Court stated:

ference with U.S. foreign policy.[78] Invocation of the doctrine is an exercise of judicial restraint.[79] To apply the act of state doctrine, the foreign sovereign's involvement must be significant.[80] In addition,

---

> [S]ome aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

Id.

78. In Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 697 (1976), the Court restated the act of state doctrine as follows:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarass the Executive Branch of our Government in the conduct of our foreign relations.

Dunhill involved a suit by importers of cigars manufactured by nationalized Cuban firms to recover large sums paid in error to interventors appointed by the Cuban government for pre-nationalization shipments. The refusal of the interventors to repay the money did not, according to a plurality of the Court, rise to the level of an act of state:

> No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers.

Id. at 695. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965):

> [A] court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests.
>
> . . . .
>
> *Comment d. Nature of act of state.* An "act of state" as the term is used in this Title involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory . . . . A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to public interests.

79. *See, e.g.,* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977), where the court found that the act of state doctrine precluded inquiry into the motivation behind an anticompetitive act of a sovereign to determine whether the act was instigated by private defendants. Here, the Libyan government had nationalized plaintiff's assets. Plaintiff did not challenge this nationalization; rather, he argued that because of the conduct of the defendants, he was induced to take an intransigent bargaining stance with the Libyan government, causing the government to nationalize his assets. To examine whether the concerted action of defendants caused the nationalization, the court would have had to inquire into the motive of the Libyan government for nationalization. The court stated that "the issue of legality cannot be isolated from the issue of motivation of the foreign sovereign." *Id.* at 78. Because the court declined such an inquiry, the private defendants were saved from liability for their alleged role in the nationalization of plaintiff's assets in Libya.

80. The Supreme Court refused to allow the act of state defense in two cases where the foreign sovereign was not sufficiently involved. In United States v. Sisal Sales Corp., 274 U.S. 268 (1927), the Court rejected an act of state defense where the defendant claimed that the foreign government merely approved the allegedly unlawful activity. The Court also refused to base the defense on actions by a foreign government which were induced by the defendants. The Court reaffirmed this position in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In that case, the Canadian government appointed a private corporation as its exclusive wartime agent for the importation and allocation of vanadium. The Canadian corporation conspired with its U.S. affiliate to exclude a competitor of the affiliate from the Canadian market. The Court

the act of state defense is limited by a commercial activity exeption,[81] which parallels that under the FSIA.[82]

3. *Interface of the Defenses with the Jurisdictional Rule of Reason*

The policies behind the Foreign Sovereign Immunities Act and the act of state doctrine, while not expressly applied to the jurisdictional rule of reason test, nevertheless, demonstrate a problem inherent in it. The statutory defense of sovereign immunity and the judicially created act of state doctrine originated in the separation of powers concept.[83] Through the FSIA, Congress determined the extent to which the judiciary could impact on the policies of foreign states and on U.S. foreign relations.[84] The act of state doctrine, through a practice of judicial abstention, mirrors that policy in situations not directly involving foreign sovereigns.[85] Both defenses demonstrate the limitations of the judiciary in foreign policy matters. The jurisdictional rule of reason requires the judiciary to determine both foreign governmental reaction to U.S. jurisdiction and the effects on U.S. foreign policy.[86] The breadth of the jurisdictional rule of reason analysis threatens to involve the courts in extrajudicial inquiries and determinations. While it is clear that the *Timberlane*

---

held that the defendants were "not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government," noting that the plaintiff had not alleged any wrongful activity on the part of the Canadian government and that there was no indication of approval of the efforts to monopolize by an official of that government. *Id.* at 706. The Court's approach to the act of state defense suggests that it may apply only to significant foreign acts. *See also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). *Compare* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977), where the involvement of the foreign sovereign was, arguably, more significant than in *Sisal* and *Continental Ore*.

An important corollary to the act of state doctrine is the foreign compulsion doctrine, which immunizes conduct that is compelled by a sovereign as if it were an act of state. *See, e.g.,* Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970), where it was a complete defense to the refusal by defendants to sell Venezuelan crude oil to plaintiff that the Venezuelan government imposed a boycott forbidding such sales. The court stated, "[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign." *Id.* at 1298.

81. See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), where a plurality of the Court refused to apply the doctrine to the repudiation of a commercial debt. See also Dominicus Americana Bohio v. Gulf & Western, Inc., 473 F. Supp. 680, 689-90 (S.D.N.Y. 1979), where the court suggested that discovery may provide sufficient information to determine if the Dunhill commercial activity exception applied to the defendant's act of state claim.

82. *See supra* notes 68-72 and accompanying text.

83. *See supra* notes 67 & 75-78 and accompanying text. *See also* Industrial Investment Development Corporation v. Mitsui & Co., 594 F.2d 48, 51 (5th Cir. 1979), *cert. denied,* 445 U.S. 903 (1980) (the act of state doctrine "has emerged as independently based on concerns of separation of powers").

84. *See* H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 3-8 (1976).

85. *See supra* notes 75-78 and accompanying text.

86. *See supra* text accompanying notes 51 & 60.

court did not intend to merge the defenses into the jurisdictional rule of reason analysis,[87] the defenses demonstrate that the rule of reason encroaches too far into the sphere of executive responsibility when it overlaps with the foreign policy interests delimited by the FSIA and act of state defenses.

The interest analysis approach proposed in this Note is concerned with the policies of both the United States and foreign states and, unlike the jurisdictional rule of reason test, expressly avoids judicial determinations of foreign policy. The inquiry under the interest analysis approach must follow consideration of the sovereign immunity and act of state defenses. If one of the defenses applies, then no further inquiry is necessary. If both defenses fail or are inapplicable, then interest analysis is appropriate. At no time, however, should the court re-examine the determination of Congress under the the FSIA or its corollary in the act of state doctrine. Despite the interface between the defenses and the determination of the extraterritorial application of U.S. antitrust law, neither the jurisdictional rule of reason nor the interest analysis approach obviates or embellishes separate consideration of the defenses in accordance with the distinct lines of authority interpreting them.

Although the two defenses focus on limiting the role of the federal judiciary in the foreign policy sphere, they do not address foreign objections to the extraterritorial application of U.S. antitrust law. This Note will consider the nature of these objections before examining the interest analysis approach, which seeks to focus on the fundamental State concerns and foreign objections in an effort to accommodate both.

---

87. The court rejected the act of state defense which the defendant claimed on the basis of judicial proceedings that were instituted by the defendant. The court stated:

> Timberlane does not seek to name Honduras or any Honduran officer as a defendant or co-conspirator, nor does it challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States. In fact, there is no indication that the actions of the Honduran court and authorities reflected a sovereign decision that Timberlane's efforts should be crippled or that trade with the United States should be restrained.

Timberlane, 549 F.2d at 608. Note, however, that though the court considered the act of state defense separately and before discussing the jurisdictional rule of reason, the inquiry into the factors of comity might make use of some of the same facts. The above quoted passage, for example, suggests that Honduras had no policy which enforcement of U.S. antitrust laws would impair, and that judicial involvement posed no threat to U.S. relations with Honduras. Also, the court later indicated that the district court's determination under the jurisdictional rule of reason would be difficult because the most direct economic effect was on Honduras, yet no conflict with Honduran policy was apparent.

C. Foreign Objections to the Extraterritorial Application of United States Antitrust Law

Foreign objections to the extraterritorial reach of the U.S. antitrust law essentially arise from the negative impact that reach has on the objectives of foreign nations. The foreign objectives affected can be discovered by examining each nation's legislation. The objectives are the states' expressions of the interests they seek to protect.[88] In the antitrust context, foreign objections to extraterritorial reach appear to arise from four sources of conflict: (1) different penalties imposed by each government, although policy goals are similar; (2) different views as to the activities that should be proscribed; (3) different national economic goals; and (4) different views of the reach of sovereign jurisdiction.[89] When such conflicts arise, foreign nations may attempt to thwart the pursuit of the conflicting U.S. objective through blocking legislation.[90] This legislation inhibits discovery and prevents the enforcement of United States judgments by domestic courts.

Foreign commentators criticize the *Alcoa* effects doctrine for conflicting with general principles of sovereignty.[91] The jurisdictional rule of reason does not confront this objection. The *Timberlane* court viewed its various comity and fairness factors as an articulation of the elements entering into a determination under the

88. See *infra* note 150 for a discussion of the relationship of the objectives underlying foreign law to the four sources of conflict set out in the text accompanying *infra* note 89.

89. K. Brewster, *supra* note 12, at 39. *See also* Miller, *Extraterritorial Effects of Trade Regulation,* 111 U. Pa. L. Rev. 1092 (1963).

90. For a discussion of foreign blocking legislation implemented in the United Kingdom, Canada, Australia, South Africa, The Netherlands, Italy, Germany, France and Belgium, see Pettit & Styles, *supra* note 4; Comment, *Foreign Blocking Legislation: Recent Roadblocks to Effective Enforcement of American Antitrust Law,* 1981 Ariz. State L. J. 945, 958-74.

91. Joseph J. A. Ellis, Member, Bar of the Hague, Netherlands, states:

> It cannot be denied that jurisdiction is an aspect of sovereignty, and that exercise of jurisdiction can never go beyond the limits of sovereignty itself. . . . The mere fact that an act radiates effects upon foreign territory is not sufficient basis for an assumption of jurisdiction by the foreign state unless, in the words of the Permanent Court of International Justice, "one of the constituent elements of the offense, and more especially its effects, have taken place there." In order to vest jurisdiction in the foreign state, therefore, the effects must be a constituent element of the crime.

111 U. Pa. L. Rev. 1092, 1130 (1963), quoting Case of the S. S. "Lotus," P.C.I.J., ser. A, No. 9, at 23 (1927). Ellis also cites other European jurists who criticize the *Alcoa* effects doctrine, *supra* notes 18-33, as a misstatement of the international law. Professor R. Y. Jennings states that, "the *Alcoa* pattern of case goes too far when 'jurisdiction' is assumed over foreigners' foreign agreements, merely because it has been possible to allege some 'effects' on United States imports or exports, and because the agreement would have been illegal if made in the United States." 111 U. Pa. L. Rev., *supra,* at 1131. Professor J. N. W. Verzijl asks, "how could [the *Alcoa*] order ever be directly enforced without a clear infringement of Canada's territorial sovereignty?" *Id.* at 1132.

Alcoa effects doctrine.[92] Even if the various factors represent an attempt to accommodate foreign interests, the uncertainty and breadth of the rule of reason and its judicial application cause the test to be of little comfort to foreign opponents of the effects doctrine.[93]

Foreign diplomats and legislators object to the exercise of jurisdiction and attempted enforcement of procedures and remedies by U.S. courts beyond U.S. boundaries.[94] The tenor of these objections suggests that the major problems are the lack of systematic attention to foreign interests and the seemingly unbridled reach of the current U.S. laws. The Foreign Sovereign Immunities Act[95] and the act of state doctrine[96] are small inroads into the broad extraterritorial effect given U.S. antitrust law. The international character of the contemporary economic environment clearly requires that U.S. antitrust laws have some extraterritorial reach.[97] The systematic consideration of the fundamental foreign objectives implicated in an antitrust case, which consideration is peculiarly within the competence of an

92. *See supra* note 38 and accompanying text.

93. Commentators view the jurisdictional rule of reason as only a small improvement over the *Alcoa* doctrine with respect to foreign objections. *See* Comment, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries,* 11 GOLDEN GATE U. L. REV. 577, 590-92 (1981). *See also* Pettit & Styles, *supra* note 4, at 714-15 (1982) (noting that the jurisdictional rule of reason has yet to produce a result not co-extensive with the *Alcoa* doctrine). For discussion of the foreign dissatisfaction with the uncertainty of the court-applied rule of reason, see Comment, *supra* note 90, at 962-63.

94. In response to *General Electric Co., supra* note 33, for example, the Netherlands lodged several protests with the U.S. Department of State and enacted legislation preventing compliance with U.S. court orders with respect to records and operations in the Netherlands. *See* K. BREWSTER, *supra* note 12, at 46-50. See also Note, *Section 6 of Great Britain's Protection of Trading Interests Act: The Claw and the Lever,* 14 CORNELL INT'L L.J. 457 (1982), discussing recent British legislation that undermines U.S. antitrust judgments against British defendants by allowing the British Secretary of State to prohibit compliance with discovery requests of foreign courts and by allowing a British citizen to recover multiple damages paid pursuant to a foreign judgment. The British Secretary of State, in introducing the legislation, stated that:

> My objective in introducing this Bill is to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us . . . . [T]he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America.
>
> . . . .
>
> . . . [T]he United States has shown a tendency in certain respects over the past three decades increasingly to try to mould the international economic and trading world in its own image.

Id. at 457, n.2, *citing* 973 PARL. DEB., H.C. (5th ser.) 1533-34 (1979).

See also supra note 2; A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 361-72 (2d ed. 1970); Sanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad,* 11 CORNELL INT'L L.J. 195 (1978).

95. *See supra* notes 66-72 and accompanying text.

96. *See supra* notes 73-82 and accompanying text.

97. *See supra* note 4.

independent judiciary, is the approach which could best accommodate foreign objections. The following proposal for the use of interest analysis in the determination of the extraterritorial application of U.S. antitrust law provides such an approach.

II

INTEREST ANALYSIS IN THE INTERNATIONAL CONTEXT

Some commentators have lauded the jurisdictional rule of reason approach to the determination of the extraterritorial application of U.S. antitrust law as an important improvement over the *Alcoa* effects test.[98] Assistant Attorney General William F. Baxter suggests, however, that interest analysis, as applied in domestic conflict of laws cases, may be superior to the jurisdictional rule of reason or comity and fairness doctrine. "Although some tempering of the [*Alcoa*] effects doctrine is clearly appropriate, the judicial application of comity is a less than ideal solution."[99] Baxter contends that "[c]omity is in the eye of the beholder and any long list of factors, such as those in *Timberlane,* 'is simply an open invitation to the court to decide for itself. . . .[I]t is doubtful that courts should take on executive branch responsibility by making that type of judgment.' "[100] The problem with the jurisdictional rule of reason, according to Baxter, is in the permissible breadth of judicial discretion. Baxter proposes an interest analysis approach where "one asks what laws and policies of the arguably interested jurisdictions are implicated by the challenged acts . . . . [T]he courts must attempt to balance the strength of the respective interests . . . ." He believes that "in many cases . . . the apparent conflict is merely illusory."[101]

98. *See, e.g.,* U.S. Import Weekly (BNA) 211 (Nov. 25, 1981). Richard J. Favretto noted that "[t]here is a recent judicial trend to recognize comity and conflicts of law principles in seeking to moderate the application of the *Alcoa* 'effects' test in Sherman Act cases of international sensitivity . . . . [The *Timberlane* standards are] widely regarded as having a significant and desirable result." *Id.* Professor Barry E. Hawk of Fordham University Law School "explained that the jurisdictional rule of reason is very important as a radical departure from the *Alcoa* test 'in that it includes directly and expressly the discretionary considerations of international comity in balancing of national interest and policies.' " *Id.* at 213. *But cf.* Note, *Timberlane: Three Steps Forward, One Step Backwards,* 15 INT'L LAW. 419 (1981) where the *Timberlane* balancing test is attacked on three grounds: "the text calls for resolution of issues beyond the competence of the courts; it fails to clarify relevant issues and in fact further confuses them; and it fails to adequately distinguish itself from other defenses and abstention doctrines." *Id.* at 425. The author contends that a return to the *Alcoa* effects test would be an improvement. *Id.* at 431.

99. U.S. Import Weekly (BNA) 31-32 (Oct. 14, 1981).

100. *Id.*

101. *Id.*

Among the factors cited by the *Timberlane* court are "the degree of conflict with foreign law or policy, . . . [and] the relative significance of effects on the United States as compared to those elsewhere."[102] Consideration of these factors alone might approach a simple interest analysis; to the extent that other factors affect the decision, however, the jurisdictional rule of reason departs from the method proposed by Baxter. As Baxter notes, "[t]he problem is not one of etiquette, which the doctrine of comity suggests;" rather, the problem is a conflict of laws and policies.[103] Baxter urges that multilateral negotiation is the paradigm:

> Over the long term, such problems can only be addressed effectively by international negotiation and agreement. In the shorter term, the courts can only attempt to predict the . . . result of such negotiations by estimating the strength of the competing interests and the extent to which these interests would be impaired by a decision one way or another. . . . [The use of an interest analysis approach] would force countries to think about and frame their national interest. . . . [A] dialogue in this area could resolve many of the disagreements about antitrust enforcement.[104]

This section of the Note examines the use of interest analysis in the determination of the extraterritorial application of U.S. antitrust law. The section introduces the interest analysis approach and begins with a discussion of Professor Brainerd Currie's approach to the concept of interest analysis. Although Currie's approach is not as appropriate as Baxter's in the context of antitrust law, no discussion of interest analysis would be complete without mention of his view. Professor Currie's view is followed by a discussion of Baxter's version of interest analysis and why his approach should replace the jurisdictional rule of reason as the device tempering the *Alcoa* effects doctrine.

A. CURRIE'S APPROACH

Interest analysis involves an examination of the governmental policies behind the conflicting rules of decision of arguably interested jurisdictions to determine which interests shall prevail and which policies shall yield in a conflict of laws decision. Proponents of interest analysis generally agree that if only one of the jurisdictions has an interest that would be promoted by application of its rule of decision, while other relevant jurisdictions have no interest which would thereby yield, the conflict is false and the court should

---

102. *See supra* text accompanying note 51.

103. U.S. Import Weekly (BNA) 213 (Nov. 25, 1981).

104. U.S. Import Weekly (BNA) 32 (Oct. 14, 1981). Baxter is reported as also stating that "the hardest case is where one state encouraged the acts another seeks to challenge." *Id.* Insofar as Baxter is proposing that the act of state defense be merged into an interest analysis approach, his proposal and the thesis of this Note are in conflict.

apply the rule of the interested jurisdiction. Proponents disagree, however, as to the proper disposition of cases involving true conflicts of interest where more than one jurisdiction has policies that will prevail or yield when the rule of decision is chosen.[105]

---

105. Early works suggesting an interest analysis approach include Freund, *Chief Justice Stone and the Conflict of Laws,* 59 HARV. L. REV. 1210 (1946); and Hancock, *Choice-of-Law Policies in Multiple Contact Cases,* 5 U. TORONTO L. J. 133 (1943).

Professor Brainerd Currie has published extensively on the interest analysis approach to conflict of laws issues. For Currie's general thesis, see Currie, *Notes on Methods and Objectives in the Conflict of Laws,* 1959 DUKE L.J. 171 [hereinafter cited as *Methods and Objectives*]. Other articles by Currie applying his analysis in the context of specific problems include: Currie, *The Constitution and the "Transitory" Cause of Action,* 73 HARV. L. REV. 36 (1959); Currie, *On the Displacement of the Law of the Forum,* 58 COLUM. L. REV. 964 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9 (1958); Currie, *Married Women's Contracts: A Study in Conflicts-of-Law Method,* 25 U. CHI. L. REV. 227 (1958) [hereinafter cited as *Married Women's Contracts*]; Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws,* 10 STAN. L. REV. 205 (1958).

Baxter's approach to interest analysis is set out in Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. I (1963). For other approaches to interest analysis, see Cavers, *A Critique of the Choice-of-Law Problem,* 47 HARV. L. REV. 173 (1933); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws,* 33 YALE L.J. 736 (1924); Scoles, *Interstate and International Distinction in Conflicts of Laws in the United States,* 54 CALIF. L. REV. 1599 (1966); Traynor, *Law and Social Change in Democratic Society,* 1956 U. ILL. L.F. 230.

Currie's approach is explained in the text accompanying *infra* notes 106-17; Baxter's approach is explained in the text accompanying *infra* notes 118-43. A third approach applies the rule of decision of the most interested jurisdiction by applying a test similar to Baxter's. *See, e.g.,* Freund, *supra,* at 1216-18; Lorenzen, *Tort Liability and the Conflict of Laws,* 47 L. Q. REV. 483, 492-93 (1931). A fourth approach chooses the "more effective and more useful law." *See* Yntema, *The Historic Bases of Private International Law,* 2 AM. J. COMP. L. 297, 301-02 (1953).

Cavers describes the "most interested jurisdiction" approach as follows:

> The new conception views the basic problem as how to make that choice between conflicting laws which will best accommodate conflicting state policies. This renders it necessary to identify the respective policies and to decide whether they truly conflict, whether the application of one law will defeat or impair the policy objectives of the other . . . .
>
> Where analyses of the policies underlying apparently conflicting laws do not reveal the conflict to be false, nevertheless study of the circumstances of the transaction or event out of which the controversy has arisen may disclose that the reasons for the application of one state's law are significantly stronger than the reasons for applying the law of the other state.

Cavers, *Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem,* in A.L.I., STUDY OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154, 163-65, app. (Tent. Draft No. 1, 1963).

Baxter denominates the "more effective and more useful law" choice as the "super-value judgment" approach. He describes it as follows:

> Every choice-of-law case involves several parties, each of whom would prevail if the internal law of one rather than another state were applied. Each party is "right," "worthy," and "deserving" and "ought in all fairness" to prevail under one of the competing bodies of law in the view of one of the competing groups of lawmakers. Fact situations which differ only in that they are internal to a single state have been assessed by the different group of lawmakers, and each has reached a different value judgment on the rule best calculated to serve the overall interest of its community. If attention is confined to the circumstances of the immediate parties, the conflict between the internal laws and between the value

Professor Currie has written extensively on the conflict of laws problem in the context of interstate cases. He advocates the application of the law of the forum when both the forum state and the foreign state have a valid governmental interest in the application of their respective laws.[106] Currie finds some support for this approach

---

judgments they are intended to implement cannot be resolved by the judge unless he is prepared to impose still another value judgment upon the controversy. The judge who takes this approach must conclude, for example, that legal systems recognizing past consideration in contract cases embody a juster justice than those that do not.

Baxter, *supra,* at 5.

There is a plethora of additional variations on "interest analysis" that incorporate some aspects of those approaches discussed *supra* and that introduce alternative considerations. *See, e.g.,* D. CAVERS, THE CHOICE OF LAW PROCESS (1965); Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U. L. REV. 267 (1966). *See generally* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW, GENERAL PART (1967). For an eclectic approach, see Note, *Extraterritorial Application of United States Law: A Conflict of Laws Approach,* 28 STAN. L. REV. 1005, 1025-29 (1976).

Currie's approach is singled out for comparison to Baxter's approach for two reasons: (1) Currie and Baxter both have articulated their interest analysis methods more extensively than other commentators; and (2) other versions of interest analysis either employ similar concepts to those used by Currie and Baxter or advocate solutions without adequate justificatory force.

106. Currie describes his approach to the determination of the appropriate rule of decision in a given case as follows:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

Methods and Objectives, supra note 105, at 178. When Currie refers to a "foreign state" or to "foreign law," he is generally speaking of the interested non-forum state within the United States, not an extranational state. Currie's analysis emphasizes the determination of whether the policies underlying the forum state's rule of decision are implicated by the allegedly unlawful activity. If the forum state has a policy that would be promoted by application of the relevant rule of decision, then investigation into the policies underlying the foreign state's rule of decision is rendered unnecessary. Thus, Currie's approach ignores the foreign interests in any case that invokes the policies of the forum state to any extent.

in U.S. Supreme Court cases.[107] He contends that when the Court decides that the interests of the forum state should yield to stronger foreign state interests, "it has simply legislated."[108]

According to Currie, congressional legislation is the ideal in the interstate situation; however, his choice of forum law in true conflicts is not an attempt to approximate the legislative solution. Currie apparently considers the ideal unapproachable for a court acting unilaterally.[109] Thus, the only appropriate resolution is an application of the law of the forum with which the court is most familiar. Currie advocates the application of forum law in true conflict cases because the court "can be sure at least that it is consistently advancing the policy of its own state."[110]

Currie finds little merit in negotiation between interested jurisdictions as an alternative to his choice-of-law method in true conflict cases.[111] He is uncomfortable with the possibility that some deeply rooted policy could be bargained away in exchange for collateral concessions in another case.[112] Currie recognizes a value in agreements that control cases "in which a state asserts an unsubstantial, or collateral, or predatory interest,"[113] but not in agreements that control cases involving true conflicts.[114] Currie's view ignores the exist-

107. *See Methods and Objectives, supra* note 105, at 177 (citing Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954)).

108. *Id.* Currie explains that a "weighing" of interests is grounded in politics rather than in jurisprudence:

> I do not rail against this, nor do I intend to crusade against the usurpation. No doubt the Court has been sorely tempted, seeing problems which it believes should be solved in a particular way, and frustrated by the failure of Congress to use its power to solve the problems. I simply want the record kept straight. I want it understood that such action by the Supreme Court must find its justification in politics, not in jurisprudence, and that its decisions in this field are to be evaluated accordingly . . . .
>
> We would be better off without choice-of-law rules. We would be better off if Congress were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solutions is serious. In the meantime, we would be better off if we would admit the teachings of sociological jurisprudence into the conceptualistic precincts of conflict of laws.

Id. at 177-78.

109. *See supra* note 108 and accompanying text.

110. *Married Women's Contracts, supra* note 105, at 261-62 (footnotes omitted). Currie claims that the promotion of a foreign state's interests at the expense of the forum state's interests is not a good reason for applying foreign law. *Id.*

111. *Id.* at 263-64.

112. *Id.*

113. *Id.* at 264.

114. Currie does recognize, however, that international agreement may be the only alternative to domestic determination. "[S]ince the international agreement is the only method available to independent, sovereign states for the resolution of true conflicts of interest, the limitations of that method may help to explain why continental legal systems have adhered so persistently to the ill-fated efforts to find a metaphysical system for resolving those conflicts." *Id.*

ence of foreign objections or obstructions to the application of forum law.

Many commentators criticize Currie's formulation,[115] but for the purposes of this discussion, its primary fault is its inapplicability to international conflicts. First, Currie's ideal in the interstate context is congressional legislation. There is no corresponding body available in the international sphere. Second, because courts are restricted to individual cases, judicial analysis does not attempt to promote the ideal. Third, Currie's approach provides no limitation to the *Alcoa* effects test.[116] If a U.S. court has subject matter jurisdiction over the action, then the action must implicate a U.S. interest.[117] A finding that a U.S. court has jurisdiction obviates any inquiry into the interests of another jurisdiction. If a court applies Currie's approach, then it will always apply U.S. law, whether the conflict is false (no foreign interest) or true (both U.S. and foreign interests implicated to some extent). As applied to antitrust cases involving conduct abroad, Currie's method is tantamount to the *Alcoa* effects test. If U.S. commerce is affected, then the court can exercise jurisdiction and apply U.S. law. Thus, Currie's approach, as applied to extraterritorial antitrust enforcement, is a mechanical device for determining the applicability of U.S. law. It provides litigants with predictable results and promotes the consistent development of local law, however, it also produces several difficulties in modern international law.

In the international economic context, compromise is both necessary and appropriate. In the long run the United States can only promote the policies behind its antitrust laws if it can harmonize its efforts with those of foreign jurisdictions. If the United States avoids consideration of substantial foreign interests and refuses to compromise its own interests, it will be unable to further even those policies that compromise would leave intact. Thus, Currie's mechanical approach to interest analysis is inadequate to deal with the problem of determining whether to apply U.S. antitrust law extraterritorially. Baxter's approach, also proposed primarily in the interstate conflict of laws context, recognizes the need for compromise. As such, it presents a superior method for the resolution of true conflicts in the extraterritorial application of U.S. antitrust law.

---

115. *See generally* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW, GENERAL PART 63 (1967). *See also* Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. 1 (1963).

116. *See supra* notes 18-33 and accompanying text.

117. For a discussion of the threshold subject matter jurisdiction issue, see *supra* note 55.

B. BAXTER'S COMPARATIVE IMPAIRMENT APPROACH

In 1963, William F. Baxter criticized Currie's approach to true conflicts, and applied the concept of comparative impairment interest analysis to interstate conflict of laws cases.[118] In approaching a true conflict, Baxter identifies the relevant state interests and assesses the extent to which the application of one state's law would impair the other state's objectives.[119] The court applies the law of the jurisdiction whose interests would be most impaired by application of foreign law.[120] Although Baxter proposed the comparative impairment approach to interest analysis in the interstate conflict of laws context, his justificatory arguments are sufficiently robust to apply to international conflicts over the extraterritorial reach of sovereign laws.[121]

Baxter identifies two types of governmental objectives underlying rules of decision: internal objectives and external objectives.[122] Internal objectives resolve private conflicts arising from wholly local activity.[123] Such objectives prioritize local private interests.[124] They are manifest in the rules of decision, both statutory and common law, that resolve controversies between domestic actors.[125] When a controversy involves foreign parties, the internal objectives underlying the rules do not provide a resolution. External objectives are implicated.[126] External objectives apply the legal ordering used in domestic conflicts to conflicts between a domestic party and a foreign party. They do not extend automatic protection to a domestic party simply because it is domestic. Instead, the external objectives protect the domestic party to the same extent that they would protect that party in a wholly domestic dispute.[127] Thus, if the internal objectives would not protect the domestic party in a wholly domestic suit, the external objectives will not seek to protect the domestic party against a foreign claimant.

This separation of interests into essentially identical internal and external components, while a useful analytical tool, does not

118. Baxter, *supra* note 115.
119. *Id.* at 17-18.
120. *Id.*
121. Baxter, in his present role as Assistant Attorney General in charge of antitrust, has suggested publicly that conflict of laws interest analysis is superior to the *Timberlane* factor test in tempering the extraterritorial application of the antitrust laws. *See supra* notes 98-104 and accompanying text.
122. Baxter, *supra* note 115, at 17.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

resolve the conflict inherent in determining the law applicable in a dispute between two parties of different nationalities. Each nation involved in the dispute has an external objective to protect its own citizen. The external objective may be minimal, or it may be strong, depending upon the degree of protection afforded the domestic actor in a wholly domestic dispute. Resolution of any true conflict requires the subordination of one or more governments' external objectives to those of another government.[128] Baxter advocates the resolution of these conflicts through a comparative impairment method. The court assesses the effect which each nation's law has upon the domestic interests of the other nation. The court applies the law which least impairs the other nation's internal objectives. According to Baxter, it is possible to "apply a normative principle to determine which external objective to subordinate. The principle is to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand."[129] Such an investigation "may be regarded as the measure of the rule's pertinence and of the state's interest in the rule's application within the class of conflicts."[130]

It is important to clarify what the Baxter test does not attempt to do. First, the test does not rank the competing objectives. Unlike the suggestions from other conflict of laws commentators,[131] Baxter's test does not prioritize each nation's internal, and inherently subjective, interests and require the court to make the pretense of objectively deciding which interests are paramount. Baxter argues that this "super-value judgment" is not appropriate for judges from one of the interested nations.[132]

Baxter's approach merely assesses the *impairment* of interests which are presumed to be equal. Each nation's implicated interest is presumed to be equal with the other's, and the test addresses the degree to which the application of one law will impair the other nation's interest. Thus, Baxter's comparative impairment approach does not attempt to prioritize the competing national objectives in a conflict of laws case; rather, it attempts to select the law which minimizes the impact on the objectives.[133] Under Baxter's approach, the application of one nation's law does not signify that the interest which it promotes is more important than its competitor's, but

128. *Id.*
129. *Id.* at 18-19.
130. *Id.* at 9.
131. *See supra* note 105.
132. Baxter, *supra* note 115, at 5, 22-23.
133. *See supra* text accompanying note 129.

rather, that its impact on the other nation is less than the impact of the competitor's law on its objectives.[134]

Baxter admits that the application of his method to borderline cases will be difficult. He contends, however, that many legal tests are subject to the same criticism.[135] The jurisdictional rule of reason, for example, promotes an even broader and more difficult examination than does Baxter's approach to achieve the same result—the principled limitation of the *Alcoa* effects doctrine.

A mechanical rule is easier to apply than a comparative impairment approach, but it often defeats policy goals solely because of fortuitous circumstances. Mechanical rules emphasize the goals of uniformity and predictability, or protection of party expectations. Such objectives fail to take into account "the normative criterion of implementing state policies."[136] Choice doctrines with uniformity objectives implicate three concepts: primary predictability, secondary predictability and doctrinal uniformity.[137]

The goal of primary predictability seeks to enable actors to predict the legal consequences of their conduct at the time of performance.[138] Secondary predictability refers to the ability to predict the consequences of past conduct in a particular forum.[139] Doctrinal uniformity occurs when all possible forums would choose the same rule of decision in a given case.[140] Any choice method uniformly applied can achieve these goals; only extremely rigid mechanical choice rules, however, would be superior to the application of normative criteria.[141] Baxter's comparative impairment method will serve these goals; the application of normative criteria, however, subordinates the goals to the objective of minimizing the impairment of state objectives.

Currie contends that the application of normative criteria in a choice rule is never appropriate for a court.[142] Baxter rejects this

134. Baxter expressly rejects the ranking inherent in the "super-value judgment" approaches. *See supra* notes 105 & 132. He nevertheless chooses to denominate law selected by the comparative impairment test as the most "pertinent." Baxter, *supra* note 115, at 9. Despite the ranking notion connoted by the term "pertinent," this Note shall hereinafter comply with Baxter's terminology.

135. *Id.*

136. *Id.* at 20. *Cf.* Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach,* 28 STAN. L. REV. 1005, 1027 (1976).

137. Baxter, *supra* note 115, at 19-21.

138. *Id.*

139. *Id.*

140. *Id.*

141. Traditional mechanical rules such as *lex loci contractus* or *lex loci delicti* do not satisfy the rigidity requirement because of the difficulty in characterizing a case and the ambiguity in finding the appropriate *lex loci. See* Baxter, *supra* note 115, at 3-4; and *Methods and Objectives, supra* note 105, at 173-77.

142. *Methods and Objectives, supra* note 105, at 176.

contention: "The question 'Will the social objective underlying the [State] X rule be furthered by the application of the rule in cases like the present one?' need not necessarily be answered 'Yes' or 'No;' the answer will often be, 'Yes, to some extent.' "[143]

This Note asserts that the comparative impairment approach to the determination of the extraterritorial application of U.S. antitrust law is superior to either mechanical rules or the jurisdictional rule of reason as an effective means of tempering the *Alcoa* effects test. An evaluation of this assertion requires analysis of a state's selection of a choice method. The following analysis is premised on the fundamental idea of a state's pursuit of its own objectives.

C. A Comparison of the Jurisdictional Rule of Reason with the Comparative Impairment Approach

A state confronting a true conflict has three alternatives in determining the applicable rules of decision. It may (1) promote the local interest whenever given the opportunity; (2) decide in an arbitrary, though arguably neutral, fashion which interest to promote through the application of a mechanical choice rule; or (3) assess the competing interests against normative criteria to find the most pertinent interest.[144] These alternatives can be evaluated by reference to the long-run impairment of internal objectives. The alternative that minimizes impairment is superior. Consider a jurisdiction that chooses to promote its local interest whenever possible. That jurisdiction will be able to promote its internal objectives only when it is the forum state, and only if competing states do not thwart enforcement of its judgments. Next, consider a jurisdiction which chooses

143. Baxter, *supra* note 115, at 22.

144. A fourth alternative would be to take the "super-value judgment" approach, discussed at *supra* note 105. This alternative is dismissed by Baxter as follows:

> The drawbacks of this approach . . . are easily identified. The judge is required to formulate law in a much more frank and open manner than is generally thought compatible with his non-political status . . . . Necessarily a super-value judgment is disputable: the very occasion for its articulation is the existence of a contrary judgment reached by one of the contending bodies of internal lawmakers. Finally, the objective of primary predictability is not likely to be furthered. The uniformity of outcome on which it depends will exist only if the same super-value judgment is reached by all forums, consistently subordinating the same local value judgment.

See Baxter, *supra* note 115, at 5. The approach fails to distinguish between internal and external conflicts by only determining which internal resolution is best suited to an external situation. It is the only approach that has little chance of providing primary predictability because when the forum whose law is subordinated adjudicates a similar case, it is unlikely to "reach a super-value judgment in conflicts cases contrary to judgments [it] previously reached in internal cases which the approach does nothing to distinguish." *Id.* at 6. On the other hand, the application of normative criteria does distinguish external conflicts from internal ones by recognizing that each jurisdiction is primarily interested only in the parties identified with it.

an arbitrary mechanical rule. That jurisdiction will promote its objectives only in fortuitous circumstances. Normative methods, unlike mechanical rules, consider the unique factors in each individual case. In addition, normative methods are facially objective and, unlike local interest favoritism, do not alienate competing jurisdictions. Thus, normative methods are distinctly superior for determining the law applicable in a given case.

Aside from the substantive superiority of the application of normative criteria, an important, though subsidiary, concern is the administrative cost of the choice rule. Always promoting the local interest is clearly costless. Mechanical rules, however, are not likely to be less costly than the application of normative criteria, because the determination of the facts necessary to apply a mechanical rule involves inquiries that most likely will be as costly as the determination of foreign and domestic interests invoked by a particular controversy. Furthermore, a court finding facts to apply a mechanical rule is not able to depend on briefs of the parties or *amici* as is a court determining what interests are invoked.

If all competing jurisdictions choose the interest that is least impaired, total impairment aggregated across all competing jurisdictions will be minimized. This method of selecting the applicable law, however, will not necessarily minimize the impairment of a single jurisdiction's internal objectives. If, for example, the relevant objectives of U.S. antitrust law are always less impaired by the application of foreign law than the objectives of foreign states are impaired by the application of U.S. antitrust law, then the use of the comparative impairment approach in all international cases will maximize the impairment of the U.S. objectives. The application of the law which least impairs the foreign state's objectives will, however, minimize the aggregate impairment of all nation's interests.

The above analysis illustrates that a state unilaterally determining a choice rule, in the general case, may not be satisfied with the comparative impairment method. Consider, however, a narrower inquiry. Assume State X is the dominant arbiter[145] of a class of conflicts implicating particular State X objectives. State X will seek to choose the choice of law rule that will minimize impairment of its objectives with respect to that class. If State X chooses to promote its objectives whenever it is the forum state,[146] it incurs the risk that states with competing objectives will thwart enforcement of its judg-

145. The term "dominant arbiter" denotes the state that will, in most or all cases, be the situs for the resolution of the competing objectives. *See infra* notes 146-47 and accompanying text.

146. Because State X is the dominant arbiter of the class of conflicts under consideration, it will most often or always be the forum state.

ments, thereby impairing State X objectives. If State X chooses an arbitrary mechanical rule, then it will promote its objectives only when the circumstances are fortuitous. If, however, State X chooses to advance its objectives only when they are more pertinent, then it will dissuade competing states from attempting to thwart enforcement of its judgments by assuring those states that it will defer to foreign objectives when they are more pertinent. Because State X is the dominant arbiter of the class of conflicts, the prospects of avoiding foreign objections, and promoting State X objectives when it is most important to do so, are attractive. Thus, the application of normative criteria to that class of conflicts is the method most likely to achieve those goals.

The United States is the dominant arbiter with respect to the class of conflicts implicating the objectives underlying its antitrust laws. Although in some cases the United States may suffer by not applying its antitrust laws, it will benefit in the long run from the comparative impairment approach because, as in the hypothetical above, it is the dominant arbiter of those laws. The United States must recognize the international opposition to the enforcement of the U.S. antitrust laws and the resulting limits to their international reach.[147] If the United States promotes its antitrust objectives whenever it is the forum state, it incurs the risk of further foreign blocking legislation. If it applies an arbitrary mechanical rule, its antitrust objectives will only be promoted under fortuitous circumstances. If it tempers its enforcement in a principled manner, however, it will achieve the greatest possible enforcement of those objectives. Foreign states will be less likely to block U.S. judgments because of U.S. deference to foreign objectives when they are more pertinent and the United States will be able to advance its objectives when they are most significant. A normative approach allows the United States to achieve these goals. As the dominant arbiter in the enforcement of its own antitrust laws, the United States should find a normative approach attractive.

The jurisdictional rule of reason and Baxter's comparative impairment approach are alternative normative tests for determining the law applicable in a particular case. Three criteria provide the standards for assessing these alternative methods: (1) The method should provide the benefits that distinguish the normative approach from mechanical and other rules; (2) The method should be appropriate for application by the judiciary; and (3) The method should take into account the ideal of multilateral negotiation.

147. *See supra* notes 89-97 and accompanying text.

The preceding analysis identified two primary benefits which distinguish normative methods from mechanical and other rules. First, the application of normative criteria to determine the state with the more pertinent interest is more likely than the other approaches to dissuade foreign states from thwarting U.S. judgments, because the normative method compromises U.S. and foreign objectives in a reasonable manner, thereby accommodating foreign objections. Second, by choosing U.S. objectives when they are most pertinent, the United States promotes its internal objectives in the cases where the United States most strongly desires to regulate conduct. Because the jurisdictional rule of reason is a broader test than the comparative impairment test,[148] it constitutes a greater threat to each benefit of the normative approach. The jurisdictional rule of reason does not focus on internal objectives. Rather, internal objectives are only one component of a multifaceted analysis.[149] Thus, when factors other than the conflict between U.S. and foreign policies weigh in the analysis, the jurisdictional rule of reason applies normative criteria to considerations other than internal objectives. The comparative impairment approach focuses exclusively on the internal objectives of the competing jurisdictions. Because the end result of the analysis is the decision whether to apply U.S. law, the primary impact of the analysis is on the internal objectives underlying that law. Foreign objections arise from the conflict between U.S. and foreign internal objectives.[150] The comparative impairment

148. *See supra* notes 101 & 103 and accompanying text.

149. In addition to a consideration of internal objectives, the courts establishing the jurisdictional rule of reason have named several other criteria. *See supra* notes 51, 60 & 65 and accompanying text.

150. *See supra* notes 88-97 and accompanying text. Consider each of the four sources of conflict which give rise to foreign objections to the extraterritorial application of U.S. antitrust law. *See supra* text accompanying note 89. A case implicates the first source (different remedies to effect similar policy objectives) only when the foreign state's objectives are affected by the case's outcome. The different legal approach to the promotion of that interest will create conflict. The second source of conflict (differing policy objectives) arises only when the foreign state's policy objectives will be impaired by application of U.S. law. The third source of conflict (economic conflicts of interest) will arise only when the foreign state expresses an economic interest through policy objectives underlying its rules of decision. Likewise, the fourth source of conflict (different views of the reach of sovereign jurisdiction) will arise only when a U.S. court impairs the internal objectives of the foreign state. The objectives underlying the foreign laws, as indicated by legislative histories, etc., will be the sole expression given by foreign states to signal to the U.S. court their objection to the application of U.S. law. Although, as regards to the third and fourth sources of conflict, one can attribute to a foreign state a desire to protect its citizens from penalties imposed by a U.S. court when the activity invoking the penalty *does not* adversely affect the foreign state's interests, this Note takes the position that such a desire does not, as a general proposition, comport with notions of sovereignty and therefore should be ignored. Clearly, consideration of such a desire is extralegal and is, therefore, beyond the reach of a United States court conscious of separation of powers limitations.

approach directly confronts foreign objections and better accommodates them. Therefore, the comparative impairment approach is more likely than the jurisdictional rule of reason to dissuade foreign states from creating obstacles to the promotion of United States objectives, the first benefit of the normative approach.

For similar reasons, the comparative impairment method is more likely to advance the second benefit of the normative approach. By focusing exclusively on internal objectives, the comparative impairment approach promotes those objectives when they are most pertinent. To the extent that the jurisdictional rule of reason considers factors other than the conflict between United States and foreign objectives, the method risks (1) choosing to apply foreign law when the U.S. interest is most pertinent, and (2) choosing U.S. law when the foreign interest is more pertinent. These two errors defeat the second benefit of the normative approach.

The second criterion for assessing the jurisdictional rule of reason and the comparative impairment methods involves their implementation by the U.S. judiciary. Both methods require judicial application. The U.S. judiciary is competent to interpret rules of decision and analyze internal objectives, but is not competent to engage in international economic policy-making.[151] The broad inquiry under the jurisdictional rule of reason requires the court to make determinations which are in the purview of the executive branch of the federal government.[152] The comparative impairment approach requires the court to focus exclusively on determinations which the judiciary is competent to make.[153] Thus, implementation of the comparative impairment approach is more appropriate to the United States separation of powers concept.

The third criterion requires an assessment of the extent to which the methods under consideration take into account the ideal resolution of the problem. The ideal resolution of true conflicts over the extraterritorial application of U.S. antitrust law is multilateral agreement—sovereigns negotiating compromise in the promotion of internal objectives.[154] The primary impact of multilateral agreements on

151. *See supra* note 100 and accompanying text.

152. Consideration of the possible effect of the exercise of jurisdiction on U.S. foreign relations, *see* text accompanying *supra* note 60, for example, is clearly not within the court's competence. Rather, it is a concern belonging exclusively to the executive branch.

153. As in purely domestic cases, the analysis is within the court's competence. *Cf. supra* note 108.

154. For Currie's criticism of international agreement in the resolution of conflicts, see *supra* notes 111-14 and accompanying text. Currie admits that despite the problem of compromising objectives, international agreement is the only method available to sovereigns for resolution of conflicts. *See supra* note 114.

Baxter's writings advocate a bilateral negotiation process, which he describes as follows:

the extraterritorial reach of laws would be on the internal objectives underlying those laws. The comparative impairment approach focuses exclusively on the elements to be negotiated, while the jurisdictional rule of reason considers a broader range of factors. Furthermore, the comparative impairment approach forces foreign litigants and foreign governments to frame internal objectives, an activity necessary as a prelude to negotiation.

In summary, a sovereign which is the dominant arbiter of a class of true, international conflicts, is more likely to minimize impairment of its internal objectives if it chooses a conflicts rule that applies normative principles. The United States, as the dominant arbiter of its antitrust law, should choose the comparative impairment approach over the jurisdictional rule of reason. In the long run, accommodating foreign objections by application of the comparative impairment approach will result in the maximum promotion of U.S. interests. It will forestall blocking legislation, force governments to frame their national interests, and set the stage for multilateral negotiation.

> Each [sovereign] at the outset might unreasonably demand application of its law in every situation having any contact with its state. But as each became aware that the other had roughly equal bargaining power and tactical skill, the usual fruits of negotiation would emerge: each would cautiously give up what it wanted less to obtain what it wanted more, each side's perception of its own self-interest and of the other's objective would sharpen, and the final agreement would approximate maximum utility to each. In the course of negotiations the participants would realize the basis of this particular conflict . . .: the lawmakers had allocated differently certain costs of civilized society.

Baxter, *supra* note 115, at 7.

Several other commentators propose negotiation for conflict resolution and discard the unilateral approach.

Miller suggests that studies be undertaken by groups of nations to "serve as a factual basis for cooperative action against restrictive practices in international trade." Miller, *Extraterritorial Effects of Trade Regulation,* 111 U. PA. L. REV. 1092, 1115 (1963). Sanford states that in disputes between governmental policies:

> [i]t is inappropriate for one of the governments involved in the policy conflict to seek to impose its desired solution by invoking its domestic law before its tribunals to adjudicate the legality of conduct in another jurisdiction. The difference should be resolved, as are other intergovernmental differences, by consultation and negotiation.

Sanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad,* 11 CORNELL INT'L L.J. 195, 201 (1978). *See generally* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAW 460-66 (2d ed. 1973); A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW, GENERAL PART 27-47 (1967).

Tsoris contends that a unilateral approach is inherently inadequate, and a multilateral approach is unlikely for the present. Thus, "bilateral agreements between the United States and concerned nations present the most attractive alternative." *See* Note, *supra* note 94, at 447.

Rahl suggests that international conflicts be submitted to the International Court of Justice. H. RAHL, COMMON MARKET AND AMERICAN ANTITRUST 411-13 (1970). *See also* McClelland, *Toward a More Mature System of International Commercial Arbitration,* 5 N.C. INT'L L. AND COMM. REG. 169 (1980) (proposing new methods of settling international contracts disputes).

D. The Comparative Impairment Approach Applied

Baxter's comparative impairment method relies strongly on the analysis of the facts of each individual case.[155] A complete explanation of the method requires examples. Before proceeding to the examples of a false conflicts case, cases where one nation's interests predominate, and a borderline case, some conclusions may be stated. First, the comparative impairment method is difficult to implement in borderline cases—cases "that thwart easy application of every principle of law."[156] In such cases, "[t]he judge decides on the basis of some marginal factor and justifies his decision as best he can . . . ."[157] Baxter contends that this fate for borderline cases is preferable to the application of a mechanical rule.[158] Second, in all true conflicts where one state's objectives are obviously more pertinent, the application of the comparative impairment method will achieve the most desirable result, measured by normative criteria.[159] Third and finally, the comparative impairment approach highlights false conflicts and mandates the quick resolution of such cases according to the relevant normative factors.[160]

1. False Conflict Example

A Swiss corporation and a U.S. corporation both manufacture widgets for sale in the United States. The U.S. corporation imports widgets from its wholly-owned European subsidiary. The Swiss corporation exports to the United States from its wholly-owned subsidiary located elsewhere in Europe. In Switzerland the Swiss and U.S. corporations agree to divide the U.S. market for widgets. The Swiss corporation will supply the northeastern states, and the U.S. corporation will supply the southern and western states. Due to the cost structure and the demand curve for widgets, the Swiss and U.S. corporations supply the bulk of the U.S. demand for widgets. Because they do not compete in their respective territories, prices rise to the monopoly level. The U.S. government sues both corporations for violating Section One of the Sherman Act.[161]

In a purely domestic case, allocation of markets between com-

155. *See supra* notes 122-30 and accompanying text.

156. Baxter, *supra* note 115, at 9.

157. *Id. But see infra* notes 184-90 and accompanying text, where this Note proposes an alternative resolution for borderline conflicts.

158. Baxter, *supra* note 115, at 9.

159. *See supra* notes 144-54 and accompanying text.

160. *See* text accompanying *supra* note 105.

161. *See supra* note 11.

petitors is a *per se* violation of the Sherman Act.[162] Because U.S. commerce in widgets is directly and substantially affected by the agreement, a U.S. court could exercise jurisdiction over the action.[163] Under the comparative impairment approach, it is necessary to determine whether the case implicates any internal objectives underlying Swiss law.

Under authority of the Federal Act on Cartels and Similar Organizations, Switzerland's Cartels Commission, on special inquiry, may prohibit an agreement that prevents competition and injures Swiss markets or consumers.[164] Unlike the United States, which has a *per se* rule against the allocation of markets between competitors, Switzerland apparently does not automatically consider market allocation agreements injurious to the Swiss public interest. The Swiss rule requires a special inquiry and a finding that the market allocation causes actual harm.[165] Thus, an implied underlying objective of the Swiss rule is to permit anti-competitive agreements that are benign to the Swiss public interest. Another, more obvious, objective of the Swiss rule is to protect Swiss markets and consumers from harmful anticompetitive agreements. In the hypothetical situation, Swiss markets and consumers are not harmed by the agreement to divide the U.S. market; therefore, this Swiss objective is not implicated.

In the above hypothetical, the widgets are neither produced nor sold in Switzerland. Swiss markets and consumers are not affected by the agreement. Therefore, the application of U.S. antitrust laws will not impair the Swiss objective. The conflict is false and the court should apply U.S. antitrust laws.[166]

---

162. *See, e.g.,* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. National Lead Co., 332 U.S. 319 (1947); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

163. *See supra* note 55. The court must always answer the threshold question of whether it has subject matter jurisdiction over the action. For the comparative impairment approach, this question is answered by reference to whether the allegedly unlawful activity has an effect on U.S. commerce sufficient to be cognizable as an antitrust violation. The determination of antitrust law subject matter jurisdiction in U.S. courts is essentially a determination of whether the plaintiff alleges facts sufficient to implicate U.S. internal objectives underlying the antitrust laws. Thus, in the case of a false conflict where the United States has no interest implicated, the court dismisses the action for lack of subject matter jurisdiction. The conflict in the text's hypothetical situation is false because it implicates no foreign objectives.

164. OECD, COMPARATIVE SUMMARY OF LEGISLATIONS ON RESTRICTIVE BUSINESS PRACTICES 32 (1971).

165. *Id.*

166. For false conflicts, Currie's approach and the comparative impairment approach to interest analysis are identical. Baxter, *supra* note 115, at 3-4. Under a jurisdictional rule of reason approach, the court would find no conflict with foreign laws or policies. This, however, would not end the inquiry. Presumably, the court would find that most of the factors of comity weigh heavily in favor of the application of U.S. law. *See supra*

Foreign objections to the extraterritorial application of U.S. antitrust laws concentrate on the conflict between the U.S. law and foreign internal objectives.[167] When there are no foreign internal objectives implicated, no source for objection exists. Thus, courts should apply U.S. antitrust laws to international activity in a false conflict situation.

2. Dominant Foreign Interest Example

The widget producing firms in the German Federal Republic are all small to medium-sized. The primary purchasers of German widgets are U.S. manufacturers that incorporate the widgets into several finished products. The widgets represent approximately one-tenth of the cost of the finished products and must be made to order. A close substitute for German widgets is available in the United States and the U.S. manufacturers use it in ten percent of the finished products.

The German firms agree to divide the U.S. market and allocate primary purchasers exclusively to certain firms. Such an agreement ordinarily violates Section One of the Republic's Act Against Restraints of Competition.[168] Section 5b of the Act,[169] however, permits agreements in restraint of trade if they promote efficiency in small or medium-sized firms.[170] Pursuant to Section 5b, the German firms file a notification of their agreement with the cartel authority.[171] They present convincing evidence to the cartel authority that the allocation of U.S. market subdivisions is required to avoid inefficiencies that would render their businesses unprofitable. Each firm would require equipment modifications if they had to compete for short-term contracts on made-to-order widgets from multiple pur-

notes 51, 60 & 65 and accompanying text. The factors concerning (1) the relative significance of the effect on U.S. commerce compared to the effect abroad, (2) forseeability of the effect on U.S. commerce, and (3) intent to harm U.S. commerce suggest, for example, that U.S. law should be applied in this case. On the other hand, factors such as (1) whether an order for relief would be acceptable in the United States if made by the foreign nation under similar circumstances, and (2) nationalities of the parties, are ambiguous. Such inquiries are extralegal and, therefore, are not within the competence of the court. Furthermore, proponents of the jurisdictional rule of reason provide no justification for the relevance of comity factors such as the availability of a remedy abroad. Therefore, the broader inquiry under the jurisdictional rule of reason is, without justification, more difficult to apply than is the comparative impairment analysis, and is more likely to result in error.

167. *See supra* note 150.

168. Act Against Restraints of Competition, § 1, BGB 1, I.S. 458 (as amended Apr. 26, 1980).

169. *Id.* at § 5b.

170. Permitting such agreements is termed "rationalization" of the economic activities. *Id.*

171. *Id.*

chasers throughout the United States. These equipment modifications would be inefficient.

Several U.S. purchasers are unable to obtain contracts from German firms that charge lower prices to other purchasers. They institute suit against the cartel organization and each of the member firms. In a wholly domestic case, market allocation agreements between competitors in the United States are *per se* illegal.[172] The agreement significantly affects U.S. commerce in widgets and the end-products incorporating widgets. Thus, the threshold inquiry supports the exercise of jurisdiction by the courts.[173]

In this situation, the U.S. antitrust laws seek to protect U.S. widget purchasers from monopoly pricing or supply restriction which may result from the German market allocation agreement. The German competition law seeks to protect both small and medium-sized firms from ruinous competition. Because both the United States and the Republic have internal objectives implicated in this situation, the U.S. court must compare the potential impairment to determine which country has the most pertinent interest.

On these facts, the German interests are more pertinent and the court will not apply the U.S. antitrust laws. This result is reached by hypothesizing the application of each law and testing its effect on the internal objectives of the other nation.[174] After performing this comparative impairment test, the court selects the law which least impairs the internal objectives of the other nation.[175]

The application of the German law, allowing the market allocation agreement, will not significantly affect the U.S. internal objectives. Allowing the market allocation agreement is unlikely to promote monopoly price levels or reduced supply in U.S. markets. The size of the producing firms suggests that entry into the widget industry does not require substantial capital investment. Thus, the potential for entry is high if the German firms begin to extract monopoly profits from the sale of widgets in the United States. New producing firms will enter the widget market, attracted by the monopoly price. This increased competition will tend to reduce the price to competitive levels. Additionally, production and demand substitution factors will combine to diminish the potential for reduced supplies in U.S. markets. Because widgets are made to order, the German firms are unlikely to restrict supply to raise prices. Furthermore, some German firms charge lower prices to

172. *See supra* note 162.
173. *See supra* note 55.
174. *See supra* text accompanying notes 122-30.
175. *See supra* text accompanying note 129.

their U.S. market subdivisions suggesting a high demand price elasticity in certain sectors of the U.S. market, possibly arising from the closeness of the widget substitute. These market conditions diminish the potential for harm to U.S. purchasers.

Conversely, applying the U.S. antitrust law, and thus disallowing the market allocation agreement, will significantly affect the German internal objectives. Assuming the U.S. court applies an effective enforcement mechanism, it will thwart the German interest in protecting small businesses from ruinous competition. Because the United States is the primary market for German widgets, enforced competition among German firms for United States purchase contracts will produce the same inefficiencies suffered by the producers before their agreement. The very harm that the German exemption seeks to avoid will occur. Thus, whereas the impairment of the U.S. protective interest is likely to be insubstantial if the court abstains from exercising jurisdiction, the German protective interest will be totally impaired by application of the U.S. law. The comparative impairment method would operate to choose abstention.

The above hypothetical illustrates the sacrifice that the comparative impairment method imposes on U.S. objectives.[176] This Note proposes that in a case such as this one, where the foreign interest is more impaired than the U.S. interest, a U.S. court should decline jurisdiction. Foreign objections to the extraterritorial application of U.S. antitrust law are strongest when the foreign objectives are more pertinent.[177] Deferring to foreign objectives when they are more pertinent, therefore, removes the source of the strongest foreign

176. Under Currie's approach, the court would apply U.S. antitrust law to the hypothetical case because the activity implicates U.S. objectives. *See supra* text following note 117. The disposition of this case under the jurisdictional rule of reason is uncertain. The conflict between United States and German policies weighs in favor of abstention. The intended, forseeable effect on United States commerce, however, weighs in favor of the application of U.S. antitrust law. Thus, a reasonable consideration of the comity factors could result in the application of U.S. law. The comparative impairment analysis reveals that, focusing on the fundamental concern of internal objectives, the U.S. interest should yield to the more pertinent German interest. The broad inquiry under the jurisdictional rule of reason fails to give a court sufficient guidance in the determination. Because foreign objections are rooted in foreign internal objectives, the dispersion of the court's focus under the jurisdictional rule of reason is inappropriate to the reasonable accommodation of foreign objections. Furthermore, the uncertainty of the result under the jurisdictional rule of reason supports the proposition that the method "is simply an open invitation to the court to decide for itself." *See supra* note 100 and accompanying text. Thus, the jurisdictional rule of reason casts the court in a policy-making role. Such a role is outside the court's competence, whereas, when applying the comparative impairment method, the court is exercising the judicial function of analyzing the objectives underlying competing rules of decision.

177. For an analysis of the interrelation between foreign internal objectives and the extraterritorial application of the United States antitrust laws, see *supra* note 150.

objections. By sacrificing less pertinent U.S. interests, the court accommodates foreign objections, and dissuades the foreign state from attempting to thwart U.S. objectives. By focusing exclusively on internal objectives, the comparative impairment method makes the optimal trade-off. The method impairs United States objectives when the U.S. interest is less significant, while it accommodates those objectives when they are strongest.

3. Dominant United States Interest Example

An Austrian firm produces various types of widgets for sale to wholesalers for worldwide distribution. The firm imposes minimum retail selling prices, withholding supply to any wholesaler reselling to a retailer that undercuts the price.[178] Thus, U.S. retailers must agree to observe the minimum retail price in order to purchase the Austrian widgets, and wholesalers must agree to sell only to the retailers observing the minimum price. One U.S. retailer advertises and sells widgets below the minimum price; the Austrian firm and all wholesalers subsequently refuse to supply the retailer. The U.S. government initiates a suit against the Austrian firm and all U.S. wholesalers based upon the excluded retailer's complaint.

The Austrian firm's activity would be a violation of the Sherman Act in a wholly domestic case.[179] Austrian law, however, permits verticle price maintenance, subject to cartel registration. The Cartel Court grants registration if it finds the activity "justified from the point of view of the national economy" and finds the prices not to be excessive.[180] In this hypothetical, the Cartel Court sanctioned the arrangement.

On these facts, the U.S. interests are more pertinent than the Austrian and the court will apply the U.S. antitrust laws. This result is reached by hypothesizing an application of each law and testing its effects on the internal objectives of the other nation.[181] After this comparative impairment test, the court selects the law which least impairs the internal objectives of the other nation.[182] If the U.S.

178. For a discussion of the profit-making goals behind retail price maintenance, see Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 U. CHI. L. REV. 1 (1977); Bork, *The Rule of Reason and the Per Se Concept; Price Fixing and Market Division II,* 75 YALE L.J. 373 (1966); Tesler, *Why Should Manufacturers Want Fair Trade?,* 3 J. LAW & ECON. 86 (1962).

179. *See* United States v. Parke, Davis and Co., 362 U.S. 29 (1960).

180. Austrian Cartels Act of November 22, 1972, § 24. The Austrian law explicitly exempts from its purview cartels relating to foreign markets. *Id.* at § 5(1)2. The meaning of the exemption, however, is unclear. If the wholesalers in this hypothetical situation are Austrian, then the Act may apply regardless of the effect on foreign markets. The discussion in the text assumes that the Act applies.

181. *See supra* text accompanying notes 122-30.

182. *See supra* text accompanying note 129.

court declines jurisdiction, domestic retailers could agree with wholesalers to fix the U.S. retail price for Austrian widgets, impairing the U.S. objectives of protecting consumers and promoting competition. The U.S. law seeks to protect U.S. consumers from the pernicious effects of price fixing and to promote competition among retailers to effect the efficient allocation of resources.

The Austrian Cartels Act provides for registration of retail price maintenance agreements so that if the Cartel Court finds that the Austrian economy would not be adversely affected, an Austrian manufacturer can benefit from such an agreement. In this case, the Austrian firm produces for worldwide consumption. Thus, if the court exercises jurisdiction and applies U.S. antitrust law, any remedy will affect only part of the Austrian firm's retail market. Furthermore, the remedy will not affect the Austrian firm's price to U.S. wholesalers. Thus, if the court applies U.S. antitrust law, the benefit of retail price maintenance to the Austrian firm will not be completely lost. Correspondingly, the Austrian objective of benefiting certain manufacturers will not be completely impaired. Therefore, the court's abstention would impair U.S. interests more than its exercise of jurisdiction would impair Austrian interests. By comparative impairment analysis, the court should apply U.S. antitrust law.

In any true conflicts case, one jurisdiction's objectives prevail. As the dominant arbiter of conflicts implicating antitrust law objectives, the United States seeks to minimize impairment of those objectives. To pursue that goal through unilateral judicial resolution of conflicts, the United States must apply a choice method that contemplates the potential for impairment resulting from foreign objections. The comparative impairment approach focuses on the source of foreign objections and provides a choice criterion which is appropriate for judicial application. The approach chooses to impair the least pertinent objectives; therefore, it chooses to defer to foreign objections when impairment of those objectives would evoke the strongest objections. Likewise, the comparative impairment method chooses U.S. law when the source of foreign objections is weakest. Thus, the choice of U.S. law in this case, on the basis that the U.S. interest is more pertinent, is a trade-off of foreign objections for the realization of U.S. objectives. The choice is the result of a rational analysis of the competing interests. The comparative impairment approach, unlike the alternative choice doctrines, recognizes both the trade-off involved in the determination and the limits of judicial competence.[183]

183. Currie's approach to interest analysis would also choose to apply U.S. law in this situation; however, the analysis ignores the fundamental concern with internal objectives.

4. Balanced Interest Example

Borderline cases arise whenever a choice doctrine applies normative criteria. Under the comparative impairment approach, courts will face cases in which the respective interests appear balanced. The interests are balanced if each state's underlying objectives are equally impaired by application of the other state's rule of decision. In the context of U.S. antitrust laws, the interests are balanced if application of the U.S. antitrust laws will impair foreign objectives to the same extent that abstention will impair U.S. objectives.

In a true conflict where the respective state interests are balanced, the comparative impairment method does not provide a solution. Neither applicable law will minimize the impairment of internal objectives. This Note proposes that when interests are balanced in antitrust cases, the United States should mechanically apply its own law. No other nation desires to enforce the U.S. antitrust laws. As the dominant arbiter, the United States must apply a normative conflict of laws rule. Nevertheless, the dominant arbiter may, in limited circumstances, such as borderline cases, satisfy a secondary conflict of laws goal. The application of the law of the forum in borderline cases will allow litigants to predict, prior to their activity, which law will apply.[184]

The application of a mechanical rule applying U.S. antitrust law in balanced interest cases raises two questions. First, is a mechanical rule appropriate? A normative criterion that uniformly serves some U.S. objective obviates the need for a mechanical rule. No such normative criterion commends itself in this situation because U.S. courts are not competent to formulate or implement policies relegated to the legislative or executive branches of the federal government. Therefore, a mechanical rule is appropriate. Second, should U.S. courts apply U.S. antitrust law or should they abstain from exercising jurisdiction in balanced interest cases? Both choice rules promote predictability. The abstention rule, however, removes balanced cases from the U.S. sphere of control. Foreign states would not need to negotiate for control. The application of

---

The result in this situation under the jurisdictional rule of reason is uncertain. *See supra* note 176. Thus, it is possible that the application of the comity doctrine would not result in the optimal decision in this case.

184. *Cf.* Baxter, *supra* note 115, at 3. Baxter identifies two elements necessary for a litigant to predict the applicable law at the time of his activity. Each forum's choice of law rule must be predictable and consistent. In the instant case, a litigant bringing a balanced interest claim can be certain that the court will apply U.S. law. In addition, only U.S. courts apply the U.S. antitrust laws, so that a choice of forum will not disturb the litigants ability to predict the applicable law. *See supra* notes 137-41 and accompanying text.

U.S. antitrust laws, on the other hand, preserves the need for international negotiation. According to Baxter, multilateral negotiation is the ideal.[185] Neither mechanical rule, abstention nor application, better approximates the ideal. Thus, the rule which preserves the need for negotiation is superior. Therefore, the courts should apply U.S. antitrust law wherever the U.S. and foreign interests are equally balanced.

The following hypothetical, modelled after *In re Uranium Antitrust Litigation,*[186] illustrates a balanced interest case. In an effort to promote sales of electricity-generating nuclear reactors, a U.S. producer of nuclear reactors entered into long-term contracts with domestic and foreign utility companies to supply uranium. The U.S. corporation did not contract to purchase uranium to cover these long-term contracts. When the world price of uranium increased more than six-fold over a four year period, it was forced to renege on its contracts. The utility companies sued.

In its defense, the U.S. corporation alleged that a cartel of uranium producers caused the price increase. The cartel activities were approved by the Canadian government, though no act of state was involved.[187]

To properly adjudicate the price-fixing allegations, the U.S. courts require information located in Canada. The Canadian firms, however, are disinclined to supply the necessary documents, and the Canadian government supports their refusal. United States commerce is directly and substantially affected by the cartel's alleged activity, which the U.S. corporation blames for its breach of the contracts with U.S. and foreign utility companies. Price-fixing is among the most pernicious activities covered by U.S. antitrust laws.[188] The United States, therefore, has a strong interest in acquiring the information and adjudicating the claims.

Canada desires to protect its private firms from prosecution when they are cooperating in the implementation of national eco-

185. *See supra* note 154 and accompanying text.

186. 617 F.2d 1248 (7th Cir. 1980). *See also* lower court cases by the same name at 480 F. Supp. 1138; 473 F. Supp. 393 (N.D. Ill. 1979); Recent Developments, *Antitrust Law: Extraterritoriality,* 21 HARV. INT'L L.J. 515 (1980). The Westinghouse suit charged twenty-nine defendants as conspirators. Nine defaulted, including one Canadian firm. Besides Canada, the other foreign nations identified with defendants are Australia, South Africa, Switzerland, and the United Kingdom. The hypothetical in the text is confined to the United States-Canada conflict.

187. In *In Re Uranium Antitrust Litigation,* the court stated: "While the governments of the foreign participants in this alleged conspiracy are acting and admittedly sympathetic to the economic determinism of the defaulters, there is no claim that the alleged conduct of the defaulters is mandated by these governments." Therefore, the act of state defense was unavailable. 617 F.2d at 1254 n.21.

188. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

nomic policy.[189] Resisting U.S. efforts to obtain the information promotes that objective. The issue in this case is not whether the U.S. court should provide a remedy for the failure to produce information, but whether the U.S. court should exercise jurisdiction over the Canadian defendants.

The U.S. interest in protecting U.S. nationals from price-fixing would be totally impaired by abstention. Similarly, the Canadian interest in protecting the private sector from penalties for pursuing Candian national economic interests would be totally impaired by the application of U.S. antitrust laws. A U.S. court applying the comparative impairment method would find the respective internal objectives equally balanced. Therefore, the court would use the mechanical rule and choose to apply U.S. antitrust law. There is no basis for finding that either abstention or the application of U.S. law would better approximate the negotiation results. If the U.S. court abstained from exercising jurisdiction in this borderline case, it would be allocating control over borderline cases to Canada. Canada would have nothing more to gain with respect to borderline cases implicating U.S. antitrust law objectives. Therefore, the deci-

189. Sanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad,* 11 CORNELL INT'L L.J. 195, 205-06 (1978). Sanford, the Director General, Bureau of Commercial and Commodity Relations, Department of External Affairs, Ottawa, states:

> Canada and the United States provide information to each other freely in the course of consultation and negotiation to the extent that their laws permit . . . . What, then, is the element in the request for information about uranium marketing, for example, that sets it apart and leads normally cooperative governments to resist [United States] efforts to obtain information? I believe the answer is that . . . unlike normal judicial assistance, this request concerns a proceeding that the requested governments have reason to believe may be inimical to their national interests. To be more specific, if the Canadian Government transmits or permits the transmission of information from Canada to the United States to assist the prosecution of persons or corporations for acts done outside the United States at the request or encouragement of the Canadian Government, then the next time Canada seeks similar cooperation from the private sector of the Canadian economy in the implementation of national economic policy, it must expect the multinationals in Canada first to seek the advice of their [United States] legal counsel, and then to comply with the Canadian request only if compliance will not expose them or their [United States] affiliates to legal proceedings in the United States. Consequently, if the Canadian Government is not prepared to accord what protection it can to private firms prosecuted abroad for complying with Canadian policy, it cannot reasonably expect the future cooperation of those firms in carrying out measures it judges to be in the Canadian economic interest. The private sector would thus become more responsive to [United States] law than to Canadian law and policy in determining whether and to what extent it would act in the Canadian interest. This is not a result that a foreign government can accept.

Sanford suggests that if the United States ignores the Canadian interest, future cases will meet with blocking legislation or other direct governmental intervention in order to establish appropriate sovereign defenses to the extraterritorial application of U.S. antitrust law. *Id.*

sion would obviate negotiation for control over that class of cases. The application of U.S. law in this situation, however, preserves the need for negotiation because the United States retains control, at least to the extent that U.S. enforcement mechanisms are effective. Both the United States and Canada could benefit from negotiating over control because both could exchange less desirable spheres of control for more desirable ones. This in turn would maximize the scope and impact of their respective internal objectives. Thus, when the court chooses to apply U.S. antitrust laws, it preserves the potential for a resolution of the conflict through negotiation.[190]

III

INTEREST ANALYSIS AS A PRELUDE TO MULTILATERAL NEGOTIATION

The international economic environment contains neither an independent arbiter for disputes nor a regulatory institution. Negotiation is, as a result, the optimal method to resolve conflicting internal objectives raised by international commercial activity.[191] Negotiation provides a constructive resolution to these conflicts. National hegemony over and retaliation against certain resolutions of conflicts, on the other hand, are destructive.

A sovereign's bargaining power reflects the extent to which it could promote its interests unilaterally. In negotiations, each sovereign uses that bargaining power to extend its interests by exchanging less desirable spheres of control for more desirable ones. Therefore, through negotiation, each sovereign maximizes the extent of its interests.

In the absence of negotiation, each sovereign provides a mechanism for resolving conflicts. In the United States, the judicial system provides the process. Its limited competence restricts the choice of a conflicts resolution doctrine.[192] The comparative impairment approach, which identifies internal objectives and assesses the perti-

190. The effect of the mechanical rule in borderline cases is to create a presumption in favor of the application of U.S. antitrust law. The rule only applies, however, when comparative impairment analysis fails to provide a solution. Thus, the rule does not create a presumption that U.S. objectives are more pertinent. The steps in the analytical process proposed in this Note must remain independent if the process is to honor the rationale justifying it. First, the court determines whether the case implicates any foreign objectives. Second, the court compares the potential impairment of United States and foreign objectives by either the abstention from or exercise of jurisdiction, respectively. Third, if and only if systematic examination reveals that United States and foreign objectives are equally pertinent, the court applies the mechanical rule and chooses to exercise jurisdiction and apply U.S. antitrust law.

191. *See supra* note 154 and accompanying text.

192. *See supra* notes 151-53 and accompanying text.

nence of competing states' interests, is appropriate for judicial application.[193] In addition, this approach takes into account the ideal of negotiation.[194]

Actual negotiation involves a face-to-face confrontation; a court, however, must act unilaterally. Judicial conflict resolution is not a close substitute for the ideal of negotiation. In a negotiation, two sovereigns might agree to resolve two classes of conflicts by ceding one sphere of control to the other. A court, however, must resolve a conflict in a single case. If the court considers the sovereigns' internal objectives, it will, at least, consider the appropriate subject matter. The competing objectives would be the focus of negotiation. In addition, the comparative impairment approach forces foreign nations to frame their national interests, a necessary prelude to negotiation. Finally, the adoption of the comparative impairment test may signal a serious U.S. effort to temper the extraterritorial application of its antitrust laws and promote a spirit of international negotiation. The comparative impairment approach for the resolution of conflicts is, therefore, both an appropriate doctrine for judicial application and an approach calculated to take into account the negotiation ideal. The alternative doctrines considered in this Note do not share these two qualities.

The *Alcoa* effects doctrine does not consider competing internal objectives.[195] Currie's approach to interest analysis,[196] and other mechanical choice doctrines,[197] also ignore competing objectives. The jurisdictional rule of reason requires the court to consider factors inappropriate to judicial determination.[198] Thus, the comparative impairment method is a superior doctrine for unilateral conflict resolution in the United States, where the judicial system provides the process by which actors can invoke sovereign interests.

CONCLUSION

U.S. courts currently apply the *Alcoa* effects doctrine and the jurisdictional rule of reason in various forms when determining the extraterritorial application of U.S. antitrust law. Both methods of analysis are deficient. The *Alcoa* doctrine does not consider foreign objections to the extraterritorial application of U.S. antitrust law and prompts foreign legislation blocking discovery and enforcement of United States judgments. The jurisdictional rule of reason requires

193. *See supra* note 153 and accompanying text.
194. *See supra* note 154 and accompanying text.
195. *See supra* notes 18-33 and accompanying text.
196. *See supra* notes 106-17 and accompanying text.
197. *See supra* notes 136-41 and accompanying text.
198. *See supra* notes 151-53 and accompanying text.

the courts to engage in inquiries outside of the realm of judicial competence.

The comparative impairment approach provides significant improvements over both the *Alcoa* effects test, and the jurisdictional rule of reason. The comparative impairment approach accommodates foreign objections by considering the competing objectives implicated in an individual case and applying U.S. law only when the U.S. interest is more pertinent. This approach confines the judicial inquiry to identification and assessment of the internal objectives underlying the laws and policies of the respective jurisdictions, a task particularly within the realm of judicial competence.

Multilateral negotiation is the ideal method for resolving conflicts. Through negotiation each jurisdiction can maximize the extent of its interest by trading less desirable spheres of control for more desirable ones. The focus of negotiation would be the internal objectives of each sovereign. The comparative impairment approach analyzes internal objectives exclusively. It forces sovereigns to frame their national interests, setting the stage for multilateral negotiation. Thus, U.S. courts should eschew the *Alcoa* doctrine and the jurisdictional rule of reason in favor of the comparative impairment approach to interest analysis in the determination of the extraterritorial application of U.S. antitrust law.

Edward A. Rosic, Jr.