

Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law

*Mais pour l'amour de Dieu, ne laissons pas des querelles de
pêcheurs dégénérer en querelles de nations.*

—le Duc de Choiseul, 1763¹

Expansive extraterritorial application of United States antitrust law has precipitated a political crisis with America's major trading partners. Hostility toward United States policy has prompted these nations to enact retaliatory legislation insulating their corporations from the reach of American courts. The political and economic effects of this ongoing dispute demand attention in order to restore amicable relations and increase the free flow of trade.²

This Note reassesses antitrust jurisdiction in international transactions, recognizing that the present dispute is essentially a political one that courts lack the power and competence to resolve. After tracing the dimensions of the problem, this Note discusses the present interest-based revisionist approach to extraterritorial jurisdiction of antitrust law, and finds it incapable of effectively resolving the tensions produced by expansive

1. Letter from le Duc de Choiseul to Lord Halifax regarding controversy over Newfoundland fisheries following the Seven Years' War, 1763, quoted in Soltau, *Le Chevalier d'Eon et les Relations Diplomatiques de la France et de L'Angleterre*, in *MÉLANGES D'HISTOIRE OFFERTS À M. CHARLES BÉMONT* 655 (1913), cited in Viner, *Power versus Plenty as Objective of Foreign Policy in the Seventeenth and Eighteenth Centuries*, in *REVISIONS IN MERCANTILISM* 80 (D. Coleman ed. 1969).

2. The gravity of this problem has precipitated something of a *guerre des savants*. Commentators have offered analyses and solutions that differ significantly from those proposed here. See, e.g., Dunfee & Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal For an Interim Solution*, 45 OHIO ST. L.J. 883 (1984) (arguing that courts should take as many controversial cases as possible so as to escalate crises and force political branches to respond); Gerber, *The Extraterritorial Application of German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983) (comparative analysis arguing both for placing conceptual limits on effects doctrine and for use of public international law to devise method of weighing national interests); Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need For Reassessment*, 51 FORDHAM L. REV. 201 (1982) (proposing appointment and agenda of national commission to study problem); Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097 (1981) (careful analysis of origins and effects of limiting legislation; concluding it is inconsistent with international law and proposing arbitration or negotiation to resolve dispute over application of competition laws).

Two comprehensive, continuously updated treatises have been written in recent years that provide helpful commentaries on the law in this area. J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (2d ed. 1981); B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* (1979).

application of United States competition laws to international transactions. The Note advocates instead an approach based on the traditional judicial doctrine of *forum non conveniens*. Such an approach is capable of accommodating political and economic interdependence, while sparing the courts the difficult analyses of law and diplomatic concerns of respective nations that interest analysis entails.

I. DIMENSIONS OF THE PROBLEM

America's current international antitrust policy reflects America's economic dominance after World War II.³ This dominance enabled American courts to enforce a political preference for free trade and maximum competition.⁴ An expansive interpretation of American antitrust laws⁵ based on a theory of extraterritoriality was consistent with these developments. This theory, formulated in *United States v. Aluminum Co. of America (Alcoa)*,⁶ determined that American courts had subject matter jurisdiction over acts taking place entirely abroad, if the actions were both intended to⁷ and did have a demonstrable effect on American commerce.⁸

3. See Hawk, *supra* note 2, at 206.

4. See Sornarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise*, 31 INT'L & COMP. L.Q. 127, 149 (1982) ("[W]hen the United States dominated international trade [after World War II], American courts formulated a theory of extraterritoriality which would have permitted them control over business conduct occurring abroad but having effects in the American market"); cf. Bressand, *Mastering the "World economy"*, 61 FOREIGN AFF. 745, 752 (1983) (United States had overwhelming interest in free trade after World War II). Extraterritorial application of the Sherman Act provided a means to effectuate America's interest in free trade by policing against creeping mercantilism. See generally, Reich, *Beyond Free Trade*, 61 FOREIGN AFF. 773, 776 (1983) (America's free trade *cum* intervention philosophy opposes mercantilist intervention by American government because intervention "by assumption distorts production and saps our competitive strength," yet maintains concurrently that intervention by other governments in *their own* economies gives them "unfair competitive advantage") (emphasis in original).

5. The relevant language of the Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with *foreign nations*, is declared to be illegal. . . .

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with *foreign nations*, shall be deemed guilty of a felony. . . .

15 U.S.C. §§ 1-2 (1982) (emphasis supplied).

6. 148 F.2d 416 (2d Cir. 1945). The Second Circuit was sitting on certification from the Supreme Court because the high court was unable to constitute a quorum of justices who were not, for various reasons, disqualified from hearing the case. 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 147 [hereinafter cited as ATWOOD & BREWSTER].

7. *Alcoa*, 148 F.2d at 444. Confusion exists over whether the intent requirement of *Alcoa* is one of purpose or of foreseeability. Compare ATWOOD & BREWSTER, *supra* note 6, at 152 (noting that Hand's concern with international complications arising from expansiveness of effects test suggests that he would favor showing of purposive conduct) with ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INT'L OPERATIONS 6 (1977), quoted in ATWOOD & BREWSTER, *supra* note 6, at 152-53 (reading *Alcoa* as requiring conduct with "substantial and 'foreseeable'" effects).

8. *Alcoa*, 148 F.2d at 444; see also Blechman, *Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere: An Appraisal of American Developments and Foreign Reactions*, 49 ANTITRUST L.J. 1197, 1199 (1980) (noting trend toward further expansion of subject matter jurisdic-

Forum Non Conveniens

Alcoa has led American courts to take jurisdiction over cases where the effects on the United States are significantly less compelling than those on the other country.⁹ The easy entry into American courts allowed by the effects test,¹⁰ combined with other factors,¹¹ has made American courts attractive for both foreign and domestic plaintiffs. These factors include more stringent antitrust laws, the attraction of treble damages,¹² more comprehensive discovery rules,¹³ jury trials,¹⁴ contingency fees,¹⁵ class actions,¹⁶ and suits by private parties.¹⁷

America's expansive extraterritorial antitrust policy has generated in-

tion such that even absent effects on domestic markets, courts will entertain cases where foreign conduct alleged to affect American exports adversely).

9. The status of the effects doctrine in international law remains unresolved. Compare B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 16 (Supp. 1983) ("[G]enerally . . . public international law today does not preclude reliance on an effects doctrine . . . for jurisdiction.") with Sornarajah, *supra* note 4, at 136 ("[T]he effects doctrine of jurisdiction . . . does not accord with international law rules relating to jurisdiction."). Revisionists and foreign observers argue that the effects doctrine is inconsistent with general principles of international law, which require that findings of jurisdiction be confined to a territorial basis in order "to reduce the chaos that would result if several States claimed jurisdiction over an event." *Id.* at 136; see also sources cited *infra* note 44.

10. The lack of a required threshold level of effect for finding jurisdiction means that "[n]o manner of trade between this country and any other is beyond the [Sherman] Act's reach." Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199, 203 (1977).

11. Many of these attractions were specifically recognized by the Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 & n.18 (1981).

12. 15 U.S.C. § 15 (1982); see also Rosenthal, *What Should be the Agenda of a Presidential Commission to Study the International Application of U.S. Antitrust Law?*, 2 Nw. J. INT'L L. & BUS. 372, 378 (1980) (noting abuse of treble damage remedy) [hereinafter cited as Rosenthal, *Antitrust Commission*].

13. See Rosenthal, *Antitrust Commission*, *supra* note 12, at 377. The British have long regarded the wide-open pre-trial discovery of documents under U.S. law as a court-sponsored fishing expedition through corporate files. See *Radio Corp. of America v. Rauland Corp.*, [1956] 1 All E.R. 549; Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697, 700 (1982). In 1964, these American discovery provisions led Britain to adopt legislation giving its Secretary of State discretion to withhold commercial documents sought by foreign courts. See Shipping Contracts and Commercial Documents Act, 1964, ch. 87.

14. See *Smith Kline & French Laboratories v. Bloch*, [1983] 2 All E.R. 72, 74 (Opinion of Lord Denning, M.R.) ("As a moth is drawn to the light, so is a litigant drawn to the United States There is . . . in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic [to plaintiffs].").

15. See Note, *supra* note 2, at 1103.

16. See *id.*

17. Only the U.S. provides a cause of action under its competition law to private plaintiffs. In all other developed countries only the government may undertake such proceedings. See Rosenthal, *Antitrust Commission*, *supra* note 12, at 378. When a government contemplates an antitrust prosecution it can consider more objectively than a private plaintiff the whole host of economic and political effects that such a suit would have on other nations as well as its own foreign policy. Because the individual plaintiff is concerned only with his own welfare, many suits are brought in U.S. courts that other governments have made affirmative choices not to institute. The result has been a series of ongoing diplomatic crises. See *id.* at 378. For a discussion of the availability of private rights of action in the U.S. for both American and foreign plaintiffs, see Huntley, *The Protection of Trading Interests Act 1980: Some Jurisdictional Aspects of Enforcement of Antitrust Laws*, 30 INT'L & COMP. L.Q. 213, 218-21 (1981).

ternational tension for two reasons.¹⁸ First, the intrusive relief that American courts regularly grant¹⁹ significantly disrupts the economic policies of United States trading partners.²⁰ Foreign commentators have protested the absurdity of jurisdiction based on economic effects, arguing that in a systemic world economy effects on the exports of one state *a force* have reciprocal effects on the economy of the importing state.²¹

Second, and more importantly, the American free trade policy ignores political decisions made by other nations to advance competing and sometimes inconsistent trading policies.²² Many American trading partners have moved toward "neo-mercantilist" regulatory policies²³ that are contrary to American notions of free trade.²⁴ Other nations encourage export cartels,²⁵ dictation of market arrange-

18. Foreign hostility toward extraterritorial application of U.S. antitrust laws is not a recent phenomenon. See Rosenthal, *Relationship of U.S. Antitrust Laws to Formulation of Foreign Economic Policy, Particularly Export and Overseas Investment Policy*, 49 ANTITRUST L.J. 1189, 1193 (1980) [hereinafter cited as Rosenthal, *Antitrust and Overseas Investment*]. Foreign governments protested American antitrust enforcement abroad in the 1950's. See K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 46-51 (1st ed. 1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 344-46 (1st ed. 1958). In 1956 one commentator noted that "there is increasing evidence that our efforts at Sherman Act enforcement are regarded by others as an unwarranted interference in their internal affairs." Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1148-49 (1956).

19. In applying antitrust law to international transactions, American courts frequently "order (or enjoin) conduct either in foreign countries or which [has a] substantial effect or impact in foreign countries." Examples of court-ordered relief include:

1. divestiture of stockholdings in foreign corporations or joint ventures
2. reasonable or good faith efforts to sell abroad
3. reasonable or good faith efforts by foreign competitors to sell in the United States
4. transfer of foreign patent and trademark rights, including compulsory royalty-free licensing of foreign patents and knowhow
5. enjoining the exercise of foreign patents, knowhow and trademark rights.

B. HAWK, *supra* note 2, at 345-46; see generally *id.* at 344-64 (detailed discussion of extreme examples of relief and remedies imposed by American courts).

20. See Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U.L. REV. 323, 324 (1981).

21. See Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DE COURS L' HAGUE ACADEMIE DES DROIT INTERNATIONALE 1 (1964 i), reprinted in F. MANN, STUDIES IN INTERNATIONAL LAW 1, 91 (1973); see also Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) (recognizing need for mutual forbearance in international cases because of reciprocal nature of bases of jurisdiction); Katzenbach, *supra* note 18, at 1150 ("[A]nything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States.").

22. See ATWOOD & BREWSTER, *supra* note 6, at 4 (noting significant growth of antitrust regimes abroad, which are often different than that of U.S.); Feinberg, *supra* note 20, at 324.

23. Dunfee & Friedman, *supra* note 2, at 887.

24. See ATWOOD & BREWSTER, *supra* note 6, at 4; Rosenthal, *Antitrust Commission*, *supra* note 12, at 376 (noting conundrum of whether jurisdiction should be taken over acts that violate U.S. law but are in furtherance of policies of foreign governments); Shenfield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 354 (1983) (commenting that American preference for competition collides with "regulatory regimes" of other nations).

25. Rosenthal, *Antitrust Commission*, *supra* note 12, at 376. In many cases, foreign governments have made conscious policy choices to foster anticompetitive export associations in order to increase their share of world trade. See Pettit & Styles, *supra* note 13, at 699 (noting that United States, United Kingdom, Canada, West Germany, Japan, and Australia promote such associations). These

Forum Non Conveniens

ments,²⁶ and significant cooperation among competitors.²⁷ The legitimacy of these policy choices is ignored and their purposes undermined when plaintiffs use liberal jurisdictional rules and stiff American competition laws to drag foreign companies into United States courts, exacting treble damages for conduct that is not only legal but affirmatively encouraged by the corporation's parent state.²⁸

Several controversial antitrust cases recently brought in American courts have intensified this tension. In the litigation surrounding the collapse of Laker Airways, engaged American²⁹ and British³⁰ courts in a jurisdictional tug-of-war—each trying not only to take jurisdiction but affirmatively to deny the jurisdiction of the other tribunal. Similarly, hostility resulted in *In re Uranium Antitrust Litigation*³¹ both because American courts sought to disrupt the affirmatively collusive policies of other governments, and because four of these governments tried to cooperate

nations regard American insistence that foreign traders act competitively in dealing with the United States as hypocritical, *id.*, since America specifically allows the formation of cartels for international trade under the provisions of the Webb-Pomerene Act (15 U.S.C. §§ 61–66 (1982)). See Goldsweig, Enborg & Walton, *The Impact of United States Antitrust Law on the Balance of Trade*, 15 VAND. J. TRANSNAT'L L. 751, 757 (1982).

26. See, e.g., Note, *Potential Havens From American Jurisdiction and Discovery Laws in International Antitrust Enforcement*, 33 U. FLA. L. REV. 240, 257–58 (1981) (Canada refused to cooperate with American antitrust case because it interfered with market arrangement that Canadian government had sought and approved).

27. See Shenefield, *supra* note 24, at 354 (discussing various perceptions of role of competition).

28. While the Justice Department notifies and consults with a foreign government when pending antitrust actions might affect that nation's policies, this attempt at accommodation has "frequently . . . been deemphasized in favor of the United States national interest in enforcing the antitrust laws to protect domestic consumers or exporters." Hawk, *supra* note 2, at 227. Thus America's challenge to Canadian price-setting for potash prompted a Canadian official to denounce the "arrogant stupidity on the part of the Government of the United States." *Id.* at 237–38.

Many foreign governments tend generally to discount American claims that its antitrust policies are grounded on neutral values favoring competition and free trade, viewing these laws instead as a "tool of United States commercial interests." Rosenthal, *Antitrust and Overseas Investment*, *supra* note 18, at 1195.

29. The ongoing controversy surrounding the collapse of Laker Airways has become notorious. The American court characterized the British law on competition as "offensive" and designed "only to quash the practical power of the United States courts," *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937–38 (D.C. Cir. 1984), which would lead to "unfettered chaos," *id.* at 941. The court found itself attempting to resolve "a head-on collision between the diametrically opposed antitrust policies of the United States and the United Kingdom," *id.* at 916, and concluded that the constraints of United States reliance on the effects doctrine lead inevitably either to capitulation by one party or to deadlock, *id.* at 954.

30. The British Court of Appeals (Civil Division) in *British Airways Bd. v. Laker Airways*, [1983] 3 All E.R. 375, ruled that since the British defendants in Laker's pending antitrust suit in America were barred by the Protection of Trading Interests Act, 1980, ch. 11, reprinted in [Apr.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 959, at F-1 to F-2 (Apr. 10, 1980) [hereinafter cited as POTI Act], under order of the Secretary of State for Trade, from cooperating with American courts, an injunction would issue preventing Laker from proceeding in his American action.

31. *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1250 (7th Cir. 1980) (twenty-nine domestic and foreign defendants haled into American court over allegations of world-wide uranium cartel); see also Dunfee & Friedman, *supra* note 2, at 887–89 (discussing uranium cartel controversy at greater length).

with the court by appearing as *amici curiae* to contest American jurisdiction, only to be dismissed³² with language so disparaging as to prompt the embarrassed State and Justice Departments to file a joint protest with the court.³³

Yankee "jurisdictional jingoism" has created wide-spread resentment³⁴ and prompted America's closest allies to retaliate³⁵ by adopting legislation limiting the reach of the Sherman Act in foreign jurisdictions.³⁶ Controversy over the proper scope of American law led Britain³⁷ to adopt a comprehensive statute³⁸ attacking both the substance and the process of American antitrust law³⁹ by limiting the ability of American courts to reach

32. 617 F.2d at 1256.

33. Letter from Roberts B. Owen, Legal Advisor of the Department of State, to John H. Shenefield, Associate Attorney General (Mar. 17, 1980), reprinted in Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 657, 665-67 (1980).

34. See ATWOOD & BREWSTER, *supra* note 6, at 4-5, 11 (differing antitrust policies have precipitated political resentment resulting in "overt conflict"); Note, *supra* note 26, at 261 (assertion of jurisdiction over case involving collusive marketing of potash, despite Canadian protests, caused more damage to U.S.-Canadian relations than it benefitted plaintiff by increasing competition). In response to foreign objections, America has repeatedly, though unsuccessfully, sought to negotiate agreements with other nations and to cooperate in antitrust enforcement, but that consultation has not reduced the scope of American law. See Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500, 501 (1981) ("By informal estimate, there have been five diplomatic protests of U.S. antitrust cases for every instance of express diplomatic support, and three blocking statutes for every cooperation agreement.").

35. See Samie, *Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction*, 16 INT'L LAW. 313, 317 (1982) ("The POTI Act is a purely retaliatory act."). For excerpts from a particularly heated British parliamentary debate chastising America's antitrust policies, see Huntley, *supra* note 17, at 224. For a similar Canadian rodomontade, see Hawk, *supra* note 2, at 237. Cf. R. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE: THE ORIGINS AND THE PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* 384 (2d ed. 1980) (controversies stemming from application of U.S. antitrust law in Britain led to "immoderate and inflexible positions" not in best interests of either country).

36. A compendium of foreign limiting legislation is provided in A. LOWE, *EXTRATERRITORIAL JURISDICTION* 79-225 (1983).

37. Forty-one members of the British Commonwealth have adopted a resolution critical of United States antitrust laws. The resolution has been interpreted as encouraging Commonwealth members to pass legislation similar to the POTI Act. *Commonwealth Nations Adopt Resolution Criticizing U.S. Treble Damage Judgments*, [Apr.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 963, at A-10 to A-11 (May 8, 1980).

38. POTI Act, *supra* note 30. For a thorough, well-reasoned analysis of this Act and its validity under principles of international law, see Note, *supra* note 2.

39. The POTI Act is colloquially known as the Blocking and Clawback Statute. The blocking portion allows the British Secretary of State for Industry to excuse British nationals from compliance with foreign antitrust judgments, § 1-(3), strictly limits discovery, § 2-(1), and grants the Secretary power to force British plaintiffs to withdraw from foreign antitrust actions if the judgment received would be enforceable against British defendants, § 1-(3), -(5).

Clawback refers to two sections of the Act. Section 5 declares foreign multiple damage judgments unregistrable for reciprocal enforcement in British courts. In the case of an American antitrust action, this would deny enforcement of both the punitive two-thirds of the damages and the compensatory one-third. The effect of the Act has been to insulate British defendants from treble damage liability. See Note, *Enjoining the Application of the British Protection of Trading Interests Act in Private American Antitrust Litigation*, 79 MICH. L. REV. 1574, 1577-78 (1981).

Section 6 provides that British defendants may recover in British courts the punitive portion of any damages, previously awarded, in an action against the foreign plaintiff. Section 7 provides that the British will reciprocate in enforcing judgments to clawback punitive damages for nations extending

Forum Non Conveniens

defendants or documents abroad.⁴⁰ Other nations have followed suit.⁴¹

Because expansive application of United States antitrust policy in the international context ascribes little legitimacy to countervailing foreign policy choices, it has created a situation of international political tension. Judges have responded to this political conflict either by ignoring completely the international dimensions of their actions⁴² (by reliance on the effects test), or by recognizing the diplomatic implications of the controversy and attempting to resolve the controversy by application of fundamentally political criteria to achieve a politically desired result⁴³ (by means of interest analysis). The former approach generates needless diplomatic tension; the latter thrusts courts into a role that they cannot perform effectively and should not play in a democracy.

II. THE FAILURE OF THE INTEREST-BASED REVISIONIST APPROACH

Some American courts have chosen to recognize rather than to ignore the disruptive political implications of expansively applied competition law. These courts have resolved international antitrust controversies by analyzing and balancing political and diplomatic criteria called "interests." Case law flowing from this "revisionist" approach⁴⁴ at one time seemed to offer the promise of mollifying tensions by adopting a balancing of government interests for its jurisdictional analysis.⁴⁵ But interest analy-

that courtesy to Britain—creating an incentive for others to follow suit. *See* Note, *supra* note 26, at 265-66.

40. The Act was prompted in part by outrage over the aggressive American prosecution of the uranium cartel case. *See In re Uranium Antitrust Litigation*, 473 F. Supp. 382 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980). But the POTI Act also represents general retaliation by the British for the failure of the U.S. to respond to British complaints. *See* Samie, *supra* note 35, at 317-19.

41. Other nations with their own version of blocking and/or clawback statutes include Canada, Australia, South Africa, the Netherlands, Italy, West Germany, France, and Belgium. Pettit & Styles, *supra* note 13, at 707-14.

At the same time, West Germany and the European Economic Community have also enacted regulatory legislation at least as strict as the Sherman Act. *See* Dunfee & Friedman, *supra* note 2, at 887; Hawk, *supra* note 2, at 207, 232. Such enactments should not be viewed as an endorsement of American policy. Instead they were motivated by defensive considerations—a desire to meet the United States policy head-on with a policy as expansive in application as is the Sherman Act—in hopes of thereby forcing the American government to reconsider its policy. *See, e.g.*, Gerber, *supra* note 2, at 756.

42. *See, e.g., Sabena*, 731 F.2d at 949 (court will not engage in interest balancing because "[a]n English or American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary.") (italics omitted).

43. *See, e.g., Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 614 (9th Cir. 1976); *cf. K. BREWSTER*, *supra* note 18, at 446 (interest factors used by courts "are a response to essentially political rather than economic and business considerations.").

44. Revisionist interpretations of international antitrust jurisdiction are enunciated in *Timberlane*, 549 F.2d 597; *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *ATWOOD & BREWSTER*, *supra* note 6; *B. HAWK*, *supra* note 2.

45. The revisionist approach was properly viewed as a departure from the effects test of *Alcoa*, and was followed, at least in spirit, by three circuits. *See* *Montreal Trading v. Amax, Inc.*, 661 F.2d

sis is both inappropriate and unworkable because it involves courts in weighing sensitive political and diplomatic concerns traditionally considered nonjusticiable.

A. Timberlane and Interests

*Timberlane Lumber Co. v. Bank of America National Trust & Savings Association*⁴⁶ (*Timberlane*) is the seminal revisionist case. Having established jurisdiction by a showing of substantial effect, as in *Alcoa*, the *Timberlane* court based its decision to exercise jurisdiction on an analysis of comity.⁴⁷ The court viewed comity not as a jurisdictional test per se, but rather as a factor that gave the trial judge some discretion to decline jurisdiction in the interest of harmony with other nations.

To evaluate comity, the court employed a conflict-of-laws⁴⁸ analysis of relative governmental interests,⁴⁹ specifically offering eight factors to be considered in striking such a balance⁵⁰ once the extent of the conflict was

864, 869, 871 (10th Cir. 1981) (denying extraterritorial application of American antitrust laws using *Timberlane* approach), cert. denied, 455 U.S. 1001 (1982); *Mannington Mills*, 595 F.2d at 1297-98 (listing ten factors central to determination of whether to exercise jurisdiction); cf. *Industrial Inv. Dev. Corp. v. Mitsui*, 671 F.2d 876, 884-85 n.7 (5th Cir. 1982) (comity relevant but not part of jurisdictional test), vacated, 460 U.S. 1007, reaff'd, 704 F.2d 785 (per curiam), cert. denied, 104 S.Ct. 393 (1983).

More recent decisions suggest that the revisionist approach may well be an aberration from an otherwise consistently expansionist case law. See, e.g., *Sabena*, 731 F.2d at 948 (refusing to engage in *Timberlane*-style balancing of interests); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255 (comity merely a factor for district court to consider in deciding whether to exercise jurisdiction once it was established).

46. *Timberlane*, 549 F.2d 597 (plaintiff alleged conspiracy in both America and Honduras to drive *Timberlane's* Honduran subsidiaries out of business of exporting lumber to United States).

47. Comity, according to the Supreme Court, is neither a matter of obligation nor of good will. "[I]t is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens" *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); accord *Sabena*, 731 F.2d at 937 ("[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability The interests of both forums are advanced."). Comity merely permits, but does not require, application of foreign law. *Sabena*, 731 F.2d at 938 (comity need not be extended if domestic law clearly intended to reach conduct in question); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §33 (1834) (comity is matter of convenience rather than obligation); Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 1972-1973, at 145, 218, (1975) (comity imposes "no duties to apply foreign law"); Gerber, *supra* note 2, at 759 (comity is discretionary); Holmes, *Government Antitrust Actions and Remedies Involving Foreign Commerce: Procedural and Substantive Limitations*, 4 NW. J. INT'L L. & BUS. 105, 120 (1982) (same).

48. THE RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 40 (1965) offers a definition of conflict of law. "Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction"

49. The court must consider "whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority." *Timberlane*, 549 F.2d at 613.

50. *Timberlane*, 549 F.2d at 614:

Forum Non Conveniens

determined. A court would exercise extraterritorial jurisdiction only if the forum government's interests in adjudicating the controversy were sufficiently compelling. This list of factors constituted a "jurisdictional rule of reason"⁵¹ requiring the courts to ascertain the potential degree of conflict that an American trial would precipitate.⁵²

B. *The Limits of Timberlane*

Interest analysis, as proposed by *Timberlane* and the other revisionist cases,⁵³ is neither legitimate nor workable.⁵⁴ Interest analysis is inappropriately applied to extraterritorial antitrust cases because the "interests" it purports to examine properly fall within the domain of the political branches. *Timberlane* directs courts to weigh relative conflicts between the law and policy of the respective states, the likelihood of compliance by foreign states with American court decisions, and the relative effects on the various nations.⁵⁵ These "interests" are not legal principles of the sort courts normally apply; they plainly require a court to take account of sensitive diplomatic matters⁵⁶ and require qualitative assessments of the political choices and economic policies⁵⁷ of foreign governments.⁵⁸

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted.

51. *Timberlane*, 549 F.2d at 613. Kingman Brewster coined the phrase. K. BREWSTER, *supra* note 18, at 446.

52. Rosenthal, *Antitrust and Overseas Investment*, *supra* note 18, at 1193-94.

53. See cases cited *supra* notes 44-45.

54. Despite the initial praise for *Timberlane*'s break with the *Alcoa* effects test, and speculation that it indicated a shift away from the expansive jurisdiction of the effects test toward a more limited interest approach, see B. HAWK, *supra* note 2, at 44, many courts and commentators have found the balancing of interests approach useless. See, e.g., *Sabena*, 731 F.2d at 951 (rejecting interest approach because no correlation between economic realities of transactions at issue and interest-balancing formula); cf. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392 (1980) ("Interest analysis merely substitutes one set of metaphysical premises for another."); Gerber, *supra* note 2, at 781 (interest analysis lacks "a conceptual structure"); Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 317 (1982) (interest analysis "will usually reflect an understandable bias in favor of the forum's policy"); Reese, Book Review, 16 U. TORONTO L.J. 228, 229 (1965) (reviewing B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963)) (criticizing Currie's governmental interest theory as simplistic) [hereinafter cited as Reese, Book Review].

55. *Timberlane*, 549 F.2d at 614.

56. *Sabena*, 731 F.2d at 949 (balancing "generally incorporate[s] purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing."); K. BREWSTER, *supra* note 18, at 446; Dunfee & Friedman, *supra* note 2, at 906.

57. See Note, *The Use of Interest Analysis in the Extraterritorial Application of United States Antitrust Law*, 16 CORNELL INT'L L.J. 147, 178 (1983).

58. These are not simple cases where one state's interests are obviously paramount. Instead, they

The traditional response of American courts when presented with such matters has been to declare them nonjusticiable and to leave their resolution to the political branches.⁵⁹ This reflects the view both that a determination of competing interests of two sovereign states is "a political function of a very high order"⁶⁰ which is properly committed to the elected branches,⁶¹ and that courts are functionally ill-equipped to undertake this sort of analysis.

1. *The "Political Function" of Interests*

Courts avoid rendering determinations beyond their constitutional competence by using the political question doctrine. Relevant indicia of a nonjusticiable question include the court's inability to secure information necessary for reasoned decision,⁶² the implication of the responsibilities of the political departments,⁶³ the dearth of well-defined criteria for judicial decisionmaking,⁶⁴ and the appearance that the courts are no longer able to act as neutral arbiters of law.⁶⁵ *Timberlane's* method of decision implicates each of these aspects of nonjusticiability.

require a complex analysis of the stated policies and underlying, often unstated, policy objectives of entirely different national systems. J. CASTEL, *CONFLICT OF LAWS* 45 (2d ed. 1968). Even identically worded statutes adopted by two different governments should not be presumed to represent identical interests, for "different policies or policies of different intensity may underlie" such statutes. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 316 (1972) (discussing general problem of resolving transborder choice of law questions) [hereinafter cited as Reese, *Choice of Law*]. The result is not a generally applicable choice of law rule, but rather a prescription for case-by-case adjudication.

59. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 71-72 (1978). Professors Dunfee and Friedman have likewise argued that the only feasible way to resolve the problem of extraterritorial application is through "legislation [rather] than through adjudication." Dunfee & Friedman, *supra* note 2, at 917. They trace a number of possible legislative responses. *Id.* at 916-22.

60. Cf. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176 (assessing value of competing legislative interest "is a function which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources.").

61. See Katzenbach, *supra* note 18, at 1153; Ruiz, *Interest-Oriented Analysis in International Conflict of Laws: The American Experience*, 23 NETHERLANDS INT'L L. REV. 5, 39 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 575 (1966).

62. See *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939) (noting large volume of information needed on "political, social and economic" conditions in order to resolve certain legal questions suggests such matters are more "appropriate for the consideration of the political departments of Government.") (Court will not review propriety of contested state legislative procedures used in vote on proposed amendment to U.S. Constitution).

63. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (while not completely beyond scope of judicial cognizance, courts are usually reluctant to review questions implicating foreign policy determinations because "resolution of such issues frequently turn[s] on standards that involve the exercise of a discretion demonstrably committed to the executive or legislature.").

64. See *Baker v. Carr*, 369 U.S. at 226 (political questions characterized by "lack of judicially manageable standards" for resolving them); *Coleman*, 307 U.S. at 453-54; see also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1304 (1961) ("question is one for the decision of which there are no well-developed principles").

65. See Scharpf, *supra* note 61, at 576 ("As an unfailing support for the rightness of American claims . . . would jeopardize the integrity of the judicial process, the political question doctrine is a

Forum Non Conveniens

First, proper resolution of international antitrust cases requires access to a great deal of reliable information⁶⁶ on the internal policy determinations of foreign governments.⁶⁷ Hostility to American law has made procuring such data directly from governments extremely unlikely.⁶⁸ Further, the limits that other governments have imposed on discovery inhibit necessary fact-finding.⁶⁹

Second, the President, with the approval of Congress, has responsibility for the conduct of foreign relations.⁷⁰ Ultimately, these policies must be "defined, presented and defended by the political departments of the government."⁷¹ The courts have only a limited role in unsettled areas of foreign affairs.⁷²

Third, as Chief Justice Hughes recognized more than forty-five years

legitimate means for the Court to delimit its responsibility in international conflicts."); *cf.* *Baker v. Carr*, 369 U.S. at 213 (noting need for finality in foreign policy determinations, while recognizing dangers of appearing to defer out of habit rather than reason).

66. By what technique would a court apprise itself of foreign interests and political concerns? Courts formerly deferred to the State Department as to whether hearing a case would conflict with foreign interests, *see, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964), but that approach is less favored now. A court might rely on the defendant to "present all national interest factors favoring dismissal," Note, *The Inconvenient Forum and International Comity in Private Antitrust Actions*, 52 *FORDHAM L. REV.* 399, 419 (1983) [hereinafter cited as *FORDHAM Note*], but defendants are unlikely to interpret such policies objectively. Courts might request *amicus* briefs when governments are involved in the suit, 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, 163 (1982), but in private actions courts must decide who may speak for foreign concerns. Even if they asked foreign governments to intervene, a government might refuse to recognize the jurisdiction of American courts to decide the matter by appearing specially. *See* Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 *Nw. J. INT'L L. & BUS.* 336, 363 (1980). Moreover, what is to be made of legislative silence? Balancing of interests requires normative judgments based on ascertainable policies, *see* Westen, Comment, *False Conflicts*, 55 *CAL. L. REV.* 74, 81-82 (1967), and yet it is not clear whether a country's lack of a competition statute is an official statement that the government does not wish to regulate such conduct or simply that the legislature has not considered the matter.

67. *Cf.* Scharpf, *supra* note 61, at 567. "Judicial competence to decide may be doubtful if the Court is not assured of full clarification of all relevant questions of fact and law" at least when a lack of information affects an individual case; when there is a *general* lack of access to information, it might be more appropriate to adopt "an unqualified limitation upon [court] power," *id.*, as this Note suggests.

68. *See supra* notes 18-43 and accompanying text.

69. *See* R. von Mehren, *Perspective of the US Private Practitioner*, in *EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO* 203 (C. Olmstead ed. 1984) ("[T]he blocking statutes which other countries have enacted to curb American discovery may inhibit the efforts of parties to American litigation to prosecute or defend an action.").

70. The President's primacy in foreign affairs derives from his constitutional status as Commander in Chief of the military, U.S. CONST. art. II, § 2, cl. 1, from his power to conclude treaties and to appoint ambassadors, *id.* at cl. 2, and from his duty to receive ambassadors of other nations, *id.* at § 3.

71. Scharpf, *supra* note 61, at 575.

72. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-37 (1964) (Court will avoid decisions drawing into question the acts of foreign governments due to difficulty of inquiry); R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 111 (1964) (when no clear consensus on international norms governing such questions exists, domestic courts must assume "passive" role by avoiding decision); *cf.* 28 U.S.C. §§ 1330, 1602-11 (1982) (Foreign Sovereign Immunities Act defines court jurisdiction in this area).

ago, one hallmark of a political question is the need for "appraisal of a great variety of relevant conditions, political, social and economic" where there are simply no useful criteria for judicial determination.⁷³ Such matters are non-justiciable and belong to the political departments.⁷⁴ Cases implicating foreign affairs constitute paradigmatic political questions because resolution of such cases requires policy determinations where there are no well-developed guiding principles.⁷⁵ The lack of useful principles for interest analysis is exemplified by the failure of courts and commentators to agree even on a definition of an "interest" and its constituent elements.⁷⁶

Finally, no matter how carefully done, it is unseemly for courts to enter the political thicket of foreign relations.⁷⁷ Unquestioning support for the executive branch calls into question the courts' institutional integrity.⁷⁸ If judges act independently, however, they may preempt the formulation of policies by the Executive or the Congress for which the latter two branches are together accountable.⁷⁹ Conversely, any efforts by the political branches to ignore or defy court decisions will diminish the respect and authority upon which the courts' legitimacy depends.⁸⁰

73. *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939).

74. *Chicago & S. Air Lines Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (courts will not apply usual principles of judicial review to presidential decisions as to international air routes because cases impinging on foreign policy "are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.").

75. See Jaffe, *supra* note 64, at 1304.

76. See, e.g., *Timberlane*, 549 F.2d at 614 (eight factors define interests); *Mannington Mills*, 595 F.2d at 1297-98 (ten factors); K. BREWSTER, *supra* note 18, at 446 (six factors); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (five factors).

77. Professors Dunfee and Friedman, *supra* note 2, recognize the undesirable nature of court involvement in these political questions and argue for a legislative solution. But, surprisingly, they offer an "interim" proposal to focus attention on the problem through congressional passage of a statute forcing courts to run straight into the political thicket. The proposed statute would mandate that jurisdiction be found as broadly as possible so as to precipitate a diplomatic crisis that would in turn force Congress to address the main issue. *Id.* at 932.

This proposal is misguided for two reasons. First, it is illogical, both for the reasons developed in this Note at text accompanying notes 53-80, and for those that Dunfee and Friedman themselves develop, *supra* note 2, at 916-22, to thrust the courts into a diplomatic role that they are not competent to perform. As these authors themselves argue, courts are simply not capable of reading and responding to the vicissitudes of foreign policy. *Id.* at 906 ("Courts will have no reference points when analyzing the political questions. Precedent is of little value because foreign relations and policies constantly shift and change.").

Second, the proposal requires congressional adoption of an amendment to strip American courts of their ability to decline cases on comity grounds. *Id.* at 924-25. How this provides a solution to the present problem is a mystery. The goal should not be to make American laws even more annoying so as to chide foreign governments into recognizing the need for revision of the Sherman Act; rather it must be to get the United States Congress concerned enough to reconsider the problem. Once congressional inertia is overcome, it is more plausible to expect that Congress will act to craft a solution, rather than merely to create a mechanism that will force it to act a few years later.

78. See Scharpf, *supra* note 61, at 576.

79. See *id.*

80. See Jaffe, *supra* note 64, at 1307.

2. *The Unworkability of "Complex Exercises in Comparative Law"*

Beyond the fact that the court role entailed in interest analysis is prudentially inappropriate, the approach itself is unworkable.⁸¹ First, as noted above, procuring the necessary information is difficult given foreign hostility to American law.⁸² Second, even if all of this information could be aggregated, a court faces the daunting task of assigning relative weights to standardless factors of unequal importance and arriving at a reasoned judgment as to whether United States jurisdiction should be exercised.⁸³ The *Timberlane* factors serve only to identify the existence or absence of a conflict; they do nothing to guide courts in choosing the appropriate disposition of a conflict.⁸⁴ The Supreme Court has said that courts must not attempt "complex exercises in comparative law"⁸⁵—and courts cannot do so effectively.⁸⁶

Third, even if courts were able to undertake such a balancing, the overwhelming tendency when presented with a request to balance interests is for courts to resolve the conflict, not by seeking to determine if the foreign forum is actually interested in the case, "but rather by asking whether—in light of forum policy—that declared interest seems reasonable."⁸⁷ The result, predictably, is the application of the *lex fori*.⁸⁸ Of the

81. As one commentator dryly noted, determining jurisdiction by interest analysis is "more akin to tottering than to balancing." Olmstead, *Concluding Remarks*, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO, *supra* note 69, at 235. The complexities of full-scale interest analysis under the *Timberlane* criteria are set out in Kadish, *supra* note 66, at 156–62.

82. See *supra* text accompanying notes 68–69.

83. See *Sabena*, 731 F.2d at 916 ("The intersection of these issues confronts us with the Herculean task of accommodating conflicting, mutually inconsistent national regulatory policies while minimizing the amount of interference with the judicial processes of other nations that our courts will permit."); cf. Currie, *supra* note 60, at 176 (when several states have different policies, court is in no position to weigh competing interests); Gerber, *supra* note 2, at 781 (noting that interest analysis gives courts standardless factors that cannot be used predictably); Reese, *Choice of Law*, *supra* note 58, at 317 (interest analysis ultimately requires courts to use standardless factors to render *ad hoc* decisions).

84. *Sabena*, 731 F.2d at 948–49 (interest factors are neutral and provide no guidance in resolving the conflict of law question).

85. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251 (1981) (Court declines to resolve choice of law question; instead dismisses tort claim arising from airplane crash in Scotland on *forum non conveniens* grounds).

86. See *Sabena*, 731 F.2d at 949–50 (rejecting use of interest factors noted in *Timberlane* as unworkable "[g]iven the inherent limitations of the Judiciary"); Baxter, *Antitrust in an Interdependent World* 6–7 (Sept. 29, 1981) (speech before American Bar Association Section on International Law) reprinted in 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 36 (2d ed. Supp. 1984) (courts should not take on executive branch responsibilities by making this type of judgment as most are unequipped to do so); Shenefield, *supra* note 24, at 353–54 ("[T]he flaws in this three-step [*Timberlane*] approach begin to emerge almost as soon as the threshold inquiry into personal jurisdiction is begun").

87. Westen, *supra* note 66, at 85.

88. Cf. Akehurst, *supra* note 47, at 185–86 (discussing the "homeward trend" to apply domestic law, if possible, in choice of law determinations); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 643 (1960) (resolution of political factors leads to application of *lex fori*); Maier, *supra* note 54, at 317 (attempting to balance interests yields "homing ten-

recent decisions of American courts using the interest analysis suggested by *Timberlane*, there are "none where United States jurisdiction was declined when there was more than a *de minimis* United States interest."⁸⁹

Fourth, were courts able to overcome this *lex fori* tendency, the fact that there is no way to standardize the relative importance of interest factors would undermine the predictable application of United States law.⁹⁰ Only if the factors that prompt an American court to decline extraterritorial jurisdiction are relatively unambiguous and easily applied can economic actors predictably structure transactions. The largely standardless balancing required by *Timberlane* cannot yield such results.⁹¹

Finally, *Timberlane* fails to achieve its underlying objective of alleviating the political tensions surrounding extraterritorial application of the Sherman Act because its proposed solution is merely comity. Comity means only that a balancing of foreign government interests is appropriate; it in no way dictates the proper *outcome* of that balancing.⁹² An approach that focuses only on process cannot reduce hostility that ultimately derives from outcome. Only the dismissal of suits to more convenient foreign tribunals can reduce the present political tensions.

III. FORUM NON CONVENIENS

Interest analysis represents one possible, albeit misplaced, judicial response to the tensions arising from the expansive *Alcoa* jurisdictional test. A better response to the challenge of selecting cases appropriate for United States jurisdiction, that would also obviate the need for "complex exercises in comparative law,"⁹³ would be to return to the juridical princi-

ple" in choice of law cases).

89. *Sabena*, 731 F.2d at 950-51 (emphasis in original); see also cases discussed *supra* note 45; *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) ¶64,774, 71,789-90 (N.D. Cal. 1982) (real interest of American courts in resolving case against American corporation trumps speculative Japanese interests); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (courts cannot properly balance economic and social policies of foreign countries); *A.G.S. Electronics v. B.S.R. (U.S.A.)*, 1979-1 Trade Cas. (CCH) ¶62,684, 77,849-50 (S.D.N.Y. 1978) (effect abroad not sufficient to overcome American interest in consumer protection); *ATWOOD & BREWSTER*, *supra* note 86, at 38 ("[C]ourts have not yet developed smooth, workable methods and standards to implement the *Timberlane* balancing process."); *Hawk*, *supra* note 2, at 241 ("[T]he large majority of courts employing a *Timberlane* approach nevertheless have exercised jurisdiction."); *Maier*, *supra* note 54, at 297 (courts "have not produced an effective synthesis of relevant values to characterize the interrelationship between international power and wise national policy.").

90. See *Maier*, *supra* note 54, at 319 ("[N]eeds of the states and their subjects in the international community will not be well served unless the value of predictability is given high priority"); *Reese, Choice of Law*, *supra* note 58, at 316 (predictability important for planning future conduct); *Reese, Book Review*, *supra* note 54, at 230 ("[T]he expectations of the parties should be protected.").

91. See *Baxter*, *supra* note 86, at 36 (considerations of international interests "would inject an inappropriate degree of unpredictability" into the law); *Gerber*, *supra* note 2, at 781; *Shenefield*, *supra* note 24, at 369 (*Timberlane* balancing is not predictable).

92. See *Gerber*, *supra* note 2, at 781.

93. *Reyno*, 454 U.S. at 251; see also Note, *Forum Non Conveniens: Standards for the Dismissal*

Forum Non Conveniens

ples of self-restraint embodied in the common law doctrine of *forum non conveniens*.⁹⁴ This doctrine offers a method for selecting the best forum for those cases at the margins of jurisdiction which might properly be heard in any number of fora.⁹⁵

A. *The Proposed Approach*

A grant of a motion of *forum non conveniens* results in the dismissal of an action brought in one court, allowing the plaintiff to take the case to another forum⁹⁶ where greater availability of witnesses and evidence suggests that the case can be heard more effectively, efficiently, and conveniently. The defendant's objection in such a motion is typically not a chal-

of Actions from United States Federal Courts to Foreign Tribunals, 5 FORDHAM INT'L L.J. 533, 559 (1982) (courts should avoid complicated choice of law determinations in international context).

94. At least one other author has argued that the proper reach of American antitrust law can be settled by means of a *forum non conveniens* analysis. See FORDHAM Note, *supra* note 66. Significant differences exist between that approach and the approach taken in this Note, however, despite use of similar nomenclature.

That author argues that the weakness of the *Timberlane* interest analysis lies in its failure properly to regard the need for an "adequate alternative forum," and in *Timberlane's* solicitude for "national concerns [which] ignores the litigants' interests." *Id.* at 418. The author of the Note would merely expand the list of interest factors, which *Timberlane* previously identified for determining the appropriateness of the forum, by considering two additional factors.

This Note advocates a significantly different approach. Rather than rely on an *interest*-based conflict of laws analysis, this Note argues for a *contacts* analysis based on the *forum non conveniens* factors identified by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The distinction is not merely academic. As discussed *supra* at text accompanying notes 53-92, the processes of balancing interests and conducting "complex exercises in comparative law" are both difficult and disfavored by the Supreme Court. The author of the FORDHAM Note aims to remedy this by factoring in additional considerations. Having to consider more interests can only make the balancing even more unwieldy.

The analysis becomes more problematic when the FORDHAM Note argues, *supra* note 66, at 419, that courts should balance interests against effects—an ill-advised amalgamation of the standards of *Timberlane* and *Alcoa*. Finally, that Note's concern for adequacy of alternative fora, *id.* at 418, misapprehends the clear holdings of *Reyno* and *Gilbert* which make this a virtually insignificant concern. See *infra* note 126.

95. For definitions of *forum non conveniens*, see *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) ("The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."); Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 869 (1935) (court may refuse jurisdiction over case brought in forum not "appropriate" for such suit); BLACK'S LAW DICTIONARY 589 (5th ed. 1979) ("Term refers to discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.").

96. The general venue statute, 28 U.S.C. § 1404(a) (1982), states, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." That statute does not preclude a *forum non conveniens* approach. Although § 1404(a) substituted a transfer requirement for a provision allowing dismissal of a suit, *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964), this transfer of law requirement applies only under the venue statute—not under common law. See *Reyno*, 454 U.S. at 253-54 (permitting dismissal under *forum non conveniens*). *Forum non conveniens*, rather than § 1404(a), applies in cases where the action should have been brought in a foreign tribunal rather than an American court. See *Miskow v. Boeing Co.*, 664 F.2d 205, 207 (9th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Prack v. Weissinger*, 276 F.2d 446, 450 (4th Cir. 1960); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

lenge to the subject matter jurisdiction of the court per se, but rather an assertion of the impropriety of that particular court's exercising its jurisdiction over the case⁹⁷ because litigation in such an inconvenient forum amounts to an illegitimate exercise of state power.⁹⁸ Courts consider the motion before reaching any of the underlying legal issues of the case.⁹⁹

American courts have relied upon *forum non conveniens*, even if not always by name,¹⁰⁰ as part of their inherent power to control their own docket and expedite court business,¹⁰¹ as well as to define the "territorial limits on national legislation."¹⁰² The criteria relevant to *forum non conveniens* dismissals are not rigid, thus allowing courts flexibility to respond to various fact situations.¹⁰³ Nevertheless, the *forum non conveniens* criteria are more manageable and suited to judicial capabilities¹⁰⁴ than are the *Timberlane* factors. Rather than balancing conflicting economic and political interests by parsing foreign statutes and legislative histories, as *Timberlane* requires, *forum non conveniens* involves comparing "the burdens of suit in this forum to those of suit in the home forum"¹⁰⁵ in order to determine whether trial in the American forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience."¹⁰⁶

The Supreme Court clearly set forth the factors for striking such a balance in *Gulf Oil v. Gilbert*:

97. See Blair, *The Doctrine of Forum Non Conveniens In Anglo-American Law*, 29 COLUM. L. REV. 1, 2-3 (1929).

98. See F. MANN, *supra* note 21, at 40 (quoting DAHM, VÖLKERRECHT (1958-61)).

99. See *Recent Developments*, 44 FORDHAM L. REV. 402, 419-20 (1975).

100. As one author noted, American courts had long relied on the doctrine "with such little consciousness of what they were doing as to remind one of Molière's M. Jourdain, who found he had been speaking prose all his life without knowing it." Blair, *supra* note 97, at 21-22 (referring to Molière, *Le Bourgeois Gentilhomme*, act II, sc. vi).

101. See Blair, *supra* note 97, at 1. At least one author has argued that courts do not have and should not exercise discretion in determining their jurisdiction. See FORDHAM Note, *supra* note 66, at 417. This approach is clearly incorrect for the reasons identified *infra* at notes 127-37 and accompanying text. Further, such an argument cuts against that author's own proposal in that any attempt to scale back application of American law runs contrary to the traditionalist claim that Congress intended to create jurisdiction running to the limits of the law.

102. Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, 70 YALE L.J. 259, 286 (1960).

103. See *Reyno*, 454 U.S. at 249-50.

104. *Forum non conveniens* is a mode of analysis that courts are capable of applying effectively. See Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1138 (1981) ("[I]t should not be an impossible task for a court to determine whether litigation in a particular forum will be truly burdensome or unfair to the defendant."); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 420 (1947). Further, judges have much experience in applying *forum non conveniens* analysis. See Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 756-57 (1977).

105. Redish, *supra* note 104, at 1137.

106. *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

Forum Non Conveniens

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.¹⁰⁷

B. *Advantages of the Forum Non Conveniens Approach*

The *Gilbert* factors are especially useful in determining convenience in international antitrust cases. Such actions are among the most complex to litigate because they rely so heavily on massive amounts of documentary¹⁰⁸ and testimonial¹⁰⁹ evidence. Subpoena and discovery of corporate records is necessary to prove or refute the existence of agreements to engage in concerted action, boycotts, predatory pricing, and the like.¹¹⁰ Various corporate officers must be available for testimony or deposition.¹¹¹ Both parties must be able to marshal large numbers of documents¹¹² and subject them to computer-assisted analysis¹¹³ by economists retained as expert witnesses in order to determine relevant markets, degrees of concentration, anticompetitive effects, levels of competition and competitive injury, price elasticity, and price leadership.¹¹⁴ Indeed, expert testimony can be excluded in American courts unless the expert has thorough knowledge of industry conditions in order to attest to the accuracy of the data.¹¹⁵ Absent access to the relevant data through discovery and absent opportunity for the experts of each party to analyze this data,¹¹⁶ a meaningful court decision is impossible.¹¹⁷ Access to testimony and evidence is precisely what makes a trial most “easy, expeditious and inexpensive” in antitrust cases. When meaningful access is not possible, courts should decline jurisdiction and send the parties to courts better positioned to obtain the information necessary for a decision.

Determining which forum is most convenient, based on *Gilbert* criteria,

107. *Gilbert*, 330 U.S. at 508.

108. 16-I J. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 110.02 (1984).

109. *Id.* § 110.03.

110. *Id.* § 110.01[2].

111. *Id.* § 112.05[13].

112. *Id.* § 110.01[2].

113. *Id.* § 110.01[2], at 110-7.

114. *Id.* §§ 110.03, 110.01[1], at 110-3.

115. *Id.* § 110.03, at 110-30.

116. *Id.* § 110.01[2], at 110-6-7.

117. *Id.* § 110.03. Expert witnesses are necessary because lay courts and juries are unable to synthesize and simplify the evidence sufficiently to understand the issues in the case. Indeed, some courts find it necessary to retain their own economic specialists to act as neutral advisors. *Id.*

is more in keeping with the court's proper role in approaching jurisdictional questions with international implications. This is because *forum non conveniens* utilizes purely juridical rather than political factors. *Gilbert* affirmatively directs courts to refuse to decide cases where adequate access to documents or testimony of witnesses or defendants is unavailable. It removes from the court the responsibility for balancing policy interests of various nations, a salient feature of nonjusticiable questions. It provides the "well-developed principles"¹¹⁸ necessary to resolve cases in a principled fashion.¹¹⁹ Finally, because the *Gilbert* factors direct courts to consider the enforceability of any judgment rendered, *forum non conveniens* allows explicit consideration of the effects that a decision might have on court integrity.¹²⁰ Because the *forum non conveniens* approach is consistent with the court's proper role in cases having diplomatic consequences,¹²¹ it is preferable to interest analysis.

Where the factors of convenience counsel that a case is better heard elsewhere, courts should decline jurisdiction. *Forum non conveniens* is a method of analysis that courts can and have applied to dismiss sensitive cases.¹²² Because application of *forum non conveniens* will lead to dismiss-

118. See Jaffe, *supra* note 64, at 1304.

119. Determination of convenience is a traditional function of the courts. See, e.g., Schertenleib v. Traum, 589 F.2d 1156, 1164-65 (2d Cir. 1978) (controversy over management of mutual funds held in Switzerland dismissed on *forum non conveniens* grounds); Del Rio v. Ballenger Corp., 391 F. Supp. 1002, 1004-05 (D. S.C. 1975) (dismissal on *forum non conveniens* motion of tort claim arising in Panama against American corporation).

120. As noted *supra* note 50, *Timberlane* does provide for consideration of the enforceability of American court judgments as part of its interest analysis. But there is little reason to assume that the enforceability question would prompt a court to decline jurisdiction, given the political emphasis of the interest factors, and the fact that no court to date has assigned significant weight to enforceability. On the other hand the *forum non conveniens* analysis, taken as a whole, places the presumption more strongly against going forward in American court; to that extent such a determination would more likely tip the presumption against American court jurisdiction.

121. The *forum non conveniens* approach would also result in predictability because when a forum is inconvenient, courts would refuse jurisdiction. Foreign governments can structure their economies without fear that erratically applied American law will upset their long-range policies. See Barrett, *supra* note 104, at 402-03.

122. In addition to those cases cited *supra* note 119, see *Reyno*, 454 U.S. at 257-61 (affirming dismissal of tort claim to Scotland); *Mizokami Bros. of Arizona v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977) (dismissal on *forum non conveniens* grounds of suit by American plaintiff against Mexican and German defendants over chemical contamination of goods purchased by plaintiff), *cert. denied*, 434 U.S. 1035 (1978); *Paper Operations Consultants Int'l v. Steamship Hong Kong Amber*, 513 F.2d 667, 672 (9th Cir. 1975) (suit dismissed because necessary documents, unobtainable in United States court, could be had in foreign forum); *Fitzgerald v. Westland Marine*, 369 F.2d 499, 501 (2d Cir. 1966) (cost of transporting witnesses from alternate forum caused court to dismiss suit); *Abouchalache v. Hilton Int'l*, 464 F. Supp. 94, 98 (S.D.N.Y. 1978), *aff'd mem. sub nom. Collins v. Hilton Int'l*, 628 F.2d 1344 (2d Cir. 1980) (suit dismissed under *forum non conveniens* because premises in question in England); *Mitchell v. General Motors*, 439 F. Supp. 24, 27-28 (N.D. Ohio 1977) (suit dismissed on *forum non conveniens* grounds because of necessity of applying Ontario law); *Texaco Trinidad v. Astro Exito Navegacion S.A.*, Panama, 437 F. Supp. 331, 334 (S.D.N.Y. 1977) (granting *forum non conveniens* motion dismissing maritime action to Trinidad); *Dorizos v. Lemos & Pateras, Ltd.*, 437 F. Supp. 120, 123 (S.D. Ala. 1977) (suit dismissed due to cost of bringing witnesses from alternate forum); *Papageorgiou v. Lloyds of London*, 436 F. Supp. 701, 703 (E.D.

Forum Non Conveniens

sal of those cases not properly tried in American courts, it deals with the fundamental foreign objection—the opposition to American jurisdiction over cases involving fundamental decisions by foreign governments about how to structure their economies. *Forum non conveniens*, by refusing certain parties their desired forum, leaves them to pursue their claims in foreign tribunals or with the political departments where such claims more properly belong. The nation whose courts are best able to render a just verdict,¹²³ as determined by convenience factors,¹²⁴ would bear the obligation of trying the case in accordance with its own laws,¹²⁵ and will prescribe the remedy available to the plaintiff.¹²⁶

Pa. 1977) (suit dismissed because witnesses available in alternate forum were not amenable to service of process by United States court); *Harrison v. Capivary, Inc.*, 334 F. Supp. 1141, 1142–43 (E.D. Mo. 1971) (mem.) (*forum non conveniens* dismissal of contract claim between American plaintiff and Paraguayan corporation).

123. The FORDHAM Note, *supra* note 66, is concerned with the interests of the individual litigants, *id.* at 422 (“[I]t is extremely unfair that the litigants’ interests should be ignored in favor of ‘larger policies.’”), and with maximizing the enforcement of American antitrust law, *id.* at 419. In contrast, this Note focuses on the ability of a court to render justice, and adopts an internationalist perspective, ultimately concerned with facilitating international commerce and with persuading American courts to adopt a less parochial view. It is precisely the function of jurisdiction to allocate the burden and cost of suit in an inconvenient forum, for the forum convenient for one party in an international case will be inconvenient for the other. “[T]he question is which party it should be.” Brillmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 92. Courts may allocate this burden because an American citizen does not have an unqualified right to sue in American court on his own behalf, *Mizokami Bros.*, 556 F.2d at 977; *Vanity Fair Mills*, 234 F.2d at 645. Further, *Reyno* makes clear that the individual plaintiff has no right to an equally advantageous alternate forum, *see infra* note 126.

An awareness of the need to adjust our traditional legal doctrines to “the expanding horizons of American[s]. . . who seek business in all parts of the world” is evident in the Supreme Court’s ruling in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972). The Court there upheld a forum selection clause in a contract between an American oil drilling operation and a West German towing concern. The Court recognized that we live “in an era of expanding world trade and commerce,” and that a rigid doctrine of expansive jurisdiction for American courts “would be a heavy hand indeed on the future development of international commercial dealings by Americans.” *Id.* at 9. Exaggerated concern with ousting American courts of jurisdiction was based on “hardly more than a vestigial legal fiction” and reflected “something of a provincial attitude regarding the fairness of other tribunals.” *Id.* at 12.

124. All factors of convenience will almost never cut in one direction. But such factors need not be so favorable to one forum or the other as to be “overwhelming.” *Reyno*, 454 U.S. at 257–58. The trial courts must be vested with discretion to determine, on balance, which forum will pose “fewer evidentiary problems.” *Id.* at 258.

125. *Forum non conveniens*, unlike the conflict of laws approach of *Timberlane*, is consistent with the Supreme Court’s holding that the need to apply foreign law creates a presumption favoring dismissal. *Reyno*, 454 U.S. at 260–61.

126. In order to invoke *forum non conveniens*, there must be at least one other forum in which the maker of the motion is amenable to process. *Gilbert*, 330 U.S. at 506–07. At issue is whether the alternative forum must provide a remedy which could be described as “adequate” or “equivalent.” The most recent decision of the Supreme Court on the subject, *Reyno*, states unequivocally that possible change in substantive law governing the remedy is an insubstantial, though not insignificant, concern. 454 U.S. at 247–49.

The Court only generally discussed how inadequate the remedy available elsewhere must be before courts should evince concern. “Of course, 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.” *Id.* at 254. The Court offered no explanation or criteria as to what constituted a remedy “so

C. *Propriety of the Forum Non Conveniens Approach*

Although one might argue that Congress has determined that United States antitrust law should extend to the very cases that courts would refuse to hear on *forum non conveniens* grounds,¹²⁷ courts need not hesitate to apply the *forum non conveniens* approach to international antitrust cases.¹²⁸ First, Congress has not spoken unequivocally to the issue of ex-

clearly inadequate" as to be "no remedy at all." The Court eschewed reliance on any one factor, fearing that such recognition would destroy the flexibility that is the hallmark of the *forum non conveniens* doctrine. *Id.* at 249-50. Given this extremely low requirement, the question of remedy ordinarily will be irrelevant to a court's consideration of a *forum non conveniens* motion. An alternative forum must be provided, but it apparently need not be a sympathetic one.

Thus, *Sabena* is in error when it suggests that *forum non conveniens* is inapplicable on the grounds that the doctrine requires a "second forum that can fully resolve the plaintiff's claims." 731 F.2d at 936 (emphasis supplied). Such an assertion is contrary to *Reyno*, 454 U.S. at 254.

127. For example, the Court of Appeals for the District of Columbia Circuit, in an appeal of the on-going *Laker* suit, recognized that the Anglo-American antitrust dispute was a festering one reflecting a conflict "between deeply felt and long held economic and political policies," *Sabena*, 731 F.2d at 941 n.121, but conceded that the court was powerless to act in the face of "strongly mandated legislative policies" embodied in the Sherman Act, 731 F.2d at 916. *But see* Kintner & Griffin, *supra* note 10, at 202 ("It was left to the courts, however, to decide the circumstances under which the Sherman Act would apply to what effectively were foreign transactions.").

Some question the legitimacy of attempts by courts to dismiss actions where there exists a plausible claim of a congressional requirement that the case be heard. Professor Maier, for example, has argued that:

[s]ince courts in these cases are always operating under legislative language that on its face suggests that the statute is applicable to the foreign events or persons involved, there is some anomaly in a court's finding that a regulation may be applied without violating international jurisdictional standards but that the congressional command will not be followed if the court determines that as a matter of policy the regulation is inappropriately applied.

Maier, *supra* note 54, at 299 (emphasis in original); *see also* Kadish, *supra* note 66, at 149 ("dissatisfaction with the effects test . . . does not provide a principled basis of authority for restricting the statutory language of the Sherman Act . . . [M]ere judicial dissatisfaction with a legislative enactment does not give the judiciary the authority to rewrite the law."); Rahl, *supra* note 66, at 363 (same).

128. Although the Fifth Circuit has held that *forum non conveniens* is not available in any antitrust action, *Industrial Inv. Dev. Corp. v. Mitsui*, 671 F.2d 876 (5th Cir. 1982), its reasoning is erroneous. In *Mitsui*, the court denied a motion to dismiss an action to be tried in Indonesia by relying on an older Supreme Court opinion, *United States v. National City Lines*, 334 U.S. 573 (1948) [hereinafter cited as *National City Lines I*], handed down before Congress enacted the venue statute 28 U.S.C. § 1404(a).

But *Mitsui* misread a subsequent Supreme Court decision following the enactment of § 1404(a), *United States v. National City Lines*, 337 U.S. 78 (1949) [hereinafter cited as *National City Lines II*], which effectively rejected the reasoning of *National City Lines I*, and removed the proscription against reliance on *forum non conveniens* in an antitrust context. In *National City Lines II*, the court concluded that by enacting § 1404(a) Congress intended to apply the transfer statute only to "any civil action," 337 U.S. at 80-81, and hence that *National City Lines I* was not a bar to transferring an antitrust action from Los Angeles to Chicago on *forum non conveniens* grounds.

Mitsui attempted to distinguish *National City Lines II* by arguing that since the Court did not explicitly extend its ruling to the common law doctrine, that portion of *National City Lines I* precluding application of *forum non conveniens* still stands. 671 F.2d at 890-91 & n.18. It cannot reasonably be argued, however, that Congress or the Court sought to preserve the goals outlined in *National City Lines I*—avoiding denial of the plaintiff's choice of forum, protracting litigation, and scattering defendants while concomitantly allowing change of venue. The same problems are as relevant in a transfer as in a dismissal.

Moreover, to impose a per se rule against applying *forum non conveniens* to an antitrust case would result in burdensome restrictions on the courts, in direct contradiction of the Supreme Court's

Forum Non Conveniens

trattorial Sherman Act jurisdiction,¹²⁹ leaving the courts to decide the reach of the Sherman Act.¹³⁰ Hence, courts are free to scale back Judge Learned Hand's effects test. *Alcoa*, which has been viewed as a touchstone, crumbles to dictum.¹³¹

Second, it is simply inherent in the doctrine of *forum non conveniens* that courts will exhaust adjudicative jurisdiction¹³² and dismiss a case even where legislative jurisdiction¹³³ would go further. Were this not so, the convenient forum doctrine would be meaningless, for how could a court both exercise the full measure of legislative jurisdiction, and at the same time decline to hear a case because it could better be heard elsewhere?¹³⁴

recent recognition of the "need to retain flexibility" in applying *forum non conveniens*, and of its refusal to "lay down a rigid rule to govern discretion." *Reyno*, 454 U.S. at 249. Given the confusion over the precise holdings of *National City Lines I* and *II*, and the longstanding tradition of extending *forum non conveniens* to all civil actions, unless and until Congress explicitly acts to restrict the free exercise of a *forum non conveniens* motion, courts should not unilaterally do so.

129. See K. BREWSTER, *supra* note 18, at 72-73 (unclear what Congress meant; *Alcoa* merely one interpretation); Hawk, *supra* note 2, at 202 ("In 1890 Congress paid little or no attention to the Sherman Act's application in international trade [T]he legislative history provides no effective guidance as to either the application of the Sherman Act in international trade or the policies and national interests that should inform that application."); Ongman, "Be No Longer a Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope, 71 Nw. U.L. Rev. 733, 738 n.20 (1977) (legislative history of Sherman Act spare to begin with, but "simply useless in dealing with specific fact situations in American foreign trade.").

130. A careful parsing of the congressional response to the revisions in jurisdiction attempted by *Timberlane* demonstrates congressional approval of adjudicative jurisdiction that falls short of the full reach of legislative jurisdiction. Cf. Note, *Jurisdiction Over Foreign States for Acts of Their Instrumentalities: A Model for Attributing Liability*, 94 YALE L.J. 394, 413 & n.85 (legislative history of Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233, codified at 15 U.S.C. § 6(a) (1982), supports view that court should consider comity in cases with international repercussions).

131. The Sherman Act is unusual in the expansive interpretation courts afforded its jurisdiction. Previously, questions of extraterritorial jurisdiction had arisen only in relatively simple criminal cases. See Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639, 643-45 (1954) (criminal laws historically given extraterritorial application only in narrow circumstances; justification for extending jurisdiction not applicable to antitrust laws); Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1007-10 (1976) (discussing historical reticence of American courts to imply extraterritorial reach of American law, absent explicit Congressional directive).

132. Adjudicative jurisdiction comprehends "the willingness of a . . . society to furnish the law-applying agency—usually, but not necessarily, a court—for the adjudication of a matter involving significant elements that are not domestic to that society." A. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 283 (1983); cf. *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1315-18 (D.C. Cir. 1980) (uses terms "jurisdiction to prescribe" and "jurisdiction to enforce").

133. Legislative jurisdiction "is the power of a state to apply its law to create or affect legal interests." Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978), and it marks the "outer limits for choice of law." Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 563 n.13 (1952).

134. Courts can decline on *forum non conveniens* grounds the full exercise of jurisdiction permitted by Congress. *Canada Malting v. Paterson S.S.*, 285 U.S. 413, 422-23 (1932); *Paper Operations Consultants Int'l v. Steamship Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975).

In *Sabbatino* the Court upheld abstention based on the act of state doctrine. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government.").

Indeed, one can only make sense of the *Piper Aircraft Co. v. Reyno* decision by accepting the validity of incongruent legislative and adjudicative jurisdiction.

Third, as developed above,¹³⁵ separation of powers considerations provide courts with power to decline jurisdiction in international antitrust cases on *forum non conveniens* grounds. These international cases turn largely on political and diplomatic considerations that courts are simply not competent to resolve.¹³⁶ Applying interest analysis calls into question the competence and legitimacy of the Third Branch as an institution.¹³⁷ Courts can and must decline to become entangled in such litigation.

CONCLUSION

This Note proposes that courts substitute juridical factors of *forum non conveniens* for political decisionmaking in resolving extraterritorial antitrust suits. This approach represents the only means by which courts can effectively and legitimately render verdicts, and it removes judges from the political thicket that, under both the expansive effects test of *Alcoa* and *Timberlane's* interest analysis, is unavoidable.

Moreover, the approach set forth in this Note may provide an effective means of mitigating the international controversy that usually attends the application of the Sherman Act to international business transactions. Plaintiffs would find American courts less available as vehicles to disrupt or thwart the political and economic choices of other sovereign governments. Convenience analysis would allow courts to dismiss nettlesome cases, with only tangential American contacts, to foreign tribunals better positioned to secure the evidence and witnesses necessary to a meaningful adjudication of the controversy. By minimizing diplomatic conflict while enhancing the possibility of a proper determination of the claim, convenience analysis will help prevent the quarrels of commerce from degenerating into the quarrels of nations.

—John Byron Sandage

135. See *supra* text accompanying notes 59–80.

136. See Currie, *supra* note 60, at 176.

137. See Scharpf, *supra* note 61, at 576.