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Extraterritorial Application of U.S. Antitrust Law

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COMMENTS

EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAW

I. INTRODUCTION

Each American antitrust statute encompasses some form of jurisdiction over international commerce. The Sherman Act declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations" is illegal.[1] And it is a crime for any person to monopolize or to attempt to monopolize "any part of trade or commerce . . . with foreign nations."[2] Both the Clayton Act[3] and FTC Act[4] also extend the scope of their application to commerce with foreign nations.

As the interdependency of international trade has increased after World War II, the American view of jurisdiction has expanded in response to the internationalization of the world trade and its effect on the American economy.[5]

In the landmark decision of *United States v. Aluminum Co. of America* (*Alcoa*), the Second Circuit held that U.S. courts have subject matter jurisdiction over antitrust activity committed abroad if it affected, and was intended to affect, commerce in the United States.[6] That decision has become the cornerstone of enforcement of U.S. antitrust laws abroad.

Since the *Alcoa* decision in 1945, extraterritorial enforcement of U.S. antitrust laws has caused increasingly serious economic and political problems for the United States. The U.S. has rather vigorously enforced its antitrust law (in comparison with other foreign countries) against anticompetitive conduct outside its borders.[7] Only the United

1. 15 U.S.C. § 1 (1988).
2. *Id.* § 2.
3. *Id.* § 12.
4. *Id.* § 44.
5. *See,* Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949 (S.D.N.Y. 1968) (holding the United States antitrust laws extend to any activity, which affects the trade and the commerce of the United States, irrespective of the citizenship of the actor or the place where the activity took place); Joseph Muller Corp. v. Societe Anonyme de Gerance et D'Armament, 451 F.2d 727 (2d Cir. 1971), *cert. denied,* 406 U.S. 906 (1972) (retaining jurisdiction over an antitrust claim brought by a Swiss corporation against a French corporation where the conduct occurred in the U.S. and abroad).
6. 148 F.2d 416, 443-44 (2d Cir. 1945).
7. The Foreign Trade Antitrust Improvement Act of 1985: Hearing on S. 397 before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 57 (1985). This bill was reintroduced in the 1987 term. *See* S. 572, 100th Cong., 1st Sess. (1987). Senator DiConcini introduced this bill to attempt to resolve conflicts in applying the U.S. antitrust laws to international situations. The bill adopted the "jurisdictional rule of reason" developed in Timberlane Lumber Co. v. Bank of America, 549 F.2d 579 (9th Cir. 1976) and Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). *See* S. 572 § 103. Also it attempted to eliminate the treble damage remedy in antitrust lawsuits brought against foreign defendants in order to appease foreign government. S. 397 § 5, 99th Cong., 1st Sess. (1985). Elimination of the treble damage provision was deleted in the second bill. This bill never reached the floor of Congress.

States allows recovery of treble damages in private legal actions seeking to apply antitrust laws to persons acting outside its borders.[8]

Conflicting policies and different views among nations regarding their antitrust laws[9] have led to many international conflicts over the years.[10] These conflicts injure U.S. foreign relations and hinder the promotion of U.S. foreign policy. In fact, these conflicts have led to specific reprisals against U.S. government policy. Several foreign nations have criticized the United States antitrust law policy and have legislated blocking statutes in response.[11]

These blocking statutes evidence foreign disapproval of American antitrust laws, and are designed to create a disincentive to the extraterritorial reach of U.S. antitrust laws.[12] Furthermore, the British retaliatory statute has "claw back" provision.[13] If British firms have made treble damage payments under the U.S. antitrust laws, the British statute enables British defendants to recover damage payments by making a claim against U.S. subsidiaries in Britain.[14] The "claw back" statute is an example of extreme foreign resistance to U.S. antitrust laws. Also under this statute, any nation may use British courts to sue U.S. subsidiaries in Britain to recover treble damage payments if that nation has a corresponding statute.[15] This provision is to encourage other nations to pass similar statutes in response to U.S. antitrust law enforcement efforts.[16]

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8. S. 397, *supra* note 7, at 8.

9. *See* Victor & Chou, *United States Jurisdiction over Overseas Disputes After Title IV of the 1982 Export Trading Company Act And Timberlane,* 10 FORDHAM INT'L L.J. 1 (1986). In contrast to the United States' antitrust law policy, many foreign nations have promoted their economic development through more centralized industrial policies (state-owned, directed or assisted), and a lesser emphasis on competition policy. A number of countries exempt exporters from their antitrust laws in certain areas, including United States. *See also* 15 U.S.C. §§ 61-65(1982). The Webb-Pomerene Act provides a limited antitrust exemption to the export of "goods, wares, or merchandise." The Export Trading Company Act of 1982 also sets forth limited immunity from antitrust suits. 15 U.S.C. §§ 4011-4021 (1988).

10. Comment, *Reassessment of International Application of Antitrust Law: Blocking Statutes, Balancing Tests, And Treble Damages,* 50 LAW & CONTEMP. PROBS. 197 (1987).

11. *Id.*; Pittit & Styles, *The International Response To The Extraterritorial Application Of United States Antitrust Laws,* 37 BUS. LAW. 697, 698-99 (1982).

12. *Id.* at 699; Comment, *supra* note 10, at 198.

13. Protection of Trading Interests Act 1980 § 6, *reprinted* in Antitrust & Trade Reg. Rep. (BNA) No. 959 F-1 (Apr. 10, 1980).

14. *Id.* § 6.

15. *Id.* § 7.

16. Protection of Trading Interests Act 1980 § 6, *supra* note 13. Britain legislated the Protection of Trading Interests Act 1980 to retaliate for U.S. antitrust enforcement against British subjects. There are two kinds of blocking provisions. First, there are discovery (or evidentiary) blocking provisions aimed at preventing compliance with foreign state requests or orders for documents or information. Second, there are judgment blocking provisions that declare unenforceable in whole or in part the decisions or orders of a foreign court purporting to affect foreign nationals. *Id.* §§ 1,2,4,& 5. Therefore, if a number of foreign nations legislate similar blocking and "claw back" statutes and recognize reciprocity with each other, U.S. antitrust law enforcement only brings up international chaos rather than effective enforcement of its antitrust laws.

To reduce international conflicts, Congress legislated the Foreign Trade Antitrust Improvement Act.[17] But this Act does not resolve the international tension because the U.S. courts are faced with international comity issues and, additionally, because the Act does not apply to the import trade or commerce out of which most conflicts arise.[18]

II. BACKGROUND

1. American Banana - *A Limited View*

The Supreme Court first addressed antitrust extraterritoriality in 1909 in *American Banana Co. v. United Fruit Co.*, holding that the Sherman Act was not applicable to activity which occurred outside the United States.[19] American Banana, in its suit for treble damages under the Sherman Act, alleged that its banana plantation had been destroyed as a result of confiscation of its plantation and cargo of supplies by Costa Rican soldiers and officials at the instigation of United Fruit.[20] The confiscation was alleged to be part of United Fruit's anticompetitive scheme to monopolize and restrain banana imports from Central America into the United States.[21] Justice Holmes flatly rejected this claim, holding that because the seized plantation was within the *de facto* jurisdiction of Costa Rica and the injury complained of had occurred outside the United States, United Fruit's scheme was beyond the jurisdictional reach of the Sherman Act.[22] He stated, under his view, that to assess damages under the Sherman Act would be unjust and would be an interference with the authority of another sovereign.[23] Justice Holmes also stated "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[24] The Court never mentioned the issue of whether the decision would have been different if the activity had effect on United States commerce.

2. Alcoa - *The Effects Test*

Alcoa abandoned the very narrow *American Banana* limitation on antitrust extraterritorial jurisdiction.[25] In *Alcoa,* the United States government sought to break up Alcoa's domestic aluminum monopoly, and also challenged activities of Alcoa's independent Canadian sub-

17. 15 U.S.C. § 6a (1988).
18. *Id.*
19. 213 U.S. 347 (1909). Both parties are American corporations. American Banana is an Alabama corporation and United Fruit is New Jersey corporation. *Id.* at 354.
20. *Id.* at 349, 354-55.
21. *Id.* at 354. United Fruit, by outbidding, also had driven purchasers out of market and compelled producers to come to its terms, and it had prevented American Banana from buying for export and sale. *Id.*
22. *Id.* at 357-58. The Court held further that seizures by Costa Rican soldiers and officials were acts of a foreign sovereign, the validity of which could not be challenged. Justice Holmes assumed the acts had been done by order of the government. *Id.* at 358-59.
23. *Id.* at 356.
24. *Id.* (quoting Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1903)).
25. *Alcoa,* 148 F.2d at 443-44.

sidiary, Aluminum Limited.[26] Aluminum Limited and European aluminum producers formed a cartel that imposed a quota on its members' production, and persuaded the foreign producers either not to import into the United States market at all or to import under restrictions.[27] The *Alcoa* court therefore had to analyze whether United States antitrust laws reached Aluminum Limited's participation in a cartel with European aluminum producers.

In holding the Sherman Act applicable to the acts of Alcoa's independent Canadian subsidiary, Judge Learned Hand asserted it was settled law "that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[28]

Therefore, the Sherman Act could apply to cartel agreements and concerted conduct, even though the agreements were made abroad among foreigners,[29] "if [these cartel agreements] were intended to affect imports and did affect them."[30] Judge Hand found that this extraterritorial conduct of the cartel was intended to, and did in fact, have an effect upon United States commerce by setting up a quota system.[31] Judge Hand also held that once the intent to affect United States commerce was shown, the burden of proof should be shifted to the defendant.[32] In other words, a showing of intended effects constituted a prima facie showing of actual effects.[33] The court noted that it was proper to

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26. *Id.* at 420-21. The United States filed this suit in 1937 and named sixty-three defendants, but there were fifty-one defendants at the time of judgment, including Alcoa and Aluminum Limited. *Id.*

27. *Id.* at 422. Alcoa was a Pennsylvania corporation organized in 1888 and it continued to be the single producer of ingot aluminum for 30 years in the United States. *Id.*

28. *Id.* at 443. There will be conflicts because other countries do not recognize the same liabilities as the United States does.

29. *See also,* Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949, the court refused to dismiss for lack of subject matter jurisdiction, citing *Alcoa,* and held that:

> The antitrust laws of this country extend to any activity (unless plainly and clearly exempted by statute), whether carried on by a foreigner or a citizen, which affects the trade and the commerce of the United States; and this is so irrespective of the citizenship of the actor and the place where the activity took place.

Id. at 953.

30. *Alcoa,* 148 F.2d at 444.

31. *Id.*

32. *Id. See,* Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd., 494 F. Supp 1161 (E.D. Pa. 1980), *aff'd in part, rev'd and remanded in part, sub nom., In re* Japanese Elec. Prod. Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd and remanded sub nom.,* Matsushita Elec. Indus. Co., Ltd., 475 U.S. 574 (1986). Judge Becker viewed that the intent required by *Alcoa* is a general rather than specific intent, and stated:

> Judge Hand did not specify the degree of effect nor the type of intent required. In applying the rule to the facts at hand, however, he implied that the intent required was of a general and not specific nature, using such words as "expected" and "supposed" to describe the [defendants'] state of mind.

Zenith Radio, 494 F. Supp. at 1184.

33. *Alcoa,* 148 F.2d at 444-45.

shift the burden of proof because it was a Canadian subsidiary which procured the inclusion of the imports quota agreements.[34] This is the so-called "effects test" of subject matter jurisdiction.

Under the "effects test" it became easier for plaintiffs to establish jurisdiction in suits involving extraterritorial conduct; some courts have held that almost any effect on U.S. commerce will suffice.[35] In short, U.S. antitrust laws may be applied whenever conduct abroad is intended to and does result in substantial effects within the United States.[36] This concept of the effects test was modified to require a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and incorporated into the Restatement (Second) of Foreign Relations Law of the United States as a general jurisdictional principle.[37]

Foreign countries have criticized the "effects test" for ignoring the policies and concerns of foreign governments. They have characterized it as a wholesale exportation of U.S. competition policy, which gives no weight to the competing interests of foreign sovereigns.[38]

3. Timberlane *and* Mannington Mills

Starting in 1976 with the decision in *Timberlane Lumber Co. v. Bank of America* (*Timberlane I*),[39] a trend has emerged to the effect that the exercise of national jurisdiction over extraterritorial activities also sub-

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34. *Id.* at 445.

35. *See* Papst Motoren GMbH & Co. KG v. Kanematsu-goshu (U.S.A.),Inc., 629 F. Supp. 864, 868 (S.D.N.Y. 1986); El Cid, Ltd. v. New Jersey Zinc Co., 551 F. Supp. 626, 629 (S.D.N.Y. 1982).

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

37. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (Restatement Second). It states:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct as foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Compare, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1988). Section 402 included traditional principles of nationality and territoriality for the basis of jurisdiction, but the RESTATEMENT THIRD added subsection (1)(c), an intent-effects clause, and eliminated Section 18(a)(iv) of the RESTATEMENT SECOND.

38. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, reporters' note 2 (1988) (Restatement Third). *See also,* Haight, *International Law and Extraterritorial Application of the Antitrust Laws,* 63 YALE L.J. 639 (1954); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad,* 11 CORNELL INT'L L.J. 195 (1978).

39. 549 F.2d 597 (9th Cir. 1976) (*Timberlane I*) *remanded,* 574 F. Supp. 1453 (N.D. Cal. 1983) (*Timberlane II*), *aff'd,* 749 F.2d 1378 (9th Cir. 1984), *cert. denied,* 472 U.S. 1032 (1985).

ject to foreign law should be tempered by comity.[40] *Timberlane I* and *Mannington Mills, Inc. v. Congoleum Corp.*[41] modified the effects test by adding comity considerations to the determination of whether the court could hear an international antitrust case, and developed a "jurisdictional rule of reason."[42]

In *Timberlane I,* the plaintiffs were an Oregon partnership, which purchased and distributed lumber in the United States, and two Honduran subsidiaries of the partnership, each of which purchased timber and had lumber milling operations in Honduras to supply lumber to the parent. The plaintiffs alleged that their operations in Honduras had been paralyzed by the attachment of their properties in a Honduran judicial proceeding initiated by the defendants. This proceeding was part of a conspiracy to prevent them from both milling lumber in Honduras and exporting the lumber to the United States, thereby allowing the defendants to maintain control of the Honduran lumber export business.[43] The plaintiffs contended that the alleged conspiracy directly and substantially affected the "foreign commerce of the United States" and therefore was within the coverage of United States antitrust laws.[44] The defendants countered Timberlane Lumber's claim by asserting an act of state defense.[45]

The Ninth Circuit rejected the application of the act of state doctrine because the judicial proceedings in Honduras had been instituted by private litigants.[46] Timberlane did not seek to name Honduras or any Honduran officer as a defendant or co-conspirator and it did not challenge Honduran policy or sovereignty. The adjudication of the antitrust claim would in no way threaten relations between the United States and Honduras.[47]

Judge Choy, writing for the court, criticized the effects test as being "by itself . . . incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country."[48] He then stated a

40. Park, *Extraterritorial Impact of United States Antitrust Laws and Commercial Bribery Considerations,* 1 DICK. INT'L L.J. 105, 108 (1982).

41. 595 F.2d 1287 (3d Cir. 1979).

42. *Timberlane I,* 549 F.2d at 615; *Mannington Mills,* 595 F.2d at 1297-98; Comment, *Economic Rationality and Extraterritorial Application of United States Law In Private Antitrust Litigation,* 9 CARDOZO L. REV. 1401, 1406-07 (1988).

43. *Timberlane I,* 549 F.2d at 604-05.

44. *Id.* at 601.

45. *Id.* at 605. The act of state doctrine precludes the courts of one country from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424-25 (1964). *See also,* O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, 830 F.2d 449 (2d Cir. 1987). The district court dismissed the case under the jurisdictional rule of reason analysis. The Second Circuit affirmed the district court's dismissal, but on the ground of the act of state doctrine. *Id.* at 452, 454.

46. *Id.* at 607. The court noted that private litigation lacks the public interest element, under the view that the act of state is to give effect to its public interests. *Id.* at 608. *See also,* RESTATEMENT SECOND, *supra* note 37, § 41 comment d.

47. *Timberlane I,* 549 F.2d at 608.

48. *Id.* at 611-12 (footnote omitted).

three-part test for determining whether subject matter jurisdiction exists over such extraterritorial activities.[49] First, the trial court should decide whether there was some effect, actual or intended, on United States commerce.[50] Second, the court should determine whether the restraint of trade was of such a type and magnitude so as to be cognizable as a violation of the United States antitrust laws.[51] Third, the court should consider whether to abstain from exercising its jurisdiction for reasons of international comity fairness, or to assert the extraterritorial jurisdiction of the United States.[52] This would be decided by balancing the interest of the United States against the interests of other nations.[53]

Judge Choy listed several other factors to be weighed in determining the above third prong, including:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared to those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such an effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[54]

Basically, Judge Choy adopted the balancing test set forth in the Restatement Second, Section 40.[55]

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49. *Id.* at 613.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 613-14. In 1962, the U.S. Supreme Court balanced foreign interests in a monopoly case, stating "Canadian interest was slight and was outweighed by the American interests in condemning the restraint." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706 (1962).
54. *Timberline I,* 549 F.2d at 614.
55. RESTATEMENT SECOND, *supra* note 37, § 40. Section 40 reads in part:

> [W]here two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderation the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Id. Compare Section 403 of the RESTATEMENT THIRD, *supra* note 38. *See* Comment, *Extraterritorial Jurisdiction Under The Third Restatement Of Foreign Relations Law Of The United States,* 12 FORDHAM INT'L L.J. 127, 135-36 (1988) for a discussion of the balancing test of Section 40 of the RESTATEMENT SECOND and the Section 403 of the RESTATEMENT THIRD.

On remand, the district court dismissed the antitrust action for lack of subject matter jurisdiction.[56] The Ninth Circuit affirmed the dismissal stating that:

> [A]ll but two of the factors in *Timberlane I*'s comity analysis indicate that we should refuse to exercise jurisdiction over this antitrust case. The potential for conflict with Honduran economic policy and commercial law is great. The effect on the foreign commerce of the United States is minimal. The evidence of intent to harm American commerce is altogether lacking. The foreseeability of the anticompetitive consequences of the allegedly illegal actions is slight. Most of the conduct that must be examined occurred abroad. The factors that favor jurisdiction are the citizenship of the parties and, to a slight extent, the enforcement effectiveness of United States law. We do not believe that this is enough to justify the exercise of federal jurisdiction over this case.[57]

Timberlane I was significant for reformulating the test for United States extraterritorial jurisdiction under the antitrust laws, and also for introducing the concept of abstention under the jurisdictional rule of reason.[58] Moreover, it offered a mechanism that permitted emphasis on strong antitrust enforcement to be reconciled with a sensitivity to legitimate foreign state concerns regarding intrusions on their sovereignty.[59]

The Third Circuit in *Mannington Mills* favorably cited the *Timberlane I* approach.[60] But unlike the Ninth Circuit in *Timberlane I,* the Third Circuit explicitly interpreted the issue as a question of abstention rather than an issue of jurisdiction.[61] The *Mannington Mills* court applied its analysis of the foreign interests after deciding that there was subject matter jurisdiction.[62] Therefore, under the Third Circuit's

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56. *Timberlane II,* 574 F. Supp. at 1455.

57. *Timberlane II,* 749 F.2d at 1386.

58. *Timberlane I,* 549 F.2d at 613. Some later cases treated the *Timberlane I* approach as an abstention analysis. *See, e.g.,* Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd., 671 F.2d 876, 884 n.7 (5th Cir. 1982), *vacated on other grounds,* 460 U.S. 1007 (1983); Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied,* 455 U.S. 1001 (1982); National Bank of Canada v. Interbank Card Ass'n, 507 F. Supp. 1113, 1120 (S.D.N.Y. 1980). But Dominicas American Bahio v. Gulf & Western, 473 F. Supp. 680 (S.D.N.Y. 1980) viewed *Timberlane I* as a question of jurisdiction and stated that *Timberlane I's* balancing test was used to determine if jurisdiction existed in the first instance. *Id.* at 687-88. *See also,* Sennett & Gavil, *Antitrust Jurisdiction, Extraterritorial Conduct And Interest Balancing,* 19 INT'L L. 1185, 1197 (1985)(viewed as a question of jurisdiction).

59. *Timberlane I,* 549 F.2d at 615; Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws,* 52 FORDHAM L. REV. 350, 363 (1983).

60. *Mannington Mills,* 595 F. 2d 1287.

61. *Id.* at 1296-97.

62. *Id.,* 595 F.2d at 1294, 1297-98. The court stated that:

> Having concluded that the act of state doctrine is not applicable in these circumstances and there is subject matter jurisdiction, the question remains whether jurisdiction should be exercised.

Id. at 1294. *See also,* Comment, *supra* note 42, at 1407 n.30. But, in *In re* Uranium

view, even though subject matter jurisdiction is found to exist, international comity factors must be weighed in deciding whether to exercise such jurisdiction.[63]

In *Mannington Mills,* Congoleum Corporation owned patents for the manufacture of chemically embossed vinyl floor covering in the United States and twenty-six foreign nations.[64] Mannington Mills was licensed to use Congoleum's patents in the United States, but was not licensed to use them abroad.[65] Congoleum instituted patent infringement suits against Mannington Mills in New Zealand, Canada, Australia, and Japan.[66] Mannington Mills replied by filing a suit in the United States which alleged that Congoleum obtained its twenty-six foreign patents by fraudulent representation to foreign patent offices.[67] Mannington Mills also alleged that Congoleum did not allow Mannington Mills to use patents abroad, and threatened to bring infringement suits abroad. These licensing practices imposed an unreasonable restriction on United States foreign commerce with an intent to monopolize, in violation of Section 2 of the Sherman Act.[68]

The trial court dismissed on the basis of the act of state doctrine.[69] On appeal, the Third Circuit reversed the trial court's holding,[70] finding the act of state doctrine inapplicable because "the granting of the

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Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980), Judge Campbell interpreted *Timberlane I* similar to *Mannington Mills,* stating that:

> [O]nce a district judge has determined that he has jurisdiction, he should consider additional factors to determine whether the exercise of that jurisdiction is appropriate.

Id. at 1255 (footnote omitted).

63. *Mannington Mills,* 595 F.2d at 1294.

64. *Id.* at 1290.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The Sherman Act Section 2 provides that every combination or conspiracy in restraint of United States trade or commerce is illegal and is subject to antitrust sanction. 15 U.S.C. § 2 (1982).

69. *Mannington Mills,* 595 F.2d at 1290. The act of state doctrine is a self-imposed judicial abstention from inquiring into the validity of a foreign sovereignty's acts. Arising from the conflict of laws and a relative to the doctrine of sovereign immunity, the act of state doctrine can be used as a defense by a private litigant. The doctrine is based upon a recognition of mutual respect for the sovereignty and independence of every other foreign state to conduct its affairs accordingly. Underhill v. Hernandez, 168 U.S. 250, 252 (1897)(domestic court refused to inquire into act of foreign government done within its own territory). For complete discussion of state action immunity, see Garland, *Antitrust and State Action: Economic Efficiency and the Political Process,* 96 YALE L.J. 486 (1987). Another defense is foreign sovereign compulsion, where foreign authorities compel private parties to engage in conduct that has an anticompetitive effect on U.S. commerce. *See, e.g.,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (rejected sovereign compulsion as a defense); Interamerican Refining Corp. v. Texaco Maracaibos, Inc., 370 F. Supp. 1291 (D. Del. 1970) (defendant successfully invoked sovereign compulsion defense); Comment, *Sovereign Compulsion and International Antitrust: Conflicting Laws and Separating Powers,* 25 COLUM. J. TRANSNAT'L L. 403 (1987). Also, defendants may rely upon the Foreign Sovereign Immunities Act, under which foreign sovereigns and their instrumentalities are immune from suit in U.S. courts, except in certain circumstances. 28 U.S.C. §§ 1330, 1602-1611 (1982).

70. *Mannington Mills,* 595 F.2d at 1293-94.

patents . . . is not the kind of governmental action contemplated by the act of state doctrine."[71] The Third Circuit concluded that the district court did have jurisdiction because the antitrust activity abroad resulted in harm to U.S. export business.[72] Remanding the case, the Third Circuit directed the trial court to develop a record containing information sufficient to assess specified international comity considerations.[73]

The Third Circuit found itself in "substantial agreement" with the *Timberlane I* court.[74] However, the Third Circuit proposed ten specific factors, including the *Timberlane I* factors, to be considered to determine whether to exercise jurisdiction in balancing United States and foreign government interests.[75] These factors are:

> 1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue.[76]

Basically, the *Mannington Mills* court's jurisdictional test was comprised of two parts. First, the court decided whether jurisdiction existed based upon a showing of detrimental effects on United States foreign commerce.[77] Then having found jurisdiction, the court evaluated in the second step whether it should exercise such jurisdiction based upon an assessment of international comity considerations.[78] The second step, by incorporating the ten factors of international comity, functions as a self-imposed restraint on the court's finding of antitrust extraterritorial jurisdiction to avoid unnecessary international conflicts.[79]

The *Mannington Mills* court has implicitly interpreted Section 40 of the Restatement Second as requiring discretionary exercise of a court's enforcement of jurisdiction based upon considerations of international comity.[80] The *Timberlane I* court, however, construed Section

71. *Id.* at 1294.
72. *Id.* at 1292.
73. *Id.* at 1298.
74. *Id.* at 1297-98.
75. *Id.*
76. *Id.*
77. *Id.* at 1291-92. It seems that the effects in this step are the same as the *Alcoa*'s "effects."
78. *Id.* at 1297.
79. *Id.* at 1296-97.
80. *Id.* at 1294, 1302.

40 to imply that a determination that extraterritorial jurisdiction exists will come only after a weighing of international comity factors.[81]

The *Mannington Mills* court suggested that international comity is an abstention doctrine in the realm of international antitrust law.[82] *Mannington Mills* dictates that the exercise of recognized jurisdiction is entirely discretionary, based upon factors of international comity.[83] But Judge Adams disagreed in his concurring opinion. His view was that courts should not engage in a discretionary inquiry in connection with the exercise of subject matter jurisdiction.[84] He stated that once a court had jurisdiction to hear a claim, it should exercise that power.[85] The court, therefore, should weigh traditional effects along with international comity factors as one question of jurisdiction, rather than two questions.[86]

4. U.S. Extraterritorial Jurisdiction and Foreign Hostility

The extraterritorial application of the U.S. antitrust laws to foreign parties has resulted in an escalation of legal confrontations between the U.S. and foreign nations. The discussion of the following cases demonsrates how the courts have struggled with applying the "effects test" or the jurisdictional rule of reason, and how foreign governments have reacted negatively toward U.S. courts' application of its antitrust law jurisdiction.

A. Uranium Antitrust Litigation

In the case *In re Uranium Antitrust Litigation,* Westinghouse Electric Corporation filed suit against twenty-nine defendants (including foreign producers from Australia, England, South Africa, and Canada) in United States district court alleging a violation of United States antitrust laws.[87] Westinghouse alleged that uranium producers out-

81. *Timberlane I,* 549 F.2d at 613; Comment, *Antitrust Law: Extraterritorial Jurisdiction,* 4 SUFFOLK TRANSNAT'L L.J. 185, 196 (1980).

82. *Mannington Mills,* 595 F.2d at 1296. The court stated that:

> When foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.

Id. (footnote omitted).

83. *Id.* at 1296-97; Comment, *supra* note 81, at 197 n.84.

84. *Mannington Mills,* 595 F.2d at 1299 (Adams, J., concurring).

85. *Id.* Judge Adams stated:

> I do not agree that court may conclude that it is invested with subject matter jurisdiction under the Sherman Act but may nonetheless abstain from exercising such jurisdiction in deference to considerations of international comity; rather it seems that those considerations are properly to be weighed at the outset when the court determines whether jurisdiction *vel non* exists, or in fashioning the decree.

Id.

86. Sennett & Gavil, *supra* note 58.

87. 480 F. Supp. 1138 (N.D. Ill. 1979)(*Uranium Antitrust I*), *aff'd.* 617 F.2d 1248 (7th Cir. 1980)(*Uranium Antitrust II*).

side the United States had formed a cartel and raised the price of uranium so high that Westinghouse was rendered unable to perform its contractual obligation with public utilities.[88]

Westinghouse attempted to obtain documents and testimony from foreign producers.[89] These requests prompted retaliatory responses from foreign governments.[90] Australia, South Africa, and Canada passed legislation prohibiting compliance with American discovery requests.[91] The House of Lords of England refused to enforce the letters rogatory[92] issued by the U.S. court, deferring to the British government's view that British sovereignty would otherwise be infringed.[93]

The foreign defendants did not appear at trial and default judgments were entered.[94] The trial judge relied on the *Alcoa* test, expressing his frustration with the *Timberlane I* approach:

> Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws . . . three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of Ameri-

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88. *See, e.g.,* Matter of Westinghouse Corp. Uranium Contracts Litigation, 517 F. Supp. 440 (E.D. Va 1981); *In re* Uranium Antitrust Litigation, 473 F. Supp. 382 (N.D. Ill. 1979); Note, *The Effects Test vs. Act of State Considerations: A Comparison of the OPEC and Westinghouse Decisions,* 53 COLO. L. REV. 677, 678-79 (1982). In the 1960s Westinghouse entered a number of contracts to construct nuclear facilities. The contracts also provided that Westinghouse would supply the facilities with uranium fuel for a long-term and at fixed price, subject to an escalator clause pegged to the general rate of inflation. The uranium supply contracts ultimately reached in excess of 70 million pounds. The price of uranium was $6 to $8 during the period of contracts, but it had risen to $26 by 1975 and $41 by 1976. In 1975, facing multibillion dollar losses, Westinghouse notified the public utilities that it would not honor the contracts because of commercial impracticability, and the electric utilities sued Westinghouse alleging breach of contracts. A court order could have rendered Westinghouse insolvent and forced the utilities to suffer an unexpected and significant increase in costs if Westinghouse were excused from performance. During this litigation, Westinghouse had learned that its inability to perform contracts was caused by the operation of the cartel formed by the major uranium producers.

89. *Uranium Antitrust I,* 480 F.2d at 1142-43.

90. *Id.*

91. *Id.* at 1143.

92. *Uranium Antitrust I,* 480 F. Supp. at 1142-44. *See also,* Dunfee & Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for An Interim Solution,* 45 OHIO ST. L.J. 883, at 888 n.29, n.31.; Comment, *supra* note 10, at 199 n.12, n.13 (1987). A letter rogatory is a legal paper by which a court in one country requests a court in another country to use its processes to obtain information within its jurisdiction for transmittal to the court of the requesting country.

93. For a detailed discussion on blocking statutes, *see* Pittit & Styles, *supra* note 11; Comment, *supra* note 10, at 199; Comment, *Foreign Statutory Response to Extraterritorial Application of United States Antitrust Law,* 1 DICK. INT'L L.J. 125 (1982).

94. *Uranium Antitrust II,* 617 F.2d at 1252-53 n.11.

> can antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating action.[95]

On an interlocutory appeal to the Seventh Circuit, several foreign governments,[96] appearing as *amici curiae,* argued that the district court should not have exercised its jurisdiction over the defendants. Relying on *Timberlane I* and *Mannington Mills,* those foreign governments argued that *Alcoa*'s effects test was no longer settled law in light of comity considerations.[97] The Seventh Circuit rejected this argument and held that the district court had jurisdiction under the "effects" doctrine articulated in *Alcoa.*[98] The court stated that it did not find the *Timberlane I* and *Mannington Mills* decisions controlling, and that the circumstances were distinct from those in *Timberlane I* and *Mannington Mills.*[99] The court pointed out that the defendants appeared and contested the jurisdiction before the U.S. court in *Timberlane I* and *Mannington Mills.* But in this case the defaulters had refused to come into court and present evidence as to why the U.S. court should not exercise its jurisdiction.[100]

The Seventh Circuit, however, stated that the district court was unable to consider the jurisdictional question because the foreign defendants defaulted, even though the district court tried to apply the jurisdictional rule of reason without the defendants' participation in discovery.[101] Therefore, the court apparently left open the possibility of using the *Timberlane I* or *Mannington Mills* analysis in cases when the foreign defendants participate in discovery and appear before an American court.[102] This case was settled in March, 1981.[103]

B. The Laker Airways Litigation

Laker Airways Ltd. v. Sabena, Belgian World Airways "represents a head-on collision between the diametrically opposed antitrust policies of the United States and United Kingdom," and revealed the limited ability of the judiciary to resolve the extraterritoriality issue.[104] In his opinion Judge Wilkey demonstrated that no matter how they are formulated, judicial limiting doctrines can never resolve the issue of

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95. *Uranium Antitrust I,* 480 F. Supp. at 1148.
96. *Uranium Antitrust II,* 617 F.2d at 1253. Australia, Canada, South Africa, Britain and Northern Ireland filed briefs. *Id.*
97. *Uranium Antitrust II,* 617 F.2d. at 1254. Britain relied primarily on the comment in *Timberlane I* that "[t]he effects test by itself is incomplete because it fails to consider other nation's interests." *Uranium Antitrust II,* 617 F.2d at 1255.
98. *Id.* at 1255-56.
99. *Id.* at 1255.
100. *Id.* at 1255-56.
101. *Id.* at 1256.
102. *Id.* at 1255-56.
103. *See* Comment, *supra* note 10, at 208 & n.71.
104. 731 F.2d 909, 916 (D.C. Cir. 1984) (hereinafter *Laker Airways*).

extraterritoriality because that issue inherently involves political considerations beyond the competence of courts.[105]

In 1977, Laker Airways introduced low price for transatlantic fares between New York and London.[106] It was alleged that in response to Laker's low price the members of the International Air Transport Association (IATA)[107] conspired to drive Laker Airways from the market for transatlantic air service. Perceiving Laker's operations as "a threat to their system of cartelized prices," these members of IATA allegedly agreed to a schedule of predatorily low fares with the intention of driving Laker out of business.[108] They also were alleged to have paid secret commissions to travel agents who diverted potential customers from Laker and to have agreed to raise prices following Laker's demise.[109] After reaching its peak in 1981, Laker Airways had been carrying one out of every seven passengers between the United States and the United Kingdom.[110] But due to the defendants' activities, Laker was forced into liquidation in early February, 1982.[111] IATA members also interfered with Laker's attempt to reschedule its financial obligations in a reorganization process, by pressing Laker's lenders to withhold financing.[112]

The liquidators of Laker Airways brought the antitrust suit against the major North Atlantic competitors in the United States because there were no similar antitrust laws in the United Kingdom.[113] Under British law, the alleged activities were not illegal.[114] On the other hand, the United States potentially had jurisdiction over the case because the conduct at issue had substantial effects within the United States.[115]

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105. *Id.* Judge Wilkey stated:

> Given the inherent limitations on the Judiciary's ability to adjust national priorities in light of directly contradictory foreign policies, there is little the Judiciary may do directly to solve the conflict.

Id.

106. *Id.* at 916-17. Laker Airways' fare was approximately one-third of the other airlines, without any in-flight services (so-called no-frills services).

107. *Id.* IATA is a trade association of the world's largest air carriers. They substantially controlled the prices for scheduled transatlantic air service. The IATA meets annually to establish fixed fares for air carriage.

108. *Id.* at 917. Some airlines offered the same fares as Laker's with full services. *Id.*

109. *Id.*

110. *Id.* at 916.

111. *Id.* at 916-17.

112. *Id.* 917.

113. *Id.* at 917-18. Laker Airways named as defendants four American corporations (Pan Am. World Airways, Trans World Airlines, McDonnell Douglas Corp., and McDonnell Douglas Finance Corp.) as well as four foreign airlines (British Airways, British Caledonian Airways, Lufthansa, and Swissair). Laker later commenced a second antitrust action against KLM Royal Dutch Airlines and Sabena Belgian World Airlines.

114. Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1137 (D.D.C. 1983). Under British law, it is lawful for a corporation to monopolize commerce by offering exceptional terms resulting in losses so as to drive competitors out of business, with the expectation that the losses will be recouped later once the competitors have been eliminated. *Id.*

115. *Laker Airways,* 731 F.2d at 924. The court noted that Laker's principal creditors in the liquidation process were American, and that a great percentage of passengers on North Atlantic air routes were American, so that a predatory pricing scheme would

Four defendants (British Airways, British Caledonian Airways, Lufthansa, and Swissair) attempted to escape U.S. jurisdiction by seeking an interim injunction from the British courts. This injunction would restrain Laker from pursuing its antitrust action in the Unites States.[116] The British High Court of Justice initially granted a preliminary injunction against Laker.[117] The injunction prevented Laker from taking any further steps to prosecute its U.S. claim against the British airlines,[118] and to prohibit Laker from instituting any other proceeding relating to the case in any non-English forum.[119] The British government also issued an order under the Protection of Trading Interests Act[120] prohibiting any airline doing business in England from producing any documents or information to the American court for the use of Laker's action.[121]

The British court's ruling prompted the U.S. District Court to issue antisuit injunctions against Sabena Belgian World Airlines and KLM Royal Dutch Airlines, preventing them from obtaining similar relief from the British court or any other foreign courts.[122] Sabena and KLM appealed this decision, and Swissair and Lufthansa supported this appeal by filing *amicus* briefs.[123]

The principal issue before the court on appeal concerned the validity of the preliminary injunction issued by the U.S. District Court. Sabena and KLM argued that the district court's injunction itself should not have been issued in light of principles of comity, and also charged that the district court ignored Britain's paramount right to apply British law to Laker Airways.[124] Sabena and KLM asserted that the American injunction offended British interests as reflected in the antisuit

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result in increased fares for American passengers. It also ruled that the United States has a substantial interest in regulating the conduct of business within the Unites States. *Id.*

116. *Id.* 917-18.

117. *Id.* at 920-21.

118. *Id. See also,* Dunfee & Friedman, *supra* note 92, at 911 n.163. Lufthansa and Swissair applied for relief, but the British court ruled only on two British airlines, not on Lufthansa or Swissair. *Id.*

119. *Laker Airways,* 731 F.2d at 918.

120. *Supra* note 13.

121. *Laker Airways,* 731 F.2d at 940.

122. *Laker Airways,* 559 F. Supp. at 1138-39.

123. *Laker Airways,* 731 F.2d at 921.

124. *Id.* Three years after *Laker Airways,* the Second Circuit vacated the district court's grant of an anti-foreign-suit injunction in a liability suit on the ground of international comity. China Trade & Development v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987). The South Korean shipping company, Ssangyong, agreed to transport soybeans into China from the United States. The vessel ran aground and the soybeans, the China Trade contended, became virtually valueless because they were contaminated by seawater. The China Trade brought an action in the U.S. District Court against Ssangyong for failure to deliver the soybeans. Both parties proceeded to prepare the case before the U.S. District Court. While discovery was still progressing, Ssangyong filed a pleading in the Korean court, seeking declaratory judgment that Ssangyong was not liable for China Trade's loss. On China Trade's motion, the U.S. District Court issued a permanent injunction prohibiting Ssangyong from further proceeding in the Korean court against China Trade. But the Second Circuit vacated this injunction on grounds of comity. *Id.* at 37.

injunction issued by the British court, thereby limiting Laker's ability to proceed with its U.S. antitrust suit.[125]

The D.C. Circuit affirmed the district court's grant of a preliminary injunction.[126] The court concluded that Britain and the U.S. had concurrent jurisdiction.[127] The court held that "[j]urisdiction exists under United States antitrust laws whenever conduct is intended to, and results in, substantial effects within the United States."[128] The British jurisdictional base was to some extent extraterritorial, but was primarily based on the British nationality of the parties.[129]

The D.C. Circuit, in reaching its decision, did not take into account the existence of the British blocking order. But the court found that the British injunction was purely offensive and was only intended to interfere with the properly invoked jurisdiction of a United States court.[130] In contrast to such an offensive injunction, the U.S. court's antisuit injunction was defensive. It was not designed to interfere with the British court, but to protect the jurisdiction of the U.S. court.[131] The court stated that:

> There is simply no visible reason why the British Executive, followed by the British courts, should bar Laker's assertion of a legitimate cause of action in the American courts, except that the British government is intent upon frustrating the antitrust

125. *Laker Airways,* 731 F.2d at 939.
126. *Id.* at 930.
127. *Id.* at 926.
128. *Id.* at 925 (footnote omitted). Judge Wilkey stated that the price fixing conspiracy and the attempts to drive Laker out of business by interfering with refinancing would injure American consumers because a great percentage of passengers on North Atlantic air routes had been American citizens. *Id.* He also identified the following American interests as to the creditors:

> Because Laker is currently being liquidated, the claims of its creditors are even more directly at stake than consumer interest. Laker is now little more than a corporate conduit through which its assets, including any damages owed Laker, will pass to its creditors. Its antitrust action is primarily an effort to satisfy its creditors, who ultimately bear the brunt of the injury allegedly inflicted upon Laker . . . Laker's principle creditors are Americans. Laker's fleet of American manufactured DC-10 aircraft was largely financed by banks and other lending institutions in the Unites States. Moreover, a substantial portion of its total debt obligations are likely to have been American, since the bulk of the debts and expenses were payable in American dollars. The actions of the alleged conspirators destroyed the ability of Laker to repay these American creditors; any antitrust recovery will therefore benefit these United States interests. In addition to the protection of American consumer's and creditors' interests, the United States has substantial interest in regulating the conduct of business within the United States.

Id. at 924 (footnotes omitted).
129. *Id.* at 926. The price fixing conspiracy took place in Britain and Laker Airways was operating in Britain. *Id.*
130. *Id.* at 939. The D.C. Circuit also criticized the assertion of comity in an American court by the defendants, and stated that it was the British court that should have considered comity before it issued an injunction since the recovery suit was first instituted in the American court. *Id.*
131. *Id.* at 938.

> policies of the American government. The effort of the British therefore is not to see that justice is done anywhere, either in the United States or British court, but to frustrate the enforcement of American law in American courts against companies doing business in America. Absent a clear treaty concluded by the United States Executive Branch, this simply cannot be agreed to by the courts of the United States.[132]

The D.C. Circuit recognized consideration of comity principles as legitimate,[133] but found that the "balancing test" under the jurisdictional rule of reason analysis was useless in allocating jurisdiction when concurrent jurisdiction existed.[134] The court held that it was incompetent to weigh the purely political factors involved.[135] The court also questioned whether adopting the balancing test would promote international comity,[136] finding that in no instance had a court declined to exercise its prescriptive jurisdiction based on the balancing test analysis where the U.S. interests at stake were more than *de minimus*.[137]

The D.C. Circuit explicitly rejected the application of the jurisdictional rule of reason analysis in this case.[138] The court held that it was essentially a political question and that courts are ill-equipped to balance national interests and determine which interest predominates.[139] The court stated that judges are not politicians and courts are not organs of political compromise.[140]

The D.C. Circuit also invoked the constitutional principle of separation of powers for rejecting the application of the balancing test, concluding:

> Both institutional limitations on the judicial process and Constitutional restrictions on the exercise of judicial power make it unacceptable for the Judiciary to seize the political initiative and determine that legitimate application of American laws must evaporate when challenged by a foreign jurisdiction.[141]

Instead, the court simply held that the jurisdiction should be exercised in *Laker* because important United States interests were involved, and because the district court's issuance of an injunction was not proscribed by the principles of international comity.[142]

The D.C. Circuit refused to adopt the "jurisdictional rule of reason" analysis of *Timberlane I* and *Mannington Mills*.[143] The Laker court

132. *Id.* at 940.
133. *Id.* at 937.
134. *Id.* at 948-49.
135. *Id.* at 949.
136. *Id.* at 950.
137. *Id.* at 950-51.
138. *Id.* at 953.
139. *Id.* at 948-55.
140. *Id.* at 953. The D.C. Circuit also found no evidence that interest balancing approach represented a rule of international law. *Id.* at 950.
141. *Id.* at 954 (footnote omitted).
142. *Id.* at 955-56.
143. *Id.* at 937-39.

held that "[a]bsent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction."[144] In so holding, the D.C. Circuit affirmed the district court's assertion of jurisdiction and the grant of a preliminary injunction prohibiting KLM and Sabena from seeking British antisuit injunctions.[145]

5. In Re Insurance Antitrust Litigation

After the *Laker Airways* case, it is difficult to define the present status of the law. There has been no uniformity in the standard applied, and no prediction is possible as to which approach will be employed in what circumstances.[146] In September, 1989, a United States District Court in California dismissed an antitrust claim in *In re Insurance Antitrust Litigation* on grounds of international comity.[147] The court explicitly applied the jurisdictional rule of reason analysis, by balancing *Timberlane I* factors.[148]

The Insurance Services Office, Inc. (ISO)[149] had revised the standard form for commercial general liability (CGL) insurance.[150] The new version of the standard CGL form reduced the coverage available under the old form by eliminating an insurer's "long tail risk."[151] ISO, during 1984-86, filed the new form for CGL insurance policies with all state insurance departments.[152]

Nineteen states and numerous private plaintiffs brought antitrust actions against all major American insurance companies, ISO, and three major English insurance companies.[153] The plaintiffs charged that the

144. *Id.* at 955.

145. *Id.* at 956. The parties began to negotiate a settlement shortly after Laker Airways moved to compel the foreign defendants to produce documents on March 27, 1985, then settled the case. *See,* Comment, *supra* note 10, at 210 n.96.

146. Victor & Chou, *supra* note 9, at 12.

147. 1989 U.S. Dist. LEXIS 11170 (N.D. Cal. Sept. 20, 1989) (MDL No. 767) (hereinafter *Insurance Antitrust*). This case was decided on September 20, 1989. The author of this comment interviewed Mr. John Kithas of the law firm of Saveri and Saveri in San Francisco on October 9, 1989. Mr. Kithas has served as an Administrative Liaison Counsel for private plaintiffs. He stated that state and private plaintiffs were considering an appeal. They have 60 days to appeal.

148. *Id.* at 69.

149. *Id.* at 9. ISO is an association of American property or casualty insurers, consisted of more than one thousand insurance companies, including Hartford, Allstate, Aetna and CIGNA. ISO is an advisory organization in all 50 states and its primary function is to develop standardized policy forms for property and casualty insurance. *Id.*

150. *Id.* at 8. CGL insurance protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, nonprofit groups, and governmental entities. *Id.*

151. *Id.* at 9. Under the old form, the insured was covered for claims arising out of occurrences during the policy period, no matter when asserted. Therefore, the insurance company bore the risk of future claims for a long period. But the coverage of the new form was limited to claims made during the policy period regardless of when the occurrence out of which the claim arose had taken place. Thereby insurers eliminated the so-called "long tail risk". *Id.* at 9-11.

152. *Id.* at 9.

153. *Id.* at 8.

British defendants, by agreement with American insurance companies, undertook joint efforts to promote the new form, and reinsurers refused to accept new reinsurance business or renew old business unless the primary carrier agreed to switch to the new form.[154] The plaintiffs alleged that the defendants had agreed that their casualty reinsurance policies for the United States primary insurers would not cover pollution liability.[155] The plaintiffs also alleged that London retrocessional reinsurers agreed to boycott retrocessional reinsurance policies for American reinsurers unless the original insurance excluded seepage, pollution, and contamination liability.[156] As a result of this agreement, seepage and pollution coverage had been excluded from policies on American risks, and prices for such coverage increased.[157]

The defendants filed a motion to dismiss arguing that the U.S. District Court lacked subject matter jurisdiction to hear the action.[158] The court analyzed two claims under the international comity principle because all of the defendants were foreign nationals and anticompetitive activities occurred in London.[159] The court first found that agreements not to provide reinsurance or retrocessional reinsurance to cover certain types of risk in the United States had a "direct effect" on primary insurance availability in the United States.[160] Therefore, the court held that the Foreign Trade Antitrust Improvement Act was not applicable, but there existed subject matter jurisdiction under the Sherman Act.[161] Regardless of the existence of subject matter jurisdiction, the court evaluated *Timberlane I's* seven factors to determine whether or not the court should exercise jurisdiction on grounds of international comity.[162]

The court found that: (1) the degree of conflict with foreign law and policy was a sufficient reason to decline the exercise of jurisdiction because enforcement of the U.S. antitrust laws would lead to significant conflict with English law and policy;[163] (2) the nationality of parties and the place of business weighed against the exercise of jurisdiction because the defendants were of English nationality and the witnesses and documents were located in England;[164] (3) the expectation of compliance analysis tipped slightly against the exercise of jurisdiction since the English courts had refused to aid in an enforcement of an American court judgment[165] and the Protection of Trading Interests

154. *Id.* at 12.
155. *Id.* at 60-61.
156. *Id.* at 61. Retrocessional insurance is insurance for reinsurers. *Id.* at 13 n.4.
157. *Id.*.
158. *Id.* at 18.
159. *Id.* at 79.
160. *Id.* at 67.
161. *Id.*
162. *Id.*
163. *Id.* at 73-75.
164. *Id.* at 75. An English "blocking" statute restricts the availability of documents for use in judicial proceedings in the United States. Protection of Trading Interests Act of 1980, *supra* note 13, § 2.
165. *Insurance Antitrust,* 1989 U.S. Dist. LEXIS, at 76.

Act[166] may forbid English nationals from complying with foreign antitrust judgments;[167] (4) the significance of effects weighed in favor of the exercise of jurisdiction due to the "direct effect" to American CGL policy;[168] (5) the purpose to harm or the effect on U.S. commerce weighed against the exercise of jurisdiction because the actions of English insurance companies, reducing risks and controlling losses, were consistent with local customs and practices;[169] (6) defendants conceded that foreseeability of the effect in the United States weighed in favor of the exercise of jurisdiction;[170] and (7) the balance of importance to violation weighed against the exercise of jurisdiction because none of the anticompetitive conduct occurred in the United States.[171]

The U.S. District Court stated that the activities occurred abroad, were carried out by foreign actors, and were conducted in a manner consistent with local law and practice, and enforcement of any judgment would be difficult and limited at best.[172] The court concluded that the balance of the factors clearly weighed against the exercise of jurisdiction.[173]

6. Foreign Trade Antitrust Improvement Act

The Foreign Trade Antitrust Improvement Act of 1982 (FTAIA) amended the broad and general jurisdiction provisions of the Sherman Act and the FTC Act. The FTAIA inserted the traditional language of the "effects test"; a "direct, substantial, and reasonably foreseeable effect."[174] This Act deals only with jurisdiction over U.S. export transactions and purely foreign transactions. But the Act is not intended to apply to import trade or commerce.[175]

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166. *Supra* note 13, § 5.
167. *Id.* § 1.
168. *Insurance Antitrust,* 1989 U.S. Dist. LEXIS at 77.
169. *Id.* at 78.
170. *Id.*
171. *Id.* at 78-79.
172. *Id.* at 79.
173. *Id.*
174. 15 U.S.C. § 6a (1988). The FTAIA provides that;

> [T]he Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless -
>
> (1) such conduct has a direct, substantial , and reasonably foreseeable effect -
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, or a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section. If [the Sherman Act] applies to such conduct only because of the operation of paragraph (1)(B), then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.

Id.

175. H.R. Rep. No. 686, 97th Cong., 2d Sess., 9-10 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2487.

The "reasonably foreseeable" requirement indicates congressional desire to avoid any subjective inquiry into motives that might arise with an intent requirement. This also renders international traders free from undue worry over incidental or *de minimus* effects.[176] The test is whether the effects would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown.[177]

There is argument on the purpose and effect of this Act.[178] The purpose is to reduce antitrust conflicts with foreign nations.[179] The Act does not apply to a case involving import trade or commerce.[180] But most international conflicts have resulted from U.S. antitrust actions involving import trade or commerce.[181] Import trade or commerce is the major area which American litigants are most likely to challenge in the future.[182] Therefore, international conflicts will more likely increase as a result of this legislation as a whole.[183]

The Act does not reject the "jurisdictional rule of reason" analysis of *Timberlane I.* The *Timberlane I* approach mandates considering international comity before exercising subject matter jurisdiction.[184] But the Act adopts a neutral position and gives courts discretion whether to evaluate international factors to determine the jurisdictional issue.[185] The House Report clearly expressed this view:

> [T]he bill is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction. Similarly, the bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist or to extraterritorial pursuit of evidence in appropriate cases.[186]

Congress enacted the Foreign Trade Antitrust Improvement Act of 1982 to provide a single standard to determine whether American antitrust laws apply to a given extraterritorial transaction.[187] Congress

176. *See id.* at 9.
177. *Id.*
178. Fox, *Extraterritoriality, Antitrust, And The New Restatement; Is "Reasonableness" The Answer?*, 19 NYU J. INT'L L. & POL. 565, 579-82 (1987).
179. *House Judiciary Committee Reports Export Trading Companies Legislation*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1069, 1260 (June 17, 1982).
180. 15 U.S.C. § 6a.
181. Fox, *supra* note 178, at 580.
182. *Id.*
183. *Id.*; Hawk, *International Antitrust Policy And The 1982 Acts; The Continuing Need For Reassessment*, 51 FORDHAM L. REV. 201, 222 (1982).
184. *Timberlane I*, 549 F.2d 613.
185. *See* H.R. Rep., *supra* note 175, at 13.
186. *Id.*
187. *O.N.E. Shipping Ltd.*, 830 F.2d at 451.

confused the issue when they left the courts with the discretion to decide when to employ notions of abstention in exercising jurisdiction in extraterritorial antitrust cases.

7. Restatement Third

Restatement Third section 402 lists the general bases of "jurisdiction to prescribe",[188] Section 403 provides limitations on jurisdiction to prescribe,[189] and Section 415 sets forth principles governing jurisdiction to apply the U.S. antitrust laws.[190] These three sections can be summarized as the principle of reasonableness. Reasonableness is to be determined by balancing various factors, including the Section 403(2) factors.[191]

Territoriality, nationality, and the effects doctrine of the Restatement Second remain the principal bases of "jurisdiction to prescribe" in the Restatement Third.[192] But the Restatement Third added subsection (1)(c), which provides that a state has jurisdiction to prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory."[193] Therefore, according to the Restatement Third, it is sufficient to support an exercise of jurisdiction over conduct occurring outside its territory if there is either actual or intended effects within the territory. Subsection (1)(c) substantially relaxes the rather strict requirements of the Restatement Second[194] so that the court may exercise broader extraterritorial jurisdiction.[195]

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188. RESTATEMENT THIRD, *supra* note 38, § 402. Jurisdiction to prescribe is defined as the application of state's law to the activities by the legislative, executive, or judicial branch. *Id.* § 401(a).

189. *Id.* § 403.

190. *Id.* § 415.

191. *Id.* pt. IV, ch. 1, introductory note.

192. *Id.* RESTATEMENT THIRD Section 402 provides bases of jurisdiction in respect to the following:

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

193. *Id.* § 402(1)(c).

194. RESTATEMENT SECOND, *supra* note 37, Section 18 requires "direct, substantial, and foreseeable effect" test.

195. Fox, *supra* note 178, at 586. Professor Fox stated that:

> Thus, [S]ection 402 expressly recognizes that jurisdictional bases are provided not only by nationality or acts in the territory but also by acts outside of territory that have actual or intended effects within. Intended but thwarted effect is included as an appropriate basis.

Id.

Section 403 of the Restatement Third provides that a state may not exercise jurisdiction over persons or activities having a connection with another state when the exercise of such jurisdiction is unreasonable, even though the bases for jurisdiction under section 402 is present.[196] The Restatement Third section 403(2) lists eight relevant factors to be considered when determining whether the exercise of jurisdiction is reasonable.[197]

Where the exercise of jurisdiction by two states is reasonable, but conflicts nonetheless, each state should evaluate its own interest, as well as the other state's interest. One state should defer to the other state based on principles of comity if that state's interest is clearly greater.[198] This is a significant departure from the Restatement Second because the Restatement Second, Section 40 requires a state to consider only in-good-faith balancing and to moderate its enforcement under traditional principles of international law.[199]

The Restatement Third, section 415 applies the general principles of section 402 and section 403 to regulate anticompetitive activities. Subsection (1) addresses jurisdiction over conduct that occurs in the United States, regardless of the nationality of the parties or the place

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196. RESTATEMENT THIRD Section 403(1) provides:
Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

197. RESTATEMENT THIRD Section 403(2) provides:
(a) the link of the activity to the territory of the regulating state,i.e. the extent to which the activity takes place within he territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.

198. RESTATEMENT THIRD, Section 403(3) provides that:
When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

199. RESTATEMENT SECOND, *supra* note 55, § 40.

of anticompetitive activities.[200] Subsection (2) applies if parties intend to interfere with and cause some effects on the commerce of the United States, even though the anticompetitive conduct takes place outside of the United States.[201] Subsection (3) applies to any conduct if it has a substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.[202]

Therefore, where the principal purpose is clearly to interfere with U.S. commerce, the effect can be less than substantial, but not insignificant. Where there is no principal purpose to interfere with U.S. commerce, the effect must be greater, and the gravity of the offense may be relevant.[203] Under the Restatement Third's view, the courts must decide (1) existence of jurisdiction under "intent and effects" doctrine, (2) "reasonableness" by evaluating all relevant factors including listed factors in subsection 2,[204] and (3) whether another state's interest is clearly greater.[205] In sum, the Restatement Third takes effects and international comity factors into consideration in determining whether the exercise of jurisdiction is reasonable.[206] This approach is the same as that of *Timberlane I.*[207]

8. Justice Department Guidelines

The Justice Department Guidelines state that "[t]he reach of the U.S. antitrust laws is not limited solely to conduct and transactions that occur within the United States."[208] The Guidelines adopt the "direct, substantial, and reasonably foreseeable effect" test for find-

200. RESTATEMENT THIRD, Section 415(1) provides that:
Any agreement in restraint of United States trade that is made in the United States, and any conduct or agreement in restraint of such trade that is carried out in significant measure in the United states, are subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct.

201. RESTATEMENT THIRD, Section 415(2) provides that:
Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

202. RESTATEMENT THIRD, Section 415(3) provides that:
Other agreements or conduct in restraint of United States trade are subject to the Jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

203. Fox, *supra* note 178, at 589.

204. RESTATEMENT THIRD, *supra* note 38, § 403(2).

205. *Id.* § 403(3).

206. *Id.* § 403(2), § 402 comment d.

207. *Timberlane I,* 549 F.2d at 615.

208. *Antitrust Enforcement Guidelines for International Operations, U.S. Department of Justice Antitrust Division* (1988), at 29, *reprinted in* 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988)(Special Supp.)(hereinafter "Guidelines").

ing a violation of the antitrust laws and the existence of jurisdiction.[209] But the Department enforces jurisdiction only when it is reasonable to do so.[210] The Department may decline to enforce jurisdiction upon considering international comity.[211]

The Guidelines rely mainly upon the Foreign Trade Antitrust Improvement Act of 1982 for its standards,[212] which applies only to non-import trade or commerce with foreign nations.[213] To cover the import area, the Guidelines expressly state that "the Department also applies the 'direct, substantial, and reasonably foreseeable [effects]' standard to import commerce and to mergers and acquisitions."[214]

Upon establishing the antitrust law violations and the existence of jurisdiction under the above "effects test", the Department determines reasonableness of enforcing jurisdiction in consideration of international comity.[215] The Guidelines state that "[t]hus, in determining whether it would be reasonable to assert jurisdiction . . . the Department considers significant interests of any foreign sovereign would be affected, and asserts jurisdiction only when the Department concludes that it would be reasonable to do so."[216] In bringing enforcement actions, the Department stated that it would "consult with interested foreign sovereigns through appropriate diplomatic channels to attempt to eliminate or substantially reduce anticompetitive effects in the United States."[217]

In performing a comity analysis, the Department asks whether there will be actual conflict between the antitrust enforcement interests of the United States and the laws or policies of the foreign sovereign. If the anticompetitive conduct in question is prohibited under the laws of the foreign sovereign, there is no conflict with the application of the U.S. antitrust laws.[218]

But if an actual conflict arises, the Department attempts to "balance" the interests of the U.S. Government in preserving competitive markets and protecting U.S. consumers, and the interests of the affected foreign sovereign in promoting its laws and policies.[219] In addi-

209. *Id.* at 29 & 31.
210. *Id.* at 31-32 (footnote omitted).
211. *Id.* at 29 n.157, 32 n.170.
212. *Id.* at 30.
213. *See* H.R. Rep., *supra* note 175, at 13. In passing this Act, Congress did not change the ability of the courts to exercise comity or otherwise recognize the peculiar problems associated with antitrust actions invoking international transactions. *Id.*
214. Guidelines, *supra* note 208, at 31.
215. *Id.* at 29 n.157.
216. *Id.* at 31-32.
217. *Id.* at 32 n.167.
218. *Id.* at 32.
219. *Id.* (footnote omitted). In balancing the interests, the Department considers various factors including:

> (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
> (2) the nationality of the persons involved in or affected by the conduct;
> (3) the presence or absence of a purpose to affect United States consumers or competitors;

tion, the Department may, in extraordinary circumstances, consider the possible effect on the foreign relations.[220]

The factors listed in the Justice Department Guidelines are not intended to be weighed by a court, but are intended to be considered by the Department in determining whether to bring an antitrust lawsuit.[221] It is proper for the Department to consider these relevant factors as a part of its legitimate prosecutorial discretion.[222]

As a part of the Executive Branch, the Department is in a much better position than the courts to determine reasonableness by considering international comity factors. The Guidelines' factors are very valuable when the Department attempts to balance U.S. interests in a competitive market and consumer protection with foreign interests, and to decide whether the Department should exercise prosecutorial discretion.

In spite of the positions of the Restatement Third and the Justice Department Guidelines, the circuits have still not been consistent in their treatment of the issue.

III. ANALYSIS

The United States Supreme Court has not yet ruled on the conflicting holdings among the circuit courts. Generally, the circuit court holdings can be categorized into two groups. One is the "effects doctrine" which the D.C. Circuit and the Seventh Circuit have adopted.[223] The other is the "jurisdictional rule of reason" which the Second, Third, Fifth, Ninth, and Tenth Circuit have adopted.[224]

The "effects doctrine" originated in *Alcoa*.[225] There the court held that the U.S. courts have subject matter jurisdiction over antitrust activities committed abroad if these activities affected commerce in the United States.[226] This "effects doctrine" has been adopted by the Seventh Circuit in *Uranium Antitrust II*[227] and by the D.C. Circuit in *Laker Airways*.[228] The Seventh and D.C. Circuits explicitly rejected the "juris-

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(4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
(5) the existence of reasonable expectations that would be furthered or defeated by the action; and
(6) the degree of conflict with foreign law or articulated foreign economic policies.

Id. n.170.

220. *Id.* at 33 (footnote omitted).

221. *Id.* at 1.

222. *See* Fugate, *The New Justice Department Antitrust Enforcement Guidelines for International Operations - A Reflection of Reagan and, Perhaps, Bush Administration Antitrust Policy*, 29 VA J. INT'L L. 295, 303 (1989).

223. *Uranium Antitrust II*, 617 F.2d at 1255-56; *Laker Airways*, 731 F.2d at 955-56.

224. *See supra* notes 39, 41, 58.

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

226. *Id.*

227. *Uranium Antitrust II*, 617 F.2d at 1255-56.

228. *Laker Airways*, 731 F.2d at 955-56.

dictional rule of reason" and applied the "effects doctrine", and exercised jurisdiction over the cases upon finding anticompetitive effects on commerce in the United States.[229] Specifically, the D.C. Circuit refused to apply the "jurisdictional rule of reason" because the court was inherently incompetent to balance the political factors involved.[230]

The Foreign Trade Antitrust Improvement Act of 1982 has basically adopted the "effects doctrine" on its face.[231] However, the FTAIA does not clearly preclude the "jurisdictional rule of reason." The legislative history shows that the Act adopts a neutral position and leaves the court with discretion to consider international comity in determining the jurisdictional issue.[232] Therefore, FTAIA's standard is not clear.

The jurisdictional rule of reason principle was developed in *Timberlane I* and *Mannington Mills*.[233] The Ninth and Third Circuits modified the effects doctrine by adding international comity considerations to determine whether the court should exercise jurisdiction over an international antitrust case.[234] The *Timberlane I* and *Mannington Mills* courts applied the same basic approach. The only difference was that *Timberlane I* combined effects and international comity as one question to determine the issue of the exercise of jurisdiction.[235] *Mannington Mills* found the existence of jurisdiction first and then evaluated international comity factors to determine whether the court should exercise jurisdiction.[236] This "jurisdictional rule of reason" has been applied recently in *Insurance Antitrust*.[237]

The Restatement Third has adopted the jurisdictional rule of reason principle.[238] The Restatement Third section 415 looks for: (1) anticompetitive effect on commerce in the United States to find the existence of jurisdiction; and, (2) the "reasonableness" of exercising jurisdiction.[239] The Restatement Third lists eight international comity factors to be considered to determine reasonableness.[240] Therefore, the Restatement Third considers effects and international comity factors to determine whether the exercise of the jurisdiction is reasonable.[241] This approach is the same as that of *Timberlane I*.[242]

The Justice Department has also adopted the jurisdictional rule of reason principle.[243] The Justice Department's Guidelines apply the

229. *Uranium Antitrust II*, 617 F.2d at 1255-56; *Laker Airways*, 731 F.2d at 948-55.
230. *Id.*
231. *See supra* note 174, and accompanying text.
232. H.R. Rep., *supra* note 175, at 13.
233. *Timberlane I*, 549 F.2d at 615; *Mannington Mills*, 595 F.2d at 1297-98.
234. *Timberlane I*, 549 F.2d at 615; *Mannington Mills*, 595 F.2d at 1297-98.
235. *Timberlane I*, 549 F.2d at 613-14.
236. *Mannington Mills*, 595 F.2d 1296-97.
237. *Insurance Antitrust*, 1989 U.S. Dist. LEXIS, at 79.
238. RESTATEMENT THIRD, *supra* note 38, § 415.
239. *Id.*
240. *Id.* § 403(2).
241. *Id.*
242. *Timberlane I*, 549 F.2d at 615.
243. Guidelines, *supra* note 208, at 31-32.

effects doctrine for finding a violation of antitrust laws and the existence of jurisdiction.[244] The Department asserts jurisdiction only when such assertion is reasonable considering international comity.[245] This two-step approach is the same as that of *Mannington Mills.*[246] Hence, the jurisdictional rule of reason principle mandates that a court consider international comity to determine whether the court should exercise jurisdiction.[247] On the other hand, the Foreign Trade Antitrust Improvement Act gives the court discretion to evaluate international comity factors for the same purpose.[248]

If the courts had applied the effects doctrine in *Timberlane, Mannington Mills,* and *Insurance Antitrust,* the courts would have exercised jurisdiction. This is because the courts would have found some anticompetitive effects on U.S. commerce.[249] However, the courts found no subject matter jurisdiction under the jurisdictional rule of reason principle.[250]

If the Seventh Circuit had applied the jurisdictional rule of reason principle to *Uranium Antitrust,* the court might have exercised jurisdiction even in considering international comity, because direct anticompetitive effect is so substantial and the U.S. interests weighed in favor of the exercise of jurisdiction.[251] However, the D.C. Circuit might have not exercised jurisdiction in *Laker Airways* under the jurisdictional rule of reason. The court likely would have found that the IATA members' anticompetitive activities directly affected U.S. commerce, but not substantially. On the other hand, the D.C. Circuit might have found that strong foreign interests outweighed U.S. interests.

U.S. courts should compromise somewhere to maximize effectiveness and practicality in the extraterritorial enforcement of antitrust laws. The "effects doctrine" enables the U.S. court to exercise jurisdiction over all international antitrust cases if their anticompetitive activities have some effects on U.S. commerce.[252] This is one of the purposes of U.S. antitrust laws. However, from the aspect of effective enforcement, the effects doctrine does not provide a sound solution. Foreign nations have vigorously resisted enforcement by legislating "blocking" statutes and even "claw back" statutes.[253] The enforcement of U.S.

244. *Id.* at 31.
245. *Id.* at 31-32.
246. *Mannington Mills,* 595 F.2d at 1296-97.
247. *Timberlane I,* 549 F.2d at 613; *Mannington Mills,* 595 F.2d at 1291-92.
248. H.R. Rep., *supra* note 175, at 13.
249. *Timberlane II,* 574 F. Supp. at 1466; *Mannington Mills,* 595 F.2d at 1292; *Insurance Antitrust,* 1989 U.S. Dist. LEXIS, at 77. The courts found anticompetitive effects on U.S. commerce in each case.
250. *Timberlane II,* 574 F. Supp. at 1455; *Insurance Antitrust,* U.S. Dist. LEXIS, at 79.
251. *Uranium Antitrust II,* 617 F.2d at 1255-56.
252. *Alcoa,* 148 F.2d 443-44.
253. *Supra* note 12-16 and accompanying text. *See also,* Shenefield, *supra* note 59, at 356. He points out that the most objectionable aspect of United States antitrust law from the perspective of foreign government is the private treble damage remedy. *Id.*

antitrust laws has thus become ineffective and has injured international relationships.[254]

The jurisdictional rule of reason principle provides favorable analysis at this stage in the absence of United States legislative initiatives or international treaties. Although the jurisdictional rule of reason in the international antitrust area makes the courts' task more difficult, its flexibility allows for the best resolution of international conflicts. Some courts have refused to apply the jurisdictional rule of reason because the court is not a proper place to interpret political factors.[255] This is especially true, when considering that international politics and economic policies are constantly changing.

Under the jurisdictional rule of reason, in comparison to the application of the rigid effects doctrine, courts have more flexibility in determining whether or not jurisdiction should be exercised. The court balances U.S. interests and foreign interests by considering various relevant factors.[256] The flexibility of the jurisdictional rule of reason allows courts the opportunity to effectively enforce U.S. antitrust law while at the same time minimizing international tension.

International treaties are a possible method of addressing the political issues. It is unlikely that these agreements will be reached because every country has a different antitrust policy depending upon: (1) its level of economic power; (2) its free trade or government-control economic policies; and (3) the nature of its relations with other countries. Courts should encourage active participation by both the U.S. Executive Branch and foreign governments through filing *amicus curiae* briefs. *Amicus curiae* briefs are a very good source of information when the court considers international comity factors.

The U.S. Congress could legislate to restrict the abusive use of the effects doctrine. Congress may heighten the standard for effects from the current "direct, substantial, and foreseeable" to "actual" effects. This heightened standard of effects would reduce the courts' difficult task of evaluating political questions.[257] If there are actual effects on U.S. commerce, the courts, in most cases, would determine that American interests outweigh those of foreign nations.

The jurisdictional rule of reason does not raise serious questions where an anticompetitive effect on U.S. commerce is not significant. But this principle does not provide a solution where both the United States and foreign nations have strong interests. For this situation,

254. *Laker Airways,* 731 F.2d at 940. The English Executive had issued an order to every airline in the world doing business in England to refuse to submit to jurisdiction of the U.S. court and not to submit any documents from England pursuant to an order of an American court. *Id.*

255. *Uranium Antitrust II,* 617 F.2d at 1255-56; *Laker Airways,* 731 F.2d at 948-55.

256. *Timberlane I,* 549 F.2d at 613-14.

257. *See Laker Airways,* 731 F.2d at 948-55. The D.C. Circuit refused to apply the jurisdictional rule of reason analysis because relevant factors are political questions and courts are ill-equipped to balance international questions. *Id.*

as the Justice Department Guidelines indicate, the diplomatic channel is probably the best way to handle the case.[258]

IV. CONCLUSION

The U.S. Judiciary, Congress, and the Executive Branch have struggled for effective enforcement of the U.S. antitrust laws in international situations. But vigorous enforcement of antitrust laws has caused adverse consequences, leading foreign nations to legislate blocking statutes to prevent the U.S. from enforcing its antitrust laws.

International treaties will not be reached in the near future because there is too wide a gap between U.S. antitrust policy and foreign nations' policies. Several attempts by the U.S. Congress to close these gaps through legislation have failed. The "jurisdictional rule of reason" should be the judicial response to the legislative and executive branches' failure to deal with extraterritorial antitrust problems. Its flexibility enables the courts to consider effective enforcement and minimize international tension.

If American antitrust policy is understood by foreign governments, resistance to its enforcement will be minimized. Because of this knowledge of American policy, the foreign corporation can attempt to avoid violating it, and avoid a lawsuit in an American court. Therefore periodic international conferences on antitrust policy, or an exchange by U.S. government officials with foreign nations would be very helpful to reduce international conflicts.

JOONG SIK SHIN

258. GUIDELINES, *supra* note 208, at 32 n.167.