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Antitrust Jurisdiction, Extraterritorial Conduct and Interest-Balancing[†]

Introduction

Antitrust "extraterritoriality" is the rage. In the past two years the debate over U.S. antitrust jurisdiction has intensified on three fronts, in each case focusing on ways to ameliorate what is perceived as being the impermissibly broad scope of U.S. antitrust jurisdiction in the context of foreign conduct.

In the courts, the District of Columbia Court of Appeals and the Ninth Circuit Court of Appeals have taken unmistakably conflicting positions on the propriety of various "interest-balancing" approaches to regulating the application of U.S. antitrust laws to foreign conduct.¹ Within and without the American Law Institute, disagreement over the jurisdictional provisions of the proposed revisions to the Restatement of Foreign Relations Law continues to delay the Restatement's adoption.² And lastly, in the Con-

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[†]See Sennett & Gavil, *Extraterritorial Conduct Issue Ripe for Review*, Legal Times of Washington, Mar. 18, 1985, at 17, col. 1, for an earlier, abbreviated version of portions of this article.

1. *Contrast* Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) ("Laker Airways") with *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 53 U.S.L.W. 3895 (U.S. June 24, 1985) (No. 84-1761) (Justices White and Blackmun dissented indicating that they would have granted the petition) ("Timberlane III"). The designation of the Timberlane cases as "Timberlane I, II, & III," representing the initial Court of Appeals decision, the District Court decision on remand and the Court of Appeals decision following remand, is a convention adopted by the Ninth Circuit in Timberlane III and followed here to avoid confusion.

2. See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Draft No. 6, April 12, 1985) ("RESTATEMENT (REVISED)"); *ALI Defers Consideration of Draft Restatement of Foreign Relations Law*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1217, at 935 (May 30, 1985).

gress, consideration of a legislative solution to the issues raised by the conflict in the courts is rapidly progressing.³

The debate in all three forums proceeds from the assumption that the traditional "effects" doctrine⁴ fosters considerable friction between the U.S. and its trading partners by subjecting a wide variety of foreign conduct to the U.S. antitrust laws.⁵ To alleviate that friction, courts and commentators have proposed the adoption of an interest-balancing approach that would require courts to consider a laundry list of factors to determine whether as a matter of "international comity and fairness" it would be appropriate under the facts of a given case to exercise antitrust jurisdiction over a controversy based on foreign conduct.⁶

Part I of this article reviews the present status of interest-balancing in the courts, in the American Law Institute's latest proposed revisions to the Restatement and in Congress. Section A briefly examines efforts by the courts since the *Uranium* litigation⁷ to implement variations of that interest-balancing analysis, focusing in particular on the recent *Laker Airways* case and the Ninth Circuit's most recent *Timberlane* decision. Section B focuses on the development of the Restatement and explores its approach to interest analysis and its use of "prescriptive jurisdiction" as a concept that encom-

3. S. 397, 99th Cong., 1st Sess., 131 Cong. Rec. 1160-63 (Feb. 6, 1985). Hearings before the Senate Judiciary Committee commenced in late June and the Antitrust Section of the American Bar Association has filed a task force report qualifiedly endorsing the bill. *ABA Antitrust Law Section Endorses Most of Bill on Extraterritoriality*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1219, at 1022 (June 13, 1985).

4. The effects doctrine holds that U.S. antitrust jurisdiction can extend to foreign conduct that "affects" U.S. commerce and generally has been traced to *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("Alcoa"). For a good discussion of the development of the effects doctrine in the courts, see 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD*, 147-56 (2d ed. 1981).

5. For a sampling of foreign criticism of the reach of U.S. antitrust laws, see Pengilly, *Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View From "Down Under,"* 16 VAND. J. TRANSNAT'L L. 833 (1983); Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982); Debate, *Extraterritorial Application of U.S. Antitrust Law (Economic Imperialism or Protecting Competition Against Foreign Invasion?)*, 50 ANTITRUST L.J. 617 (1982); Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1 (1979). See also PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffin ed. 1979); 1 ATWOOD & BREWSTER, *supra* note 4, at 100-05; 1 W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 92-97 (3d ed. 1982); RESTATEMENT (REVISED) § 403, reporters' note 1; Symposium—*Transnational Litigation—Part II: Perspectives from the U.S. and Abroad*, 18 INT'L LAW. 773-803 (1984); Robinson, *Compelling Discovery and Evidence in International Litigation*, 18 INT'L LAW. 533 (1984).

6. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) ("Mannington Mills"); RESTATEMENT (REVISED) § 403(2).

7. See, e.g., *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979); 1 ATWOOD & BREWSTER, *supra* note 4, at 169-73.

passes the power of courts to determine cases or controversies. Lastly, section C analyzes S. 397, introduced in February of this year, which attempts to codify a modified interest-balancing approach that would require U.S. courts to dismiss antitrust actions when the court determines that the interests of the United States in enforcement are outweighed by the interests of adversely affected foreign nations.⁸

Part II more closely analyzes the various criticisms that have been leveled at interest balancing in the context of the two foci of the interest-balancing debate: (1) whether courts acting within the federal system unilaterally can adopt interest-balancing as a tool to temper the allegedly harsh reach of U.S. antitrust jurisdiction; and (2) whether the courts or Congress, regardless of their power to do so, should implement interest-balancing as a solution to the perceived problem of overbroad U.S. antitrust jurisdiction.

Part III concludes that the controversy over U.S. antitrust jurisdiction began as a political and diplomatic dialogue and should remain as such. Interest-balancing not only raises serious constitutional questions but is unwise as a policy matter and likely to generate more conflict than it resolves. Plunging courts into the arena of foreign affairs in the context of threshold jurisdictional inquiries can only lead to the further politicization of the judicial process and should be avoided. Comity considerations may, however, inform the courts in the exercise of their jurisdiction and serve as useful guidelines throughout the course of litigation.

I. Interest Balancing in the Courts, Restatement and Congress

A. DISAGREEMENT GROWS IN THE COURTS

1. *The Timberlane Cases*

The *Timberlane* case⁹ arose out of an American lumber company's unsuccessful efforts to establish a base of operations in Honduras for purposes of milling and exporting Honduran lumber to the United States. In the early 1970s Timberlane Lumber Company, an Oregon partnership engaged in the wholesale distribution of lumber in the United States, ventured to Honduras in search of new sources of lumber to import into the United States. Through two Honduran corporations principally owned by Timberlane's general partners, the company set out to purchase Honduran lumber, to be milled in Honduras and thereafter shipped to the United States. Although

8. The bill would, in part, amend the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, § 402, 96 Stat. 1233, 1246-47 (1982) (codified at 15 U.S.C. § 6a).

9. *Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n*, 549 F.2d 597 (9th Cir. 1976) ("*Timberlane I*"); *Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n*, 574 F. Supp. 1453 (N.D. Cal. 1983) ("*Timberlane II*").

Timberlane's original plans called for the construction of a new milling facility in Honduras, it instead purchased a substantial interest in an existing lumber mill that had previously been owned by the Lima family, one of three principal groups involved in milling lumber in Honduras at that time. Although the mill had experienced substantial financial difficulties and had ceased operation, Timberlane sought to revive it as an ongoing business.

At the time the mill was purchased by Timberlane, the Lima enterprise remained heavily indebted to the Bank of America National Trust and Savings Association, a wholly-owned Honduran subsidiary of the Bank of America. The bank also had substantial financial interests in the two competing Honduran lumber milling enterprises. Timberlane alleged that the two Honduran competitors and the bank conspired to eliminate Lima and later Timberlane from the production and export of Honduran lumber, in part by refusing to refinance the Lima mill's debt or to sell the bank's interests in the mill to Timberlane. Instead, the bank transferred its claims to Lima's competitors, apparently for nominal consideration, who thereafter proceeded to use the Honduran courts and other means to force closure of Timberlane's operations. In 1973, Timberlane filed a federal action and a California state unfair competition suit based on the conduct undertaken in Honduras.¹⁰

Timberlane I came before the Ninth Circuit in 1976 following the district court's dismissal of Timberlane's action based on the act of state doctrine and for want of subject matter jurisdiction. The court of appeals reversed on both grounds.¹¹ With respect to the issue of jurisdiction, the Ninth Circuit found that the lower court had erred by looking only at whether the challenged conduct had a "direct and substantial effect" on U.S. foreign commerce.¹² As an alternative, the court outlined what has now become well-known as the *Timberlane* tripartite test:

[T]he problem should be approached in three parts: 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

10. *Timberlane I*, 549 F.2d at 603-05; *Timberlane II*, 574 F. Supp. at 1455-59.

11. The court found the act of state doctrine inapplicable, since the "acts" in question were Honduran court orders prompted by private litigation. *Timberlane I*, 549 F.2d at 605-08. See also Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327 (1983). The defendants apparently did not argue for extraterritorial application of the *Noerr-Pennington* doctrine, which insulates court petitioning activity from antitrust attack under certain circumstances. See generally United States Department of Justice, *Antitrust Guide for International Operations* 62-63 (1977); 1 ATWOOD & BREWSTER, *supra* note 4, at 256-59; Hawk, *Act of State Doctrine, Noerr-Pennington Abroad and Foreign Government Compulsion Defense*, 47 ANTITRUST L.J. 987, 1000-01 (1978); Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1364-67 (5th Cir. 1983). For a brief review of the Revised Restatement's provisions concerning the act of state doctrine and foreign government compulsion, see Fugate, *Antitrust Aspects of the Revised Restatement of Foreign Relations Law*, 25 VA. J. INT'L L. 49, 65-71 (1984).

12. *Timberlane I*, 549 F.2d at 610.

Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?¹³

On remand, the lower court permitted extensive discovery and concluded once again in *Timberlane II* that the action should be dismissed for lack of subject matter jurisdiction.¹⁴

On appeal following remand, the Ninth Circuit affirmed the court's dismissal of Timberlane's action for lack of subject matter jurisdiction, though it criticized the district court for failing to address directly the *Timberlane I* factors.¹⁵ Citing *Timberlane I*'s tripartite test, the court of appeals posed the first issue as "[d]oes the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?" Quoting *Timberlane I*, the court held that this first prong of the test requires only "that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under [the antitrust] statutes."¹⁶ In order to avoid the need to resolve factual issues going to the merits of Timberlane's claims, the Ninth Circuit accepted plaintiff's allegations of anticompetitive effects in U.S. markets, finding that Timberlane had met this *de minimis* requirement.

Second, the court considered whether the conduct challenged was of "such a type and magnitude so as to be cognizable as a violation of the Sherman Act?" The Ninth Circuit rejected the argument that this second prong of *Timberlane I* requires "a showing of a 'direct and substantial' effect on the foreign commerce of the United States."¹⁷ According to the court, the only issue under this portion of its test is "whether the magnitude of the effect identified in the first part of the test rises to the level of a civil antitrust violation, *i.e.*, conduct that has a direct and substantial anticompetitive effect." Stated somewhat more accurately, did Timberlane allege effects "sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws?"¹⁸ Again, the Ninth Circuit had no difficulty finding this second prong to have been satisfied by the allegations of Timberlane's complaint.¹⁹

13. *Id.* at 615.

14. *Timberlane II*, 574 F. Supp. at 1460.

15. *Timberlane III*, 749 F.2d at 1383 & n.3. The District Court found, and the Court of Appeals agreed, that the defendants' motion was properly treated as one to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure rather than as a Rule 56 motion for summary judgment, despite the extensive record that had been generated through discovery and the extensive conclusions of fact which the court drew in order to resolve the "jurisdictional" question. *Timberlane II*, 574 F. Supp. at 1460-61; *Timberlane III*, 749 F.2d at 1381-82.

16. *Timberlane III*, 749 F.2d at 1383. Viewed in isolation, the court's treatment of this "first prong" would seem to be inconsistent with Sherman Act section 7's direct, substantial and reasonably foreseeable effect standard. 15 U.S.C. § 6a.

17. *Timberlane III*, 749 F.2d at 1383, quoting *Timberlane I*, 549 F.2d at 613.

18. *Timberlane III*, 749 F.2d at 1383.

19. *Id.*

With respect to the third prong of the *Timberlane* tripartite test, whether “[a]s a matter of international comity and fairness . . . the extraterritorial jurisdiction of the United States [should] be asserted to cover” the challenged conduct,²⁰ the Ninth Circuit instructed that *Timberlane I* requires consideration of the degree of conflict with foreign law or policy, the nationality of the parties and their principal places of business if corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of the activity’s effects on the U.S. as compared to other states, the presence of an explicit purpose to harm or affect American commerce, the foreseeability of such an effect, and the situs of the conduct principally giving rise to the violation.²¹ The court of appeals undertook its own review of the record evidence with respect to each of these factors, arguing that it was free on appeal to determine for itself controverted fact issues arising under the third prong of the *Timberlane* test since, in its view, resolution of a “policy judgment” under Rule 12(b)(1) “need not directly implicate the merits of the case.”²²

Finding that all but two of the seven factors disfavored the exercise of jurisdiction, the Ninth Circuit affirmed the district court’s dismissal of *Timberlane’s* action. It is clear from the court’s considerations, however, that its decision was based in large part on the mere fact of conflict with foreign law and the relative significance of the effects on United States foreign commerce as compared with the effects on the Honduran economy. Thus, the court concluded that application of U.S. antitrust law to the conduct in question would create “a potential conflict with the Honduran government’s effort to foster a particular type of business climate.”²³ Without stating any rationale or apparent justification for its conclusion, the court of appeals held that such a clear conflict of law or policy, “unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction over this dispute.”²⁴

The court also concluded that “[t]he insignificance of the effect on the foreign commerce of the United States when compared with the substantial

20. *Id.*

21. *Id.* at 1384–85.

22. *Id.* at 1382.

23. *Id.* at 1384. According to *Timberlane’s* complaint, the defendants’ actions included bribery of court officials, violence and the securing of perjured testimony. *Timberlane II*, 574 F. Supp. at 1459. It is certainly questionable whether the encouragement of such a “business climate” was the “policy” of Honduras and, even if it was, whether a U.S. court should so casually surrender its jurisdiction to avoid interfering with the implementation of such a “policy.” Indeed, one of the factors listed in the Revised Restatement is the degree to which regulation of the conduct challenged under the *domestic* law is generally accepted outside of the United States. RESTATEMENT (REVISED) § 403(2)(c). It would seem appropriate to apply the same standard to the foreign law or policy to which deference is urged.

24. *Timberlane III*, 749 F.2d at 1384.

effect in Honduras suggests federal jurisdiction should not be exercised.”²⁵ This conclusion apparently rested upon the court’s resolution of conflicting evidence indicating that Honduran lumber accounted for at most between three percent and four percent of total U.S. imports.²⁶ Arguably then, the Ninth Circuit may have reached the proper conclusion, but for the wrong reasons and with some violence to Rule 56.²⁷

2. *The Laker Case*

In *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,²⁸ the District of Columbia Circuit unambiguously rejected the use of *Timberlane*-style interest balancing early last year, holding that “[a]bsent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction.”²⁹ In so holding, the D.C. Circuit affirmed the district court’s assertion of jurisdiction and its entry of a preliminary injunction prohibiting the defendants, Belgian and Dutch airlines, from joining in a British suit instituted by two British airlines, also defendants in the U.S. action, against the plaintiff seeking to enjoin it from proceeding with its antitrust claims in the United States.³⁰

The saga of Laker Airways began with the introduction by Sir Freddie Laker of “no-frills” air passage between the United States and the United Kingdom in 1977. It was alleged that in response to Laker’s low priced transatlantic fares, the members of the International Air Transport Association (IATA), a trade association of the world’s largest air carriers that “substantially controlled” the prices for scheduled transatlantic air service, conspired to drive Sir Freddie from the market for transatlantic air service. Perceiving Laker’s operations “as a threat to their system of cartelized prices,” these members of IATA allegedly agreed to a schedule of pred-

25. *Id.*

26. *Id.* at 1385. In so holding, however, the court made numerous conclusions about the relevant markets and the impact of the defendants’ actions without the benefit of a full trial record. Although purporting to act under Rule 12(b)(1), the propriety of resolving disputed fact questions based on such a preliminary record highlights a serious flaw in the balancing approach.

27. This may have been responsible for the Supreme Court’s denial of *Timberlane*’s petition for a writ of certiorari.

28. 731 F.2d 909 (D.C. Cir. 1984). See also *British Airways Board v. Laker Airways Ltd.*, [1984] 3 W.L.R. 413; *Laker Airways Ltd. v. Pan American World Airways*, 1985-1 Trade Cas. (CCH) ¶ 66,390 (D.D.C. 1984). For a post-decision discussion of the *Laker* case by the author of the decision, see Wilkey, *United States of America*, in *Symposium on Transnational Litigation—Part II: Perspectives from the U.S. and Abroad*, 18 INT’L LAW. 779 (1984).

29. 731 F.2d at 955.

30. In July 1984, several months after the D.C. Circuit reached its decision, the House of Lords declined to enjoin Laker from proceeding with its American suit, acknowledging that the U.S. courts were appropriately exercising their jurisdiction under principles of international law. *British Airways Board v. Laker Airways Ltd.*, [1984] 3 W.L.R. 413.

atorily low fares with the intention of driving Laker out of business. They also were alleged to have paid secret commissions to travel agents who diverted customers from Laker, to have agreed to raise prices following Laker's demise and to have blocked Laker's attempt to reorganize. After reaching its peak in 1981, allegedly carrying one out of every seven passengers between the United States and the United Kingdom, Laker was forced into liquidation in early February 1982.³¹

The principal issue before the court on appeal concerned the propriety of the "antisuit injunction" issued by the district court, prohibiting Sabena and KLM from joining in the British action and from initiating any action on their own for similar relief anywhere else in the world.³² In a thorough presentation of the principles of jurisdiction over extraterritorial conduct,³³ Judge Wilkey, in the lengthy majority opinion, found that the lower court's issuance of the injunction was justified in order to protect the court's jurisdiction and on public policy grounds.³⁴ The court then rejected the arguments of appellants, KLM and Sabena, that the district court's injunction should be reversed based on considerations of international comity and fairness.

Initially, KLM and Sabena argued that the district court's injunction itself should not have issued in light of principles of comity. KLM and Sabena thus asserted that the antisuit injunction offended British interests as reflected in the antisuit injunction issued by the British courts limiting Laker's ability to proceed with its U.S. antitrust suit.³⁵ Accepting the underlying premise of the appellants' position, the court noted that the "central precept" of comity teaches that, "when possible, the decisions of foreign tribunals should be given effect in domestic courts. . . ."³⁶ Where the foreign act is "inherently

31. 731 F.2d at 916-17.

32. For a detailed review of the procedural history of the Laker dispute, see 731 F.2d at 917-21. Interestingly, Judge Starr dissented, arguing that the district court's injunction was unjustifiably broad in light of considerations of comity, because it prohibited KLM and Sabena from seeking redress from Laker's action in *any* court in the world. The dissent would have remanded for consideration of a narrower injunction, limited only to the courts of the U.K. *Id.* at 957-58 (Starr, J., dissenting). For the majority's response, see *id.* at 942-45.

33. The court criticized the convention of referring to "extraterritorial application of U.S. antitrust law" as inaccurate and misleading. If extraterritorial conduct has the requisite effect on U.S. commerce, the exercise of federal jurisdiction is not, strictly speaking, "an *extraterritorial* assertion of jurisdiction." 731 F.2d at 923 (emphasis in original) (footnote omitted). See also Robinson, *Conflicts of Jurisdiction and the Draft Restatement*, 15 L. & POL. INT'L BUS. 1147 (1983) (the term "extraterritorial" is not "conducive to dispassionate analysis").

34. 731 F.2d at 921-26. Utilizing the same nomenclature adopted by the Revised Restatement, the court generally avoided use of "subject matter jurisdiction," instead preferring to discuss the three aspects of jurisdiction in terms of jurisdiction to prescribe, to adjudicate and to enforce. *Id.* at 923; see also RESTATEMENT (REVISED) § 401; B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 19 (1979).

35. 731 F.2d at 939. As noted above, that injunction was ultimately dissolved by the House of Lords. See note 30 and accompanying text *supra*.

36. 731 F.2d at 937.

inconsistent with the policies underlying comity," however, no such deference is required. In the court's words, "[n]o nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. . . . [T]he obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act."³⁷

The court found that the British injunction was just such an act, undeniably intended to interfere with the properly invoked jurisdiction of a United States court. In contrast to such an "offensive" injunction, the U.S. court's antisuit injunction was "defensive," not designed to interfere with the British courts, but to protect the jurisdiction of the U.S. court.³⁸ Moreover, if the antitrust laws of the U.S. "were clearly intended to reach the injury charged in the complaint, . . . allowing the defendant's conduct to go unregulated could amount to an unjustified evasion of United States law injuring significant domestic interests."³⁹ In the court's view, the defendants' argument would require a U.S. court to surrender even its right to make the threshold determination that a given dispute is within its prescriptive jurisdiction.⁴⁰ Finally, to the extent KLM and Sabena argued that the conduct of the British Executive was entitled to deference, the court held that the issue was one "better left to the American Executive to negotiate."⁴¹

The *Laker Airways* defendants' second appeal to comity—that the U.S. court reconcile the obvious conflict between the United States and the United Kingdom by abandoning its claim to concurrent prescriptive jurisdiction—is the *Timberlane* argument and indeed this is where the D.C. Circuit and the Ninth Circuit most strongly conflict. In the D.C. Circuit's view, since Congress specifically authorized private treble damage actions by foreign corporations,⁴² and because *Laker's* jurisdictional contacts were sufficient to permit the legitimate exercise of prescriptive jurisdiction under section 7 of the Sherman Act, the issue before the court was whether there existed any ground upon which it could decline to exercise its jurisdiction.⁴³

37. *Id.* (footnote omitted).

38. *Id.* at 938.

39. *Id.*

40. *Id.* at 939.

41. *Id.* at 942 n.121. Indeed, at the apparent behest of the British government, the President instructed the Justice Department to abandon its grand jury probe of the facts underlying the *Laker* dispute. *President Reagan Halts Grand Jury Investigation of U.K.-U.S. Air Travel*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1191, at 929 (November 22, 1984).

42. Section 1 of the Clayton Act, 15 U.S.C. § 12, provides in pertinent part:

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. [emphasis added]

43. 731 F.2d at 945-46. The court noted the *Alcoa* case and argued that with the exception of the 1982 amendment to section 7 of the Sherman Act, 15 U.S.C. § 6a, Congress had not acted to

As in *Timberlane*, the defendants urged comity as that ground: "The suggestion has been made that this court should engage in some form of interest-balancing, permitting only a 'reasonable' assertion of prescriptive jurisdiction to be implemented."⁴⁴

The court's response to the arguments of KLM and Sabena is apparent from its opening volley: "Even as the political branches of the respective countries have set in motion the legislative policies which have collided in this litigation, they have deprived courts of the ability meaningfully to resolve the problem."⁴⁵ Thus, the court argued, interest-balancing, particularly where a court is asked to choose between inherently conflicting legal frameworks, "is hobbled by two primary problems: (1) there are substantial limitations on the court's ability to conduct a neutral balancing of the competing interests, and (2) the adoption of interest-balancing is unlikely to achieve its goal of promoting international comity."⁴⁶

Citing sections 403(2)(a) and (b) of the Revised Restatement, *Timberlane I* and *Mannington Mills*, the court admonished that some of the factors that have been included in the balancing calculus are "already evaluated" under the test for sufficient prescriptive jurisdiction.⁴⁷ Such factors as the relative effect on U.S. commerce, the nationality or principal business locations of the parties and the foreseeability of the impact on U.S. commercial interests are all properly considered in determining whether the challenged conduct had a direct, substantial and reasonably foreseeable effect on U.S. foreign commerce.⁴⁸

Aside from the effects factors, however, there are two categories of factors that *Timberlane*, *Mannington Mills* and the Revised Restatement would have the federal courts consider. First, there are what the D.C. Circuit considered "neutral" factors, "such as 'the extent to which another state may have an interest in regulating the activity,' and 'the likelihood of conflict with regulation by other states.'" According to the court, "[p]ursuing these inquiries only leads to the obvious conclusion that jurisdiction could be exercised or that there is a conflict, but does not suggest the best avenue of conflict resolution."⁴⁹ Indeed, this was a principal flaw in the Ninth Circuit's analysis in *Timberlane III*, where the mere existence of an alleged conflict was given almost conclusive effect. As the D.C. Circuit suggested in *Laker Airways*, such heavy reliance on the conflict between

modify the test of jurisdiction over extraterritorial conduct since the *Alcoa* case was decided nearly forty years ago. *Id.* at 946 & n.137.

44. 731 F.2d at 948, citing RESTATEMENT (REVISED) § 403 (footnote omitted).

45. 731 F.2d at 948.

46. *Id.*

47. *Id.* at 948 & n.145.

48. *Id.*

49. *Id.* at 949.

U.S. and foreign law simply begs the question whether jurisdiction should be exercised. If no such conflict exists, the justification for engaging in any kind of comity analysis will presumably be absent.⁵⁰ Conversely, the mere fact of a conflict should at most indicate that the exercise of U.S. antitrust jurisdiction may offend foreign interests and that other factors need to be considered. There is no reason why, as *Timberlane III* suggests, the fact of conflict alone should automatically lead to abandonment of U.S. antitrust jurisdiction in deference to foreign law.

Second, and more controversial, are the "political factors," *i.e.*, those factors whose consideration calls for inherently political as opposed to legal judgments.⁵¹ Although that line often may be difficult to discern, assessing the *relative* importance of conflicting regulations or the *degree* to which certain types of regulations are accepted or desirable clearly leads the courts into areas they have historically avoided.⁵² Such evaluations would force the courts to harken back to the days of substantive due process and evaluate the comparative merits of foreign and domestic legislation.⁵³ Moreover, in the *Laker Airways* court's view, neither an English nor an American court can "refuse to enforce a law its political branches have already determined is desirable and necessary."⁵⁴

The court also found itself institutionally incompetent to adjudicate the relative importance of U.S. and U.K. competition policies. Such an adjudication would at best be illusory since, as the court argued, "[a] proclamation by judicial fiat that one interest is less 'important' than the other will not ease a real conflict."⁵⁵ Moreover, an Article III court is "ill-equipped to 'balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate.'"⁵⁶

The D.C. Circuit seriously questioned, moreover, whether adopting the interest balancing approach would appreciably promote international comity. The court took note of the increasing volume of criticism among courts and commentators directed at interest-balancing, finding that in no instance had a court declined to exercise its prescriptive jurisdiction based on the

50. 731 F.2d at 954 n.175 ("the existence of conflict alone does not establish the judicial prerogative to relinquish prescriptive jurisdiction"). Cf. *Mannington Mills*, 595 F.2d at 1302 (Adams, J., concurring). Moreover, a distinction should be drawn between affirmatively conflicting antitrust policies, such as those at issue in *Laker Airways*, and policies that are passive or neutral with respect to antitrust issues such as those of Honduras as reflected in *Timberlane*. In the latter case, no real "conflict" with U.S. law may exist.

51. See, e.g., RESTATEMENT (REVISED) § 403(2)(c), (e), (f), (g), (h); *Timberlane III*, 749 F.2d at 1384-85 (factors (a), (d), (g)); *Mannington Mills*, 595 F.2d at 1297-98 (factors (3), (6), (9)).

52. See notes 124-28 and accompanying text *infra*.

53. 731 F.2d at 949.

54. *Id.*

55. *Id.* at 949.

56. *Id.* at 950, quoting *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1978).

interest-balancing analysis where it could not have reached the same result based on the lack of effect of the challenged activity on U.S. commerce.⁵⁷ In the court's words, "[w]hen push comes to shove, the domestic forum is rarely unseated."⁵⁸

The court also questioned whether "comity" is indeed an accepted principle of international law. Acknowledging that U.S. courts will generally abide by principles of international law absent a contrary indication from the Congress,⁵⁹ the D.C. Circuit found wanting any support either for the recognition of comity as such a principle or for the notion that concurrent prescriptive jurisdiction is somehow an inherent evil to be avoided.⁶⁰ Absent any "neutral principles on which to distinguish judicially the reasonableness of the concurrent, mutually inconsistent exercises of jurisdiction in this case," the court refused to adopt any such rule on its own initiative.⁶¹

Finally, there is the question whether a federal court should "defuse unilaterally" a confrontation with the foreign law by "jettisoning our [the U.S. court's] jurisdiction."⁶² Arguing that "courts are not organs of political compromise," the D.C. Circuit again declined to dissolve the district court's injunction. Expressly invoking the constitutional principle of separation of powers for the first time in its opinion as the basis for its objection to interest-balancing, the court concluded:

[B]oth institutional limitations on the judicial process and Constitutional restrictions on the exercise of judicial power make it unacceptable for the Judiciary to seize the political initiative and determine that legitimate application of American laws must evaporate when challenged by a foreign jurisdiction.⁶³

3. *The Conflict*

Laker Airways thus stands in stark contrast to *Timberlane III* in both the depth of its analysis and its conclusions about the use of interest-balancing. Although *Laker Airways* acknowledges the role that interest-balancing may

57. 731 F.2d at 950-51 & n.156. See also A. NEALE & D. GOYDER, *THE ANTITRUST LAWS OF THE U.S.A.* 346-56 (3d ed. 1980) (questioning whether *Timberlane* approach is sufficiently responsive to foreign concerns).

58. 731 F.2d at 951 & n.158 (footnote omitted).

59. 731 F.2d at 950. See also Henkin, *International Law As Law in the United States*, 82 MICH. L. REV. 1555 (1984).

60. 731 F.2d at 950-52. As will be further discussed *infra*, Judge Wilkey's comments about the treatment of concurrent prescriptive jurisdiction prompted a significant exchange between His Honor and the reporters of the Revised Restatement. That dialogue yielded important changes in the latest version of the Restatement. See notes 81-84 and accompanying text *infra*.

61. *Id.* at 953 (footnote omitted).

62. *Id.*

63. *Id.* at 954 (footnote omitted). The *Laker Airways* case now appears to be headed towards settlement. See *Laker's Liquidator Announces Terms of Agreement That Could Settle Suits*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1224, at 185 (July 18, 1985). For a general discussion of the role of courts in foreign affairs, see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* at 205-24 (2d ed. 1975).

play when direct conflicts *between courts* arise, it clearly rejects interest-balancing as an element of the prescriptive jurisdictional equation. It thus became the first appellate court squarely to reject *Timberlane*'s tripartite test for determining when U.S. antitrust jurisdiction should be applied to foreign conduct.⁶⁴ The conflict between *Timberlane III* and *Laker Airways* in turn is likely to fuel increasing disparities among the circuits as they face antitrust challenges to foreign conduct.

Laker Airways failed to draw an important distinction, however, between the approach taken by the Revised Restatement and *Timberlane* on the one hand and *Mannington Mills* on the other. In *Mannington Mills*, the Third Circuit perceived itself as faced with two questions: (1) do we have jurisdiction, and (2) assuming we have jurisdiction, should we exercise it in light of international comity.⁶⁵ Conceptually, therefore, the *Mannington Mills* approach is one of unabashed abstention—assuming that a court has the jurisdictional power to adjudicate a controversy, it may nevertheless decline to exercise that jurisdiction.⁶⁶

It was to avoid this appearance of abstention that the Revised Restatement and the *Timberlane* cases incorporated the “direct, substantial and reasonably foreseeable effects” test into their jurisdictional rule of reason. That proposed unitary test would weigh traditional “effects” factors along with international comity and other interests to determine whether the assertion of “prescriptive jurisdiction” would be “reasonable.” Indeed, appreciating this inclusion is the key to comprehension of the jurisdictional rule’s reason for being—rather than two questions, there is just one: does the federal court have prescriptive jurisdiction? To decide that issue, a court must weigh all of the supposedly relevant factors, including whether the conduct in question had a direct, substantial and reasonably foreseeable effect on United States foreign commerce. There is no preliminary decision regarding jurisdiction based solely on the statutory language.⁶⁷

64. *But see* National Bank of Canada v. Interbank Card Assoc., 666 F.2d 6, 8 (2d Cir. 1981) (indicating that “pertinence” of third prong of *Timberlane* test may be open to question); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979). *Contra* Montreal Trading Ltd. v. AMAX, Inc., 661 F.2d 864, 869 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982) (endorsing *Timberlane* approach). It is notable that *Timberlane III* neither acknowledges the existence of *Laker Airways* nor makes any attempt to address the D.C. Circuit’s criticism of the jurisdictional rule of reason.

65. 595 F.2d at 1291–92, 1294–98. *See also* *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255 (7th Cir. 1980).

66. 595 F.2d at 1291–92. *See generally* 1 ATWOOD & BREWSTER, *supra* note 4, at 166–69; 1 W. FUGATE, *supra* note 5, at 78–80.

67. *See, e.g.,* Swan, *International Antitrust: The Reach and Efficacy of United States Law*, 63 OR. L. REV. 177, 203–08 (1984); Craig, *Extraterritorial Application of the Sherman Act: The Search for a Jurisdictional Standard*, 7 SUFFOLK TRANSNAT’L L. J. 295, 314–18 (1983). The continued use of “subject matter jurisdiction” is thus viewed as a throw-back to an outmoded conceptual framework typified by *Mannington Mills*. Substitution of “jurisdiction to pre-

B. THE RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES

The Restatement (Second) of the Foreign Relations Law of the United States was developed over a period of nearly ten years before its final adoption in 1965.⁶⁸ Divided into four parts, jurisdiction, recognition, international agreements and responsibility of states for injuries to aliens, the Restatement (Second) sought to synthesize the most essential aspects of U.S. foreign relations law which, in its view, comprehended both international law and domestic U.S. law to the extent domestic U.S. law gives effect to international law or concerns foreign relations.⁶⁹

The Revised Restatement, although standing "on the shoulders"⁷⁰ of the Restatement (Second), represents a much more ambitious undertaking—one whose ambitiousness is no doubt a reflection of the increasing importance of the rule of law in foreign relations. In contrast to the four part division of the Restatement (Second), the Revised Restatement is organized into nine parts and is far more comprehensive in its treatment of foreign relations issues than was its predecessor.⁷¹

In the area of jurisdiction and, more particularly, in the area of U.S. antitrust jurisdiction, the Revised Restatement would work a significant change in the Restatement (Second)'s treatment of foreign conduct challenged under U.S. antitrust law. As one commentator has noted, however, "[r]ather than clarifying the current law in this area, the Reporters have rather muddled the waters in their treatment of antitrust jurisdiction."⁷²

Section 40 of the Restatement (Second) provides that, where the rules of law prescribed by two states with valid claims to prescriptive jurisdiction would "require inconsistent conduct upon the part of a person" subject to both states' jurisdiction, those states should "consider, in good faith, mod-

scribe," to "adjudicate" and to "enforce" is thus favored by most proponents of the jurisdictional rule and has been adopted by the Revised Restatement. See generally Lowenfeld, *Antitrust, Interest Analysis, and the New Conflict of Laws*, 95 HARV. L. REV. 1976, 1978-84 (1982) (reviewing J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (2d ed. 1981)); *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 884-85 n.7 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983).

68. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES VII (1965) ("RESTATEMENT (SECOND)"). See also Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7, 13 (1984).

69. RESTATEMENT (SECOND) IX & §§ 1, 2.

70. RESTATEMENT (REVISED) I.

71. The nine parts are: (1) International Law and Its Relation to United States Law; (2) Persons in International Law; (3) International Agreements; (4) Jurisdiction and Judgments; (5) The Law of the Sea; (6) The Law of the Environment; (7) Protection of Persons (Natural and Judicial); (8) Selected Law of International Economic Relations; and (9) Remedies for Violations of International Law. The jurisdictional provisions discussed here are contained in part IV.

72. Fugate, *supra* note 11, at 50. For a good discussion of the securities law aspects of the Revised Restatement, see Goelzer, Stillman, Walter, Sullivan & Michael, *The Draft Revised Restatement: A Critique From a Securities Regulation Perspective*, 19 INT'L LAW. 431 (1985).

erating the exercise of [their] enforcement jurisdiction," by weighing five factors: (1) the vital national interests of each of the states; (2) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; (3) the extent to which the required conduct is to take place in the territory of the other state; (4) the nationality of the person; and (5) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.⁷³ By its terms, therefore, section 40 only applies to circumstances of conflicting, concurrent "jurisdiction to prescribe" where the exercise of both states' enforcement jurisdiction would require inconsistent conduct on the part of a person subject to the jurisdiction of both states.⁷⁴ It prescribes a rule of comity, intended to moderate enforcement jurisdiction; it does not directly limit prescriptive jurisdiction as a matter of international law.

Section 403 of the Revised Restatement would substitute the concept of "reasonableness" for the Restatement (Second)'s principle of comity, refocusing the relevant inquiry on the reasonableness of a given state's jurisdiction to prescribe as opposed to the moderation of its enforcement through the exercise of comity.⁷⁵ As one commentator has argued, "this isn't a matter of comity as the idea is set forth in section 40 of the present *Restatement*. This is a legal disability under international law."⁷⁶

Section 403 sets forth the Revised Restatement's general formula for limiting the reach of U.S. law, *i.e.*, the limit of legitimate exercise of U.S. jurisdiction to prescribe. Although some basis in conduct may exist for invoking that jurisdiction under section 402,⁷⁷ section 403(1) instructs legislatures, courts and administrative bodies to find jurisdiction wanting when its invocation would be "unreasonable." Unreasonableness is determined

73. RESTATEMENT (SECOND) § 40 (emphasis added).

74. Fugate, *supra* note 11, at 63.

75. See, *e.g.*, Maier, *supra* note 68, at 9-10.

76. *The Draft Restatement of the Foreign Relations Law of the United States (Revised)*, 76 AM. SOC'Y INT'L L. PROC. 184, 196 (1982) (comments of John Houck). See also RESTATEMENT (REVISED) § 403, reporter's note 10.

77. Section 402 provides:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1)(a) conduct a substantial part of which takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory which has or is intended to have substantial effect within its territory;
- (2) the activities, status, interests or relations of its nationals outside as well as within its territory; or
- (3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or a limited class of other state interests.

RESTATEMENT (REVISED) § 402. Section 402(1)(c) acknowledges the "effects" doctrine, although with some qualification. *Id.*, comment d. See also RESTATEMENT (REVISED) § 415, comment d (taking no position as to whether a threatened effect on U.S. commerce alone would justify the exercise of U.S. antitrust jurisdiction); RESTATEMENT (SECOND) § 18.

by balancing a list of unranked factors which, in part, encompass and reiterate the underlying U.S. statutory prerequisites for the exercise of U.S. antitrust jurisdiction, *i.e.*, that the conduct in question produce a direct, substantial and reasonably foreseeable effect on U.S. commerce:

(2) Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of the regulation in question to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by other states.⁷⁸

This multifactor analysis is incorporated by reference in section 415, "Jurisdiction to Apply Antitrust Laws," and thereby made directly applicable to U.S. antitrust jurisdiction.⁷⁹

The jurisdictional provisions of the Revised Restatement, and the use of interest-balancing in the context of antitrust jurisdiction generally, have been the subject of extensive debate and commentary.⁸⁰ More recently, the

78. RESTATEMENT (REVISED) § 403(2).

79. Section 415 provides:

(1) Any agreement in restraint of United States trade made in the United States, and any conduct or agreement in restraint of such trade carried out in significant measure in the United States, is subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct.

(2) Any agreement in restraint of United States trade made outside of the United States, and any conduct or agreement in restraint of such trade carried out predominantly outside of the United States, is subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

RESTATEMENT (REVISED) § 415. See also *id.*, comment a; Fugate, *supra* note 11, at 56-65.

80. See, e.g., Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1312-14 (1985); Maier, *supra* note 68; Fugate, *supra*

dialogue concerning the Restatement has focused on its apparent suggestion that, in any given case, only one state will have a legitimate claim to the reasonable exercise of prescriptive jurisdiction. In previous drafts of the Restatement, section 403's balancing test could have been viewed as a tool for determining which state had such a claim.⁸¹ The latest revisions to section 403, however, clarify that it may be reasonable for more than one state to exercise prescriptive jurisdiction in a given set of circumstances.⁸² Professor Maier argues that now the reasonableness test "embodied in section 403(1) and (2), clearly indicates only that meeting a threshold of reasonableness is a prerequisite to jurisdiction, not that solely the state with the most reasonable relationship to a transaction or event may have jurisdiction as a matter of either international or domestic law."⁸³ These changes were prompted in large part by the debate sparked by *Laker Airways*.⁸⁴

The question remains, however, as to the underlying import of section 403, *i.e.* that courts will engage in the same kind of interest-balancing as will Congress and the Executive in determining when the exercise of U.S. prescriptive jurisdiction would be reasonable.⁸⁵ Neither section 403 nor section 415, however, draws any distinction between the use of the proposed approach by the courts and by Congress or the Executive. This flows directly

note 11; Dunfee & Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for An Interim Solution*, 45 OHIO ST. L. J. 883 (1984); Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783 (1984); Note, *Reasonableness As A Limit To Extraterritorial Jurisdiction*, 62 WASH. U. L. Q. 681 (1984); Swan, *supra* note 67, at 196-216; Shenefield, *Extraterritoriality in Antitrust*, 15 L. & POL. INT'L BUS. 1109 (1983); Robinson, *supra* note 33; Craig, *supra* note 67; 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 (1983); Maier, *Interest-Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350 (1983); Kadish, *Comity and the International Application of the Sherman Act: Encouraging the Courts to Enter the Political Arena*, 4 NW. J. INT'L L. & BUS. 130 (1982); Lowenfeld, *supra* note 67; Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500 (1981); Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439 (1981); and Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336 (1980).

81. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 403 (Tent. Draft No. 2, March 27, 1981). See also Letter from Hon. Malcolm R. Wilkey to Professor Louis Henkin (Apr. 24, 1984), reprinted in Maier, *supra* note 68, at 43; Robinson, *supra* note 33, at 1153-54.

82. RESTATEMENT (REVISED) § 403(3) & comment d.

83. Maier, *supra* note 68, at 41.

84. *Id.* at 33-40. Professor Maier perhaps goes too far by suggesting that these changes bring the Revised Restatement full circle to a refined version of the comity approach of section 40. *Id.* at 40. Section 403 remains a test of prescriptive jurisdiction and is not, as is section 40, designed merely to temper enforcement based on that jurisdiction. See generally Fugate, *supra* note 11, at 62-65.

85. Indeed, Professor Maier points out that even the latest draft of section 403 "does not . . . address the problem raised by Judge Wilkey, and by this author, that the judicial forum is an inappropriate forum for balancing many of the national interests involved in these cases." Maier, *supra* note 68, at 39. See also Maier, *supra* note 80, at 597.

from section 401, which treats courts, legislatures and the executive alike for purposes of defining and limiting a state's jurisdiction to prescribe.

Section 401 describes a state's authority in terms of three categories of jurisdiction:

Under international law, a state is subject to limitations on its authority to exercise

(1) "jurisdiction to prescribe," *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, *or by determination of a court*;

(2) "jurisdiction to adjudicate," *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, and whether or not the state is a party to the proceedings; and

(3) "jurisdiction to enforce," *i.e.*, to induce or compel compliance or punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.⁸⁶

This division of jurisdiction into three "compartments" reflects a substantial change from the Restatement (Second), which viewed jurisdiction in terms of two categories, jurisdiction to prescribe and jurisdiction to enforce.⁸⁷ Moreover, the Restatement (Second) did not include court determinations within its definition of jurisdiction to prescribe, but rather viewed such activities as an aspect of enforcement jurisdiction.⁸⁸ Although the Restatement (Revised) acknowledges that there are substantial differences in the limitations of a state's jurisdiction to prescribe, to adjudicate and to enforce, the drafters nevertheless include court determinations within the Restatement's definition of jurisdiction to prescribe. Through sections 403 and 415, the Restatement builds on that definition, by expecting courts, legislatures and the executive alike to utilize the same multifactor balancing test in determining when, as a matter of international law, the exercise of U.S. prescriptive jurisdiction in the antitrust context would be reasonable. As will be seen, by so doing, the Reporters of the Revised Restatement plant the seed of a serious conceptual pitfall to the rule of jurisdiction proposed in section 403, one that raises questions about the legitimacy and workability of the Revised Restatement within the federal context.

C. CONGRESS ATTEMPTS TO CODIFY TIMBERLANE: S. 397

In February of this year, Sen. Dennis DeConcini (D. Ariz.) introduced S. 397, the "Foreign Trade Antitrust Improvements Act of 1985."⁸⁹ The bill

86. RESTATEMENT (REVISED) § 401 (emphasis added). *See also* Maier, *supra* note 80, at 582.

87. RESTATEMENT (SECOND) §§ 6-7. *See also* FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1315-18 (D.C. Cir. 1980). The reporters do caution, however, that the three categories of jurisdiction set forth in section 401 are not intended to be rigid, "discrete conceptual categories." RESTATEMENT (REVISED) § 401, comment a.

88. RESTATEMENT (SECOND) § 6, comment a; RESTATEMENT (REVISED) § 401, reporters' note 2.

89. S. 397, 99th Cong., 1st Sess., 131 CONG. REC. 1160-63 (daily ed. Feb. 6, 1985). Section 1 of the bill sets forth its short title.

is divided into five sections and would amend various provisions of the Sherman and Clayton Acts in order to, in the words of its sponsor, "rationalize further the application of U.S. antitrust law to U.S. foreign trade by supplementing the provisions of the 1982 Foreign Trade Antitrust Improvements Act. . . ."⁹⁰

Section 2 of the bill would amend section 7 of the Sherman Act⁹¹ by adding a new section "(b)" that would require a court faced with a motion to dismiss for lack of subject matter jurisdiction as a preliminary matter, without permitting any discovery or other proceedings unrelated to the motion, to proceed with the motion prior to any determination on the merits. The bill makes this presumably expedited procedure "the duty" of the judge designated to hear the case.⁹² According to Sen. DeConcini's statement accompanying the bill, the section

. . . works no substantive change in the 1982 Act's provisions concerning antitrust subject matter jurisdiction. Instead it is directed to the procedural difficulties that arise in attempting to give this language its intended effect. Defendants to antitrust actions often find that the courts are reluctant to consider whether they have subject matter jurisdiction over a dispute until after the parties have largely completed their discovery of facts from one another and from third parties.⁹³

The provisions of section 2 thus seek to address the complaints that have been directed not only at the scope of U.S. antitrust jurisdiction, but at the U.S.'s "unparalleled provisions for wide-ranging pretrial discovery."⁹⁴

The most significant change intended by the bill is reflected in section 3 which would add a new section to the Clayton Act, section 21, mandating interest-balancing by a court faced with an antitrust action set in the context of international trade. The section provides, in part:

Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws and involving trade or commerce with a foreign nation, the court shall enter a judgment dismissing such action whenever it determines that *the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action*. Upon a request by the court, the Attorney General shall appear to set forth the views of the United States as to the effects of the action on the interests of the United States and on any affected foreign nation.⁹⁵

90. *Id.* at 1161.

91. 15 U.S.C. § 6a. The 1982 Act amended the substantive provisions of the Sherman and FTC Acts to clarify that their prohibitions only apply to foreign conduct having a "'direct, substantial and reasonably foreseeable effect' on domestic commerce or domestic exports" of a U.S. person. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 2 (1982).

92. 131 Cong. Rec. at 1161.

93. *Id.* It is ironic that this precise criticism has been leveled at the interest-balancing approach, whose laundry list of factors will necessarily require discovery of numerous issues including the views of the U.S. and relevant foreign governments. See, e.g., Laker Airways, 731 F.2d at 950. See also notes 135-40 and accompanying text *infra*.

94. 131 Cong. Rec. at 1162.

95. *Id.* at 1161 (emphasis added). The section also contains a parallel provision to the

According to Sen. DeConcini, section 3 of the bill is "intended to codify, and improve the operation of, the 'jurisdictional rule of reason' in private antitrust actions involving commerce with foreign nations."⁹⁶ Although the section clearly is intended to embrace *Timberlane*, it deliberately stops short of specifying the factors relevant to the interest balancing inquiry. Choice of relevant factors is left to the courts.⁹⁷

In his statement accompanying S. 397, Sen. DeConcini suggests three possible criticisms of the *Timberlane*-style approach that S. 397 would mandate: (1) some of the factors that have been considered in connection with interest balancing may not be "useful" in "determining which nation is most affected by the parties' business conduct"; (2) the court may not be well suited for the task of balancing national interests; and (3) the jurisdictional rule of reason is not an accepted rule of international law.⁹⁸

In response to the first of these anticipated criticisms, the senator points out that the bill does not endorse any particular list of factors, but rather "rests on the finding that the kinds of factors enumerated in the leading decisions and the authoritative commentaries can properly and usefully be considered by antitrust courts in balancing U.S. and foreign interests."⁹⁹ Of course, this merely begs the question how courts are to administer the mandated test and wholly fails to respond to the criticism even as character-

proposed amendment to section 7 of the Sherman Act that would require the court to expedite treatment of a motion to dismiss brought under the section. *Id.* at 1162.

96. *Id.* The provision would not apply to actions brought by the government, which is presumed to engage in a similar balancing of interests as a matter of prosecutorial discretion. Where "prosecutorial zeal threatens foreign interests," the Executive remains able to "remedy" the situation. *Id.* Indeed, concern over second-guessing by the courts prompted the government to request further study time from the American Law Institute prior to adoption of the Revised Restatement. Unlike S. 397, the Restatement as it now stands would not excuse the government from having to justify the exercise of jurisdiction through the balancing process in the courts, regardless of any similar, internal governmental efforts that preceded the filing of suit.

97. *Id.* at 1162. See also RESTATEMENT (REVISED) § 403, comment b (list of factors in section 403(2) not intended to be exhaustive).

98. 131 Cong. Rec. at 1162. See also *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. (June 21, 1985) (statement of Senator Thurmond) (listing as issues requiring exploration: (1) the potential for intragovernmental policy conflicts; (2) the potential for intradepartmental policy conflicts; (3) the ability of courts to engage in interest balancing; (4) the bill's requirement that, if asked, the Attorney General "shall appear" to set forth the government's views; and (5) the impact of the bill on private antitrust enforcement). Neither Sen. DeConcini nor Sen. Thurmond raise the issue of the bill's constitutionality. Arguably, if interest-balancing would require the judiciary to exercise a function allocated by the Constitution to Congress or the Executive, the Congress could not constitutionally delegate that authority to the courts. Indeed, the Supreme Court has demonstrated its willingness to strike down attempts by the Congress to alter the constitutional scheme of compartmentalized functions. See, e.g., *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (one house veto unconstitutional delegation of legislative power); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (bankruptcy courts unconstitutional delegation of the judicial power).

99. 131 Cong. Rec. at 1162.

ized by Sen. DeConcini. Courts are left with virtually no guidance as to what factors are significant in the opinion of the Congress and as to the relative significance of different factors. Such an unguided approach likely will result in courts making dispositive either the mere fact of conflict, as arguably did the Ninth Circuit in *Timberlane III*, or the effect on U.S. commerce. In the former case, the goal of enlightened analysis will hardly have been achieved; in the latter case, the act will prove ineffectual. Indeed, this lack of guidance in part prompted the Department of Justice and the Department of State to oppose the bill, fearing that the open-ended test proposed by section 3 would invite the courts to enter the arena of foreign affairs—an arena that in their view should remain the province of the Executive.¹⁰⁰

Second, acknowledging that complaints from courts and commentators regarding the limitations of the judiciary are the “most serious criticism,” the Senator offers two responses. First, citing *Timberlane III*, he argues that “‘political’ considerations” are not likely to play an important role in balancing. The Senator also argues that any difficulties in weighing political considerations are alleviated by the bill’s provision that a court may request from the attorney general, and the attorney general is obligated to supply to the court, a statement of the government’s views as to the relevant political considerations in a given case.¹⁰¹

The Senator’s first response to the judicial limitations criticism, that political considerations are not likely to play an important role in the balancing process, ignores the reality of interest-balancing. Its reason for being is political tension between the U.S. and the state whose nationals have been made defendants in a U.S. court or in whose territory the challenged conduct took place. The nature of the controversy is necessarily political and diplomatic.¹⁰²

100. *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. (June 21, 1985) (statement of Abraham D. Sofaer, legal adviser, Department of State, at 8–10; statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, at 9–11). The Justice Department would limit the courts’s role to considering “objective” factors, such as, whether the challenged conduct had direct, substantial and reasonably foreseeable effects on U.S. domestic or import commerce, whether enforcement is likely to achieve compliance, whether there was intent to harm or affect American commerce, the foreseeability of such effects and the relative significance of those effects in the U.S. and abroad. “Political” issues would be left to the Executive. *See, e.g.*, RESTATEMENT (REVISED) §§ 403(2)(c), (e), (f), (g) and (h).

101. 131 Cong. Rec. at 1162.

102. Sen. DeConcini’s citation to *Timberlane III* illustrates the point. The Ninth Circuit’s heavy reliance on “the degree of conflict with foreign policy” required it to make a fundamentally political assessment of Honduras’ policies with respect to anticompetitive activities. Thus, as noted above, the court concluded: “The application of United States antitrust law in this case creates a potential conflict with the Honduran government’s effort to foster a particular type of business climate.” *Timberlane III*, 749 F.2d at 1384. Such assessments of what will and what will not offend foreign governments clearly cannot be viewed as nonpolitical or even apolitical.

Sen. DeConcini's second response, that any institutional deficiencies faced by the courts in assessing political factors can be cured by providing the courts with direct access to the attorney general, is also unpersuasive. First, the implication of the relevant bill provisions is that the executive branch can feed the court the political assessment it needs only to have the court parrot that assessment and abide by it in its decision on the jurisdictional question. This appearance of an executive/judicial consortium would be even more pronounced in the event a foreign state chooses not to express its views. Yet, the purpose of interest-balancing in part is to permit the courts to make an independent assessment of U.S. and foreign interests, not to turn them into a voice of the Executive.¹⁰³

Moreover, requiring the attorney general to provide the government's views raises additional, serious questions. There may be instances where for diplomatic or other reasons the government would prefer not to make a public assessment as to the policies of a given foreign state.¹⁰⁴ For these reasons it would be advisable to make the attorney general's participation in any case as *amicus curiae* optional.¹⁰⁵

Lastly, Sen. DeConcini urges his colleagues to accept "the core concern of the jurisdictional rule of reason" as a principle of international law.¹⁰⁶ At best, however, the degree to which *Timberlane*-style balancing and the "principle of reasonableness" generally are considered to constitute a rule of international law remains subject to debate.¹⁰⁷

Section 4 of the bill would amend section 12 of the Clayton Act by adding a new section that "is intended to remove any uncertainty that the well-

103. Of course, it is common practice for the Supreme Court in the domestic context to seek the views of the Justice Department regarding petitions for writs of certiorari filed in private antitrust and other actions.

104. This potentiality again highlights the necessarily political nature of the assessment process being forced upon the courts.

105. Indeed, this was the conclusion of the Task Force appointed by the Antitrust Section of the American Bar Association to study S. 397. The Task Force Report recommends making court solicitation of government views mandatory, but participation by the attorney general optional. *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. (June 21, 1985) (American Bar Association Section of Antitrust Law, Report on S. 397, the Foreign Trade Antitrust Improvements Act of 1985, at 23).

106. 131 Cong. Rec. at 1162. In so concluding, Sen. DeConcini heavily relies upon Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 AM. J. INT'L L. 783 (1984). Although Sen. DeConcini is careful not to overstate Professor Meessen's conclusions, his argument strongly suggests that international law supports *Timberlane*-style balancing as endorsed by S. 397. Yet, Professor Meessen clearly concludes that neither *Timberlane* nor section 403 of the REVISED RESTATEMENT reflect international law. *Id.* at 802 ("Timberlane is too open a rule to be operable on the level of international law"). *But see* RESTATEMENT (REVISED) § 403, comment a.

107. *See, e.g.*, *Laker Airways*, 731 F.2d at 950; Robinson, *supra* note 33, at 1152 (arguing that section 403 of the Revised Restatement "does not accurately reflect the state of international law"); Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487 (1985).

established doctrine of *forum non conveniens* . . . is applicable to antitrust suits involving trade or commerce with foreign nations."¹⁰⁸ According to Sen. DeConcini:

Under this doctrine, a court may decline jurisdiction over a lawsuit, and send the plaintiff to an alternative forum, *including a foreign forum*, where trial of the lawsuit in the other forum would better serve the overall convenience of the parties and the courts and would be in the interests of justice.¹⁰⁹

This provision of the bill would effectively overrule several decisions of the lower courts in which *forum non conveniens* was rejected as a legitimate basis for dismissal of an antitrust action where the alternative forum was a foreign court.¹¹⁰ In Sen. DeConcini's view, the availability of this additional option will aid the courts in lessening the tensions that may be prompted by the exercise of U.S. antitrust jurisdiction.

Forum non conveniens, however, is extremely unlikely to assist in the resolution of difficult cases of conflicting jurisdiction. A prerequisite for invocation of the doctrine is the adequacy of the alternate forum.¹¹¹ In the antitrust area, however, since the source of conflict likely will be the foreign state's rejection of U.S. antitrust principles, no adequate alternate forum will be available.¹¹²

The final provision of the bill, section 5, would add yet another tool to the federal courts's arsenal of comity weapons. The section would permit courts to limit a private party's recovery to actual damages, interest and litigation costs, including attorneys fees, if three conditions are met: (1) the claim must "result from conduct occurring in the course of trade or commerce with a foreign nation," (2) the claim must "affect adversely and substantially the interests of a foreign nation," and (3) it must be shown that the adverse impact of the claim "would be substantially reduced" if the plaintiff's recovery was so limited.¹¹³

108. 131 Cong. Rec. at 1162. Sen. DeConcini cites *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), as an example of the approach intended to be codified.

109. *Id.* (emphasis added).

110. See, e.g., *Industrial Investment Development Corp. v. Mitsui Co.*, 671 F.2d 876, 890-91 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983); *Laker Airways Ltd. v. Pan American Airways*, 568 F. Supp. 811, 817-18 (D.D.C. 1983).

111. *Piper Aircraft*, 454 U.S. at 254 ("if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice") (footnote omitted). This fact prompted the Laker Airways court to reject the *forum non conveniens* approach. *Laker Airways*, 568 F. Supp. at 817-18.

112. The Department of Justice indicated its skepticism about the effectiveness of section 4 of the bill for this precise reason. *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Senate Committee on the Judiciary* (June 21, 1985) (statement of Charles F. Rule, acting assistant attorney general, Antitrust Division, at 6) ("[a]lthough we support the intent of [the *forum non conveniens* provision], we do not believe that [it is] likely to have a very significant practical effect"). But see Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693 (1985).

113. 131 Cong. Rec. at 1161.

The provision is prompted by the perception that the treble damage remedy is one of the sources of foreign criticism of U.S. antitrust law.¹¹⁴ The section, however, is subject to the same criticism that has been voiced concerning the jurisdictional rule of reason—it places courts in the position of gauging a foreign nation's response to the possible imposition of treble damages on persons subject to that state's jurisdiction without any guidance as to the methods to be utilized for making that determination. It also invites courts to enter the arena of foreign affairs, placing themselves in a position of in effect having to negotiate with a foreign state as to the remedy to be imposed on persons subject to its jurisdiction. Although limiting the treble damage remedy may be a valuable concession to foreign criticism of U.S. antitrust law, a more objective standard should be developed for use by the courts.¹¹⁵

II. Constitutional Authority and Judicial Expertise

The lurking issues posed by *Timberlane III*, the Revised Restatement and S. 397 remain—should courts, either on their own or at the behest of Congress and the Executive, go beyond the “direct, substantial and reasonably foreseeable” effects standard of the Foreign Trade Antitrust Improvements Act of 1982¹¹⁶ to dismiss federal antitrust actions based on a balancing of national interests and other factors. There is the question of constitutional authority and the intertwined issue of judicial expertise in the area of foreign relations, as well as problems of administration and procedure.

The initial problem raised by interest-balancing is its apparent detachment from the federalist framework. This is reflected in the Revised Statement's treatment of courts as equals of the coordinate branches for purposes of defining jurisdiction to prescribe; in the debate among court's as to the applicability of the label “abstention” to the jurisdictional rule of reason; and in S. 397's willingness to delegate an essentially executive function to the

114. 131 Cong. Rec. at 1163.

115. The Antitrust Division has asked the Committee to delay further consideration of the detrebling provisions of S. 397 until the projected completion of the Georgetown Project on treble damages later this year. *Foreign Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Senate Committee on the Judiciary*, 99th Cong. 1st Sess. (June 21, 1985) (statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, at 12–14).

116. Pub. L. No. 97–290, § 402, 96 Stat. 1233, 1246–47 (1982) (codified at 15 U.S.C. § 6a). The legislative history indicates that Congress intended “neither to prevent nor to encourage” Timberlane-type balancing tests. H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982). The House Report accompanying the bill, however, went on to state that “the bill is not intended to restrict the application of American laws to extraterritorial conduct *where the requisite effects exist* or to the extraterritorial pursuit of evidence in appropriate cases.” *Id.* (emphasis added). Professor Fugate maintains that the Act effectively overruled *Timberlane*. Fugate, *supra* note 11, at 53. *But see* Swan, *supra* note 67, at 215–16 (interest-balancing is unaffected by Foreign Trade Antitrust Improvements Act of 1982).

courts. In each case the traditional role of courts within the federal system has been circumvented or simply ignored.

Yet, it is well settled that "federal courts are courts of limited jurisdiction."¹¹⁷ As such, "[t]hey are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress."¹¹⁸ Viewed in this context, a federal court does not have jurisdiction to prescribe, *i.e.*, power to prescribe, in the same sense as does Congress or the Executive, save in those areas where such power has been delegated to it, such as in the area of Sherman Act enforcement, or ceded to it, as in the limited area covered by federal common law.¹¹⁹ Its role is otherwise limited to determining whether, in a given case, Congress expressly has provided for the court to hear the case, whether Congress can delegate that authority within the bounds of the Constitution and whether the activities challenged and before the court can constitutionally be prescribed by the Congress. Only if the answer to these three preliminary inquiries is affirmative can the court proceed and exercise its "jurisdiction to adjudicate." In the past, courts and commentators have labelled this ability to entertain a particular case or controversy "subject matter jurisdiction."

Use of "subject matter jurisdiction" has been criticized, particularly in the context of the debate over the reach of U.S. antitrust law. It places a conceptual framework on the issue of jurisdiction over foreign conduct that equates use of an interest-balancing approach with judicial abstention.¹²⁰ In an attempt to circumvent that conclusion, the Revised Restatement, and arguably S. 397 and *Timberlane III*, view court judgments as yet another aspect of jurisdiction to prescribe.

The Revised Restatement seeks to accomplish this end by adjusting the jurisdictional equation. The substance of that equation, however, cannot be altered through mere relabelling. Indeed, even the courts and commentators that have embraced the jurisdictional rule of reason have struggled with the need to accommodate the well-entrenched notions that underlie the concept of subject matter jurisdiction.¹²¹ Given that framework, the issue becomes whether and to what extent a court can and/or should rely on a balancing of unranked factors to dismiss on jurisdictional grounds an otherwise congressionally authorized claim for relief.¹²² As Professor Rahl succinctly put it: "[c]omity is a laudable and indeed essential idea in interna-

117. C. WRIGHT, *LAW OF FEDERAL COURTS* 22 (4th ed. 1983).

118. *Id.*

119. See generally M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 79-108 (1980).

120. RESTATEMENT (REVISED) § 401, comment c; Lowenfeld, *supra* note 67, at 1978-84.

121. See, e.g., Lowenfeld, *supra* note 67, at 1978-84; *Mannington Mills*, 595 F.2d at 1299 (Adams, J., concurring).

122. Grippando, *supra* note 80, at 400; Rahl, *supra* note 80, at 363.

tional relations. As a ground for outright dismissal of a cause of action otherwise authorized by Congress, however, it gives rise to some problems."¹²³

There are serious doubts about the legitimacy of federal courts declining to exercise their jurisdiction based on interests of international comity. Indeed, the Supreme Court has held that absent one of the traditional bases for abstention, a federal court has a "virtually unflagging obligation" to exercise the jurisdiction delegated to it by the Congress.¹²⁴ Thus, when the courts have declined to hear a given controversy they have generally required some basis grounded in the Constitution's allocation of powers for doing so.¹²⁵ In the area of foreign affairs, that basis has often been the assignment of authority over issues of foreign relations to the Executive and the Congress.¹²⁶ In the past, courts have repeatedly abstained from entering that arena, declaring such issues "non-justiciable."¹²⁷

In the case of interest-balancing, courts are being urged to abandon this well-settled aversion to adjudicating issues that directly impact on U.S. foreign relations. Instead, the courts are being instructed to examine submissions from foreign governments, the U.S. executive, private parties and possibly others, in order to determine whether the "interests" of the U.S. in antitrust enforcement are outweighed by the interests of other states in light of a number of factors. It is ironic that where in the past courts have declined to go for want of authority they are now being urged to go, arguably in order to reach the same conclusion, that a given case is, in a sense, "non-justiciable."¹²⁸

123. Rahl, *supra* note 80, at 363. Rahl lists three such problems: (1) whether a court can legitimately exercise such broad discretion absent congressional approval; (2) whether and how a court can adequately inform itself of the policies and interests to be weighed; and (3) whether procedures could be developed systematically to implement such a complex balancing approach.

124. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). *See also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given").

125. *Cf. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

126. *See generally* L. Henkin, *supra* note 63, at 205-24; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (foreign relations committed to the "political" branches—the legislative and the executive). The Departments of State and Justice cited separation of powers as one of their reasons for objecting to the jurisdictional rule of reason contemplated by S. 397. *See* note 100 and accompanying text *supra*.

127. *See, e.g., Crockett v. Reagan*, 720 F.2d 1355, 1356 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 3533 (1984); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied sub nom.*, *Occidental of Umm al Qaywayn, Inc. v. Cities Service Oil Co.*, 442 U.S. 928 (1979); *Dickson v. Ford*, 521 F.2d 234, 235-36 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd per curiam*, 755 F.2d 34 (2d Cir. 1985).

128. Such non-justiciable issues have been grouped under the "political question" doctrine. *See generally* C. WRIGHT, *supra* note 117, at 74-81; L. HENKIN, *supra* note 63, at 210-16;

Moreover, as Professor Grippando points out, unlike the areas of act of state and state sovereign compulsion, here "comity" is being invoked as a defense by foreign private parties on the assumption that offending such parties is equivalent to offending their governments.¹²⁹ Although as a practical matter that assumption may be true in some cases, it is far more difficult to justify abstention based on a separation of powers theory when private parties are involved as opposed to their governments.

Commentators and courts also have questioned a court's competence and ability to engage in the kind of foreign policy interest-balancing called for by the Revised Restatement, S. 397 and *Timberlane III*. This was of particular concern to Judge Marshall in the uranium litigation,¹³⁰ and more recently to the D.C. Circuit in the *Laker Airways* litigation¹³¹ and the Departments of Justice and State.¹³² Where a foreign private party fails to appear in court even to argue the propriety of jurisdiction or the U.S. executive declines to express the views of the current administration, the adversarial guarantee that the court will be adequately informed of the competing interests is absent. Thus, while the balancing approach may be an appropriate tool to inform prosecutorial discretion, it raises serious questions in the judicial context.¹³³ It is ironic indeed that, as noted above, the political question doctrine, long an accepted although debated basis for judicial abstention, is based upon the assumption that courts are not only constitutionally inappropriate forums for weighing such policy considerations, but are institutionally incapable of doing so.¹³⁴

Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J., at 597 (1976). In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth three criteria for determining the non-justiciability of a given issue: (1) does the issue involve resolution of questions committed by the Constitution to a coordinate branch of government; (2) does the court have the expertise to consider the issues; and (3) are there prudential considerations that counsel against a finding of justiciability? *Id.* at 217. See also *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

129. Grippando, *supra* note 80, at 397-98.

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

131. *Laker Airways*, 731 F.2d at 948-50. See also Lowenfeld, *supra* note 67, at 1984; Maier *supra* note 68, at 23-24, 39-40; Kadish, *supra* note 80, at 164-66.

132. *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. (June 21, 1985) (statement of Abraham D. Sofaer, Legal Advisor, Department of State, at 10; statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, at 9-10).

133. See, e.g., American Bar Association, Section of Antitrust Law, *Task Force Report: The Antitrust Guide for International Operations Revisited* 7 (1984); Statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Concerning International Aspects of Antitrust Enforcement 10-11 (Nov. 19, 1981); Rahl, *supra* note 80, at 363-64.

134. See note 128 and accompanying text *supra*. The proposed test also lacks any benchmarks or procedures to guarantee its uniform application. Although this could also be said of any amorphous, balancing test involving consideration of a complex list of unranked factors, the spectre of conflicts among and within the circuits based on variations in foreign policy over time or judicial perception of that policy remains.

The use of any interest-balancing formula also can be objectionable for procedural reasons. The test will inevitably require extensive "nonmerits" discovery and perhaps requests for submissions from U.S. and foreign government political branches.¹³⁵ Indeed, the long history of the *Timberlane* cases reinforces the perceived difficulties of the test in the context of a preliminary jurisdictional proceeding. Use of the interest-balancing approach in *Timberlane* required the creation of an exhaustive discovery record and, more troubling, the district court's pretrial resolution of numerous fact issues going to the core of *Timberlane*'s substantive antitrust complaint.¹³⁶ Moreover, the Ninth Circuit's test appeared to require less of an exercise in weighing issues of politics and sovereignty than an archetypal conflict of laws analysis in which United States law generally defers to foreign law. In the conflict of laws area, however, both domestic and international, a U.S. court's analysis begins with the presumption that a judicial forum is available to the plaintiff. The only issue before the court is what state's or nation's laws should be applied.¹³⁷ The presence of an available judicial forum is also a critical prerequisite to application of domestic "abstention" doctrines.¹³⁸ Since a critical reason for declining to exercise jurisdiction will usually be the incompatibility of U.S. antitrust law with the laws or policies of a foreign nation, however, no alternative to the U.S. forum is likely to be available to the private plaintiff. Where such a forum is available, the intensity of the conflict is not likely to be severe. This potentiality prompted the courts in *Mannington Mills* and arguably in *Timberlane I* to include the availability of an alternate forum in their lists of balancing factors.¹³⁹ Yet, discussion of the issue is noticeably absent from *Timberlane III* and the Revised Restatement.¹⁴⁰

135. *Laker Airways*, 731 F.2d at 950. S. 397 specifically contemplates solicitation by the courts of such statements. See note 105 and accompanying text *supra*.

136. It should be emphasized that after remand from *Timberlane I*, the action took nearly seven years to reach the court of appeals a second time, arguably still limited to the issue of the court's jurisdiction. S. 397's mandate for expedited treatment of motions to dismiss on jurisdictional grounds would likely meet the same fate. Indeed, endorsing the position taken by the Second Circuit in *National Bank of Canada v. Interbank Card Ass'n.*, 666 F.2d 6, 8 (2d Cir. 1981), Congress in adopting the 1982 amendment to section 7 of the Sherman Act indicated that the "effect" necessary to establish jurisdiction "must be of the type that the antitrust laws prohibit." H.R. Rep. No. 686, 97th Cong. 2d Sess. 11 (1982). As a result, there will necessarily be some overlap between the jurisdictional inquiry and the question of substantive anticompetitive effect. See, e.g., *Timberlane III*, 749 F.2d at 1384-85; *Foreign Antitrust Improvement Act of 1985: Hearings on S. 397 Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. (June 1985) (statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, at 6) (expedited motion provisions not likely to be effective).

137. Cf. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

138. See, e.g., *Laker Airways*, 731 F.2d at 936; Grippando, *supra* note 80, at 402 & n.32, 408-10. See generally M. Redish, *supra* note 119, at 233-58, 291-321.

139. *Mannington Mills*, 595 F.2d at 1297 (factor 4); *Timberlane I*, 549 F.2d at 614; Grippando, *supra* note 2, at 408-10 & n.69.

140. *Timberlane III*, 749 F.2d at 1384; RESTATEMENT (REVISED) § 403(2). S. 397 would

Lastly, particularly with respect to the approach set forth by S. 397, there is the danger of entangling the courts on the one hand, with Congress and the Executive on the other by encouraging formal and informal contacts between them concerning sensitive issues of foreign relations. The courts should not become an international forum for lobbying in which the inquisitor generally defers to the views of its patrons. The appearance of partiality could placate or exacerbate foreign states, but most certainly would lessen the independence of the courts.

III. Needed: Increased Political and Diplomatic, Not Judicial, Dialogue

Although the most recent wave of complaints concerning the scope of U.S. antitrust jurisdiction arguably was triggered by private antitrust treble damage actions, the response of foreign states has predictably been directed at Congress and the Executive. Thus, debate has proceeded at the political and diplomatic level between sovereigns, with some valuable results.¹⁴¹ Arguably, the arena of international negotiation at the executive level is the most appropriate avenue for resolution of the problems raised by concurrent prescriptive jurisdiction, where the laws or policies of the concerned states collide.¹⁴²

To the extent the courts have a role to play in lessening the tensions likely to arise in the context of international trade, traditional tools of comity and equity are available to permit them to temper the impact of U.S. antitrust jurisdiction at the discovery and remedial level.¹⁴³ Continued use of these tools while the broader issues of conflicting industrial and trade policies are

introduce the factor by codifying the doctrine of *forum non conveniens*. See note 112 and accompanying text *supra*.

141. See, e.g., Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation With Respect to the Application of National Antitrust Laws, Mar. 9, 1984, _____ U.S.T. _____, T.I.A.S. No. _____, reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,464; Agreement on Antitrust Cooperation, United States-Australia, June 29, 1982, _____ U.S.T. _____, T.I.A.S. No. 10365, reprinted in [1983 Transfer Binder] TRADE REG. REP. (CCH) ¶ 50,440; Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, United States - Federal Republic of Germany, June 23, 1976, 27 U.S.T. 1956, T.I.A.S. No. 8291, reprinted in [1983 Transfer Binder] TRADE REG. REP. (CCH) ¶ 50,238. See also 2 ATWOOD & BREWSTER, *supra* note 4, at 136-45; Note, *The United States-Australian Antitrust Cooperation Agreement: A Step in the Right Direction*, 24 VA. J. INT'L L. 127, 164-65 (1983).

142. See, e.g., Robinson, *supra* note 33; *Extraterritoriality and Conflicts of Jurisdiction*, U.S. Department of State Current Policy Bulletin No. 481 (Apr. 15, 1983); Remarks by Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, Before the Annual Conference of the Canadian Council on International Law (Oct. 21, 1983).

143. See, e.g., Fugate, *supra* note 11, at 63-65. One option that should be considered by foreign firms doing business in the United States is the inclusion of an arbitration clause in all of their contractual arrangements. The Supreme Court recently held that such clauses are enforceable even to the extent they require federal antitrust claims to be submitted to an international arbitration panel. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 53 U.S.L.W. 5096 (U.S. July 2, 1985) (No. 83-1569).

left to Congress and the Executive is more likely to place the courts in a constructive role than would foisting upon them the role of grand inquisitor—a role likely to embroil the courts in continued controversy. As suggested by the Justice Department in its critique of S. 397, the courts can best serve the interests of harmony in international trade by confining their inquiries to the objective kinds of criteria with which they are familiar and at their best—both constitutionally and by expertise.¹⁴⁴

144. Immediately prior to publications of this issue of *THE INTERNATIONAL LAWYER*, Sen. DeConcini introduced a “revised” version of S. 397. The new bill differs from the original version as follows: (1) Sections 2(b), 3(b), and 5(b) of the bill would permit the courts discretion to allow merits discovery to proceed during the pendency of a motion to dismiss on jurisdictional grounds; (2) Section 3 contains a list of suggested factors purportedly “purged” of political considerations. Thus, the views of the Attorney General are no longer “required.” However, where the Attorney General “certifies” that an action will “interfere with the conduct” of U.S. foreign relations, the court is *required* to dismiss the action; (3) Section 5, the detrebling provision, has been altered to permit detrebling where a court determines that it would be more reasonable for the action to proceed limited to compensatory damages and to authorize retention of treble damages where their elimination would impair U.S. antitrust enforcement interests; and (4) the bill expressly places U.S. and foreign nationals on equal ground as defendants—dismissal or detrebling as to the foreign defendant(s) would require dismissal or detrebling as to the U.S. defendant(s). For many of the reasons stated in our article, these revisions are insufficient to resolve the problems raised by the original bill and indeed raise significant additional issues, both procedural and constitutional, including particularly the Attorney General’s “certification” authority.