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The Expanding Extraterritorial Jurisdiction of the Sherman Antitrust Act: Intent and Effects in the Balance?

“It is obvious that, however stated, the plaintiff’s case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the [Sherman Act].”

American Banana Co. v. United Fruit Co., 213 U.S. 347, 355 (1908).

“A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.”

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962).

I. INTRODUCTION

Economic competition and warfare between states are facts of life¹ in a global community of independent and sovereign nations.² Both strong and weak nations resort to their use.³ The scope of economic competition includes the independent nation’s right to regulate foreign commerce, a historical right recognized by international law as the sovereign prerogative of nation states:

Individual nations have historically regulated imports by imposing

1. Lillich, *The Status of Economic Coercion Under International Law: United Nations Norms*, 12 TEX. INT’L L.J. 17, 17 (1977).

2. Lillich suggests that economic competition between sovereign states became an international reality following the Peace of Westphalia in 1648. *Id.* The Peace, which ended the Thirty Years’ War in Europe, recognized the full sovereignty of over 300 German principalities within the Holy Roman Empire, the complete independence of the Dutch Republic, and the Swiss liberation from the Hapsburgs. The political and territorial consequences of the Peace were the decline of the Holy Roman Empire and the emergence of numerous sovereign nation states competing within the new European economic community. 28 ENCYCLOPEDIA AMERICANA 672-73 (1963).

3. Parry, *Defining Economic Coercion in International Law*, 12 EX. INT’L L.J. 1, 4 (1977).

tariffs, inspections, quantitative and qualitative restrictions, and numerous other conditions and barriers to international trade. They have frequently regulated exports as well, including, recently, complete cut-offs where deemed necessary to retain adequate domestic supply without inflation.⁴

A sovereign state's subjective determination to employ various methods of economic competition and restrictive trade practices may detrimentally affect the social, economic and political well-being of other nation states. The question arises whether these nations should be held accountable for this conduct by an objective standard.⁵ Historically, few organizations have been capable of making such objective determinations.⁶ Attempts to regulate global restrictive trade practices through international regulatory bodies have met with little practical success.⁷ The most common problem in this area is the lack of a universal consensus on such objective standards for antitrust enforcement.⁸ Thus, despite international agreement that

4. Muir, *The Boycott in International Law*, 9 J. INT'L L. & EC. 187, 192 (1974), reprinted in Lillich, *supra* note 1.

5. Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 245, 254 (1976).

6. *Id.* Examples of limited mechanisms that can make objective determinations include: the United Nations Security Council, which claims exclusive jurisdiction over serious forms of coercive economic measures, Advisory Opinion on Certain Expenses of the United Nations (art. 17, para. 2 of the Charter), 1962 I.C.J. 151, ad hoc bodies with the authority to intervene in transactions governed by treaty, Bowett, *supra* note 5 at 254, and internal dispute settlement procedures contained in commercial treaties.

7. Triggs, *Extraterritorial Reach of United States Antitrust Legislation: The International Law Implications of the Westinghouse Allegation of a Uranium Producers' Cartel*, 12 MELB. U.L. REV. 250, 257 (1979). Early attempts included the 1948 drafting of the Havana Charter for International Trade Organizations to create international legal rules and institutional mechanisms to control restrictive trade practices. See United States Department of State, *Havana Charter for International Trade Organization*, 23-140 (1948); Draft Restrictive Business Practices Convention 1953, reprinted in 2 METZGER, LAW OF INTERNATIONAL TRADE 1500 (1966). More recent efforts have produced two important, but highly general and purely voluntary, nonbinding international codes. 2 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, 133-44 (2d ed. 1981). They are the Organization for Economic Cooperation and Development (OECD) Code of Conduct for Multinational companies, reprinted in 75 DEP'T ST. BULL. 83 (1976), 15 I.L.M. 967 (1976); and the UN Conference on Trade and Development (UNCTAD) code on restrictive trade practices, UN Doc. TD/RBP/CONF/10 (1980), reprinted in 963 ANTITRUST & TRADE REG. REP. G-1 (1980), 19 I.L.M. 813 (1980).

8. Triggs, *supra* note 7, at 258. At a recent conference of developing countries, some states objected to the development of a model antitrust code, expressing a belief that restrictive trade practices serve as an important means of achieving goals other than those involving free competition. *Id.* Conversely, American interests have traditionally avoided international codes because of the potential of adverse effects on the freedom and profitability of American business abroad. 2 J. ATWOOD & K. BREWSTER, *supra* note 7, at 133.

individual nation states possess a sovereign prerogative to regulate foreign competition affecting their individual economies,⁹ the absence of an international regulatory organization capable of tempering a "target" nation's subjective response to foreign competition has deprived the international community of a uniform approach to dealing with such conflicts.¹⁰

Attempting to fill this void, many nations have resorted to domestic laws to curb foreign restrictive trade practices.¹¹ This comment focuses on the United States' application of its powerful antitrust statute, the Sherman Antitrust Act,¹² in regulating foreign anti-competitive forces, and the role of the United States' federal courts in weighing the competing domestic and international interests in the assertion of extraterritorial jurisdiction over foreign nationals.

II. EXTRATERRITORIAL APPLICATION OF THE SHERMAN ANTITRUST ACT

Article 1, section 8 of the United States Constitution authorizes Congress to regulate commerce within its territorial boundaries and with foreign nations.¹³ In 1890, Congress enacted the Sherman

9. See generally Lillich, *supra* note 1, at 17. See also *Standard Oil Co. v. United States*, 221 U.S. 1, 57 (1910) (Court's opinion under the Sherman Act adopting the general purpose and rationale of Anglo-American Common Law condemnation against restraints of trade and monopolies).

10. Triggs, *supra* note 7, at 257.

11. *Id.* at 259. In general, the per se violations — price fixing, market allocation, limitation of production or supply and boycotts — under U.S. antitrust laws are also illegal in the majority of the 24 member states of the OECD. W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 35,960 (2d ed. 1982).

12. 15 U.S.C. §§ 1-7 (West Supp. 1982). Section 1 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years or both said punishments, in the discretion of the court.

The Clayton Act, ch. 323, § 1, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1976)), complements the Sherman Act by enumerating certain restrictive practices as unlawful, including: price, services or facilities discrimination. Federal enforcement may provide injunctive relief, criminal prosecution or treble damages in actions brought by private parties.

13. U.S. CONST. art. I, § 8, cl. 3. Article I, section 8 grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" *Id.*

Antitrust Act to deal with anti-competitive forces.¹⁴ The Act's broad language¹⁵ has "precipitated dealing with international restraints of trade judicially on a case by case basis, and therefore, much is left to judicial discretion and to prevailing attitudes."¹⁶ When applying antitrust law to foreign anticompetitive trade conduct, United States courts concern themselves with multifarious interests:

[T]he conduct concerns more than one country and touches on the sensitive area of sovereignty both in the country which seeks to correct what it views as a "public injury" and in the country of the foreign actor which regards the charge and, above all, the order punishing or prohibiting the "injury" as infringing [upon] its sovereignty.¹⁷

A. Historical Background

The jurisdictional reach of the Sherman Act to monopolistic conduct outside the United States was first tested in *American Banana*

14. See *supra* note 12.

15. United States antitrust statutes tend to prohibit activities, rather than being directed at nationals alone, thereby allowing far-reaching application. ANTITRUST AGAINST FOREIGN ENTERPRISES 7 (C. Canenbley ed. 1981).

16. Note, *The International Reach of United States Antitrust Law and the Significance of Timberlane Lumber Co. v. Bank of America*, 13 U. RICH. L. REV. 149, 151 (1978). One commentator has noted the U.S. view in the area of antitrust as:

There is a conclusive presumption in favour of competition over agreements which eliminate competition in any way. . . . There is [also] a strong policy, [based on fairness], in favour of protecting the existence, freedom and opportunities of small business units in competing with . . . larger companies. What this has meant is that in American Law, exemptions from competitive policy almost invariably require legislative dispensation.

Turner, *The Principles of American Antitrust Law*, reprinted in 2 METZGER, LAW OF INTERNATIONAL TRADE 1378-1383 (1966). Extraterritorial application of national antitrust laws vary widely in this respect and it is often necessary to examine the state's attitude towards the assumption of extraterritorial jurisdiction generally when seeking an answer. C. Canenbley, *supra* note 15, at 7. Antitrust differences between the U.S. and Europe are described by Paul Nixon in a statement before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary:

[U.S.] policy rests on the twofold presumption, well supported by the facts of industrial experience, as your recent hearing on economic concentration have shown, (1) that mergers of market leaders, usually do not result in social efficiencies, and (2) competition is a regulating force to be preserved in its own right. In Europe, in contrast, antitrust policy is one passive acquiescence in merger, the theory being that once a firm reaches a dominant position in the market it may then be subject to regulation. Some European anti-trust officials take the position that mergers are imperative in order to achieve increased efficiencies, and that competition may well be sacrificed on the altar of such alleged gains in efficiency. But then they take a harsh view of dominant firms.

Hearings on S. 191 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 511, 516-17 (1966)(statement of Paul Rand Nixon).

17. Barnard, *Extra-territoriality and Anti-trust in the United States*, reprinted in 2 METZGER, LAW OF INTERNATIONAL TRADE 1453 (1966).

*Co. v. United Fruit Co.*¹⁸ Plaintiff Banana Company alleged that defendant Fruit Company had effectively monopolized and restrained the Central American banana trade with the United States by out-bidding competitors and by persuading the Costa Rican militia to seize plaintiff's banana plantation and railway.¹⁹ In denying plaintiff's recovery, the Court applied the doctrine of "strict territoriality," holding that "[a]ll legislation is *prima facie* territorial"²⁰ and that therefore, the prohibitions of the Sherman Antitrust law did not extend to acts done in Panama or Costa Rica.²¹ Justice Holmes stated for the Court: "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."²² The principle of strict territoriality was to become the United States Supreme Court's basic approach for determining jurisdiction in foreign antitrust cases.

In asserting jurisdiction over foreign defendants in subsequent antitrust suits, the Supreme Court distinguished the facts of *American Banana*, cautiously working within the strict territoriality principle.²³ In *United States v. Pacific & Arctic Co.*,²⁴ the Court again did not deviate from the territoriality approach, but did find that jurisdiction existed over United States and foreign defendants who had allegedly entered into an illegal agreement in the United States to control passenger travel between the United States and British Columbia.²⁵ In *Pacific & Arctic*, the government charged that the defendants, United States and Canadian rail and steamship carriers, had conspired in the United States to monopolize rail and steam transportation between the United States and British Columbia.²⁶ Defendants contended that the Supreme Court lacked jurisdiction because part of the transportation route lay in Canada and therefore, beyond the territorial reach of the Sherman Antitrust Act.²⁷ The Court, however, rejected the foreign defendants' jurisdiction claim:

18. 213 U.S. 347 (1909).

19. *Id.* at 354-55.

20. *Id.* at 357.

21. *Id.*

22. *Id.* at 356.

23. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 146 (2d ed. 1981).

24. 228 U.S. 87 (1913).

25. See *infra* text accompanying notes 26-28.

26. 228 U.S. at 88-93.

27. *Id.* at 105.

[I]t is . . . clear that our laws cannot be extended so as to control or affect the foreign carriage. This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept In other words, [the combination] was a control to be exercised over transportation in the United States, and, so far, is within jurisdiction of the laws of the United States, criminal and civil.²⁸

The *Pacific & Arctic* decision reinforced the Court's basic territoriality approach although it and subsequent case law did illustrate the subtle nuances of the meaning of territoriality.²⁹

B. The Alcoa Approach

The territorial approach, originally enunciated in *American Banana*, was eventually reevaluated thirty-six years later in *United States v. Aluminum Company of America*³⁰ (Alcoa) by the Second Circuit acting on certification from the Supreme Court.³¹ In *Alcoa*, the United States government brought suit under the Sherman Act for dissolution of the corporate defendant's aluminum ingot monopoly, alleging a restraint on both interstate and foreign commerce.³² Plaintiffs alleged that Alcoa formed a cartel (Alliance)³³ with foreign companies through its Canadian subsidiary, Aluminum Limited (Limited).³⁴ The district judge, however, found that Alcoa had severed its connection with Limited in 1935, and therefore had

28. *Id.* at 105-06.

29. *See Pacific & Arctic Co.*, 228 U.S. at 87; *American Banana Co.*, 213 U.S. at 347.

30. 148 F.2d 416 (2d Cir. 1945).

31. The Second Circuit was hearing the case on certification from the Supreme Court, which did not have a quorum of six justices qualified to hear the case. *Id.* at 421.

32. *Id.* at 420-21.

33. The Cartel provided for the formation of a Swiss corporation, pursuant to an agreement entered into on July 3, 1931, by two German corporations, one French corporation, a Swiss corporation, a British corporation, and Limited, a Canadian corporation. The Corporation issued shares to each of its members and was to periodically fix production quotas for each share to each of its members and was to periodically fix production of aluminum by the number of shares it held. "No shareholder was to 'buy, borrow, fabricate, or sell' aluminum produced by anyone not a shareholder except with the consent of the board of governors" *Id.* at 442. The Court found, however, that the production quotas did not include imports to the United States, but did find that the Cartel's Agreement of 1936, which substituted a system of royalties for the production quotas, was to affect aluminum exports to the United States. *Id.* at 442-44.

34. *Id.* at 440.

not participated in the alleged foreign restrictive conduct.³⁵ While these findings were not disturbed by the court of appeals,³⁶ Judge Learned Hand was still left with the question of whether Limited itself had violated the Sherman Antitrust Act.³⁷ The legality of the foreign agreement depended on "whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it."³⁸ The court's analysis of congressional intent necessarily included a recognition of the:

Limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws . . ."³⁹ [The Court] should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.⁴⁰

With this limitation in mind, the court stated that "it is 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."⁴¹ Stating that "international complications were likely to arise" if activity abroad producing "consequences" within the United States were treated as per se unlawful, Judge Hand concluded that the Sherman Act reprehended only those acts possessing both an intent to produce an effect, and an actual effect on United States commerce:⁴²

35. *Id.* at 441.

36. *Id.*

37. *Id.* at 442.

38. *Id.* at 443.

39. *Id.* The court was referring to RESTATEMENT OF CONFLICT OF LAWS § 65 (1934): *EVENTS CONSEQUENT ON ACTS DONE IN ANOTHER STATE*. If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof.

Compare Section 65 with the ALI's revised provision in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971):

Causing Effects in State by Act Done Elsewhere. A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

40. *Alcoa*, 148 F.2d at 443 (citing *American Banana Co.*, 213 U.S. at 357).

41. *Alcoa*, 148 F.2d at 443 (citing *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1910)(habeas corpus proceeding in extradition)). See also RESTATEMENT OF CONFLICTS OF LAWS § 65 (1934).

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

[W]e shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. Where both conditions are satisfied [intent and effect], the situation certainly falls within such decisions as [*Pacific & Arctic, Thomsen, and Sisal*]⁴³.⁴⁴

Applying this two part test, Judge Hand concluded that Limited had violated the Sherman Act. The requisite intent was satisfied by the Alliance agreement's 1936 amendment which was "deliberate and . . . expressly made to accomplish [an effect on United States imports]." ⁴⁵ Further, once the intent to affect imports was proven, the burden of proof shifted to Limited to show no resulting actual effect on United States imports.⁴⁶ Limited's inability to rebut this presumption was decisive in finding a violation of the Sherman Act.⁴⁷

Judge Hand's approach to the extraterritoriality analysis under the Sherman Act was treated as authoritative, although the Supreme Court has left lower federal courts to explain and apply the *Alcoa* test.⁴⁸ Subsequent case law produced few serious challenges to *Alcoa's* approach with distinctions being confined within the test's overall framework.⁴⁹ Thirty-five years passed before perceived deficiencies with *Alcoa*⁵⁰ — primarily with the "effects" component of the two-part test — inspired the Ninth Circuit Court of Appeals to formulate a new approach.

43. *Pacific & Arctic*, 228 U.S. at 87; *Thomsen v. Cayser*, 243 U.S. 66 (1916); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). The Court noted that in those cases, agents had been sent into the United States by the guilty parties to perform part of the illegal act, but held those agents to be a mere "animate means of executing his principal's purposes." Thus, *Alcoa's* factual difference did not distinguish those cases. *Alcoa*, 148 F.2d at 444.

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

45. *Id.* The Court's "deliberate" and "express" language coupled with its concern for international complications suggests that the intent to affect United States commerce be specific in nature. *Id.* See also *supra* note 33 and accompanying text (discussing the Cartel Agreement).

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

47. *Id.* at 444-45.

48. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 151.

49. *Id.*

50. "The State Department's Legal Advisor reported in 1959 that 'there are a number of friendly foreign governments, foreign officials, and even foreign courts, which believe strongly — or even passionately, I may say — that [*Alcoa* and similar cases constitute] a violation and infringement' of international law and sovereignty." 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 157 n.84 (citing Becker, *The Antitrust Law and Relations With Foreign Nations*, 40 DEP'T ST. BULL. 272-73 (1959)).

C. The Timberlane Approach

In *Timberlane Lumber Co. v. Bank of America*,⁵¹ plaintiffs alleged that certain Bank officials and others residing both in the United States and Honduras conspired to prevent Timberlane, an Oregon partnership, from milling lumber in Honduras and exporting it to the United States through its Honduran subsidiaries. As a result, domination of the Honduran lumber export business remained in exclusive control of select individuals financed and controlled by the Bank. The conspiracy allegedly interfered with the exportation of Honduran lumber to the United States and Puerto Rico for sale or use by the plaintiffs, thereby directly and substantially affecting the foreign commerce of the United States.⁵²

The district court dismissed the action, reasoning that the act of state doctrine⁵³ prohibited the court from examining the acts of a foreign sovereign and, further, that the court lacked jurisdiction in the absence of a direct and substantial effect on United States foreign commerce.⁵⁴ The Ninth Circuit Court of Appeals reversed the district court. Because the judicial proceedings were initiated by private parties and not by the Honduran government, and because the court's action did not reflect sovereign policy, the circuit court concluded that the judgments did not constitute acts of state.⁵⁵ Resolution of the jurisdictional question, however, was not as easy. Judge Choy expressed an unwillingness to rely on the precedent set by *Alcoa*, citing its failure to ensure a comity analysis in its approach to extra-

51. 549 F.2d 597 (9th Cir. 1976), as amended on denial of reh'g and reh'g en banc Mar. 3, 1977.

52. *Id.* at 601.

53. The United States Supreme Court explained the act of state doctrine in *Underhill v. Hernandez*:

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

168 U.S. 250, 252 (1897).

The doctrine derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the United States Government. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1963).

54. 549 F.2d at 601. The district court was vague in stating the basis of the dismissal. *Id.* The circuit court treated the basis of the dismissal as a failure to state a claim and found that dismissal without allowing discovery was improper under FED. R. CIV. P. 12(b)(6) and 56(e). 549 F.2d at 601-03.

55. 549 F.2d at 608.

territorial jurisdiction:⁵⁶

The effects test by itself is 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. Whether the alleged offender is an American citizen, for instance, may make a big difference; applying American laws to American citizens raises fewer problems than application to foreigners.

. . . .

American courts have, in fact, often displayed a regard for comity and the prerogatives of other nations and considered their interests as well as other parts of the factual circumstances, even when professing to apply an effects test. To some degree, the requirement for a "substantial" effect may silently incorporate these additional considerations, with "substantial" as a flexible standard that varies with other factors. The intent requirement suggested by *Alcoa*, 148 F.2d at 443-44, is one example of an attempt to broaden the court's perspective, as is drawing a distinction between American citizens and noncitizens.

The failure to articulate these other elements in addition to the standard effects analysis is costly, however, for it is more likely that they will be overlooked or slighted in interpreting past decisions and reaching new ones.⁵⁷

Recognizing that "at some point the interests of the United States are too weak . . . to justify an extraterritorial assertion of jurisdiction,"⁵⁸ the court enunciated the tripartite "jurisdictional rule of reason" test:⁵⁹

[First,] [d]oes the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? [Second,] [i]s it of such type and magnitude so as to be cognizable as a violation of the Sherman Act? [Third], [a]s a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?⁶⁰

The tripartite test manifests an intent to refrain from undue reliance on the substantiality test and to embrace considerations of international

56. *Id.* at 612.

57. *Id.* at 611-12 (footnotes omitted).

58. *Id.* at 609.

59. *Id.* at 613-15. See K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958).

60. 549 F.2d at 615 (footnote omitted).

fairness and comity in the determination of jurisdiction.⁶¹ As with the act of state doctrine, the court desired to express a similar awareness of the possible foreign implications of its extraterritorial actions.⁶² Thus, the court will balance the degree of conflict with foreign law or policy⁶³ and then determine whether the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.⁶⁴ The *Timberlane* court remanded to the district court with instructions to balance and reconsider the exercise of jurisdiction in light of these factors.⁶⁵

The *Timberlane* court's jurisdictional formulation of de-emphasizing the effects test in favor of a more complex and multilevel comity analysis was well received in the United States.⁶⁶ The Third Circuit adopted a similar approach in *Mannington Mills, Inc. v. Congoleum Corp.*,⁶⁷ although using a slightly different list of factors

61. *Id.* at 613.

62. *Id.*

63. The elements to be weighed include the 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 with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present. Nationality is another; though foreign governments may have some concern for the treatment of American citizens and business residing there, they primarily care about their own nationals.

Id. at 614.

See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40, which considers the following factors relevant in the balancing process:

- (a) vital national interest 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 be reasonably expected to achieve compliance with the rule prescribed by that state.

64. 549 F.2d at 614-15.

65. *Id.* It is interesting to note that in April 1982 (more than five years after remand from the court of appeals) the district court appointed a special master to hear the jurisdictional issue. *Timberlane Lumber Co. v. Bank of America*, No. C 73 0792 SW (N.D. Cal. Apr. 5, 1982) noted in 42 ANTITRUST & TRADE REG. REP. 808 (1982).

66. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 162.

67. 595 F.2d 1287 (3d Cir. 1979). The Fifth and Tenth Circuits have now also

in the balancing process⁶⁸ and indicating a preference for retaining *Alcoa* standards for the threshold effects determination.⁶⁹ This preference, however, illustrates a major difference in the plaintiff's burden of proof under the two approaches.⁷⁰ Under *Timberlane*, as long as there was some effect on United States commerce, and a valid claim alleged under the Sherman Act, the court would proceed to the critical balancing process.⁷¹ *Mannington*, however, would seemingly require a showing of "substantial" effects at the initial stage of inquiry before the balancing process would be applied.⁷²

National and especially foreign criticism of *Timberlane* has focused on the possibility that restraints having only minor effects on United States commerce will be litigated in American courts:

If the plaintiff does not have to prove significant effects at stage one of the process and if, as is likely, a large quantum of proof will not be required to satisfy the threshold standard in any event, the result will be that even cases in which the United States has only a trivial interest will survive the first stage and move on to the balancing stage, where costly discovery and lengthy proceedings may be necessary.⁷³

accepted the basic *Timberlane* line of analysis. See *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982), *vacated on other grounds*, 103 S. Ct. 1244 (1983); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

68. The Third Circuit relied on the following in the balancing analysis:

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; and
10. Whether a treaty with the affected nations has addressed the issue.

595 F.2d at 1297-98.

69. 595 F.2d at 1291-92.

70. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 167.

71. *Id.*

72. *Id.*

73. *Id.* at 167-68.

Emphasis on the comity analysis has done little to appease foreign criticism of the extraordinary reach of United States antitrust laws⁷⁴ and several foreign states have rejected the balancing test as a violation of their sovereignty.⁷⁵ Others have felt compelled to enact general blocking statutes.⁷⁶ The catalyst for much of the foreign criticism was the complex and multi-defendant case of *In re Uranium Antitrust Litigation (Uranium)*⁷⁷ which represented the first real opportunity for a United States court to test the effectiveness of the as yet unproven comity test.

We have considerable apprehension about the Timberlane decision I suppose everybody else here is too polite to ask how it is that a judge of a Canadian court or of an American court can decide what is the proper balance of international interest, the interests, for example, of Canada in the exploitation of its natural resources and the interests of [the U.S.] in the maintenance of competition. I feel that this is not a good area for the judiciary.

*D. The Balancing Process in Operation:
the Uranium Experience*

In *Uranium*,⁷⁸ plaintiff-appellee Westinghouse Electric Corporation brought suit against twenty-nine foreign and domestic uranium producers, alleging Sherman antitrust violations and a conspiracy to fix the price of uranium in the world market.⁷⁹ The facts surrounding plaintiff's allegations and the appearance of several foreign govern-

74. Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213, 226 (1982).

75. Blair, *The Canadian Experience*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 67 (J. Griffin ed. 1979):

76. See *Commonwealth Nations Adopt Resolution Criticizing U.S. Treble Damage Judgments*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 963f, at A-10 (May 8, 1980); *Foreign Resentment Over Extraterritorial Enforcement is Growing, Conference is Told*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 993, at A-7 (Dec. 11, 1980). For a thorough comparison of various foreign blocking statutes enacted in response to the extraordinary reach of U.S. antitrust laws, see Comment, *supra* note 74, at Appendix 1.

77. See *infra* text accompanying notes 78-105.

78. *In re Uranium Antitrust Litigation*, 473 F. Supp. 382 (N.D. Ill. 1979). This litigation was settled for the most part in late 1981. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at Supp. 31.

79. 473 F. Supp. at 382.

ments as *amici curiae*⁸⁰ on behalf of the foreign defendants suggested that evaluation of the court's jurisdiction would be proper under the *Timberlane* and *Mannington Mills* balancing tests.⁸¹ Amici's argument for a comity analysis was based on several factors. First, the bulk of the challenged conduct had occurred abroad and had governmental approval because the conduct related to the mining and development of natural resources important to those countries.⁸² Second, the uranium cartel's alleged price fixing was merely a defensive reaction to a United States import embargo on foreign-source uranium into the United States.⁸³ Finally, the cartel was intended to mitigate price declines in non-American markets caused by the United States ban, and therefore the requisite intent to affect United States commerce and the substantial effect on that commerce were absent.⁸⁴ The prospects for judicially deciding the comity issues, however, were hindered when nine of the properly served defendants elected not to appear.⁸⁵ Their failure to respond angered the court, and on January 3, 1979, the district court granted Westinghouse's motion for entry of final default judgments against the defaulting defendants.⁸⁶ Judge Marshall's decision did not address the ques-

80. The governments of Australia, Canada, South Africa, Great Britain and Northern Ireland filed briefs as *amici curiae*. See *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1253 (7th Cir. 1980). Under current practice, the Departments of Justice and State encourage foreign governments to present their views to the American courts as *amici*. See Letter from Roberts B. Owen, Legal Adviser of the State Department to John H. Shenefield, Associate Attorney General (March 17, 1980), *reprinted in* 74 AM. J. INT'L L. 665-67 (1980) [hereinafter cited as Letter from Roberts Owen to John Shenefield].

81. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 170-71.

82. *Id.* at 170.

83. *Id.*

84. *Id.* Further concerns were voiced by amici arising out of their involvement in developing "and or implementing official policies concerning uranium marketing which they deemed consistent with their national interest and which [were] now being challenged, not through diplomatic channels, but through private damage litigation in a U.S. court." Letter from Roberts Owen to John Shenefield, *supra* note 80, at 665-66.

85. Four Australian companies were in default: Conzinc Rio Tinto of Australia, Ltd., Mary Kathleen Uranium, Ltd., Pancontinental Mining, Ltd., and Queensland Mines, Ltd. Two British companies were in default: Rio Tinto Zinc Corp. and RTZ Services, Ltd. Two South African companies were in default: Nuclear Fuels Corp. and Anglo-American Corporation of South Africa, Ltd. One Canadian corporation was in default: Rio Algom, Ltd. 473 F. Supp. at 385, n.1.

86. Westinghouse's motion for entry of final default judgment was granted pursuant to FED. R. CIV. P. 54(b). *Id.* at 390. District Judge Marshall stated that he was granting the default judgment in recognition of its significance as a "procedural tool for enforcing compliance with rules of procedure, see [FED. R. CIV. P.] 37(d) . . . and for disciplining the obstructionist adversary who willfully ignores the processes of the court." *Id.*

tions of jurisdiction or comity, but instead focused on the complexity of the litigation, protecting the plaintiff's ability to secure a writ of execution to collect any subsequent damages,⁸⁷ the seriousness of the plaintiff's charges and the foreign defendant's recalcitrant attitude.⁸⁸

On interlocutory appeal of Judge Marshall's default order, amici again appeared, arguing for remand to the district court on the question of whether subject matter jurisdiction was being properly exercised in light of comity considerations.⁸⁹ After considering this argument, the court of appeals refused to remand the case.⁹⁰ Concluding that Westinghouse's allegations of concerted conduct by the defendants were sufficient to confer jurisdiction under *Alcoa's* effects test,⁹¹ the appellate court disposed of amici's comity argument by stating that such factors were discretionary and pertinent only after the district judge had determined that jurisdiction was proper.⁹² The court gave two grounds for holding that Judge Marshall had not abused his discretion by refusing to consider the *Mannington Mills* comity factors:⁹³

First, the *Mannington Mills* factors are not the law of this circuit. Second, even assuming their adoption by this Court, the circumstances here are distinct from those found in *Timberlane* and *Mannington Mills*. In those cases the defendants appeared and contested the jurisdiction of the District Court. In the present case, the defaulters have contumaciously refused to come into court and present evidence as to why the District Court should not exercise its jurisdiction If this Court were to remand the matter for further consideration of the jurisdiction question, the District Court would be placed in the impossible position of having to make specific findings with the defaulters refusing to appear and participate in discovery. We find little value in such an exercise.⁹⁴

87. The district court entered three injunctions against Atlas Alloys and one against Rio Algom enjoining the transfer of funds from the United States. These events are described in *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1251 (interlocutory appeal of Judge Marshall's order granting the default judgments).

88. 473 F. Supp. at 390.

89. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 171.

90. 617 F.2d at 1255-56.

91. *Id.* at 1254.

92. *Id.* at 1255.

93. *Id.*

94. *Id.* at 1255-56.

E. Implications of the Uranium Litigation

Recent commentary⁹⁵ suggests that, at a minimum, the *Uranium* experience indicates that sensible use of the comity balancing test is effectively undermined when foreign defendants fail to appear.⁹⁶ It also raises the broader question of whether United States' courts can properly balance vital American and foreign national interests. Judge Marshall describes the difficulty:

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.⁹⁷

The competing interests referred to were Westinghouse's attempt to secure foreign documents through the discovery process to prosecute its private antitrust action and the responding blocking legislation enacted by three foreign governments:

Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.⁹⁸

While *Uranium's* failure to test the benefits and evenhandedness of the comity tests of *Timberlane* and *Mannington Mills* proved disappointing,⁹⁹ it illustrated the difficulty courts face in balancing the various relevant interests. Criticism of the balancing process extends from a court's overreliance on international comity principles¹⁰⁰ to its

95. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 173.

96. *Id.*

97. In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

98. *Id.* See also Kestenbaum, *Antitrust's "Extraterritorial" Jurisdiction: A Progress Report on the Balancing of Interests Test*, 18 STAN. J. INT'L L. 311, 315 (1982).

99. 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at 180.

100. "[Declining] extraterritorial antitrust jurisdiction on grounds of international comity is an abuse of judicial equity power." Grippando, *Declining to Exercise Extraterritorial Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 395, 428 (1983).

underreliance on such factors.¹⁰¹ A more fundamental problem with the balancing process is its feasibility and manageability. Providing a court with a "list of factors and an instruction to consider and weigh them do no provide much guidance about the character of the balancing process."¹⁰² The court in *Mannington Mills*, for example, required a separate balancing analysis for each of the twenty-six foreign countries involved.¹⁰³ Such ambitious undertakings will inevitably require the extensive "over-discovery" complained of by foreign governments¹⁰⁴ and result in protracted, expensive and unmanageable litigation.¹⁰⁵

III. ENFORCING ANTITRUST STATUTES IN THE FUTURE

United States antitrust statutes apply to markets outside the United States.¹⁰⁶ American business' interest in maintaining free competition in domestic and foreign markets is responsible for much of the United States antitrust legislation, as well as the extraterritorial problems that have arisen in enforcing those laws beyond national geographic limits. United States courts have interpreted the statutory language of the Sherman Antitrust Act in conjunction with the Clayton Act as conferring jurisdiction over conduct outside the United States by non-nationals whose actions cause effects within the United States which are direct and substantial.¹⁰⁷ Recent courts have also recognized the significance of a comity analysis.¹⁰⁸ The problem that has arisen concerns the extent to which the comity analysis affects a court's determination of jurisdiction. The *Uranium* experience illustrates the global impact of United States antitrust litigation: the number of named defendants;¹⁰⁹ the time involved in pursuing, and potential

101. "The . . . [balancing] approach may have even lowered the threshold 'effects' requisite." Kestenbaum, *supra* note 98, at 336.

102. *Id.* at 335-36.

103. 595 F.2d 1287, 1298 (3d Cir. 1979).

104. *See supra* text accompanying notes 97-98.

105. *Compare supra* note 65.

106. Debate, *Extraterritorial Application of U.S. Antitrust Law (Economic Imperialism or Protecting Competition Against Foreign Invasion?)*, 50 ANTITRUST L. J. 617, 630 (1981) (statement by James A. Rahl).

107. *See supra* text accompanying notes 32-51.

108. *See supra* text accompanying notes 52-77.

109. Westinghouse Electric Corporation named twelve foreign and seventeen domestic corporations in its antitrust suit. *See supra* text accompanying note 79.

recovery for enormous treble damage awards;¹¹⁰ and the adverse effects on foreign relations.¹¹¹ It signifies the need for an objective, uniform standard for determining jurisdictional questions. Continued trust in the courts' ability to deal with sensitive and everchanging foreign relations concerns and to gradually fill in its hazy contours imposes an undue burden on the courts.¹¹² Assistant Attorney General William F. Baxter has recognized that burdening the courts with a "long list of factors" is simply an open invitation for the court to decide for themselves.¹¹³

IV. CONCLUSION

Federal courts belong in the process of maintaining competitive and open world markets. A jurisdictional test based on intent and effects in conjunction with the comity analysis allows the judiciary to enforce American antitrust laws in appropriate cases. However, as discussed, the courts' effective participation in this process is hampered by a multivariable comity analysis which often requires a balancing of factors which are beyond judicial expertise.

Congressional initiative coupled with executive foreign policy objectives is needed to formulate additional objective and uniform guidelines for the judiciary's responsible use of the comity analysis. With limited exception,¹¹⁴ however, such direction has been slow in coming. Such action is essential for effective, long term enforcement of American antitrust laws. Until further direction is forthcoming,

110. The total amount of damages sought by Westinghouse was estimated at \$6-7 billion. 457 AUST. PARL. DEB. 2186 (18 Nov. 1976) (statement of Sen. P. Durack). Much of the litigation was mercifully settled in late 1981, five years after Westinghouse had filed its complaint. See 1 J. ATWOOD & K. BREWSTER, *supra* note 7, at Supp. 31.

111. The court's reaction to the amici and their role in the comity analysis was so critical and antagonistic that Roberts B. Owen, Legal Advisor of the Department of State, asked John H. Shenefield, Associate Attorney General, to notify the court of the concern it had caused the United States Government and to "take into account appropriate considerations of comity where there is a possible conflict between the laws or policies of nation states." Letter from John H. Shenefield, Department of Justice, to Judge Prentice H. Marshall, District Judge, United States District Court, N.D. Ill., *reprinted in* [Transfer Binder Current Comment 1969-83] TRADE REG. REP. (CCH) ¶ 50, 416.

112. Kestenbaum, *supra* note 98, at 336.

113. W. Baxter, "Antitrust in an Interdependent World," Remarks Before the ABA Section of International Law, the International Trade Committee of the ABA Section of Antitrust, the Japan Society, the International Division of the D.C. Bar, and the International Law Institute of the Georgetown University Center (Sept. 29, 1981), *reprinted in* CURRENT ISSUES IN INTERNATIONAL ANTITRUST 13, 18 (J. Griffin ed. 1981).

114. See *infra* text accompanying notes 118-22.

the broad balancing analysis would be best used by federal judges as a discretionary jurisdictional test.¹¹⁵ A discretionary approach provides a court with much needed flexibility in dealing with complex, multiple party antitrust suits.

Consideration of the comity factors in light of preexisting jurisdiction to determine whether exercising that jurisdiction is appropriate provides wary courts with a legitimate means of postponing adjudication of complex cases. Similar to the political question doctrine,¹¹⁶ the discretionary jurisdictional comity test could be the basis of the case's dismissal, or in close cases, abstention pending administrative review of the court's comity findings. Extension of the political question doctrine to abstention situations would accomplish two major goals. First, it would encourage executive intervention by the State and Justice Departments in the resolution of sensitive foreign policy matters. Second, the danger of ad hoc, multifarious precedent among the circuits would be minimized by administrative review of a court's comity findings, an executive function that serves as a prime example of the necessity for long range executive action and which may already exist through intergovernmental agreement.¹¹⁷

The recently concluded agreement between the United States and Australia exemplifies action by both governments to cooperate in antitrust matters.¹¹⁸ A product of the *Uranium* debacle, this agreement essentially established a dialogue between the two countries with respect to antitrust matters. As a significant part of that dialogue, the United States committed itself to apprising courts entertaining private antitrust suits of that intergovernmental agreement when requested by the Australian government.¹¹⁹

On the legislative side, recent congressional initiative has produced the Foreign Trade Antitrust Improvements Act of 1982

115. *But see* Industrial Inv. Development Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), *vacated on other grounds*, 103 S. Ct. 1244 (1983). In *Mitsui*, Judge Reavley stated that the balancing test presented a question of law, not one of discretion — fully reviewable on appeal. *Id.* at 884-85 n.7. He rejected the suggestion in *Timberlane*, developed more fully in *Uranium*, that once a district judge has determined that jurisdiction exists, he should then consider the comity factors to determine whether exercise of that jurisdiction is appropriate. *See In re Uranium Antitrust Litigation*, 617 F.2d at 1255.

116. *See* *Baker v. Carr*, 369 U.S. 186 (1962).

117. *See infra* notes 118-19.

118. Agreement Relating to Cooperation on Antitrust Matters, United States-Australia, June 29, 1982, *reprinted in* [1969-83 Transfer Binder] TRADE REG. REP. (CCH) ¶ 50,440.

119. *Id.* art. 6.

(Act).¹²⁰ While the Act does not affect "the courts ability to employ notions of comity,"¹²¹ it does provide a special statutory standard of subject matter jurisdiction in foreign commerce situations. The Act requires a "direct, substantial and reasonably foreseeable effect" on United States domestic or import commerce or on an export trader located in the United States.¹²² Although judicial construction of the statute is still forthcoming, its enactment recognizes the need for clarification of jurisdictional issues and its wording suggests that a "court's ability to employ notions of comity" is discretionary in nature and proper only after an initial finding of jurisdiction based on the intent and effects test.

Judicial uniformity and consistency in the enforcement of United States antitrust laws is in the best interest not only of private litigants, but also of the Executive Branch, whose foreign policy decision-making should not include ameliorating the decisions of well-meaning but unversed federal judges. Clarification of the comity test's foreign policy component is an Executive and Legislative function, and the Judiciary should only follow their lead.

Kurt A. Didier

120. Pub. L. 97-290, 96 Stat. 1246.

121. H. REP. NO. 686, 97th Cong., 2d Sess. (1982).

122. See *supra* note 120, at § 403.

