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Mladen Don Kresic

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THE INCONVENIENT FORUM AND INTERNATIONAL COMITY IN PRIVATE ANTITRUST ACTIONS

INTRODUCTION

On January 21, 1983, a British court enjoined the plaintiff in an American antitrust action from proceeding with the suit. The American court responded by issuing an injunction preventing the defendants "from seeking shelter from United States law in a British court." On December 7, 1983, the Department of Justice announced that it was ending a six-year investigation of four American oil companies operating in Saudi Arabia. Assistant Attorney General William F. Baxter stated that the investigation did not justify "the almost inevitable foreign political costs." In the last quarter of 1979, five foreign governments filed amicus briefs urging an American court not to exercise antitrust jurisdiction over firms incorporated in their nations. Their arguments were rejected.

These situations are recent examples of the tension created by the application of American antitrust laws to conduct occurring outside

2. Id. at 1139.
4. Id. at D6, col. 4.
5. In re Uranium Antitrust Litig., 617 F.2d 1248, 1253 (7th Cir. 1980) (Australia, Canada, Great Britain, Northern Ireland, South Africa).
6. Id. at 1256.

Former Assistant Attorney General John Shenefield recently articulated the problem as jurisdictional on one hand and involving controversies of "conflicting economic regimes" reflected in varied antitrust enforcement schemes on the other. See Shenefield, Thoughts on Extraterritorial Application of United States Antitrust Laws, 52 Fordham L. Rev. 354 (1983). Many governments subscribe either "to a 'nationality' principle of jurisdiction, asserting a primary right to regulate conduct of their nationals," or to a territorial principle, asserting the right to regulate conduct within their territories. Id. at 362. Less common are the universality principle, based on a nation's custody over the defendant, and the protective principle, based on criminal threats to state security. See B. Hawk, supra, at 31. This is in sharp contrast to expansive United States notions of jurisdiction.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982) (emphasis added). Although in American Banana Co. v. United Fruit Co., 213 U.S.

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the United States. In today's integrated world economy, the American interest in protecting its free-market system increasingly conflicts with the interests of foreign governments that deplore such "legal imperialism." Although bilateral or international treaties, such as the one recently concluded between the United States and Australia, are preferable to judicial attempts to resolve these controversies, diplomatic agreements cannot prevent all such disputes from reaching the courts.

347 (1909), the Supreme Court proscribed extraterritorial extension of the Act, subsequent cases eroded this ruling, see, e.g., United States v. Sisal Sales Corp., 274 U.S. 268 (1927); Thomsen v. Cayser, 243 U.S. 66 (1917); United States v. Pacific & A. Ry. & Navigation Co., 228 U.S. 87 (1913), so that by 1945 application of antitrust laws to extraterritorial conduct had become accepted. See B. Hawk, supra, at 22-26. In 1945, Judge Learned Hand articulated the "intent and effects" jurisdictional test in holding that the Sherman Act can be applied extraterritorially. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945). "[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders . . . which the state reprehends . . . ." Id. See infra note 16.

8. For a general discussion of the tensions caused by extraterritorial extension of United States antitrust laws, see Shenefield, supra note 7.


10. Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10,365, reprinted in 21 Int'l Legal Materials 702 (1982). Articles 1 through 4 provide for notification and consultation regarding action taken by either government that may conflict with the laws of the other. Id. at 703-07. Article 5 provides for cooperation in antitrust enforcement when the other government's laws are not implicated. Id. at 708. Lastly, Article 6 provides for United States Government participation in any private antitrust action, upon the request of the Australian Government, when the suit relates to conduct advancing a policy of the Australian Government. Id.

11. See B. Hawk, supra note 7, at 812-14; C. Stark, Chief, Foreign Commerce Section: Antitrust Division, Remarks Before the World Trade Institute Seminar on Advanced International Antitrust Practices and Related Trade Issues (Dep't of Justice Press Release May 12, 1983). The Department of Justice enthusiastically supports such diplomatic efforts. Id. at 10-15. Diplomatic efforts are preferable for at least two reasons. First, they help diffuse the "confrontational atmosphere," id. at 10, that usually results from unlimited antitrust enforcement. Second, foreign affairs are the province of the executive branch of government, which is better able to consider the effects of these suits on relations with other nations and to decide whether the costs to the American economy are outweighed by the strain placed on foreign relations. The Supreme Court has recognized that, in the field of foreign affairs, court action may impede American foreign policy and therefore, the courts should not interfere. See Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("The President [is] the Nation's organ for foreign affairs . . . ."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("The President [is] the sole organ of the federal government in the field of international relations . . . .").

The judiciary is thus presented with two problems. First, the extent to which American courts have subject matter jurisdiction in suits involving anticompetitive conduct that occurs outside the United States is unclear. Second, courts and commentators disagree on whether judicial discretion should be exercised in either denying jurisdiction or dismissing a suit after jurisdiction has been established. Although the traditional "intent and effects" jurisdictional test seemed to limit the extraterritorial application of American antitrust laws, the use of this test is the focus of criticism because it inevitably results in overbroad exercise of jurisdiction. As a result, circuit courts have

13. This has been discussed in commentaries, see B. Hawk, supra note 7, at 31; Kintner & Griffin, Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act, 18 B.C. Indus. & Com. L. Rev. 199, 208-09 (1977), and demonstrated in the varying tests applied by the courts. See National Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 8-9 (2d Cir. 1981) (court found effect on commerce but not on competition and dismissed for lack of subject matter jurisdiction); In re Uranium Antitrust Litig., 617 F.2d 1248, 1253-56 (7th Cir. 1980) (court used intent and effects test to find jurisdiction, refusing to apply comity analysis); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292, 1294-99 (3d Cir. 1979) (court found jurisdiction using Alcoa's intent and effects test, but vacated and remanded for consideration of comity factors); Timberlane Lumber Co. v. Bank of Am., 1984-1 Trade Cas. (CCH) ¶ 65,775, at 67,199-200, 67,204-06 (N.D. Cal. 1983) (court dismissed for lack of subject matter jurisdiction, using comity analysis as part of the jurisdictional test).

14. See infra notes 110-111, 113 and accompanying text.

15. See infra notes 110-111, 113 and accompanying text.

16. This test, as first articulated in United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), seemed to limit jurisdiction. "[T]he [Sherman] Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them." Id. at 444. The test was widely accepted. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 & n.8 (1969); Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952); In re Uranium Antitrust Litig., 617 F.2d 1248, 1253-54 (7th Cir. 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979).

In Alcoa, the Supreme Court lacked the statutory quorum of six justices, ch. 231, § 215, 36 Stat. 1152 (1911) (codified at 28 U.S.C. § 1 (1976)), to hear the case. United States v. Aluminum Co. of Am., 320 U.S. 708 (1943). The Court therefore certified the case to be heard by the three most senior judges of the circuit from which the case arose, in this case the Second Circuit. United States v. Aluminum Co. of Am., 322 U.S. 716 (1944); see 28 U.S.C. § 2109 (1976). Thus, Alcoa has the authority of Supreme Court precedent. See American Tobacco Co. v. United States, 328 U.S. 781, 811-14 (1946).

17. See Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 610-12 (9th Cir. 1976); B. Hawk, supra note 7, at 32-34; Grippando, Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine, 23 Va. J. Int'l L. 395, 404-05 (1983). The intent part of the test, see United States v. Aluminum Co. of Am., 146 F.2d 416, 443-44 (2d Cir. 1945), also fails to limit the extraterritorial extension of the antitrust laws, because courts have found that an intended effect on almost any product market affects the American portion of that market. See United States v. Alkali Export Ass'n, 86 F. Supp. 58, 74 (S.D.N.Y. 1949) (participation in international
devised a new jurisdictional test, adding a "comity" prong to jurisdictional analysis. This approach, first adopted in *Timberlane Lumber Co. v. Bank of America*, requires a court to balance certain interests of the United States against the corresponding interests of other nations to determine whether the suit should be dismissed.

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19. *Id.* at 1294-98.

20. *Id.* The test according to *Timberlane* should begin with the *Alcoa* "intent and effects" analysis. *Id.* at 613, 615. A private plaintiff must then show that he is within the sector of the economy that is targeted by the conspiracy or which will be affected by the defendant's conduct. *Id.* at 613. This part of the analysis is known as the "target area" test. *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 885-86 (5th Cir. 1982) (to have standing plaintiff must be within that part of the economy which is targeted by defendant's conduct), vacated on other grounds, 103 S. Ct. 1244 (1983); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975) (consumers have no standing when manufacturers of telecommunications equipment are targets of the conspiracy). This part of the analysis seems to combine substantive and jurisdictional issues, which causes some confusion. B. Hawk, *supra* note 7, at 43. On remand of *Timberlane*, however, the Northern District of California used this prong as a "target area" standing analysis. *Timberlane Lumber Co. v. Bank of Am.*, 1984-1 Trade Cas. (CCH) ¶ 65,775, at 67,202-03 (N.D. Cal. 1983). Finally, the "comity" prong of the test determines whether the court should exercise jurisdiction over the action. *Timberlane*, 549 F.2d at 613-615. The factors to be weighed under this prong are:

- the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.
549 F.2d at 614. In Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), the Third Circuit used a somewhat different list. The court added availability of remedy and possible effect on foreign relations as considerations in assessing comity. Id. at 1297-98.

A similar “jurisdictional rule of reason” was proposed as early as 1958. See K. Brewster, Antitrust and American Business Abroad 446 (1958). It has been adopted by the Restatement, see Restatement (Second) of Foreign Relations Law of the United States § 40 (1965); Restatement (Revised) of Foreign Relations Law of the United States § 403 (Tent. Draft No. 2, 1981), and by the Antitrust Division. Dep’t of Justice Antitrust Guide for International Operations 6-7 (1977); see C. Stark, Chief, Foreign Commerce Section: Antitrust Division, Remarks Before the Annual Conference of the Canadian Council on International Law 3-4 (Dep’t of Justice Press Release October 21, 1983). Some courts, however, have not accepted the Timberlane balancing approach. See National Bank of Can. v. Interbank Card Ass’n, 666 F.2d 6, 8 (2d Cir. 1981); In re Uranium Antitrust Litig., 617 F.2d 1248, 1254-55 (7th Cir. 1980).

21. Once it has been determined that a court has jurisdiction, regardless of the analysis used, the act of state and sovereign compulsion doctrines are defenses which may provide a limitation on the extraterritorial reach of American law.

The classic formulation of the act of state doctrine is found in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

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.


The applicability of the act of state and sovereign compulsion doctrines in private antitrust actions, however, is limited partially because the goal behind these doctrines is to protect the conduct of foreign affairs by the political branches from interference by the judiciary. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 605 (9th Cir. 1976); see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). “[T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.” Id. at 428. The greatest limitation is inherent in the narrow factual situations that can give rise to the defenses. See McLaughlin, The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis, 46 Fordham L. Rev. 1071, 1104-09 (1978). The act of state doctrine, for example, was rejected in Timberlane, 549 F.2d at 605-08, and other recent cases that presented foreign relations problems. See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba,
The comity approach, however, has two serious shortcomings: the absence of a requirement of an alternative forum in which the plaintiff may seek redress and the failure to give adequate consideration to litigants' interests. Moreover, this analysis, which balances comity factors to determine whether subject matter jurisdiction exists, has no firm basis in legislation or congressional intent. Under this analysis, the subject matter jurisdiction of federal district courts can vary in cases in which the alleged conduct is identical. A more principled and sound approach can be found in the doctrine of forum non conveniens.

Unfortunately, in 1948 the Supreme Court held that the doctrine of forum non conveniens was not available in antitrust cases. The decision was overturned on other grounds but its reasoning has never been attacked and, until recently, the defense of forum non conveniens has rarely been raised in antitrust actions.

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22. See Grippando, supra note 17, at 421, 422. The adequacy of an alternative forum is just one factor in the comity analysis and not a prerequisite. See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979).

23. See infra notes 121, 129-31 and accompanying text.


25. The Timberlane court recognized that conflicting government policies may be factors in deciding whether to accept jurisdiction. 549 F.2d at 614. Thus, the alleged conduct of the defendant is not dispositive of the jurisdictional question. The same conduct may therefore be the basis of jurisdiction in some cases but not in others.

26. Forum non conveniens "deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Colum L. Rev. 1, 1 (1929). This doctrine is often applied in an international context, in particular to mass tort causes of action such as airplane crashes, see, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Ahmed v. Boeing Co., 720 F.2d 224 (1st Cir. 1983); Friends for All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602 (D.C. Cir. 1983), and maritime accidents, see, e.g., Lauritzen v. Larsen, 345 U.S. 571 (1953); Needham v. Phillips Petroleum Co. of Nor., 719 F.2d 1481 (10th Cir. 1983); Chiaazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir. 1981), cert. denied, 455 U.S. 1019 (1982).


29. See Paramount Pictures v. Rodney, 186 F.2d 111, 113-14 (3d Cir.) (forum non conveniens may be applicable to antitrust), cert. denied, 340 U.S. 953 (1951); Pocahontas Supreme Coal Co. v. National Mines Corp., 90 F.R.D. 67, 71-72 (S.D.N.Y. 1981) (forum non conveniens motion to dismiss denied on the merits); El
Recent discussion of forum non conveniens in antitrust cases and dissatisfaction with the *Timberlane* analysis both suggest a need to re-examine the use of common-law forum non conveniens in antitrust. This Note asserts that forum non conveniens is a possible, albeit not all-encompassing, solution to the controversies created by expansive American notions of jurisdiction, and that it may complement other defenses commonly applied in international antitrust actions. The doctrine may also provide an opportunity for the courts to avoid the problems posed by the application of the *Timberlane* comity analysis. This Note concludes that forum non conveniens is the most equitable way to assess both public policy and litigants' interests while addressing the concerns of foreign nations.

I. THE DEVELOPMENT OF THE FORUM NON CONVENIENS DOCTRINE AND ITS HISTORICAL TREATMENT IN ANTITRUST LAW

Forum non conveniens is a discretionary doctrine that allows a court to decline to exercise jurisdiction when it appears more appropriate to try the case elsewhere. The doctrine allows courts to ease the rigidity of jurisdictional rules that may impose unnecessary burdens on the litigants or the judicial resources of the community in which the action is brought. In 1948 the exercise of the doctrine was precluded in antitrust cases, and despite subsequent developments in the law that permit its use, forum non conveniens has seldom been applied.


31. See Kadish, supra note 24, at 147-49; see also Grippando, supra note 17 (criticism of comity approach).

32. See supra note 21.

33. See infra notes 122-32 and accompanying text.

34. See supra note 20 and accompanying text.

35. Blair, supra note 26, at 1. Forum non conveniens is a post-jurisdictional doctrine. "Indeed, the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).

36. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (protecting rights of litigants); Blair, supra note 26, at 25 (forum non conveniens is a means to protect the citizens of the forum state from burdens imposed upon them by imported actions).


38. See infra notes 79-88 and accompanying text.

39. See supra note 29 and accompanying text.
A. Forum Non Conveniens in the Federal Court System

In the federal court system the equitable doctrine of forum non conveniens was first applied in admiralty cases. Courts were con-
cerned, as they are today, that "imported controversies" would unfairly burden the community in which the action was brought. The Supreme Court crystallized the modern doctrine of forum non conveniens in 1947 in *Gulf Oil Corp. v. Gilbert*. The Court stated that there had to be another accessible court before dismissal could be granted points to the modern requirement of an alternative forum. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

The first formal recognition of forum non conveniens in the United States was in Paxton Blair's landmark article in 1929. Blair, supra note 26. Blair recognized that the individual states had been applying the doctrine for some time without fully articulating it. Id. at 21-22. Some American courts recognized the doctrine independently, "without benefit of the Latin phrase." Barrett, supra, at 387; see, e.g., *Great W. Ry. v. Miller*, 19 Mich. 305, 307 (1869); *Johnson v. Dalton*, 13 Am. Dec. 564, 565 (N.Y. Sup. Ct. 1823); *Gardner v. Thomas*, 7 Am. Dec. 445, 446 (N.Y. Sup. Ct. 1817). The dismissals were generally in favor of forums of other states, and the justifications were rooted in policy and not legal doctrine. Id. at 22. Because courts did not articulate the doctrine, judicial guidelines for the exercise of such discretion were never set. The courts dismissed suits in favor of other forums in an ad hoc fashion by considering such factors as unavailability of witnesses, *Great W. Ry. v. Miller*, 19 Mich. 305, 315 (1869), and the protection of citizens from burdens imposed upon them by imported controversies, causing increased administrative expense and delays in justice through court congestion. See *Dewitt v. Buchanan*, 54 Barb. 31, 33 (N.Y. Sup. Ct. 1868); *Pietraroia v. New Jersey & H.R. Ry. & Ferry Co.*, 197 N.Y. 434, 439, 91 N.E. 120, 122 (1910). These are similar to some private and public interest factors recognized by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). See infra notes 48-51 and accompanying text.

42. *Braucher*, supra note 40, at 919, 920-21; see *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932); *In re Louisville Underwriters*, 134 U.S. 488 (1890). As early as 1804, Chief Justice Marshall, writing for the Court, recognized that a district court may use its discretion to refuse to hear admiralty disputes between aliens, even when it possesses jurisdiction. *Mason v. The Ship Blaireau*, 6 U.S. 239, 263, 2 Cranch 240, 264 (1804). 43. *Compare* *Johnson v. Dalton*, 13 Am. Dec. 564, 565 (N.Y. Sup. Ct. 1823) ("[O]ur courts may take cognizance of torts committed on the high seas... where both parties are foreigners; but on principles of comity... they have exercised a sound discretion in entertaining jurisdiction or not, according to circumstances.") *with* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238-39 (1981) (forum non conveniens dismissal when plaintiff's residence and accident giving rise to cause of action were both outside the United States) and *Ahmed v. Boeing Co.*, 720 F.2d 224, 225 (1st Cir. 1983) (same) and *Pain v. United Technologies Corp.*, 637 F.2d 775, 779 (D.C. Cir. 1980) (forum non conviens dismissal when accident occurred outside the United States, and ownership and maintenance of the instrumentality were both outside the United States), *cert. denied*, 454 U.S. 1128 (1981).

44. Blair, supra note 26, at 25. Courts believed it was improper to defer business of American citizens due to "litigations between parties owing no allegiance to [American] laws." *One Hundred and Ninety-Four Shawls*, 18 F. Cas. 703, 705 (S.D.N.Y. 1848) (No. 10,521). This type of consideration is reflected in the public interest factors of the modern forum non conveniens doctrine. See infra note 50 and accompanying text.


46. 330 U.S. 501 (1947). The Court recognized that the doctrine allows a district court to "resist imposition upon its jurisdiction even when jurisdiction is authorized."
an alternative forum must be available before the doctrine may be applied and that this requirement is satisfied when the defendant is amenable to process in the alternative forum.\textsuperscript{47} It also enumerated the private and public considerations to be weighed in the analysis.\textsuperscript{48} Private considerations include the ease of access to evidence, the availability of compulsory process over witnesses and the cost of obtaining their attendance, the possibility of viewing the scene where the cause of action arose, and any other factors that may make the trial "easy, expeditious and inexpensive."\textsuperscript{49} Public considerations, on the other hand, require balancing the interests of the community where the action is brought\textsuperscript{50} against the corresponding interests of the community of the proposed alternative forum.\textsuperscript{51}

\textit{Id.} at 507. The case involved a Virginia plaintiff who sued a Pennsylvania corporation in New York on a tort cause of action that accrued in Virginia. \textit{Id.} at 502-03. The Court affirmed the dismissal in favor of a Virginia forum. \textit{Id.} at 512.

\textsuperscript{47} \textit{Id.} at 506-07.

\textsuperscript{48} \textit{Id.} at 508-09.

\textsuperscript{49} \textit{Id.} at 508. The private interest analysis is used, in part, to determine whether the plaintiff's choice of forum is necessary for his own convenience or whether that choice is made just to vex and harass the defendant into an early settlement. \textit{Id.} at 507-08; Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947).


50. Communities that have no relation to the litigation should not bear the judicial burdens. \textit{Gilbert}, 330 U.S. at 508-09.

51. \textit{See id.} Localized disputes should be adjudicated in the home forum. \textit{Id.; see Friends for All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 606, 608-09 (D.C. Cir. 1983).} Furthermore, "[i]n cases which touch the affairs of many persons, there is reason for holding the trial in their view." \textit{Gilbert}, 330 U.S. at 509. Administrative problems and congestion of the courts in the forum where the action is brought and the connection of that community with the action are both crucial in this balancing process. \textit{Gilbert}, 330 U.S. at 508-09; see Pain v. United Technologies Corp., 637 F.2d 775, 791-93 (D.C. Cir. 1980), \textit{cert. denied}, 454 U.S. 1128 (1981).

An additional consideration recognized by \textit{Gilbert} is the court's familiarity with the law that should be applied to the case. \textit{Gilbert}, 330 U.S. at 509. This is not, however, a factor in an extraterritorial case.

If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of \textit{forum non conveniens} would become quite difficult. Choice-of-law analysis would become extremely important,
Weighing most heavily against dismissal on forum non conveniens grounds is the interest of the plaintiff in having the action adjudicated in the forum of his choice.\textsuperscript{52} The deference given plaintiff's choice of forum, however, is diminished when that plaintiff is a foreign resident: Convenience should not be presumed when the suit is not brought in the plaintiff's home forum.\textsuperscript{53}

The scope of the common-law forum non conveniens doctrine has been narrowed in federal district courts, where transfer of venue\textsuperscript{54} has replaced forum non conveniens dismissal.\textsuperscript{55} Common-law forum non conveniens, however, is still applied when there is no court to which the action can be transferred,\textsuperscript{56} as where the alternative forum is a foreign tribunal.\textsuperscript{57}

Recently, the Supreme Court strongly reaffirmed the \textit{Gilbert} decision in \textit{Piper Aircraft Co. v. Reyno},\textsuperscript{58} a case in which dismissal was in favor of a foreign forum.\textsuperscript{59} The Court asserted that no single factor is

and the courts would frequently be required to interpret the law of foreign jurisdictions. . . . The doctrine of \textit{forum non conveniens}, however, is designed in part to help courts avoid conducting complex exercises in comparative law.


\textsuperscript{52} \textit{Gilbert}, 330 U.S. at 508. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." \textit{Id.}; \textit{see Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981)}; 1A J. Moore, W. Taggart, A. Vestal & J. Wicker, Moore's Federal Practice ¶ 0.204, at 2206 (2d ed. 1983). In \textit{Koster v. Lumbermens Mut. Casualty Co.}, 330 U.S. 518 (1947), the Court recognized that special deference should be given to plaintiff's choice if that choice is his home forum. \textit{Id.} at 524.

\textsuperscript{53} \textit{Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 & n.23 (1981)}.

\textsuperscript{54} The transfer-of-venue provision is a statutory version of the forum non conveniens doctrine. 28 U.S.C. § 1404 (1976) (Reviser's Notes); \textit{see J. Moore, supra note 52, ¶ 0.204, at 2205; 35 Cornell L.Q. 459, 461 (1950)}.

\textsuperscript{55} J. Moore, \textit{supra} note 52, ¶ 0.204, at 2208 ("[W]hen there is another federal district court where the action might have been brought . . . the power to dismiss on the ground of \textit{forum non conveniens} no longer exists."); \textit{see Gross v. Owen, 221 F.2d 94, 96 (D.C. Cir. 1955)}; Mars, Inc. v. Standard Brands, Inc., 386 F. Supp 1201, 1204 (S.D.N.Y. 1974); \textit{Fiorenza v. United States Steel Int'l, Ltd.}, 311 F. Supp. 117, 120 (S.D.N.Y. 1969).

\textsuperscript{56} J. Moore, \textit{supra} note 52, ¶ 0.204, at 2208; C. Wright, Law of Federal Courts § 44, at 260 (4th ed. 1983); \textit{see Harrison v. Capivy, Inc.}, 334 F. Supp. 1141, 1142 (E.D. Mo. 1971) (codification of forum non conveniens does not lessen a federal court's authority to dismiss cases in favor of foreign forums).

\textsuperscript{57} J. Moore, \textit{supra} note 52, ¶ 0.204, at 2208; C. Wright, \textit{supra} note 56, § 44, at 260; \textit{see, e.g.}, \textit{Piper Aircraft Co. v. Reyno, 454 U.S. 235, 261 (1981)} (dismissal in favor of Scotland); \textit{Ahmed v. Boeing Co.}, 720 F.2d 224, 226 (5th Cir. 1983) (dismissal in favor of Pakistan or Saudi Arabia); \textit{Needham v. Phillips Petroleum Co. of Nor.}, 719 F.2d 1481, 1484-85 (10th Cir. 1983) (dismissal in favor of Norway).

\textsuperscript{58} 454 U.S. 235 (1981).

\textsuperscript{59} The dismissal was in favor of Scotland. \textit{Id.} at 261. The accident took place in Scotland, the victims were all Scottish subjects, and the airplane was owned, operated and maintained by Scottish corporations. \textit{Id.} at 239, 260. Although the two
dispositive\(^6^0\) of a forum non conveniens motion to dismiss.\(^6^1\) To allow such dismissal would limit the doctrine and reduce its value as a flexible, discretionary tool.\(^6^2\) Furthermore, the Court reasserted the rule that the requirement of an available alternative forum is satisfied when the defendant is amenable to service in that forum.\(^6^3\) This requirement is easily satisfied, however, when dismissal is conditioned upon the defendant's waiver of personal jurisdiction objections in the alternative forum.\(^6^4\)

**B. Forum Non Conveniens in Antitrust: The National City Lines Decisions**

In *United States v. National City Lines (National I)*,\(^6^5\) the Supreme Court held that the doctrine of forum non conveniens was unavailable in antitrust actions.\(^6^6\) This decision followed a procedural revolution regarding the doctrine and was shaped, in part, by language in *Gilbert*\(^6^7\) that impliedly limited the use of forum non conveniens to actions in which venue was authorized under the general venue stat-

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60. Id. at 249; see Reyno v. Piper Aircraft Co., 630 F.2d 149 (3rd Cir. 1980) (less favorable foreign law dispositive of forum non conveniens motion), rev'd, 454 U.S. 235 (1981).

61. 454 U.S. at 249-50.

62. See id.

63. Id. at 254 n.22; see Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).


65. 334 U.S. 573 (1948). *National I* was an action against nine corporations charged with violations of §§ 1 and 2 of the Sherman Act for conspiring to acquire control of local transportation companies in various cities throughout the United States. Id. at 575.

66. Id. at 588.

More importantly, however, the Court placed great weight on the congressional intent behind the specific antitrust venue provision in the Clayton Act—to ensure the plaintiff a convenient forum—and thus prohibited discretionary dismissal.

The National I Court found additional support for its holding in other considerations. It feared that forum non conveniens dismissal would "lengthen litigation already overextended." Additionally, the Court reasoned that there is no better forum than the one chosen by the plaintiff when the scope of the alleged violations is nationwide and the defendants are widely scattered.

In 1949, Congress passed the transfer-of-venue statute, partially in response to National I and other decisions limiting the use of forum non conveniens.


Furthermore, the distinction between special and general venue provisions has been eliminated with respect to forum non conveniens. See Bickel, The Doctrine of Forum Non Conveniens as Applied to the Federal Courts in Matters of Admiralty, 35 Cornell L.Q. 12 (1950). "[T]he Court [in National II] held only that § 1404(a), which in effect codifies the Gilbert and Koster cases, applies, special venue provisions to the contrary notwithstanding." Id. at 18; see United States v. National City Lines, 337 U.S. 78, 80-84 (1949).

69. 15 U.S.C. § 22 (1982) provides: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business...."

70. Congress wanted the plaintiff to be able to sue in his home forum, which was usually where the cause of action arose. See United States v. National City Lines (National I), 334 U.S. 573, 583-84 & n.22 (1948); 51 Cong. Rec. 9416 (1914) (statement of Rep. Cullop).


72. 334 U.S. at 589. "Antitrust suits... are notoriously... drawn out.... To inject into this overlengthened procedure what would amount to an additional preliminary trial... could not but add... to the time essential for disposing of the cases...." Id. at 590.

73. Id. at 591.

non conveniens.75 Section 1404(a) of title 28 provides that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."76 Pursuant to the new section 1404(a), the district court on remand of National I granted transfer77 and the Supreme Court affirmed.78

II. THE AVAILABILITY OF FORUM NON CONVENIENS IN ANTITRUST ACTIONS AFTER THE SECOND NATIONAL CITY LINES DECISION

The National I holding was dramatically narrowed by the second United States v. National City Lines (National II)79 decision, which disposed of the case on purely statutory grounds.80 Section 1404(a) replaced common-law forum non conveniens in the federal district courts81 and was applied to antitrust actions.82 Thus, forum non conveniens was rarely raised in antitrust actions until two recent cases revived the controversy.83

A. The Applicability of National I in Cases In Which Venue Lies in Another Federal Forum

The National II decision did not explicitly overturn National I with respect to the applicability of common-law forum non conveniens in antitrust actions,84 but it put the viability of that decision in serious

75. In National II the Court stated that "the reviser's notes to § 1404(a), although citing [Baltimore & O.R.R. v. Kepner, 314 U.S. 44 (1941)], make no reference to . . . our previous decision in this litigation. . . . The notes cite the [Kepner] decision 'as an example of the need of such a provision.' Obviously, an example is not a complete catalogue. . . . Quite the contrary, . . . [a]lthough no explanation is needed for the lack of Congressional reference to our former decision, simple chronology may be consulted." 337 U.S. at 81-82 (1949); see ch. 646, 62 Stat. 937 (1948) (codified as amended at 28 U.S.C. § 1404(a) (1976)) (Reviser's Notes). See supra note 68.

79. Id.
80. Id. at 84 ("We hold that § 1404(a) is applicable here.").
81. See supra notes 54-55.
84. In Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 103 S. Ct. 1244 (1983), the circuit court seemed to recognize that National II did not explicitly overturn National I, id. at 890 n.18, and
doubt. In National I, the Court had decided that courts are not endowed with the power to qualify plaintiff's forum selection. In the second National decision, the Supreme Court concluded that, in enacting section 1404(a), Congress intended to allow the federal courts some discretion in qualifying plaintiffs' forum selection, at least when another federal forum is available. Thus, the Supreme Court implicitly recognized that its own assessment of congressional intent in National I was wrong, and that judicial discretion can be used to override jurisdiction in cases brought under section 12 of the Clayton Act.

Moreover, an antitrust plaintiff may establish venue under the general venue statutes, as well as under the specific antitrust venue provision. Federal actions of all types are brought under the general venue provisions and are routinely dismissed on common-law forum non conveniens grounds. It would, therefore, be paradoxical if Con-

in light of the narrow holding in National II, 337 U.S. 78, 84 (1949), this appears to be a reasonable conclusion. The issue, however, as framed by the National II Court, suggests a wider scope. "The issue here is whether the 1948 revision of the Judicial Code (Title 28, United States Code) extends the doctrine of forum non conveniens to antitrust suits." Id. at 79.

87. See J. Moore, supra note 52, § 0.204, at 2206-07. See supra note 55.
91. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Id. at 507; see, e.g., Van Dusen v. Barrack, 376 U.S. 612, 634 n.30 (1964) (mass tort action); Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1248-51 (5th Cir. 1983) (maritime action); American Rice, Inc. v. Arkansas Rice Growers Coop. Ass'n, 701 F.2d 408, 417 (5th Cir. 1983) (unfair competition and trademark infringement); Schertenleib v. Traum, 589 F.2d 1156, 1160 (2d Cir. 1978) (abuse of process action).

The goal behind specific venue statutes is to insure that plaintiffs have a forum in which to pursue a remedy, thereby filling gaps in the general venue statutes as applied to particular situations. Thus, the two types of statutes are complementary, and there is no logic in treating them differently. See Albert Levine Assoc. v. Bertoni & Cotti S.p.A., 314 F. Supp. 169 (S.D.N.Y. 1970). "[T]he specific venue provisions of the antitrust statutes were intended to facilitate the prosecution of these actions
B. The Applicability of National I When Dismissal Is in Favor of a Foreign Forum

In a 1982 decision, Industrial Investment Development Corp. v. Mitsui & Co.,92 the Fifth Circuit held that forum non conveniens dismissal in antitrust cases is precluded as a matter of law. The Mitsui court also reasoned that forum non conveniens is inapplicable in antitrust cases, even without the National I precedent, because an antitrust suit is in the nature of a criminal action.94 In a more recent case, Laker Airways v. Pan American World Airways,95 the trial court reached the merits of a forum non conveniens motion to dismiss,96 but held that the plaintiff could not be relegated to a tribunal in a country that did not provide a comparable cause of action.97 Therefore, the Laker court indicated that it considered forum non conveniens viable in antitrust actions.

Different readings of the Supreme Court's assessment of the congressional intent behind section 12 of the Clayton Act may explain the different approaches of the two lower courts.98 The National I Court and not to make unavailable the general venue provisions." Id. at 170; see United States v. National City Lines (National I), 334 U.S. 573, 581-82 (1948) (specific venue provision of the Clayton Act); Baltimore & O.R.R. v. Kepner, 314 U.S. 44, 49-50 (1941) (specific venue provision of the Federal Employers Liability Act).

92. 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 103 S. Ct. 1244 (1983).
93. Id. at 890-91. The Mitsui court never reached the merits of the forum non conveniens motion, ruling that "antitrust cases cannot be dismissed on the ground that a foreign country is a more convenient forum." Id. The court relied on the National I decision as binding precedent. Id. at 890.
94. Id. at 891. See infra notes 140-43 and accompanying text.
96. 568 F. Supp. at 816-17. The Laker court cited Mitsui favorably, but it did not accept National I as precedent and did not preclude application of forum non conveniens as a matter of law. The court acknowledged that "it has ... been held that the doctrine of forum non conveniens does not apply to antitrust actions," id. at 817, but refused to preclude the use of the doctrine, thereby implying that there may be situations in which forum non conveniens is applicable to antitrust actions. This is consistent with other cases. See supra note 29.
97. Id. at 818; see Laker Airways v. Pan Am. World Airways, 559 F. Supp. 1124, 1137 (D.D.C. 1983). This is really a reference to the threshold requirement of an adequate alternative forum. The Laker court also stressed the overwhelming contacts of the action with the United States. 568 F. Supp. at 814-17.
98. See United States v. National City Lines (National I), 334 U.S. 573, 588, 596-97 (1948). The Mitsui court seems to accept this reading of congressional intent as
inferred a congressional intention to give plaintiffs the opportunity to litigate antitrust actions in their home forum, usually the forum in which the cause of action arose.\textsuperscript{99} This reasoning clearly does not apply to foreign plaintiffs or to causes of action accruing outside the United States.

Furthermore, two additional considerations that supported the \textit{National I}\textsuperscript{100} holding are not compelling in cases involving the extraterritorial extension of American antitrust laws. The first, that antitrust actions are already too lengthy and that forum non conveniens dismissals would delay the process even further,\textsuperscript{101} is not applicable in such cases. If an inconvenient forum were to retain jurisdiction, the unavailability of witnesses, documents, and process over witnesses\textsuperscript{102} (which are factors in the forum non conveniens analysis) would delay the action even more than forum non conveniens dismissal.\textsuperscript{103} The problem is compounded when actions are brought in the United States by foreign plaintiffs for the sole purpose of recovering greater damages than are available in a more appropriate foreign forum.\textsuperscript{104} The Supreme Court has recognized that such cases should be dismissed because they are a waste of American judicial resources.\textsuperscript{105} The second consideration cited by the Court was the difficulty of applying forum non conveniens in cases in which the violations charged are nationwide in scope and effect and the defendants are widely scattered throughout the country.\textsuperscript{106} The Court feared that a forum non conveniens dismissal would result in the issue being relitigated in the second forum, resulting in additional delay.\textsuperscript{107} Although valid, whereas the \textit{Laker} court probably recognized that this reading of congressional intent was negated by the \textit{National II} decision. See \textit{supra} notes 84-88 and accompanying text.

\textsuperscript{99} See \textit{supra} note 70.
\textsuperscript{100} 334 U.S. at 589-92.
\textsuperscript{101} \textit{Id.} at 589-90.
\textsuperscript{103} \textit{Piper Aircraft Co. v. Reyno}, 454 U.S. 235, 258-59 (1981). This problem is particularly acute when the American tribunal is faced with a foreign "blocking" statute which prohibits production of information for purposes of discovery in an American action. \textit{Hawk, supra} note 12, at 237-38; see Protection of Trading Interests Act, 1980, ch. 11 (British blocking statute), reprinted in [Jan.-June] \textit{Antitrust & Trade Reg. Rep. (BNA)} No. 959, at F-1-2 (Apr. 10, 1980).
\textsuperscript{104} See \textit{Piper Aircraft Co. v. Reyno}, 454 U.S. 235, 252 (1981); R. Casad, Jurisdiction in Civil Actions  \textsection{} 5.06, at 5-48 (1983). Foreign governments are likely to invoke the blocking statutes when the action is brought in the United States solely to recover greater damages and "the challenged conduct takes place outside United States territory." \textit{Hawk, supra} note 12, at 208.
\textsuperscript{105} \textit{Piper Aircraft Co. v. Reyno}, 454 U.S. 235, 252 & n.18.
\textsuperscript{107} \textit{Id.}
this reasoning was closely related to the specific facts of the National case, it is also applicable to many antitrust actions against multiple defendants, such as Laker. Courts, however, may grant forum non conveniens motions to dismiss on the condition that such defenses be waived in the alternative forum.\(^\text{108}\)

Thus, a proper reading of the National decisions indicates that the exercise of forum non conveniens is permissible in antitrust actions in which the alternative forum is in a foreign country. The most important question, which should ultimately resolve the controversy, is whether there is real utility in applying forum non conveniens in such actions.

III. **Scope and Limits of the Use of Forum Non Conveniens in Antitrust: Where and Why Should the Doctrine Be Applied?**

The application of the doctrine of forum non conveniens in antitrust cases that cross national boundaries can resolve many of the problems left unanswered by the jurisdictional comity analysis and other approaches. Forum non conveniens not only considers the factors which are part of the comity analysis, but also has the benefit of considering private interests in the litigation. Permitting application of forum non conveniens would thus foster more orderly and equitable prosecution of private antitrust suits.\(^\text{109}\) Additionally, recent legislation and Justice Department policy are both consistent with the application of forum non conveniens.

**A. The Advantages of Using Forum Non Conveniens in Lieu of the Comity Approach**

The Timberlane comity approach balances the interests of the United States against the interests of other nations concerned with the litigation.\(^\text{110}\) It involves discretionary dismissal, on subject matter ju-

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\(^{108}\) See *supra* note 64. Generally, this consists of conditional dismissal subject to the defendant's agreement to suit in the alternative forum and to the waiver of jurisdictional and statute of limitations objections. See, e.g., Ahmed v. Boeing Co., 720 F.2d 224, 225 (1st Cir. 1983) (dismissal on condition that defendant agree to appear in Pakistan or Saudi Arabia); Needham v. Phillips Petroleum Co. of Nor., 719 F.2d 1481, 1483 (10th Cir. 1983) (dismissal conditioned upon defendant's waiver of statute of limitations defense in the alternative forum); Schertenleib v. Traum, 589 F.2d 1156, 1157 (2d Cir. 1978) (dismissal conditioned upon defendant's consent to suit in Switzerland).

\(^{109}\) The applicability of forum non conveniens, however, is limited by the requirement of an adequate alternative forum. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).

\(^{110}\) Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613-15 (9th Cir. 1976).
risdiction grounds, of congressionally-authorized causes of action.\textsuperscript{111} This approach, which has been adopted by a number of courts, has been severely criticized.\textsuperscript{112} Federal courts should not use discretion in jurisdictional questions;\textsuperscript{113} rather, jurisdiction should be determined pursuant to congressional mandate.\textsuperscript{114}


There is some question whether the \textit{Timberlane} comity test is jurisdictional at all. \textit{See} Kadish, supra note 24, at 145-47; Note, \textit{Mannington Mills, Inc. v. Congoleum Corp.: A Further Step Toward a Complete Subject Matter Jurisdiction Test}, 2 Nw. J. Int'l L. & Bus. 241, 260 (1980). In \textit{In re Uranium Antitrust Litig.}, 617 F.2d 1248 (7th Cir. 1980), the circuit court did not view the test as jurisdictional, but rather as one of post-jurisdictional abstention. \textit{Id.} at 1255. The majority in \textit{Mannington Mills} took a similar approach. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); \textit{see} Grippando, supra note 17, at 408-10.

Other judges and authors, however, see the \textit{Timberlane} approach as a threshold jurisdictional question. Judge Adams, concurring in \textit{Mannington Mills}, made this clear in his criticism of the majority opinion, calling the \textit{Timberlane} approach an "expanded jurisdictional test." 595 F.2d at 1301-02 n.9 (Adams, J., concurring). In Montreal Trading, Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981), \textit{cert. denied}, 455 U.S. 1001 (1982), the Tenth Circuit explicitly relied on comity concerns in declining to exercise jurisdiction. \textit{Id.} at 871. Former Associate Attorney General John Shenefield sees the \textit{Timberlane} three-part test as a substitute for the \textit{Alcoa} jurisdictional analysis. Shenefield, supra note 7, at 362-64. Recently, on remand of \textit{Timberlane}, 1984-1 Trade Cas. (CCH) ¶ 65,775 (N.D. Cal. 1983), the district court confirmed the view that the \textit{Timberlane} comity approach is a jurisdictional analysis. \textit{Id.} at 67,199.

The Department of Justice Antitrust Division accepts the \textit{Timberlane} comity concerns as a necessity. U.S. Dep't of Justice, Antitrust Guide for International Operations 6-7 (1977). For the elements of this test, \textit{see supra} note 20. The Division, however, separates the comity considerations from the subject matter jurisdiction analysis. \textit{Id.}

112. \textit{See supra} notes 22-25, 31 and accompanying text.

113. \textit{See} Kadish, supra note 24, at 149. Judicial discontent with legislative acts does not permit courts to reform the law, and there is certainly no authority by which courts can restrict the language of the Sherman Act. \textit{Id.} The \textit{Alcoa} jurisdictional test was based on the Court's interpretation of congressional intent. United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).

114. "The creation of a new basis of federal jurisdiction . . . is a legislative act." \textit{Price v. Gurney}, 324 U.S. 100, 107 (1945); \textit{see Neirbo Co. v. Bethlehem Shipbuilding Corp.}, 308 U.S. 165, 167 (1939) ("jurisdiction of the federal courts . . . is a grant of authority to them by Congress"); \textit{Hoffman v. Lynch}, 23 F.2d 518, 521-22 (N.D. Ga. 1928) (legislative grant of powers is not to be overridden); \textit{Good v. Krauss}, 457 F. Supp. 50, 51 (E.D. Tenn. 1978) (federal courts have only the jurisdiction prescribed to them by Congress pursuant to Article III of the Constitution); \textit{Vigil v. United States}, 293 F. Supp. 1176, 1185 (D. Colo. 1968) (federal courts have no authority to adjudicate a cause of action which is not within their congressionally authorized
In response to criticism of this approach, some courts have applied the comity analysis only after jurisdiction has been found. For example, in Mannington Mills, Inc. v. Congoleum Corp., the Third Circuit, using the "intent and effects" test, specifically recognized that the district court had subject matter jurisdiction over the case. The court then applied the comity approach to balance national interests to determine "whether [extraterritorial] jurisdiction should be exercised."

The most significant drawback to the two comity approaches is the absence of a requirement of an adequate alternative forum. Furthermore, the comity analysis stresses national concerns and ignores the litigants' interests. Forum non conveniens, however, encompasses the requirement of comity within the framework of existing law. All factors used in balancing public or national interests involved in an antitrust action under Timberlane can be adequately weighed in a public interest analysis under forum non conveniens. Timberlane factors, such as the degree of intent to affect American power), aff'd, 430 F.2d 1357 (10th Cir. 1970); J. Moore, supra note 52, ¶ 0.201, at 2018.

It may be argued that, although courts are applying their own jurisdictional comity analysis, the results have been the same as those obtained by the Alcoa test. See B. Hawk, supra note 7, at 20-22 (Supp. 1983). Although the results may be the same as those obtained under the Alcoa test, which is rooted in congressional intent, see supra note 113, this does not justify the use of a jurisdictional test that is not rooted in congressional intent. Our system is one of law: It prides itself on the maxim that the ends do not justify the means. Miranda v. Arizona, 384 U.S 436, 460 (1966).


116. 595 F.2d 1287 (3d Cir. 1979).

117. See supra notes 16-17 and accompanying text.

118. 595 F.2d at 1292.

119. Id. at 1294.

120. See supra note 22.

121. In Mannington Mills, considerations of availability of witnesses, evidence and process are conspicuously absent from the comity balance. 595 F.2d at 1297-98. This is also true in other cases that have applied the comity analysis. See Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864, 869-70 (10th Cir. 1981), cert denied, 455 U.S. 1001 (1982); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976).

122. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249-50 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). Forum non conveniens is a traditional discretionary tool. This is clear from its congressional recognition as the basis of § 1404(a). See 28 U.S.C. § 1404(a) (1976) (Reviser's Notes); H.R. Rep. No. 308, 80th Cong., 1st Sess. A132 (1947). Blair has suggested that in some cases, the application of forum non conveniens is the only way to satisfy requirements of comity. Blair, supra note 26, at 6 n.34.
commerce and the significance of the effects in the United States relative to those elsewhere,\textsuperscript{123} indicate the extent to which the United States has an interest in the action.\textsuperscript{124} The opportunity given to defendants to present all national interest factors favoring dismissal under the public interest consideration of forum non conveniens\textsuperscript{125} should help reduce tensions caused by extraterritorial extension of the antitrust laws.

The strong public interest in American antitrust enforcement\textsuperscript{126} should also play a major role in the forum non conveniens analysis. Thus, the interest that a foreign state has in the litigation must outweigh the effects that the alleged antitrust violations have in the United States. For example, when the alleged conduct has a discernible effect on American commerce, but not on competition, and the alternative forum has a significant interest in the litigation, then forum non conveniens analysis favors dismissal.\textsuperscript{127} Similarly, if there is an anticompetitive effect in the United States, but it is outweighed by the effect in a foreign nation, then the suit may be dismissed in favor of an action brought in the other forum.\textsuperscript{128}

Unlike the Timberlane comity approach, forum non conveniens considers the litigants' interests.\textsuperscript{129} Protection of private interests\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{123} Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976). These are just two of the Timberlane factors. See supra note 20.
\item \textsuperscript{124} This is the crucial public interest concern under Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). Moreover, these factors point to the ease, expedition and relative expense of trial, all of which are private litigant's concerns. \textit{Id.} at 508.
\item \textsuperscript{125} See supra notes 50-51 and accompanying text.
\item \textsuperscript{126} "The U.S. antitrust laws are the foundation of our broad national commitment to competition based on efficiency . . . ." U.S. Dep't of Justice, Antitrust Guide for International Operations 2 (1977); see Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958).
\item \textsuperscript{127} Cf. National Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 8-9 (2d Cir. 1981) (subject matter jurisdiction absent for lack of a connection between alleged conduct and anticompetitive consequences in the United States).
\item \textsuperscript{128} For example, country X, whose major economic resource is sugar, has 25 sugar refineries that control approximately 70% of the world market. There are two refineries in the United States with about 95% of the American market, but only 1% of the world market outside the United States. Twenty of X's refineries with 50% of the market form a cartel and set maximum prices at the price level of the American producers in order to price out their competition in X. The anticompetitive effect in X is potentially more severe and economically detrimental than the effect in the United States, and therefore, X's enforcement measures should be given deference.
\item \textsuperscript{129} See supra note 20. Additionally, as in Timberlane, discussions about American antitrust policy are generally so heated that the interests of the parties are all but forgotten.
\item \textsuperscript{130} These interests involve factors of convenience such as availability of process, witnesses and evidence. See supra note 49 and accompanying text. On remand, the Timberlane district court considered some private interest factors, but it did not make the detailed inquiry required by forum non conveniens. See Timberlane Lum-
ultimately effectuates the enforcement of United States antitrust laws within our adversarial system of justice and thereby results in effective adjudication of antitrust claims. Moreover, in the forum non conveniens analysis, there is a threshold requirement of a finding of an adequate alternative forum before a court will consider a forum non conveniens motion to dismiss. The forum non conveniens analysis thus affords greater protection than the Timberlane approach to both the plaintiff's interest and the American interest in enforcing the antitrust laws.

B. Can There Be an Adequate Alternative Forum in Antitrust Cases?

Historically, the justification for enforcement of American antitrust laws across national boundaries rested on the absence of international mechanisms to ensure protection against anticompetitive behavior in international business. This view, although outdated, is the basis of criticism directed at dismissals based on international comity: insufficient attention is paid to the adequacy of a foreign forum to which a plaintiff may have to resort after dismissal. It is argued that no forum outside the United States can be adequate in antitrust cases. The reasons given to support this view are the United States' primary national interest in enforcing its antitrust

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131. The private interests are integrally related to, and often derived from, the tensions created by the extraterritorial extension of antitrust laws. By blocking discovery or impeding the continuance of actions, foreign courts affect the private interests to be considered in a forum non conveniens motion. See Laker Airways v. Pan Am. World Airways, 559 F. Supp. 1124, 1127 (D.D.C. 1983); Shenefield, supra note 7, at 355 & n.23. See supra note 103. Effective and fair enforcement of United States antitrust laws is difficult if not impossible under such circumstances. This apparent advantage given to a defendant's motion to dismiss is partially offset by the requirement of an adequate alternative forum.


134. Hawk, supra note 12, at 207. See infra notes 150-51, 161-66 and accompanying text.


136. Grippando, supra note 17, at 405-10.

137. Id. at 410; see Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 890-91 (5th Cir. 1982), vacated on other grounds, 103 S. Ct. 1244 (1983).
laws\textsuperscript{138} and the lack of an adequate remedy in foreign forums.\textsuperscript{139} The courts have called private plaintiffs "private attorneys general"\textsuperscript{140} and have referred to the Sherman Act as our "charter of economic liberty."\textsuperscript{141} Antitrust actions are sometimes compared with criminal prosecutions because of their deterrent purpose.\textsuperscript{142} It is therefore contended that antitrust actions have no place in foreign courts because one nation cannot enforce the criminal laws of another.\textsuperscript{143} This argument is flawed in two critical respects when used to defeat the applicability of forum non conveniens in antitrust.

First, such an argument runs counter to the Supreme Court's assessment of civil antitrust actions as purely civil in a procedural sense.\textsuperscript{144} This was recognized in \textit{National II}, in which the Court held that antitrust actions fall under the "any civil action" language of section 1404(a).\textsuperscript{145} Moreover, the Antitrust Division of the Justice Department was formed in 1933 for the purpose of fostering and maintaining economic competition in the United States, by the "criminal and civil enforcement of the federal antitrust laws."\textsuperscript{146} Thus, the "penal" ele-


\textsuperscript{139} Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 890-91 (5th Cir. 1982), \textit{vacated on other grounds}, 103 S. Ct. 1244 (1983); Grippando, \textit{supra} note 17, at 410-14.


\textsuperscript{143} Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 891 (5th Cir 1982), \textit{vacated on other grounds}, 103 S. Ct. 1244 (1983) (citing \textit{The Antelope}, 23 U.S. 30, 53-54, 10 Wheat. 66, 123 (1825)).


\textsuperscript{145} United States v. National City Lines (\textit{National II}), 337 U.S. 78, 81-82 (1949). This does not imply that, substantively, the antitrust laws are not in the nature of a criminal action. See \textit{supra} notes 94, 143 and accompanying text. However, for purposes of forum non conveniens application the relevant question is whether, procedurally, the case is civil or criminal. See United States v. National City Lines (\textit{National II}), 337 U.S. 78 (1949).

\textsuperscript{146} U.S. Dep't of Justice, Antitrust Division Manual I-17 (1982).
ment is furthered by government enforcement actions, to which forum non conveniens would not apply. With this in mind, it is extremely unfair that the litigants' interests should be ignored in favor of "larger policies." That is not to say that there can be no deterrent effect in private enforcement, but when the alleged offenses are sufficiently detrimental to American economic interests, then American antitrust policies can be adequately protected by a government action.

Furthermore, anticompetitive behavior is now more widely condemned. The recognition among industrial nations of the damage caused by such conduct shows that the American interest is not unique and is addressed concurrently by other developed nations. There is also a strong interest among developing countries in curbing the anticompetitive conduct of large multinational corporations. Thus,

147. The strong expression of the United States interest in the action, inherent in a suit brought by the Department of Justice, should preclude forum non conveniens dismissal. See Grippando, supra note 17, at 425.

148. It has been suggested, however, that private antitrust actions raising questions of extraterritorial application be statutorily prohibited. Snyder, Private Investment & Trade: Extraterritorial Impact of U.S. Antitrust Law, 6 Va. J. Int'l L. 1, 36-37 (1965).

149. See Grippando, supra note 17, at 425. Legislation has "further emphasized the compensatory purpose of private treble damage actions. The Federal Trade Commission Act, for example, established a governmental agency to police anticompetitive behavior." Id. at 412; see Federal Trade Commission Act, 15 U.S.C. § 41 (1982).

150. This is particularly true for nations in the European Economic Community. Hawk, supra note 12, at 207; see generally Unit B, World Law of Competition (J. von Kalinowski gen. ed. 1979) (multivolume treatise dealing with anticompetition laws throughout the world).

151. This is made evident by the United Nations Conference on Restrictive Business Practices, adoption of a Restrictive Business Practices Code. UNCTAD, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10 (1980), reprinted in 19 International Legal Materials 813 (1980). This code is designed to promote: "(a) The creation, encouragement and protection of competition; (b) Control of the concentration of capital and/or economic power; (c) Encouragement of innovation." Id. at 815. Adherence to the Code is voluntary, based on national and regional promulgation of laws consistent with it. Id. at 819-20 (section E).

Certain developing nations have enacted antitrust legislation. For example, Brazil has had an anticompetition provision in its constitution since 1946, see Unit C, World Law of Competition, Bra 3-2 n.1 (J. von Kalinowski gen. ed. 1982), and it enacted antitrust legislation in 1962. Id. at Bra 3-2. Although rarely applied at first, "more recently, due to the recognition given worldwide . . . antitrust legislation has begun to take its rightful place in Brazilian law." Id. This law is aimed at prohibiting unfair competition and monopolization. Id. at Bra 3-3. It also provides for stiff penalties to be imposed on violators. Id. at Bra 3-38. Additionally, Argentina has recently amended its laws to protect against anticompetitive conduct and monopolistic practices, id. at Arg 2-2 to 2-3, and to provide for criminal sanctions, id. at Arg 2-16 to 2-17.
there is greater potential that the antitrust policies recognized by the United States can be furthered without the need for American courts to act.\textsuperscript{162}

Commentators fear that unavailability of the treble damage remedy\textsuperscript{153} in foreign courts would diminish the deterrent effect of United States antitrust laws.\textsuperscript{154} If, however, the American interest in the cessation of particular conduct is strong enough to require such a deterrent force, the Department of Justice can express that national interest by instituting criminal or civil proceedings of its own.\textsuperscript{155} Furthermore, it is unlikely that potential antitrust violators will alter their conduct on the basis of the chance that a lawsuit will be dismissed on forum non conveniens grounds.

The second purpose of the treble damage provision is to encourage private actions,\textsuperscript{156} which aid in the enforcement of the antitrust laws. Dismissal in favor of a foreign forum may discourage plaintiffs from continuing with the action. The plaintiff's decision, however, is independent of the court's decision to dismiss on the basis of the relative weakness of American interest in the action. Thus, congressional intent manifested by the treble damage provision is not frustrated by forum non conveniens dismissal, when, by definition, another forum has a greater interest in the action.\textsuperscript{157}

C. What Alternative Forums Are Adequate?

In Gilbert, the Supreme Court defined an adequate alternative forum as one in which the defendant is "amenable to process."\textsuperscript{158} In addition, the Piper Court recognized that an alternative forum is inadequate only when the remedy offered by that forum is "clearly unsatisfactory."\textsuperscript{159} While this standard is generally easy to meet,\textsuperscript{160} antitrust cases pose unique problems.

\begin{itemize}
  \item [152.] When, however, a plaintiff brings an action to enjoin the defendant's conduct and, following dismissal, the foreign tribunal frames the injunction narrowly, solely to protect its interests, then United States interests may require domestic enforcement.
  \item [154.] See Grippando, supra note 17, at 415-17. See supra note 142 and accompanying text.
  \item [155.] See supra notes 146-149 and accompanying text.
  \item [156.] "It is clear Congress intended to use private self-interest as a means of enforcement . . . ." Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947); see 51 Cong. Rec. 16,274 (1914) (statement of Rep. Webb).
  \item [158.] 330 U.S. at 507.
  \item [159.] 454 U.S. at 254 n.22.
  \item [160.] See, e.g., Ahmed v. Boeing Co., 720 F.2d 224, 225 (1st Cir. 1983); Needham v. Phillips Petroleum Co. of Nor., 719 F.2d 1481, 1483-85 (10th Cir. 1983); Coastal
A great number of antitrust violations of international scope concern conduct in European markets. Thus, the European Economic Community (EEC) is of particular interest in providing adequate alternative forums for actions sought to be dismissed from American courts.

The EEC Treaty does not provide for private recovery of damages under Articles 85 and 86, the counterparts to sections 1 and 2 of the Sherman Act. National courts, however, "have a duty to provide effective remedies . . . for loss due to any infringement of Community Law." Pursuant to the urging of the EEC Commission, the courts of some member nations, including France, England, Scotland, Ireland, West Germany, and Belgium, have provided private damage remedies for violations of Articles 85 and 86. Thus, it can


161. See Haw, supra note 12, at 201; Shenefield, supra note 7, at 351-52. This is logical since the majority of industrialized western nations are European. Consideration should, however, be given to other parts of the world as well. For example, the United States and Australia have signed a cooperation agreement that indicates the importance of cooperation with respect to antitrust enforcement in the two countries. Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10,365, reprinted in 21 Int'l Legal Materials 702 (1982). See supra note 10.


163. Id. at 47-48.

164. Id. at 48-49.

165. B. Hawk, supra note 7, at 430, 680.

Given the host of the United States statutes and enforcement bodies and vehicles developed over almost a century, it is noteworthy that the far simpler structure of the Common Market has managed in a comparatively short length of time to bring about competition rules which are clearer and more readily ascertainable to business and lawyers than is true in the United States.

Id. at 427.

The best way for the United States to combat extraterritorial antitrust violations is to subscribe to the EEC method of enforcement, either by joining with the EEC, or by forming a like organization. An international method of policing what are largely international violations is most likely to be effective, and least likely to be offensive to individual states. This would leave the antitrust laws of the United States intact when involved with a largely domestic problem.


167. Temple Lang, supra note 166, at ___. "In . . . Ireland, Scotland and England, an action can be brought for an injunction or damages . . . for breach of statutory duty," while in other member states the action is for "loss caused by an unlawful act." Id. at ___.
hardly be said that in these nations the remedy provided is so "clearly unsatisfactory" that they do not provide an adequate alternative forum.

Furthermore, foreign statutes, such as the British "claw back" provisions, enable defendants to recover the punitive portion of the damages awarded in a United States action. Therefore, the remedy available in a foreign forum may be no less adequate than the one obtained in an American court. Moreover, the fact that the laws of a foreign nation may be less favorable to the plaintiff should not in itself be dispositive of a forum non conveniens motion to dismiss. This consideration has been rejected by the Supreme Court, because a plaintiff will usually bring suit in an available forum with the most favorable law. Under such circumstances, forum non conveniens dismissal would seldom be possible.

The Court in Piper suggested that dismissal is not appropriate "where the alternative forum does not permit litigation of the subject matter of the dispute." Forum non conveniens is therefore precluded only in actions in which the alternative forum does not provide for private recovery of damages caused by anticompetitive conduct.

D. Expressions of Government Policy Militate in Favor of Use of Forum Non Conveniens in Antitrust

Additional policy reasons militate in favor of the exercise of forum non conveniens in antitrust cases. Antitrust actions place a particularly heavy burden on American judicial resources because such actions are by their nature complicated and time consuming. This is exacerbated by the fact that American courts are attractive to foreign plaintiffs because of the availability of treble damages.

170. Section 6 provides in part: "(2) ... the qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount ... as exceeds the part attributable to compensation." Id.
171. The deterrence and incentive goals of the treble-damage provision, 15 U.S.C. § 15 (1982), are limited under these circumstances.
173. Id.
174. Id. at 254 n.22.
Moreover, the Justice Department rejects extraterritorial application of antitrust laws in cases in which the foreign activities "have no direct or intended effect on United States" consumers even when the defendants are American.\(^{177}\) The Justice Department thus recognizes both the duty of other nations to redress wrongs committed upon their populace and the availability of such redress.\(^{178}\) This is not only a reaction to the international political dilemma that excessive extraterritorial assertion of United States law creates. It is also a reaction to the "proliferation of antitrust legislation in foreign nations,"\(^{179}\) which has weakened the traditional justification for extraterritorial enforcement of antitrust laws.\(^{180}\)

Recent legislation also indicates a trend away from rigid extraterritorial antitrust enforcement. In 1982, Congress amended the antitrust laws to provide that the Sherman Act shall not apply to export trade unless the conduct has a "direct, substantial, and reasonably foreseeable effect" on import trade, or other American export trade.\(^{181}\) Moreover, legislation proposed by the Department of Justice would limit the availability of treble damages in antitrust actions, and would thereby lessen the attractiveness of American courts.\(^{182}\)

Thus, it seems clear that even the traditionally rigid government policy in favor of unimpeded enforcement of United States antitrust laws has softened. This development invites the use of the forum non conveniens doctrine as a viable tool in dispensing with antitrust actions which may be better brought elsewhere.

**Conclusion**

Although not proposed as a panacea to the conflicts involving the extraterritorial extension of United States antitrust laws, forum non conveniens can be an effective way of disposing of some actions in an efficient manner. Consideration of the full spectrum of interests—national and international, public and private—is the most equitable means of evaluating the viability of American adjudication of antitrust actions involving extraterritorial issues. Furthermore, the contin-


\(^{178}\) Id.

\(^{179}\) Grippo, supra note 17, at 395 n.1; see, Hawk, supra note 12, at 207.

\(^{180}\) See supra note 133 and accompanying text.


\(^{182}\) See W. Baxter, Assistant Attorney General, Antitrust Division, Remarks Before the Committee on the Judiciary, United States Senate 7 (Dep't of Justice Press Release June 29, 1983); W. Baxter, Assistant Attorney General, Antitrust Division, Remarks Before the Subcommittees on Investigations & Oversight & Science Research & Technology of the Committee on Science and Technology, U.S. House of Representatives 6 (Dep't of Justice Press Release June 30, 1983).
Using international development of antitrust laws helps guarantee both redress to private plaintiffs and vindication of competition principles.

*Mladen Don Kresic*