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Bringing Meaning to Interest Balancing in Transnational Litigation

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ABSTRACT

This Article contends that the current state of the debate over the balancing of interests in the extraterritorial application of United States law is outmoded and in need of serious reexamination. Most commentators and scholars continue to focus on the area of jurisdiction to prescribe, the acceptability of the effects test, and the development of lists of United States and foreign interests to be balanced by a United States court before exercising jurisdiction.

Professor Waller contends that this debate is no longer productive. Extraterritoriality, with some limitations for the interests of other states, is an accepted feature of United States law, and approaches the degree of binding state practice to be considered a rule of customary international law. In addition, the concept of extraterritoriality and interest balancing has spread beyond the area of jurisdiction to prescribe and has permeated all aspects of transnational litigation procedure.

These cases now raise on a regular basis difficult questions of jurisdiction to prescribe, personal jurisdiction, and discovery abroad. The Supreme Court's response has been to call for the same type of unstructured and highly discretionary balancing of interests tests that has plagued the antitrust area since the Timberlane *decision.*

Professor Waller argues that such unstructured balancing tests impose significant and unfamiliar burdens on parties and courts trying to resolve issues that go beyond the private interests of the litigants and seek to address the interests the United States and a foreign state may have in an otherwise private dispute. The author argues that the problems raised by the spread of an unstructured balancing of interests require a deeper probing of the nature, expression, and documentation of foreign interests. Professor Waller sets forth the type of foreign interests that mandate deference by a United States court, the expression of those national inter-

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ests, and the sources of information available to document such interests as a matter of evidence, and not merely rhetoric.

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I. INTRODUCTION

The extraterritorial application of United States law has been addressed in hundreds of articles, monographs and treatises,[1] and two sepa-

1. Over 450 writings address the subject of the extraterritorial application of United States law. In another context, the author identified over 300 works on the topic of the limits of national jurisdiction in 1985. *See* Waller & Simon, *Analyzing Claims of Sovereignty in International Economic Disputes*, 7 NW. J. INT'L L. & BUS. 1, 4 n.18 (1985). Through August 1990, approximately 160 additional articles have appeared indexed under extraterritoriality in the *Index to Legal Periodicals*. For bibliographies on the extraterritorial application of national law, see Behney, *Bibliography*, 15 LAW & POL'Y

rate Restatements by the American Law Institute.[2] The majority of these pieces deal explicitly with the jurisdictional aspects of the extraterritorial application of United States antitrust law. This commentary has defended the application of the Sherman Act to foreign commerce,[3] condemned the practice as a violation of international law,[4] and proposed numerous tests and limitations on the extraterritorial application of the Sherman Act to foreign interests.[5]

The extraterritorial debate has become unproductive. For better or worse, extraterritoriality is an accepted part of United States antitrust law and enforcement policy. The courts and the United States government generally agree on the use of comity principles. They agree further that courts and policy makers should balance the interests of the United States and foreign states in determining whether the United States has sufficient interests to justify asserting jurisdiction with the attendant friction.[6]

More importantly, the same principles have spread beyond the narrow issue of the jurisdictional reach of the antitrust laws. Comity and interest balancing have escaped the boundaries of jurisdiction to prescribe altogether and pervasively influence the areas of personal jurisdiction and discovery in transnational litigation.[7]

Continuing debate over extraterritoriality and comity serves only to obscure the more important analysis of how such issues are decided in United States courts on the basis of the evidence presented, rather than on rhetoric. The challenge is to address the balancing of interests process itself. The nature and sources of foreign interests must be defined and the means of determining and expressing those interests must be developed. The most important issue involved, however, is the determination of which foreign interests warrant United States restraint.

This Article examines the growth of extraterritorial jurisdiction and the development of balancing of interests tests in the area of jurisdiction to prescribe. Section III of the Article then explores the spread of unstructured interest balancing tests to more general transnational litigation issues of personal jurisdiction and choice of discovery rules. Section IV examines the current state of scholarship and the failure to directly ad-

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INT'L BUS. 1187 (1983); Behney, *Bibliography*, 50 LAW & CONTEMP. PROBS. 303 (1987).

2. *See infra* notes 15-17, 24-27 and accompanying text.
3. *See infra* notes 81-101 and accompanying text.
4. *Id.*
5. *Id.*
6. *See infra* notes 18-47 and accompanying text.
7. *See infra* notes 48-80 and accompanying text.

dress the principled application of the balancing of interests process throughout United States transnational litigation. Section V analyzes the challenge ahead in defining the nature, expression, and documentation of foreign interests necessary for a meaningful balancing process. Section VI then applies these concepts to illustrate the type of analysis permitting an informed use of the balancing tests so integral and prevalent in United States law and policy.

II. EXTRATERRITORIALITY AND COMITY IN JURISDICTION TO PRESCRIBE

A. *The Growth of Extraterritoriality*

The initial development of extraterritorial jurisdiction and the balancing of interests based on principles of comity are directly related to the development of United States antitrust law regarding anticompetitive conduct abroad.[8] The first pure extraterritorial application of United

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8. While a variety of other regulatory laws have since been applied on an extraterritorial basis, the balancing of interests approach has not yet been adopted with the same enthusiasm as in the antitrust area. Instead, the analysis has largely been limited to examining congressional intent and applying the law on an extraterritorial basis if an affirmative intent can be ascertained or inferred. *See Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598 (1990); Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U.L. REV. 339 (1990).

In the securities area, the courts typically have asserted jurisdiction based on conduct within the United States or under the traditional effects test first set out in the antitrust context in *Alcoa*. *See* MCG, Inc. v. Great Western Energy Corp., 896 F.2d 170 (5th Cir. 1990)(no jurisdiction over London purchase of securities by a Hong Kong buyer in a foreign offering as to which American buyers were disqualified as purchasers); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), *rev'd in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969) (jurisdiction over shareholder derivative suit involving share repurchase in Canada because of harm to United States purchasers and use of United States securities exchanges). *Cf.* Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5 (2d Cir. 1979) (incidental conduct in United States insufficient when effect entirely abroad); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975) (three-part test based primarily on situs of conduct and effects but also considering nationality of parties).

The inroads made by the balancing of interests test were acknowledged, but heavily criticized by Judge Bork in Zoelsch v. Arthur Anderson & Co., 824 F.2d 27 (D.C.Cir. 1987). *Zoelsch* concerned a fraud claim premised on the fact that the defendant took action in the United States regarding a securities transaction abroad that produced no effect in this country. *Zoelsch* was a case of first impression in the D.C. Circuit, and left the court free to formulate its own test for subject matter jurisdiction.

Judge Bork rejected any explicit balancing of United States and foreign interests,

States antitrust law occurred in *United States v. Aluminum Co. of America (Alcoa)*.[9] This case concerned collusive activities of bauxite producers outside of the United States. The Second Circuit held that United States courts could exercise jurisdiction over conduct abroad when the conduct was intended to, and actually did, affect the United States.[10] The court considered conduct having economic effects within the United States indistinguishable from actual conduct within our borders.[11]

Subsequent decisions interpreted *Alcoa* expansively.[12] These decisions for the most part disregarded the intent component of the test.[13] In addi-

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stating:

> [I]t would also seem counterproductive to adopt a balancing test, or any test that makes jurisdiction turn on a welter of specific facts. As we know from our experience in the extraterritorial application of antitrust law, such tests are difficult to apply and are inherently unpredictable. They thus present powerful incentives for increased litigation on the jurisdictional issue itself, which inevitably tends to defeat efforts to protect limited American judicial resources. A strong argument has also been made that balancing tests "are not faithful to the principle of comity among nations," for in practice they tend to deemphasize foreign sovereign interests and almost never lead a court to decline jurisdiction.

Id. at 32 n.2 (citations omitted).

Extraterritoriality is also present in statutes that explicitly regulate foreign trade such as export controls, foreign antiboycott provisions, and the Foreign Corrupt Practices Act, which have explicit extraterritorial application through the expansive definition of acts within United States commerce. Extraterritoriality is also a feature of such diverse areas of United States law as taxation, bankruptcy, civil rights, environmental law, and criminal law enforcement. *See, e.g.*, Behney, *supra* note 1.

The call for an explicit balancing of interests between the United States and affected foreign jurisdictions has come primarily from the commentators, but has not yet been adopted by the courts in interpreting the scope of these equally important statutes.

9. United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443-44 (2d Cir. 1945)(on certification and transfer from the United States Supreme Court for lack of a quorum of qualified judges).

Alcoa represented a clean break from the era of jurisprudence marked by Justice Holmes' decision in American Banana Co. v. United Fruit Co., 213 U.S. 347, 356-59 (1909), which held the Sherman Act could not be applied to conduct wholly outside the United States. The intervening cases therefore focused on locating some conduct within the United States as a basis for asserting jurisdiction. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

10. *Alcoa*, 148 F.2d at 443.

11. *Id.* at 444-45.

12. *See* Note, *Extraterritorial Application of the Antitrust Laws*, 69 HARV. L. REV. 1452 (1956). For example, the United States through May 1973 filed 268 antitrust suits involving foreign trade. None were dismissed for lack of jurisdiction. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 498-543 (2d ed. 1973).

13. *See, e.g.*, Sabre Shipping Corp. v. American Presidents Line, 285 F. Supp. 949, 953 (S.D.N.Y. 1968), *appeal denied*, 407 F.2d 173 (2d Cir.), *cert. denied sub. nom.*,

tion, the courts found increasingly trivial effects sufficient to adjudicate the conduct of foreigners abroad under United States antitrust law.[14]

The perceived abuse of the intended effects test was addressed by the American Law Institute in its *Restatement (Second) Foreign Relations Law of the United States* (the *Second Restatement*).[15] Section 18 of the *Second Restatement* limited the jurisdiction of United States courts to conduct abroad causing an effect within the United States if:

> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effects are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[16]

The *Restatement* also proposed a balancing of interests analysis based on comity to avoid conflicting and contradictory legal rulings by two or more states.[17]

Japan Line Ltd. v. Sabre Shipping Corp., 395 U.S. 922 (1969).

14. *See, e.g.*, Dominicus Americana Bohio v. Gulf Western Industries, 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (court has subject matter jurisdiction if effect is more than de minimis).

15. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter *Second Restatement*].

16. *Id.* § 18.

17. Section 40 of the *Second Restatement* states:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct from the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
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> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Id. § 40.

B. *The Adoption of the Comity Test*

The seminal judicial adoption of a comity-based balancing of the interests of the United States and foreign states came in *Timberlane Lumber Co. v. Bank of America.*[18] *Timberlane* involved allegations of a conspiracy to prevent the plaintiff from milling lumber in Honduras and exporting it to the United States. The Ninth Circuit rejected the effects test because of its failure to consider other states' interests. The court applied a three-part test in its analysis: first, there must be some effect, actual or intended, on United States commerce; second, a greater burden is placed on the plaintiff to show cognizable injury; and third, a court must determine whether United States interests outweigh the interests of the foreign state affected by the assertion of jurisdiction.[19]

On remand, the district court again dismissed the complaint utilizing the new balancing of interests test.[20] The Ninth Circuit affirmed the dismissal, holding in conclusory fashion that United States interests were outweighed by those of Honduras in the dispute.[21]

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18. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), *on appeal following remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

19. *Timberlane Lumber*, 549 F.2d at 613. The court proposed seven elements to be weighed in determining whether to exercise jurisdiction:

> (1) the degree of conflict with foreign law or policy;
> (2) the nationality, location, and principal places of business of the parties;
> (3) the extent to which enforcement by either state can achieve compliance;
> (4) the relative significance of effects on the United States as compared with those elsewhere;
> (5) the existence of intent to harm or affect American commerce;
> (6) the foreseeability of such effect; and
> (7) the relative importance of conduct in the United States as compared with conduct abroad.

Id. at 614.

20. 574 F. Supp. 1453 (N.D. Cal. 1983).

21. The Ninth Circuit stated:

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

Timberlane Lumber, 749 F.2d at 1386.

The Third Circuit adopted a variation of the *Timberlane* test in *Mannington Mills, Inc. v. Congoleum Corp.*[22] The court in *Mannington* dismissed a complaint seeking treble damages and injunctive relief relating to allegations that foreign patents had been secured by fraud. The court held that although the district court had jurisdiction under the *Alcoa* intended effects test, the court should, as a matter of comity, balance the same type of interests set forth in *Timberlane* before exercising jurisdiction.[23]

The *Restatement (Third) of Foreign Relations Law* (the *Third Restatement*) adopted yet another variation of *Timberlane*.[24] This approach requires a similar balancing of United States and foreign national interests, not as an exercise in comity, but as an affirmative element of jurisdiction.[25] This is an attempt to codify the *Timberlane* analysis as a principle of international law. The *Third Restatement* permits jurisdiction over conduct that was either intended to produce significant effects, or in fact produced such effects, if such jurisdiction is "reasonable."[26] Essentially, the *Third Restatement* measures reasonableness through an open-

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22. 595 F.2d 1287 (3d Cir. 1979).

23. *Id.* at 1292. The Third Circuit set forth 10 factors to be considered:

1. The degree of conflict with foreign law or policy;
2. The nationality of the parties;
3. The relative importance of the alleged violation of conduct here compared to that abroad;
4. The availability of a remedy abroad and the pendency of litigation there;
5. The existence of intent to harm or affect American commerce and its foreseeability;
6. The possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or to be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and
10. Whether a treaty with the affected nations had addressed the issue.

Id. at 1297-98.

24. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1986) [hereinafter THIRD RESTATEMENT].

25. Industrial Inv. Corp. v. Mitsui & Co., 671 F.2d 876, 883-84 (5th Cir. 1982).

26. THIRD RESTATEMENT, *supra* note 24, § 402. Although the balancing of interests is mandatory to determine reasonableness under the *Third Restatement*, it is unclear whether the *Third Restatement* requires a state to defer to another state with greater interests in a particular controversy. Section 403(3) of the *Third Restatement* provides that following the balancing of interests, a state "should" defer to a foreign state with greater interests.

ended balancing of national interests.[27]

C. *Applying* Timberlane

Subsequent court decisions have done little to provide content to the *Timberlane* balancing of interest process. For example, in *Star-Kist Foods, Inc. v. P.J. Rhodes Company*,[28] the Ninth Circuit applied the *Timberlane* test and refused to apply United States trademark law to an extraterritorial dispute. The court relied upon an intuitive analysis of the third element of the *Timberlane* test, holding that the interests of the United States were outweighed by the interests of the Philippines in the regulation of the use of trademarks within Philippine territory.[29]

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27. These factors include:

(a) the link of the activity to the territory of the regulatory state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

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

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

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

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

(f) the extent to which the 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 another state.

Id. § 403.

28. 769 F.2d 1393 (9th Cir. 1985).

29. The court stated:

Application of the Lanham Act to wholly foreign Philippine commerce could create a conflict with Philippine patent and trademark law and with pending proceedings in that country. Further, adjudication of the right to use the trademarks in Philippine commerce with nations other than the United States would require the testimony of Philippine nationals and the production and analysis of Philippine documents. The effect on United States commerce from the alleged illegal use of the trademarks in trade between the Philippines and other foreign countries is relatively insignificant compared to the effect on Philippine commerce. These factors indicate that the significant interest of the Philippines in restricting the extraterritorial application of the Lanham Act should preclude extension of the Act to wholly foreign commerce in this case. The other *Timberlane I* considerations do

There appears to be only one case dismissed pursuant to a balancing of interest analysis test that would not have been dismissed under the traditional effects test. In *In Re Insurance Antitrust Litigation*,[30] a federal district court dismissed an antitrust challenge to an agreement among London insurers regarding the type and language of certain insurance coverage offered in the United States. The court concluded that a significant conflict existed with foreign law and policy given the extensive foreign regulation of the insurance industry, the antipathy of the United Kingdom toward United States antitrust law, and the existence of British blocking statutes designed specifically to thwart the investigation, trial, and enforcement of judgments in United States private antitrust suits.[31] The court determined that the defendants and the evidence were located principally in the United Kingdom and that a United States judgment would be unenforceable in British courts because of the blocking statutes.[32] The court indicated that while no specific intent to harm the United States existed, significant effects occurred within the United States that were reasonably foreseeable.[33] Finding that the interests of the United States and Great Britain were of equal importance, the court concluded that the degree of conflict with British policy dictated a refusal to exercise jurisdiction.[34]

D. *United States Governmental Policy Towards Extraterritorial Antitrust Jurisdiction*

The Department of Justice affirmed both the principle of extraterritoriality and the role of comity in the application of United States antitrust law to conduct outside the United States in the 1977 and 1988 International Antitrust Guidelines.[35] The 1977 International Guidelines fol-

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not mandate a contrary result.
Id. at 1396 (citations omitted).

30. 723 F. Supp. 464 (N.D. Cal. 1989).

31. *Id.* at 487-89.

32. *Id.* at 489.

33. *Id.* at 490.

34. *Id.*

35. UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), *reprinted in* 4 Trade Reg. Rep. CCH ¶13,110 [hereinafter 1977 INTERNATIONAL GUIDELINES]; UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1988), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,109 [hereinafter 1988 INTERNATIONAL GUIDELINES].

The Federal Trade Commission (FTC) has devoted considerably less attention to questions of extraterritoriality. The FTC generally has cited to *Timberlane* favorably,

lowed the principles of the *Second Restatement*, indicating that United States antitrust laws "should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations."[36] In addition, the 1977 Guidelines suggest that a "direct or intended effect" on the United States is necessary to exercise subject matter jurisdiction.[37] The 1977 International Guidelines do not discuss *Timberlane*, though they explicitly acknowledge the role of comity in case investigation and prosecution.[38]

The 1988 International Guidelines adopt similar language in describing United States jurisdiction.[39] The 1988 Guidelines contain an exten-

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and has adopted a balancing of interests approach in exercising prosecutorial discretion in foreign commerce investigations and complaints. Brunswick Corp., 94 F.T.C. 1174, 1265 n.21 (1979); *see also* SKF Industries, 94 F.T.C. 6, 74 (1979); *cf.* Institut Merieux, S.A., File No. 891-0098, 5 Trade Reg. Rep. (CCH) ¶22,779, 55 Fed. Reg. 1614 (Jan. 17, 1990) (consent decree permitting merger between Canadian and French potential competitors in production of vaccines with no assets in United States upon condition of sale of key assets in Canada); *see generally* Holmes, *Government Antitrust Actions and Remedies Involving Foreign Commerce: Procedural and Substantive Limitations*, 4 NW. J. INT'L L. & BUS. 105, 115 n.47-48 (1982) (argues that critics of the application of antitrust laws to commercial activities abroad often fail to recognize the procedural and substantive limitations that restrain government agencies). The FTC, however, has not issued international guidelines of its own, and has not expressly announced its position regarding the principles set forth in the 1988 International Guidelines. Owen & Parisi, *International Mergers and Joint Ventures: A Federal Trade Commission Perspective*, presented at the 1990 Fordham Corporate Institute (personal remarks of FTC Commissioner Deborah K. Owen).

36. 1977 INTERNATIONAL GUIDELINES, *supra* note 35. The 1977 International Guidelines state:

> Competition by foreign producers is particularly important when imports are or could be a major source of a particular product, or where the domestic industry is dominated by a single firm or a few firms. An agreement or set of private agreements designed to raise the price of such imports or to exclude them from the domestic market raises most serious antitrust concerns. Antitrust enforcement can be expected against domestic firms and foreign firms subject to our jurisdiction for participation in such agreements. Moreover, the form of agreement is not controlling; an informal undertaking embodied in a single conversation may be just as punishable as the same undertaking contained in a complete contract. Any type of restraint which limits the competition offered by significant foreign competitors and products in our domestic market will be examined with great care by enforcement officials.

Id. at 6-7.

37. *Id.* at 7.

38. *Id.*

39. The 1988 International Guidelines state:

> Just as the acts of U.S. citizens in a foreign nation ordinarily are subject to the

sive discussion of comity and the balancing of interests as a consideration in the exercise of prosecutorial discretion in asserting jurisdiction.[40] The Department of Justice recognizes the significance of comity and indicates that it will examine whether significant interests of a foreign sovereign will be affected adversely by an enforcement action.[41] The Department's primary concern is avoiding any actual conflict between United States antitrust enforcement and the laws and policies of a foreign sovereign.[42]

The Justice Department also takes the unprecedented position that the doctrine of comity should not be applied to dismiss actions brought by the Government.[43] This apparent inconsistency stems from the Department's views that comity concerns in private litigation result from the act

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law of the country in which they occur, the acts of foreign citizens in the United States ordinarily are subject to U.S. law. The reach of the U.S. antitrust laws is not limited solely to conduct and transactions that occur within the United States, however. Conduct relating to U.S. import trade that harms consumers in the United States may be subject to the jurisdiction of the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved. Thus, for example, applying the Sherman Act to restrain or punish a private international cartel the purpose and effect of which is to restrict output and raise prices to U.S. consumers may be both appropriate and necessary to effective enforcement of that Act. On the other hand, the Sherman Act does not reach the activities of U.S. or foreign firms in foreign markets if those activities have no direct, substantial, and reasonably foreseeable effect on U.S. interstate commerce, on import trade or commerce, or on the export trade or commerce of a person engaged in trade or commerce in the United States.

1988 INTERNATIONAL GUIDELINES, *supra* note 35, § 4.

40. *Id.* § 5; *see also* Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283 (1987) (discussing State Department practice).

41. 1988 INTERNATIONAL GUIDELINES, *supra* note 35, § 5.

42. If an actual conflict exists, the Department considers several factors in its enforcement decisions. These factors include:

(1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;

(2) the nationality of the persons involved in or affected by the conduct;

(3) the presence or absence of a purpose to affect United States consumers or competitors;

(4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;

(5) the existence of reasonable expectations that would be furthered or defeated by the action; and

(6) the degree of conflict with foreign law or articulated foreign economic policies.

Id. § 5 n.170.

43. *Id.* § 5 n.167.

of state doctrine and the limited role of the courts in foreign affairs.[44] The Department indicates that the decision to bring action represents an affirmative determination by the executive branch that the interests of the United States outweigh those of the other state affected, and that the challenged conduct is more harmful to the United States than the potential harm to foreign relations resulting from the litigation.[45] The 1988 International Guidelines further state that governmental actions do not raise the risk of judicial intrusion into the legitimate affairs of a foreign sovereign, because the government considers such factors in its decision to bring the action.[46]

This novel proposition, however, has not been tested in court. While a court most likely will give great deference to the views of the government in matters relating to foreign affairs,[47] it is unlikely that a court will consider itself bound to exercise jurisdiction in a case merely because of the views of one of the parties involved.

III. The Spread of Comity and Balancing of Interests Throughout United States Transnational Litigation Procedure

The need for a coherent framework applying comity principles and the balancing of interests now extends beyond antitrust analysis. The United States Supreme Court has adopted these principles in several important areas involving transnational litigation.

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44. *Id.* This aspect of the Guidelines constitutes an inappropriate revival of the policies set forth during the use of the *Bernstein* doctrine in which a court facing an act of state issue would refrain from adjudicating the case unless and until the United States government would advise the court that the case would not interfere with the conduct of United States foreign policy. Bernstein v. N.V. Nederlandsche Amerikaansche Stoomvaart-Maatschappij, 210 F.2d. 375 (2d Cir. 1954). *Bernstein* has been replaced by a practice of the courts proceeding unless the government contends that foreign policy objectives would be injured. Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984). Even when the government makes such a representation, some courts will not abstain automatically from adjudicating, but independently will determine the risks from proceeding to decide the case on the merits. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). *See infra* notes 137-42 and accompanying text.

45. 1988 International Guidelines, *supra* note 35, § 5 n.167.

46. *Id.*

47. Dames & Moore v. Regan, 453 U.S. 654 (1981); Goldwater v. Carter, 444 U.S. 996 (1979); Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

A. *Personal Jurisdiction*

A primary area in which notions of comity and interest balancing have expanded is the exercise of personal jurisdiction. In addition to receiving actual notice of the complaint, a defendant must fall properly within the personal jurisdiction of the court.[48] The United States Constitution imposes requirements beyond literal compliance with statutory requirements for personal jurisdiction.[49] Specifically, the defendant must have "minimum contacts" with the jurisdiction before the assertion of jurisdiction will comport with notions of fundamental fairness implicit in the due process clause of the fifth and fourteenth amendments of the United States Constitution.[50] These minimum contacts must be based on "some acts by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[51]

The Supreme Court has imposed the additional requirement of "reasonableness" to assert personal jurisdiction over a foreign defendant. In *Asahi Metal Industry Co. v. Superior Court*,[52] the Court considered a product liability suit brought by a United States consumer against a Japanese manufacturer of motorcycle tires. The Japanese defendant brought a claim for indemnity against the Taiwanese company that manufactured the tire valves. Following a settlement between the plaintiff and the Japanese defendant, the Supreme Court held that the United States did not have personal jurisdiction over the claim between the two foreign parties.[53] The Court split evenly on the issue of whether the Taiwanese corporation's awareness that its products were entering United States commerce was sufficient to satisfy the minimum contacts test for personal jurisdiction.[54]

Nonetheless, a majority of the Court held that the extension of personal jurisdiction over the Taiwanese defendant would offend "traditional notions of fair play and substantial justice."[55] The Court held that

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48. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

49. U.S. CONST. amends. V, XIV.

50. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); *International Shoe*, 326 U.S. at 316.

51. *Burger King*, 471 U.S. at 475; Hanson v. Denkla, 357 U.S. 235, 253 (1958); *accord* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

52. 480 U.S. 102 (1987).

53. *Id.* at 113.

54. *Id.* at 109, 117.

55. *Id.* at 113, *citing International Shoe*, 326 U.S. at 316; Milliken v. Meyer, 311 U.S. 457, 463 (1940).

the reasonableness of personal jurisdiction depended upon: (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interests of the several states in furthering fundamental substantive social policies.[56] The Court concluded that the United States interests in the dispute were "slight" and imposed great burdens on the Taiwanese defendant.[57]

The *Asahi* decision has far greater significance than any of the subject matter jurisdiction disputes. Challenges to personal jurisdiction are litigated frequently in all areas of the law. Unfortunately, subsequent case law has not developed the open-ended *Asahi* balancing test or presented guidance in this difficult analysis of foreign and domestic interests. Moreover, the analysis often does not vary from the traditional inquiry of whether minimum contacts existed in the first place.

In *Newport Components, Inc. v. NEC Home Electronics (USA), Inc.*,[58] the trial court denied a motion to dismiss antitrust claims against a Japanese manufacturer, finding that NEC's contacts with the United States as a whole were sufficient to establish personal jurisdiction over the defendant.[59] The court in *NEC* found sufficient contact in NEC's use of United States federal courts to pursue claims, direct advertising of its trademark in the United States, trading of American Depository Receipts in United States securities markets, and sale of its products in the United States.[60] Similarly, in *Sinatra v. National Enquirer*,[61] the Ninth Circuit held that when a defendant purposely does business in the United States, it has a heavy burden to demonstrate that the exercise of

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56. *Id.* at 113, *citing World-Wide Volkswagen*, 444 U.S. at 292.

57. *Id.* at 114. The Court also noted the probable jurisdiction of both the Japanese and Taiwanese courts and the difficult choice of law questions if the United States court asserted jurisdiction. *Id.* The Court stated:

> In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

Id. at 115 (citation omitted).

58. 671 F. Supp. 1525 (C.D. Cal. 1987).

59. *Id.* at 1539.

60. *Id.* at 1539-40.

61. 854 F.2d 1191 (9th Cir. 1988).

jurisdiction is unreasonable.[62]

In *Karsten Manufacturing Corp. v. United States Golf Association*,[63] the court more explicitly relied upon the reasonableness principles of *Asahi* in dismissing an antitrust claim. A golf club manufacturer filed an action against a foreign golf association that prohibited the use of the plaintiff's clubs at sanctioned tournaments. The Arizona district court declined to exercise jurisdiction over officers and members of the association residing in Great Britain because the association did no business in Arizona, took no purposeful acts in Arizona to injure the plaintiff, and did not enforce their rules anywhere in the United States.[64] The court further noted the burden on the defendants in defending the action in United States district court, the availability of other fora, and the long standing controversy between the United States and Great Britain regarding the extraterritorial application of United States antitrust law.[65]

Similarly, in *Federal Deposit Insurance Corp. v. British-American Insurance Co.*, the Ninth Circuit found a lack of personal jurisdiction over a foreign insurance company that allegedly received funds fraudulently transferred from a United States bank.[66] The court found it unreasonable to exercise personal jurisdiction when the defendant's presence in California was limited to taking physical possession of a check and transferring the proceeds by wire to Fiji.[67] The court further relied on the status of the defendant as a foreign national, the subject of the controversy being a foreign corporation, the location of the evidence outside the United States, and the governing law being that of Fiji as further evidence of the unreasonableness of asserting jurisdiction over the dispute.[68]

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62. *Id.* at 1198-1202; *accord* Mason v. F. Lli Luigi & Franco Dal Maschio Fu G.B., 832 F.2d 383, 386 (7th Cir. 1987) (finding personal jurisdiction over a foreign machinery manufacturer who had been added as a third party defendant when interests of the plaintiff and the forum state made jurisdiction reasonable, and distinguishing *Asahi* as an action involving contribution claims between two foreign corporations); Hall v. Zambelli, 669 F. Supp. 753 (S.D.W.Va. 1987) (finding jurisdiction over actual manufacturer of product in product liability suit).

63. 728 F. Supp. 1429 (D. Ariz. 1990).

64. *Id.* at 1432-34.

65. *Id.* at 1435-36.

66. 828 F.2d 1439 (9th Cir. 1987).

67. *Id.* at 1442-43.

68. *Id.* at 1444; *see also* Wilson v. Kuwahara Co., Ltd., 717 F. Supp. 525 (W.D. Mich. 1989) (rejecting personal jurisdiction over Japanese parts manufacturer in product liability action against Japanese bicycle manufacturer); Garrett v. Beaver Run Ski Enter., 702 F. Supp. 265 (D. Colo. 1988) (no personal jurisdiction when foreign manufacturer sold only to distributor in another state who then sold into Colorado); Smith v.

B. *Choice of Discovery Rules*

United States courts apply a similar, unstructured balancing analysis to the choice of discovery rules available in United States litigation involving foreign parties. The United States is a party to the Hague Convention on the Taking of Evidence (Hague Convention),[69] which imposes significantly more restrictive conditions on discovery than do the Federal Rules of Civil Procedure[70] or state law equivalents. In addition, the Hague Convention generally requires discovery in a form acceptable under the legal systems of both nations involved.

Because of the difficulties associated with the use of the Hague Convention,[71] a conflict developed in both state and federal court over

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Dainichi Kinzoku Kogyo Co., 680 F. Supp. 847 (W.D. Tex. 1988) (rejecting personal jurisdiction over Japanese manufacturer which sold lathe to regional retailer serving states other than forum state); Ward v. Armstrong, 677 F. Supp. 1092 (D. Colo. 1988) (no personal jurisdiction for manufacturer which was successor to manufacturer doing business in forum state, not sufficient contacts for successor); Huang v. Sentinel Gov't Sec., 657 F. Supp. 485 (S.D.N.Y. 1987) (unrelated telephone calls to United States and single visit insufficient for personal jurisdiction in securities fraud case against foreign defendant).

69. 23 U.N.T.S. 2555, T.I.A.S. No. 7444. Signatories to this Convention include Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States.

70. FED. R. CIV. P. 26-37.

71. Obtaining the right to take a deposition under the Hague Convention is very different from the traditional domestic notice or subpoena for deposition which is prepared by the parties or issued as a ministerial matter by the clerk's office of the United States district court conducting the litigation. FED. R. CIV. P. 30, 45(d). A party must first seek the issuance of a letter rogatory or letter of request from the United States court pursuant to motion under Rule 28(b), and any applicable local rules governing the briefing and hearing of motions. The other party or parties to the litigation may oppose the motion, propose modifications, or request additional areas of discovery from the witness.

Once the letter of request has been issued by the United States court it must be transmitted to the Central Authority of the receiving country for review to determine whether the letter of request comports with the Hague Convention, any reservations adopted by the receiving jurisdiction, and local procedure. The letter normally will not be executed by the receiving Central Authority if it seeks a type of discovery not permitted under the Convention or local procedure. Most of the signatories to the Convention, for example, have executed a reservation under article 23 barring the use of letters of request to obtain pretrial discovery as that term is understood in the United States.

In addition, a foreign state may refuse outright to enforce a request under the Convention. At least two foreign courts have refused specifically to enforce letters rogatory in the context of private treble damage antitrust litigation in the uranium industry. In Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 2 W.L.R. 81 (H.L. 1977), the British Law Lords refused to enforce a letter rogatory requested by Westinghouse to

whether the Hague Convention was the required or preferred method for obtaining discovery of evidence abroad. The Supreme Court unsuccessfully attempted to clarify the issue in *Société Nationale Industrielle*

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obtain evidence in support of its claim that its inability to fulfill uranium delivery contracts was the result of an international uranium cartel. In another aspect of the same controversy, the Canadian Supreme Court refused to enforce a letter rogatory in Gulf Oil Corp. v. Gulf Canada Ltd., [1980] 2 S.C.R. 39, 1980-1 Trade Cas. (CCH) ¶63,285 (Canada 1980), on the grounds that the extraterritorial assertion of United States antitrust law violated Canadian public policy and Canadian sovereignty.

If the letter of request is proper in both form and substance, the Central Authority will transmit the request to the appropriate court which will execute the request. If the examination takes place in a civil law jurisdiction, the examination normally will take place by or in the presence of a judicial officer, which may impose further delays in scheduling.

The costs of proceeding under the Hague Convention may be prohibitive in cases with limited monetary value. While English and French are the official languages of the Convention, the Convention also permits reservations requiring the translation of documents into the national language or languages. Normally, the witness also will have the right to have the examination conducted in his or her native language, which requires additional translation fees for the examination itself. The additional limitations imposed by local procedural rules normally will require the assistance of local counsel in the preparation of the request, and the scheduling and conduct of the examination. In addition, each party normally will bear its own expenses in connection with the travel costs of the foreign examination.

The examination itself will be conducted under local procedural rules and not those of the United States. The witness may not necessarily be sworn prior to testimony. In most civil law jurisdictions, the examination will be conducted by a judicial officer based upon written questions submitted by the parties. The witness may refuse to answer any questions under a valid privilege of either the United States or the jurisdiction of the examination. Most civil law jurisdictions require the examining officer to prepare a protocol summarizing the questions and answers rather than creating a verbatim transcript of the proceedings.

The final protocol or transcript of the examination may be in a form very different from a United States deposition. The admissibility of such evidence will depend on the degree of reliability of the procedures used in the examination. Evidence obtained in response to a letter rogatory or letter of request will not be excluded merely because it differs in form from discovery taken under the Federal Rules of Civil Procedure, but may be excluded when wholly lacking in reliability and probative value. FED. R. CIV. P. 28(b); *see also* United States v. Salim, 855 F.2d 944 (2d Cir. 1988); United States v. Badalamento No. 84 Cr. 236 (PNL) (S.D.N.Y. 11/8/85) (available on Westlaw, 1985 WL 3844) (admitting testimony where civil law jurisdiction prohibited witness taking oath); Danisch v. Guardian Life Ins. Co., 19 F.R.D. 235 (S.D.N.Y. 1956); Uebersee Finanz-Korporation A.G. v. Brownell, 121 F. Supp. 420 (D.D.C. 1954).

For a detailed examination of the procedures applicable in each signatory to the Hague Convention, see B. RISTAU, 1 INTERNATIONAL JUDICIAL ASSISTANCE § 5 (1984).

Aérospatiale v. United States District Court.[72] The Court held that the Hague Convention was neither the exclusive nor the preferred method of seeking discovery abroad.[73] The Court held that the trial court must render its decision on a case-by-case basis by balancing the particular facts of the case, the sovereign interests of the two legal systems, and the likelihood that the choice of discovery rules will be effective.[74]

Although vague, *Aérospatiale* is revolutionary. The Supreme Court's earlier decision in *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*[75] held that compliance with discovery requests under the Federal Rules of Civil Procedure was mandatory absent a protective order from the United States court.[76] *Rogers* further held that the requirements of foreign law were relevant only to the decision of what sanctions are applicable for the failure to comply with discovery.[77] Under *Aérospatiale*, in contrast, foreign law considerations are now relevant to whether discovery requests under the Federal Rules of Civil Procedure will be permitted.[78]

The *Aérospatiale* test is significant only for its vagueness, which represents a trend toward the same unstructured and discretionary balancing analysis already present in personal and subject matter jurisdiction questions.[79] This inherent vagueness is compounded by the failure to delineate which party has the burden of proof under the three part test. Although subsequent cases have not resolved this or any of the other ambiguities posed by *Aérospatiale*, most courts have bypassed the problem by placing the burden of proof on the party *opposing* the use of the Federal Rules of Civil Procedure.[80]

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72. 482 U.S. 522 (1987).

73. *Id.* at 529. The use of the Hague Convention is required to obtain evidence abroad from non-party witnesses from a signatory state, unless the United States is party to additional multilateral or bilateral treaties with the foreign jurisdiction.

74. *Id.* at 544.

75. 357 U.S. 197 (1958).

76. *Id.* at 204-06.

77. *Id.* at 207-08.

78. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544. *See also* THIRD RESTATEMENT, *supra* note 24, § 442(1)(c) (calling for balancing of interests before authorization of any discovery located abroad).

79. Determination of preliminary jurisdiction questions also requires application of this same balancing approach. *See, e.g.*, Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 452 (6th Cir. 1988) (apply three-part test for choice of discovery rules governing whether to apply Foreign Sovereign Immunities Act); Rich v. KIS California, Inc. 121 F.R.D. 254, 258 (M.D.N.C. 1988) (using three-part test to determine discovery rules for personal jurisdiction decision).

80. Rich v. KIS Cal., Inc. 121 F.R.D. 254 (M.D.N.C. 1988); Haynes v.

IV. THE STATE OF SCHOLARSHIP

Despite the fact that versions of the same open-ended balancing test have permeated the key areas of United States transnational litigation procedure, the academic community remained locked in a debate over the acceptability of the balancing tests as originally formulated in antitrust cases dealing with jurisdiction to prescribe. The debate continues to concern primarily which version of the balancing test should be applied. These same commentators have failed to take the next step and address how the balancing of interests test can be applied in a meaningful way as throughout transnational litigation in the United States.[81]

Although interest balancing and the principle of comity have support in the academic community,[82] the *Timberlane* balancing test is widely criticized on the basis of both procedural and substantive grounds.[83] The *Timberlane* test has the effect of extending rather than restricting jurisdiction over conduct outside the United States.[84] For example, the first prong of the test permits a court to exercise jurisdiction if there is some effect in the United States, even in the absence of an actual and intended effect, or a direct, substantial, and reasonably foreseeable effect.[85] *Timberlane* then requires the parties and the court to determine, through a costly and lengthy balancing process, whether jurisdiction should be exercised.[86] This process allows a discretionary comity analysis instead of setting forth mandatory rules of jurisdiction.

Commentators condemn the entire concept of balancing of foreign interests by a branch of the United States government as an invasion of

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Kleinwefers, 119 F.R.D. 335 (E.D.N.Y. 1988); Benton Graphics v. Uddeholm Corp. 118 F.R.D. 386 (D.N.J. 1987); Sandsend Fin. Consultants Ltd. v. Wood, 743 S.W.2d 364 (Tex. App. 1988); *but see* Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987).

81. The importance of giving content to the balancing process is enhanced given the need to apply the test in congested state and federal courts of general jurisdiction in more routine contract and tort litigation of lesser stakes.

82. 2 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 18.28 (2d ed. 1981); Small, *supra* note 40; Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350 (1983); Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U.L. REV. 323 (1981).

83. 4 V. NANDA & D. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 5.02[4] (1990) (ideal theoretically, too complicated in application).

84. *Timberlane*, 549 F.2d at 608-09.

85. *Id.* at 610.

86. *Id.* at 612. For example, the resolution of *Timberlane* under the balancing test required an additional eight years of litigation after the district court initially dismissed the case under the effects test.

foreign sovereignty.[87] These commentators contend that courts applying the balancing of interests test have not been faithful to comity principles by deemphasizing foreign interests and routinely asserting jurisdiction.[88] Foreign commentators are also concerned that balancing foreign interests against those of the United States and then finding the foreign interests less compelling is likely to produce more friction than applying a principled version of the intended effects test.[89] The *Timberlane* balancing approach also has been criticized as a judicial abdication of congressionally conferred jurisdiction.[90] Additionally, *Timberlane* has been criticized for elevating private litigation into potential international disputes between states[91] and for injecting the judiciary into the political arena.[92]

Many commentators also indicate that a comity-based approach is

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87. D. ROSENTHAL & W. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY 86 (1982); Griffin, *Potential Resolutions of International Disputes Over Enforcement of United States Antitrust Laws*, 18 STAN. J. INT'L L. 279, 294-95 (1982) (United States court not the proper forum to consider foreign governmental interests); Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34 INT'L & COMP. L.Q. 724 (1985); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 268-69 (1981) [hereinafter Lowe, *Blocking Extraterritorial Jurisdiction*].

88. D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 86; Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11, 16-22 (1987); Hoechner, *A Swiss Perspective on Conflicts of Jurisdiction*, 50 LAW & CONTEMP. PROBS. 271, 278-79 (1987); Lowe, *Blocking Extraterritorial Jurisdiction*, *supra* note 87, at 268-69; Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310 (1985).

89. 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).

90. Sennett & Gavil, *Antitrust Jurisdiction, Extraterritorial Conduct and Interest-Balancing*, 19 INT'L LAW. 1185, 1208-10 (1985); 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); Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336 (1980).

91. Simon & Waller, *A Theory of Economic Sovereignty: An Alternative to Extraterritorial Jurisdictional Disputes*, 22 STAN. J. INT'L L. 337 (1986); Waller & Simon, *supra* note 1, at 1.

92. 1988 INTERNATIONAL GUIDELINES, *supra* note 35, § 5 & n. 167; Sennett & Gavil, *supra* note 90, at 1210-11; Kadish, *supra* note 90; Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1702 (1985); *but see* Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 806 (1984) (legitimacy of balancing public policy factors under international law).

simply unworkable.[93] *Timberlane* fails to provide a workable framework within which interests can be balanced and provides little guidance assigning weight to the various factors of the test.[94] Such a fact specific test invites litigation on jurisdictional questions with the consequent wasting of judicial resources on matters with tangential domestic impact better handled by a priori rules of jurisdiction.[95]

Critics of the comity approach generally propose returning to a principled version of the effects test[96] or limiting the courts' discretion in considering jurisdictional questions through external principles such as noninterference, predictability, sovereignty, due process, and true comity.[97] Other proposed solutions include reliance on consultation, harmonization of competition norms, and the negotiation of explicit bilateral and multilateral agreements regarding jurisdiction.[98] Furthermore, creating an in-

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93. Note, *supra* note 92, at 1701. For example, the court in Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984), thoughtfully examined the bases for deferring to British interests in a controversial private antitrust action brought by the receiver of a defunct airline against the leading national airlines of Europe. The court ultimately found "no neutral principles on which to distinguish judicially the reasonableness of the concurrent, mutually inconsistent exercises of jurisdiction in this case . . . ." *Id.* at 953.

94. 1 J. ATWOOD & K. BREWSTER, *supra* note 82, § 6.15; Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE INT'L L.J. 185 (1984); Note, *supra* note 88, at 1310.

95. Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 (D.C. Cir. 1987).

96. B. HAWK, 1 UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 153-56 (1989); Wood, *Conflicts of Jurisdiction in Antitrust Law: A Comment on Ordover and Atwood*, 50 LAW & CONTEMP. PROBS. 179 (1987); Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 N.Y.U. J. INT'L L. & POL. 565, 591 (1987); Note, *Beyond the Rhetoric of Comparative Interest Balancing: An Alternative Approach to Extraterritorial Discovery Conflicts*, 50 LAW & CONTEMP. PROBS. 95 (1987).

97. Brilmayer, *supra* note 88, at 37-38 (due process limitations); Gerber, *supra* note 94, at 185 (international law constraints); Lowe, *Blocking Extraterritorial Jurisdiction*, *supra* note 87, at 268-69; Note, *supra* note 88, at 1310; *but see* Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273 (1990) (arguing that resolution of jurisdictional conflicts requires redefinition of nation state and relationship to subject of regulation).

98. D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 90-91; Wood, *International Jurisdiction in National Legal Systems: The Case of Antitrust*, 10 NW. J. INT'L L. & BUS. 56 (1989); Möschel, *International Restraints of Competition: A Regulatory Outline*, 10 NW. J. INT'L L. & BUS. 76 (1989); Joelson, *Harmonization: A Doctrine for the Next Decade*, 10 NW. J. INT'L & BUS. 133 (1989); Atwood, *Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels*, 50 LAW & CONTEMP. PROBS. 153, 162 (1987); Tower & Willett, *Enforceability and the Resolution of International Jurisdictional Conflicts: Comments on Abbott, Atwood, and Ordover*, 50 LAW & CON-

ternational forum for resolving international antitrust disputes[99] and substantively revising United States antitrust laws have been suggested as possible solutions.[100]

Critics generally agree only that *Timberlane* and its progeny provide courts with an excess of unguided discretion on whether and how to balance foreign interests.[101] Continued variations on the existing themes will neither prevent conflicts from arising, nor fully eliminate judicial discretion and result-oriented jurisprudence.

V. The Challenge that Lies Ahead

The continuing criticism of *Timberlane* and the multiplicity of alternative approaches is unproductive and threatens to produce a theoretical incoherence that retards consistent application of principles of comity in antitrust and general transnational litigation. The cacophony of voices provides litigants and courts with no guidance on using the balancing of interests process. In addition to the external critiques of the balancing process, analysis must consider the actual application of the general balancing of interests in litigation, and the manner in which parties can limit the discretion of the court through the evidence they present.

Unlimited judicial discretion aids interested parties attempting to prevail on the basis of rhetoric, rather than well-founded claims relating to conduct abroad. Litigants and governments have a shared interest in avoiding the litigation of controversial government and private transnational actions based on either parochial domestic interests or unwarranted deference to specious claims of foreign interests.

TEMP. PROBS. 189, 192 (1987); Hoechner, *supra* note 88, at 279-81; Snyder, *International Competition: Toward a Normative Theory of United States Antitrust Law and Policy*, 3 B.U. INT'L L.J. 257, 318-23 (1985) (proposing model bilateral agreement); Small, *supra* note 40, at 290; Griffin, *supra* note 87, at 305; *cf.* Meessen, *Competition of Competition Law*, 10 NW. J. INT'L L & BUS. 17 (1990) (encouraging diversity of national approaches and warning against costs of attempts to overharmonize).

99. D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 91; Meessen, *supra* note 92, at 809.

100. D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 87-88; 2 J. ATWOOD & K. BREWSTER, *supra* note 82, § 18.31; Griffin, *supra* note 87, at 302-04.

101. *But see* Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7, 15-16 (1984) (comity and reasonableness used as principles to guide exercise of discretion, not as substitutes for analysis).

A. *The Burden of Balancing*

The balancing of governmental interests is not impossible.[102] However, this type of general balancing of interests at the very earliest stages of the litigation imposes a tremendous burden on all parties. The balancing of interests test may require additional discovery and expense. This burden is inevitable whenever the parties are called upon to litigate issues that go beyond the private interests of the clients and encompass the interests of the states whose nationals are involved in the dispute.

Similarly, the requirements of the interest-balancing tests impose an equally heavy burden on the judicial system. The complicated issues of comity and balancing national interests add to the already crowded trial court dockets. In general, these courts lack significant experience in adjudicating cases involving international and comparative law. Even the most sophisticated federal district court judge typically lacks a background in international law and confronts such issues only in limited circumstances each year. Further, trial court judges and their law clerks typically lack access to international or comparative law materials and lack familiarity with international legal research methods.[103]

B. *The Uniqueness of Balancing*

The *Timberlane* balancing of interests test and its progeny is significantly more complex than the balancing tests most familiar to United States lawyers and judges. The United States legal system is most familiar with the limited balancing of interests used in forum non conveniens[104] and transfers of venue.[105] This type of analysis seldom extends beyond the private interests of the parties and issues of convenience of litigation.

Analogies to choice of law principles are also of limited value. The distinction between the two types of analyses is complicated by the adop-

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102. *See* Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 LAW & CONTEMP. PROBS. 47, 64 (1987); Meessen, *supra* note 92, at 806-07.

103. *See* Committee Report, *Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report*, 24 INT'L LAW. 903 (1990).

104. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). *See* Note, *supra* note 92, at 1706-14 (distinguishing factors considered under forum non conveniens analysis and *Timberlane* balancing process). Moreover, the doctrine of forum non conveniens is not applicable to antitrust litigation. United States v. National City Lines, Inc., 334 U.S. 573 (1948).

105. 28 U.S.C. § 1404(a) permits a federal district court to transfer a case to another federal court for the convenience of parties and witnesses.

tion of identical vocabularies to describe very different processes.[106] The so-called "interest balancing" test in modern choice of law analysis is different in both purpose and application from the test in *Timberlane*.[107] In subject matter and personal jurisdiction questions, a United States court is seeking to determine whether it has the power to proceed in a particular case and whether that power should be exercised.[108] In choice of law analysis, a court with proper jurisdiction seeks to determine which substantive law should be applied in the case.[109]

Moreover, the actual interest balancing test in most choice of law questions has come to mean a very different process than the *Timberlane*, *Asahi*, and *Aérospatiale* tests. Modern interest analysis in conflicts law evolved to replace the traditional lex loci test. Under this traditional analysis, a court with proper jurisdiction applied the law of where the wrong occurred in deciding multistate tort claims.[110] Modern choice of law theory replaced this test with an analysis of multiple factors to determine which state represented the center of gravity for the tort claim in dispute.[111]

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106. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 89-93 (3d ed. 1986).

107. Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 LAW & CONTEMP. PROBS. 39, 40 (1987).

108. *See* Maier, *supra* note 101, at 24.

109. *Id.*

110. R. WEINTRAUB, *supra* note 106, at 280-359.

111. *Id. See also* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 972 (1952). Although the *Restatement (Second) of Conflicts of Law* drew on many sources, the center of gravity approach was one of the primary sources it incorporated. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 8 (1984).

Section 145 of the *Restatement (Second) of Conflicts of Law* states:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> a) the place where the injury occurred,
>
> b) the place where the conduct causing the injury occurred,
>
> c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145 (1971).

Section 6 deals with the related issue of the choice of law principle to be applied to

The search for the "center of gravity" is too often a weighing of the private, but not the public factors of *Timberlane*.[112] Such public law factors almost never are reached in a domestic conflicts case comparing the "interests" of two states within the United States federal system.[113] As Professor Juenger has noted: "governmental interests in domestic choice-of-law cases are tenuous, if not entirely lacking . . . ."[114]

The principal tasks of modern interest analysis are the identification and resolution of false conflicts in which only one state has any interests to be advanced, and the application of the law of the forum in true conflict cases.[115] The high degree of shared interests and similarity of substantive law between the United States and other states regarding private law matters, however, reduces the number of true international conflicts that arise.[116]

Conflicts analysis rarely addresses articulated substantive state interests and focuses instead on the reach of statutes when the legislature has been silent.[117] The "interests" that this analysis seeks to identify is the interest of the jurisdiction in applying its policies, and not in the substantive policies themselves.[118] Accordingly, one of the founders of interest analysis expressly argued against any type of explicit balancing of affirmative state interests in the case of a true conflict.[119]

In practice, choice of law decisions operate differently than the true balancing of interests adopted in *Timberlane*, *Asahi*, and *Aérospatiale*. Choice of law systems typically have built-in default rules that eliminate the need for the complex balancing of national interests and policies.[120]

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determine the applicable substantive law. *Id.* § 6.

112. *Id.*

113. Juenger, *supra* note 107, at 42.

114. *Id.*; Juenger, *supra* note 111, at 10-11, 37-39; *cf.* R. WEINTRAUB, *supra* note 106, at 284 ("Seeking a rational solution to a true conflict does not involve 'weighing' the interests of the two jurisdictions.").

115. *See* R. WEINTRAUB, *supra* note 106, at 281-84; Juenger, *supra* note 111, at 9-12.

116. D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 86.

117. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 400-01 (1980).

118. *Id.* at 393, 417-23.

119. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182, 606, 610, 617 (1963).

120. Such analysis in true international conflicts cases is limited by the rule that a case may be dismissed for failure to plead and prove foreign law, or in the alternative, a court simply will apply forum law in the absence of proof of a contrary foreign law. Cavic v. Grand Bahama Dev. Co., 701 F.2d 879 (11th Cir. 1983); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976

In addition, courts continue to use multifactor tests relating to the number of contacts with a jurisdiction and a speculative, rather than evidentiary, analysis of the interests of other jurisdictions.[121]

C. *Bringing Content to Balancing*

Litigants engaged in a true balancing of national interests must provide the court with a sufficient evidentiary record to permit decisions on a principled basis. While existing cases identify a laundry list of factors for a court to consider,[122] there is little guidance in applying these factors, the burden of proof, or the nature of evidence to be presented.[123] Cases too often consist of the rhetoric of the parties and the ill-defined exercise of discretion of the court. It is insufficient to indicate a common law or statutory cause of action and the existing local discovery rules on behalf of a plaintiff or the sovereign interests of a foreign state on behalf of a defendant.[124] The type of domestic or foreign interests that warrants deference by a United States court, the manner in which the state has chosen to express this interest, and the sources of record evidence available to document those interests remain unanswered.

1. What Foreign Interests Matter?

To make the balancing of interests process meaningful, "foreign interests" must be something other than a vague and generalized preference that a state's nationals avoid liability when sued in foreign courts. The

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(1982); 1700 Ocean Ave. Corp. v. GBR Associates, 354 F.2d 993 (9th Cir. 1965); Tidewater Oil Co. v. Waller, 302 F.2d 638 (10th Cir. 1962); Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956).

Moreover, the desirability and actual meaning of interest balancing even in true conflicts of law remains in substantial controversy. It is not desirable to import this confusion into the equally difficult areas of personal jurisdiction and jurisdiction to prescribe. For a survey of the shortcomings of interest analysis in choice of law questions, see Juenger, *supra* note 111, at 1.

121. *See* Judge v. American Motors Corp., 908 F.2d 1565 (11th Cir. 1990) (choosing domestic state law over Mexican law barring cause of action based on speculation as to Mexican policy from comments to *Restatement (Second) of Conflicts of Laws*).

122. *See supra* notes 18-27 and accompanying text.

123. *See, e.g.*, 1 J. ATWOOD & K. BREWSTER, *supra* note 82, § 6.18 (analyzing significance of foreign policy interests in balancing); THIRD RESTATEMENT, *supra* note 24, § 403 reporters' note 6 (suggests consulting diplomatic notes, amicus briefs, parliamentary records, and more informal communications such as press conferences and communiques).

124. Arguments regarding sovereignty are one of the most frequent areas of abuse in the balancing of national interests. *See* Waller & Simon, *supra* note 1, at 1; Simon & Waller, *supra* note 91, at 337.

interests of the state itself must be implicated in the litigation. This suggests that the foreign defendant or state must articulate some fundamental, pre-existing national policy that is threatened by the issue before the court.

A strong argument exists that these interests should be limited to those rights of the state that are recognized by public international law or to situations in which the state itself will suffer injury.[125] Under classic international law, the state itself is unable to bring a legal claim on behalf of its national unless there is a violation of international law.[126] There is no persuasive reason to permit the converse and allow a private party to invoke the protection of the sovereign without the state being, in effect, a real party in interest to the dispute.

Two commentators, Douglas Rosenthal and William Knighton, assert that a state has an implied interest in exclusively regulating its enterprises and shielding them from any form of extraterritoriality.[127] This view is another version of the failed claim that extraterritoriality is not consistent with international law or state practice.[128] A general prefer-

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125. *See* Waller & Simon, *supra* note 1, at 1; Simon & Waller, *supra* note 91, at 337.

126. *See, e.g.*, W. BISHOP, INTERNATIONAL LAW 742-43 (3d ed. 1971); 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 471-72 (1943).

127. D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 29.

128. The only judicial decision of an international tribunal directly on point condones the extraterritorial application of national law. In the *S.S. Lotus* decision, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, the Permanent Court of International Justice considered the jurisdiction of Turkey to bring criminal charges against a French officer on a ship involved in a fatal collision on the high seas. The acts of the French officer resulting in the collision were regarded as occurring on French "territory" by virtue of the registration of the vessel under French law. *Id.* at 25. The collision resulted in the deaths of eight crew and passengers aboard a Turkish vessel.

The Court held that international law did not prohibit the exercise of criminal jurisdiction, stating:

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law . . . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

Id. at 19; *cf.* Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1911 (1941) (each state owes duty to protect other states against injurious acts by individuals within its jurisdiction).

In addition, the use of extraterritoriality has reached the degree of universality re-

ence for *laissez-faire* is not the same as a specific and articulable national policy crucial to the integrity of the state and the promotion of its national interests.[129] Such a broad reading of national policy is an endorsement of protectionism and neo-mercantilism that is not legitimate under the language and spirit of the international trading system.[130]

Rosenthal and Knighton further suggest that a foreign state should be permitted to retroactively validate private conduct by assuming responsibility for conduct that the state either may not have known or approved in advance. They contend, without support, that: "[i]t is the nature of national sovereignty to include the right of retroactive official endorsement of conduct which initially was private and unofficial."[131] This position is not supported by either international or domestic United States law, and it represents a fundamental misconception of the meaning of sovereignty. Such a policy would have the unfortunate effect of increasing controversy rather than promoting dispute resolution and unnecessarily injecting diplomatic conflict into private litigation.[132]

2. The Expression of National Interests

The fundamental interests of states normally are expressed through such traditional hierarchical sources in a well-developed legal system as a constitution, statutes, regulations, and the multiplicity of statements by governmental decision makers in the exercise of their duties.[133] Decisionmakers must be sensitive and avoid applying a parochial view of foreign governmental processes. Some legal systems, such as Great Britain's, do not have a written constitution, and derive constitutional principles from custom and practice.[134] Similarly, domestic legislation

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quired for the assertion that extraterritoriality is permitted as a rule of customary international law. Fox, *supra* note 96, at 601; Meessen, *supra* note 102, at 58-65; Meessen, *supra* note 92, at 798-805 (effects test with consideration of foreign interests supported by state practice); Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500 (1981); *but see* Griffin, *supra* note 87, at 282. *See also infra* notes 155-78 and accompanying text describing state use and acceptance of extraterritoriality.

129. Simon & Waller, *supra* note 91, at 349; Waller & Simon, *supra* note 1, at 8-9.

130. Simon & Waller, *supra* note 91, at 349; Waller & Simon, *supra* note 1, at 8-9. *Accord* THIRD RESTATEMENT, *supra* note 24, § 442, comment c.

131. D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 30.

132. Waller & Simon, *supra* note 1, at 4-6.

133. This tends to exclude those nations whose national interests represent nothing more than the personal whim of an authoritarian ruler or rulers.

134. *See* D. YARDLEY, INTRODUCTION TO BRITISH CONSTITUTIONAL LAW (6th ed. 1984).

will differ from state-to-state depending on the constitutional relationship between the legislative and executive branches, and national traditions regarding the granting of discretion in enforcing statutes.

These factors suggest the necessity of analyzing the actual practice of the state involved to ascertain the national interests to be balanced. This approach is consistent with the principles governing international law and the focus on the custom and practice of states as a source for law.[135] An emphasis on actual practice resolves the difficult problems of interpreting legislative intent of a foreign government whose conduct and true purpose may be quite different from the stated purpose of statutes and regulations.[136] In addition, actual practice is capable of accounting for fundamental interests not embodied in sources akin to United States governmental tradition.

3. Documenting Foreign Interests

It is possible to present direct evidence in litigation as to the respective interests of the United States and a foreign government. This presentation, however, depends on the willingness of the effected governments to communicate their views to the court supervising the litigation. The United States government rarely sets forth its views, except when obligated to do so under a treaty.[137] It is equally difficult for a foreign defendant to persuade a foreign government to intervene or submit amicus briefs in support of its interests.[138]

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135. I.C.J. Statute, Art. 38.

136. *See infra* notes 171-78 and accompanying text.

137. *See* D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 87; Griffin, *supra* note 87, at 291-94, 299-300 (advocating increased use of United States government amicus briefs and Suggestions of Interest pursuant to 28 U.S.C. § 517 in private international antitrust litigation); Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 254-56, 263 (1982) (advocating more active United States governmental amicus participation).

One of few times the United States offered its views in a private foreign commerce antitrust case occurred in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The Justice Department previously had refused the invitation of both sides to participate in the lower courts. The Supreme Court requested the views of the Justice Department as to the granting of certiorari and the decision on the merits. The Department of Justice argued that the plaintiffs had failed to prove an actionable conspiracy under the antitrust laws and the conduct of the Japanese defendants was immune pursuant to the foreign sovereign compulsion defense. The Court held that the defendants were entitled to summary judgment on substantive antitrust grounds, and did not discuss the other points raised by the Justice Department and the parties.

138. *See* Note, *Foreign Government Participation in United States Antitrust Litigation*, 15 J. INT'L L. & ECON. 605 (1981); *but see* 1 J. ATWOOD & K. BREWSTER, *supra*

The active participation of either the United States or a foreign government in the private litigation often raises complications. Both governments argue that their views as to the disposition of the litigation should be given conclusive effect by the court. Countering these arguments requires an understanding of the nuances of the act of state doctrine as interpreted by United States courts. The classic formulation of this doctrine is that a United States court will not sit in judgment on the legality of acts of foreign states under foreign law.[139] A United States court, therefore, will abstain from adjudicating the merits of a case in which such analysis is required.[140]

The view that any position of the United States government is conclusive in litigation affecting foreign policy derives from an alternate basis of the act of state doctrine. The Supreme Court previously emphasized that the primary role of the executive branch in the conduct of foreign affairs justified judicial abstention from cases involving conflicts with foreign policy. A corollary to that view of the act of state doctrine, the *Bernstein* doctrine, required the United States government to certify affirmatively that litigation would not disrupt the conduct of foreign affairs before the court adjudicates the matter.[141] The separation of powers rationale underlying the act of state and *Bernstein* doctrines, however, is used less often. Even in cases involving affirmative statements of potential damage to foreign affairs, courts have not abstained from adjudicating the matter.[142]

On the other hand, foreign governments claim that the act of state doctrine requires United States courts to give conclusive effect to its interpretation of its own law.[143] While a court may be bound by the description of certain facts and their significance under foreign law, a court still has the ability and the obligation to determine the significance

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note 82, § 6.18; Shenefield, *Extraterritoriality in Antitrust*, 15 LAW & POL'Y INT'L BUS. 1109, 1116 (1983) (potential reluctance of foreign governments to reveal interests in United States litigation).

139. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990); Underhill v. Hernandez, 168 U.S. 250 (1897).

140. *W.S. Kirkpatrick & Co.*, 110 S. Ct. at 707; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

141. Bernstein v. N.V. Nederlandsche Amerikaansche Stoomvaart-Maatschappij, 210 F.2d. 375 (2d Cir. 1954). *Bernstein* has been replaced by a practice of the courts proceeding unless the government contends that foreign policy objectives would be injured. Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984).

142. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

143. United States v. Pink, 315 U.S. 203, 220 (1942).

of those statements under United States law in deciding the issue before the court.[144]

Whether direct governmental participation occurs, counsel for private litigants have to articulate national interests through the use of international and comparative law research.[145] The governing law of each state with a potential interest in a dispute is set out in the state's consistent conduct, its domestic legislation and regulations, the text and negotiating history of its treaties and executive agreements, and its participation in international organizations.[146]

In the United States federal system, proof of foreign law is governed by the Federal Rules of Civil Procedure. A party may present evidence regardless of its admissibility under the Federal Rules of Evidence, provided it indicates the existence and meaning of foreign law.[147] A party intending to raise an issue concerning foreign law must give reasonable notice.[148] A party may prove the requirements of foreign law by submis-

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144. For example, consider a case involving a claim that conduct in Japan was exempt from the application of United States antitrust laws because the private parties had been compelled to undertake the conduct by the Japanese government. The Japanese government submitted an amicus brief before the United States Supreme Court describing the actions it had taken, and its conclusion that it had "directed" the private conduct at issue in the litigation. Assuming that a United States court was required to accept these statements as true, the statements by themselves would not answer the paramount question of legal interpretation whether such conduct qualified as a matter of United States law under the foreign compulsion defense to the antitrust laws. *See* Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986).

145. For an excellent source on international legal research, see Williams, *Guide to International Law Research*, 20 GEO. WASH. J. INT'L L. & ECON. 1-413 (1986); *see also* S. KLECKNER, INTERNATIONAL LEGAL BIBLIOGRAPHY (2d ed. 1988).

146. Research on treaties can be particularly frustrating. Bilateral treaties in which the United States is a party are published in the United States Treaties (U.S.T.) and the Treaties and Other International Agreements Series (T.I.A.S.). Multilateral treaties in which the United States is a party are published in the United Nations Treaty Series (U.N.T.S.) and its predecessor, the League of Nations Treaty Series (L.N.T.S.), as well as the U.S.T. and T.I.A.S. Treaties where the United States is not a signatory can be found in the U.N.T.S., L.N.T.S., and the official foreign national treaty series. The indexing of treaties in any of these series is often limited.

Significant United States treaties and executive agreements are normally reprinted in *International Legal Materials*, a publication of the American Society of International Law. An additional source of diplomatic materials and United States governmental views is the Digest of International Law, which reprints key documents, but is not typically timely in terms of publication.

Domestic and comparative legal sources including legislative history, administrative regulations, and diplomatic correspondence also may be of help.

147. FED. R. CIV. P. 44.1.

148. *Id.*

sion of foreign legal materials, affidavits, or testimony.[149] The court, in determining the applicable foreign law, may consider any relevant material or source,[150] and is subject to de novo review on appeal.[151]

VI. An Antitrust Example

It is difficult to fully explain or illustrate the nature, expression, and documentation of United States and foreign interests, and the application of a truly evidence-based balancing of interests process in the abstract. By way of example, consider the resolution of a question of jurisdiction to prescribe in an antitrust action involving a foreign export cartel whose products are sold in the United States from the perspective of a litigant seeking to find record evidence in response to a motion to dismiss for lack of jurisdiction in a court requiring a balancing of national interests.

A. *Comparative Law Sources*

To assess the significance of the foreign interests involved in an antitrust action, the competition laws of the foreign state involved must be examined. This analysis requires examination of three elements. First, the private agreement or practice must be examined under the domestic competition law of the foreign state.[152] The legality of a practice within a foreign market is significant in confirming that an anticompetitive practice in international trade reflects foreign national policy.

Second, it is crucial to examine how the domestic competition law of the foreign state regulates anticompetitive export conduct. For substantive, mercantilistic, and jurisdictional considerations, the treatment of anticompetitive conduct may vary significantly in domestic and export contexts.[153]

Further, the existence of an export cartel does not conclusively indicate the existence of a favorable national policy, because the state's opin-

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149. *Id.*

150. Note the significant dangers of judicial notice if the court's determination of foreign law is not strictly guided by the parties.

151. Twohy v. First Nat'l Bank of Chicago, 758 F.2d 1185 (7th Cir. 1985).

152. For excellent sources for determining foreign competition law, see J. Von Kalinowski, World Law of Competition (1987); Organisation of Economic Cooperation & Development, Guide to Legislation on Restrictive Business Practices (4th ed. 1976).

153. *See* OECD Committee of Experts on Restrictive Business, Export Cartels (1974); Waller, *The Ambivalence of United States Antitrust Policy Towards Single-Country Export Cartels*, 10 Nw. J. Int'l L. & Bus. 98, 98 (1989).

ion of the export cartel may vary.[154] At one extreme, some states require exporters to participate in price or quantity restrictions. Other states merely permit the existence of such cartels and disregard their operation. Other states do not condone the existence of export cartels, but find their domestic laws inapplicable to pure export restrictions. Further, a given export cartel may be illegal, or may exceed the bounds of its lawful existence subject to civil or criminal consequences.

Third, it is necessary to examine the foreign state's own attitudes towards extraterritoriality. This examination requires analysis of more than just public pronouncements on the matter in controversy. Actual state practice must be examined to determine if the state consistently exercises extraterritorial jurisdiction in areas of economic regulation. The state's sponsorship or assent to international agreements that explicitly or implicitly endorse extraterritoriality is also relevant.

The European Economic Community (EC or Community) has applied its competition law in a manner similar to the traditional United States effects doctrine on several occasions to conduct arising outside the Community. In *Imperial Chemical Industries, Inc. v. Commission*,[155] for example, the European Court of Justice held that members of a cartel of dyestuffs producers located outside the EC violated article 85 of the EEC Treaty, because their conduct produced anticompetitive effects within the Community.[156] The court rejected the arguments of the defendants and the British government[157] that international law forbids such jurisdiction.[158] The strength of *Imperial Chemical*'s endorsement of the effects test is suspect, however, given the court's reliance on the presence of wholly owned subsidiaries of the foreign defendants within the Community to exercise jurisdiction.[159]

The strongest endorsement to date of a pure effects test came in *A. Ahlstrom Osakeyhtio v. Commission (Wood Pulp)*.[160] In *Wood Pulp*, the

154. Waller, *supra* note 153, at 111-13.

155. Imperial Chem. Indus. v. Commission, 1972 C.J. Comm. E. Rec. 619, Comm. Mkt. Rep. (CCH) ¶8161 (1971-73 Transfer Binder).

156. *Id.*

157. *See* British Aide-Memoire, *reprinted in* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310 (3d ed. 1979). At the time of the incidents forming the basis of the Dyestuffs case, Great Britain was not yet a member of the EEC.

158. Imperial Chem. Indus. v. Commission, Comm. Mkt. Rep. ¶8161, at p. 8005-07, 8030-31; *cf.* Beguelin Import Co. v. G.L. Import S.A., 1971 E.C.R. 949, CCH ¶8149 (dicta endorsing effects doctrine).

159. Imperial Chem. Indus. v. Commission, Comm. Mkt. Rep. (CCH) ¶8161.

160. [1987-88 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶14,491 (Sept. 27, 1988) [hereinafter *Wood Pulp*].

European Court of Justice held that an international cartel of wood pulp producers also violated article 85(1) of the EEC Treaty. *Wood Pulp* is significant because the defendants included foreign producers with no facilities or subsidiaries in the Community.[161] Without utilizing the effects doctrine by name, the Court held that the cartel's conduct fell within the Community's jurisdiction.[162]

Other states enforce their laws on an extraterritorial basis when conduct abroad adversely affects competition in their domestic market. In Germany, the effects doctrine is part of the statutory competition provisions.[163] The German competition authority has applied this provision to both cartel and merger activity outside Germany.[164] In addition to Germany, the competition laws of several other states appear on their face to be capable of extraterritorial application.[165]

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161. *Id.* at 18,603-04.

162. *Id.* at 18,611; *see also* Aluminum Imports from Eastern Europe, O.J. L 92 (Mar. 30, 1985), (1982-84 Transfer Binder) Comm. Mkt. Rep. (CCH) ¶10,658 (rejecting the argument that international law barred the exercise of jurisdiction over the acts of foreign defendants outside of the Community).

163. Gesetz gegen Wettbewebsbeschrangungen BGB1.I 1761 § 98(2) (Sept. 24, 1980), *translation reprinted in* 5 WORLD LAW OF COMPETITION (Federal Republic of Germany) part 9, app. 1 (1988); *see also* Stockmann, *The Janus-Face of Competition Policies*, 10 NW. J. INT'L L. & BUS. 31 (1989); Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983); *cf.* Hölzler & Braun, *Antitrust Controls Over "Pure" Export Cartels: The New German Approach*, 27 ANTITRUST BULL. 957 (1982).

164. *See Domestic Effects Within the Meaning of Section 98(2) of the Act Against Restraints of Competition in the Case of Mergers, reprinted in* ENFORCING ANTITRUST AGAINST FOREIGN ENTERPRISES 104-05 (C. Canenbley ed. 1981) (unofficial translation of unofficial guidelines).

165. *See* Matsushita, *The Antimonopoly Law of Japan*, in 11 LAW IN JAPAN 57, 68 (1978) (discussing extraterritorial application of antimonopoly law to international market division between Japanese and West German firms); ENFORCING ANTITRUST AGAINST FOREIGN ENTERPRISES, *supra* note 164, at 9-11 (speculating on the potential extraterritorial application of the French, Swiss, and Australian competition laws).

Several of the states that choose not to exercise jurisdiction on an extraterritorial basis have accepted, or mooted their opposition to, the United States exercise of such jurisdiction in competition matters. Such acceptance is the most widespread in government antitrust investigations, when the foreign government will have an opportunity to air its grievances through diplomatic channels, and the United States government has committed itself to consider such views and interests of comity in exercising its prosecutorial discretion.

Many of the developed nations have pledged to assist the United States through diplomatic contacts and consultations through the Organisation for Economic Cooperation and Development (OECD) and through bilateral consultations on competition matters. Consultations on competition matters also are required by several treaties of Friendship,

Even Great Britain, the strong dissenter in the extraterritoriality debate, applies its domestic law on an extraterritorial basis.[166] For example, Great Britain interprets its Secrets Act as barring publication of prohibited material anywhere in the world and has sought to prevent the foreign publication of certain books.[167] Similarly, Great Britain permits gambling only at private clubs, and forbids the advertising of such clubs, even in publications outside of Great Britain.[168]

Navigation and Commerce and Bilateral Investment Treaties between the United States and other nations.

The United States has explicit bilateral antitrust cooperation agreements with several nations. These agreements typically call for cooperation on competition matters, unless such cooperation would be inconsistent with domestic law or important national interests. Canada and the United States have had both formal and informal agreements regarding antitrust matters dating back to 1959. The United States and the Federal Republic of Germany entered into a similar agreement in 1976.

The most significant agreements of this type are the agreements in the 1980s with Canada and Australia, both previously strident foes of extraterritoriality that have enacted blocking statutes specifically to defeat United States antitrust enforcement. While neither of these agreements constitutes a blanket waiver of potential objections to United States antitrust investigations or litigation, both states have agreed not to automatically assert an invasion of self-defined sovereignty because of the mere existence of a United States government investigation into conduct occurring within their borders.

For example, Article 5(2) of the Australia-United States Agreements states:

> The mere seeking by legal process of information or documents located in its territory shall not by itself be regarded by either Party as affecting adversely its significant national interests, or as constituting a basis for applying measures to prohibit the transmission of such information or documents to the authorities of the Other Party, provided that in the case of United States legal process prior notice has been given of its issuance.

In return, the United States has agreed to give prior notice of requests for information in the state, consult regarding potential conflicts, and participate in private antitrust litigation involving such potential conflicts, and inform the court of the substance and outcome of the consultations.

166. *See* Shenefield, *The Perspective of the U.S. Department of Justice,* in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 12, 18 (J. Griffin ed. 1979) (describing extraterritorial application of British statutes and criminal law); Willoughby, *Remarks by an English Solicitor,* in *id.* at 56.

Great Britain also has cited *Timberlane* with approval on at least one occasion in its amicus brief in the *Aérospatiale* litigation. *See* Lowe & Worbrick, *Extraterritorial Jurisdiction and Extradition,* 36 INT'L & COMP. L.Q. 398, 402 (1987).

167. *See* G. PINCHER, THE SPYCATCHER AFFAIR (1988); M. TURNBULL, THE SPYCATCHER TRIAL (1988) (discussion of attempts to enjoin publication in Australia of book regarding British counterintelligence); *Spy Book Excerpts Get Magazine Banned,* Chicago Tribune, Nov. 25, 1988 (threat of contempt proceedings against publisher outside of Great Britain if it published classified excerpts in United States).

168. Gaming Act 1968, s.42.

In the regulation of business torts and crimes, Great Britain has asserted jurisdiction, for example, over attempted fraud on a life insurance company consisting of a staged suicide in the United States.[169] Although all conduct arose outside of Great Britain, the British courts asserted jurisdiction since the effect of the fraud was in Great Britain where the insurance company issued the policy.[170]

The most flagrant example of British extraterritoriality is the adoption and use of the 1980 Protection of Trading Interests Act[171] as a defensive measure to counteract perceived excesses in United States jurisdictional claims. The Act grants the British Government the power to prohibit and block a private party's compliance with a foreign discovery request seeking information located within Great Britain.[172] The Act also prohibits the enforcement of awards of multiple damages in Great Britain arising out of competition matters.[173] The Act further permits a British defendant in a foreign competition case to bring an action to recover any portion of an award in excess of actual damages.[174] Although phrased to apply to any foreign proceeding, the Act was intended primarily to address Britain's objections to United States antitrust proceedings against

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169. Director of Pub. Prosecutions v. Stonehouse, [1977] 2 ALL E.R. 909 (H.L.).

170. *Id.* at 915-17 (opinion of Lord Diplock), 920 (opinion of Viscount Dilhorne), 923 (opinion of Lord Salmon), 928 (opinion of Lord Edmund-Davies), 936-41 (opinion of Lord Keith of Kinkel); *cf.* Secretary of State for Trade v. Marcus, [1976] A.C. 35 (jurisdiction for fraudulent inducements for investment abroad resulting in victim's investment in the United Kingdom); Director of Pub. Prosecutions v. Doot, [1973] A.C. 807, [1973] All E.R. 940 (prosecution of drug conspiracy initiated outside of British territory).

Even in the area of competition law, Great Britain has attempted to investigate and regulate certain conduct by non-British firms outside of Great Britain. In Britain's attempts to prevent foreign pharmaceutical manufacturers from charging supercompetitive prices for sales to public entities, Britain routinely requested elaborate price and cost information from the foreign parents of British subsidiaries. *See* Rhinelander, *The Roche Case: One Giant Step for British Antitrust*, 15 VA. J. INT'L L. 1 (1974). The failure of a foreign firm to submit complete information was an explicit basis of the decision to require drastic price reductions on the basis of the best information available. Monopolies Commission, Report on the Supply of Chlordiazepoxide and Diazepam (Apr. 11, 1973). A spirited debate ensued in the House of Commons as to the consistency between Britain's own information requests and a contemporaneous order to a British pharmaceutical firm forbidding the provision of information in a United States antitrust investigation involving the pricing of a different drug. *See* House of Common Debates, 7-20 (June 18, 1973).

171. Protection of Trading Interests Act of 1980, ch.11.

172. *Id.* §§ 2, 4.

173. *Id.* § 5.

174. *Id.* § 6.

British subjects.[175]

The Act is phrased to protect Great Britain's trading interests around the globe and not merely to protect an abstract principle of territorial jurisdiction. The decision to invoke the Act's blocking provision is discretionary and assessed on a case-by-case basis in light of Britain's perceived self-interest.[176] This aspect alone suggests that the Act aims to promote Britain's economic interests, both territorial and extraterritorial.[177] Most commentators in the United States and Great Britain concede the extraterritorial effect of the Act, insofar as it relates to the conduct of British subjects outside of Great Britain and the ability to interfere with the awards of a United States court.[178]

B. *International Law Sources*

Two key international bodies, the Organisation for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD), have addressed international competition matters. The OECD includes the majority of states with ac-

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175. *See* Lowe, *Blocking Extraterritorial Jurisdiction, supra* note 87, at 257.

176. Protection of Trading Interests Act of 1980, ch. 2.

177. The ironies of the Act were not lost on the House of Commons, which showed concern for allegations that the Act partook of the same vice that it sought to cure. House of Commons Debates 1548-49, 1555-60 (Nov. 15, 1979); House of Commons Debates 19-20 (Dec. 4, 1979); House of Commons Debates 61-62, 67-68 (Dec. 6, 1979).

178. D. ROSENTHAL & W. KNIGHTON, *supra* note 87, at 78; Small, *supra* note 40, at 284; Snyder, *supra* note 98, at 316 & n.248; *but see* Lowe, *Blocking Extraterritorial Jurisdiction, supra* note 87, at 274-75, 280. Professor Lowe concedes that the use of the "clawback" provision could itself constitute a violation of "American sovereignty." *Id.* at 280. He argues that the blocking aspects of the Act are not extraterritorial: "Extraterritorial effects on British trade are no more than the occasion for the exercise of intraterritorial (or national) jurisdiction: no jurisdiction is claimed over the extraterritorial causes." *Id.* at 275. Professor Lowe's argument, however, is undercut by the Act's application to the conduct of British subjects outside of Great Britain.

Ultimately, Great Britain's position on extraterritoriality is largely preempted by its membership in the EC, and the EC's own use of extraterritoriality. *See supra* notes 155-62 and accompanying text. Regardless of whether British domestic law would allow such jurisdiction, a British subject could bring an action in British courts to enforce rights under articles 85 and 86 of the EC Treaty alleging the type of effects jurisdiction that the European Court of Justice has previously endorsed. *Id. See* D. GOYDER, EEC COMPETITION LAW 352-57 (1988). A private plaintiff could even use articles 85 and 86 as a basis to recover actual damages in national courts for a violation of EC competition principles. Garden Cottage Foods, Ltd. v. Milk Mktg. Bd., [1983] 2 All E.R. 770 (denying injunctive relief because of availability of damages for violation of EC competition provisions).

tive competition enforcement authorities.[179] The OECD arranges regular meetings and consultations among the competition authorities of its member states. The OECD also has promulgated a series of resolutions regarding cooperation among its members in competition matters.[180]

The OECD is also a prodigious source of reports and other scholarly materials on competition. The OECD published the competition laws of its members,[181] studies on the regulation of export cartel practices by its members,[182] and other comparative works on competition law and economic regulation.[183] Substantively, the OECD Guidelines for Multinational Enterprises set standards to prevent enterprises from adversely affecting competition.[184]

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179. The members of the OECD are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United States. Japan is the principal industrialized nation with a system of national competition law that is not a member.

180. *See* 1986 OECD Recommendation Concerning Cooperation Between Member States on Restrictive Business Practices Affecting International Trade, *reprinted in* 25 INT'L LEGAL MATERIALS 1629 (1986); *see also* OECD Recommendations Concerning Cooperation Between Member States on Restrictive Business Practices Affecting International Trade, Oct. 5, 1967, July 3, 1973, and Sept. 25, 1979, *reprinted in* EXTRATERRITORIAL JURISDICTION 243-45, 251-54 (A. Lowe ed. 1981).

181. GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (4th ed. 1976); *see also* COMPARATIVE SUMMARY OF LEGISLATIONS ON RESTRICTIVE BUSINESS PRACTICES (1978).

182. OECD COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, EXPORT CARTELS (1974).

183. *See* PREDATORY PRICING (1989); COMPETITION POLICY AND INTELLECTUAL PROPERTY (1989); DEREGULATION AND AIRLINE COMPETITION (1988); INTERNATIONAL MERGERS AND COMPETITION POLICY (1988); COMPETITION POLICY AND JOINT VENTURES (1987); COMPETITION POLICY IN OECD COUNTRIES (annual volumes); COMPETITION POLICY AND THE PROFESSIONS (1985); MERGER POLICIES AND RECENT TRENDS IN MERGERS (1984); COMPETITION AND TRADE POLICES: THEIR INTERACTION (1984); COMPETITION LAW ENFORCEMENT: INTERNATIONAL COOPERATION IN THE COLLECTION OF INFORMATION (1984).

184. The Guidelines discourage:

1) the abuse of a dominant position including anticompetitive acquisitions, predatory behavior, unreasonable refusals to deal, abuse of intellectual property rights, and price discrimination; or

2) participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels.

Guidelines for Multinational Enterprises, June 21, 1976, *reprinted in* EXTRATERRITORIAL JURISDICTION, *supra* note 180, at 246-47. OECD members are urged to adopt legislation barring these same practices in the OECD Council Recommendation Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprise, adopted July 20, 1978, *reprinted in*

UNCTAD also has dealt extensively with competition policy. UNCTAD's membership and interests are significantly more diverse than the OECD, and include lesser developed states, and both market and planned economies. Hence, UNCTAD's agenda and work product tend to compromise true competition law and national economic development principles. Despite these differences, UNCTAD has produced a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,[185] adopted by unanimous United Nations declaration.[186] The UNCTAD principles state that enterprises should refrain from practices which "limit access to markets or otherwise unduly restrain competition, *having or being likely to have adverse effects on international trade . . . .*"[187]

Because foreign antitrust issues are related inextricably to international trade practices, litigants may also find the General Agreement on Tariffs and Trade (GATT)[188] useful in structuring arguments regarding the balancing of national interests. Although few provisions of GATT deal directly with competition issues,[189] the language of GATT itself, the recommendations of GATT dispute resolution panels,[190] the interpreta-

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EXTRATERRITORIAL JURISDICTION, *supra* note 180, at 248-50.

185. Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10 (1980), *reprinted in* EXTRATERRITORIAL JURISDICTION, *supra* note 180, at 257.

186. General Assembly Resolution 35/63, Dec. 5, 1980, *reprinted in* EXTRATERRITORIAL JURISDICTION, *supra* note 180, at 256-57.

187. Multilaterally Agreed Equitable Principles, *supra* note 185, at D(3)(emphasis added). The UNCTAD principles further set forth specific practices to be avoided, including:

1) import and export cartels;
2) bid rigging;
3) quantity, market and customer allocations among competitors;
4) concerted refusals to deal; and
5) the abuse of a dominant position including predation, anticompetitive mergers, price discrimination, resale price maintenance in export markets, abuse of intellectual property rights, tying, and certain vertical restraints on distribution.

Id. at D(3)(a-f).

188. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 188, 61 Stat. A3, T.I.A.S. No. 1700 [hereinafter GATT].

189. *See* Art. 17, GATT, *supra* note 188 (regulating state trading); *cf.* arts. 6, 16 GATT (regulating dumping and government subsidies).

190. Art. 23, GATT, *supra* note 188; *see generally* Bello & Homer, *Settling Disputes in the GATT: The Past, Present and Future*, 24 INT'L LAW. 519 (1990); Van Bael, *The GATT Dispute Settlement Procedure*, 22(4) J. WORLD TRADE L. 67 (1988); Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987).

tive agreements executed by GATT signatories,[191] and the reports and views expressed in the various GATT negotiating rounds represent a consensus of trading nations as to the permissible trade practices.[192]

Similarly, the work of international governmental organizations and international nongovernmental organizations are relevant in a United States antitrust challenge to conduct in a specific industry regulated by the work of these organizations. The United Nations is the most prominent, but by no means the only, international organization where the United States and foreign nations exchange views on matters that address competition policy. The negotiating history and the actual agreements creating these organizations also may contain valuable references to the strength of the United States and foreign interests involved. The work product of the organizations is further evidence of customary international law relevant to the balancing process.

VII. CONCLUSION

The concept of extraterritoriality is here to stay. In United States antitrust enforcement, comity and the balancing of interests prevail. Despite significant and well-founded criticism, this balancing of interests has expanded beyond its original boundaries to pervade United States transnational litigation practice. The United States Supreme Court, however, has failed to give meaning or guidance to the balancing tests it continues to endorse, and subsequent lower court decisions fail to provide much more.

The academic community has been negligent in failing to fill this void. The focus of scholarship and litigation must shift from old debates to focus on the consistent and principled balancing of United States and

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191. *See* 26th Supp., Basic Instruments and Selected Documents of GATT: Agreement on the Interpretation and Application of Article VI, XVI, and XXIII of the General Agreement (Subsidies and countervailing Duties Code); Agreement on the Implementation of Article VI of the General Agreement (Revised GATT Antidumping Code); Agreement on Government Procurement, Agreement on Implementation of Article VII of the General Agreement (Customs Valuation); Protocol to the Agreement on Customs Valuation; Agreement on Technical Barriers to Trade (Standards Code); Agreement on Import Licensing Procedures; International Dairy Agreement; Agreement on Bovine Meat; Agreement on Trade in Civil Aircraft.

192. *See also* the Havana Charter, the failed predecessor to GATT, which contemplated a more formal international trade organization and included explicit competition provisions. Havana Charter for an International Trade Organization, art. 46, U.N. Doc. E/Conf. 2/78 (Mar. 24, 1948), *reprinted in* U.S. Department of State, Pub. No. 3206, Commercial Policy Series 114 (1948); *see generally* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 35-49 (1969).

foreign interests. To make this system work, both the bench and the bar must be the subject of an intensive educational process. The demystification of these issues and the incorporation into mainstream commercial litigation practice will assure parties adequate representation and informed and consistent judicial rulings.