Loyola of Los Angeles Law Review

Volume 10 | Number 3 Article 6

6-1-1977

Foreign Affairs—Jurisdiction—Extraterritorial Application of the Sherman Act—a New Analysis—Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)

Karen Growdon

RECENT NINTH CIRCUIT DECISIONS

FOREIGN AFFAIRS—JURISDICTION—EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT—A NEW ANALYSIS—*Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

Timberlane Lumber Co. v. Bank of America[1] provides a thorough and far-ranging analysis of the limitations on the extraterritorial application of American antitrust laws. The Ninth Circuit was faced with allegations of a conspiracy whose participants included foreign nationals and which was carried out largely through activity outside of the United States. The court held, first, that the involvement of the judiciary of a foreign country to preserve a security interest in land did not constitute the act of a sovereign state which would render the activities complained of immune from scrutiny by a court of this country,[2] and second, that assertion of subject matter jurisdiction was appropriate despite the foreign elements which the case presented.[3] In deciding the jurisdictional question, the court adopted a new multiple factor analysis[4] which will have a significant impact on future foreign commerce cases which involve conflicting national policies and interests.

I. FACTS OF THE CASE

Although other acts of misconduct were alleged, the following events comprised the major part of the conspiracy as described in the complaint: In 1971 and 1972, Timberlane, an Oregon partnership, was preparing to enter the lumber export business in Honduras. Two subsidiary corporations were formed in Honduras in order to purchase lumber and conduct milling operations there, and the plant facilities of a former milling business were acquired. At the time of the purchase, certain claims on this property were held by the Bank of America and by a company which would have been one of Timberlane's major competitors in the Honduran lumber business. Timberlane attempted to purchase these claims without success. Instead, they were conveyed

1. 549 F.2d 597 (9th Cir. 1976), *as amended on denial of rehearing and rehearing en banc* March 3, 1977.
2. 549 F.2d at 608.
3. *Id.* at 615.
4. *Id.* at 614.

to a third party, who, in furtherance of the conspiracy, sought judicial help in enforcing them.[5]

A court-ordered attachment known as an "embargo" was obtained against the Honduran subsidiaries in order to prevent the property from being sold. Further, in order to prevent diminution in the value of the property, a judicial officer called an "interventor" was appointed. The interventor, who was allegedly on the payroll of the bank, caused troops temporarily to shut down the milling operation, thereby thwarting Timberlane's efforts to establish itself as a competitor in the Honduran lumber market.[6]

Thus Timberlane sketched a conspiracy on the part of the bank and others to prevent it from exporting lumber from Honduras to the United States and to insure that a monopoly in the Honduran lumber export business remained in the hands of its two major competitors.[7] Timberlane brought suit for damages, alleging violations of sections 1 and 2 of the Sherman Act[8] and section 73 of the Wilson Tariff Act.[9] Among the corporations and individuals named as defendants were citizens of the United States, Honduras, and Canada.[10]

The district court dismissed the complaint, reasoning that the involvement of the Honduran judiciary through the conduct of the inter-

5. *Id.* at 604-05.

6. *Id.*

7. *Id.* at 601.

8. *Id.* at 600.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975), provides in relevant part that "[e]very 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."

Section 2 of the Sherman Act, 15 U.S.C. § 2 (Supp. V 1975), provides in relevant part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ."

9. 549 F.2d at 600.

Section 73 of the Wilson Tariff Act, 15 U.S.C. § 8 (1970), provides in relevant part:

> Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, . . .

10. 549 F.2d at 603-04.

ventor was the act of a sovereign state which could not be reviewed by a court of this country,[11] and that since there was no direct and substantial effect on United States foreign commerce, the court was without jurisdiction.[12]

The Ninth Circuit reversed. Since there was uncertainty as to the grounds for the district court's dismissal, the court examined both the sufficiency of the plaintiffs' claim for relief and the question of subject matter jurisdiction.[13] Following this bifurcated analysis, the court held, first, that the act of state doctrine did not bar the plaintiffs' claim for relief,[14] and, second, that there was a sufficient basis for exercising subject matter jurisdiction.[15]

II. THE ACT OF STATE DOCTRINE

The most frequently quoted explanation of the act of state doctrine was provided in *Underhill v. Hernandez*:[16]

> 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.[17]

As explained by Justice Harlan in *Banco Nacional de Cuba v. Sabbatino*,[18] if not constitutionally required, the doctrine nonetheless has " 'constitutional' underpinnings" in the concept of separation of powers and represents judicial deference to the notion that foreign relations are properly the concern of the executive, rather than the judicial branch.[19] Thus, in a given case, the doctrine may require that a court

11. *Id.* at 601 & n.3. The lower court's decision was not published.
12. *Id.*
13. The finding of the district court that the acts complained of had no "direct and substantial" effect on United States foreign commerce could have been the basis of a dismissal either for lack of subject matter jurisdiction or for failure to state a claim for relief. *Id.* The Ninth Circuit treated the dismissal as if based on the latter ground, and found that dismissal without allowing discovery was inappropriate under FED. R. CIV. P. 12(b)(6) and 56(e). *Id.* at 601-03.
14. *Id.* at 608.
15. *Id.* at 615.
16. 168 U.S. 250 (1897).
17. *Id.* at 252.
18. 376 U.S. 398 (1964).
19. *Id.* at 423, 427-28.

refrain from adjudicating the validity of the act of a foreign sovereign within its borders to avoid embarrassing the executive branch in its conduct of foreign affairs.[20] It has been stated that a second basis for the doctrine is that "external deference" to the laws of a foreign sovereign promotes the growth of international law and provides a principled means of ordering relations between nation-states.[21]

The earliest and best-known application of the doctrine in an antitrust case is Justice Holmes' opinion in *American Banana Co. v. United Fruit Co.*[22] The plaintiff in that case alleged that the defendant, a New Jersey corporation, engaged in the banana export business in Central America, had, as part of a scheme to prevent competition by the plaintiff, induced the Costa Rican government to seize its plantation during a border dispute with Panama.[23] As one ground for affirming dismissal of the complaint, Justice Holmes found the seizure to be the act of a sovereign state within its own territory and thus not reviewable by a court in the United States.[24]

The latest reliance on the act of state doctrine in an antitrust case was in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*[25] The plaintiffs held an oil drilling concession in the territorial waters of the Trucial State of Umm al Qaywayn; they alleged that as part of an anticompetitive conspiracy the defendants induced both the neighboring state of Sharjah and the government of Iran to claim sovereignty over the area of the concession and thereby disrupt the plaintiffs' drilling

---

20. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697-98 (1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431-33 (1964).

21. R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 8-9 (1964); Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad*, 9 INT'L L. & ECON. 233, 251 (1974) [hereinafter cited as Simson].

This second rationale for the act of state doctrine has received at least implicit judicial recognition in the past, as indicated by this statement from *Sabbatino*: "[W]e conclude that both the national interest *and progress toward the goal of establishing the rule of law among nations* are best served by maintaining intact the act of state doctrine in this realm of its application." 376 U.S. at 437 (emphasis added). However, later Supreme Court opinions have placed primary reliance on the separation of powers rationale. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697-98 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765-69 (1972) (opinion of Rehnquist, J.).

22. 213 U.S. 347 (1909).

23. *Id.* at 354-55.

24. *Id.* at 357-58. A second basis for the decision was that the Sherman Act was not intended to cover extraterritorial activity. *Id.* at 355-57. *See* note 41 *infra* and accompanying text.

25. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 965 (1972).

operations.[26] The district court, in an opinion which was summarily affirmed by the Ninth Circuit,[27] found a sufficient basis for the exercise of subject matter jurisdiction in that the plaintiffs had alleged a "direct" restraint on American foreign commerce,[28] but held that the territorial claims asserted by the two foreign governments were acts of state which barred the plaintiffs' claim for relief.[29]

In *Timberlane*, the district court found *Occidental Petroleum* controlling and ruled that the involvement of the Honduran courts was an act of state which it was precluded from examining.[30] Upon appeal, the Ninth Circuit, without expressly distinguishing *Occidental Petroleum*, found that the judicial involvement did not give effect to any public policy of Honduras so as to warrant application of the act of state doctrine:

> The so-called "act of state" here was the application by the courts and their agents of the Honduran laws concerning security interests and the protection of the underlying property against diminution. . . . There is no indication that the court action reflected any official Honduran policy that Timberlane's efforts should be crippled or that trade with the United States should be restrained. Timberlane does not . . . challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States.[31]

The court in *Timberlane* thus refused to defer automatically to the involvement of the Honduran courts and instead sought to determine whether any foreign governmental policies would be impaired by application of American law. This analysis would appear consistent with the view expressed in *Sabbatino* that the act of state doctrine does not automatically confer immunity upon all actions of a foreign government, but instead calls for a balancing of the "relevant considerations" in each case.[32] At the same time, the *Timberlane* court may have been

26. *Id.* at 98-101.
27. 461 F.2d 1261 (1972).
28. 331 F. Supp. at 102-03.
29. *Id.* at 113.
30. 549 F.2d 601 & n.3.
31. *Id.* at 15.
32. 376 U.S. at 428. In *Occidental Petroleum*, the court found that adjudication of the plaintiffs' claim would not require settling an international boundary dispute, a contention raised by the defendants on their motion to dismiss. 331 F. Supp. at 104. The court further found that the states which had asserted sovereignty over the area of the oil-drilling concession did not need to be joined as parties under FED. R. CIV. P. 19 because a decree could be fashioned which would not affect them. *Id.* at 106-07. For these reasons, the decision has been criticized for applying the act of state doctrine too mechanically instead of adhering to the balancing approach called for in *Sabbatino*.

following certain implications of the Supreme Court's recent narrow reading of the act of state doctrine in *Alfred Dunhill of London, Inc. v. Cuba.*[33]

In *Dunhill*, interventors, officials appointed by the Cuban government to operate nationalized cigar manufacturing firms, successfully sought payments from importers in the United States for the purchase price of cigars imported following nationalization of the industry in 1960. Dunhill, one of the importers, counterclaimed for a greater sum allegedly owing because it had mistakenly paid the interventors the purchase price of cigars ordered *before* nationalization. A bare majority of the Court held that the refusal to return these payments, as expressed by Cuban counsel in court, did not amount to an act of state and that Dunhill's claim against the interventors was not barred.[34] In addition, four justices[35] were of the opinion that the act of state doctrine should never be applicable when a foreign government engages in "commercial" as opposed to "governmental" activity.[36]

While adhering in part to the balancing approach of *Sabbatino*, Justice White's opinion in *Dunhill*[37] formulates the rule, presumably to be

---

Simson, *supra* note 21, at 261. The reasoning in *Timberlane* would seem to be an implicit rejection of the approach followed in *Occidental Petroleum*, although the factual differences between the two cases might also explain why the Ninth Circuit in *Timberlane* did not find its decision in *Occidental Petroleum* controlling.

33. 425 U.S. 682 (1976).

34. *Id.* at 694-95.

35. While he joined in the majority opinion, Justice Stevens did not concur in that portion setting forth the commercial-governmental distinction. *Id.* at 715 (Stevens, J., concurring).

36. Justice White developed this distinction by analogizing to the "restrictive" theory of sovereign immunity which posits that a sovereign government which engages in "commercial or proprietary" activity will not be accorded immunity from suit on claims arising out of that activity. *Id.* at 698-705. Subsequently, the restrictive view of sovereign immunity was adopted by Congress in the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (to be codified at 28 U.S.C. §§ 1330, 1332 (a)(2)-1332(a)(4), 1391(f), 1441(d), 1602-1611). Section 1605(a) of the Act provides in part:

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

37. Justice White expressed his rationale for the distinction in part as follows:

> [S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities,

of general application, that "repudiation by a sovereign of a commercial debt is not an act of state."[38] This approach clearly seems at variance with the approach of *Sabbatino*. The commercial-governmental distinction, of course, was not applicable in *Timberlane* since there the asserted act of state was court action; however, there are other implications in the majority opinion in *Dunhill* that tend to narrow the act of state doctrine which the *Timberlane* court may have found persuasive.[39]

It would seem that the commercial-governmental distinction, if followed, will have a great impact in future antitrust cases.[40] If the act

---

foreign governments do not exercise powers peculiar to sovereigns. . . . Subjecting then in connection with such acts to the same rules as private citizens is unlikely to touch very sharply on "national nerves."

425 U.S. 703-04 (citations omitted).

38. *Id.* at 697 n.12.

39. In that part of the *Dunhill* opinion in which a majority of the Court joined, Justice White observed that "[n]o statute, decree, order, or resolution of the Cuban government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers." *Id.* at 695. This language was quoted by the *Timberlane* court. 549 F.2d at 606. The statement may simply be another way of saying that the defendants in *Dunhill* had failed to meet their burden of proof on the act of state issue; it also suggests that whether governmental activity is an act of state entitled to immunity is a question to be determined by examining the formalities with which the act is executed. In this respect, as well as in the commercial-governmental distinction enunciated in the plurality opinion, the decision may represent a departure from *Sabbatino*, where the Court refused to lay down an "inflexible and all-encompassing rule." 376 U.S. at 428.

40. For example, adoption of this rule would have a significant impact on the question whether the well-known anticompetitive activities of the Arab members of the Organization of Petroleum Exporting Countries (OPEC) and of the League of Arab States are reachable under American antitrust laws. There seems to be no real dispute that many of these activities, if engaged in by private individuals, would violate the antitrust laws. *See, e.g.*, Timberg, *Sovereign Immunity Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 2-4 (1976) [hereinafter cited as Timberg]; Joelson & Griffin, *The Legal Status of Nation-State Cartels under United States Antitrust and Public International Law*, 9 INT'L LAW 617, 622 (1975) [hereinafter cited as Joelson & Griffin]; Note, *The Antitrust Implications of the Arab Boycott*, 74 MICH. L. REV. 795, 798-803 (1976). One study of the Arab oil embargo and production cutbacks in 1973 and the subsequent increases in the price of oil concluded that there were no satisfactory guidelines under existing law to determine if the defenses of sovereign immunity and act of state would apply. Joelson & Griffin, *supra*, at 629-36.

The enactment of the Foreign Sovereign Immunities Act and the *full* judicial acceptance of the restrictive view of the act of state doctrine which may follow will provide considerably more guidance in this area. Not all boycotting practices and cartel-related activities would automatically fall within the regulatory jurisdiction of the United States. Serious questions would remain as to the propriety of interfering with those practices, otherwise commercial in nature, which constitute acts of economic warfare against a

of state doctrine is construed more narrowly by courts in the future, the question of the proper bases for subject matter jurisdiction may assume increasing importance in foreign commerce cases. Accordingly, that aspect of the court's analysis in *Timberlane* should be examined.

III. Application of the Antitrust Laws in Foreign Commerce Cases

The restrictive territorial view of the reach of the antitrust laws, as established by the Supreme Court in the *American Banana* case,[41] has not been widely followed. Succeeding foreign commerce cases found that American law was applicable despite the fact that some of the allegedly illegal conduct took place outside the territorial boundaries of the United States.[42] It has been pointed out,[43] however, that all of the foreign commerce cases following *American Banana* included allegations that some of the relevant activity had taken place in the United States,[44] or, at the least, that foreign defendants were acting in concert with a domestic party;[45] it may be inferred that a nexus of this type

---

third country. Timberg, *supra*, at 31, 37. Moreover, the difficult question whether activity by a foreign government should be considered commercial or governmental would have to be decided in each case. Nevertheless, it seems clear that the current developments in the law will significantly curtail the possibilities of successfully asserting these defenses in many cases.

41. American Banana Co. v. United Fruit Co., 213 U.S. 347, 355, 357 (1909).

42. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. American Tobacco Co., 221 U.S. 106 (1911).

43. K. Brewster, Antitrust and American Business Abroad 70 (1958) [hereinafter cited as Brewster].

44. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927). In this case, certain United States and Mexican corporations had conspired to monopolize interstate and foreign commerce in sisal. It was alleged that the defendants, as part of the conspiracy, had obtained discriminatory legislation from the governments of Mexico and Yucatan which gave one of the foreign co-conspirators an exclusive agency to buy and sell sisal in those countries. The court distinguished *American Banana* and expressed its rationale for exercising jurisdiction in these terms: "Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. . . . True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States." *Id.* at 276.

45. *See, e.g.*, United States v. American Tobacco Co., 221 U.S. 106 (1911). Several American corporations entered into a conspiracy with a British corporation to divide among them the world market in tobacco. A second British corporation was formed to conduct the export business of all the parties involved. All of the anticompetitive activities of the British corporations took place outside the United States. Nonetheless, the Supreme Court found that the Sherman Act reached these activities because the foreign defendants had participated in a conspiracy which involved United States citizens and which had affected American interstate and foreign commerce. *Id.* at 184-85.

was deemed a prerequisite for the exercise of jurisdiction over extraterritorial activity.

For this reason, Judge Learned Hand's opinion in the leading case of *United States v. Aluminum Co. of America (Alcoa)*[46] represented a significant departure from earlier analyses of the question of subject matter jurisdiction. Alcoa, a United States corporation, and Limited, a Canadian corporation, were both charged with participation in the "Alliance," a multinational cartel based in Switzerland whose members had restricted the import of aluminum into the United States in violation of the Sherman Act. The evidence was insufficient to establish that Alcoa had actually participated in the Alliance.[47] However, even without this nexus, Judge Hand found that the Sherman Act could appropriately reach the participation in the cartel of Limited, the Canadian defendant, because the agreements it had entered into were intended to cause an adverse effect on this country's foreign commerce and had actually accomplished that effect.[48]

From the opinion in *Alcoa* was derived the "effects test"[49] for determining the scope of jurisdiction. In diverse formulations this test was applied in succeeding foreign commerce cases;[50] it is reflected in the

46. 148 F.2d 416 (2d Cir. 1945).

47. *Id.* at 442.

48. *Id.* at 444. In requiring that there be an intended effect on this country's commerce, Judge Hand was purporting to delimit the application of the Sherman Act to extraterritorial activity. *Id.* at 443-44. It is questionable that he accomplished this result. Once intent was proved, the burden shifted to Limited to show that its activities in the cartel had not restricted imports into the United States. *Id.* at 444-45.

49. The view that jurisdiction over extraterritorial activity can be based upon the effects on United States interstate or foreign commerce is an extension of the territorial principle of jurisdiction which is usually denominated the "objective territorial principle." Under this principle, the occurrence of a forbidden effect within a jurisdiction establishes the competency of that jurisdiction to declare illegal the extraterritorial activity which caused that effect the same as if that activity had occurred within its borders. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 35-39 (2d ed. 1973) [hereinafter cited as FUGATE]; *cf.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b) & Comments f, g, i (1965) (see note 55 *infra*) [hereinafter cited as RESTATEMENT]. The reasoning followed in *Alcoa* has been criticized as a misapplication of this principle and as contrary to generally-accepted notions of international law. Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558 (1967). Thus, while a jurisdiction may validly proscribe extraterritorial conduct which causes within its border an effect such as the death of an individual, the importation of prohibited goods, or the commission of a fraud, *id.* at 564-65, there is no recognized basis for declaring as illegal extraterritorial activity which leads only to a *negative* effect within the jurisdiction (*i.e.*, the restraint on the import of aluminum), when that jurisdiction cannot validly require the opposite positive effect—in this case an order directing the foreign producers to ship aluminum into the United States. *Id.* at 565, 569.

50. *E.g.*, Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949,

district court's finding in *Timberlane* that the plaintiffs' allegations failed to establish a "direct and substantial effect on United States foreign commerce . . . ."[51] The Ninth Circuit surveyed the varying applications of the test since *Alcoa*, reviewed the criticism that had been leveled against it, and concluded that in a case with multinational elements, the effects test was inadequate to decide whether jurisdiction should be asserted. The test's major shortcoming, the court reasoned, was that "it fail[ed] to consider the other nation's interests [and] expressly [to] take into account the full nature of the relationship between the actors and this country."[52]

Instead, the court determined that the appropriate analysis in a case of this nature was one which can be divided into three parts. The district court must first determine whether the alleged restraint is sufficient to support subject matter jurisdiction and to raise a claim for relief under the antitrust laws; in making these two determinations, a focus on the nature and magnitude of the effect on commerce is appropriate.[53] Additionally, the court must decide whether the interests of, and contacts with, the United States are sufficient to justify the assertion of jurisdiction in the fact of conflicting foreign policies and interests.

953 (S.D.N.Y. 1968), *aff'd*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969); United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957).

The intent component of Judge Hand's formulation has not been significantly followed. In United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949), the court found that a specific intent to violate this country's antitrust laws was not necessary to justify the assertion of jurisdiction over the conduct of a foreign defendant. The court found that the defendant knew or "should have known" of the adverse impact on United States commerce of its activities and that "its . . . apathy to the impact of its real relationship with General Electric [the domestic defendant] upon . . . [the antitrust laws] was an indifference to them that amounted to a willingness to be a party to a breach of them." *Id.* at 891. Thereafter, as the *Timberlane* court noted, the focus in cases using this test has been on the proper characterization of the effect necessary to support jurisdiction. *See* 549 F.2d at 610-11. As a result, the rule has been stated quite broadly with no mention of the intent requirement:

> 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 . . . "The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce? . . ."

Sabre Shipping Corp. v. American President Lines, 285 F. Supp. 949, 953 (S.D.N.Y. 1968), *aff'd*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969) (citations omitted).

51. 549 F.2d at 601.

52. *Id.* at 611-12.

53. While acknowledging that a greater showing of effect or restraint is necessary to state a claim for relief than to establish a basis for subject matter jurisdiction, *id.* at 613, the court also noted that in neither case did a "direct and substantial" effect on foreign commerce need to be established. *Id.* at 615 & n.35.

Here the effects test is inadequate; rather, the court should apply a "jurisdictional rule of reason."[54] The factors to be weighed under this approach include the following:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance to the 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.[55]

Following this three part analysis, the court determined first, that the allegation of a restraint on the export of lumber from Honduras to the United States provided a basis for the exercise of subject matter jurisdiction; second, that the magnitude of the alleged restraint was sufficient to raise a claim under the Sherman Act; and third, that on the record before it, there was no reason to refrain from exercising jurisdiction.[56]

IV. WEIGHING THE FACTORS: A JURISDICTIONAL RULE OF REASON

The jurisdictional rule of reason set forth in *Timberlane* does not represent a total departure from judicial precedent, even though it finds little express support in prior antitrust cases.[57] It has always been ac-

54. *Id.* at 613. The phrase was coined by Kingman Brewster. BREWSTER, *supra* note 43, at 446.

55. 549 F.2d at 614 (footnote omitted). The court made it clear that this multiple factor approach was relevant not to determine the question of jurisdictional *power*, but to decide whether in light of considerations of international comity and fairness to the litigants, jurisdiction *should* be asserted. *Id.* at 613. In this respect, the approach is similar to that of § 40 of the Restatement, which also operates only after a sufficient basis for subject matter jurisdiction has been found. RESTATEMENT, *supra* note 49, § 40, Comment 2 at 120-21. However, the approach in *Timberlane* is broader than that of the Restatement. Section 40, while enumerating many of the same factors, applies only when the rules of two or more nations "may require inconsistent conduct upon the part of a person." By contrast, *Timberlane* appears to require a balancing of the relevant factors in *all* cases which involve international elements, without a showing of the possibility of inconsistent legal obligations.

56. 549 F.2d 615.

57. The only case relied on by the *Timberlane* court which explicitly employed a balancing approach to solve the question of subject matter jurisdiction was Lauritzen v. Larsen, 345 U.S. 571 (1953), a case involving a claim under the Jones Act. *See* 549 F.2d at 614. On the other hand, the opinion in Continental Ore Co. v. Union Carbide &

knowledged that our antitrust laws were not intended to have unlimited application with respect to extraterritorial conduct. Judge Hand explained one of the most basic limits on the assertion of extraterritorial authority as follows: "[T]he only question . . . is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so. . . . We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."[58] In the context of statutory interpretation, he delimited the reach of jurisdiction by focusing on the effects of the defendant's activity—specifically, by requiring an effect on the commerce of the United States which was intended by the defendant.[59] *Timberlane* incorporates and expands this effects-oriented analysis by including as relevant criteria "the extent to which there is explicit purpose to harm or affect American commerce" and "the foreseeability of such effect."[60]

In some respects, then, *Timberlane* continues the method of handling the problem of extraterritoriality which was followed in *Alcoa.* In particular, the intent component of *Alcoa,* a principle which virtually has lain dormant since that case was decided,[61] has been reemphasized in *Timberlane.* Its significance can be seen by examining its potential interplay with nationality, another factor which the *Timberlane* court incorporated into the third part of its analysis.[62]

While there is support for the idea that the United States could exercise jurisdiction over the activities of its citizens solely on the basis of their citizenship,[63] the nationality or citizenship principle has not been relied upon extensively in cases dealing with the question of jurisdiction over extraterritorial conduct.[64] In *United States v. R.P. Oldham Co.,*[65] for example, the court attached little significance to the fact that all

---

Carbon Corp., 370 U.S. 690 (1962), also cited by the *Timberlane* court, does not employ balancing language and is addressed principally to the question whether the act of state doctrine applied in that factual situation. *See* 370 U.S. at 706-07. The principal support for the multiple factor jurisdictional test comes from the secondary authorities cited by the court in *Timberlane.* 549 F.2d at 613-14 nn.29 & 31.

58. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

59. *See* note 48 *supra* and accompanying text.

60. 549 F.2d at 614.

61. *See* note 50 *supra.*

62. 549 F.2d at 614.

63. *See, e.g.,* Blackmer v. United States, 284 U.S. 421 (1932); RESTATEMENT, *supra* note 49, § 30.

64. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation,* 22 OHIO ST. L.J. 586, 603-10 (1961).

65. 152 F. Supp. 818 (N.D. Cal. 1957).

of the defendants in an action based on an international conspiracy were citizens of the United States. Instead, the court justified its conclusion that there was a basis for jurisdiction on the fact that the defendants' activities, even though completely extraterritorial, had caused a "direct and substantial" effect on this country's commerce.[66]

However, with the new emphasis on nationality mandated by *Timberlane*, this factor, when weighed with other relevant considerations, might serve in a given case to justify affirmatively the exercise of jurisdiction[67] or to support a conclusion that the exercise of jurisdiction is improper.[68] It is with respect to the defendant's nationality that the question of intent becomes relevant. Normally, neither section one nor section two of the Sherman Act requires that a specific intent to violate the antitrust laws be established.[69] In most cases, where, for example, the defendants are all United States citizens, or where, as in *Timberlane*, foreign nationals have acted in concert with United States citizens,[70] there would be little reason to look beyond the general intent requirement when determining whether the exercise of jurisdiction is appropriate. However, where all the named defendants are foreign nationals who have acted abroad, fairness to the defendants might require that a showing of specific intent be made to justify the assertion of jurisdiction.[71] Tightening the intent requirement in such a case

66. *Id.* at 822.

67. If the *Timberlane* court is correct in its assumption that courts in past foreign commerce cases have tacitly considered other factors besides the effect on this country's commerce, then the court in *R.P. Oldham Co.* may in fact have silently attached significance to the defendants' citizenship. *See* 549 F.2d at 612.

68. The relevance of nationality as a limitation on extraterritorial jurisdiction was explicitly recognized in two cases dealing with actions for trademark infringement. In Steele v. Bulova Watch Co., 344 U.S. 280 (1952), the Supreme Court held that the district court had jurisdiction under the Lanham Act to prevent the unfair use of the plaintiff's trademark in Mexico by the defendant, a citizen of the United States. Subsequently, in Vanity Fair Mills v. T. Eaton Co., 133 F. Supp. 522 (S.D.N.Y. 1955), *modified*, 234 F.2d 633 (2d Cir. 1956), *Steele* was distinguished in part on the basis of the defendant's nationality, and relief was denied since the defendant was a Canadian citizen.

69. Intent is presumed if it is shown that the normal and probable consequences of the defendant's activity are results forbidden by either section. FUGATE, *supra* note 49, at 17, 74.

70. *See* 549 F.2d at 603-04.

71. One exponent of a balancing approach asserted that an explicit purpose to harm this country's commerce is so important that express proof of such purpose should be made a prerequisite to the exercise of jurisdiction in this factual setting. BREWSTER, *supra* note 43, at 446, 448. Whereas the *Timberlane* approach merely calls for the nature of the defendant's intent to be weighed with all other relevant considerations, it seems likely that, in effect, the character of the defendant's intent would be accorded almost the same importance under this approach. *See, e.g.*, Simson, *supra* note 21, at

could clearly advance principles of international comity as well as insure fairness to the litigants.[72] Thus, sensitive application of the jurisdictional rule of reason in future foreign commerce cases may significantly revitalize the intent component of *Alcoa*.

While building in part on the implications in *Alcoa*, the rule set forth in *Timberlane* calls for a much broader inquiry. This departure from the relatively narrow focus of the effects test is well illustrated by the *Timberlane* court's direction that district courts consider "the extent to which enforcement by either state [which has jurisdiction with respect to the conduct of the parties] can be expected to achieve compliance."[73] This factor, apparently adopted wholesale from the Restatement,[74] seems to incorporate pragmatic considerations as well as a concern for international comity and fairness; specifically, it may reflect a desire to avoid situations such as the aftermath of *United States v. Imperial Chemical Industries, Ltd. (ICI)*.[75] In *ICI*, the district court's remedial decree affecting a foreign defendant led to a foreign court's judgment that the defendant could not legally comply with that decree.[76] Even though there is disagreement as to the extent to which the action of the district court in *ICI* violated principles of comity,[77] the frustration of the effectiveness of the decree is clear. The approach adopted in *Timberlane* would seem to call for total jurisdictional

---

246; Note, *Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act*, 20 VAND. L. REV. 1031, 1056 (1967).

72. Similarly, Judge Hand acknowledged in *Alcoa* that "international complications" might arise if the United States asserted jurisdiction over agreements formed abroad by foreign nationals which caused unintended effects on this country's commerce. 148 F.2d at 443.

73. 549 F.2d at 614.

74. *See* RESTATEMENT, *supra* note 49, § 40(e).

75. 100 F. Supp. 504 (S.D.N.Y. 1951), *opinion on relief*, 105 F. Supp. 215 (S.D.N.Y. 1952).

76. In *ICI*, DuPont, an American Corporation, and ICI, a British corporation, were found guilty of a conspiracy effectuated in part by the use of patents. The remedial decree fashioned by the district court called for the compulsory licensing of certain patents held by DuPont and directed that ICI grant immunity under the corresponding patents which it held and reassign them to DuPont. Thereafter, a British company which previously had entered into a contract with ICI to be granted exclusive licenses under the patents in question brought suit to prevent ICI's compliance with the decree. The British court enjoined ICI from obeying the order of the American court and later ordered specific performance of ICI's contract with the British plaintiff. British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., [1953] 1 Ch. 19, 24, *aff'd*, [1954] 3 All E. R. 88.

77. Compare Simson, *supra* note 21, at 241-42, *with* FUGATE, *supra* note 49, at 130-34.

forbearance when an impasse of this type could be predicted with certainty.

However, total dismissal in many cases seems unnecessarily drastic. Often, shaping the remedial decree to avoid a conflict with foreign law would appear sufficient to prevent any violation of principles of comity or imposition of an unnecessary hardship on a foreign defendant.[78] This flexibility is built into the Restatement approach, which calls for a court "to consider . . . moderating the exercise of its enforcement jurisdiction" when necessary.[79] It is unclear, however, whether this same rationale was adopted by the *Timberlane* court or whether the only recourse when the assertion of jurisdiction appears likely to damage foreign interests is outright dismissal. Thus, clarification of this area by the Ninth Circuit is called for.

V. THE JURISDICTIONAL RULE OF REASON AND ACT OF STATE

The wide-ranging thrust of the decision in *Timberlane* suggests that the development of a jurisdictional rule of reason conflicts with the restrictive view of the act of state doctrine that is likely to gain currency.[80] If given full judicial recognition,[81] the commercial-governmental distinction will curtail the applicability of the act of state doctrine by creating a large class of activities to which the doctrine does not afford immunity; in cases involving the commercial activities of foreign governments, adjudication of the rights of the individual litigants will assume paramountcy. The rationale behind the jurisdictional rule of reason is more expansive. Courts which follow its mandate must serve dual goals: in applying the balancing test, they must be concerned not only with effectuating the policies behind the antitrust laws but also with avoiding unnecessary encroachment upon the interests of other nations.

In practical effect, application of the rule in *Timberlane* will require courts to identify and weigh many of the same considerations which

78. *See, e.g.*, United States v. General Elec. Co., 115 F. Supp. 835, 878 (D.N.J. 1954).

79. RESTATEMENT, *supra* note 49, § 40.

80. *See* notes 33-39 *supra* and accompanying text.

81. Adherence to a restrictive view of the act of state doctrine would appear necessary to avoid thwarting the policies behind the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (to be codified at 28 U.S.C. §§ 1330, 1332(a)(2)-1332(a)(4), 1391(f), 1441(d), 1602-1611). *See* Timberg, *supra* note 40, at 31; *cf.* Alfred Dunhill of London, Inc. v. Banco Nacional de Cuba, 425 U.S. 682, 698-705 (1976) (opinion of White, J.) (rationale behind restrictive theory of sovereign immunity supports adoption of restrictive theory of act of state).

are relevant in an analysis under the act of state doctrine.[82] For example, a case may involve the activities of a foreign nationalized industry which are questionable under the American antitrust laws; even if the activities are found to be "commercial" and thus not entitled to immunity as acts of state, the significant governmental involvement must be accounted for and might require dismissal unless the contacts and interests of the United States are substantial. It might thus appear that the jurisdictional analysis set forth in *Timberlane* is antithetical to the act of state doctrine as it is evolving and that it might often frustrate the purposes behind the restrictive theories of sovereign immunity and act of state. In other words, it might be asserted that under the guise of jurisdictional analysis the *Timberlane* court has erected a new barrier to suit which the legislative and judicial development in the above areas had operated to eliminate.

For several reasons, the conflict is more apparent than real. The act of state doctrine and the jurisdictional test are fundamentally different in conception and operation. While considerations of comity underlie each,[83] the jurisdictional rule does not share with the act of state doctrine the same concern for maintaining separation of powers within the national government with respect to foreign affairs.[84] The act of state doctrine is an affirmative defense[85] which has been applied primarily in cases involving foreign expropriations.[86] By contrast, the jurisdictional rule of *Timberlane*, although theoretically applicable to the question of extraterritoriality in general,[87] has thus far been limited by the Ninth Circuit to defining the reach of the antitrust laws and of closely-related trademark regulations.[88] While many of the surrounding procedural aspects are unclear, it appears certain that the jurisdictional rule will not impose the same heavy burden of proof as the act

82. In fact, the *Timberlane* court explicitly called for recognition that the aims of the two doctrines are similar: "The act of state doctrine . . . demonstrates that the judiciary is sometimes cognizant of the possible foreign implications of its action. Similar awareness should be extended to the general problems of extraterritoriality." 549 F.2d at 613.

83. *Id. See also* note 21 *supra* and accompanying text.

84. *See* notes 19-20 *supra* and accompanying text.

85. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 691 (1976).

86. Joelson & Griffin, *supra* note 40, at 632.

87. *See generally* Trautman, *The Role of Conflicts Thinking in Defining the Reach of American Regulatory Jurisdiction*, 22 OHIO ST. L.J. 586, 611-27 (1961).

88. In Wells Fargo & Co. v. Wells Fargo Exp. Co., — F.2d — (9th Cir. 1977), the Ninth Circuit held that the question of the extraterritorial application of the Lanham Trade-Mark Act, 15 U.S.C. §§ 1051-1127 (1970), should be decided in accordance with the guidelines set forth in *Timberlane*.

of state doctrine[89] nor otherwise be treated precisely as an affirmative defense.[90]

More important than procedural disparities is that the focus of inquiry in the two areas differs. The *Timberlane* court synthesized this difference by noting that whereas the act of state doctrine precludes examining the validity of the foreign governmental interest, under its jurisdictional analysis the validity of the foreign interest is assumed; only under the jurisdictional test must the interests of the United States be explicitly balanced against those of the foreign state.[91] While the court did not account for the probable changes in the act of state doctrine, the observation above would still appear to be an accurate statement of a primary distinction between these two areas.

In sum, to say that a foreign interest might be deferred to under the balancing test yet not be immune from scrutiny under the act of state doctrine is not to say there is a conflict in the law. Because these doctrines deal with different, although closely related, issues, the jurisdictional rule of reason and the restrictive theory of act of state can be reconciled.[92]

---

89. Even though many of its implications are uncertain, it is clear that *Dunhill* sets a rigorous standard for a party who would prove that foreign governmental action is a nonreviewable act of state. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 691-95 (1976).

90. The *Timberlane* opinion gives little indication of how the balancing test will be called into operation in future cases. Although the court separated the question whether jurisdiction may be asserted from the question whether jurisdiction should be asserted, 549 F.2d at 613, it is still possible that a motion under FED. R. CIV. P. 12(b)(1) to dismiss for lack of subject matter jurisdiction is the proper vehicle to raise the latter issue.

Similar uncertainties exist with respect to the allocation of the burden of proof. The *Timberlane* court found that dismissal was inappropriate because there had been no "comprehensive analysis of the relative connections and interests of Honduras and the United States." *Id.* at 615. It seems that by necessity the burden of raising the foreign interests not apparent from the plaintiff's pleadings will fall on the party seeking dismissal. It is not clear, however, whether that party would carry the burden of proving *all* factors which would call for dismissal, or whether the plaintiff should be required to prove certain elements, such as specific intent on the part of foreign defendants, beyond those necessary to establish a basis for subject matter jurisdiction and a claim for relief. These uncertainties indicate some of the refinements which are called for in this area on the part of the Ninth Circuit.

91. *Id.* at 615.

92. The rationale supporting adoption in *Dunhill* of a restrictive approach to act of state is in part that adjudication of claims arising out of the commercial activities of a foreign government is less likely to cause offense than judicial interference with purely governmental functions. *See* 425 U.S. at 697-98 (plurality opinion of White, J.); *cf. id.* at 715 (concurring opinion of Powell, J.) (adjudication of cases involving commercial activities of foreign governments will not interfere with the conduct of foreign

VI. CONCLUSION

At the same time it expands and elaborates on some of the implications of the *Alcoa* decision, *Timberlane* may also help resolve some of the more problematic aspects of *Alcoa* and it progeny. For over thirty years, *Alcoa* has borne the brunt of criticism, both foreign and domestic, of the intrusiveness of our antitrust laws into the affairs of other nations.[93] Despite language to the contrary, the basic thrust of the decision provided a rationale for the potentially unlimited exercise of jurisdiction over extraterritorial conduct. By contrast, the opinion in *Timberlane* provides a principled basis on which a court may decline to exercise jurisdiction where it appears that the damage to foreign interests which would be caused by adjudication of the claim outweighs the need to redress the injury to our commerce.

Karen Growdon

---

relations by the political branches). There may be a temptation to transpose this rationale to application of the jurisdictional rule of reason and assert that commercial operations of a foreign government should in general be accorded less weight than governmental activity. Such reasoning would violate the principles set forth in *Timberlane*. Adjudicating a quasicontractual claim (the issue in *Dunhill*) is far less of an intrusion into the affairs of another nation than subjecting the activities of a government to the operation of a remedial decree.

93. *See, e.g.*, A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 363-64 (1970); Rahl, *Foreign Commerce Jurisdicion of the American Antitrust Laws*, 43 ANTITRUST L.J. 521, 522 (1974); Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558, 559 (1967).