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Timberlane: Three Steps Forward, One Steop Backwards

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sending State subject to our recognition. Since they are citizens or permanent residents of this country their privileges and immunities are to a lesser degree than accorded career consul officers.

I hope I have been able to convey a sense of the operations of the Office of Protocol in the area of privileges and immunities. It is important work requiring a knowledge of the governing treaties and domestic statutes. Although our efforts in this area are by necessity usually discreet they require expertise and tact, essential ingredients of successful diplomacy.

ABELARDO L. VALDEZ

***Timberlane*: Three Steps Forward, One Step Backwards**

Introduction

In *Timberlane Lumber Co. v. Bank of America*¹ the Court held that the traditional "effects" test² governing extraterritorial application of the United States antitrust laws

[I]s alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness. In some cases, the application of the direct and substantial test in the international context might open the door too widely by sanctioning jurisdiction over an action when these considerations would support dismissal. At other times, it may fail in the other direction, dismissing a case for which comity and fairness do not require forbearance, thus closing the jurisdictional door too tightly—for the Sherman Act does reach some restraints which do not have a direct and substantial effect on the foreign commerce of the United States. A more comprehensive inquiry is required.³

Such an inquiry by Judge Choy in *Timberlane* led to his proposal of a three-part test:

Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?⁴

¹549 F.2d 597 (1976).

²The "effects" test is the legacy of Judge Learned Hand in *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945). Under this formulation, acts committed by aliens outside the territorial boundaries of the United States are within the jurisdiction of United States antitrust laws if these acts are intended to affect United States foreign commerce and do so affect it. *Id.*, at 444.

³549 F.2d at 613.

⁴*Id.*, at 615.

In the consideration of the third question, Judge Choy recommends an ad hoc "evaluation and balancing of the relevant considerations in each case."⁵ Such a "balancing" is to be performed over a series of concerns amalgamated from earlier treatments in the *Restatement (Second) of Foreign Relations Law of the United States*⁶ and in Kingman Brewster's *Antitrust and American Business Abroad*.⁷ In the language of *Timberlane*,⁸ these concerns

[I]nclude 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.

Analysis of these competing interests and their ultimate resolution together with the adaptation of a modified "effects" threshold in the first two parts of the test is claimed by the Court to provide an interpretation of the extraterritorial reach of the antitrust laws which is in keeping with the spirit of the legislation, recognizes the constraining influences of public international law in general and United States foreign policy in particular, and brings a greater realism and appropriateness to the adjudication of such disputes. Concentrating on the "balancing" test, this discussion takes a contrary view. It is here argued that such a radical modification of the "effects" test is not needed; that the *Timberlane* "balancing" test is even in theory a cumbersome and inapposite approach to the perceived need; that in practice it has been seen to be unworkable; and that its relation to the other two portions of the overall test also reveals debilitating drawbacks. A review of recent commentaries on *Timberlane* brings to light similar misgivings. Judge Choy's proposal at best represents a considerable muddying of the waters; at worst, a source of almost indefinite delay and confusion to enforcement without any of the countervailing attention to foreign relations sensitivities which it purports to foster.

Need for a Balancing Test

The validity of an "effects" test to determine subject matter jurisdiction has typically been criticized on two grounds: that its reach is insufficiently discriminating (usually too broad) and that its applications ignores other serious interests (usually public international law, sovereignty, and foreign relations policy).

⁵*Id.*, at 613.

⁶RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965), para. 40.

⁷BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958), at 446.

⁸549 F.2d at 614.

A reasonably objective indication of the Sherman Act's foreign commerce ambit under an effects test might be found in the fact that from *American Banana*⁹ till the present (or at least 1973), no government foreign trade claim has been rejected on the basis of lack of subject matter jurisdiction,¹⁰ and private actions have been nearly as successful. This frequently cited¹¹ piece of legal folklore is also noted in *Timberlane*¹² without any further discussion. Such a result may of course be attributed to a preponderance of properly brought cases rather than an overly broad test.¹³ Government and private claims have been rejected on other grounds to be sure, most notably with respect to the Act of state doctrine,¹⁴ and it can be argued¹⁵ that the *Timberlane* balancing proposal largely confuses that defense with the jurisdictional limits it attempts to set up. Indeed, the view in *Timberlane* that, perversely enough, the "effects" test will sometimes *fail* to reach violations¹⁶ seems to be based on an impression that the Act of State doctrine is applied too broadly instead.¹⁷ Even if this conclusion is true, the *Timberlane* correction smacks too much of Ptolemaic epicycles. In any event, jurisdiction has not been rejected by any court following the *Timberlane* balancing test either.¹⁸

Another more theoretical reason for not immediately finding the "effects" test too broad is that even under the conflict of laws approach endorsed by *Timberlane*¹⁹ it seems to be acceptable that the jurisdictional reach of a theory should be commensurate with the strictness of the underlying legislated interests. Given the comparative stringency in the international community of American antitrust regulation and the body of law that has grown around it, it is neither sinister nor slack-minded for jurisdiction to be found fairly routinely. The inappropriate stance would instead be an attempt at universal application of a law to which no national concern attached.

In a more practical vein, the stake of the United States in the world econ-

⁹*American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

¹⁰FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, (2d ed. 1973), at 498.

¹¹*E.g.*, Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 COR. INT'L L.J. 205 (1978), at 227 without credit.

¹²549 F.2d at 608 n.12.

¹³As even *Timberlane* admits ". . . most of the litigated cases have involved relatively obvious offenses and rather significant and apparent effects on competition within the United States . . . It is probably in part because the standard has not often been put to a real test that it seems so poorly defined." 549 F.2d at 611.

¹⁴The Act of State Doctrine may be briefly stated as the principle that the courts of one country will not sit in judgment upon the acts of a foreign sovereign performed within its own territory. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

¹⁵*Cf. notes 49-56 and accompanying text.*

¹⁶549 F.2d at 613.

¹⁷Becker, *Comment: Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COL. L. REV. 1247 (1977), at 1248.

¹⁸*Cf. notes 64-86 and accompanying text.*

¹⁹549 F.2d at 608-12.

omy generally might also render the "effects" test's reach more palatable.²⁰ A large proportion of all international trade is carried on by American corporations; if anything, in the foreign trade arena the reach of personal jurisdiction is even longer than that of subject matter jurisdiction. The range of the "effects" test only mirrors national economic activities and involvement.

With respect to conflicts in the international dimension, problems are real, although more political than legal. In the realm of public international law, the "effects" test with its "direct and substantial" standard is stricter than the minimum required out of deference, for "the practice of states does not reflect any distinction among the types of effects involved" in a determination of jurisdiction, i.e. any causal tie can serve as a basis.²¹ The balancing approach, apparently believing in an antitrust heaven, contends that the test's reach should exceed its grasp, if only to avoid "an open invitation to outrage and retaliation, a progressive anarchy of legal conflict."²² (If such retaliation is in the form of foreign application of equally strict antitrust laws, it is difficult to see what is to be feared. This point is at the heart of the reach-commensurate-with-strictness argument mentioned above.)

Notwithstanding these points, considerable acrimony has arisen on several occasions, and one foreign commentator has hailed *Timberlane's* balancing approach as removing "an affront to international law occasioned by the present exercise of American antitrust jurisdiction purely on the basis of 'effects' upon American commerce."²³ Of course, it can be presumed that a balancing test is seen as a step in the right direction because jurisdiction will occasionally *not* be exercised, but, as pointed out above, this has yet to occur. One must accordingly ask whether it is effectively more insulting to the sovereignty of a foreign country for its interests to be ignored under an "effects" tests or to be directly considered and found inconsequential under a "balancing" approach.

It is clear that some form of balancing has always informed enforcement decisions, and the privacy and informality of those decisions may prevent a direct insult occasioned by a court opinion. This is recognized even in the *Antitrust Guide to International Operations*, where the Department of Justice claims that its intent is to "avoid unnecessary interference with the sovereign interest of foreign nations."²⁴ The Antitrust Division head John Shenefield went further in stating that "I fully recognize that unique factors

²⁰Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519, at 544-45; Becker, *supra* note 17 at 1247 n.2.

²¹RESTATEMENT, *supra* note 6, para. 18, Reporter's Notes at 55. Cf. Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U.L. REV. 7 (1966), at 15.

²²BREWSTER, *supra* note 7 at 298.

²³Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 J. INT'L L. & ECON. 273 (1978), at 300.

²⁴Antitrust Division, United States Department of Justice, *Antitrust Guide for International Operations* (1977) at 7.

are involved in the foreign commerce aspects of enforcement and I intend to ensure that we give them adequate consideration. If we neglect to do so, then it is clear to me that the courts, under *Timberlane*, should rein us in.”²⁵ This reliance on *Timberlane* seems inappropriate as well as unnecessary. It is clearly inappropriate as a call for the courts to second-guess not only the foreign relations policy of the United States, as the balancing test would typically have them do, but also the enforcement priorities of the Department of Justice. It is unnecessary to the extent that the courts have traditionally behaved in a fashion which will produce similar results, but which is based (more wisely, it will be argued below) on the Act of State doctrine and related defenses rather than direct contemplation of foreign affairs.²⁶ Where more sweeping language exists, it typically still embraces the “effects” test, as in Judge Hand’s statement in *Alcoa*,²⁷ cited in *Timberlane*:²⁸

It is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the “Conflict of Laws.” We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.

That is, the “effects” test itself is seen as the moderating influence on jurisdiction with a respectful nod to international law. Following *Alcoa* in seeing the effects test as a restraint on jurisdiction rather than an unleashing of it is *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*,²⁹ where in a similar context the Court states that it “may fairly be inferred, in the absence of a clear showing to the contrary, that Congress did not intend an application that would violate principles of international law.”³⁰

Another harm that a more explicit balancing arrangement might bring about would be an increased public perception (probably accurate) of being at the mercy of foreign relations policy without protection of the laws. If it is assumed *arguendo* that an “effects” test has been met in a given test but the claim founders on the “balancing” test, it must be concluded that American citizens have suffered injury, in all likelihood greater than that complained of by the plaintiff, but that harm is being deliberately ignored. Admitted insults to a nation’s own populace should take precedence over hypothetical ones to the international community. (This withdrawal may also have adverse constitutional effects.)

²⁵Shenefield, *The Perspective of the U.S. Department of Justice*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (Griffin, ed. 1979), at 24.

²⁶*Cf.* notes 58–87 and accompanying text.

²⁷148 F.2d at 443.

²⁸549 F.2d at 613, in abbreviated form.

²⁹404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). *Cf. also* Note, *American Antitrust Liability of Foreign State Instrumentalities: A New Application of the Parker Doctrine*, 11 COR. INT’L L.J. 305 (1978), at 315–16.

³⁰*Id.* at 814.

A consequence of this particular "balancing" test of *Timberlane* is that, carried to its logical extreme, it might be antithetical to the international comity it claims to protect. Under the *Timberlane* criteria, jurisdiction would be most likely to be asserted where no foreign policy crisis exists, both nations have similar attitudes towards similar laws, and no enforcement problems present themselves. In other words, jurisdiction would be exercised in precisely those cases where there is *no* need for doing so in order to eliminate the harm, and where such exercise may seem the most arbitrary and detrimental to continued good relations. Conversely, jurisdiction would not be exercised in exactly those circumstances where the United States does have a stake in a differing result. Part of this failing is due to Judge Choy's omission of highly relevant *Restatement* language,³¹ quoted early in the opinion³² but significantly omitted in the presentation of and reference to his criteria:³³ the *Restatement's* list is only applicable where two nations *require inconsistent* behavior on the part of the defendant. There, upon appropriate "balancing," the *Restatement* proposes that jurisdiction can still be exercised. (The courts typically are much more conservative, following the sovereign compulsion defense.) Many of *Timberlane's* problems come from the application of the list to *consistent* behavior, including the absurdity sketched above. The more accepted approach is to *reject* jurisdiction where laws are similar.³⁴

Several alternatives to an explicit balancing test have been proposed without a great deal of plausibility to recommend them. Rahl has suggested submission of such cases to the International Court of Justice.³⁵ The political sensitivities of such a move, not to mention the practical workload constraints, would dwarf any seen in the current debate. One commentator finds the problems of implementing a "balancing" test to be due to the inexperience of judges in international matters and the narrow precedential base. His remedy would be the creation of a special Extraterritorial Court which would deal exclusively in such cases.³⁶ Such an answer sidesteps the more basic question as to whether courts should be performing this function at all, especially if it is admitted that they cannot do so at the present.³⁷ One approach with a kernel of reasonability would be the abolition of private suits in the foreign trade area.³⁸ The inference is that the appropriate foreign policy balancing would be done by enforcement authorities rather

³¹RESTATEMENT, *supra* note 6, para. 40: "Where two states have jurisdiction . . . and the rules they may prescribe require inconsistent conduct."

³²549 F.2d at 613.

³³*Id.*, at 614 n.31.

³⁴Rosenfield, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005 (1976), at 1034.

³⁵RAHL, COMMON MARKET AND AMERICAN ANTITRUST (1970), at 411-13.

³⁶Patterson, *Act of State Doctrine—Limitation on Application of the Act of State Doctrine in Extraterritorial Private Antitrust Suits*, 10 VAND. J. TRANS. L. 475 (1977), at 484.

³⁷*Id.*

³⁸*Id.*, also, Jones, *Extraterritoriality in United States Antitrust; An International "Hot Potato,"* 11 INT'L LAW. 415 (1977), at 435.

than uninformed private parties, or, presumably, the courts. The United States is a maverick in allowing them, and their disappearance would not be mourned greatly on the international scene. Domestic political reaction to such a move, however, would be negative; lost as well would be the "watchdog" function such private suits perform and the public sense of involvement in and protection by the antitrust laws mentioned above.

Finally, perhaps the greatest difficulty in the radical imposition of a "balancing" test as proposed in *Timberlane* is the discontinuity introduced, not just in the traditional precedent but in the decision-making process of any given case. In "obvious" cases, a "balancing" test is neither needed nor relevant. Indeed, the novelty of the *Timberlane* proposal is sometimes defended by pointing out that jurisdictional decisions have typically *not* been difficult ones.³⁹ But just in those potential cases where the decision becomes close, where the claim is operating in the outer penumbra of the "effects" test, then suddenly a new test is imposed, the criteria for which have nothing to do with facts or theories under consideration up to that time. The "balancing" test balances more than just international interests, problematical as they are. It must also balance those interests with the strength of the antitrust claim, an even more strained apples-and-oranges problem. At a determination's most tenuous and confused point, the "balancing" test introduces a new order of complexity just when it can be handled least well. (One possible compromise which would interrupt the process less severely would be the use of *economic* criteria for the balancing, i.e., criteria much more accessible by the courts such as the effect in the United States economy, similar economic interests, protection of the business community, consideration of vested rights, etc.)⁴⁰

Feasibility of the *Timberlane* "Balancing" Test

The feasibility of the successful application of the *Timberlane* balancing test may be attacked on at least three grounds: the text calls for resolution of issues beyond the competence of the courts; it fails to clarify relevant issues and in fact further confuses them; and it fails to adequately distinguish itself from other defenses and abstention doctrines.

The competence of the courts is strained by the *Timberlane* approach in terms of both the political questions involved and the inherent complexity and subjective evaluation of the interests to be balanced. With respect to the former, the courts must first question the wisdom of a suit being brought in the first place (a task perhaps usefully but not comfortably to be performed in any private action but one certain to provoke confrontation in a government case) and then analyze the claim in the light of presumed understanding of United States foreign policy, present and future, not to mention the relevant foreign interests and the policies informing those

³⁹549 F.2d at 611, citing AREEDA, *ANTITRUST ANALYSIS* (1974), at 129 n.455.

⁴⁰Fortenberry, *supra* note 20 at 521, 544-45.

interests. Such judgments at best may represent second-guessing a good portion of the Executive branch; in more extreme cases, these political questions may rise to the level of a "political questions" and constitute unacceptable interference with the Executive branch's exclusive foreign relations power. In the past such deference has taken place in response to an actively expressed State Department opinion or even new legislation.⁴¹ Here the courts are asked to sit in judgment on their own competence when it would seem that they should not be able to get as far as "balancing" United States foreign policy; the moment they foresee a substantial impact on such policy is the time for abstention (which is not to say that the courts must be slavishly guided by expressions of foreign policy but simply that they may not presumptively rule on its validity). A remark by Assistant Attorney Shenefield⁴² to the effect that under the *Timberlane* test the courts are not balancing the interests of the United States against those of other countries but rather are balancing the interests of the United States prosecutions against the potential damage to United States foreign relations seem ingenious at best and hardly escapes the above problems.

That the elements of the *Timberlane* balancing test are inherently complex and call for an analysis which cannot hope to match even the superficial rigor given the economic issues seems obvious. Some commentators (and presumably Judge Choy) are unperturbed, however. An Australian reviewer of *Timberlane* concludes:

As to competency, although no proof is offered, for none is available, it is suggested that the Courts are at least as able as any other body to evaluate and balance the factors involved.⁴³

Though speaking more generally prior to *Timberlane*, another writer⁴⁴ is equally sanguine in claiming the observation that "the courts are not equipped" applies to most judge-made rules of law." Neither statement adds much insight into application of the balancing test, and even if completely accurate do not justify the *creation* of yet another set of arcane formulas. The more typical and accurate reaction is that *Timberlane* "falls short of offering constructive guidelines" leaving readers "still mystified as to how American courts can solve such problems" particularly in the absence of even an implicit weighing scheme.⁴⁵ An earlier review of the conflict-of-laws approach concluded that the *Restatement* test on which *Timberlane* is based is far too ambitious and allowing of too many permutations; no effective "law" could develop in this area.⁴⁶ The most heartfelt cries, however, come from *Mannington Mills, Inc. v. Congoleum Corp.*,⁴⁷

⁴¹Becker, *supra* note 17, at 1252-53.

⁴²Shenefield, *supra* note 25, at 23.

⁴³Taylor, *supra* note 23, at 304.

⁴⁴Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 17 (1963), at 21.

⁴⁵Note, *The Act of State Doctrine and Jurisdiction over Extraterritorial Antitrust Violations*, 9 LAW. AMER. 709 (1977), at 725-26.

⁴⁶Metzger, *supra* note 21 at 20.

⁴⁷595 F.2d 1287 (3d Cir. 1979).

where the Court was faced with the prospect of performing *Timberlane's* balancing test for *twenty-six* foreign defendants. The Court found no opportunity for any reasoned decision, and was appalled by the prospect of exercising jurisdiction piecemeal over portions of the claim.⁴⁸ The *Timberlane* test remains to be performed for the record.

With respect to clarity, it is clear at least that *Timberlane* represents a considerable step backwards in the understanding and predictability of jurisdictional determinations. Aside from the initial confusion due to the adoption of any new process, the balancing approach brings problems of its own in the move to radically new subject matter and incommensurability of issues. A conflict-of-laws approach should ideally provide for the protection of justified expectations, certainty and uniformity of results, ease in determining the law, and full disclosure of reasoning for the sake of fairness.⁴⁹ The hodgepodge, ad hoc *Timberlane* list will do little to advance these aims. Further, should other nations adopt the same approach, such a balancing test could easily degenerate into a Chinese-boxes examination of endlessly regressing interests and motivations.

Finally, the *Timberlane* test seems to provide more heat than light in its failure to adequately distinguish itself from other defenses and abstention doctrines. It is not obvious even from Judge Choy's opinion whether it is properly part of a jurisdictional determination or whether it is a subsequent decision not to exercise jurisdiction. For example, the second, sixth, and seventh elements of the *Timberlane* test (nationality, intent, location of conduct) all duplicate elements of Sherman Act jurisdiction proper.⁵⁰ Judge Choy himself suggests in a later opinion that the *Timberlane* rules might be appropriate for a ruling on a *forum non conveniens* issue.⁵¹ Such a usage would avoid the invention of such an unwieldy tool for a new theory. Judge Adams' concurring opinion in *Mannington Mills*⁵² treats the "balancing" test not as a form of abstention (where he sees constitutional problems lurking) but as an expansion of the jurisdictional test only. All in all, he sees the balancing approach as more relevant to an examination of the foreign compulsion issues,⁵³ which is much closer to the original spirit of the *Restatement* factors behind *Timberlane*.⁵⁴ Other writers⁵⁵ argue that the *Timberlane* test merely lays the groundwork for consideration of the Act of State doctrine, which *Timberlane* and *Hunt v. Mobil Oil*⁵⁶ have broadened somewhat by limitation of the inquiry into the motivation of a foreign sov-

⁴⁸*Id.*, at 1298.

⁴⁹Rosenfield, *supra* note 34, at 1025, 1028-29.

⁵⁰*Cf. Fry, Recent Developments: Antitrust—Extraterritorial Jurisdiction under the Effects Doctrine—A Conflicts Approach*, 46 *FORD. L. REV.* 354 (1977), at 365.

⁵¹*Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406 (9th Cir. 1977) at 431.

⁵²595 F.2d at 1302.

⁵³*Id.*

⁵⁴RESTATEMENT, *supra* note 6, para. 40.

⁵⁵Becker, *supra* note 17, at 1251-59; see generally Annotation, *Extraterritoriality of Federal Antitrust Laws to Acts Occurring in Foreign Commerce*, 40 *A.L.R. FED.* 343.

⁵⁶550 F.2d 68 (2d Cir. 1977).

ereign. Still others claim that *Timberlane* is just a common sense recognition of enforcement and compliance possibilities.⁵⁷

There seem to be no shortage of alternative theories and methodologies, all with a stronger conceptual and precedential base, to accomplish what *Timberlane* aspires to in its “balancing” test. Such experimental ventures should not be allowed to dominate the development of the law in this already crowded area.

The *Timberlane* Test in Practice

The *Timberlane* test has not fared particularly well in its applications. First, there has been some legitimate carping from the sidelines⁵⁸ that *Timberlane* merely constructs a recital of elements traditionally examined in foreign trade cases—similar conclusions of foreign law,⁵⁹ consistency with United States foreign policy,⁶⁰ and the consequences of foreign non-recognition of the American decision⁶¹—and that no new construction was needed.⁶²

It also seems to be true that the “balancing” test as presented was not actually required in *Timberlane* itself.⁶³ The Court found no genuine conflict with the Honduran government in the first part of its decision exploring the Act of State doctrine.⁶⁴ Such “balancing” as was required was already performed by the time the jurisdictional discussion was reached. That it took place at all is probably due to Judge Choy’s misleading application of his criteria to instances where no inconsistent conduct is required by the defendants.

Timberlane has not had a very loyal or enthusiastic following in other courts as well. In *Hunt v. Mobil Oil*,⁶⁵ an Act of State case where *Timberlane* “balancing” and “piercing the sovereign veil” might seem appropriate and useful, there is only a sidelong reference⁶⁶ in closing to *Timberlane*⁶⁷ citing *Sabbatino*.⁶⁸

In *United States v. Westinghouse Elec. Corp.*,⁶⁹ the Court similarly ignores in a patent licensing claim the “balancing” portion of *Timberlane*’s

⁵⁷Metzger, *supra* note 21, at 20; Patterson, *supra* note 36, at 481.

⁵⁸Patterson, *supra* note 36, at 481.

⁵⁹Haight, *International Law and the Extraterritorial Applicability of Antitrust Laws*, 63 YALE L.J. 643 (1954).

⁶⁰Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962); United States v. Watchmakers of Switzerland Information Center, 1963 Trade Cas. ¶ 70,6000 (S.D.N.Y. 1962), *ord. modif.* 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965).

⁶¹United States v. Imperial Chemical Industries Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951).

⁶²Patterson, *supra* note 36, at 484.

⁶³Note, *International Law—Antitrust Law—Immunity to Extraterritorial Application of United States Antitrust Law*, 12 J. INT’L LAW & ECON. 487 (1978) at 494.

⁶⁴549 F.2d at 605-08.

⁶⁵550 F.2d 68 (2d Cir. 1977).

⁶⁶*Id.*, at 78, n.14.

⁶⁷*Banco Nacional de Cuba v. Sabbatino*, *supra* note 14.

⁶⁸549 F.2d at 605.

⁶⁹417 F. Supp. 532 (N.D. Cal. 1978).

jurisdictional determination, while still relying on the second part of the test, the *de minimis* rule.⁷⁰

In *Mannington Mills, Inc. v. Congoleum Corp.*,⁷¹ a suit revolving around patents obtained by fraud abroad, the Court found itself “in substantial agreement with” the balancing approach of *Timberlane*,⁷² even expanding *Timberlane*’s list of seven factors to ten.⁷³ *Mannington Mills*’ additional criteria—pending litigation, existence of an antitrust treaty, and requirement of inconsistent behavior—are instructively more traditional and useful tests of jurisdictional reach than those of *Timberlane* and in fact require very little “balancing” at all.

The Court found, however, that “The record in this case is not adequate to allow a reasoned decision on these highly complex issues even if only one foreign nation were involved rather than 26.”⁷⁴ The Court went on to point out that it was exceedingly unlikely for the resolution of such balancing to lead to the same result in every instance, and that plaintiff’s hope of a unitary action is a forlorn one.⁷⁵ The case was remanded to the District Court for further consideration.

In a concurring opinion, Judge Adams expressed strong reservations on the place of the “balancing” test as a mode of abstention, and believed that it could only be appropriately used as a direct expansion of the jurisdictional determination itself.⁷⁶ He also rightly observed that, following the thrust of the original *Restatement* proposal, the test should only be applied where foreign compulsion of inconsistent behavior exists.⁷⁷ Accordingly he found jurisdiction easily without the need for balancing in *Mannington Mills* and forestalled consideration of international repercussions to the remedy stage.⁷⁸

In *Dominicus Americana Bohio v. Gulf & Western*,⁷⁹ both *Timberlane* and *Mannington Mills* were cited for support of a balancing approach, although the Court found the *Mannington Mills* argument over abstention to be inconsequential.⁸⁰ That said, the Court again concluded that “the record in the case at bar is insufficient for a thorough review of all the relevant factors”⁸¹ and further discovery was called for. In closing, the Court held that “defendants must bear the burden of demonstrating that foreign policy considerations outweigh the need to enforce the antitrust laws where the for-

⁷⁰549 F.2d at 613, 615.

⁷¹595 F.2d 1287 (3d Cir. 1979).

⁷²*Id.*, at 1297.

⁷³*Id.*, at 1297–98.

⁷⁴*Id.*, at 1298.

⁷⁵*Id.*

⁷⁶*Id.*, at 1302.

⁷⁷*Id.*

⁷⁸*Id.*, at 1303.

⁷⁹473 F. Supp. 680 (S.D.N.Y. 1978).

⁸⁰*Id.*, at 687–88.

⁸¹*Id.*, at 688.

eign commerce of the United States is affected,"⁸² in which case the balancing test again seems closer to a foreign compulsion defense than a mode of abstention.

Finally, in *Wells Fargo & Co. v. Wells Fargo Exp. Co.*,⁸³ a claim involving extraterritorial application of the Lanham Act, Judge Choy took an opportunity to chide a lower court for not having had *Timberlane* before it and for its subsequent inevitable misreading of the law.⁸⁴ The *Timberlane* balancing criteria were recited without any commentary and the case was remanded with the burden on the *plaintiffs* to show a basis for jurisdiction.⁸⁵ Also of note is that Judge Choy rejected the lower court's contention that inconsistent foreign law undermines jurisdictional reach;⁸⁶ he did so, however, without mentioning the full *Restatement* proposal with which he is now in accord. Lastly, he surprisingly compared the considerations of *Timberlane's* "balancing" test to a basis for a *forum non conveniens* dismissal.⁸⁷

The delay and confusion in these decisions brought about by *Timberlane*, together with the failure to find any consistent manner of interpreting, let alone implementing, the "balancing" test, represent a serious step backwards for conscientious determination of jurisdiction.

Relationship to the Tripartite Test

It is hoped that the discussion thus far has adequately demonstrated the inutility of *Timberlane's* "balancing" test in its own right. Seen as the third element of Judge Choy's tripartite test, which has *not* been adopted in any case citing *Timberlane*, it is confronted with an additional problem.

The cases and commentators are virtually unanimous in declaring that the order of the tests is inappropriate or even violative of constitutional restraints.⁸⁸ Judge Choy in *Timberlane* speaks of whether jurisdiction *should* be asserted after finding grounds for jurisdiction in the first two parts of the test.⁸⁹ It seems mandatory that this discretionary decision be omitted altogether, or at the very least exercised *before* finding jurisdiction. Judge Adams, concurring *Mannington Mills*⁹⁰ commented:

As I understand it, however, a court may not abstain where jurisdiction properly lies unless abstention is warranted under a recognized abstention doctrine. *See, e.g., McClellan v. Carland*, 217 U.S. 268, 281, 30 S. Ct. 501, 54 L. Ed. 762 (1910);

⁸²*Id.*

⁸³556 F.2d 406 (9th Cir. 1977).

⁸⁴*Id.*, at 427.

⁸⁵*Id.*, at 429.

⁸⁶*Id.*, at 428-29.

⁸⁷*Id.*, at 431.

⁸⁸Taylor, *supra* note 23, at 299-301; *Mannington Mills*, *supra* note 71, at 1301; Backer, *supra* note 17, at 64 n.80; Ongman, *Be No Longer a Chaos: Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 Nw. U.L. Rev. 733 (1977), at 742-43.

⁸⁹549 F.2d at 613.

⁹⁰595 F.2d at 1301.

Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5. L. Ed. 257 (1821) ("It is most true, that this court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction, if it should . . . , We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.") (ellipsis in original)

International comity does not present such a basis for abstention.

(In passing it should also be noted that the second portion of Judge Choy's proposal—the de minimis "cognizable injury" test⁹¹—has also been subject to considerable criticism for attempting to prejudge the merits of the case.⁹²

Conclusion

The need for a "balancing" test as expressed in *Timberlane* is considerably overstated, for the range of the "effects" test is neither insufficiently discriminating⁹³ nor violative of international law.⁹⁴ *Timberlane*'s "balancing" test as a remedy would have sharply counter-productive consequences.⁹⁵ The *Timberlane* test also interposes a radical discontinuity in the decision-making process.

The "balancing" test raises issues which are too complex or equivocal for judicial competence,⁹⁶ do not clarify the jurisdictional determination,⁹⁷ and are too easily confused with other defenses and abstention doctrines.⁹⁸ It has not found a warm reception in later cases⁹⁹ and may be based on a profound misunderstanding of the nature of asserting jurisdiction.¹⁰⁰

A return to the "effects" test of *Alcoa* would be an advance.

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⁹¹549 F.2d at 613, 615.

⁹²Fry, *supra* note 50, at 359–60, n.40; Ongman, *supra* note 88, at 742.

⁹³*Cf.* notes 9–20 and accompanying text.

⁹⁴*Cf.* notes 21–30 and accompanying text.

⁹⁵*Cf.* notes 31–40 and accompanying text.

⁹⁶*Cf.* notes 41–48 and accompanying text.

⁹⁷*Cf.* note 49 and accompanying text.

⁹⁸*Cf.* notes 50–57 and accompanying text.

⁹⁹*Cf.* notes 58–87 and accompanying text.

¹⁰⁰*Cf.* notes 88–92 and accompanying text.

