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United States Antitrust Jurisdictions Over Overseas Disputes After Title IV of the 1982 Export Trading Company Act and Timberlane

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Abstract

Extraterritorial application of the United States antitrust laws often has been a sticking point between the United States and its foreign trading partners. Tensions have arisen between the United States and other nations in this area as a result of differing competition policies, regulatory regimes, legal systems and forms of business enterprise. The importance of this subject area, and the global irritations it has generated for many years, suggest the development of a uniform approach by either the United States Congress or via the United States Supreme Court. This Article reviews the case law in this subject area, and discusses some of the efforts in other forums to clarify the current confusion.

UNITED STATES ANTITRUST JURISDICTION OVER OVERSEAS DISPUTES AFTER TITLE IV OF THE 1982 EXPORT TRADING COMPANY ACT AND *TIMBERLANE*†

*A. Paul Victor**
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INTRODUCTION

Extraterritorial application of the United States antitrust laws often has been a sticking point between the United States and its foreign trading partners. Foreign government protests have been particularly vigorous when, as in *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*,[1] (*Japanese Electronic Products*), the allegedly unlawful conduct at issue has been mandated by foreign sovereigns.

Tensions have arisen between the United States and other nations in this area as a result of differing competition policies, regulatory regimes, legal systems and forms of business enterprise.[2] The United States might be characterized as a "mixed" economy marked by expansive antitrust laws, limited government intervention, predominantly private enterprise and a major emphasis on private litigation. Many other nations, however, have promoted their economic development through more centralized industrial policies; state-owned, directed or assisted enterprises; a lesser emphasis on the primacy of competition policies; and virtually no private antitrust enforce-

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1. Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd., 494 F. Supp. 1161 (E.D. Pa. 1980), *aff'd in part, rev'd and remanded in part, sub nom.*, In re Japanese Elec. Prod. Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd and remanded sub nom.* Matsushita Elec. Indus. Co., Ltd., 106 S. Ct. 1348 (1986).

2. *See* Gotleib, *Extraterritoriality: A Canadian Perspective*, 5 NW. J. INT'L L. & BUS. 449 (1983); Shultz, *Trade, Interdependence and Conflicts of Jurisdiction*, DEP'T ST. BULL., June 1984, at 33.

ment.[3] Not surprisingly, such divergent governmental interests and policies have frequently clashed when private plaintiffs have sought to apply the United States antitrust laws extraterritorially. For example, most of our trading partners do not sanction such broad-ranging discovery as is available in the United States, consider private treble damages to be improperly "penal," and generally rely upon governmental agencies, rather than private parties, to enforce their competition policies.[4]

In response to what they believe to be improper assertions of United States antitrust jurisdiction over conduct affecting national interests, many foreign governments have retaliated against the United States by enacting so-called "blocking" statutes. These statutes restrict the extent to which U.S. private litigants can obtain evidence or production of documents for use in proceedings in the United States.[5] Variants of such a statute have been enacted by Australia,[6] Canada,[7] France[8] and the United Kingdom,[9] among others. The British legislation also contains a "clawback" provision[10] that allows for recovery of the non-compensatory portion of any treble damage judgment paid to a prevailing American plaintiff.

The importance of this subject area, and the global irritations it has generated for many years, suggest the development of a uniform approach by either the United States Congress or via the United States Supreme Court. However, no such approach has yet been devised. Title IV of the Export Trading

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3. *E.g.*, Japan and Korea.

4. The competition laws of the European Economic Community and West Germany, for example, do not provide for wide-ranging discovery as is permitted by U.S. law, do not provide for treble damages, and are primarily enforced by administrative agencies.

5. *E.g.*, Holland (The Dutch Law of June 28, 1956, Concerning Economic Competition, (1956) Stb. 1061, *as amended*, Law of July 16, 1958 § 39, (1958) Stb. 413); New Zealand (1980 N.Z. Stat. 173, No. 27); South Africa (Atomic Energy Act, 1967, No. 90 § 30, 15 Stat. Repub. So. Afr. 1045 (1977)); Switzerland (STGB, C.P., C.P. Art. 162 and 273).

6. Prohibition of Certain Evidence Amendment Act, 1976, No. 121, 1976 Austl. Acts 1125, as amended by No. 202, 1976 Austl. Acts 1743.

7. *Uranium Information Security Regulations*, Can. Stat. O. & Reg. 76-644 (P.S. 1976-2368, Sept. 21, 1976).

8. Act of July 16, 1980, No. 80-538, 1980 J.O. 1799, D.S.L. 285.

9. Protection of Trading Interests Act, 1980, ch. 11, § 6.

10. *Id.*

Company Act of 1982 has resulted in little change.[11] Some forty years after Judge Learned Hand's seminal decision in *United States v. Aluminum Company of America*[12] (*Alcoa*), the law governing extraterritorial application of the United States antitrust laws remains somewhat uncertain, perhaps because of judicial reluctance to engage in what the courts view as "political" decision-making.

This Article reviews the case law in this subject area, and discusses some of the efforts in other forums to clarify the current confusion.

I. *CASE LAW DEVELOPMENTS*

In 1909, when the Sherman Act[13] was first interpreted in an extraterritorial context, the Supreme Court, in *American Banana*,[14] held that it did not cover conduct occurring outside the United States. The Supreme Court refused to take jurisdiction over a suit in which the plaintiff, the American Banana Company, alleged that the defendant's activities in Costa Rica monopolized and restrained the Central American banana trade with the United States, because the challenged conduct occurred outside of the United States.[15] This decision was, in part, a reflection of the relatively limited role of the United States in the world economy during the early twentieth century, as well as of the narrow territorial concept of jurisdiction then prevailing.[16]

A. *The* Alcoa *Test*

After World War II, jurisdictional thinking underwent a revolutionary change. The United States emerged as one of the dominant postwar economies with increasing commercial ties around the world and the narrow *American Banana* limita-

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11. *See infra* notes 77-88 and accompanying text.

12. 148 F.2d 416 (2d Cir. 1945).

13. 15 U.S.C. §§ 1-2 (1982). By its terms, the Sherman Act covers "[e]very contract, combination . . . or conspiracy, in restraint of trade" and every person who shall "monopolize . . . attempt to monopolize, or combine or conspire . . . to monopolize" trade or commerce "with foreign nations. . . ." *Id.*

14. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

15. *Id.* at 354-55.

16. J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 6.02-6.06 (2d ed. 1981).

tion on antitrust jurisdiction was abandoned in *Alcoa*.[17] In *Alcoa*, the United States government sought to break up Alcoa's domestic aluminum monopoly, and also challenged activities of Aluminum Limited, Alcoa's independent Canadian subsidiary.[18] The *Alcoa* court therefore had to analyze whether United States antitrust laws reached Limited's participation in a cartel with European aluminum producers.

Described in broadest terms, *Alcoa* has come to stand for the so-called "effects test" of subject matter jurisdiction. Judge Hand declared that it was "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . .,"[19] and held that the Sherman Act's subject matter jurisdiction extended to those cases in which the extraterritorial conduct was intended to, and did in fact, have an effect upon United States commerce.[20] Judge Hand also held that once intent to affect United States commerce was shown, the burden of proof should be shifted to the defendant; in other words, a showing of intended effects constituted a prima facie showing of actual effects.[21]

The *Alcoa* approach has been applied in varying formulations and to varying degrees in a number of subsequent cases.[22] Some of the cases after *Alcoa* seem to omit intent altogether as in, for example, *Sabre Shipping Corp. v. American President Lines, Ltd.*,[23] in which an American shipping company alleged that one Phillipine and five Japanese shipping companies conspired to monopolize the Hong Kong-United States and Japan-United States shipping trade. The district court refused to

17. *Alcoa*, 148 F.2d at 416.

18. *See generally id.*

19. *Id.* at 443 (citations omitted).

20. *Id.* at 443-44.

21. *Id.* at 444.

22. Formulations have included: (i) "anticompetitive effects on the United States," Waldbaum v. Worldvision Enterprises, Inc., 203 U.S.P.Q. 926, 929 (S.D.N.Y. 1978); (ii) "impact upon United States commerce," Industria Siciliana Asfalti, S.p.A. v. Exxon Research and Engineering Co., 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,784 (S.D.N.Y. 1977); and (iii) "direc[t]" effect on "the flow of foreign commerce into or out of this country. . . ," Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974).

23. 285 F. Supp. 949 (S.D.N.Y. 1968), *cert. denied sub nom.* Japan Line, Ltd. v. Sabre Shipping Corp., 395 U.S. 922 (1969).

dismiss for lack of subject matter jurisdiction, citing *Alcoa*,[24] and simply held that:

> *[t]he 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.[25]

Another view of the intent requirement was suggested in the comprehensive discussion of extraterritorial antitrust jurisdiction principles in *Japanese Electronic Products*.[26] Judge Becker suggested that the intent required by *Alcoa* is a general rather than specific intent as follows:

> Judge Hand did not specify the degree of effect nor the type of intent required. In applying the rule to the facts at hand, however, he implied that the intent required was of a general and not specific nature, using such words as "expected" and "supposed" to describe the [defendants'] state of mind.[27]

The language that courts have used to describe the effects required has also varied. Under the farthest-reaching formulation of the effects test, any activity that has any effect at all on United States commerce will support jurisdiction. Thus, in *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*,[28] the Southern District of New York stated that "it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimus."[29]

Application of the effects test, in its various formulations, has engendered much friction between the United States and other nations. Foreign critics of the test complain that it considers only the interests of the United States, without giving any weight to the competing interests of foreign sovereigns.[30]

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24. *Id.* at 953.

25. *Id.* (citation omitted) (emphasis added).

26. 494 F. Supp. at 1184.

27. *Id.*; *see also* Fleischmann Distilling Corp. v. Distillers Co., Ltd., 395 F. Supp. 221, 226-27 (S.D.N.Y. 1975).

28. 473 F. Supp. 680 (S.D.N.Y. 1979).

29. *Id.* at 687.

30. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402 comment d & reporter's note 2 (Tent. Final Draft 1985).

Additionally, they argue that for the United States to impose its antitrust philosophy on foreign businesses in foreign countries on such a basis is violative of international law.[31]

In response, many scholars advocate incorporation of the interests of foreign states and other so-called "comity" considerations into the jurisdictional analysis. In his influential 1958 treatise, for example, Kingman Brewster proposed a "jurisdictional rule of reason" test which would require courts to balance a variety of factors in determining antitrust jurisdiction over extraterritorial disputes.[32]

The two cases most closely associated with a jurisdictional rule of reason approach are *Timberlane Lumber Co. v. Bank of America*,[33] in the Ninth Circuit, and *Mannington Mills, Inc. v. Congoleum Corp.*,[34] in the Third Circuit.

B. Timberlane *and* Mannington Mills

In *Timberlane*, plaintiffs were an Oregon partnership that purchased and distributed lumber in the United States, and two Honduran subsidiaries of the partnership, each of which supplied lumber to the parent. Plaintiffs alleged that the defendants conspired to prevent them from both milling lumber in Honduras and exporting the lumber to the United States, thereby maintaining control of the Honduran lumber export business. Plaintiffs contended that the alleged conspiracy affected the "foreign commerce of the United States" and therefore was within the coverage of United States antitrust laws.[35]

Judge Choy, writing for the Ninth Circuit, set forth a three-part test for determining whether subject matter jurisdiction exists over such extraterritorial activities: first, does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States; second, is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act; and third, whether as a matter of international comity and fairness, should the extraterritorial jurisdiction of the United

31. *Id.*
32. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958).
33. 549 F.2d 597 (9th Cir. 1976) (*Timberlane I*) *remanded*, 574 F. Supp. 1453 (N.D. Cal. 1983) (*Timberlane II*), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3514 (1985).
34. 595 F.2d 1287 (3d Cir. 1979).
35. *Timberlane I*, 549 F.2d at 601.

States be asserted.[36]

In connection with the third prong of the analysis, Judge Choy proposed an evaluation and balancing of a variety of factors, including:

> 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 to those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such an effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[37]

This balancing analysis integrates the rule of reason as an aspect of determining subject matter jurisdiction.

On remand, the district court dismissed the antitrust action for, among other things, lack of subject matter jurisdiction.[38] Eight years later, the dismissal was affirmed by the Ninth Circuit, which held:

> all but two of the factors in *Timberlane I*'s comity analysis indicate that we should refuse to exercise jurisdiction over this antitrust case. The potential for conflict with Honduran economic policy and commercial law is great. The effect on the foreign commerce of the United States is minimal. The evidence of intent to harm American commerce is altogether lacking. The foreseeability of the anticompetitive consequences of the allegedly illegal actions is slight. Most of the conduct that must be examined occurred abroad. The factors that favor jurisdiction are the citizenship of the parties and, to a slight extent, the enforcement effectiveness of United States law. We do not believe that this is enough to justify the exercise of federal jurisdiction over this case.[39]

In *Mannington Mills*, the next significant antitrust jurisdiction case, a United States manufacturer of vinyl floor covering brought an antitrust action against another United States man-

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36. *Id.* at 615.
37. *Id.* at 614.
38. *Timberlane II*, 574 F. Supp. at 1455.
39. *Timberlane II*, 749 F.2d at 1386 (Sneed, J.).

ufacturer alleging that the defendant had secured foreign patents by means of fraudulent representations to various foreign patent offices.[40] In conducting the jurisdictional inquiry, the Third Circuit looked to two questions: (1) whether subject matter jurisdiction exists at all; and (2) whether to exercise jurisdiction if it does exist.[41]

The court held that the *Alcoa* intended effects test should be applied to determine whether subject matter jurisdiction *exists*,[42] and also held that "when two American litigants are contesting alleged antitrust activity abroad that results in harm to the export business of one, a federal court does have subject matter jurisdiction."[43]

To determine whether to *exercise* jurisdiction, as a matter of international comity, the *Mannington Mills* court balanced a variety of factors including, in addition to those factors set forth in *Timberlane*, the possible effects upon United States foreign relations and potential conflicts of jurisdiction.[44] In contrast to *Timberlane*, which used the rule of reason balancing inquiry to analyze whether subject matter jurisdiction *exists*, a majority of the *Mannington Mills* panel favored using these balancing factors to determine, as a discretionary matter, whether subject matter jurisdiction, if it exists, should be *exercised*.[45]

Scholars have debated whether there is a proper jurisprudential basis for the jurisdictional rule of reason analysis when, as in *Mannington Mills*, it is not used to determine the existence of subject matter jurisdiction. For example, Judge Adams, concurring in *Mannington Mills*, argued that courts should not engage in a discretionary inquiry in connection with the *exercise* of subject matter jurisdiction.[46] In his view, once a court has jurisdiction to hear a claim, it must exercise that power.

This position has been supported by, among others, Atwood and Brewster:

> [i]n our view, the balancing process should be an integral part of the jurisdictional issue. This appears to have been

40. *Mannington Mills*, 595 F.2d at 1294.
41. *See id.*
42. *Id.* at 1291-92.
43. *Id.* at 1292 (citation omitted).
44. *Id.* at 1297-98.
45. *See id.* at 1297.
46. *See id.* at 1299.

the *Timberlane* court's intent, since it viewed the balancing element as a partial substitute for the "substantiality" and "intent" elements generally engrafted onto the *Alcoa* effects test of jurisdiction. The bulk of international scholarship historically has treated comity as a qualification on the scope of a state's legislative jurisdiction; and as Judge Adams observed, this classification for the balancing test removes any question as to its doctrinal legitimacy.[47]

Although *Timberlane* and *Mannington Mills* are distinguishable on the foregoing grounds, they seem likely to be virtually indistinguishable in practice and, indeed, are generally both cited as having adopted the rule of reason test.

C. *After* Timberlane *and* Mannington Mills

Since *Timberlane* and *Mannington Mills*, other circuits have taken differing and occasionally uncertain positions on the exercise of subject matter jurisdiction. The Tenth Circuit, for example, has generally endorsed the jurisdictional rule of reason approach. In *Montreal Trading Ltd. v. Amax, Inc.*,[48] the Tenth Circuit followed *Timberlane* in refusing to find jurisdiction over an alleged concerted refusal of Canadian subsidiaries of American companies to sell Canadian potash for delivery in Canada to a Canadian company.[49] The Tenth Circuit focused, among other things, on the facts that United States interests in protecting a *Canadian* company from such a concerted refusal to deal were "minimal" and that the plaintiff had "not shown more than a speculative and insubstantial effect on United States commerce."[50]

The Second Circuit, for its part, has never definitively articulated the standard it would apply to determine subject matter jurisdiction. In *National Bank of Canada v. Interbank Card Association*,[51] the Second Circuit criticized the first two prongs of the *Timberlane* analysis on the ground that:

> the separate identification of the first two tests may lead unwarrantedly to an assertion of jurisdiction whenever the challenged conduct is shown to have some effect on Ameri-

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47. J. ATWOOD & K. BREWSTER, *supra* note 16, at 166.
48. 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).
49. *Id.* at 869-70.
50. *Id.*
51. 666 F.2d 6 (2d Cir. 1981).

> can foreign commerce, even though the actionable aspect of the restraint, the anticompetitive effect, is felt only within the foreign market in which the injured plaintiff seeks to compete. Building upon the fundamental 'effects' test outlined by Judge Learned Hand in [*Alcoa*], we think *the inquiry should be directed primarily toward whether the challenged restraint has, or is intended to have, any anticompetitive effect* upon United States commerce. . . .[52]

The *Interbank* court did not reach the question of whether the third prong of the *Timberlane* test, the balancing inquiry, should be recognized as an element of the subject matter jurisdictional inquiry. In at least one district court case arising out of the Second Circuit, *Interbank* has been read as establishing "anticompetitive effects" as the Second Circuit's test of subject matter jurisdiction.[53]

In a Fifth Circuit case, *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*,[54] a United States corporation and its two Hong Kong subsidiaries sued a Japanese corporation and its United States subsidiary, among others, charging a conspiracy to keep plaintiffs out of the business of harvesting trees in Indonesia and exporting logs and lumber products to the United States.[55] The court identified "direct and substantial" effects as the determinant of subject matter jurisdiction.[56] It went on, however, to consider the defendants' argument that the court should not exercise jurisdiction based on the *Timberlane* factors as a matter of comity and conflicts of law.[57] Applying those factors, following *Mannington Mills*, the court refused to grant summary judgment to defendants based on their failure to make the necessary showing.[58]

In the *Uranium* case,[59] the Seventh Circuit considered an allegation of price fixing in the process of reviewing a default

52. *Id.* at 8 (emphasis added).

53. *See* Bulk Oil (Zug) A.G. v. Sun Co., Inc., 583 F.Supp. 1134, 1136 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1431 (2d Cir. 1984).

54. 671 F.2d 876 (5th Cir. 1982), *vacated and remanded*, 460 U.S. 1007, *aff'd on rehearing*, 704 F.2d 785, *cert. denied sub nom.*, Mitsui & Co., Ltd., v. Indus. Inv. Dev. Corp., 464 U.S. 961 (1983).

55. *Id.* at 881.

56. *Id.* at 883.

57. *Id.* at 885.

58. *See id.* at 884-85.

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

judgment entered against foreign corporations who had refused to appear below. In analyzing the grounds for summary judgment in the circumstance of such non-appearances, the Seventh Circuit held it was not improper for the district court to apply neither a *Timberlane* nor *Mannington Mills* analysis but, instead, to simply consider three factors: (1) the complexity of the action, which was a multi-national and multi-party action; (2) the seriousness of the charges asserted; and (3) the recalcitrant attitude of the defaulters.[60] However, the Seventh Circuit also found that nothing in *Timberlane* was inconsistent with exercising jurisdiction in the *Uranium* case. The Seventh Circuit also apparently left open the possibility of using a *Mannington Mills* or *Timberlane* analysis in cases when the foreign defendants participate in discovery and appear before the court.[61]

Finally, and most recently, the D.C. Circuit rejected the notion that United States courts can or should balance competing national interests or evaluate the foreign policy implications of asserting extraterritorial antitrust jurisdiction in the *Laker* case.[62] At issue was a jurisdictional conflict between United States and British law. After Laker filed its antitrust action against United States, British and other foreign airlines, the foreign airlines filed suits in the High Court of Justice of the United Kingdom to seek an injunction forbidding Laker from prosecuting its United States antitrust action against the foreign defendants.[63] After the High Court of Justice entered interim injunctions against Laker, the British Court of Appeal issued a permanent injunction ordering Laker to take action to dismiss its United States suits against the British airlines.[64] In the meantime, Laker requested injunctive relief in the United States District Court in Washington, D.C., arguing that a restraining order was necessary to prevent the remaining defendants (all of the non-British defendants), as well as other non-British foreign defendants Laker had named in a subsequent antitrust claim, from duplicating the British defendants'

60. *Id.* at 1255.
61. *See id.* at 1255.
62. Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).
63. *Id.* at 915.
64. *Id.*

successful request for a British injunction.[65] Underlying these procedural events was the long-simmering conflict between United States and British views towards United States antitrust enforcement.[66]

Judge Wilkey, writing for the D.C. Circuit, first determined that both the United States and Britain had a legitimate basis for exercising jurisdiction, the United States by virtue of application of the effects test (i.e., territoriality),[67] and Britain principally by virtue of nationality.[68] Judge Wilkey recognized consideration of comity principles as legitimate,[69] but questioned the utility of an interest balancing test under the circumstances when more than one country has a basis for exercising jurisdiction.[70] Indeed, he specifically rejected its application in those circumstances, at least in the absence of guidance from the Executive Branch, arguing that it was essentially a *political* inquiry and that courts are ill-equipped to balance national interests and determine which predominate.[71] Instead, Judge Wilkey simply held that jurisdiction should be exercised in *Laker* because of the important United States interests involved.[72]

In the aftermath of these cases, it is difficult to define the present status of the case law. There has been no uniformity in the standard applied and no predicting which approach will be employed in what circumstances.

II. *POLICY AND LEGISLATION*

Faced with this diversity of judicial views and the increas-

65. *Id.*

66. *See id.* at 916-21.

67. *Id.* at 923-26.

68. *Id.* at 926.

69. *See id.* at 937.

70. *See id.* at 953-55.

71. *See id.* at 948-55. Judge Wilkey stated:

> Both nations have jurisdiction to prescribe and adjudicate. Both have asserted that jurisdiction. However, this conflict alone does not place the court in a position to initiate a political compromise based on its decision that United States laws should not be enforced when a foreign jurisdiction, contrary to the domestic court's statutory duty, attempts to eradicate the domestic jurisdiction. *Judges are not politicians. The courts are not organs of political compromise.*

Id. at 953 (emphasis added).

72. *Id.* at 955-56.

ing internationalization of business, what non-judicial steps have been pursued to resolve this problem? During the past five to ten years, there have been a number of efforts to devise a uniform standard for determining antitrust subject matter jurisdiction.

A. *Department of Justice Guidelines*

In 1977, the United States Department of Justice provided in its *Antitrust Guide for International Operations*[73] that "the U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce."[74] Though the *Guide* also suggests that there should be avoidance of unnecessary interference with sovereign interests of foreign nations, to the extent consistent with the enforcement of United States antitrust laws,[75] they are generally viewed as having set forth a formulation of the effects standard. (This, of course, may change when the new, revised Guide comes out. It may reflect the "reasonableness" test spelled out in the Reagan Administration's 1986 antitrust legislation package.)[76]

Use of this formulation is understandable, perhaps, when the United States Government is enforcing the antitrust laws, because the Government is presumably sensitive to the concerns of foreign governments and will make a "foreign relations" decision before instituting a lawsuit. The *Guide*, however, is of no solace to foreign governments in private antitrust actions in which plaintiffs are not required to consider foreign government sensitivities before commencing a suit.

B. *Title IV of the Export Trading Company Act of 1982*

Partially in response to complaints by United States exporters that the wide-ranging application of various formulations of the effects test to bring extraterritorial activity under antitrust coverage inhibited exporters' ability to compete effectively in overseas markets, Congress enacted Title IV of the

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73. ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977).

74. *Id.* at 6.

75. *Id.* at 6-7.

76. *See infra* notes 102-04 and accompanying text.

Export Trading Company Act of 1982.[77] In rather convoluted fashion, Title IV mandates use of the *direct, substantial, and reasonably foreseeable effects* standard to determine subject matter jurisdiction in connection with United States export trade activities. However, Title IV seems in fact to have resulted in little change. It does not affect current antitrust coverage of restraints on United States import trade. It merely removes from antitrust scrutiny conduct that has no effect on United States import commerce, essentially codifying the Department of Justice's enforcement policy in situations involving certain export-related conduct.

The House Judiciary Committee Report[78] contains a number of interesting comments concerning this legislation. First, the report makes clear that Title IV is only jurisdictional in nature and is not intended to affect the substantive legal standard for determining whether conduct violates the antitrust laws.[79] However, the report also suggests that to serve as the predicate for antitrust jurisdiction the domestic effect must be an anticompetitive effect prohibited by the antitrust laws.[80] This provision apparently endorses the Second Circuit's *Interbank* test, discussed above. Additionally, the report notes that courts remain free to go beyond the effects test and incorporate comity considerations as well.[81]

Only a few cases have been decided thus far under Title IV. They do not contain any surprises. In *Eurim-Pharm GmbH v. Pfizer, Inc.*,[82] a German company brought an action against Pfizer, Inc., and a number of Pfizer's foreign subsidiaries, claiming that the defendants had conspired to allocate foreign markets for the antibiotic, Vibramycin.[83] The defendants moved to dismiss for lack of subject matter jurisdiction on the ground "that the challenged activities fail to have an anticompetitive effect on United States domestic, import or export commerce because the transactions underlying this action and

77. 15 U.S.C. §§ 6a, 45(a)(3) (1982) (incorporating the Foreign Trade Antitrust Improvements Act of 1982).

78. H.R. REP. No. 686, 97th Cong., 2d Sess. (1982).

79. *Id.* at 13.

80. *Id.* at 11.

81. *Id.* at 13.

82. 593 F. Supp. 1102 (S.D.N.Y. 1984).

83. *Id.* at 1104.

the effect of these transactions occurred solely within Europe, and the primary actors were European companies doing business solely within Europe."[84] The court granted defendants' motion for dismissal because the plaintiff had failed to allege any effects at all on United States trade or commerce.[85]

Another case, *Liamuiga Tours v. Travel Impressions, Ltd.*,[86] involved, among other things, a claim by a local tour guide from the Caribbean island of St. Kitts that the refusal of defendant, a New York tour operator, to refer business to the plaintiff violated United States antitrust laws. The district court dismissed this claim pursuant to Title IV, holding that the plaintiff had failed to allege any effects other than on St. Kitts.[87] In dictum, the court suggested, contrary to the legislative history, that Title IV was intended to establish "direct, substantial and reasonably foreseeable effect[s]" as the sole test of antitrust subject matter jurisdiction.[88]

C. *The Revised Restatement of Foreign Relations Law*

Currently in its seventh tentative draft, the Revised Restatement of Foreign Relations Law (Revised Statement) sets forth a two-step jurisdictional rule of reason inquiry.[89] Section 402 specifies the bases for determining whether jurisdiction exists at all, providing, among other things, that "a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory which has or is intended to have substantial effect within its territory. . . ."[90]

Section 403 then specifies a balancing analysis for determining whether jurisdiction should or should not be exercised.[91] Specifically, section 403 provides that "a state may not exercise jurisdiction . . . when the exercise of such jurisdiction is unreasonable." To determine whether the exercise of juris-

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84. *Id.*
85. *Id.* at 1107.
86. 617 F. Supp. 920 (E.D.N.Y. 1985).
87. *Id.* at 924-25.
88. *Id.* at 925.
89. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), *supra* note 30.
90. *Id.* § 402(2).
91. *Id.* § 403 (Tent. Draft No. 7, 1986).

diction is reasonable, the Revised Restatement proposes the evaluation of a variety of factors, including:

> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effects upon or in the regulating state;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
>
> (e) the importance of the regulation in question to the international political, legal, or economic system;
>
> (f) the extent to which such regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by other states.[92]

Unlike *Laker*, section 403 also calls for balancing of foreign interests when more than one state may have jurisdiction and for one state "to defer to the other state if the other state's interest is greater."[93]

The Revised Restatement purports to summarize the prevailing view of international law as to the proper scope of jurisdiction. This is a departure from the general approach embodied in restatements in other areas of law which, by and large, attempt to summarize United States case law. Whether or not the Revised Restatement's position represents the prevailing thinking of international jurists is debatable. Less debatable is that to date, this position has not been accepted uniformly by

92. *Id.*

93. *Id.* § 403(3).

United States jurists.[94] As the foregoing review of recent major cases in this area revealed, those circuits that have addressed the question of extraterritorial application of the United States antitrust laws are widely divergent in their approaches, and the Revised Restatement is essentially yet another formulation of a rule of reason approach.

D. *Recent Legislative Efforts.*

Finally, what's going on on the legislative front? Early in 1985, Senator DeConcini of Arizona introduced the Foreign Trade Antitrust Improvements Act of 1985.[95] The centerpiece of the bill, Section 3, originally proposed that courts be required in determining whether to exercise antitrust jurisdiction to weigh the interests of foreign nations that might be affected against the interest of the United States in enforcement of its antitrust laws.[96] The bill would have mandated the dismissal of a case whenever a court determines that the interests of the United States served by the antitrust action were outweighed by the interests of one or more nations adversely affected by the action.[97]

As explained by Senator DeConcini's statement introducing the original bill, Section 3 was "intended to codify, and improve the operation of, the 'jurisdictional rule of reason' in private antitrust actions involving commerce with foreign nations."[98] Senator DeConcini described the provision as providing, in essence, that United States courts would not exercise jurisdiction over antitrust actions when the interests of foreign governments would be adversely affected and when the United States' antitrust interest is not sufficient to justify injury to the foreign national interest.[99]

94. *See e.g.*, Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d at 953 (Wilkey, J.).

95. S. 397, 99th Cong., 1st Sess., 131 Cong. Rec. S1160-62 (1985).

96. *Id.* § 3.

97. *Id.*

98. 131 Cong. Rec. S1160, 1162 (daily ed. Feb. 6, 1985) (statement of Sen. DeConcini).

99. *Id.* at 1161. Section 3, as originally proposed, provided:

> Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws and involving trade or commerce with a foreign nation, the court shall enter a judgment

Senator DeConcini's original proposal was criticized by the Reagan Administration on the ground that it would embroil the courts in foreign policy determinations.[100] In re-

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> dismissing such action whenever it determines that the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action. Upon a request by the court, the Attorney General *shall* appear to set forth the views of the United States as to the affects of the action on the interests of the United States and on any affected foreign nation.

Id. (emphasis added).

100. Although commending Senator DeConcini's effort to devise a solution to the mess that exists in *private* antitrust cases, Charles F. Rule, then Acting Assistant Attorney General for the Antitrust Division of the Justice Department, nevertheless noted in his testimony:

> We do not believe S. 397's open-ended delegation to the courts of responsibility for weighing the relative importance of policies and interests of our government against those of other governments is the proper legislative response to the foreign policy concerns arising out of private antitrust litigation . . . .
>
> We believe Judge Wilkey's thoughtful opinion in the *Laker* litigation correctly stated that the courts are simply the wrong place, under our Constitution's allocation of responsibilities and competences, to engage in a balancing of conflicting U.S. and foreign economic policies and philosophies. . . .
>
> We believe that the jurisdictional balancing test is actually composed of three steps—the first two could generally be performed by the judiciary, while the third should be the province of the Executive Branch. First, under existing law a court must determine whether conduct being scrutinized has "direct, substantial and reasonably foreseeable effects" on United States domestic or import commerce. Only if such effects are found should the inquiry continue. Second, assuming the initial jurisdictional hurdle has been cleared, the court may weigh a variety of fact-specific considerations having no foreign relations or political overtones. They include the extent to which enforcement by either state can be expected to achieve compliance, the extent to which there is an explicit purpose to harm or affect American commerce, the foreseeability of such an effect, and the relative significance of effects on the United States as compared with those elsewhere. If weighing of these factors suggests jurisdiction should not be asserted, the inquiry ceases.
>
> It is the third step of the balancing test that allows the courts to balance the interests of the foreign nation against those of the U.S. and otherwise to consider the effect of an antitrust action on foreign relations interests. It is this potential step that the Department finds objectionable. If private treble damage actions are to be dismissed at this stage—and we recognize that such dismissals may be appropriate in extraordinary circumstances—we believe that it is the Executive, not the Judicial, Branch that should make that final determination.
>
> Generally the first two steps should resolve most jurisdictional disputes without requiring the courts to balance political considerations. If a jurisdictional balancing test consisted solely of these two steps and if the list of factors to be balanced in step two were explicitly and inclusively spelled out

sponse to this criticism, Senator DeConcini drafted a revised version of the bill that simply calls for courts to apply a "jurisdictional rule of reason" rather than a balancing of United States and foreign interests.[101] Specifically, the Section 3 jurisdictional test now rests explicitly on the rule of reason, which includes factors drawn principally from *Timberlane* but excludes foreign policy issues. The proposed revision would also adopt the suggestion of the ABA Antitrust Section to allow, rather than require, courts to request the views of the United States Government while affording the Government the discretion to decide whether to actually set forth its views on a particular case.[102]

The bill would not be applicable to actions instituted by United States enforcement agencies because, according to Senator DeConcini, it is generally believed that these agencies are already sensitive to the foreign policy implications of antitrust enforcement and weigh the interests of the United States against foreign nations *before* challenging conduct which might encroach on foreign sovereign interests.

> to avoid any foreign relations or other political considerations, the test might be acceptable. However, to the extent the test goes beyond well-defined metes and bounds of these first two steps to consider foreign policy factors, we believe that it is the Executive Branch that should perform this final step.

The Foreign Trade Antitrust Improvements Act of 1985: *Hearings on S.397 Before the Comm. on the Judiciary, United States Senate*, 99th Cong., 1st Sess. (1985) (statement of Charles F. Rule) (emphasis added).

101. The proposed revision of Section 3 would read as follows:

> Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws and involving trade or commerce with a foreign nation, the court shall enter a judgment dismissing such action as to all parties whenever it determines that the jurisdictional rule of reason requires such dismissal. In determining whether to dismiss the action, the court shall consider, as appropriate and without limitation except as provided in this Act, such factors as the relative significance of the violation alleged to conduct within the United States as compared with conduct abroad, the nationality of the parties and the principal place of business of corporations, the presence or absence of a purpose to affect United States consumers or competitors, the relative significance and foreseeability of the effects on the United States as compared with the effects abroad, the existence of reasonable expectations that would be furthered or defeated by the action, the degree of conflict with foreign law or foreign economic policies, and the effect of the exercise of jurisdiction on international commerce.

102. *See supra* note 101 and accompanying text.

Senator DeConcini's proposed bill also calls for, among other things, expedited determination of motions to dismiss for lack of subject matter jurisdiction, and elimination of treble damages when to do so would be more consistent with the jurisdictional rule of reason and would not substantially impair United States antitrust enforcement efforts.

Early in 1986, the Administration released its version of the "Foreign Antitrust Improvements Act."[103] Contrary to the DeConcini bill, it contained no provision for optional de-trebling, nor a provision inviting the Attorney General to provide his views on the jurisdictional issue. The other differences were characterized as "refinements" of the DeConcini approach. The most important is a straightforward provision stating that a court shall dismiss actions "whenever it determines that the exercise of jurisdiction is unreasonable" in light of six exclusive factors set forth in the bill:

> (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
> (2) the nationality of the parties and the principal place of business of corporations;
> (3) the presence or absence of a purpose to affect United States consumers or competitors;
> (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad;
> (5) the existence of reasonable expectations that would be furthered or defeated by the action; and
> (6) the degree of conflict with foreign law.[104]

The exclusivity of the factors was intended to foreclose an open-ended balancing test and foreign policy judgments by the courts, while accommodating the legitimate interests of both the United States and foreign governments.

CONCLUSION

The law governing extraterritorial application of the United States antitrust laws remains in a state of flux. All

103. *Thurmond Introduces Administration's Antitrust Reform Legislative Package*, [Vol. 50, Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1256, at 446 (March 13, 1986).

104. *Id.*

branches of the Government are struggling to create a meaningful and acceptable solution that accommodates the need of the United States to ensure effective antitrust enforcement in international situations yet gives due consideration to the competition law and policy of other sovereign states. Given these potentially conflicting objectives, it would seem sensible to continue with a flexible approach to this problem that enables the courts to consider *all* factors relevant to the exercise of jurisdiction. In other words, perhaps Congress would be wise to leave the law as it stands. The current flexible approach has not created any *insurmountable* problems over the years, even in private actions where the problems can be most difficult.