Inconsistent Application of the Extraterritorial Provisions of the Sherman Act: A Judicial Response Based Upon the Much Maligned "Effects" Test

Edward L. Rholl

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INCONSISTENT APPLICATION OF THE EXTRATERRITORIAL PROVISIONS OF THE SHERMAN ACT: A JUDICIAL RESPONSE BASED UPON THE MUCH MALIGNED "EFFECTS" TEST

"In truth, few laws can escape the searching analysis of the judicial power for any length of time . . . ."

—Alexis De Tocqueville

I. INTRODUCTION

Extraterritoriality concerns the exercise of jurisdiction by United States courts over activities occurring beyond its physical borders. Extraterritorial application of legislation issued by the United States Congress has triggered a retaliatory response by foreign governments as


2. Extraterritoriality implicates both subject matter and personal jurisdiction. See Note, Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction, 98 HARV. L. REV. 1310, 1310 n.2 (1985). This Comment will address the issues and problems related to subject matter jurisdiction assertions over foreign corporations under the Sherman Antitrust Act.


4. See, e.g., Foreign Antitrust Judgments Act, No. 13 (AUSTL. 1979); Business Records Protection Act, ONT. REV. STAT. ch. 54 (1970); Protection of Trading Interests Act, 1980, ch. 11 (Great Britain).

well as a concern among businessmen and commentators about the effects such legislation may have on the American economy.5

The application of United States extraterritorial legislation to foreign corporations has its source in the antitrust laws.6 In 1909 the Supreme Court held that United States antitrust laws could not reach conduct outside of the United States.7 Thirty-six years later, the Second Circuit stated that United States courts could assert jurisdiction over foreign conduct under antitrust law where the conduct was intended to, and actually did, affect the United States.8 This famous "effects" standard was interpreted broadly by the courts and heralded a period of increasingly expansive interpretation of the extraterritorial reach of United States antitrust legislation.9 It was not until 1976 that a federal court departed from the "effects" test regarding the extraterritorial reach of United States antitrust laws.10

With this expanded view of extraterritorial reach under the Sherman Act has come a proliferation of tests created by the courts to determine whether, in a particular situation, subject matter jurisdiction can be maintained over a defendant.11 In addition, tests have been formulated by Con-


8. United States v. Aluminum Co. of Am. ("Alcoa"), 148 F.2d 416, 443 (2d Cir. 1945) (on certification and transfer from the Supreme Court for lack of a quorum of qualified justices).

9. See infra notes 94-139 and accompanying text; see also E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 22-28 (1974) (discussion of impact of Alcoa on development of interpretive judicial decision-making in the federal courts).

10. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). For a thorough treatment of Timberlane and other cases employing so-called "balancing" tests of jurisdiction under the Sherman Act, see infra notes 140-83 and accompanying text.

THE MALIGNED “EFFECTS” TEST

gress and the American Law Institute. The variety of jurisdictional tests and interpretations under the extraterritorial provisions of United States antitrust laws has contributed to a lack of predictability with respect to the scope and reach of these statutes.

First, this Comment will trace the development of extraterritorial subject matter jurisdiction under the Sherman Act through an analysis of case law. This will provide an understanding of the problems associated with the wide range of tests applied by the federal courts in determining jurisdiction under the Sherman Act. Next, the viability of continued judicial efforts to address the jurisdictional inquiry is presented. A call for the Supreme Court to announce a uniform jurisdictional standard follows, along with a discussion of the proper framework within which such a standard should be constructed. This Comment concludes with an argument favoring a test

12. Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C.A. §§ 6a, 45(a) (1982). The Act supplements Sherman Act jurisdictional provisions relating to export trade, stating that such provisions apply only where alleged conduct has a “direct, substantial and reasonably foreseeable effect” on United States commerce.

Some commentators have minimized the importance of the Act because it does not apply to United States import trade, which more frequently implicates foreign defendants. See, e.g., Schmidt, The Extraterritorial Application of United States Antitrust Laws, 5 J.L. & COM. 321, 333-35 (1985); Victor & Chou, United States Antitrust Jurisdiction Over Overseas Disputes After Title IV of the 1982 Export Trading Company Act and Timberlane, 10 FORDHAM INT’L L.J. 1, 14-15 (1986).

Some courts have applied the Act’s jurisdictional standard, but many have chosen to ignore it. Compare Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984) (effects must be direct, substantial and reasonably foreseeable) with Timberlane Lumber Co. v. Bank of Am. (Timberlane I), 749 F.2d 1378 (9th Cir. 1984) (applying balancing of interests test with no mention of FTAIA standard).

13. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403. Section 402 of the Restatement provides for a “substantial effects” jurisdictional test. Section 403 specifies that courts may choose to apply an abstention doctrine to determine whether to assert jurisdiction in a particular case.

The use of such abstention doctrines has found some acceptance among the courts and commentators. See, e.g., Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Shenefield, Extraterritoriality and Antitrust — New Variations on a Familiar Theme, Remarks before the International Law Institute and the ABA Section of International Law (Dec. 10, 1980), reprinted in L.A. Daily J., Jan. 7, 1981, at 4, col. 3. However, more recent commentaries and decisions have called into question the validity of the abstention doctrine in the Sherman Act context. See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); 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, 144-45 (1982).

based on "effects," rather than "balancing," in order to foster greater predictability in Sherman Act jurisdictional assertions.

II. TESTS OF SUBJECT MATTER JURISDICTION UNDER THE ANTITRUST LAWS

The first step in determining whether a particular court may assert jurisdiction over a specific defendant involves a consideration of whether the court has subject matter jurisdiction over the dispute. Congress has granted the federal courts exclusive general jurisdiction under both the Sherman and Clayton Acts. The following material analyzes the courts' treatment of subject matter jurisdiction under the Sherman Act.

A. The Territoriality Test

The first case to consider the extraterritorial application of United States antitrust law was American Banana Co. v. United Fruit Co. In this case, an Alabama corporation brought suit against a New Jersey corporation alleging the Costa Rican government, at the instigation of the defendant, had seized plaintiff's banana plantation. The alleged conduct occurred entirely outside of the United States. Justice Holmes announced that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." Therefore, the Sherman Act could have no application to conduct which occurred outside of the United States.

18. Id. at 354-55. After the seizure a Costa Rican court held an ex parte hearing and declared the plantation to be the property of a Costa Rican citizen.
19. Id. at 355. This appears to have been the controlling factor in Justice Holmes' decision.
20. Id. at 356. Justice Holmes also recognized the role of comity in the jurisdictional inquiry, stating:
   For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.
Id. (emphasis added).


21. American Banana, 213 U.S. at 357. Justice Holmes did, however, recognize that in certain cases "immediately affecting national interests [a court may] . . . make and . . . execute . . . threats as to acts done within another recognized jurisdiction." Id. at 356. Justice Holmes obvi-
In the years following the *American Banana* decision, the United States became increasingly involved in international commerce. This involvement was accompanied by an expanded view of the extraterritorial potential of the Sherman Act by the Supreme Court. The first sign of this changing philosophy was manifest in *United States v. Pacific & Arctic Railway & Navigation Company*, decided only four years after *American Banana*. In *Pacific Railway* the United States alleged that Canadian and American corporations had conspired to monopolize transportation routes between the United States and various Alaskan and Canadian ports. The defendants argued that *American Banana* precluded the Court from exercising jurisdiction over a foreign corporation absent its consent. The Supreme Court rejected this logic and without distinguishing *American Banana*, held that the Sherman Act authorized jurisdiction over the foreign defendants with respect to those acts which occurred within the United States. The Court reasoned that jurisdiction cannot be defeated simply because one

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23. 228 U.S. 87 (1913).

24. *Id.* at 101-03. While *American Banana* was a private antitrust suit brought by one corporation against another, *Pacific Ry.* represents a public antitrust suit brought by the United States government. It was the first public suit to succeed on jurisdictional grounds over a foreign defendant.

25. *Id.* at 100. Prior to *International Shoe*, consent was important to jurisdictional assertions over conduct beyond the physical territory in which a particular court presided. Consent was not, however, the sole determinative factor.

26. The Court could have distinguished *American Banana* from *Pacific Ry.* because in the former case both parties were American, while in the latter, one party was American and one party Canadian. In addition, all the conduct alleged in *American Banana* took place outside of the United States, while some of the conduct in *Pacific Ry.* occurred within the United States. Note, *supra* note 22, at 517 n.39.

27. *Pacific Ry.*, 228 U.S. at 105-06. The Court recognized the need for the United States to regulate its own commerce, regardless of the nationality of those who allegedly harm it. The authority of Congress to regulate the United States economy is unquestioned. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). This authority is at the heart of the antitrust policy of the United States. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Thus, courts should make their jurisdictional assessments recognizing this underlying congressional authority. See infra notes 222-33 and accompanying text.
of the defendants is foreign, when part of the alleged conduct affected the United States.\textsuperscript{28}

The Court further eroded the \textit{American Banana} test in \textit{Thomsen v. Cayser}.\textsuperscript{29} This private antitrust suit involved an alleged combination to control shipping rates between New York City and South Africa.\textsuperscript{30} The defendants combined to offer reduced prices to American firms who would agree to ship their goods exclusively with the defendants,\textsuperscript{31} while firms that refused, would pay a higher rate.\textsuperscript{32} The Court conceded that the actual agreement was formed abroad by foreign entities, which would have ended the analysis under \textit{American Banana}.\textsuperscript{33} Nevertheless, Justice McKenna held that the Court had subject matter jurisdiction under the Sherman Act because the alleged conspiracy was effectuated in New York City.\textsuperscript{34}

In \textit{United States v. Sisal Sales Corp.},\textsuperscript{35} the Supreme Court further limited \textit{American Banana}, holding that it did not apply to a conspiracy founded in the United States to monopolize the exportation of sisal from Mexico.\textsuperscript{36} The complaint alleged that a Mexican firm and several American firms combined efforts to monopolize sisal trade.\textsuperscript{37} The Mexican defendant apparently persuaded the Mexican government to enact discriminatory legislation which favored its business.\textsuperscript{38} Pursuant to this
legislation, defendants were able to control the entire sisal market in Mexico and the United States. The Supreme Court held that jurisdiction was satisfied because the alleged combination affected United States commerce and some of the conduct occurred within the United States.

Thus, twenty years after *American Banana*, courts were imposing jurisdictional power over foreign defendants whose activities were entered into or given effect in the United States and whose activities had or were intended to have a detrimental effect on American commerce. Activities conducted wholly outside the United States which affected United States commerce were not within the jurisdictional scope of the Sherman Act. The need for the "presence" of the defendant, or its acts, in order for a court to assert jurisdiction remained.

**B. The Intended Effects Test**

On the heels of *Sisal Sales* came the stock market crash of 1929, the Great Depression, the New Deal and World War II. Emerging victorious from the War, the United States quickly became a "dominant postwar economy with increasing commercial ties around the world." This set the stage for a revolutionary change in the jurisdictional thought of American courts.

The Court of Appeals for the Second Circuit had the first opportunity to demonstrate this new jurisdictional vision in *United States v. Aluminum Company of America* ("Alcoa"). In *Alcoa*, a Canadian company combined with several European producers of aluminum to control the amount of aluminum sold in the United States, thus controlling prices. Their agreements were formed outside of the United States. Judge Learned Hand determined that a United States court would have jurisdiction over

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40. Id. at 276. Justice McReynolds stated that the defendants "by their own deliberate acts, here and elsewhere... brought about forbidden results within the United States." Id. (emphasis added). In this case, the court relied upon effects ("results") as a jurisdictional factor, and also relied upon intent ("deliberate"). "Intended effects" became the jurisdictional standard in *Alcoa*.
41. Note, supra note 22, at 518.
43. Victor & Chou, supra note 12, at 3.
44. *Id*.
45. 148 F.2d 416 (2d Cir. 1945).
46. *Id* at 439-41.
47. *Id*. The court of appeals could have decided the case under the rule espoused in *Thomsen* where jurisdiction was predicated upon acts having been committed in part within the United
the conduct of foreign corporations, where that conduct was intended to, and actually did, affect United States commerce.\textsuperscript{48} The Court based its philosophical break from past cases on the notion that economic effects felt within the United States are indistinguishable from conduct within our borders and should therefore be treated the same under our laws.\textsuperscript{49}

The \textit{Alcoa} decision marked a significant overhaul of the extraterritorial application of United States antitrust laws.\textsuperscript{50} The \textit{Alcoa} test has essentially two parts: intent and actual effects.\textsuperscript{51} The required intent is not specific, but rather is "satisfied by the rule that a person is presumed to intend the natural consequences of his actions."\textsuperscript{52} The effects test is less broad, requiring "actual effects" on United States commerce.\textsuperscript{53} Once intent to affect United States commerce is demonstrated, the burden of proof shifts to the defendants;\textsuperscript{54} "in other words, a showing of intended effects constitute[s] a prima facie showing of actual effects."\textsuperscript{55} The \textit{Alcoa} decision can be seen as an attempt to revamp extraterritorial application of antitrust laws to meet the challenges and conflicts engendered by the increasing participation of the United States in the burgeoning post-war economy.

1. Application of the Effects Test

Once the extraterritorial reach of the Sherman Act was established in \textit{Alcoa}, courts felt compelled to refine the broad test outlined by Judge Hand to gauge the extent of the effects and the nature of intent necessary to in-

\begin{itemize}
  \item Under the \textit{Thomsen} standard, jurisdiction could have been found in the United States. See \textit{Thomsen}, 243 U.S. at 88.
  \item \textit{Alcoa}, 148 F.2d at 443-44.
  \item \textit{Id}. at 444. The \textit{American Banana} requirement, that conduct take place in the United States before jurisdiction may be asserted, was now completely reversed, although \textit{American Banana} itself had never been explicitly overruled.
  \item \textit{Alcoa}, 148 F.2d at 444. Judge Hand emphasized that both elements of the test must be met before jurisdiction can attach.
  \item \textit{Alcoa}, 148 F.2d at 444.
  \item \textit{Victor & Chou, supra} note 12, at 4 (citing United States v. Aluminium Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945)).
\end{itemize}
voke subject matter jurisdiction.\textsuperscript{56} The refining, and in some instances re-defining, of the Alcoa test created a wide disparity in interpretation among the circuits, leading some courts to abandon the test altogether.\textsuperscript{57} This problem has been heightened by the Supreme Court's refusal to hear cases which might require it to construct a uniform definition to be applied by all circuits.\textsuperscript{58} The following text provides a look at the development of law under the "effects" test, a body of rules and tests so disparate that one commentator has termed it a "Great Grimpen Mire"\textsuperscript{59} and another has described it as "somewhat confused."\textsuperscript{60}

\textbf{a. Intent Necessary for Jurisdiction to Attach}

Courts have generally agreed that the intent necessary to assert subject matter jurisdiction over a foreign defendant under the "effects" test is a general intent rather than a specific intent.\textsuperscript{61} However, the Supreme Court has announced that specific intent is required to prove criminal violations under the Sherman Act.\textsuperscript{62} Confusion regarding the intent portion of the "effects" test has arisen because some courts have eliminated intent completely from their jurisdictional analysis.\textsuperscript{63}

\textsuperscript{56} Perhaps the courts sensed that while the Alcoa test allowed for potentially broad extraterritorial Sherman Act jurisdictional reach, "reason dictate[d] that there must be sufficient contact with the United States and the effects upon national commerce must be more than minimal" before jurisdiction should attach. Schmidt, \textit{supra} note 12, at 329.

\textsuperscript{57} See, \textit{e.g.}, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).


The Court has affirmed the tests applied by other courts from time to time. See, \textit{e.g.}, Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 (1962) (affirming use of intended effects test); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (affirming standard of direct and influencing effect on trade). However, the Court has avoided crafting a uniform test of jurisdiction to be applied by all federal courts.

\textsuperscript{59} Fortenberry, \textit{supra} note 50, at 519.


\textsuperscript{63} See, \textit{e.g.}, Sabre Shipping Corp., 285 F. Supp. 949.
The "effects" test was utilized in *United States v. General Electric Co.* An agreement between General Electric, through a subsidiary, and several foreign corporations, which allocated the world market in incandescent lamps, contained a specific provision excluding American commerce and companies from its terms. Notwithstanding the contractual language, the Court found the agreement affected United States commerce. Further, the Court held that the foreign companies knew or should have known that the agreement was part of the American company's plan to exclude foreign competition in the United States market.

While the intent test applied in *General Electric* was not a strenuous one, the court in *Sabre Shipping Co. v. American President Lines, Ltd.*, failed to consider intent at all. In *Sabre Shipping*, the plaintiff alleged that one Philippine and five Japanese companies had entered into an agreement to monopolize the Hong Kong-United States and Japan-United States shipping trade. The district court held that it had subject matter jurisdiction over the foreign defendants because United States antitrust laws extend to any conduct "which affects the trade and the commerce of the United States." In *Fleischmann Distilling Corp. v. Distillers Co.*, intent was included in the "effects" test. Two American companies brought suit against three foreign corporations alleging that the termination of an exclusive distributorship agreement between the parties violated the Sherman Act. The court first established that the defendant's conduct affected United States commerce. It then held that the required intent could "be satisfied by the rule that a person is presumed to intend the natural consequences of his actions." The reasoning behind the loose interpretation of intent as an-

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64. 82 F. Supp. 753 (D.N.J. 1949).
65. *Id.* at 887.
66. *Id.* at 891. The court found a "direct and substantial" effect on United States commerce.
67. *Id.* Intent to affect American commerce was imputed to the defendants not based upon their subjective state of mind, but upon the very act of entering into the agreements.
68. 285 F. Supp. at 953.
69. *Id.* at 950.
70. *Id.* at 953 (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (1945)).
72. *Id.* at 226. The American companies were exclusive distributors of the defendant's products in the United States. The complaint alleged that the defendants conspired to terminate the distribution agreements without sufficient notice. *Id.*
73. *Id.* at 227.
74. *Id.* (quoting D. FUGATE, supra note 52, at 48). The idea implicit in *General Elec.*, 82 F. Supp. at 891, was verbalized in *Fleischmann*. This reading of intent requirements substantially eased the plaintiff's burden in pressing an extraterritorial antitrust claim by allowing the trier of fact to presume intent from the results. Kintner & Griffin, supra note 14, at 222.
nounced in *Fleischmann* was explained in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.* The court interpreted the intent requirement from *Alcoa* as general rather than specific, stating:

Judge Hand did not specify the degree of the effect nor the type of intent required. In applying the rule to the facts at hand, however, he implied that the intent required was of a general and not specific nature, using words such as "expected" and "supposed" to describe the [defendants'] state of mind.  

At first glance, this basic disagreement among the courts regarding intent appears to be a rather serious problem. However, given the *de minimus* standard of intent required by those courts who have employed it as part of the "effects" test, the division seems less vital. Indeed the *Sabre Shipping* court may have recognized this when it formulated its "effects only" test. The Supreme Court has also given conflicting pronouncements regarding the intent requirement of the "effects" test.  

Courts which have abandoned the "effects" test in favor of a balancing of interests test also appear to have removed intent from their jurisdictional analysis. These courts, however, may address questions of intent among the several factors they list in their balancing tests. Courts which purport to retain allegiance to the "effects" test must retain an intent requirement, for, as Judge Hand warned:

There may be agreements made . . . not intended to affect imports, which do affect them, or which affect exports. . . . Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.  

Courts which ignore the intent requirements are apt to render decisions which both anger foreign businesses and governments and embarrass the United States. Congress has attempted to address problems of arbitrary
court decisions under the Sherman Act by enacting the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). But as one commentator has stated, the Act's "'direct, substantial and reasonably foreseeable effect test' [may not differ] from the 'intended effects' test of Alcoa," in its treatment of intent.

b. Effects Necessary for Jurisdiction to Attach

While some problems have occurred as a result of different interpretations of the intent portion of the Alcoa test, a far greater concern has been the disparity in analysis of the "effects" necessary to assert jurisdiction. The General Electric case, discussed above, represents an early attempt to refine the "effects" test. There the court held that a violation of the Sherman Act requires a "direct and substantial effect" on United States commerce. The court reasoned, in light of Judge Hand's statement in Alcoa, that "[w]e should not impute to Congress an intent to punish . . . conduct which has no consequences within the United States," more than a trivial effect must be shown. The court then proceeded to apply a simple "effects" standard, asserting jurisdiction over Phillips Corporation "[e]ven though there [was] no showing as to the extent of commerce restrained . . . ."

The District Court for the Southern District of New York next had occasion to apply the "effects" test in United States v. Imperial Chemical Industries. This case involved an alleged conspiracy among the defend-
ants, three American corporations and one British corporation, to monopo-
lize world markets in the chemical products, sporting goods and
ammunitions industries.\textsuperscript{91} This was accomplished through a series of price-
fixing agreements, assuring the conspirators' ability to eliminate head to
head competition by allocating markets to jointly held subsidiaries which
sold products at prices directed by the parent corporations.\textsuperscript{92} After a
lengthy discussion of the agreements between the defendants, the court con-
cluded that the agreements were "intended to affect the export and import
trade of the United States . . . [and] achiev[ed] the purpose and end for
which they were organized."\textsuperscript{93}

The first opportunity for the Supreme Court to construe the \textit{Alcoa} test
came in \textit{Timken Roller Bearing Company v. United States}.\textsuperscript{94} In this case, an
American corporation and its two European subsidiaries had entered into
agreements providing for a territorial division of world markets for antifriction
bearings.\textsuperscript{95} The United States alleged that such agreements were en-
tered into for the purpose of fixing prices, eliminating competition and
restricting both the import and export trade of the United States.\textsuperscript{96} The
District Court for the Northern District of Ohio asserted jurisdiction over
the European subsidiaries,\textsuperscript{97} stating that "[t]he contracts . . . were intended
to and had the effect of eliminating competition."\textsuperscript{98} The district court
viewed the extent of the effects as "of no moment" under Sherman Act
considerations.\textsuperscript{99} Jurisdictional questions were not before the Supreme

\textsuperscript{91.} \textit{Id.} at 509. The division of markets was accomplished through the establishment of sev-
eral jointly owned subsidiaries operating in Europe and South America. These subsidiaries were
also parties to the unlawful agreement. \textit{Id.}

\textsuperscript{92.} \textit{Id.} at 592.

\textsuperscript{93.} \textit{Id.} The court found extensive evidence to support the plaintiff's charge of anticompeti-
tive activities. While the evidence that the court found would have easily satisfied a "substantial
effects" test, the court instead chose to apply a simple "intended effects" test. \textit{Id.}

Although, this decision appears to be in agreement with the \textit{Alcoa} test of subject matter juris-
diction, there is a sharp disparity between the test applied in this case and that utilized in \textit{General
Electric}. \textit{See supra} notes 85-89. Therefore, six years after \textit{Alcoa}, courts were in general disagree-
ment as to what the "effects" test meant.

\textsuperscript{94.} 341 U.S. 593.

\textsuperscript{95.} \textit{Id.} at 595. The European defendants, British Timken, Ltd. and Societe Anonyme Fran-
caise Timken, were wholly owned subsidiaries of Timken Roller Bearing Co., an Ohio
corporation.

\textsuperscript{96.} \textit{Id.} at 595-96.


\textsuperscript{98.} \textit{Id.} at 307.

\textsuperscript{99.} \textit{Id.} As authority for this proposition, the court cited Associated Press v. United States,
326 U.S. 1 (1945) and United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Those cases
however, dealt with intrastate and interstate commerce, and in no way implicated foreign com-
merce or jurisdictional assertions over foreign defendants. The test employed by the district court
may be read to authorize jurisdiction upon a finding of any effect upon United States commerce.
Court on appeal\textsuperscript{100} and the Court upheld the district court without commenting on its “effect” test application.\textsuperscript{101} In \textit{Timken}, the Supreme Court did not seize the opportunity to comment upon the district court’s “effects” test, nor did the Justices venture to construct their own test.

The Federal District Court for the District of Columbia had occasion to construe the “effects” test in \textit{In re Grand Jury Investigation of the Shipping Industry.}\textsuperscript{102} Here, the Deputy Attorney General had directed that evidence of possible offenses allegedly committed by firms operating in the ocean shipping industry be presented to a grand jury in the District of Columbia.\textsuperscript{103} Some of the allegations concerned price fixing agreements involving carriers of United States cotton.\textsuperscript{104} One hundred fifty corporations were served with requests for documents to be used by the grand jury and fifty-nine corporations filed motions to quash with the district court.\textsuperscript{105} The court affirmed the subject matter jurisdiction of the grand jury, stating that “the foreign commerce of this country is clearly considered to be ‘affected’” by the alleged conduct.\textsuperscript{106} Curiously, the court concluded that “the facts and prior court decisions”\textsuperscript{107} favored the conclusion that the grand jury should be “permitted to determine by inquiry whether . . . the agreements entered into by the shipping lines in the Cotton Trade [sic] do have a ‘substantial anticompetitive effect on our foreign commerce.’”\textsuperscript{108} By

\begin{itemize}
\item Thus, while appearing to apply the \textit{Alcoa} test, the district court fashioned a much broader standard, not heeding Judge Hand’s warning about such overbroad tests. \textit{Alcoa}, 148 F.2d at 443.
\item \textsuperscript{100} Appellants were permitted to appeal directly from the district court to the Supreme Court under 15 U.S.C. § 29.
\item \textsuperscript{101} \textit{Timken}, 341 U.S. at 600-01. The court has consistently avoided fashioning its own Sherman Act jurisdictional standard.
\item \textsuperscript{102} 186 F. Supp. 298 (D.D.C. 1960).
\item \textsuperscript{103} \textit{Id.} at 301.
\item \textsuperscript{104} \textit{Id.} at 302. The bulk of the American cotton that was grown in the West was exported from California and two Mexican ports, Ensenada and Guaymas. The United States claimed that agreements entered into by various carriers that were operating out of these ports effectively prevented new entrants from competing in the cotton export trade. The Justice Department claimed that these agreements directly affected the cotton export trade and indirectly affected domestic cotton prices. \textit{Id.} at 302-03.
\item \textsuperscript{105} \textit{Id.} at 301-02.
\item \textsuperscript{106} \textit{Id.} at 313.
\end{itemize}
annunciating two potentially disparate "effects" tests, the district court further contributed to the interpretive refining of the Alcoa test.\textsuperscript{109}

The opinion of the Federal District Court for the Southern District of New York in United States v. The Watchmakers of Switzerland Information Center, Ltd.\textsuperscript{110} vividly portrays the broad license courts were employing in applying the effects of the test. In Swiss Watchmakers, the United States alleged that several Swiss and American corporations had conspired to restrict American watch production, restrict exports and imports of watches and parts, and fix prices for watches and parts in the United States.\textsuperscript{111} Several of the Swiss defendants contested the subject matter jurisdiction of the district court.\textsuperscript{112}

The court, in its conclusions of law, found that the conspiracy "substantially affected United States trade and commerce."\textsuperscript{113} Later in its conclusions, the court stated that the defendant's agreements "[had] operated as a direct and substantial restraint" on United States commerce.\textsuperscript{114} The court posited that it could entertain jurisdiction over "acts and contracts abroad if . . . such acts and contracts have a substantial and material effect upon our foreign and domestic commerce."\textsuperscript{115} The court, in describing the restraints effectuated by the combinations, stated that the defendant's conduct

\textsuperscript{109} It is unclear whether the court, in citing Alcoa, was announcing Judge Hand's "intended effects" test, whether the court was trying to interpret what Alcoa must have meant, or whether the court was formulating its own standard. The Attorney General's report seems to have adopted a "substantial effects" test similar to that announced in General Elec., 82 F. Supp. at 891.

\textsuperscript{110} 1963 Trade Cas. (CCH) ¶ 70,600 at 77,414 (1962).

\textsuperscript{111} Id. at 77,416.

\textsuperscript{112} Id. at 77,417. In addition, several defendants sought to escape liability by invoking various formulations of the Act of State, Sovereign Compulsion and Sovereign Immunities doctrines. Id. at 77,456-57.

\textsuperscript{113} Id. at 77,455. The court also determined that the defendants intended their actions to have such effects on American commerce. Id.

\textsuperscript{114} Id. at 77,456. Such conduct was held to have passed the jurisdictional standard, even though some of the defendants were foreign nationals, some of the agreements were entered into in foreign countries and some of the alleged conduct was lawful in the country in which it took place. Id.

\textsuperscript{115} Id. at 77,457. This test appears to be repetitive since both "substantial" and "material" may refer to the extent of effects on commerce. However, "material" can also refer to relatedness of effects. One would be hard pressed to find conduct which has a substantial but immaterial effect on commerce. It is not as difficult to imagine conduct which is related yet insubstantial. Similarly, conduct could possibly have substantial effects on the United States, yet be unrelated to commerce.

The court's test can thus be seen as either a two-part standard, based on intent and substantial or material effects (if substantial and material both refer to extent of effects), or a three-part test, based upon intent, substantiality of effects (substantial refers to extent of effects) and materiality of effects (where material refers to relatedness of effects). The difficulty in determining which standard the court intended to apply shows the problems which arise when courts carelessly modify the language from a test announced in prior cases.
"obviously had a crippling effect" in the United States. The court concluded that "[t]he only question suggested here is whether the acts of the defendants have affected United States trade and commerce and, if so, whether they have restrained [it]." Thus, the court announced five different "effects" test formulations in its opinion.

The federal courts have been equally disparate in their jurisdictional "effects" test formulations in private Sherman Act suits. In Occidental Petroleum Corp. v. Buttes Gas and Oil Co., the district court refused to dismiss for lack of subject matter jurisdiction, stating that a "substantial and anticompetitive effect of American commerce" is not required under the jurisdictional provisions of the Sherman Act. The correct test to apply is whether there is "some effect on our foreign commerce ... ." The court adopted the view that "any effect that is not both insubstantial and indirect will support federal jurisdiction . . . ."

In Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., the district court held that restraints imposed by the defendant upon its wholesalers,
which restricted the number of distributors of its beer in the Bahamas, "di-
rectly affected the flow of commerce out of the [United States]." Thus, Sh
erman Act jurisdiction was found, even though the "ultimate result of the restraint imposed . . . [was] the elimination of competition in the Bah-
ama Islands." The court rationalized that the impact of the defendant's activities was restraint of American trade with the Bahamas.

The foregoing discussion illustrates that federal courts have inconsist-
tently and often incorrectly applied the "effects" test. Courts have chosen to modify Judge Hand's Alcoa language in an effort to define its potentially broad scope but have simply made the test more confusing. One commen-
tator summed up the unsuccessful attempt by the federal courts to refine the Alcoa "effects test," saying:

[Al]though it has been abundantly plain since the Alcoa case that trade practices which have unlawful consequences in the United States are not immune from its antitrust laws merely because the actions which brought about those consequences took place outside the territorial limits of this nation, in application there has been wide disparity in the case law as to the substantiality of the effects on American commerce required before jurisdiction may be asserted.

The stage was therefore set for a philosophical change in Sherman Act ju-
risdictional jurisprudence.

C. The Balancing Tests

The Court of Appeals for the Ninth Circuit was the first court to aban-
don the "effects" test in Timberlane Lumber Co. v. Bank of America. In Timberlane, the plaintiff alleged that American and Honduran officers of the defendant bank conspired to prevent the plaintiff from exporting lumber to the United States. The court discussed the "effects" test at length, concluding that it was "incomplete because it fail[ed] to consider other na-
tion's interests . . . [or] the full nature of the relationship between the actors

123. Id. at 587.
124. Id.; see also Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Eng'g Co., 1977-1 Trade Cas. (CCH) ¶ 61,256 at 70,775 (1977).
125. Todhunter-Mitchell, 383 F. Supp. at 587. This decision represents a particularly broad jurisdictional assertion because there was no evidence that any United States markets were af-
fected by the alleged conduct. The antitrust policy enforcement interest of the United States is at its weakest ebb when conduct alleged does not impact United States markets. See infra notes 294-95. It is not clear whether the "effects" test was designed to cover such activities. See Alcoa, 148 F.2d at 443-44.
126. Schmidt, supra note 12, at 330.
127. 549 F.2d 597 (9th Cir. 1976).
128. Id. at 601.
and this country." Instead, the court proposed a balancing of interests test grounded upon three questions:

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

Part one of the "balancing" test echoes the familiar language of the Alcoa test but is subject to a far broader reading than the "effects" test outlined by Judge Hand. Taken alone, part one of the Timberlane test could be passed upon a finding of either intent or effects on United States commerce. The second part of the test appears to address the questions of whether the effect on commerce is direct or indirect and whether it is substantial or de minimus.

129. Id. at 611-12. Judge Choy argued that adding terms such as "substantial" to the "effects" test may have played some role in addressing the interests of foreign entities. He believed, however, that the proper place for such language was in interstate antitrust suits rather than extraterritorial suits, since such terms "have a meaning in the interstate antitrust context which does not encompass all the factors relevant to the foreign trade case." Id. at 612.

130. Id. at 613. The balancing tests are often referred to as "jurisdictional rule of reason" tests, a phrase coined by Kingman Brewster. See K. BREWSTER, ANTITRUST AND BUSINESS ABROAD 446 (1958). This term is potentially confusing because it defines the well-known "rule of reason" doctrine in the interstate antitrust context. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1 (1911). Professor Brewster recognized that his "jurisdictional rule of reason" test bore little doctrinal resemblance to that announced in Standard Oil, stating that the components of the jurisdictional rule of reason are "a response to essentially political, rather than economic and business considerations." K. BREWSTER, supra at 446. For a thorough discussion of conflicts between the "rule of reason" doctrine and the "jurisdictional rule of reason" standard, see Kadish, supra note 13, at 154-56.

131. Timberlane, 549 F.2d at 615. Because the Timberlane "balancing" test announces an extremely broad "effects or intent" element, Parts Two and Three of the test act to restrict Part One. Part One may authorize jurisdiction where there is an intent to affect American commerce but no actual effect. While some courts have dropped the intent requirement (see Sabre Shipping, 285 F. Supp. at 953-57), no court has found jurisdiction absent some effect on United States commerce.

132. Presumably, this distinction would allow courts to refuse to entertain jurisdiction where the alleged effects fall upon foreign markets and the effect on the United States falls not upon its markets, but upon certain business interests. Such a test may operate to preclude a court from exercising jurisdiction in a case such as Todhunter-Mitchell where the effects fell upon Bahamian markets and upon a United States business trying to compete in those markets.

133. Concerns relating to the extent of the effects upon commerce should not be addressed at the jurisdictional stage, but at the proof of violation stage. See supra note 117.
Part three of the *Timberlane* "balancing" test marks a clear departure from *Alcoa* and its progeny. The reviewing court is required to consider the doctrine of comity through the analysis of seven factors designed to weigh the interests of the United States, foreign nations and defendants against the magnitude of the alleged restraints as evidenced in parts one and two of the test. While many commentators have criticized this part

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135. Judge Choy noted that courts which employed the "effects" test had "often displayed a regard for comity and the prerogatives of other nations and considered their interests . . . ." *Timberlane*, 549 F.2d at 612. If this is the case, then Judge Choy's assertion that the "effects" test is incapable of addressing the interests of other nations is flawed. See id. The true problem is not with the "effects" test itself, but rather with the court's wide array of interpretations of its meaning.

136. Comity has been defined as "courtesy; complaisance; respect; a willingness to grant privilege, not as a matter of right, but out of deference and good will." BLACK'S LAW DICTIONARY 242 (5th ed. 1979). The doctrine of comity has no specific rules and its principles have been likened to "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy and good faith." Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982). For these reasons, many courts and commentators feel that courts are incapable of applying the doctrine in Sherman Act cases. See, e.g., Laker Airways, Ltd. v. Sabena, Belgian World Airlines 731 F.2d 909 (D.C. Cir. 1984); Kadish, *supra* note 38, at 142-44.

137. *Timberlane*, 549 F.2d at 613-14. The seven factors advanced in *Timberlane* are:

1. The degree of conflict with foreign law or policy;
2. The nationality or allegiance of the parties and the locations or principle places of business of corporations;
3. The extent to which enforcement by either state can be expected to achieve compliance;
4. The relative significance of effects on the United States as compared with those elsewhere;
5. The extent to which there is explicit purpose to harm or affect American commerce;
6. The foreseeability of such effect;
7. The relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

*Id.* at 614. The court relied on tests created by the American Law Institute and by Professor Brewster.

The American Law Institute tests provide that a court should consider such factors as:

(a) Vital national interests of each of the states,
(b) The extent and 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.


Kingman Brewster suggested the following list of factors:

(a) [T]he relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunities; (c) the relative seriousness of effects on the United States compared with those abroad; (d) the nationality or
of the Timberlane inquiry, several courts have adopted the test. The Court of Appeals for the Third Circuit adopted its own balancing test in *Mannington Mills, Inc. v. Congoleum Corp.* A United States manufacturer of vinyl floor covering brought suit against another United States manufacturer, alleging that the defendant had secured foreign patents by means of fraudulent representations to various foreign patent offices. The court framed its jurisdictional inquiry in the form of two questions:

1. Does subject matter jurisdiction exist?
2. If jurisdiction does exist, should it be exercised?

The first question is to be answered by means of the "effects" test. If effects are demonstrated, the court, guided by a set of factors designed to balance United States and foreign interests, should determine whether to exercise subject matter jurisdiction.

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138. See, e.g., *Griffin*, supra note 4, at 294; *Kadish*, supra note 13, at 139-71; *Note*, supra note 2, at 1312 n.11; *but see* *Schmidt*, supra note 12, at 330-31.


140. 595 F.2d 1287.

141. 1290.

142. Id. at 1294. The court stated that where both litigants are Americans contesting alleged antitrust activity abroad, resulting in harm to the export business of one of them, a federal court always has subject matter jurisdiction. *Id.* at 1292.

143. Id. at 1291-92. The court cited both the original "intended effects" test from *Alcoa* and a "substantial effects" test from *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

144. *Mannington Mills*, 595 F.2d at 1297-98. The factors to be considered in the 'balancing test' include:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. 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 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;
At first glance, the tests employed in Mannington Mills and Timberlane appear to be quite similar. There is, however, a significant underlying difference between the tests. In Timberlane, the "balancing" factors were utilized in order to determine whether subject matter jurisdiction existed. In Mannington Mills, the balancing factors were utilized to determine whether subject matter jurisdiction should be exercised. Thus, the Timberlane approach seeks to replace the "effects" test with a more comprehensive jurisdictional inquiry. The Mannington Mills test essentially retains the "effects" test as a means of determining jurisdictional power, but then employs a balancing test to inquire whether the court should abstain from exercising jurisdiction. There are two resulting problems with this abstention test.

In the first instance there is no recognized abstention doctrine to fit a Sherman Act jurisdictional inquiry. Attempts to infer such a doctrine from the Alcoa case are misguided. It is generally agreed that where a court has jurisdiction to hear a claim it must exercise that power. Therefore, unless the Supreme Court adopts an abstention doctrine akin to that in Mannington Mills, the Third Circuit decision ought not be followed by other circuits.

The second concern raised by Timberlane relates to the effect of the abstention doctrine in international Sherman Act cases. Traditional abstention...
tion doctrine forces a litigant to bring his action in another forum, or to get an authoritative interpretation of the law in another forum, prior to adjudicating in the chosen forum. The practical effect of Sherman Act abstention is to deprive the plaintiff of any adjudication of his claim. Such a result implicates a denial of constitutional due process because a plaintiff may be without redress for a wrong done him.

While the balancing tests in Timberlane and Mannington Mills were heralded with much enthusiasm, many courts and commentators have since rejected their application to Sherman Act jurisdictional analysis. Currently the circuits are split, some following Alcoa, others adopting the “balancing” approach, and one apparently unwilling to commit to either test.

III. SHERMAN ACT EXTRATERRITORIALITY IN THE 1980s

The federal district courts are in general disagreement as to the jurisdictional reach of the Sherman Act, as well as the proper test to apply to determine such reach. Each circuit has developed its own body of law regarding subject matter jurisdiction under the Sherman Act. The result is a serious lack of uniformity and predictability with regard to the extraterritorial aspects of the Sherman Act.

The Court of Appeals for the First Circuit apparently adopted an “effects” test in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. This dispute revolved around whether antitrust claims brought by a dealer could be arbitrated as a counterclaim against a breach of contract suit brought by a manufacturer. The court, in dicta, indicated that United States antitrust laws “normally apply to any claim of monopolization or

152. See Kadish, supra note 13, at 145.
153. Id. The action is dismissed, leaving the plaintiff with no alternate forum despite the fact that the plaintiff may have demonstrated actual effects upon United States commerce.
155. See, e.g., Laker Airways, 731 F.2d at 949; Westinghouse, 617 F.2d at 1255; Sandage, Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law, 94 YALE L.J. 1693, 1701-02 (1985).
157. Mitsui, 671 F.2d at 876; Montreal Trading, 661 F.2d at 864.
158. Westinghouse, 617 F.2d at 1248.
159. 723 F.2d 155 (1st Cir. 1983).
160. Id. at 157.
restraint of trade," but held that extraterritorial application requires an effect on American commerce. 

The Second Circuit has been guided in part by National Bank of Canada v. Interbank Card Association. In this case the court of appeals held that "the [jurisdictional] inquiry should be directed primarily toward whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce ...." This version of an "effects" test was followed in Papst Motoren GMBH & Co. KG v. Kanematsu-Goshu, and in Bulk Oil (ZUG) A.G. v. Sun Co. 

Other district courts in the Second Circuit have opted for an "effects" test based upon the Foreign Trade Antitrust Improvements Act of 1982. Thus, in Eurim-Pharm GMBH v. Pfizer, Inc., and Liamoiga Tours v. Travel Impressions, Ltd., Sherman Act jurisdiction was predicated upon a "direct, substantial and reasonably foreseeable effect" on commerce. Reliance on the provisions of the FTAIA may not always be proper since the Act only applies to export trade activities. Furthermore, the legislative history of the Act demonstrates that its drafters may have seen no substantive difference between the "direct, substantial and reasonably foreseeable" test and the "anticompetitive effects" test.

Third Circuit courts have generally followed the lead of Mannington Mills, Inc. v. Congoleum Corp., applying a two-part test based on effects and comity. However, in Zenith Radio Corp. v. Matsushita Electric Indus-

161. Id. at 167.
162. Id. Curiously, the court cited as authority for its holding both Alcoa and the Foreign Trade Antitrust Improvements Act, despite their different tests for subject matter jurisdiction. Id. at 8. The court criticized the Timberlane test, finding that it could lead to assertions of jurisdiction "whenever the challenged conduct is shown to have some effect on American foreign commerce, even though the... anticompetitive effect is felt only within the foreign market." Id. Some "effects" test formulations are susceptible to the same overbreadth. See Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586 (E.D. Pa. 1974).
172. 595 F.2d 1287 (3d Cir. 1979).
trial Co., the District Court for the Eastern District of Pennsylvania chose to frame the test into three parts:

1. intent to affect United States commerce;
2. some actual effect on that commerce; and
3. factors relevant to balancing the ten comity factors outlined in Mannington Mills.

Using its three-part test, the court denied summary judgment in favor of several foreign defendants, holding that the facts alleged demonstrated an intended effect on American commerce. The court of appeals affirmed the district court’s denial of summary judgment to several of the foreign defendants. In doing so, it interpreted Mannington Mills as having announced an “intended effects” test and specifically stated that the circuit had adopted the Alcoa test.

In the Fifth Circuit, both the traditional “effects” test and the Timberlane Lumber Co. v. Bank of America version of the “balancing” test appear to have been advanced in Industrial Investment Development Corp. v. Mitsui & Co. The court of appeals there overturned a district court’s grant of summary judgment in favor of a Japanese corporation and

174. Id. at 1189. The district court noted that the substantiality of effects and intent were considered as part of the balancing test. Id. at 1189 n.66. Apparently the court of appeals disagreed, reviewing Matsushita in In re Japanese Elec. Prod., 723 F.2d 238, 306 (3d Cir. 1983) (implying that Part One of the Mannington Mills test stood for simple “effects” standard).
175. Matsushita, 494 F. Supp. at 1189. The court found that the record before it supported an assertion of jurisdiction but refrained from exercising it because questions remained as to which of the defendants had participated in the alleged conspiracy. Id.
176. Id. The court did not consider any of the balancing factors it had endorsed and resolved only the “purely legal” aspects of the jurisdictional inquiry. In this way the court demonstrated that it viewed effects and comity as two separate tests, granting summary judgment based on effects alone. Id.
178. Id. at 306. The court of appeals believed that the test of jurisdiction was “intended effects” and that the “balancing” tests from Mannington Mills were quite separate from the jurisdictional analysis. Confusion exists because the district court felt that the substantiality of both intent and effects could be considered within the balancing test. Matsushita, 494 F. Supp. at 1189 n.66.
179. 549 F.2d 597 (9th Cir. 1976).
its American subsidiary. The court first propounded the "direct or substantial effects" test as the proper determinant of Sherman Act jurisdiction. It then proceeded to apply a simple "effects" test, finding that the conduct alleged by plaintiffs could invoke Sherman Act jurisdiction. The court also considered the Timberlane balancing factors, concluding that "[a] district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law, or international law." The court explicitly stated that such balancing factors were not tests of subject matter jurisdiction but failed to explain why it chose to include them in its jurisdictional analysis.

The Seventh Circuit announced a jurisdictional test of "intended effects" in Westinghouse Electric Corp. v. Rio Algom Ltd. A cartel, initiated by Australia, Canada, France and South Africa in response to a United States embargo on uranium imports, sought to stabilize the uranium market by setting minimum prices and allocating non-United States sales between the members. Westinghouse, an American corporation, brought suit against several corporations operating within the cartel, alleging anticompetitive price fixing agreements. The court of appeals initially identified a two-pronged jurisdictional inquiry:

1. Does subject matter jurisdiction exist?
2. If so, should it be exercised?

As to the first question, whether jurisdiction exists, the court applied the "intended effects" standard. Turning to the second question, whether

181. Id. at 885.
182. Id. at 883. The court cited United States v. Aluminum Co. of Am. ("Alcoa"), 148 F.2d 416, 443-44 (2d Cir. 1945), as authority, yet Alcoa contains no such language.
183. Mitsui, 671 F.2d at 883.
184. Id. at 884.
185. Id. at 884 n.7. See also Rohm & Haas Co. v. Dawson Chem. Co., 557 F. Supp. 739, 832 (S.D. Tex. 1983), rev'd, 722 F.2d 1556 (1983), cert. denied, 467 U.S. 851 (1984) (citing Mitsui, 671 F.2d at 884, for the proposition that abstention doctrines, while valid, are not part of the jurisdictional analysis).
186. 617 F.2d 1248 (7th Cir. 1980).
187. Id. at 1254.
189. Westinghouse, 617 F.2d at 1253.
190. Id. at 1254. Controversy has centered around whether the court was correct in finding intentional conduct on the part of the defendants. See Kestenbaum, supra note 20, at 320 n.48.
abstention was proper, the court refused to adopt either the *Timberlane* or *Mannington Mills* balancing tests.\(^{191}\) Instead, the court affirmed the district court's three-part abstention test, which considered:

1. The complexity of the present multi-national and multi-party action;
2. The seriousness of the charges asserted; and
3. The recalcitrant attitude of the defaulters.\(^{192}\)

The court concluded that the district court did not abuse its discretion in refusing to abstain from hearing the action, largely due to the refusal of the defendants to appear.\(^{193}\)

The *Timberlane* balancing test was originally adopted by the courts of the Ninth Circuit. Decisions following *Timberlane* struggled, however, in actually applying the test.\(^{194}\) In addition, courts questioned whether *Timberlane* had in fact created a new jurisdictional test, or whether it had simply attached an abstention test to the standard "effects" test.\(^{195}\)

This confusion led the Court of Appeals for the Ninth Circuit to abandon *Timberlane* in *McGlinchy v. Shell Chemical Co.*\(^{196}\) In *McGlinchy*, the plaintiff alleged that defendants had conspired on several fronts to eliminate plaintiff's products from the market in order to monopolize production and sales.\(^{197}\) Defendants alleged that plaintiff's claims related exclusively to foreign commerce and thus were beyond the reach of the Sherman Act as amended by the Foreign Trade Antitrust Improvements Act (FTAIA).\(^{198}\) The court of appeals acknowledged that the tripartite test announced in *Timberlane* had been the governing test of subject matter jurisdiction under extraterritorial Sherman Act cases, but indicated that a *Timberlane* analysis was precluded by the FTAIA and proceeded to analyze the alleged activi-

\(^{191}\) *Westinghouse*, 617 F.2d at 1254-56.
\(^{192}\) *Id.* at 1255. The court rested its refusal to adopt the *Mannington Mills* or *Timberlane* tests upon the fact that in the case before it the defendants had never appeared to defend. The court was particularly upset that the defendant's governments had filed *amicus* briefs on their behalf. *Id.* at 1256. The court's stern language was met with indignation from foreign observers and apologies from the United States government. *See* Kestenbaum, *supra* note 20, at 322-23.
\(^{193}\) *Westinghouse*, 617 F.2d at 1256.
\(^{195}\) *Vespa*, 550 F. Supp. at 226-27 n.2.
\(^{196}\) 845 F.2d 802 (9th Cir. 1988).
\(^{197}\) *Id.* at 812.
\(^{198}\) *Id.* at 813. The court may have interpreted the coverage of the Act too broadly. *See* *supra* note 171; *see also* Victor & Chou, *supra* note 12, at 14.
ties under the "direct, substantial and reasonably foreseeable effects" test. While the court affirmed the district court's dismissal for lack of subject matter jurisdiction under the FTAIA test, it noted that the Act did not preclude courts from considering "principles of international comity" in cases where the effects test was met.

In *Laker Airways v. Sabena, Belgian World Airlines*, the Court of Appeals for the District of Columbia had occasion to thoroughly analyze current Sherman Act jurisdictional theories. In response to an antitrust suit brought by Laker Airways in the United States, several British defendants sought injunctive relief in the British courts to forbid Laker Airways from prosecuting its claims. Temporary and permanent injunctions were entered directing Laker Airways to dismiss its actions. Laker Airways sought injunctive relief in the District Court for the District of Columbia to prevent remaining foreign defendants from taking similar action. The district court granted injunctive relief to Laker Airways in order to preserve its own jurisdiction to hear the case. The defendants appealed.

In an insightful opinion by Judge Wilkey, the court of appeals affirmed the district court's issuance of an injunction against the foreign defendants. Judge Wilkey observed that both the United States and Britain had a legitimate basis for entertaining jurisdiction. He recognized that it was proper to address principles of comity but rejected the recent "balancing of interests" test as an implausible means to analyze such concerns. In-
stead, Judge Wilkey applied a "substantial effects" test to Laker Airway's antitrust allegations. Finding ample evidence of effects on United States commerce, he determined that principles of comity should not be invoked to defeat jurisdiction, since United States courts had a duty to protect important American interests.

The Laker Airways decision can be seen as construing an "effects and interests" standard of Sherman Act jurisdiction. If actual effects on American commerce are alleged, the court will examine what interests are thereby affected. If the interests are substantial, comity will not be invoked to quash jurisdiction. This test varies from the "balancing of interest" tests in two fundamental ways: 1) the court will not attempt to analyze foreign interests or foreign policy concerns, and 2) the application of principles of comity is within judicial discretion and need not be considered, balanced with other interests, or applied in every case.

Subsequent cases in the District of Columbia circuit affirmed that Laker Airways embraced an "effects" test and rejected the "balancing of interests" approach. However, it is unclear whether Judge Wilkey's "interests" analysis need be employed in all extraterritorial Sherman Act cases, or only in those cases in which more than one nation professes to have jurisdiction.

IV. IS A JUDICIAL SOLUTION POSSIBLE?

As the foregoing discussion illustrates, extraterritorial application of the Sherman Act is in a state of confusion. Courts have refined the "intended effects" test to such an extent, and in such variation, that they have completely lost sight of its meaning. Some courts have applied an "effects" test
with no intent requirement.\textsuperscript{215} Other courts have grafted tests of Sherman Act violation onto their jurisdictional inquiries.\textsuperscript{216} Recently, courts have turned away from "effects" tests and have crafted "balancing of interests" tests.\textsuperscript{217} Many courts have already rejected these tests.\textsuperscript{218}

Congress, responding to the concerns of American business, the threat of retaliatory legislation from other nations and the inability of the courts to endorse a consistent jurisdictional policy, amended the Sherman Act in 1982. The Foreign Trade Antitrust Improvements Act requires that "direct, substantial and reasonably foreseeable effects" be present for a court to entertain jurisdiction over foreign defendants.\textsuperscript{219} The FTAIA applies only to the export commerce of the United States, essentially focusing on "effects" on American business interests outside of our country rather than on "effects" within United States markets.\textsuperscript{220} Thus, the FTAIA does little to resolve conflicts involving suits against foreign defendants by American corporations which allege "effects" on United States commercial markets. In addition, the FTAIA suffers from the same shortcomings as do cases which confuse the tests of Sherman Act violation and Sherman Act jurisdictional reach.\textsuperscript{221} All things considered, the FTAIA is an inadequate response to the Sherman Act's extraterritorial difficulties.

Until Congress acts further, it will be up to the federal courts to define a predictable Sherman Act jurisdictional policy. As we have seen, however, the courts are prone to devise disparate tests of Sherman Act jurisdiction when left to their own devices. Therefore, a prerequisite to any successful judicial attempt to formulate a more cogent Sherman Act jurisdictional policy must be a definitive statement by the Supreme Court.


\textsuperscript{217} See, e.g., Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

\textsuperscript{218} See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981); Westinghouse Elec. Corp. v. Rio Algom Ltd., 617 F.2d 1248 (7th Cir. 1980).


\textsuperscript{220} See Victor & Chou, supra note 12, at 14.

\textsuperscript{221} See supra notes 117, 134.
V. THE NEED FOR A UNIFORM TEST OF JURISDICTION

A. The Supreme Court Must Act

The Supreme Court has not constructed a Sherman Act jurisdictional standard since it endorsed the “effects” test in Continental Ore Co. v. Union Carbide and Carbon Co.222 By failing to adopt a particular test, the Court has only contributed to the malaise rather than playing its mandated role as arbiter of conflicts in federal law interpretation.223 The division among the federal judicial circuits is of great proportion. Traditionally, when the federal courts have applied law in a conflicting manner, the Supreme Court has identified the proper interpretation. It should accept the challenge to do so in this instance as well.

B. Threshold Questions

In determining the proper jurisdictional standard under the Sherman Act, the Court should address three fundamental questions:

1. What is the antitrust policy of the United States?
2. Who are the antitrust laws designed to protect?
3. What jurisdictional standards best reflect the concerns raised in questions one and two?

Addressing these questions will allow the Court to announce a jurisdictional standard which reflects United States antitrust goals and policy rather than a test which itself attempts to define such policy.224

The first question is broad, yet fathoming the true purpose behind the antitrust legislation will necessarily narrow the focus of any jurisdictional test because it will expose areas beyond the intended reach of the statutes. Determining the antitrust policy of the United States involves an analysis of statutory language and congressional intent. The language of Section One of the Sherman Act declares contracts and combinations, including trusts

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224. See United States v. Cooper Corp., 312 U.S. 600 (1941) (courts should not engage in policy-making in antitrust cases). In fairness to the courts, a lack of specificity in the jurisdictional tests under the Sherman Act, which engendered much concern and criticism among foreign governments and American commentators, supra notes 4-5, may have led courts to employ the highly interpretive “balancing” tests.
and conspiracies, in restraint of trade or commerce, as illegal.\textsuperscript{225} The Act unquestionably seeks to punish those who disrupt the free flow of the market economy.\textsuperscript{226} Congress explicitly included foreign commerce within antitrust coverage, but the courts interpreted this language as limited by precepts of international law and comity.\textsuperscript{227} Therefore, it can be seen that the United States antitrust policy is intended to have broad application to regulate both foreign and domestic commerce.

The second consideration to address is to whom the antitrust protections are directed. In their broadest sense, antitrust laws are intended to protect and preserve free markets.\textsuperscript{228} As a consequence, such laws also protect consumers and creditors who operate within markets.\textsuperscript{229} In addition, such laws protect competition within markets.\textsuperscript{230} In one sense, the laws also protect the victims of antitrust damages, hence providing for damages in private suits.\textsuperscript{231} The antitrust laws are also designed to protect the federal government's right to regulate commerce.\textsuperscript{232} In general then, it can be said that United States antitrust statutes are "comprehensive . . . protecting all who are made victims of the forbidden practices, by whomever they may be perpetrated."\textsuperscript{233}

The foregoing discussion illustrates that a court must approach a jurisdictional inquiry within the Sherman Act arena with an awareness of the fundamental importance of antitrust legislation to our economic and social system. Any extraterritorial Sherman Act jurisdictional test must reflect a judicial commitment to preserve Congress' intent to protect our markets, businesses and citizens from anticompetitive practices, whatever their

\textsuperscript{228} See, e.g., United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973) (primary purpose of antitrust laws is to protect markets).
\textsuperscript{232} See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).
\textsuperscript{233} Mandeville Island Farms, Ltd. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).
source. The question then becomes which, if any, of the jurisdictional tests already announced can accommodate such a requirement.

C. The Balancing of Interests Tests

Several courts still favor the use of "balancing" tests to determine Sherman Act jurisdiction. However, such tests suffer from procedural and substantive weaknesses which render them unworkable.

1. Jurisdictional Test or Abstention Doctrine

It is manifestly unclear whether the balancing tests announce new jurisdictional standards or simply attach abstention provisions to various "effects" tests. Either interpretation leads to significant problems. If the "balancing" test is to be taken as a whole (all parts refer to an expanded jurisdictional inquiry), the test is substantively incorrect. If the test is to be split (one jurisdictional element and one abstention element), it becomes procedurally misguided.

a. Balancing Tests As Jurisdictional Inquiries

An interpretation of the "balancing" tests as expanded jurisdictional standards leads courts to factor Sherman Act violation tests into their jurisdictional inquiries.234 In application, this leads courts into the same trap that the refining of the "effects" test created.235 When courts employ such adjectives as "substantial" or "direct" in the "effects" test, the result is that plaintiff's allegations of effects on American commerce are heightened to the level of proof of a Sherman Act violation.236 To require that a plaintiff allege facts sufficient to constitute a Sherman Act violation for the court to entertain jurisdiction is both substantively and procedurally improper.237

b. Balancing Tests Favoring Judicial Abstention

There is no recognized authority for judicial abstention under the Sherman Act.238 Therefore, an interpretation of "balancing" tests which allows for judicial abstention, though the necessary effects are present, cannot be

234. See supra note 130 and accompanying text.
235. See supra notes 117, 119.
236. Id.; see also B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 42 (1979).
237. Procedurally, such tests confuse burden of production standards with burden of proof standards. Substantively, such tests make it difficult for plaintiffs to allege sufficient facts at such an early stage of the proceedings, thus usurping the antitrust protections implicit in the Sherman Act. See supra note 229 and accompanying text.
238. See Kadish, supra note 13, at 148-55.
procedurally correct. Once a court finds the necessary factors to invoke jurisdiction, it must hear a case.\textsuperscript{239} Cases which recognize the Act of State or Sovereign Compulsion doctrines do so at the jurisdictional stage, usually determining that the defendant is not amenable because his acts are not his own but those of a sovereign.\textsuperscript{240} Those courts do not find that jurisdiction can be asserted over the defendant and then choose not to do so. Rather, they find that no jurisdiction can be asserted.\textsuperscript{241}

The test in \textit{Mannington Mills, Inc. v. Congoleum Corp.}\textsuperscript{242} is often viewed as an abstention standard because its two-part inquiry specifies that once jurisdiction is determined, the court must decide whether it should be asserted.\textsuperscript{243} Not only does such a standard violate procedural Sherman Act norms, but its impact is heavier on plaintiffs than under other abstention doctrines. In traditional abstention cases, the plaintiff is forced only to select a new forum, typically in a state court.\textsuperscript{244} Under a \textit{Mannington Mills} abstention case, the plaintiff is foreclosed from any further action in United States courts since he is already in federal court.\textsuperscript{245} While such foreclosure questionably violates constitutional due process, it clearly runs afoul of congressional purposes under the Sherman Act.\textsuperscript{246}

2. Comity and Political Questions Doctrine

The balancing of interests tests encourage courts to enter the realm of international relations and politics, where they have little experience and less expertise. Substantively, this may allow Sherman Act claims to rest upon the political relations between the United States and the defendant’s country rather than upon a consideration of the plaintiff’s claim.\textsuperscript{247} Surely such tests cannot square with United States antitrust policy interests.

\textsuperscript{239} See \textit{Laker Airways}, 731 F.2d at 927.
\textsuperscript{241} This is especially true in the Act of State cases decided subsequent to the Foreign Assistance Act, 22 U.S.C. § 2370(e)(2)(1982), which reduced the court’s jurisdictional power. See \textit{Alfred Dunhill}, 425 U.S. at 697 (White, J., plurality opinion).
\textsuperscript{242} 595 F.2d 1287 (3d Cir. 1979).
\textsuperscript{243} Mannington Mills, 595 F.2d at 1294. See \textit{Schmidt}, supra note 12, at 331-32.
\textsuperscript{244} See supra note 152 and accompanying text.
\textsuperscript{245} See supra note 153.
\textsuperscript{246} See supra note 233; see also Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978) (antitrust laws are designed, ultimately, to protect American consumers).
\textsuperscript{247} See, e.g., International Ass’n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981) (court refused to assert jurisdiction over OPEC defendants because of political relationships between defendants and the United States). For a thorough discussion of the
When a court undertakes the balancing of competing national interests as required by *Timberlane Lumber Co. v. Bank of America* and *Mannington Mills*, it risks intrusion upon the limits of justiciability of political questions as determined by the Supreme Court in *Baker v. Carr*. By requiring courts to consider such factors as the relative importance of the alleged conduct to the United States as compared to the defendant's nation and the extent to which enforcement by either country would be effective, the "balancing" tests clearly place courts within the political realm. A court cannot be expected to ascertain the relative importance to another country of its assertion of jurisdiction. Furthermore, the executive and legislative branches of the federal government, and not the judiciary, are empowered to determine the extent of United States interests under legislative acts.

Aside from political problems, the comity analysis inherent in "balancing" tests engenders practical difficulties. Courts are created under national constitutions and statutes to preside over competing domestic interests. When a court is faced with adjudication of a dispute between its own country and another, it will normally uphold the interest of its own country. Thus, the comity analysis breaks down in cases in which more than one nation purports to have jurisdiction. Finally, United States courts should apply the law and policy of the United States in a way that reflects congressional and executive intent. The "balancing" test comity provisions usurp such application by forcing the courts to consider the interests of other sovereigns and thus, are unworkable. While comity may indeed play an important role in multinational litigation, it should be addressed by the legislative and executive branches rather than the courts.

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248. 549 F.2d 597 (9th Cir. 1976).


250. See *Mannington Mills*, 595 F.2d at 1297-98; *Timberlane*, 549 F.2d at 613-14.

251. See supra note 207 and accompanying text.

252. *Laker Airways*, 731 F.2d at 948-51. Judge Wilkey emphasized that "[j]udges are not politicians. The courts are not organs of political compromise." *Id.* at 953.

253. *Id.* at 951.

254. See, e.g., *id.*

255. *Id.* at 948-49; see also *Kadish*, supra note 13, at 156-62 (balancing tests are confusing to courts because interests of other nations are not self-evident and courts are not equipped to uncover them).

256. Congress has attempted to respond to international concerns relating to American assertions of jurisdiction under the Sherman Act. See *Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1982).* Whether the Act was successful in addressing these concerns is questionable. See supra notes 217-19 and accompanying text.
3. The Uncertain Application of Balancing Tests

A final weakness of the "balancing" approach is its lack of precision. On the surface, "balancing" tests appear more precise than "effects" tests because of their increased verbiage. In truth, this makes them even more vague because courts are given no direction as to how to apply the tests.257 As a result, these tests are susceptible to disparate application. In the first instance, courts are given no instruction as to how much weight to give each factor.258 Similarly, they are not given guidance as to how to balance the interests.259 Finally, the tests fail to recognize that the interests required to be balanced are not always cognizable.260

The result of this lack of precision is the uncertain application of the tests. The Timberlane court noted as much and in fact favored this result.261 However, because protection is an important factor in the application of United States antitrust law, both victims and potential violators need some certainty in order to understand where their actions stand under the law.

VI. Resurrecting the Effects Test

It is apparent that the "balancing" tests fail to adequately further the antitrust goals of the United States. The much maligned "effects" test can, however, further these goals if applied with verbal integrity and if defined in economic rather than legal or political terms.

A. Effects Tests Further U.S. Antitrust Policy

The "effects" test limits courts to consideration of allegations of American antitrust law violations and their requisite impact on American commerce.262 The focus of the "effects" test is upon the activity and the alleged impact as opposed to the actors involved.263 Thus, the "effects" test requires courts to construe United States antitrust policy rather than the poli-

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257. See Kadish, supra note 13, at 140.
258. Id.; see also Griffin, supra note 4, at 294 (endorsing suggestion that Justice Department promulgate "comity guidelines" to give courts direction in weighing balancing factors).
259. There is no indication as to how many factors, or which factors, need favor abstention before jurisdictional authority should be refused.
260. See Kadish, supra note 13, at 140-41.
261. Timberlane, 549 F.2d at 613.
262. United States v. Aluminum Co. of Am. ("Alcoa"), 148 F.2d 416, 444 (2d Cir. 1945).
263. See supra note 243. But see, International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981) (the fact that the defendants were members of a group (OPEC) upon which the United States was potentially dependent may have been the determinative factor in the OPEC case).
cies and interests of other nations, which properly rests with the legislative and executive branches. The test furthers United States antitrust policy without granting courts license to comment upon or limit such policy. Therefore, the “effects” test requires that courts simply apply the law rather than create it.

B. Effects Tests Further Congress’ Market Protections

Since the “effects” test allows for no doctrines of abstention, it assures those who operate within United States markets of protection against activities which restrain competition. Courts have and must exert subject matter jurisdiction under the “effects” test whenever alleged conduct impacts upon American commerce. This indirectly furthers Congress’ implied intent to protect consumers and ensures that the United States’ interest in regulating its own markets is unimpeded.

C. Which Effects Test?

Several forms of the “effects” test are currently in use. In order to be fair, effective and workable, one test of “effects” must be accepted by all federal courts. A single “effects” standard for Sherman Act extraterritorial subject matter jurisdiction will further two indispensable antitrust policy needs: uniformity and predictability in scope and application.

1. Courts Verbal Abuse of the “Effects” Test

Since Learned Hand announced the “intended effects” test of subject matter jurisdiction, courts have continually refined the test in an effort to curb its perceived overbreadth. Courts have used descriptive language to

264. See Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 949 (D.C. Cir. 1984) (courts are not equipped to balance inherently political interests); see also Griffin, supra note 4, at 294 (embarrassing results may occur where courts go beyond their area of expertise in international litigation).

265. See United States v. Cooper Corp., 312 U.S. 600, 606 (1941).

266. Since there is no abstention option, a plaintiff who can allege intent and effects will be entitled to the opportunity to prove antitrust damages.


268. In one sense, uniformity will render any jurisdictional test more predictable. However, if a uniform test which suffers from potentially disparate application is advanced, predictability is not furthered. Uniformity can be accomplished by a definitive Supreme Court statement. Predictability requires that the standard announced be “susceptible of consistent application...” Note, supra note 2, at 1321.

Predictability is vital to assertions of jurisdiction in the international antitrust context in two ways: to enable multinational businesses to assess the cost of doing business in the United States, and to engender a feeling among foreign nations that our antitrust policy is fair. See id.
modify "effects" without considering the corrosive impact of such language on the original and perceived meaning of the test.269 The result has been either abandonment of the test or continued application without clear understanding of its intended coverage.

The original test focused upon the conduct alleged and its resultant impact upon United States commerce.270 Subsequent courts required "direct" or "substantial" effects on commerce before entertaining jurisdiction over foreign defendants.271 These courts sought to limit the potentially broad scope of a simple "effects" test, but what they accomplished was raising the jurisdictional standard to the level of a proof of violation under the Sherman Act.272

The original test provided a built-in limitation upon the exercise of jurisdiction by requiring intent.273 Curiously, some courts removed this limitation for no apparent reason.274 In doing so, these courts allowed for an interpretation of the "effects" test far more broad than could have occurred under Judge Hand's formulation.275 Incidental effects could now implicate Sherman Act jurisdiction.

While courts struggled to limit the "effects" test, some interpreted "commerce" quite broadly. The original test concerned itself with intended effects upon United States markets.276 Some cases have found jurisdiction over disputes which affect American business operations in foreign markets.277 This is precisely what Judge Hand warned against in Alcoa, arguing that Congress did not intend the Sherman Act to cover such activities.278

In their current application, the various "effects" tests are in disarray. The original test has been so liberally refined that its progeny is, amazingly,

269. See supra notes 89, 93, 99, 109, 115, 117, 125 and accompanying text.
270. United States v. Aluminum Co. of Am. ("Alcoa"), 148 F.2d 416, 443-44 (2d Cir. 1945).
272. See supra notes 117, 119.
273. Alcoa, 148 F.2d at 444.
275. Alcoa, 148 F.2d at 443. See supra note 80 and accompanying text for the specific language.
276. Alcoa, 148 F.2d at 444-45.
278. Alcoa, 148 F.2d at 443-44.
both overbroad and underinclusive. While these hybrid effects tests are themselves failures, they nonetheless provide a framework for constructing a proper effects test.

D. Re-Constructing the Effects Test

The original “effects” test was workable, though arguably too linguistically broad to survive the increasingly varied situations demanding resolution in today’s multinational business community. Therefore, a new “effects” formulation requires more specificity, but this must be accomplished with careful attention to proper language usage.

1. Modification of “Effects”

Courts were correct in sensing the need to modify “effects” because that term left open a potentially overbroad interpretation. Sadly, those courts which attempted such modification were not careful to choose proper language to accomplish their purpose. However, a few courts have struck upon a workable modifier in applying a standard of “anticompetitive effects.” This term is useful in three ways: it can be incorporated as a “term of art;” it has an economic meaning; and it will not be confused with other Sherman Act standards.

“Anticompetitive effects” can be incorporated as a “term of art” to be used in Sherman Act jurisdictional situations. The term clearly relates to the nature of the effects rather than the extent of the effects. This is correct since the extent of effects is properly analyzed within the Sherman Act violation context. Sherman Act jurisdiction properly rests with the existence of effects. “Anticompetitive effects” include those which restrain competition, monopolize markets, fix prices or exclude new entrants into markets. It is these activities which Congress sought to proscribe under the Sherman Act, and therefore it is these activities into which courts should inquire when determining jurisdiction.

279. The tests are overbroad in the sense that some courts have asserted jurisdiction without an intent requirement. Supra note 269. In addition, other courts have exercised jurisdiction when there has been no established effect upon United States markets. Supra notes 270-71 and accompanying text.


281. See supra note 117.

282. These activities relate to the nature of conduct which the Sherman Act prohibits, as opposed to gauging the extent of such conduct. See 15 U.S.C. §§ 1-7 (1982).

283. See supra notes 224, 226-29, 231 and accompanying text.

284. See supra note 231.
Perhaps the best way to categorize an alleged effect as anticompetitive would be to consider it in light of those protections Congress identified under the Sherman Act. If the effect could injure United States markets, consumers, businesses or the governmental regulatory power, it would be classified as anticompetitive for Sherman Act jurisdictional purposes. This, of course, should play no role at all in considering whether the conduct actually violates the Act. It should only be addressed to consider whether the Act applies to the alleged conduct.

2. Modification of “United States Commerce”

The current “effects” tests are subject to very broad interpretations in terms of their “commerce” provision. Activity which affects “United States commerce” has been held to be determinative of jurisdiction. Some courts have exercised jurisdiction over activities which affected the “foreign commerce” of the United States. This part of the test must be restructured in order to better adapt the test to the antitrust policy of the United States. Commerce is a vague term, referring to virtually any activity within economic bounds. Terms such as “United States commerce” and “foreign commerce” can therefore refer to all economic activity to which the United States, or a citizen or business, is a party.

In order to restrict Sherman Act coverage for jurisdictional purposes, the word “commerce” should be replaced by the term “markets.” This
would focus the court’s inquiry upon the very economic entity which the Sherman Act is designed to protect.\textsuperscript{290} Thus, the court would look to effects upon particular economic markets. Plaintiffs would have to allege with particularity which markets are affected by the defendant’s conduct.\textsuperscript{291} Such a requirement would not raise the level of factual allegation required of the plaintiff, but would necessitate more specific allegations.\textsuperscript{292} The end result of this verbal change would be to narrow the court’s focus. The court would simply determine whether plaintiffs have alleged anticompetitive effects within a defined market, rather than having to analyze whether a totality of various alleged effects is sufficient to exercise jurisdiction.

3. Defining the Relevant Market for Sherman Act Purposes

The final modification of the “effects” test concerns to which markets the Sherman Act should apply. Under the “effects on commerce” formulation, courts were free to exercise jurisdiction when effects were alleged upon an American corporation’s ability to compete in foreign markets.\textsuperscript{293} Such cases arguably fall outside of intended Sherman Act provisions. In order to promote good will and greater predictability, the “effects” test should be

which does not force the courts into the realm of international law or politics. In truth, such judicial limitations may not be as helpful in situations where more than one nation has a valid power to assert jurisdiction. \textit{See, e.g., Laker Airways, 731 F.2d 909.}

\textsuperscript{290} \textit{See supra} note 231. It is crucial at this point to delineate between a “market definition” as is here advocated for jurisdictional purposes and a “market delineation” which is a part of the plaintiff’s Sherman Act proof requirements. \textit{See R. Blair & D. Kaserman, Antitrust Economics 106-10 (1985).} The delineation of relevant markets in the Sherman Act proof of violation phase allows the court to measure the impact of the plaintiff’s claim on commercial activity. \textit{See, e.g., Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).}

In the jurisdictional phase, the advocacy of the use of “markets” centers around an effort to limit a court’s review to effects in relevant Sherman Act areas. The use of the term “markets” in this context should essentially be geographical. The Sherman Act is designed to protect American products or other business markets. Hence, use of “markets” as a jurisdictional term is useful, and should be applied only to the extent that it defines geographical markets into which the court should, or should not, inquire in considering allegations of effects.

\textsuperscript{291} This would allow the court to focus its inquiry upon specific allegations relating to specific markets which the court could be confident that the Sherman Act was designed to cover. This would also provide the court with a method of eliminating from its consideration allegations relating to markets which the Act is not clearly designed to reach. Such a refinement would foreclose a court from asserting jurisdiction based upon conduct alleged to affect foreign markets. \textit{See, e.g., Todhunter-Mitchell, 383 F. Supp. 586.}

\textsuperscript{292} The test is still grounded upon “anticompetitive effects,” not upon “direct” or “substantial” restraints (the violation standard). Plaintiffs would, however, have to demonstrate that such alleged effects implicated American markets, as opposed to such entities as “American commerce” or “United States foreign commerce.”

\textsuperscript{293} \textit{See Todhunter-Mitchell, 383 F. Supp. 586.}
limited to domestic markets. When conduct affects foreign markets, the United States' interest is lessened and the regulatory authority of the foreign nation is increased. Similarly, the antitrust goal of the United States relating to protection of markets is at its lowest ebb. In addition, the interests of American citizens are only indirectly impacted by conduct which affects only foreign markets. Finally, the United States' interest in protecting competitiveness between businesses is not strong because those businesses have chosen to compete in foreign markets.

4. The New "Effects" Test

Thus, courts should apply a test which inquires into the alleged "intended anticompetitive effects upon United States markets." This test best reflects the antitrust goals of the United States. Furthermore, the test is based upon economic rather than political terms and better defines conduct which the Sherman Act was designed to cover. Finally, the test is more specific than current "effects" tests and does not allow for extensive judicial interpretation as under the "balancing" tests. The test will provide greater predictability for defendants, especially if applied uniformly throughout the federal circuits.

VII. Conclusion

The current application of the Sherman Act jurisdictional provisions to cases involving foreign defendants suffers from a lack of predictability and uniformity because several tests have been formulated among the circuits. Some courts have factored concerns of comity and international relations into their jurisdictional tests. This response has moved courts into the political and legislative sphere. Courts should not conduct political or legislative balancing tests in construing economic provisions such as the Sherman Act. The "effects" tests provide a better analytical framework, but current formulations are susceptible to a great deal of interpretation, which renders unpredictable results.

294. The antitrust goals of the United States and the intended protections of the Sherman Act are both at the apex of their influence when litigation centers around American markets. See Kestenbaum, supra note 20, at 326.
295. See id.
296. See supra note 230.
297. In such a situation a plaintiff may opt for litigation in the foreign territory.
298. Part of the cost analysis a business conducts before entering foreign markets should include an assessment of the relative competitive protections offered by the law of the host country.
The Supreme Court must address the wide disparity between the federal circuits in the construction of Sherman Act jurisdictional provisions. In creating a uniform test of subject matter jurisdiction, the Court should consider the antitrust policy goals of the United States as well as the protections Congress sought to create under these laws. A test is needed which reflects these concerns, keeps judicial interpretivism to a minimum, and utilizes economic rather than legal terms. The "intended anticompetitive United States market effects" test is such a standard. It is hoped that the Supreme Court will announce such a test at the next opportunity.

Edward L. Rholl

299. The Court recently passed upon such an opportunity in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). This issue, on appeal from the Court of Appeals for the Third Circuit, was whether the court of appeals had correctly evaluated the district court's grant of summary judgment in favor of the foreign defendants. Id. at 582. Summary judgment was granted not for lack of subject matter jurisdiction, but for failure to state a valid claim for relief. Id. at 597-98.

The Court considered in detail Zenith's claim that the defendant's conduct violated the Sherman Act. Id. at 582-95. In the process, the Court cited Alcoa, 148 F.2d at 443, for the proposition that the Sherman Act does not act to "regulate the competitive conditions of other nation's economies." Id. at 582; see supra notes 284, 286. The Court then posited that the Sherman Act does "reach conduct outside our borders, but only when the conduct has an effect on American commerce." Id. at 582 n.6 (citing as authority Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962)); see supra note 220 and accompanying text. Thus, the Court concluded its endorsement of the "effects" test in general, but did not reach the question of which formulation of the test should be uniformly followed. In fairness to the Court, the issue of which version of the "effects" test should be followed was not directly before it in Matsushita. It appears that the Court is still unwilling to craft a uniform test of subject matter jurisdiction under the Sherman Act until the issue is directly before it.