

COMMENTS

ANTITRUST SUITS INVOLVING FOREIGN COMMERCE: SUGGESTIONS FOR PROCEDURAL REFORM

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In an economically interdependent world in which nations pursue differing economic policies, conflicts between differing economic norms are inevitable. Because antitrust laws embody and enforce the ideal of free competition, which has never been as warmly embraced by America's trading partners as it has in this country, enforcement of the American antitrust laws has provoked resistance by other countries.¹

This conflict has both a substantive and a procedural aspect. Although there is no sharp line between procedure and substance, as both affect parties' rights, a distinction nevertheless can be made between what the antitrust laws forbid and how parties' rights are adjudicated under those laws. Although the underlying conflict concerns substantive law, much of the resistance focuses on procedural aspects of antitrust enforcement.² One of the features that faces the strongest objections is

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¹ For a discussion of the clash over substantive goals, see for example, Atwood, *Extraterritorial Discovery: The Special Case of Antitrust*, in *EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION* 319, 324-27 (1984). Cases in which there has been strong resistance include: *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 570 F.2d 899 (10th Cir. 1978); *United States v. Watchmakers of Switz. Information Center, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965); *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298 (D.D.C. 1960); *United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953); *United States v. Imperial Chem. Indus.*, 105 F. Supp. 215 (S.D.N.Y. 1952); *In re Investigation of World Arrangements with Relation to the Prod., Transp., Ref. & Distrib. of Petroleum*, 13 F.R.D. 280 (D.D.C. 1952); *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

² See Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 *FORDHAM L. REV.* 350, 355 (1983). For an example of a legislative attempt to address the procedural aspects of antitrust enforcement in the international area, see *The Foreign Trade Antitrust Improvements Act of 1985: Hearings on S.397 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (on file with the *University of Pennsylvania Law Review*) [hereinafter *Hearings*].

the relatively broad view American courts take of their jurisdiction over antitrust claims.³ Other objections stem from the nature of American discovery,⁴ fee arrangements,⁵ the availability of jury trials,⁶ and the treble damages remedy.⁷

Although no unilateral action on the part of the United States, short of abandoning our commitment to antitrust enforcement, would remove all objections, America can act to reduce the friction generated by application of the antitrust laws to foreign commerce. Such action would serve as a symbol of America's commitment to work with our allies to resolve a mutual problem. Reform in this area should address and alleviate specific areas of conflict, and should encourage other countries to move toward accommodation, rather than increasing confrontation.⁸ While suggestions as to how this problem can be alleviated are not wanting, there is a tendency to offer them without adequate consideration of how they are likely to be perceived abroad, which makes the task of ascertaining whether they will have the desired impact problematic. This Comment attempts to remedy that neglect by approaching the problem from a transnational viewpoint. Part I examines the conflict over antitrust enforcement in its current context. Part II briefly discusses some of the specific criticisms made by other nations of American antitrust laws, and Part III summarizes the steps that have been taken by the United States thus far to remedy the problem. Finally, Part IV suggests several provisions that may help to minimize the conflicts that increasing economic interdependence will otherwise bring.

I. SIGNIFICANCE OF THE PROBLEM

The conflict over antitrust enforcement is part of a broader pattern of clashes of economic interests between America and its trading partners.⁹ Trade provides a model for accommodating the different interests

³ See Shenefield, *supra* note 2, at 354.

⁴ See *ABA Probes Comparative Analysis of U.S., EC Competition Enforcement*, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1226, at 263 (Aug. 1, 1985) [hereinafter *ABA Probe*]; Shenefield, *supra* note 2, at 355.

⁵ See Shenefield, *supra* note 2, at 355.

⁶ See *ABA Probe*, *supra* note 4, at 263.

⁷ See *id.* at 263; Shenefield, *supra* note 2, at 355.

⁸ See *ABA Probe*, *supra* note 4, at 264 (predicting that blocking legislation will be repealed when foreign governments "perceive that the procedures in U.S. antitrust cases are fair").

⁹ See Shultz, *Trade, Interdependence and Conflicts of Jurisdiction*, 36 S.C.L. REV. 295, 296 (1985) (stating that conflicts over jurisdiction, oil shocks, monetary disputes, and protectionist pressures are threats to the postwar economic system).

Other areas of conflict stem from American trade and securities laws, see Judg-

of the United States and other countries in this area; the General Agreement on Trade and Tariffs has largely channeled and controlled trade disputes.¹⁰ It is generally agreed that an international meeting is necessary to establish international guidelines on substantive antitrust policy.¹¹ But such a meeting seems unlikely in the near future,¹² because the developed countries cannot agree among themselves what the proper goals of antitrust laws should be,¹³ and developing countries approach the question from a related but different perspective.¹⁴ It is nec-

ment of May 22, 1965, cour d'appel, Paris, 1968 Recueil Dalloz-Sirez, *Jurisprudence* [D.S. Jur.] 147; *ABA Probe*, *supra* note 4, at 262; the unitary tax system, *see* Shultz, *supra*, at 296-97; and the use of economic sanctions for foreign policy reasons. *See, e.g.*, 47 Fed. Reg. 27,250 (June 24, 1982), *amending* 15 C.F.R. §§ 376.12, 379.8 & 385.2 (1982), *repealed* 47 Fed. Reg. 51,858 (Nov. 18, 1982) (regulations intended to ensure that no American technology was used to build a Soviet pipeline to Western Europe); *see also* Atwood, *The Export Administration Act and the Dresser Industries Case*, 15 LAW & POL'Y INT'L BUS. 1157 (1983) (discussing the controversy in light of the case against Dresser Industries); Zaucha, *The Soviet Pipeline Sanctions: The Extraterritorial Application of U.S. Export Controls*, 15 LAW & POL'Y INT'L BUS. 1169 (1983) (discussing economic and political implications of the pipeline controversy). Although these regulations were quickly repealed, the damage had already been done. *See ABA Probe*, *supra* note 4, at 262; Shenefield, *supra* note 2, at 351; Shultz, *supra*, at 297.

¹⁰ *See* G. CURZON, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES* 313 (1965).

¹¹ *See, e.g.*, Dunfee & Friedman, *The Extraterritorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883 (1984); Shenefield, *supra* note 2, at 350.

¹² *See ABA Probe*, *supra* note 4, at 264. The closest thing to substantive competition guidelines is the UN-sponsored Set of Mutually Agreed Equitable Principles and Rules for Control of International Restrictive Business Practices. U.N. Doc. TD/RBP/Conf/10 (1980). These "principles and rules" are nonbinding and contain no enforcement mechanism.

¹³ While the promotion of competition is the major goal of American antitrust law, the European Economic Community's competition policy, for example, has both competitive and integrative goals, and the goal of integrating the economies of the member countries is the more important of the two. Also, the Community modifies its antitrust enforcement to reflect "social" and "human" demands. *See* 2 B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 1, 7-8 (1986). To take another example, Australia has preferred predictability and market penetration to the achievement of economic efficiency. *See* Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 252-56 (1982).

The policies of individual European countries also vary widely. *See* A. HERMANN, *CONFLICTS OF NATIONAL LAWS WITH INTERNATIONAL BUSINESS ACTIVITY* 45-46 (1982) (discussing advantages and disadvantages of cartels as instruments of national policy and summarizing policies of Western European nations).

¹⁴ Antitrust laws in developing countries generally are accompanied by laws restricting technology transfer, reflecting the need to control the potential threat posed by external economic power, and the desire to encourage investment, budget balancing, and the use of local technology, raw materials, and labor. *See United Nations Charter of Economic Rights and Duties of States*, 20 U.N. GAOR Supp. (No. 31) at 52, U.N. Doc. A/RES/3281 (1975), *reprinted in* 14 INT'L LEGAL MATERIALS 251, 255 (1975); Fikentscher, *Third World Trade Partnership: Supranational Authority vs. National Extraterritorial Antitrust—A Plea for "Harmonized" Regionalism*, 82 MICH. L.

essary, then, to identify smaller steps that can be taken to bring about a climate in which such a meeting could take place.

Coherent analysis requires that the victims of the current conflict over antitrust enforcement, and the goals of an interim solution, be established. There are three principal victims of the economic and political tensions caused by conflicts over antitrust enforcement: American business, especially companies with operations abroad; America's relations with its trading partners; and the international legal system.

American multinational corporations are affected in a number of ways. They are subject to regulation both by the United States and by foreign countries, and may find these regulations in conflict.¹⁵ Because American antitrust laws are more effectively enforced against American corporations, American firms are less competitive than they would be if they could operate under local law alone,¹⁶ while their foreign competitors are shielded by their respective governments.¹⁷ Less tangibly, the long reach of American antitrust laws, and the resistance they provoke abroad, has a spillover effect.¹⁸ A government that is futilely protesting

REV. 1489, 1494-98 (1984).

¹⁵ See 131 CONG. REC. S.1160 (daily ed. Feb. 6, 1985) (statement of Sen. DeConcini).

¹⁶ A study of 19 major American multinational corporations with high foreign sales found that

[a]ntitrust caused companies either not to enter markets alone or to forego opportunities to do so with others. Less frequently, companies entered markets in less profitable ways than, but for antitrust, they would have chosen voluntarily, or they stayed in markets that, but for antitrust, could have been more profitable to them. The conclusion is that antitrust has made [American multinationals] less competitive abroad.

J. TOWNSEND, EXTRATERRITORIAL ANTITRUST: THE SHERMAN ANTITRUST ACT AND U.S. BUSINESS ABROAD 251 (1980). In contrast, foreign competitors enjoyed relative freedom. See *id.* at 190. But see Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336, 352-54 (1980) (arguing that American businesses engaged in foreign commerce have benefitted substantially from the antitrust laws because the laws were instrumental in destroying post-World War II global cartels).

¹⁷ See Shenefield, *supra* note 2, at 357. In the early 1970's, the United States Chamber of Commerce conducted an inquiry into the effects of the antitrust laws on international trade and investment. It concluded that United States antitrust laws are "unfairly burdensome" for American exporters. See ANTITRUST TASK FORCE ON INTERNATIONAL TRADE AND INVESTMENT OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, FINAL REPORT ON U.S. ANTITRUST LAWS AND AMERICAN EXPORTS (Feb. 26, 1974), reprinted in *International Aspects of Antitrust Laws: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st & 2d Sess. 163 (1973-1974).

¹⁸ One commentator has noted an "already noticeable anti-American cast to the [European] Community's antitrust [enforcement]" and warned that "U.S. business must, therefore, be prepared for ever-increasing legal hurdles in the prime European market. Such a forecast . . . portends even more lost opportunities as commerce increases." J. TOWNSEND, *supra* note 16, at 252.

the existence of an antitrust suit against one of its corporations may be less likely to welcome affiliates of American companies than one that is not.¹⁹

The conflict over antitrust enforcement interferes with American foreign relations in both the short and the long run.²⁰ Individual flare-ups disturb the amicable ties between America and its trading partners and have led to the enactment of numerous statutes specifically designed to frustrate the commands of American courts in antitrust and other suits.²¹ "Blocking" laws prevent documents located abroad from being used in American litigation,²² and "clawback" laws enable foreign corporations to recover all or part of antitrust treble damage awards paid pursuant to an American court judgment.²³ More seri-

¹⁹ But see Shenefield, *supra* note 2, at 357 (deriding as a myth the belief that American antitrust laws put American business at a disadvantage abroad).

²⁰ In one representative year, "the United States . . . received well over two dozen formal and high level demarches on such issues [as extraterritoriality and discovery of documents located abroad] and [saw] . . . them intrude into the highest level of intergovernmental meetings. . . . [T]hey . . . [are] and remain among the most important politico-legal issues facing the [State Department's] Office of the Legal Advisor." Robinson, *Compelling Discovery and Evidence in International Litigation*, 18 INT'L LAW. 533, 533 (1984); see also 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4.15 (2d ed. 1981) (stating that protests over antitrust laws are raised at almost every meeting between American and European economic officials).

²¹ See *Hearings*, *supra* note 2, at 6 (statement of Abraham D. Sofaer, Legal Advisor, Department of State); Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487, 491 n.22 (1985).

²² Among the most important blocking laws are: Act of Dec. 20, 1984, ch. 49, 1984 CAN. STAT. 1863, reprinted in 24 INT'L LEGAL MATERIALS 794 (1985); Protection of Trading Interests Act, 1980, ch. 11 (U.K.), reprinted in EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION 309-18 (Practising Law Institute 1984); Act of May 24, 1965, § 11, [1965] Bundesgesetzblatt [BGBl], Teil II 833 (W. Ger.). For other examples, see Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976, No. 121, 1976 Austl. Acts 1125, amended by No. 202, *id.* at 1743; Law of July 16, 1980, [1980] Journal Officiel de la République Française [J.O.] 1799, 1980 Recueil Dalloz-Sirey, *Législation* [D.S.L.] 285; Presidential Decree No. 1718, 74 *Philippine Presidential Decrees* 58 (August 21, 1980); Evidence Amendment Act (No. 2), N.Z. Stat. No. 27 (1980).

Most blocking laws merely prevent documents and information located within the country in question from being released. A number of them go further, and direct their nationals not to comply with United States laws that conflict with international law. See Rosenthal, *supra* note 21, at 491 n.22.

²³ See, e.g., Act of Dec. 20, 1984, ch. 49, 1984 Can. Stat. 1863, reprinted in 24 INT'L LEGAL MATERIALS 794 (1985) Protection of Trading Interests Act, 1980, ch. 11 (U.K.).

A number of countries have passed legislation enabling their executive to bar enforcement of foreign antitrust judgments. See, e.g., Foreign Antitrust Judgments (Restrictions of Enforcement) Act 1979, No. 13, 1979 Austl. Acts 142; Evidence Amendment Act (No. 2), N.Z. Stat. No. 27 (1980), § 484. The British Protection of Trading Interests Act is particularly restrictive. It does not permit recovery of any part of a multiple damages claim, including merely compensatory damages. See Protection of Trading Interests Act, 1980, ch. 11, § 5 (U.K.), reprinted in Lightman & Sharpe,

ously, antitrust and other areas of economic conflict jeopardize the intricate network of economic and political ties that bind America and its allies.²⁴ Although that network is not seriously endangered, each individual antitrust suit that sparks protest unravels it to some extent.

The international legal system also suffers gravely. There is no international full faith and credit clause, and no enforcement mechanism to require the recognition of foreign judgments.²⁵ The system is founded on cooperation and respect for the interests of other nations.²⁶ The recent spectacle in the *Laker* litigation of the early 1980's, in which American and British courts usurped each other's jurisdiction and issued conflicting orders, is a sign of breakdown.²⁷ Although foreign governments thus far have exercised their authority under blocking and clawback laws rarely,²⁸ the prospect of widespread international defiance of orders of the American judiciary is extremely troubling.

Until recently, only American antitrust suits generated international protest. This is no longer the case. Actions brought in German²⁹

Discovery for the United Kingdom: A British Perspective, in EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION 309-18 (Practising Law Institute 1984).

²⁴ See Shultz, *supra* note 9, at 302.

²⁵ One of the features that distinguishes international law from other bodies of law is the absence of any centralized enforcement mechanism. Although the United Nations has nominal power to enforce the peace, and international organizations can deny benefits to their members, see M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 6-7 (4th ed. 1982), international law is largely self-regulating. See L. HENKIN, HOW NATIONS BEHAVE 49-68 (2d ed. 1979) (discussing reasons why nations choose to obey international law).

²⁶ Maier has described the international legal system as a flexible "demand-response-accommodation process," in which each nation makes decisions that further its own self-interest by encouraging the development of an effective international dispute-resolution system. Sacrificing short-term interests to promote this long-term interest is necessary if the system is to work, although it is understood that no nation can be expected to sacrifice interests central to its sovereignty. See Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982).

²⁷ Defendants in an air transport antitrust suit filed in the District of Columbia District Court obtained an injunction from a British court that prohibited the plaintiff, a British corporation, from continuing the suit. The District Court then issued an injunction against the defendants, enjoining them from getting further antisuit injunctions. The D.C. Court of Appeals affirmed. The House of Lords ultimately lifted the British injunction. See *Laker Airways Ltd. v. Pan American World Airways*, 559 F. Supp. 1124 (D.D.C.), *aff'd sub nom. Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *British Airways Bd. v. Laker Airways Ltd.*, [1983] 3 W.L.R. 545 (C.A.), *rev'd*, [1985] 1 App. Cas. 58.

²⁸ The British Protection of Trading Interests Act, for example, was applied only once in its first two years of existence. See *Cira*, *supra* note 13, at 251 & n.28. Blocking and clawback laws are generally described as measures of last resort. See, e.g., *Canadian Government Sponsors Bill to Address Extraterritoriality Issue*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1168, at 1106 (June 7, 1984).

²⁹ See Kammergericht, Decisions I and II, Nov. 26, 1980, WIRTSCHAFT UND WETTBEWERB/ENTSCHEIDUNGSSAMMLUNG OLG 2411 (1980) (Bayer/Firestone v.

courts and the Court of Justice of the European Communities,³⁰ in which jurisdiction has been based on an American-influenced broad jurisdictional test instead of a traditionally narrow European approach, have sparked protest as well. In fact, the United States has been one of the protesters.³¹ Developing countries have also expressed interest in far-reaching antitrust regulation to protect their lesser developed markets from domination by foreign multinationals.³²

This new development poses both a danger and an opportunity. Increased use of a broad jurisdictional test based on the American model will lead to increased conflict,³³ but recognition of the potential chaos may help pressure the United States and other countries into seeking an international agreement of wider scope than those that currently exist.

An interim solution should have two effects: it should reduce the gratuitous conflicts resulting from the manner in which the antitrust laws are enforced, and it should do so in such a way as to reinforce the international legal system. Achieving the first goal requires that suggested solutions address the specific features of antitrust procedures that cause other countries the most distress. The second requires that modifications of the antitrust laws increase the predictability and acceptability of the application of American antitrust law to foreign parties.³⁴

It should also be noted that the United States government takes the conflict over antitrust enforcement seriously. Each branch has worked to reduce friction, as detailed below, but no satisfactory solution has yet

Federal Cartel Office); Kammergericht, Decisions of July 1, 1983, WIRTSCHAFT UND WETTBEWERB/ ENTSCHEIDUNGSSAMMLUNG OLG 3051 (1983) (Morris/Rothmans v. Federal Cartel Office).

³⁰ See *Imperial Chem. Indus. v. Commission des Communautés Européennes*, 18 Recueil 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 (1972).

The European Court of Justice applies not only the "effects" doctrine, but also the "economic entity" test and the concept of imputing the behavior of a subsidiary to a parent corporation to determine jurisdiction. See Heck, *Transnational Litigation—Part II: Perspectives from the United States and Abroad, Federal Republic of Germany and the EEC*, 18 INT'L LAW. 793, 801 (Fall 1984).

³¹ See *Reagan Administration Keeps Tabs on Progress of EC Antitrust Probe of IBM*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1164, at 934 (May 10, 1984). The case at issue is *IBM v. Commission of the European Community*, 1982 E. Comm. Ct. J. Rep. 81, [1979-1981 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8708 (1981).

³² Most developing countries do not yet have to confront the dangers posed by internal concentrations of economic power. They are, on the other hand, continually confronted with the need to control the dangers posed by external economic power. Thus, their antitrust laws are typically accompanied by laws restricting market freedom in the area of technology transfer. See Fikentscher, *supra* note 14, at 1497.

³³ See A. HERMANN, *supra* note 13, at 15-18 (painting a grim picture of a world in which other countries with far-reaching legislation attempt to apply their laws to extraterritorial conduct).

³⁴ See Maier, *supra* note 26, at 280.

emerged.

II. AREAS OF CONFLICT

The fundamental objection to the enforcement of American antitrust laws abroad is that such laws infringe on foreign sovereignty.³⁵ Procedural aspects of American antitrust enforcement are viewed as unfairly favoring plaintiffs,³⁶ and foreign parties are often defendants.³⁷ Four of the most important procedural features of American antitrust enforcement that offend foreign sensibilities are the breadth of the American approach to jurisdiction in antitrust cases, the intrusiveness of American discovery, the availability of a private remedy for antitrust violations, and the penal effect of treble damage awards.

A. *Jurisdiction: The Effects Test*

An American court has statutory jurisdiction over an antitrust case when the defendant's conduct has had a "direct, substantial and reasonably foreseeable effect"³⁸ on American commerce. The defendant's nationality, the location of the conduct causing the antitrust violation, and any other link between the United States and the defendant, are not crucial; the requisite effect suffices. This approach either is rejected outright³⁹ or applied far more narrowly by foreign countries.⁴⁰ It is, in a sense, the heart of the "procedural" differences to which others object, because if American courts asserted jurisdiction more narrowly,⁴¹ as

³⁵ See Beckett, *Transnational Litigation—Part II: Perspectives from the United States and Abroad, United Kingdom*, 18 INT'L LAW. 773, 773 (Fall 1984); Robinson, *supra* note 20, at 534.

³⁶ See *Smith, Kline & French Laboratories, Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 734 (C.A.) (describing American system as one in which "the plaintiff holds all the cards"); *infra* notes 102 and 105 and accompanying text for discussion of pro-plaintiff aspects of the antitrust laws.

³⁷ See Beckett, *supra* note 35, at 774.

³⁸ Foreign Trade Antitrust Improvements Act of 1982, § 402, 15 U.S.C. § 6a (1982).

³⁹ See Rosenthal, *supra* note 21, at 490. The British are the most vehemently opposed to the effects test. See, e.g., *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 App. Cas. 547, 617; Wilkey, *Transnational Litigation—Part II: Perspectives from the U.S. and Abroad, United States of America*, 18 INT'L LAW. 779, 780 (1984).

⁴⁰ Recent cases in Germany and the European Economic Community have attempted to regulate extraterritorial conduct but have not tried to govern conduct abroad in conflict with the law or policy of the foreign jurisdiction. See Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 784, 797 (1984); see, e.g., *Imperial Chem. Indus. v. Commission des Communautés Européennes*, 18 Recueil 619, [1971-1973 Transfer Binder] Common Mkt Rep. (CCH) ¶18161 (1972) (involving the concerted fixing, outside the Common Market, of prices within the Market).

⁴¹ See Wilkey, *supra* note 39, at 780-84 (discussing *Laker* in relation to the

foreign courts do,⁴² many controversial cases would never be heard.⁴³

The "effects test" recognizes the futility of trying to allocate jurisdiction to any single nation over acts by multinationals in an international economy.⁴⁴ To permit economic activity to go unmonitored if the actor is a foreign national or if the activity in question takes place abroad would be to forego substantial control over one's own economy and make effective enforcement of antitrust laws impossible.⁴⁵

As applied, however, the "effects test" has permitted American

breadth of American jurisdiction).

⁴² The two principal bases of jurisdiction in international law are territoriality and nationality. Nations have the right to control acts within their territory and acts by their citizens. Territoriality is the most common basis for asserting jurisdiction. See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 comment b (Tent. Draft No. 6), (1985) [hereinafter RESTATEMENT].

The objective territoriality principle, an extended version of territoriality jurisdiction, also asserts jurisdiction over acts that take place outside the nation in question but have effects inside. It is generally accepted when applied to shooting bullets, or sending defective products or libelous publications, for example, across borders. See *id.* at comment d.

A number of countries, including the United States, Canada, and West Germany, claim a much more extended version of this "effects" jurisdiction. See 15 U.S.C. § 6a (1982); Combines Investigation Act, CAN. REV. STAT. ch. 23 (1970), amended by ch. 76, 1974-1976 Can. Stat. 1535; Gesetz Gegen Wettbewerbschraenkung (Act against Restraints of Competition) § 98(2), 1957 BGB1.I 1081 (W. Ger.). These laws generally grant jurisdiction over conduct that has substantial anticompetitive effects in the country in question. The European Community Commission, which enforces the antitrust articles of the Treaty Establishing the European Economic Community, also claims jurisdiction under an effects test. See Treaty Establishing the European Economic Community, entered into force Jan. 1, 1958, art. 85(1), 298 U.N.T.S. 11, 47-48. Moreover, both international law and foreign municipal law recognize conduct taking place within a country as the *primary* basis for conferring jurisdiction, superseding concurrent jurisdiction by other states. Only the United States considers territoriality to be a basis for jurisdiction that is merely equal to other bases. See Rosenthal, *supra* note 21, at 490. As a consequence of these different approaches to jurisdiction, the United States is "viewed abroad as a 'rogue elephant.'" *Id.* at 493.

⁴³ The nonlimiting nature of the effects test is clear; of the 248 foreign trade antitrust cases filed by the Justice Department up to May 1973, none were dismissed for want of jurisdiction. See *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 608 n.12 (9th Cir. 1976) (citing *W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS* app. B, at 498 (2d ed. 1973)). Dismissals of private cases for lack of jurisdiction were also rare. See *id.*; see also 1 J. ATWOOD & K. BREWSTER, *supra* note 20, § 6.06 ("[T]here are no reported decisions dismissing a government antitrust action on jurisdictional grounds and remarkably few dismissing private actions.").

⁴⁴ In most antitrust cases, it is likely that more than one nation will be able to claim jurisdiction under either the territorial or the effects principle. See Meessen, *supra* note 40, at 801; see also *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders."); Robinson, *supra* note 20, at 537 ("[T]he search for a single authoritative jurisdiction in each situation, as a matter of law, by means of a complex balancing process, is neither the law as it stands, nor a promising reform.").

⁴⁵ See *Laker Airways*, 731 F.2d at 923.

courts to assert jurisdiction over claims in which the activity in question has had a greater impact on countries other than the United States.⁴⁶ In some cases, the acts that form the basis of the American suit are not violations of the antitrust laws of the defendant's home country or the country in which the acts took place.⁴⁷ In other cases, a foreign government has approved of and even encouraged the acts in question. The *Westinghouse* litigation,⁴⁸ for example, was the result of attempts by uranium-producing countries to control the world market for this valuable national resource, in part by requiring the defendant corporations to work together. German courts and the Court of Justice of the European Community also take jurisdiction under versions of the "effects test,"⁴⁹ but these courts have been considerably more restrained in their application of the doctrine.⁵⁰

Other countries, notably Great Britain, object to the "effects" approach in principle as well as in practice.⁵¹ Once again, their objections stem from the issue of national sovereignty. British control over their own subjects is infringed when American courts assert jurisdiction over them. To some extent this is inevitable whenever a court of one nation asserts jurisdiction over a foreign national. But the British claim that

⁴⁶ See, e.g., *Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968) (jurisdiction based on exclusion of United States shipper from carrying merchandise between Taiwan and South Vietnam on ground that export of American shipping services affected), *cert. denied*, 393 U.S. 1093 (1969); *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680 (S.D.N.Y. 1979) (jurisdiction based on monopolization of tourist facilities in the Dominican Republic on grounds that "export" of American tourists affected); see also *Timberlane v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 579, 610-11, 613, 615 (9th Cir. 1979) (indicating that it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimis); *United States v. Aluminum Co. of America (ALCOA)*, 148 F.2d 416 (2d Cir. 1945) (noting that even wholly foreign conduct may come within the sweep of the antitrust laws if it has sufficient effect on the interstate or foreign commerce of the United States).

⁴⁷ See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962); *United States v. Holophane Co.*, 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd per curiam*, 352 U.S. 903 (1956).

⁴⁸ *In re Uranium Antitrust Litig. (Westinghouse Elec. Corp. v. Rio Algom Ltd.)*, 617 F.2d 1248 (7th Cir. 1980); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 570 F.2d 899 (10th Cir. 1978).

⁴⁹ The European Economic Community claims to have jurisdiction over cases in which there is a direct and immediate restriction of competition within the Community, and where this effect is substantial and was reasonably foreseeable. See Treaty Establishing the European Economic Community, *entered into force* Jan. 1, 1958, art. 85(1), 298 U.N.T.S. 11, 47-48. The German law is the Gesetz Gegen Wettbewerbschraenkung (Act against Restraints of Competition) § 98(2), 1957 BGBI.I 1081.

Australian antitrust law also provides for jurisdiction based on effects, although in a very restricted form. See Trade Practices Act 1974, No. 51, 1974 Austl. Acts 397.

⁵⁰ See *Cira*, *supra* note 13, at 252 (stating that enforcement of extraterritorial jurisdiction by Australia is "sparse").

⁵¹ See *ABA Probe*, *supra* note 4, at 262.

under international law effects jurisdiction may not be extended to the antitrust context.⁵² They recognize only the narrower approach as valid.⁵³ The British object, then, when "invalid" claims of jurisdiction are invoked to inflict upon British subjects the other objectionable features of American antitrust enforcement.

B. *Discovery*

Foreigners often consider American discovery to be little more than a "fishing expedition."⁵⁴ This assessment is not unreasonable; there is also considerable domestic dissatisfaction with the scope of discovery.⁵⁵ Of the various objectionable features of American antitrust

⁵² This opposition stems not so much from a doctrinaire rejection of the objective territoriality principle as from the belief that it can be applied only when there is international consensus that a wrong has been committed, when standards of proof are clear, and when the remedies are considered appropriate by international standards. See Lightman & Sharpe, *supra* note 23, at 301-02.

⁵³ See Beckett, *supra* note 35, at 774.

⁵⁴ See Cutler, *Discovery from England: A U.S. Perspective*, in EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION 261, 267 (Practising Law Inst., 1984). For some particularly scathing critiques from this viewpoint, see *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 App. Cas 547, 617; *Radio Corp. of America v. Rauland Corp.*, [1956] 1 All E.R. 549, 551 (Q.B.).

⁵⁵ The evidence on the excessive demands made by antitrust discovery is both anecdotal and statistical. Practitioners on both sides of the bar have made their unhappiness with the burdensomeness of antitrust discovery clear. See, e.g., Byrnes, *Discovery: Its Uses and Abuses—The Defendants' Perspective*, 44 ANTITRUST L.J. 14, 24-25 (1974); Kurland, *Discovery: Its Uses and Abuses—The Plaintiff's Perspective*, 44 ANTITRUST L.J. 3, 3-4 (1974). See generally D. SEGAL, SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTION AND PROPOSED REFORMS 10-12 (1978) (describing the problem of abuse of discovery as one of two main subjects of discovery literature, and summarizing criticisms).

Stories of individual cases in which discovery was so lengthy and voluminous as to be close to indigestible abound. See, e.g., NATIONAL COMMISSION FOR THE REVIEW OF THE ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, Jan. 22, 1979, at 42 [hereinafter NATIONAL COMMISSION REPORT] (discussing three cases: the IBM case, which lasted more than 10 years and involved millions of documents; a case involving Xerox, in which the pretrial stage took four years and involved hundreds of thousands of documents; and a case against Eastman Kodak in which the pretrial stage lasted four and one-half years).

Finally, statistics bear out the belief that antitrust suits are more burdensome than other kinds of cases, although they do not speak to the appropriateness of the burden. Data collected by the Administrative Office of the U.S. Courts shows, for example, that civil antitrust suits represented 0.9% of the filed suits in 1980, but 4.1% of suits pending three years or more, see 1980 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS [hereinafter 1980 ANNUAL REPORT], quoted in W. SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION 13-14 (1982), and the median time to disposition of private antitrust suits is twice as long as that for civil cases generally. See 1973-1983 ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, analyzed in Salop & White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1009 (1986) (median length of private antitrust case is approximately 17 months; median

law, this one has elicited the most dramatic response: sixteen countries have enacted laws designed solely to block American discovery.⁵⁶

Modern American discovery is the result of the particular form of the adversary system that exists in the United States: the focus on courts as agents of justice and the belief that cases are best managed by the parties.⁵⁷ Because the courts are viewed as agents of justice, rather than as dispute-settlers, the weight given to each parties' interest in not aiding its opponent is reduced. Additionally, the importance of arriving at the truth of the matter is emphasized. Surprise is regarded as highly undesirable because of its tendency to incapacitate the other party from placing the matter in its true light, and the liberal discovery rules used in most state and federal courts have succeeded in reducing, if not eliminating, trial victories based on surprise tactics.⁵⁸ Consequently, the pre-trial stage of litigation has become a relatively long, drawn-out, and detail-conscious process.⁵⁹ Concomitantly, the belief that parties can best manage their own cases has led to little judicial involvement in the discovery process, at least until recently.

American discovery is exemplified by Rule 26(b) of the Federal Rules of Civil Procedure: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ."⁶⁰ This was designed to be a very broad rule.⁶¹ It permits a party to discover whether there exist certain facts or documents, as long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."⁶² In effect, par-

length of private non-antitrust case generally is nine months). Furthermore, approximately one-sixth of the antitrust cases in that study were complex multidistrict litigations; these cases averaged 5.7 years in duration. *See id.*

⁵⁶ *See* Rosenthal, *supra* note 21, at 491; *see also* Cira, *supra* note 13, at 247-60 (discussing the blocking laws of the United Kingdom, Australia, New Zealand, France, Canada, and the Philippines).

⁵⁷ *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE §§ 1.1-2 (1985).

⁵⁸ *See id.* § 7.1.

⁵⁹ *See id.* §§ 7.2, 7.18.

⁶⁰ FED. R. CIV. P. 26(b)(1). Rules 33 (interrogatories) and 34 (production of documents) incorporate the same standard. FED. R. CIV. P. 33(b), 34(a).

⁶¹ *See generally* P. CONNOLLY, E. HOLLEMAN & M. KULMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 5-17 (1978) (discussing sources of modern discovery rules and practice); W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 26-37 (1968) (same); Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057 (1955) (describing dual purpose of the Rules as intended to lead to the resolution of cases on their merits rather than on technicalities, and to the conduct of trials as endeavors to ascertain the truth rather than contests of skill).

⁶² FED. R. CIV. P. 26(b)(1). The Rule includes "the existence . . . of any [relevant] books, documents, or other tangible things" as a permissible subject of discovery." *Id.*

ties can use discovery to shape their arguments and to determine the strength of the other party's position. Moreover, the breadth of the Rule's language is given even greater scope by the prevailing judicial approach of liberal construction.⁶³

European discovery is very different. It is rooted in a system in which the role of the courts is considerably less prominent.⁶⁴ The search for truth is achieved by strong judicial control over the evidence-seeking process, which protects parties against the danger of providing ammunition to their opponents while ensuring that the facts necessary to decide the dispute are revealed.⁶⁵ The primacy of judicial control is strengthened by the absence of jury trials in civil cases,⁶⁶ as a result, trials are not dramatic attempts by parties to influence lay judgment, but a series of hearings in which witnesses are questioned as to their knowledge of the facts of the dispute.⁶⁷ There is virtually no pre-trial stage; a lawyer will discuss the case with her client, do her research, and interview witnesses. Generally, lawyers may not question witnesses at trial.⁶⁸

Thus, discovery is taken largely by judges themselves. It is narrowly focused on the issues at bar because it is done during the trial, and it is highly protective of the parties. Moreover, it is embedded in a theory of law that makes discovery a matter of judicial sovereignty; controlling discovery is an essential part of a judge's role.⁶⁹ American dis-

⁶³ See *Hickman v. Taylor*, 392 U.S. 495, 507 (1947); NATIONAL COMMISSION REPORT, *supra* note 55, at 43-44; see also *Scope of Discovery: National Commission Staff Papers*, 48 ANTITRUST L.J. 1063, 1067 (1979) (stating that trial court rulings on discovery favor broad construction of the Rules because a contrary ruling is likely to be reversed).

⁶⁴ See generally J. MERRYMAN, *THE CIVIL LAW TRADITION* 35-39 (2d ed. 1985) (describing the court in a civil law system as a "faceless unit" and the judges as "operators of the law" who perform a mechanical function, plugging the facts of the case into the present legislative responses).

⁶⁵ See *id.* at 122.

⁶⁶ See *id.* at 121.

⁶⁷ For the German practice, see Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1211-12 (1958).

⁶⁸ A modified form of this practice exists in Italy; only the judge may question witnesses, but the questions she asks are those submitted by the parties. See M. CAPPELLETTI & J. PERILLO, *CIVIL PROCEDURE IN ITALY* 223 (1965) (Columbia University School of Law Project on International Procedure, Hans Smit ed.).

⁶⁹ See 2 J. ATWOOD & K. BREWSTER, *supra* note 20, § 15.10. Because judges are officers of the state, discovery is considered an official act. See Frei, *Transnational Litigation—Part II: Perspectives from the United States and Abroad, Switzerland*, 18 INT'L LAW. 789, 789 (Fall 1984); Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 INT'L LEGAL MATERIALS 785, 806-07 (1969). In addition to the procedural protections offered by judicial control of the discovery process, the civil law system provides substantive protections to parties of a kind and degree unknown in the United States. See 2 J. ATWOOD & K. BREWSTER, *supra* note 20, § 15.10; see also Kaplan, von Mehren & Schaefer, *supra*

covery, therefore, is seen as intrusive, overbroad, and lacking official sanction. Antitrust cases are particularly offensive, not only because they call for documents, the most restricted form of discovery under the civil system,⁷⁰ but because they call for so many documents.

If American courts restricted requests for documents to those located within the United States, the American approach to discovery might be considered merely an inevitable burden that goes along with doing business in the United States. But American courts have not so limited document requests. Foreign citizens have been required to produce documents located at home under circumstances where local laws do not require, and even forbid, their production.⁷¹ Thus, American discovery is perceived by foreigners as a tool that can be used to undermine a country's sovereignty.⁷²

This challenge to national sovereignty has brought the "blocking laws" into existence. These laws have exacerbated the problem;⁷³ a corporation may now find itself compelled by an American court to produce documents located abroad, while a court in the country in which the documents are located may forbid it to do so under the authority of

note 67, at 1237-39 (discussing German family, public official, professional, and self-incrimination privileges).

⁷⁰ In France, for example, discovery of documents by an opposing party generally is limited to commercial books of account. See P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 233 & n.6 (1967) (Columbia University School of Law Project on International Procedure, Hans Smit ed.). In Italy, documents may be discovered only if they are specifically indicated, established as indispensable to determine the facts of the case, and in the possession of the other party. See M. CAPPELLETTI & J. PERILLO, *supra* note 68, at 236. In Germany, documents are produced only by order of a court, either at the court's discretion to clarify contested material issues of fact, or on party motion where the party has a right to demand them under substantive law, or where the opposing party has offered them as proof. See Kaplan, von Mehren, & Schaefer, *supra* note 67, at 1232, 1239-41.

⁷¹ See, e.g., *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); *United States v. Vetco Inc.*, 644 F.2d 1324, 1329-33 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952-53 (D.C. Cir. 1979); *Arthur Anderson & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968).

⁷² A diplomatic note from the Canadian government, for example, protested that imposition of discovery sanctions "would have the appearance of an attempt to induce the performance in Canada of acts which are prohibited in Canada and of attaching liability for acts performed in Canada in accordance with Canadian law and the publicly declared policy of the Canadian government." *Canadian Practice in International Law During 1978 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 17 CAN. Y.B. INT'L 334, 337-38 (1979) (Note of Nov. 8, 1978 from the Canadian Secretary of State for External Affairs to the U.S. Ambassador in Ottawa).

⁷³ See *ABA Probe*, *supra* note 4, at 262.

a blocking law.⁷⁴

C. *The Private Remedy*

American antitrust laws are enforced by three agents: the Department of Justice,⁷⁵ the Federal Trade Commission,⁷⁶ and private plaintiffs.⁷⁷ The United States is the only country in which control of the economy through enforcement of antitrust law is allowed to rest in private hands.⁷⁸ In other countries, control generally rests in the hands of government agencies.⁷⁹ American antitrust law, moreover, is doubly anomalous; it not only provides for a private remedy, it also permits suits for damages.

Private enforcement is a fundamental part of general antitrust enforcement.⁸⁰ The Sherman Act was enacted in part to enable individuals to restrain competitors who were preventing the market from acting freely.⁸¹ Multiple damages were provided as a further incentive to individuals who were considering bringing suit.⁸² Subsequent amendments to the antitrust laws have generally tended to make private enforcement

⁷⁴ See, e.g., *In re Societe Internationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), cert. granted sub nom. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 106 S. Ct. 2888 (1986); *United States v. Bank of N.S.*, 740 F.2d 817 (11th Cir. 1984), cert. denied, 105 S. Ct. 778 (1985).

⁷⁵ 15 U.S.C. §§ 4, 8 (1982).

⁷⁶ 15 U.S.C. § 45(a), (b) (1982).

⁷⁷ 15 U.S.C. § 15 (1982 & West Supp. 1986).

⁷⁸ In the United Kingdom, for example, the only action directly available to private plaintiffs is a tort action against acts intended to harm plaintiffs when done in execution of agreements, rather than for the purpose of merely protecting one's own interests. See Beckett, *supra* note 35, at 774.

Although the Japanese Antimonopoly Act grants victims of a cartel a cause of action for private damages, it has been used by private parties only seven times since its enactment in 1947. See Ramseyer, *The Costs of Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 616-18 (1985).

⁷⁹ In Great Britain the responsible authorities are the Director General of Fair Trading and the Monopolies and Mergers Commission. See Beckett, *supra* note 35, at 774. In Japan, the Antimonopoly Act is enforced by the Fair Trade Commission. See Ramseyer, *supra* note 78, at 616.

⁸⁰ There were two rationales for providing a private remedy: deterrence of antitrust violations and indemnification of injury. See 21 CONG. REC. 2569 (1890) (statement of Senator Sherman) (characterizing the private remedy provision as important not only to regulate interstate commerce but also to indemnify an injured party).

⁸¹ See *id.* at 2563 (Senator Sherman, agreeing with Senator Hoar's interpretation of the private remedy provision as one that allows a private citizen to restrain those who would keep "men from freely competing.").

⁸² The Sherman bill originally provided for double recovery. It was modified during its consideration to provide for treble damages. See *id.* at 2569 (characterizing double damages as too small).

easier.⁸³ As a result, the number of private antitrust suits has far outstripped the number of suits brought by the government.⁸⁴ Although suits brought by the government are more influential than private suits, because a defendant who loses a government suit may not relitigate the issue of liability in a subsequent private suit, the government, to a large extent, has lost the ability to control enforcement of the antitrust laws.⁸⁵

As is the case with discovery, private enforcement is not merely distasteful to foreign nations; it also poses a challenge to national sovereignty. The Department of Justice generally considers the possible international repercussions of bringing antitrust suits and may refrain from bringing those suits likely to generate protest.⁸⁶ Private plaintiffs, however, are subject to no such restraints.⁸⁷ Consequently, private suits have caused several major international incidents since the 1950's, among the most notable of which are the air transport and uranium suits.⁸⁸

From the perspective of the foreign nations involved, the effect of these suits was to bring the power of the United States to bear in an attempt to destroy the economic structure of a certain commodity or service that that nation felt to be in its best interest.⁸⁹ From the American perspective, on the other hand, these suits enabled plaintiffs to recover for economic injuries inflicted upon them by foreign corporations shielded by protective governments. More broadly, private suits serve to

⁸³ See REPORT OF HOUSE COMMITTEE ON THE JUDICIARY, 98TH CONG., 2D SESS., STUDY OF THE ANTITRUST TREBLE DAMAGES REMEDY 6-9 (Comm. Print 1984) [hereinafter TREBLE DAMAGES STUDY].

⁸⁴ In the 1970's, more than 94% of the antitrust suits filed were private suits. See Hills, *Private Enforcement and Public Policy*, quoted in ANTITRUST IN THE COMPETITIVE WORLD OF THE 1980'S: EXPLORING OPTIONS 18 (1982) [hereinafter EXPLORING OPTIONS]; 1980 ANNUAL REPORT, in W. SCHWARZER, *supra* note 55, at 13. In the 1980's, the ratio of private suits to government actions dropped slightly; private suits represented an average of 92% of total antitrust cases filed between 1980 and 1984.

⁸⁵ See Hills, *supra* note 84, at 19.

⁸⁶ See Shultz, *supra* note 9, at 307 ("[W]e will exercise. . . authority with discretion and restraint, balancing all the important interests involved, American and foreign, immediate and long term, economic and political.").

⁸⁷ For a listing of the particular discovery problems raised by private antitrust suits, see Atwood, *supra* note 1, at 352-53.

⁸⁸ See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *In re Uranium Antitrust Litig.* (Westinghouse Elec. Corp. v. Rio Algom Ltd.), 617 F.2d 1248 (7th Cir. 1980); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977).

⁸⁹ Consider the statement of a Canadian lawyer in the Federal External Affairs Department: "[I]t shouldn't be up to private individuals to determine foreign policy considerations for Canada [through American antitrust suits]." *Canadian Government Sponsors Bill to Address Extraterritoriality Issue*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1168, at 1106 (June 7, 1984).

preserve American competitiveness, without requiring the government to bear the entire burden. This type of conflict is difficult to accept when two national economic policies clash, but it is even more distasteful when a private individual is permitted to trigger the conflict, especially because privately initiated conflicts are less amenable to resolution.⁹⁰

D. Treble Damages

The treble damages remedy is the centerpiece of the private antitrust remedy.⁹¹ It is also among the most objectionable features of American antitrust enforcement⁹² and increasingly the target of criticism at home.⁹³ Although not to the same extent as discovery, the availability of treble damages has also caused the enactment of foreign laws specifically designed to frustrate its intent.⁹⁴

The treble damages provision was intended to be a major incentive to private plaintiffs, and there is some evidence that it is "the most, and perhaps the only, effective deterrent under existing law."⁹⁵ One recent comprehensive study, however, reached no firm conclusion as to the remedy's effectiveness.⁹⁶ A number of proposals have been made to re-

⁹⁰ Although the government controls the suits it brings, and therefore can shape its prosecutions according to the response the suits generate abroad, the government has no direct influence on cases brought by private plaintiffs. See *ABA Probe*, *supra* note 4, at 263 ("The most extreme difficulties occur in government negotiations over private cases . . .").

⁹¹ The treble damages remedy was enacted as § 7 of the Sherman Act. Its purposes were to encourage plaintiffs other than large businesses to sue, to ensure that those responsible were punished, and to deter violations of the antitrust laws. See *TREBLE DAMAGES STUDY*, *supra* note 83, at 6-7; see also 2 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 311 (1978) (discussing treble damages as punitive).

⁹² See *ABA Probe*, *supra* note 4, at 263; Shenefield, *supra* note 2, at 356.

⁹³ The treble damage remedy is criticized for the injustice of imposing punishment when the defendants believed their actions were legal, for retarding the development of antitrust law as a result of judicial reluctance to award treble damages, and for trivializing antitrust suits by providing an incentive for recasting tort and contract suits as antitrust suits. See 2 P. AREEDA & D. TURNER, *supra* note 91, ¶ 331b2. The last charge is borne out by empirical data; in 21.6% of the antitrust cases in the Georgetown Private Antitrust Litigation Project in which the central issue was not antitrust, the antitrust claims paralleled the other claims. Salop & White, *supra* note 55, at 1048.

⁹⁴ See Beckett, *supra* note 35, at 775-78 (discussing monetary penalties, discovery, and blocking legislation).

⁹⁵ *TREBLE DAMAGES STUDY*, *supra* note 83, at 22.

⁹⁶ See Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1140 (1986); Salop & White, *supra* note 55, at 1051. Both articles are based on the Georgetown Private Antitrust Litigation Project, a study that examined more than 2350 antitrust suits filed over a 10-year period. Various aspects of the Project's findings are discussed

duce the private damages remedy to double or actual damages,⁹⁷ but such proposals have been approved only in cases with limited application.⁹⁸

American criticism of treble damages looks largely to their economic impact.⁹⁹ Treble damages are criticized as deterring socially beneficial conduct.¹⁰⁰ For instance, the threat of a treble damages suit raises the cost of an adverse judgment so dramatically that a corporation that might otherwise risk some limited and socially desirable cooperation with other firms will instead avoid it.¹⁰¹ Treble damages are also criticized as unfairly favoring plaintiffs who now have the benefit of judicial and legislative rules that substantially ease their case.¹⁰²

in *Symposium: Private Antitrust Litigation*, 74 GEO. L.J. 999-1236 (1986).

⁹⁷ One proposal is to limit damages to actual damages "when the conduct giving rise to the cause of action has been favorably reviewed by the Justice Department pursuant to an agreement with a foreign nation, or when trebling would jeopardize plaintiffs' rights to collect or retain a judgment under applicable foreign laws." TREBLE DAMAGES STUDY, *supra* note 83, at 41.

Other suggestions are that the treble damage remedy should not apply when the defendant reasonably relied on contemporary doctrine, and more generally, that it be made entirely discretionary. See 2 P. AREEDA & D. TURNER, *supra* note 91, ¶ 331b3. The New York State Bar also has called for actual damages where the defendant could not reasonably have known she was violating the law. See *Report of Antitrust Section Committee on Legislation*, 54 N.Y. ST. B.J. 395, 395 (1982) [hereinafter *Antitrust Report*].

The current administration also has proposed generally restricting the application of treble damages. See S. 2162, 99th Cong., 2d Sess. (1986), 132 CONG. REC. S. 2284-87 (daily ed. March 7, 1986).

⁹⁸ See 15 U.S.C. § 15a (1982) (limiting to actual damages recovery of the United States Government when it is injured in its business or property); Pfizer Act of 1982, 15 U.S.C. § 15(b) (1982) (limiting to actual damages recovery against foreign governments suing in their sovereign capacity); National Cooperative Research Act of 1984, 15 U.S.C. § 4303 (Supp. III 1985) (limiting to actual damages recovery against joint research and development ventures that have properly notified the Attorney General and the Federal Trade Commission).

⁹⁹ Elzinga and Breit criticize the private remedy in general. They find it results in the creation of "perverse incentives" (injured parties do not avoid injury inflicted on them even when the cost of avoidance is less than the cost of the injury), a raising of prices due to settlements agreed to by risk-averse businesses, and resources wasted in determining and allocating damages. See K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 84-91 (1976). In addition, Elzinga and Breit cite evidence that "treble damage suits represent a transfer of wealth from the corporate sector to the legal profession." *Id.* at 75.

¹⁰⁰ See, e.g., Dam, *Implications for Antitrust of a Shrinking Globe*, in *EXPLORING OPTIONS*, *supra* note 84, at 12-13 (treble damage remedy increases inefficiency); Hills, *supra* note 84, at 18-20 (treble damages chill risk-taking, encourage baseless claims and "soft" competition, extort settlements, and hinder the development of rational antitrust policy).

¹⁰¹ See TREBLE DAMAGES STUDY, *supra* note 83, at 34-39.

¹⁰² The damage multiplier has, in fact, been more than three, because the burden of proof has been eased, the class of plaintiffs enlarged, the statute of limitations lengthened, and consent decrees and pleas of *nolo contendere* in government suits made *prima facie* evidence of guilt in private suits. See *id.* at 8-9, 27-28; K. ELZINGA & W. BREIT,

Such rules did not exist when the treble damages provision was first enacted in 1890. To give two examples, the Clayton Act of 1914 included treble damages,¹⁰³ thereby extending the reach of the treble damage remedy, and summary judgments in antitrust suits traditionally have been discouraged,¹⁰⁴ increasing the "blackmail" effect of filing a treble damages claim.¹⁰⁵

Foreign criticism looks instead to the penal nature of treble damages,¹⁰⁶ and to the dramatic way in which they raise the stakes in antitrust suits.¹⁰⁷ These criticisms would apply even if treble damages were universally considered to be economically efficient. Private individuals should not be permitted, according to the foreign perspective, to threaten penal sanctions. This threat becomes even more disturbing when it is part of a private challenge to a nation's economic ordering.

America's generous approach to assuming jurisdiction, broad discovery practices, widespread use of private remedies, and mandatory trebling of damages, all serve to make enforcement of American antitrust laws very different from enforcement of foreign counterparts. Disagreement over substantive antitrust policy is exacerbated by the anger aroused by these pro-American, plaintiff-oriented procedures. Recurring international conflicts have prompted various responses by the United States government.

supra note 99, at 64-66.

¹⁰³ See TREBLE DAMAGES STUDY, *supra* note 83, at 8.

¹⁰⁴ See *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962); TREBLE DAMAGES STUDY, *supra* note 83, at 28.

¹⁰⁵ Many marginal cases are pursued because the size of potential treble damage awards and the costs of defending such suits make a substantial settlement likely. See *Hills*, *supra* note 84, at 18. The reluctance of district courts to dismiss antitrust cases at an early stage also gives the plaintiff leverage. See *Hearings*, *supra* note 2, at 1, 9-11 (testimony of Abraham Sofaer, Legal Advisor, Department of State). This reluctance has a significant impact on the length, and therefore the cost, of suits in which the primary issue is in tort or contract. When antitrust claims were made in such cases, the median length of the cases increased more than 50% to 15.4 months, a figure close to the median for other antitrust cases.

¹⁰⁶ See *Beckett*, *supra* note 35, at 774 (comparing American antitrust law to torture in light of English law).

¹⁰⁷ The effect of the threat of treble damage liability is magnified by the availability of class action suits and joint and several liability without contribution among defendants. See TREBLE DAMAGES STUDY, *supra* note 83, at 28. The effect of these procedural devices is reflected in the difference in costs incurred by the parties, although some portion of these costs undoubtedly is attributable to the inherently high nature of the stakes in antitrust cases. The median legal cost per party for civil cases of all kinds studied in the Georgetown Private Antitrust Litigation Project was \$4400 in 1984 dollars, while the average cost for antitrust cases was \$75,000. Salop & White, *supra* note 55, at 1015.

III. ATTEMPTS TO DEFUSE THE PROBLEM

Each branch of the federal government has taken action to reduce the international tension caused by antitrust enforcement. The judicial and executive branches have been the most active in the area to date. Congress has been more quiescent, and it is unclear whether the limited action Congress has taken in the area will soothe any foreign tempers. Neither the judicial nor the executive branches' actions have had much effect on the problem of private enforcement, however, because the authority of each, unlike that of Congress, is limited in this area.¹⁰⁸

A. *The Judicial Branch*

The courts have developed several doctrines that either limit their jurisdiction or provide for the non-exercise of jurisdiction. The only doctrine likely to have much effect, however—the jurisdictional rule of reason—has also been the subject of much criticism.

Two limiting doctrines are the act of state doctrine¹⁰⁹ and the for-

¹⁰⁸ See *ABA Probe*, *supra* note 4, at 264 ("Trade problems must be sorted out by governments, not lawyers . . . Congress, . . . [therefore,] must be factored into the equation.").

¹⁰⁹ The act of state doctrine ensures that the judiciary does not interfere with the conduct of foreign affairs by the executive branch, thereby enabling the judiciary to maintain its impartiality and authority. It prohibits federal courts from adjudicating the validity of sovereign acts by foreign governments in their own territories. Generally, it is applied only in cases involving expropriations of property. This doctrine differs from the doctrine of sovereign immunity in that the act of state doctrine is concerned with sovereign acts as defenses to otherwise valid claims, not with the sovereign as a party.

The major cases in the area are *Underhill v. Hernandez*, 168 U.S. 250 (1897) (court refused to sit in judgment regarding the detention of an American citizen by a Venezuelan government official); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act of state doctrine applies even where the act complained of is alleged to violate international law); *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (permitting judicial examination of the legal issues raised by the act of a foreign sovereign within its own territory, because the act of state doctrine would not advance the interest of United States foreign policy); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976) (Cuban government failed to meet burden of proof on act of state question). *Underhill* described the doctrine as rooted in the respect due other sovereign countries as equals. See *Underhill*, 168 U.S. at 252. *Sabbatino* reformulated the doctrine as one resting on separation of powers considerations. See *Sabbatino*, 376 U.S. at 423. A plurality of the Justices wrote in *Dunhill* that the act of state doctrine did not apply to acts of foreign governments when they acted in a commercial rather than sovereign capacity. See *Dunhill*, 425 U.S. at 695-706.

The act of state doctrine has barred adjudication of several antitrust cases in which a foreign government officially expropriated plaintiffs' property. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (defendant alleged to have induced Costa Rica to seize plaintiff's plantation); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.) (defendants' pressure on plaintiff to bargain hard with Libya alleged to be a factor in expropriation of plaintiff's concession by Libya), *cert. denied*, 434 U.S. 984 (1977); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal.

eign government compulsion doctrine,¹¹⁰ which protect those who can validly raise them as defenses. These doctrines result in dismissal of the case and thus are used sparingly.

The "effects test" for establishing jurisdiction was first established in *United States v. Aluminum Co. of America (ALCOA)*.¹¹¹ The requirements of the test were met if the plaintiff could show that the defendant intended to affect American commerce, and had caused an actual effect on that commerce.¹¹² This test was later reformulated to require a direct, substantial, and reasonably foreseeable effect on American commerce, and it subsequently was codified in this form.¹¹³

If high standards of proof had been applied, or a showing of substantial effects had actually been demanded in practice, the effects test

1971) (defendants alleged to have induced Gulf State to assert sovereignty over area claimed by the Gulf State that granted plaintiffs their oil concession), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

Courts generally have refused to apply the act of state doctrine when the foreign government's involvement was something other than direct expropriation of property, reasoning that because the foreign government's role was minor, political complications were not likely to arise from adjudication. *See, e.g.*, *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (Mexican and Yucatan governments passed legislation favoring defendants); *Mannington Mills, Inc. v. Congoleum Corp.* 595 F.2d 1287 (3d Cir. 1979) (foreign patents issued to defendant); *Industrial Inv. Dev. Corp. v. Mitsui & Co.* 594 F.2d 48 (5th Cir. 1979) (Indonesian Director of Forestry refused to grant harvesting license to plaintiff), *cert. denied*, 445 U.S. 903 (1980); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976) (embargo imposed on plaintiff by Honduran courts under Honduran law, effectively depriving plaintiff of his property).

¹¹⁰ The defense of foreign government compulsion applies when a defendant can show that the anticompetitive act of which the plaintiff complains was compelled by an order from a foreign government. It is based on considerations of fairness to defendants. The defendant must show that she was literally compelled to commit the offensive act; mere encouragement or authorization to act restrictively does not suffice.

When defendants cannot show that they would have been punished under foreign law for disobeying an order, or that disobeying the order would have led to an end to the foreign commerce in question, the defense of foreign government compulsion does not protect them. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (foreign government-bestowed discretion to purchase vanadium does not shield decision to purchase none from plaintiff); *United States v. Watchmakers of Switz. Info. Center*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. Dec. 20, 1962) (private agreements that are "recognized as facts of economic and industrial life" in Switzerland found not compelled by Swiss government), *judgment modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970), in which Venezuela threatened to cut off supplies of oil to two American companies if they continued to sell to the plaintiff, is the only reported case in which the foreign government compulsion doctrine has been used to relieve defendants from liability.

¹¹¹ 148 F.2d 416 (2d Cir. 1945).

¹¹² *See id.* at 431-33.

¹¹³ *See* Foreign Trade Antitrust Improvements Act of 1982, § 402, 15 U.S.C. § 6a (1982).

might have proven to be a means of restricting access to the courts. In fact, although some cases involving only de minimis effects on American commerce have been dismissed,¹¹⁴ other courts have applied the test narrowly enough to render it virtually meaningless in light of the interdependence of American and foreign commerce. In response to the ease with which the effects test may be met, a new doctrine, the jurisdictional rule of reason, has developed within the last decade.

The jurisdictional rule of reason, set out in *Timberlane Lumber Co. v. Bank of America National Trust & Savings Association*,¹¹⁵ is a balancing test that supplements the effects test. It is generally understood as an abstention doctrine, rooted in comity and due respect for other sovereigns. In *Timberlane*, the court suggested seven factors that the District Court should weigh to determine whether it was appropriate for the court to exercise its jurisdiction.¹¹⁶ This approach was initially received with hearty approval, and several other circuits have since adopted versions of it.¹¹⁷

The rule is no longer seen as a panacea, however, because it appears to suffer from a number of deficiencies. There is no agreed-upon set of factors in the doctrine, nor has any weight been assigned to the various factors, thus making the outcome of the test unpredictable.¹¹⁸ Furthermore, there is disagreement as to whether the jurisdictional rule of reason ought to be considered a prerequisite to jurisdiction or whether it is a post-jurisdictional question of judicial prudence.¹¹⁹ Some courts have refused to apply it altogether,¹²⁰ because it requires courts

¹¹⁴ See, e.g., *McGlinchy v. Shell Chem. Co.*, 1985-2 Trade Cas. (CCH) ¶ 66,672 (N.D. Cal. Nov. 30, 1984) (harm only to potential customers in Southeast Asia).

¹¹⁵ 549 F.2d 597 (9th Cir. 1976).

¹¹⁶ For the factors used see *infra* note 157.

¹¹⁷ The jurisdictional rule of reason has been applied in the following cases: *United States v. Bank of N.S.*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); *United States v. First Nat'l Bank*, 699 F.2d 341 (7th Cir. 1983); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.* 595 F.2d 1287 (3d Cir. 1979).

The *Restatement of the Foreign Relations Law of the United States* also has adopted the jurisdictional rule of reason. See *RESTATEMENT*, *supra* note 42, § 403.

¹¹⁸ But see *Hearings*, *supra* note 2, at 36 (testimony of James S. Campbell and David Westin) (indicating that there is a developing common law on which factors are to be taken into account).

¹¹⁹ Compare *In re Uranium Antitrust Litig.* (Westinghouse Electric Corp. v. Rio Algom Ltd.), 617 F.2d 1248 (7th Cir. 1980) and *Mannington Mills*, 595 F.2d at 1287 (jurisdictional rule of reason is postjurisdictional) with *Montreal Trading*, 661 F.2d at 864 and *Mannington Mills*, 595 F.2d at 1299 (Adams, J., concurring) (jurisdictional rule of reason is part of jurisdictional test).

¹²⁰ See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *In re Uranium Antitrust Litig.*, 617 F.2d at 1248.

to consider political issues inappropriate for the judiciary.¹²¹ Other courts have applied it, with results that are indistinguishable from the results in cases in which it was not applied.¹²² As a result of the lack of agreement over how and whether to use the doctrine, and the recent refusal of some courts of appeals to apply it, the doctrine's future is uncertain.

Thus, the judicial branch has been unable to find an approach that reduces antitrust tensions. This is not the result of a failure on the part of the courts, but instead a result of the nature of the problem. The problem is one that the judiciary does not have sufficient authority to resolve.¹²³ The judiciary is bound to carry out the congressional mandate, which in this area has been understood to apply to acts that take place abroad. The resulting tensions are political in nature.¹²⁴ Such matters are neither within judicial competence to resolve, nor are they appropriate for the judiciary to resolve.¹²⁵ Courts do not have the knowledge or the constitutional authority to handle political matters, nor would such knowledge or authority be consistent with the mandate given the courts by the antitrust laws.

B. *The Executive Branch*

The executive branch generally has been successful in reducing international tensions resulting from government antitrust actions. Its

¹²¹ See *Laker Airways*, 731 F.2d at 948-50.

¹²² See *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3514 (1985); *United States v. Vetco, Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Montreal Trading, Ltd. v. Amax, Inc.* 661 F.2d 864 (10th Cir. 1981); *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982).

Judge Wilkey assessed the effect of the jurisdictional rule of reason and concluded that "[a] pragmatic assessment of those decisions . . . indicates none where U.S. jurisdiction was declined when there was more than a *de minimis* United States interest." *Laker Airways*, 731 F.2d at 950-951.

¹²³ For example, once a court has found jurisdiction, it is questionable whether it may abstain when no recognized abstention doctrine exists. See *Laker Airways*, 731 F.2d at 938; *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1301 n.9 (3d Cir. 1979) (Adams, J., concurring); see also *ABA Probe*, *supra* note 4, at 264 (stating that "[a]ny solution to assertion of extraterritorial jurisdiction cannot be found in the U.S. judiciary"); Bork, *Introduction*, 18 STAN. J. INT'L L. 241, 244 (1982) (suggesting that the jurisdictional rule of reason "brings a federal court to the verge of its article III power").

¹²⁴ In *Laker Airways*, for example, Judge Wilkey noted, "The conflict faced here is not caused by the courts of [the United States and Great Britain]. Rather, its sources are the fundamentally opposed national policies toward prohibition of anticompetitive business activity." *Laker Airways*, 731 F.2d at 945; see also Bork, *supra* note 123, at 241 (The jurisdictional rule of reason forces courts to "entangl[e] [themselves] with political questions which are avoidable in domestic antitrust litigation.").

¹²⁵ See *Laker Airways Ltd.*, 731 F.2d at 955 (D.C. Cir. 1984).

success stems from various factors, among which are the following: careful consideration by the Departments of Justice and State of the international implications of bringing suit;¹²⁶ notification and consultation with foreign governments over suits thought likely to affect their interests;¹²⁷ refusal to bring cases,¹²⁸ willingness to drop cases,¹²⁹ or limitation of the remedies sought when the harm done to foreign relations outweighs the value of prosecution;¹³⁰ and participation in bi- and multilateral agreements with other countries.¹³¹ The international agreements are rendered less effective than they might be, however, because of differences in interpretation by the signatories,¹³² and more seriously, because of the limited effect that the United States has given to the multilateral agreements to which it is a party.¹³³

¹²⁶ See *ABA Probe*, *supra* note 4, at 263; Shenefield, *supra* note 2, at 350-51.

¹²⁷ Since 1967, the United States has consulted nearly 500 times with foreign governments under OECD guidelines on antitrust. See Shultz, *supra* note 9, at 305-06.

¹²⁸ See Meessen, *supra* note 40, at 795.

¹²⁹ *Id.*

¹³⁰ See *United States v. General Elec. Co.*, 115 F. Supp. 835, 875-76 (D.N.J. 1953); Meessen, *supra* note 40, at 795.

¹³¹ The United States has bilateral agreements on antitrust with Australia, Canada, and West Germany. See Agreement . . . Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10365; *Memorandum of Understanding Between the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1156, at 560 (March 15, 1984) [hereinafter *U.S.-Canada Memorandum*]; Agreement . . . Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-West Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291.

Multilateral agreements concerning international antitrust issues that the United States helped to negotiate and to which the United States is a party include the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C.A. § 1781 (West Supp. 1987)) [hereinafter *Hague Evidence Convention*]; New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3; Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163; Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, *opened for signature* Oct. 5, 1961, T.I.A.S. No. 10072, 527 U.N.T.S. 189; *Organization for Economic Cooperation and Development Code of Conduct for Multinational Enterprises*, OECD Doc. 21, (76) 04/1, *reprinted in* 3 B. HAWK, *supra* note 13, at vol. II appendices, at 261; *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/Conf/10 (1980), *reprinted in*, 3 B. HAWK, *supra* note 13, at vol. II appendices, at 269 (United Nations Conference on Trade and Development); .

¹³² The United States and Canada disagree, for example, on the crucial question of whether the U.S.-Canada Memorandum authorizes the compulsory use of process by one nation's trial court to obtain documents located in the territory of the other. See *U.S., Canada, Agree on Procedures for Cooperation in Antitrust Probes*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1156, at 525 (March 15, 1984).

¹³³ For discussion of the effect American courts have given the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, see *infra* text

The most serious limitation to the success of the executive branch in reducing international antitrust tensions is that the executive controls only suits brought by the government. Although the "piggybacking" of private suits onto successful government suits¹³⁴ magnifies the effects of the executive branch's actions, the example set by the Justice Department has not been followed by private plaintiffs in antitrust suits involving foreign commerce. Thus, it is necessary for Congress to act to reformulate the Department's mandate, and to do so broadly enough so that it may apply to all antitrust actions involving foreign commerce.

C. *The Legislative Branch*

Until recently, Congress had done very little to stem the tide of antitrust protests. The purpose of existing legislation had been to improve the lot of American business abroad in specific areas, with little consideration given to the negative effects of intrusive antitrust enforcement in general.

Congress's first venture in this area was the Webb-Pomerene Act,¹³⁵ which exempts from the Sherman Act small associations of companies engaged only in export. The Webb-Pomerene Act, in effect, has been interpreted out of existence by the judiciary, and therefore has proven ineffective.¹³⁶ More recently, Congress enacted the Export Trading Company Act of 1982,¹³⁷ the Foreign Trade Antitrust Improvements Act,¹³⁸ the Pfizer Act,¹³⁹ and the National Cooperative Research Act.¹⁴⁰ Although these demonstrate increased interest in the antitrust problem, they are not likely to help resolve it.

The Export Trading Company Act created a government certifica-

accompanying notes 206-08. German courts, in contrast, treat the Convention as pre-emptive. See Heck, *supra* note 30, at 796.

The executive branch also has been unwilling to accord full recognition to multilateral agreements. See Rosenthal, *supra* note 21, at 495.

¹³⁴ "Piggybacking" refers to the reliance by private plaintiffs upon the doctrine of res judicata to preclude defendants who have been found to have acted illegally in previous government antitrust suits from relitigating issues that have been resolved. "Successful actions by the Justice Department have traditionally provided the basis for a large proportion of private treble-damage actions." Note, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L.J. 1309, 1316 n.37 (1984).

¹³⁵ 15 U.S.C. §§ 61-65 (1982).

¹³⁶ There have been no cases since 1968 involving the Webb-Pomerene Act. See 16F J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 55.03[1] (1985); see also Note, *The Export Trading Company Act of 1982: Theory and Application*, 14 GA. J. INT'L & COMP. L. 525, 546 (1984) (stating that threat of antitrust challenge chilled small firms from attempting to associate under Webb-Pomerene Act).

¹³⁷ 15 U.S.C. §§ 4001-4021 (1982).

¹³⁸ 15 U.S.C. § 6a (1982).

¹³⁹ 15 U.S.C. § 15(b) (1982).

¹⁴⁰ 15 U.S.C. §§ 4301-4305 (1982 & Supp. III 1985).

tion process designed to encourage exports by granting limited exemptions from the antitrust laws. The procedures are cumbersome and expensive, however, and commentators have expressed considerable doubt as to whether they will be used.¹⁴¹ The Pfizer Act restricts recoveries by foreign governments to actual damages.¹⁴² The National Cooperative Research Act of 1984 loosened antitrust restrictions on cooperative research projects, and has had some minimal effect.¹⁴³

Whereas these laws loosen antitrust restrictions on American businesses, presumably increasing their competitiveness abroad, they display a lack of concern for the foreign perception that the United States imposes its antitrust laws without regard for the interests of its trading partners.¹⁴⁴ These laws do not make American antitrust enforcement more palatable abroad; therefore, they do nothing to end the increasing resistance toward enforcement.

The Foreign Trade Antitrust Improvements Act of 1982 codified the effects test: there must be an effect on *American* commerce for jurisdiction to exist under the antitrust laws.¹⁴⁵ This act should eliminate the most egregious abuses of the effects test, but it does not go far enough.

In 1986, Congress considered several bills that might have gone far to alleviate the antitrust enforcement conflict. The Reagan administration introduced a five-bill package of antitrust reforms, two of which are relevant here. Senate bill 2162¹⁴⁶ drastically narrowed the kinds of damages that might be trebled, in effect providing a general rule of actual damages. Senate Bill 2164¹⁴⁷ proposed to restrict discovery on the issue of subject matter jurisdiction and to give it priority over other matters, to mandate use of the jurisdictional rule of reason, and to permit the use of forum non conveniens in antitrust suits involving foreign commerce. All of the proposed reforms died when the 99th Congress expired.

¹⁴¹ See, e.g., Shenefield, *supra* note 2, at 358-59.

¹⁴² 15 U.S.C. § 15(b) (1982). The United States is also restricted to recovering actual damages. *Id.* at § 15a.

¹⁴³ See Pollack, *Uniting to Create Products: Imports Spur Joint Projects*, N.Y. Times, Jan. 14, 1986, at D7, col.1.

¹⁴⁴ See Shenefield, *supra* note 2, at 366.

¹⁴⁵ See Note, *supra* note 136, at 557; see also Shenefield, *supra* note 2, at 360-64 (tracing development of effects test).

¹⁴⁶ S. 2162, 99th Cong., 2d Sess., 132 CONG. REC. S. 2284-85 (daily ed. Mar. 7, 1986).

¹⁴⁷ S. 2164, 99th Cong., 2d Sess., 132 CONG. REC. S. 2288 (daily ed. Mar. 7, 1986).

IV. SOME PROPOSALS

Antitrust practitioners and scholars are well aware of the conflicts raised by antitrust suits involving foreign commerce. Many remedies have been suggested—some bizarre,¹⁴⁸ some chauvinistic,¹⁴⁹ and some sensible. Proposed remedies, however, generally consider only a short-term American point of view. Their approach is to recognize broadly that a problem exists and then to seek an answer to the problem within American borders.

In an area in which no nation can protect its interests effectively without the cooperation of others, any analysis must instead begin with the recognition that the United States is merely one among many nations. It is in the long-term interest of the United States to cooperate with other countries, especially European countries in the antitrust context, even if it thereby sacrifices some short-term interests. Vigorous American antitrust enforcement is useless, and even detrimental, if other countries act to negate its effects. Such enforcement does not achieve the desired increase in competition, it angers our allies and other nations whose friendships we seek, and it is contrary to the development of a stable international community. Given the results of vigorous antitrust enforcement, it is in the United States's overall interest to bend somewhat to foreign desires. This Comment makes several proposals that consider the broader international perspective.

First, where the "effects test" is used to determine jurisdiction, the plaintiff should meet a higher standard of proof of actual effects on trade or commerce with foreign nations. Second, the doctrine of forum non conveniens should apply to antitrust suits involving foreign commerce. Third, the procedures established by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters should be used as a matter of course for discovery in signatory countries. Fourth, discovery abroad should be limited, with certain qualifications, to information that is not available in the United States, and that would be admissible at trial. Finally, plaintiffs, in most cases, should recover only actual damages when the defendant has been compelled or actively

¹⁴⁸ One proposal contemplates an amendment to § 4 of the Clayton Act that would require the courts to apply an "intended effects" test limited only by narrowly construed sovereignty-related defenses, and the President to make the determination whether the courts should have jurisdiction based on the foreign policy interests of the United States. The purpose of this interim proposal is deliberately to generate friction to increase the pressure on national governments to reach a multilateral solution. See Dunfee & Friedman, *supra* note 11, at 885, 922-28.

¹⁴⁹ See Note, *The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments*, 91 YALE L.J. 765 (1983) (recommending that American antitrust laws be applied to anticompetitive acts by foreign governments).

encouraged by a foreign government to do the acts in question.

These suggestions do not provide definitive answers to the problems caused by enforcement of the antitrust laws; rather, they are possibilities that may deserve consideration. A brief discussion of each follows. The jurisdictional rule of reason is also discussed because it is widely viewed as an appropriate method of lessening the tensions of antitrust enforcement in the international arena. That assessment of the jurisdictional rule of reason is disputed herein.

Suggestion 1: Jurisdiction: Requiring Proof of Actual Effects

Where subject matter jurisdiction is based primarily on effects on American commerce, the burden of persuasion shall be on the plaintiff to prove actual effects on trade or commerce with foreign nations.

The current standard for showing effects at the jurisdictional stage—"a direct, substantial and reasonably foreseeable effect"¹⁵⁰—has proven unsatisfactory. As stated earlier, it has led to foreign protests over its breadth as applied. United States courts have also come to feel that the standard as applied gives insufficient weight to the interests of other countries when foreign parties are involved.¹⁵¹ In response they have developed the limiting doctrine known as the jurisdictional rule of reason, first set out in *Timberlane Lumber Co. v. Bank of America National Trust & Savings Association*.¹⁵² The rule requires a court to balance a set of factors based on comity concerns in order to ascertain whether the court should take jurisdiction. Courts and commentators initially endorsed this approach,¹⁵³ but more recently severe doubts have been expressed as to its manageability and appropriateness. This Comment argues that the jurisdictional rule of reason is neither appropriate nor manageable, and that the need to limit the effects test is better fulfilled by raising the standard of proof courts apply to the effects test.

¹⁵⁰ 15 U.S.C. § 6(a)(1) (1982).

¹⁵¹ See *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 611-12 (9th Cir. 1976).

¹⁵² 549 F.2d 597 (9th Cir. 1976).

¹⁵³ See, e.g., *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); RESTATEMENT, *supra* note 42, § 403(2).

The Jurisdictional Rule of Reason Is Not an Appropriate Means of Resolving Conflicts over Antitrust Suits in Foreign Commerce

The jurisdictional rule of reason is an unreasonable rule. It does not serve its intended purpose for two reasons: it is not in accordance with international law, and it is inherently unworkable.

The two primary bases of jurisdiction in international law are territoriality and nationality. Effects jurisdiction in the antitrust context is an extension of an offshoot of the territoriality principle known as the objective territoriality principle. The rejection by the international community of effects jurisdiction, at least as applied by American courts, already has been explored.¹⁵⁴ Even if effects jurisdiction were a rule of international law, however, the jurisdictional rule of reason would not be in accordance with international law.

Once a basis for jurisdiction exists, international law does not attempt to restrict the exercise of that jurisdiction. The balancing of interests required by the jurisdictional rule of reason is a principle of domestic conflicts of law,¹⁵⁵ not of public international law. Nations do, of course, take comity concerns into account when deciding whether to exercise jurisdiction, but this assessment is one of policy rather than law.¹⁵⁶ Furthermore, it is generally carried out by the executive in an allocation of decisionmaking that follows from the usual application of the objective territorial principle to acts generally recognized as crimes.

Thus, it is not a satisfactory response to a foreign protest over the exercise of effects jurisdiction that it is permitted by the jurisdictional rule of reason; the jurisdictional rule of reason is not a rule of international law. Moreover, the balancing of interests by courts is offensive to foreign nations, as the decision cannot be made without inquiry into the genuineness of asserted foreign interests. Thus, any exercise of jurisdiction clearly is premised upon a finding that American interests outweigh those of the protesting nation. Finally, the degree of independence enjoyed by American courts means that foreign nations have little influence upon the decision and are left with little recourse once the decision is made.

¹⁵⁴ See *supra* notes 39-42, 51-53 and accompanying text.

¹⁵⁵ See, e.g., Juenger, *Conflict of Laws: A Critique of Interests Analysis*, 32 AM. J. COMP. L. 1 (1984) (discussing two models of conflict analysis: a rule-bound approach and a balancing of interests approach).

¹⁵⁶ A balancing of national interests approach is one of the aspects of comity. Although it is important as a source of harmony in international relations, comity is not a rule of international law. See Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 215-16 (1972-73); 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, 143 (1982); Maier, *supra* note 26, at 281.

In addition to being unsatisfactory from the viewpoint of international law, the jurisdictional rule of reason is not manageable. As yet, there has been no agreement as to the definitive set of factors to be considered under the rule. Approximately fifteen different factors can be found in the cases that apply, or refuse to apply, the rule.¹⁸⁷ The factors fall into three broad categories: factors already considered when the court found subject-matter and in personam jurisdiction ("jurisdictional factors"),¹⁸⁸ factors that serve to tell the court that there is a

¹⁸⁷ *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976) applied seven factors:

- (1) the degree of conflict with foreign law or policy;
- (2) the nationality or allegiance of the parties and the locations or principal places of business of the 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 an explicit purpose to harm or affect American commerce;
- (6) the foreseeability of such an effect;
- (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614.

Mannington Mills, Inc. v. Congoleum Corp. 595 F.2d 1287 (3d Cir. 1979), used four of the factors above, and added:

- (8) the availability of a remedy abroad and the pendency of litigation there;
- (9) the possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
- (10) the possibility that granting relief will force a party to choose between obeying American law and obeying foreign law;
- (11) the acceptability in the United States of a similar order for relief by a foreign nation;
- (12) the existence of a relevant treaty with the affected nation.

Id. at 1297-98.

The *Restatement of Foreign Relations Law of the United States* has still a different set of factors, including:

- (13) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (14) the existence of justified expectations that might be protected or hurt by the regulation in question;
- (15) the importance of the regulation in question to the international political, legal or economic system;
- (16) the extent to which such regulation is consistent with the traditions of the international system.

RESTATEMENT, *supra* note 42, §403. Although these factors overlap to some extent, basically, the set of factors is elastic.

¹⁸⁸ See factors 2, 4-7 listed *supra* note 157.

conflict ("conflict factors"),¹⁵⁹ and factors that require the court to make a political judgment ("political factors").¹⁶⁰ These factors, however, do not guide a court to a decision as to whether or not the exercise of jurisdiction is "reasonable."

The jurisdictional factors are both biased and misleading. They are biased because the court has already decided that they weigh in favor of hearing the case. For example, the extent to which the acts alleged substantially harmed American competition, or were intended to do so are factors considered when the court decides whether there is a "direct, substantial and reasonably foreseeable effect" on American commerce. These factors encourage the court to treat the jurisdictional rule of reason as a question of sufficient contact with the United States, using the rule as a jurisdictional "hook," instead of as a balancing of United States and foreign interests. Not surprisingly, any doubts as to the propriety of exercising jurisdiction tend to be resolved in favor of exercising it.¹⁶¹

The jurisdictional factors are also misleading. The *Restatement of Foreign Relations Law of the United States*, considered by many courts to be an authoritative statement of international law, implies that the jurisdictional rule of reason is part of an internationally-minded rule of "reason."¹⁶² Courts, therefore, are deceived into believing that their decisions do not violate international law.

The conflict factors are pointless. Considering them does place the case in question in international perspective, but these factors give no guidance as to how the court should resolve the conflict it finds. Dismissal of an action should not rest solely on the degree of conflict it generates, because that, in effect, would allow other countries to dictate when American antitrust law should be enforced. The exercise of jurisdiction in American courts, then, would stand or fall based on political decisions made abroad. This is carrying comity too far.

Finally, a number of factors suggested by the *Restatement* require political judgments.¹⁶³ Political factors are not within judicial competence to resolve or judicial authority to decide.¹⁶⁴ Whether expectations

¹⁵⁹ See factors 1, 3, 4, 7, 8, 10, 12, 13, 16 listed *supra* note 157.

¹⁶⁰ See factors 9, 11, 14, 15 listed *supra* note 157.

¹⁶¹ Maier explains the "homing tendency" of courts using the jurisdictional rule of reason by emphasizing the complexity of the decision, the natural tendency of judges to sympathize with national values, and the difficulty of ascertaining the true weight of the foreign interests involved. See Maier, *supra* note 26, at 317. A similar explanation is offered by Judge Wilkey. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 950-51 (D.C. Cir. 1984).

¹⁶² See RESTATEMENT, *supra* note 42, § 423 comment a.

¹⁶³ See factors 13-15 listed *supra* note 157.

¹⁶⁴ Maier points out that "there is some anomaly in a court's finding that a regu-

are reasonable, for example, depends on whether the underlying regulation is considered a desirable and necessary national policy. For an American court to judge whether a foreign company reasonably should have expected to be subject to American antitrust laws is to assume that those laws are a legitimate exercise of authority by the American government. Yet this is the heart of the conflict between the United States and its trading partners.

Although the motive behind the jurisdictional rule of reason is laudable, the rule itself, as it has developed, does not serve the intended purpose. It potentially deceives courts into thinking that they are appropriately accommodating foreign interests, when, in reality, the approach they are using is not recognized abroad as legitimate. The rule also serves to give foreign countries a direct influence over the enforcement of American antitrust laws and to embroil the courts in issues that are beyond the scope of their authority. Because no weight has been assigned to the various factors, the results achieved by application of the jurisdictional rule of reason are unpredictable, except to the extent that one may predict that the rule will continue to serve as a further justification for exercising jurisdiction. In short, the jurisdictional rule of reason does not, in fact, promote a rule of reason.

Requiring Plaintiffs to Prove Actual Effects at the Jurisdictional Stage Is Both Appropriate and Manageable

The current "direct, substantial and foreseeable" standard for effects is a reformulation of the case law that has developed since the leading case of *United States v. Aluminum Co. of America (ALCOA)*.¹⁶⁵ In that case, the Second Circuit, speaking as the court of last resort, laid down an "intent and effects" standard.¹⁶⁶ It immediately undercut the effects prong by shifting the burden of proof on that question to the defendant once intent had been shown.¹⁶⁷ Later courts have undercut both prongs by requiring only general intent¹⁶⁸ and by apply-

lation may be applied without violating international jurisdictional standards but that the Congressional command will not be followed if the *court* determines that as a matter of policy the regulation is inappropriately applied." Maier, *supra* note 26, at 299.

¹⁶⁵ 148 F.2d 416 (2d Cir. 1945).

¹⁶⁶ *See id.* at 444.

¹⁶⁷ *See id.*

¹⁶⁸ *See, e.g., Zenith Radio Corp. v. Matsushita Elec. Indus.*, 494 F. Supp. 1161, 1184 (E.D. Pa. 1980) (interpreting the *ALCOA* case as requiring only general intent); *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 227 (S.D.N.Y. 1975) (finding that intent requirement is satisfied by a general intent to affect commerce); *see also* ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6 (1977) (stating that intent is inferable when there is a "substantial and foreseeable" effect on United States commerce).

ing a relaxed standard to proof of effects.¹⁶⁹

Until recently, then, the effects standard did not in fact require plaintiffs to show that the conduct complained of was "intended to affect [United States foreign commerce] and did affect [it]."¹⁷⁰ Reluctance by courts to insist on proof of a specific intent to violate the antitrust laws is understandable and reasonable; such an intent will be difficult to show when defendants are sufficiently sophisticated to avoid leaving a paper trail, and when the conduct in question substantially harms United States foreign commerce it is reasonable to infer that the harm was intended. The decline of the effects prong is not as justifiable.

The low effects standard applied by courts in practice has meant that United States courts have taken jurisdiction in cases in which foreign nations had a clear interest while the United States interest was rather more remote.¹⁷¹ Such cases have bred charges of economic imperialism: the United States has been perceived as attempting to impose its economic priorities on the rest of the world.¹⁷² Although United States antitrust cases involving foreign commerce have made the world economy more competitive,¹⁷³ moderation in all things is a virtue. When, for example, a foreign court nullifies plaintiff's joint venture agreement to harvest lumber within the country and the foreign government in question cancels its approval for the agreement,¹⁷⁴ some deference is due, even if the nullification and cancellation are the result of defendant's actions. The country in question evidently agrees with the defendant that such actions are in its economic interest. To hear the case when the plaintiff merely claimed that it intended to import the

¹⁶⁹ See, e.g., *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971) (finding that substantial anticompetitive effect is not necessary, some effect is sufficient), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); 1 J. ATWOOD & K. BREWSTER, *supra* note 20 § 6.14 ("ALCOA precedents [arguably] . . . permit[] an assertion of jurisdiction . . . even if no identifiable economic impact can be shown."); 1 B. HAWK, *supra* note 13, at 115 ("Courts tended to give considerable deference to plaintiff's allegations regarding effect. Frequently jurisdiction was upheld where a more than de minimis effect was alleged.").

¹⁷⁰ *ALCOA*, 148 F.2d at 444.

¹⁷¹ See, e.g., *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890 (5th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983); *cf.* *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n.*, 549 F.2d 597 (9th Cir. 1976) (case in United States' courts for more than 10 years before Ninth Circuit found there was no jurisdiction).

¹⁷² See *Minding Other People's Business*, *ECONOMIST*, Aug. 20, 1977, at 78 ("It is not acceptable that one country should unilaterally purport to set the rules for world business."), *quoted in* 1 J. ATWOOD & K. BREWSTER, *supra* note 20, § 4.11.

¹⁷³ See Rahl, *supra* note 16, at 353 (noting that enforcement of United States' antitrust laws had a direct bearing on the demise of post-World War II global cartels).

¹⁷⁴ See *Mitsui*, 671 F.2d at 885.

lumber into the United States, but had not done so,¹⁷⁵ violates the respect due other nations.

The low standard of proof of effects has also led to the taking of jurisdiction in cases where such jurisdiction is arguably not warranted by international law. After decades of protest, some version of the effects doctrine is increasingly being recognized abroad, but the scope of the effects test used by other nations is not as broad as that applied by American courts.¹⁷⁶ Because protests are still being received over the breadth of United States jurisdiction, it is difficult to say that this scope is legal under international law, as customary international law is founded upon the consent of nations. Furthermore, while more vigorous enforcement of foreign antitrust laws benefits the United States, the potential for chaos also increases as other nations join the United States in the pursuit of pure competition. It would be wise for the United States to limit the application of its effects test to set an example of restraint. Because the premise for this limitation is that other nations have become serious players in the antitrust arena, the promotion of competition will not be limited overall.

Finally, and most compellingly, in cases where jurisdiction is based primarily on effects, and not on traditional territoriality or nationality, plaintiffs should be required to prove that such effects are more than plausible allegations. Otherwise jurisdiction is based merely on claims of the plaintiff, normally an insufficient basis to sustain jurisdiction.¹⁷⁷

Such a heightened standard has been used in a number of recent cases and has led to dismissal at the jurisdictional stage for failure to show substantial effects.¹⁷⁸ Thus, it is feasible for courts to apply a

¹⁷⁵ *Id.* at 886.

¹⁷⁶ See cases cited *supra* notes 29-30.

¹⁷⁷ Rahl has also argued along these lines. See Rahl, *International Application of the American Antitrust Laws: Issues & Proposals*, 2 NW. J. INT'L L. & BUS. 336, 342 (1980) (suggesting statutory change requiring proof of both intent and substantial effect on price and other factors when the activity occurs abroad); cf. Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 154-55 (1972-73) (arguing that jurisdiction under international law should exist only in states in which the "primary effects" of an act have been felt).

¹⁷⁸ See, e.g., *Papst Motoren GmbH v. Kanematsu-Goshu (USA) Inc.*, 629 F. Supp. 864 (S.D.N.Y. 1986) (dismissed on motion for summary judgment because effect on resale market in United States insufficient when plaintiff sold product exclusively in foreign market); *Power East, Ltd. v. Transamerica Delaval Inc.*, 558 F. Supp. 47 (S.D.N.Y.) (dismissed on the pleadings because effects solely in Saudi Arabia), *aff'd*, 742 F.2d 1439 (2d Cir. 1983); *Conservation Council of Western Austl. v. Aluminum Co. of America*, 518 F. Supp. 270 (W.D. Pa. 1981) (dismissed on the pleadings because sole effects alleged were on "regional resources and environmental systems of Western Australia"). The Second Circuit has developed a variant of this standard. See *National Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981) (dismissing

heightened standard without becoming enmeshed in a pre-trial mini-trial on jurisdictional issues. A heightened effects standard also has the virtue that it involves merely a raising of the burden of proof on an issue familiar to courts, rather than the consideration of numerous and unfamiliar factors as required by the jurisdictional rule of reason. Finally, it is the standard envisioned by *ALCOA*.¹⁷⁹

Almost any limitation on the supply of goods in Europe . . . or in South America, may have repercussions in the United States if there is trade between the two. 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.¹⁸⁰

Suggestion 2: Forum Non Conveniens: Applying Forum Non Conveniens to Antitrust Cases Involving Foreign Commerce

The doctrine of forum non conveniens shall apply to antitrust suits involving foreign commerce.

Forum non conveniens is a postjurisdictional discretionary doctrine that permits courts to dismiss suits that are more conveniently litigated elsewhere.¹⁸¹ In its most recent major decision on the doctrine, *Piper Aircraft Co. v. Reyno*,¹⁸² the United States Supreme Court held that a showing that the substantive law of the alternative forum is less favorable to plaintiffs is not, in itself, a reason to refuse to dismiss a case on forum non conveniens grounds.¹⁸³ Less stringent antitrust laws abroad, then, should not necessarily be a barrier to the use of forum non conveniens in antitrust suits involving foreign commerce.

Forum non conveniens has not been applied to antitrust cases in-

for failure to show that termination of bank as credit card bank would have an anticompetitive effect on U.S. commerce); *Bulk Oil (ZUG) A.G., Co. v. Sun Co.*, 583 F. Supp. 1134 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1431 (2d Cir.), *cert. denied*, 460 U.S. 835 (1984).

¹⁷⁹ 148 F.2d 416 (2d Cir. 1945).

¹⁸⁰ *Id.* at 443.

¹⁸¹ Factors that the Court takes into account include: the private interest of the litigants, the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, court congestion, the burden of jury duty, local interest in deciding local controversies, and the appropriateness of the court applying its own law, instead of another's. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

¹⁸² 454 U.S. 235 (1981).

¹⁸³ *Id.* at 247.

volving foreign commerce, however, because the Supreme Court held in *United States v. National City Lines, Inc.* ("*National City Lines I*")¹⁸⁴ that forum non conveniens was not applicable in such cases. Although *National City Lines I* was severely narrowed in *United States v. National City Lines, Inc.* ("*National City Lines II*")¹⁸⁵, the rule laid down by *National City Lines I* has survived.¹⁸⁶ Moreover, one circuit court recently held that forum non conveniens is not applicable to antitrust suits involving foreign commerce even if *National City Lines I* is not controlling. It reasoned that no other country would enforce American antitrust laws, and therefore dismissal on forum non conveniens grounds would effectively place a defendant's conduct beyond the reach of the Sherman Act.¹⁸⁷

This concern for the enforcement of United States antitrust laws is not wholly warranted. Where the alternative forum available to the plaintiff is a foreign one, it is not necessary that United States law be enforced in that forum. It is only necessary that the defendant be amenable to process in a forum that permits litigation of the subject matter of the dispute.¹⁸⁸ Thus, it is sufficient if the plaintiff can bring suit against the defendant under a foreign antitrust law.

Enforcement of United States antitrust laws may be compromised to some extent where necessary to strengthen the international legal system. The Supreme Court recognized this in its recent decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁸⁹ In that case, Mitsubishi Motors, a Japanese auto manufacturer, sued Soler, a Puerto Rican corporation, to compel arbitration of a breach of contract claim. Soler countersued, alleging antitrust violations by Mitsubishi

¹⁸⁴ 334 U.S. 573 (1948).

¹⁸⁵ 337 U.S. 78 (1949). *National City Lines I* held that forum non conveniens was inapplicable to antitrust suits on the ground that § 12 of the Clayton Act, 15 U.S.C. § 22 (1982), was intended to broaden plaintiff's choice of venue and could not have been intended to permit courts to dismiss on forum non conveniens grounds when they had never done so previously. See *National City Lines I*, 334 U.S. at 580-82. *National City Lines II* held that the recently enacted 28 U.S.C. § 1404(a), which provides that "a district court may transfer any civil action to any other district or division where it might have been brought," authorized the use of forum non conveniens, and thus effectively reversed *National City Lines I* as to domestic suits. Because § 1404(a) applies to transfers between federal district courts, it did not affect the holding of *National City Lines I* as to suits that might otherwise have been dismissed to a foreign forum.

¹⁸⁶ See *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890-91 (5th Cir. 1982) (holding that forum non conveniens is not applicable to antitrust suits in foreign commerce regardless of whether *National City Lines I* is controlling), *vacated and remanded*, 460 U.S. 1007 (1983).

¹⁸⁷ See *id.* at 890-91.

¹⁸⁸ See *Piper Aircraft*, 454 U.S. at 254 n.22; *Phoenix Can. Oil Co. v. Texaco*, 78 F.R.D. 445 (D. Del. 1978).

¹⁸⁹ 105 S. Ct. 3346 (1985).

Motors, and arguing that the arbitration clause in the contract did not apply to that claim. The Court enforced the arbitration clause, reasoning that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes"¹⁹⁰ outweighed the considerations favoring adjudication of the antitrust claim in an American court. Particularly noteworthy in this context is that the Court allowed the antitrust claim to be decided in an arbitration tribunal rather than in a court.

Although the Court claimed that arbitration of a United States antitrust claim by Japanese arbitrators would not undermine enforcement of the antitrust laws,¹⁹¹ this is not a credible assertion. While the Japanese do have antitrust laws, they are not vigorously enforced;¹⁹² Japanese lawyers, therefore, are not likely to be familiar with antitrust claims or have sympathy for their enforcement—no matter how objective and experienced they may be.

There is a significant difference between permitting foreign *judicial* resolution of United States antitrust claims, a result that would be reached by use of *forum non conveniens*, and foreign *arbitral* resolution of those claims, which *Mitsubishi* permits. Arbitration is oriented toward settling claims, not deciding parties' rights. Arbitration's emphasis on the cooperation of the parties and the maintenance of a business relationship serves the triple purposes of American antitrust laws—punishment of wrongdoers, compensation of victims, and deterrence of wrongdoing—far less well than judicial resolution, even where the forum is less sympathetic to plaintiffs. The Supreme Court's willingness to allow American antitrust claims to be decided by a Japanese arbitration panel is a recognition, therefore, that the enforcement of American antitrust laws may, in some cases, be appropriately subordinated to the promotion of international harmony.

Forum non conveniens is, moreover, a desirable doctrine for the courts to use in accommodating the United States' interest in antitrust enforcement to the international system. It is apolitical; it involves fac-

¹⁹⁰ *Id.* at 3355.

¹⁹¹ *Id.* at 3358-60.

¹⁹² From April 1983 to March 1984 the Japanese Fair Trade Commission, the primary body responsible for enforcing Japanese antitrust laws, investigated 328 cases. The investigations resulted in 11 recommendations, 118 warnings, and 105 closings of cases. See *Japan's FTC Responds to World Economic Changes by Promoting Free Competition*, 48 Antitrust & Trade Reg. Rep. (BNA) No. 1196, at 40 (Jan. 3, 1985); see also Ramseyer, *supra* note 78 at 627-34 (barriers to litigation have eliminated virtually all deterrents to cartelization in Japan). In 37 years as the principal enforcement agency of the Antimonopoly Act, the Japanese Fair Trade Commission has brought only 6 criminal prosecutions. *Id.* at 616.

tors the courts are well-equipped to evaluate;¹⁹³ and it explicitly recognizes that the United States is not the only country interested in promoting competition and defers to foreign countries in circumstances likely to evoke resentment if United States courts were to exercise jurisdiction.¹⁹⁴

There is potentially one major flaw in the use of forum non conveniens in antitrust cases involving foreign commerce. Until recently, the United States was the only country to provide a forum in which private plaintiffs could bring antitrust claims.¹⁹⁵ Because *Piper* requires, at a minimum, that an adequate alternative forum be available to the plaintiff,¹⁹⁶ the lack of private remedies abroad would render the forum non conveniens provision pointless.

It is, however, no longer the case that the United States provides the only effective remedy to private plaintiffs. In 1976, Canada enacted an amendment to the Combines Investigation Act, the Canadian antitrust law, which permits private suits to remedy some violations.¹⁹⁷ The EEC has persuaded member countries to permit private suits to enforce Articles 85 and 86 (the antitrust articles) of the Treaty Establishing the European Community.¹⁹⁸ Thus, although the private cause of action still is only a pale reflection of that available in the United States,¹⁹⁹ one can predict a future increase in private enforcement abroad. European and Canadian courts, therefore, may become adequate forums in the near future.

A further consideration is the interaction between forum non conveniens and foreign blocking laws. Because one of the factors considered in determining forum non conveniens is access to sources of proof,²⁰⁰ a foreign country may use its blocking law to encourage a dismissal on forum non conveniens grounds. The availability of documents is merely one aspect of forum non conveniens, however, and the courts may employ sanctions to render such tactics useless to the defendant. Moreover, to the extent that important documents are located

¹⁹³ See Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1708-09 (1985).

¹⁹⁴ See *id.* at 1710-11.

¹⁹⁵ See *supra* note 42.

¹⁹⁶ See *Piper Aircraft*, 454 U.S. at 254 n.22.

¹⁹⁷ Combines Investigation Act, CAN. REV. STAT. ch. 23 (1970), amended by ch. 76, 1974-1976 CAN. STAT. 1535.

¹⁹⁸ See *ABA Probe*, *supra* note 4, at 257, 258.

¹⁹⁹ See *id.* at 258 ("So far . . . there has been not a single damage judgment entered in a national court of a[n] [EEC] member state based on conduct offensive to EC competition regulations; in German and UK courts, there have been interlocutory [sic] rulings and enunciated principles that support private competition law enforcement.").

²⁰⁰ See *Piper*, 454 U.S. at 258-59.

abroad, it may be appropriate to dismiss on forum non conveniens grounds, thus avoiding the conflict caused by requiring such documents. Finally, the reformed approach to antitrust enforcement advocated by this Comment should encourage other countries to moderate the hostility with which American requests for documents are met. Thus, forum non conveniens is potentially a major step forward in reducing the conflicts generated by applying American antitrust laws to foreign commerce.

Suggestion 3: Hague Evidence Convention: Mandatory but not Exclusive

The procedures established by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters are to be used for all discovery in signatory countries unless it would clearly be pointless to do so. These procedures are not exclusive.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters²⁰¹ ("the Convention") is a treaty to which the United States and sixteen other countries are signatories.²⁰² It establishes three procedures for obtaining discovery abroad. The first procedure involves a "letter of request" from the trial court to a foreign authority, requesting a foreign court to carry out the discovery in question.²⁰³ The second procedure involves having a diplomatic or consular official in the requesting country carry out the discovery.²⁰⁴ The third procedure involves the trial court's appointment of a commissioner to take the evidence abroad, with the permission of foreign authorities.²⁰⁵

The Convention has not been given the same effect in all of the signatory countries.²⁰⁶ Two ambiguities exist: whether the Convention

²⁰¹ Hague Evidence Convention, Oct. 7, 1972, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C.A. § 1781 (West Supp. 1987)).

²⁰² The other signatories to the Hague Evidence Convention are: Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom. *See id.*; Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461, 1463 (1984).

²⁰³ *See* Hague Evidence Convention, Oct. 7, 1972, arts. 1-14, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C.A. § 1781 (West Supp. 1987)).

²⁰⁴ *See id.* at arts. 15, 16, 18-22.

²⁰⁵ *See id.* at arts. 17-22.

²⁰⁶ The Hague Evidence Convention is preemptive under German law, for example. *See* Heck, *supra* note 30, at 796.

is mandatory and whether it is exclusive. With regard to the first point, the Convention is a treaty that has been ratified by the President and the Senate. Although it would be reasonable to conclude that the Convention therefore is mandatory, the federal courts have qualified the obligations imposed by the Convention.

Two recent cases have distinguished between parties subject to the trial court's jurisdiction and those that are not, and between parties supplying information voluntarily and involuntarily. In *Work v. Bier*,²⁰⁷ the District Court for the District of Columbia held that the Convention was not binding with respect to orders to parties subject to the court's jurisdiction. In *In re Anschuetz & Co.*,²⁰⁸ the Fifth Circuit held that parties may waive the use of Convention procedures. The application of the Convention, therefore, is restricted to gathering information located abroad from parties not subject to the court's jurisdiction or from unwilling witnesses.²⁰⁹

These decisions have undermined the purpose of the Convention. The Convention is an agreement among nations, not parties. The signatories entered into this agreement not merely to ensure that discovery requests are complied with, but also to eliminate the difficulties arising from differing approaches to discovery. Allowing a French party, for example, to waive application of the Convention to information located in France is a serious mistake. France, like other civil law countries, regards the gathering of information as a question of judicial sovereignty;²¹⁰ it surely would resent attempts to circumvent its authority. The fact that the party is subject to an American court's jurisdiction is not likely to be considered a mitigating factor. Carrying out the Convention's purpose is impossible unless American courts routinely use the Convention procedures.

On the other hand, the Convention procedures alone are not sufficient. They are limited to civil cases, and more importantly, the Convention significantly restricts the procedures available. The second and third procedures, which do not involve the participation of foreign judi-

²⁰⁷ 106 F.R.D. 45, 55-56 (D.D.C. 1985).

²⁰⁸ 754 F.2d 602, 615 (5th Cir. 1985).

²⁰⁹ The limited utility that results from this interpretation is evident when one considers how other countries apply the Convention. In Britain, for example, there generally is no power to compel nonparties to produce documents. Article 10 of the Convention explicitly provides that compulsion is to apply "to the same extent as . . . provided by . . . internal law." Hague Evidence Convention, Oct. 7, 1972, art. 10, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C.A. § 1781 (West Supp. 1987)). If United States courts interpreted the Convention as applicable only to nonparties, they would for all intents and purposes nullify its effectiveness.

²¹⁰ See Carter, *Obtaining Foreign Discovery and Evidence for Use in the United States: Existing Rules and Procedures*, 13 INT'L LAW. 5, 7 (1979).

cial authorities, in effect are optional in that they apply only to consenting witnesses, unless the foreign government is willing to compel evidence.²¹¹

The letter of request procedure is binding, but sizeable loopholes exist. One potentially controversial loophole is that signatory countries may refuse to execute a letter of request "issued for the purpose of obtaining pretrial discovery of documents."²¹² This could be understood to exclude virtually all requests for documents from American courts, as a German court apparently has construed it.²¹³ There is some evidence that other countries intend to use the provision only to prevent the execution of letters of request that do not specify the documents sought.²¹⁴ Nevertheless, the pretrial documents provision and another set of provisions, which provide that a letter of request need not be

²¹¹ The Hague Evidence Convention assumes that witnesses testify voluntarily. A signatory may choose to permit compulsion of its nationals. *See* Hague Evidence Convention, Oct. 7, 1972, arts. 10, 18, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C.A. § 1781 (West Supp. 1987)).

²¹² *See id.* art. 23. With the exception of the United States, Czechoslovakia, and Israel, all signatories have reserved the right to refuse to execute such letters of request. *See* Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning its Scope, Methods and Compulsion*, 16 N.Y.U. J. INT'L L. & POL. 1031, 1042 (1984).

²¹³ *See* Decision with Regard to a United States Court Request for Judicial Assistance and the Taking of Evidence, 20 INT'L LEGAL MATERIALS 1025, 1054-56 (1981) (reporting *Corning Glass Works v. I.T.T.*, W. Ger. Ct. App. 1980). For a discussion of this case and an analysis of the ambiguities of the phrase "pre-trial discovery," *see* Radvan, *supra* note 212, at 1043-45.

²¹⁴ In 1976, the United Kingdom deposited its instrument of ratification with the following reservation:

In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody, or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requesting court to be, or to be likely to be, in his possession, custody or power.

28 U.S.C.A. § 1781 (West Supp. 1987). Although this declaration is phrased as "including" non-specific Letters of Request, it has been understood to apply only to such Letters. *See Report on the Work of the Special Committee on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, June 12-15, 1978, reprinted in 17 INT'L LEGAL MATERIALS 1417 (1978). Denmark, Finland, the Netherlands, Singapore, and Sweden subsequently have made similar reservations or modified previously absolute reservations.

executed if it is impossible to perform it using local procedures,²¹⁵ if it prejudices sovereignty or security,²¹⁶ or if it violates a local privilege or duty not to give evidence,²¹⁷ mean that the Convention procedures will not be completely satisfactory.

Using the Convention procedures as a first resort and resorting to the Federal Rules of Civil Procedure only if necessary is the best way to balance the search for international harmony and the enforcement of the antitrust laws.²¹⁸

Suggestion 4: Restrict the Scope of Discovery

1) In antitrust suits involving foreign trade or commerce, parties may seek discovery abroad only to the extent that:

- a) the information sought does not duplicate information available in the United States, and
- b) the information sought is likely to be admissible at trial, if supplied, if and only if the presence of the documents abroad is the result of a good faith business practice.

2) The court may not grant such a request for discovery unless it concludes that the discovery methods to be used do not, on their faces, violate the laws of the country in which the information will be gathered.

²¹⁵ See Hague Evidence Convention, Oct. 7, 1972, art. 9, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C.A. § 1781 (West Supp. 1987)).

²¹⁶ See *id.* art. 12(b). This provision formed the basis of Great Britain's refusal to execute letters rogatory in the uranium disputes. See *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 App. Cas. 547, 561.

²¹⁷ See Hague Evidence Convention, Oct. 7, 1972, art. 11, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C.A. § 1781 (West Supp. 1987)).

²¹⁸ This approach, in essence, has been used in several cases: *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1130 (D.D.C.), *aff'd sub nom.* *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60-61 (E.D. Pa. 1983); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) ¶ 17,222 (N.D. Ill. Sept. 15, 1983); *Pierburg GmbH & Co. v. Superior Court*, 137 Cal. App. 3d 238, 247-48, 186 Cal. Rptr. 876, 882-83 (1982); *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 858, 176 Cal. Rptr. 874, 884-85 (1981). The primacy of the Hague Evidence Convention is treated as a matter of comity, however, rather than as a matter of binding law.

The effect of the Convention is presently under consideration before the Supreme Court in *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986), *cert. granted sub nom.* *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 106 S. Ct. 2888 (1986).

Two notable features of American discovery are its wide-ranging nature and the relatively limited role of judges in the process. This suggestion modifies these features in antitrust suits that involve foreign commerce so they more closely resemble the European model of discovery. If adopted, the effect would be to reduce the likelihood of undermining the role of foreign authorities, and as a consequence, to encourage foreign governments to cooperate with, or at the least not to hinder, parties' searches for information.

Restricting permissible discovery to non-duplicative material does not harm the party seeking discovery and it benefits the party from whom information is requested by reducing the potential for abuse of discovery.²¹⁹ This form of abuse generally is recognized as one of the faults of current antitrust procedure.²²⁰ Although counterarguments favoring broad discovery are particularly relevant to antitrust suits, in which the matters to be proved are complex and often highly technical,²²¹ they are less convincing in suits involving foreign commerce, where the alternative to limited discovery abroad often means no discovery abroad.²²²

Foreign governments have reacted strongly against the enforcement of United States discovery orders that require the production of documents located abroad.²²³ If the use of blocking laws is to be dis-

²¹⁹ Discovery requests often are used to burden the opposing party rather than to seek information. *See supra* note 55.

²²⁰ *See* NATIONAL COMMISSION REPORT, *supra* note 55, at 42; *see also* Kurland, *supra* note 55, at 4 (describing discovery in antitrust suits as "a mere test of endurance whose outcome depends not so much on the merits of each side's legal position as on the relative depths of each side's pockets").

²²¹ *But cf.* Kurland, *supra* note 55, at 4:

[W]ith the exception of [a] few monopoly and market structure cases, the gut issues involved in most antitrust cases are not inherently that complicated. . . . [T]he core issue usually concerns the fact of violation itself, an issue that almost always revolves around the testimony of a handful of people and that can usually be sufficiently discovered in a fairly short period of time.

²²² *See* Flexner, *Foreign Discovery and U.S. Antitrust Policy—The Conflict Resolving Mechanisms*, Remarks Before the Fordham Corporate Law Institute (Nov. 15, 1978), reprinted in 12 VAND. J. TRANSNAT'L L. 315, 318 (1979) (Justice Department representative stating that compulsory process for obtaining documents abroad is of "limited utility. . . . It occasionally produced some interesting subpoena enforcement litigation, but not many documents."); *see also* 2 J. ATWOOD & K. BREWSTER, *supra* note 20, § 15.02 (discussing Justice Department's use of voluntary disclosure approach).

²²³ Rosenthal states, "[E]very national blocking law in effect today . . . was explicitly adopted as a measure of self-protection against the unilateral extraterritorial application of United States law. In each case, the legislating state viewed some United States laws, especially . . . discovery laws, as a direct infringement of its sovereignty." Rosenthal, *supra* note 21, at 491-92 (footnote omitted). For a partial list of existing blocking laws, *see supra* note 22.

couraged, the United States cannot continue to impose its standards of discovery on the world. Although it is a radical provision, restricting the evidence sought to that likely to be admissible at trial is a proposition worth considering.²²⁴ This provision attempts to ensure that discovery requests are limited to those permissible under foreign laws, which, after all, have been used effectively to prosecute antitrust cases abroad.²²⁵ Even so, it is not unlikely that this provision would be more generously interpreted by American courts than European courts, given the American penchant for broad discovery.

Recent domestic dissatisfaction with the current scope of discovery²²⁶ has led to a proposal to limit discovery to relevant issues, rather than to the subject-matter involved in the action.²²⁷ Current antitrust litigation, however, already focuses on relevant issues. The court progressively narrows the scope of permissible discovery to relevant issues because the potentially relevant documents often are too numerous to handle. Therefore, while the relevant issues proposal, if adopted, would affect antitrust suits by changing the background against which discovery requests are made, this proposal would not be sufficient.

The requirement of good faith is necessary to prevent companies from taking advantage of greater American restraint in seeking documents by "hiding" them in countries that offer greater protection against disclosure.²²⁸ An attempt to shield documents would mean that

²²⁴ Atwood has recommended that a showing of a particularized need for extraterritorial discovery be required. See Atwood, *supra* note 1, at 356. The *Restatement of Foreign Relations Law of the United States* already requires courts to take various factors into account before ordering extraterritorial discovery. See RESTATEMENT, *supra* note 42, § 420(1)(c). This requirement, however, has not had sufficient impact.

Cutler has suggested that the current standard, mere relevance of likelihood of leading to admissible evidence for seeking documents abroad, is incompatible with comity. See Cutler, *supra* note 54, at 282.

²²⁵ See W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 16.5 (discussing strict enforcement of the Treaty Establishing the European Economic Community with respect to horizontal arrangements) (3d ed. 1982); *id.* § 16.9 (discussing German, French, Dutch, Belgian, Irish, and Danish antitrust laws).

²²⁶ See, e.g., Mazaroff, *Surviving the Avalanche: Defendant's Discovery in Title VII Litigation*, 4 LITIGATION 14, 14 (Fall 1977); McElroy, *Federal Pre-Trial Procedure in an Antitrust Suit*, 31 Sw. L.J. 649, 681 (1977).

²²⁷ See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (Mar. 1978) 6-11 (limit discovery to "claims or defenses" of the parties), *cited in* NATIONAL COMMISSION REPORT, *supra* note 55, at 53 n.3; LITIGATION SECTION, ABA, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE 2-31 (Oct. 1977) (limit discovery to "issues raised"), *cited in* NATIONAL COMMISSION REPORT, *supra* note 55, at 53 n.3; NATIONAL COMMISSION REPORT, *supra* note 55, at 46 (endorsing adoption of either proposal).

²²⁸ A similar approach is currently used to determine sanctions for noncompliance with discovery orders. See Cutler, *supra* note 54, at 285-86.

the first condition—that the documents be available in the United States—would not be met, and that the second condition—admissibility—would not apply. Thus, bad faith would involve the company in expensive litigation that it probably would lose, because the court is not likely to be receptive to arguments that foreign judicial sovereignty must be respected where it is deliberately used as a tool to flaunt American justice.

Furthermore, the court should not grant a request for documents located abroad unless it concludes that the discovery methods to be used do not, on their face, violate the laws of the country in which the information will be gathered. This suggestion has a dual purpose. It requires the court to monitor discovery requests, thus lending the requests the aura of authoritative government approval and making them more palatable abroad.²²⁹ It also forces the parties to investigate foreign law on discovery methods, a matter that may be overlooked, with potentially serious consequences for the attorneys involved.²³⁰ Because American courts cannot be expected to be versed in all the subtleties of foreign discovery methods, the provision is satisfied if the proposed methods appear to be in accord with foreign law.

An alternative to the approach suggested above is that of Senate Bill 2164, proposed by the Reagan administration in March 1986, which provided that motions to dismiss for lack of subject-matter jurisdiction and motions to dismiss pursuant to the jurisdictional rule of reason be decided before the case is allowed to proceed, and which limited discovery to information “directly related” to the motions.²³¹ Like the suggestion described above, these provisions were intended to reduce the intrusiveness of discovery in cases in which the court lacks jurisdiction over the claim. They might also reduce the objections to taking jurisdiction on the basis of effects, because the infringement on national sovereignty caused by American courts ordering the production of documents located abroad would be less frequent.

It is not clear, however, what effect such a provision would have.

²²⁹ See 2 J. ATWOOD & K. BREWSTER, *supra* note 20, § 15.11 (discussing need for greater judicial role in controlling discovery in private antitrust suits involving foreign commerce); NATIONAL COMMISSION REPORT, *supra* note 55, at 59-66, 81-87 (recommending that judges have more involvement in controlling discovery in complex antitrust cases).

²³⁰ French and Swiss law provide penal sanctions for those who attempt to use unauthorized methods of discovery. See Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 45 (1979); Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 520 (1953).

²³¹ S. 2164, 99th Cong., 2d Sess. (1986), reprinted in 132 CONG. REC. S2288 (daily ed. Mar. 7, 1986).

A finding of the requisite effect on American commerce may require inquiry into how the corporation in question operates, how it competes with others, and its place in the market in question. A finding that exercising jurisdiction is consistent with international comity may require inquiry into the location of the conduct in question, the intent behind the alleged acts, the interaction between the conduct and foreign laws and policies to determine whether a defendant induced a foreign government to pass a law in its favor, and the structure of the international market. These inquiries are likely to require substantial discovery.

At present, courts prefer to complete the massive discovery necessary in antitrust claims before deciding jurisdictional questions.²³² Whether jurisdictional questions can be resolved without full discovery is likely to vary from case to case. The typically generous attitude of American courts toward discovery, and the incentive for plaintiffs to link jurisdictional and substantive questions so as to request broad discovery, may well render these provisions nullities. The suggestion proposed by this Comment, on the other hand, requires the court to make inquiries that can be answered without extensive investigation into difficult jurisdictional issues and that are governed by relatively clear standards.

This suggestion does not address the question of appropriate sanctions when a blocking law prevents a party from providing the information sought.²³³ It looks only to the actual methods of discovery in the hope that substantial compliance with foreign law and policy on discovery will obviate the need to address the question of sanctions. If adopted, this suggestion would benefit both American business and American foreign relations. As defendants, American corporations would not be forced to choose between obeying a discovery order or a blocking law. As plaintiffs, they would benefit from the increased likelihood that discovery requests, though limited in scope, would be answered. American foreign relations would benefit to the extent that an irritant to the United States's trading partners would be reduced, and

²³² District court judges are reluctant to dismiss cases before extensive discovery has taken place. See *Hearings*, *supra* note 2, at 1 (testimony of Abraham Sofaer, Legal Advisor, Department of State).

²³³ The principal case in this area is *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), which limited the circumstances under which a plaintiff's complaint may be dismissed for failure to produce. This case provided no affirmative test, however, and later decisions have not interpreted it as barring sanctions where a blocking law forbids compliance with a production order. See generally 2 J. ATWOOD & K. BREWSTER, *supra* note 20, §§ 15.19 to .20 (discussing case law on sanctions); Cutler, *supra* note 54, at 284-88 (same).

the promulgation and use of blocking laws checked. Finally, the approach to discovery that this suggestion embodies is accepted abroad and renders the risks involved in an American antitrust suit more predictable, thus strengthening the international legal system.

Suggestion 5: Damages: Restricting Treble Damage Awards

Plaintiffs in antitrust suits involving foreign commerce shall recover only actual damages when the defendant has been compelled or actively encouraged by a government to take the acts complained of, unless the enforcement of the antitrust laws of the United States would thereby be substantially impaired.

A defendant has been compelled or actively encouraged by a government when its acts were required by law, regulation, or administrative or judicial order, or when its acts are part of a longstanding industry-wide practice that exists with government encouragement.

The enforcement of the antitrust laws of the United States is substantially impaired by practices clearly aimed at the United States market and clearly condemned by United States law at the time they took place.

This proposal addresses three concerns: the charge that treble damages are punitive, the argument that national sovereignty is violated when a private party is held liable for acts done under government auspices, and the belief that it is unfair to impose substantial penalties on defendants when the law is unclear, as is the case in some areas of antitrust law. At the same time, this proposal protects the American interest in enforcement of its antitrust laws.

Treble damages are considered punitive by some because it is thought that they require a defendant to pay more than the damage inflicted.²³⁴ As a matter of economic accuracy, it is not clear that this is the case. Empirical studies of the treble damage remedy have not

²³⁴ Non-economists have also expressed criticism of treble damages. They claim that the treble damage remedy exerts pressure on innocent defendants to settle, especially when combined with the current state of uncertainty in substantive antitrust law. Furthermore, this remedy makes it difficult for plaintiffs to vindicate their rights, given the judiciary's hesitance to impose substantial penalties on defendants for conduct defendants reasonably considered legal. See TREBLE DAMAGES STUDY, *supra* note 83, at 2. In addition, the treble damage remedy is a possible reason for the lack of development of antitrust law and for the trivialization of antitrust suits. See 2 P. AREEDA & D. TURNER, *supra* note 91, § 331b2.

yielded conclusive results.²³⁵ One may argue that the damages suffered by the plaintiff understate the total harm caused by anticompetitive behavior. That does not mean, of course, that three is the proper multiplier or that the extent of damage suffered by the plaintiff is the proper starting point in assessing damages. It does, however, suggest that something more than actual plaintiff's damages may be appropriate.

Numerous suggestions have been made for limiting the treble damage remedy.²³⁶ One argument is that when this remedy was initially enacted, the barriers to recovery by plaintiffs were much higher than they are at present, and therefore, the current system is heavily weighted in favor of plaintiffs.²³⁷ While this criticism is historically accurate, it is difficult to determine quantitatively whether the system does, indeed, favor plaintiffs. But widespread dissatisfaction with the remedy should not be ignored. This proposal suggests that, in some cases, it is appropriate to consider a lower measure of damages.

One such case involves the situation in which a foreign government compels or actively encourages anticompetitive behavior as part of its national economic policy.²³⁸ Every nation has the right to structure

²³⁵ An empirical study of price fixing in the bread industry concluded that the threat of treble damages is necessary to effective enforcement of the antitrust laws. The study found that the Justice Department's attempts to end collusion were not effective until private (treble damage) class action suits, which can "piggyback" onto successful government suits, became available. Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429 (1981), discussed in TREBLE DAMAGES STUDY, *supra* note 83, at 22. A more recent and comprehensive study, the Georgetown Private Antitrust Litigation Project, suggests that treble damages are not an accurate measure of damages, but gives no estimate of the extent to which they over- or under-penalize defendants.

²³⁶ See TREBLE DAMAGES STUDY, *supra* note 83, at 42-44; 2 P. AREEDA & D. TURNER, *supra* note 91, § 331b3.

²³⁷ Changes in statutory law that favor plaintiffs include § 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982), and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h, 18a, 66 (1982). Judicial interpretations of laws that favor plaintiffs include denial of the "pass-on" defense, *see* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); TREBLE DAMAGES STUDY, *supra* note 83, at 7-9, 27-28, and the reform of the Federal Rules of Civil Procedure, which has introduced liberal pleading and discovery rules. *See supra* notes 57-63 and accompanying text. For discussion of other pro-plaintiff aspects of the antitrust laws, *see supra* note 102.

²³⁸ Active encouragement is included in this proposal because governments may set policy through means less formal than laws and regulations. The relationship between Japanese business and the Ministry of International Trade and Industry ("MITI"), an immensely powerful bureaucracy that coordinates policy governing Japanese business, provides one example. Another example involves the situation that existed in Switzerland at the time of *United States v. Watchmakers of Switz. Information Center*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965), in which producer associations were governed by self-created, but government-encouraged, regulations. *See* Maw, *United States Antitrust Law Abroad—The Enduring Problem of Extraterritoriality*, 40 ANTITRUST L.J. 796, 797-98 (1970-71).

its economy as it sees fit. But it also has a nonlegal obligation to the international community to promote the development of the international legal order by avoiding conflicts, particularly those that arise over perceived violations of territorial integrity.²³⁹

American courts have created the doctrine of foreign government compulsion in recognition of the delicate line that must be drawn when this right and this obligation to the international community conflict. Compulsion by a foreign government is, in theory, a complete defense to a claim under the antitrust laws. The doctrine has been interpreted very narrowly, however,²⁴⁰ probably because the consequences of a successful defense on these grounds are so drastic. The proposal suggested by this Comment is an attempt to broaden the scope of the doctrine. This proposal would serve to increase recognition of the right of other countries to carry out their economic policy, without removing all incentive for those countries to avoid causing harm to the United States. It is hoped that the language of this proposal and the relative mildness of the consequences of finding that the defendant was compelled or actively encouraged by its government will encourage the courts to interpret the defense more broadly.

The defense of foreign government compulsion is inappropriate, however, when a foreign country has compelled anticompetitive behavior intended to harm American commerce. Such behavior is in conflict with the principle that nations should refrain from causing harm to other nations, and it is reasonable to impose the full force of the law in such cases. Care must be taken to ensure that this clause does not become a loophole into which every case fits. Such a result can be avoided by legislative history that states that actual intent must be proved or that the effects on the American market must be greater than those on the market of the nations in question.

Full treble damages should apply only when substantive antitrust law clearly condemns the practices in question at the time they took place. This condition is based on the belief that defendants should not be severely punished for conduct they reasonably believed to be legal at

²³⁹ International law prohibiting the violation of territorial integrity has as yet become established in only a few areas: prohibitions on pollution of the environment, *see* *Trail Smelter (U.S. v. Can.)*, 3 Int'l Arb. Awards 1911 (1941) and prohibitions on the use of aggression, *see* U.N. CHARTER art. 2(4), are two examples. In the area of economic coexistence international law is developing within the context of international organizations. *See* P. VERLOREN VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* (1981).

²⁴⁰ *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), is the only reported case in which the decision rested on foreign sovereign compulsion grounds.

the time it occurred. Lack of clarity is a common domestic and foreign criticism of American antitrust laws.²⁴¹ Where it is unclear whether an act is prohibited, reducing the penalty for committing it is unlikely to substantially impair enforcement of the laws.

One objection that may be made to this proposal is that it unfairly distinguishes between defendants. It potentially lightens the liability and, therefore, the deterrent effect of the antitrust laws on defendants engaged in foreign commerce as opposed to those engaged solely in domestic commerce. Furthermore, some defendants engaged in foreign commerce will be subject to reduced liability whereas others will not. A second possible criticism is that this suggestion carves a hole in the statutory scheme, thereby increasing the inequities of current antitrust enforcement.

The injustice of distinguishing among defendants engaged in foreign commerce is not likely to be substantial. The requirement that an award of actual damages not substantially impair the enforcement of United States antitrust laws will ensure that defendants who engage in behavior that inflicts substantial harm on competition within the United States will suffer accordingly. To the extent that a defendant has not substantially harmed competition within the United States, the harm to enforcement of the antitrust laws by reducing the damages to be paid is less. In short, those who benefit from this provision are likely to be those least reprehensible.

The injustice caused by distinguishing between defendants engaged in foreign commerce and those engaged solely in domestic commerce also is not substantial. The intent behind this exemption is to impose only actual damages in those instances where national interests are better served by reducing or avoiding conflicts with other nations. Such cases are likely to be those in which a foreign government has sanctioned the behavior of the defendant in question, because a foreign nation's interest is most likely to be adversely affected where it has determined that the national interest requires the promotion of anticompetitive behavior. Imposing actual damages on defendants carrying out foreign national policy does not unreasonably discriminate against defendants engaged solely in domestic commerce, because defendants not engaged in foreign commerce are not subject to conflicting national economic regulation.

Nor is the harm done to the statutory scheme significant. The antitrust laws are not a well-crafted whole that would suffer irreparable

²⁴¹ See 2 J. ATWOOD & K. BREWSTER, *supra* note 20, § 18.06. But see 1 B. HAWK, *supra* note 13, at 15-17 (concluding that much of this uncertainty has been eliminated by recent developments).

harm if a piece is carved out. There are numerous blanket exemptions from the antitrust laws,²⁴² and Congress has already limited recoverable damages to actual damages in several contexts.²⁴³

Finally, substantial benefits are likely to accrue to American foreign affairs and American business if this proposal is implemented. The co-existence of American treble damage awards and foreign clawback statutes indicates that if the antitrust enforcement conflict continues to worsen, American businesses with operations abroad may find that as plaintiffs in antitrust suits, their recoveries are reduced to actual or no damages. A plaintiff's damage award may be, in effect, nullified if the defendant has no property within the United States and foreign nations refuse to enforce United States treble damage awards or allow recovery of the punitive portion of the damages under clawback statutes. American business defendants will also benefit from this proposal. The existence of clawback laws provides incentive for plaintiffs to sue American defendants rather than foreign ones. Furthermore, even when both American and foreign defendants are sued, joint and several liability may result in American defendants paying even more than treble the damages inflicted on the plaintiff.

Although the proposal suggested here does not directly protect against the above scenarios, it will help to break the cycle of escalating conflicts by showing American readiness to accommodate foreign interests and by reducing the number of treble damage awards against foreign defendants. By setting guidelines for when actual and treble damages should be recovered, and by discouraging the proliferation and application of clawback laws, the proposal suggested herein will improve the environment within which American business operates abroad.

Similarly, American foreign affairs also may benefit. Foreign countries object to the treble damage remedy both because it is an award of punitive damages by a civil court, and because it is used to enforce laws whose substantive content conflicts with local government

²⁴² Julian von Kalinowski lists 59 exemptions to the antitrust laws. See 16E J. VON KALINOWSKI, *supra* note 136, at § 44-02[3][d]. Some examples include 15 U.S.C. § 17 (1982) (exemption for agricultural cooperatives, labor unions, etc.); 15 U.S.C. §§ 1801-1804 (1982) (exemption for newspapers); see also 12 U.S.C. § 1828(c) (1982) (allowing bank mergers to be attacked under the antitrust laws, but mandating the use of the standards of the government agency that approved the merger to determine the anticompetitive effects).

²⁴³ See Pfizer Act of 1982, 15 U.S.C. § 15(b) (1982) (limiting foreign governments suing in their sovereign capacity to actual damages); National Cooperative Research Act of 1984, 15 U.S.C. § 4303 (Supp. III 1985) (limiting antitrust recoveries for joint research and development ventures to actual damages if specified notification procedures have been followed).

policy. Treble damages serve to exacerbate existing tensions.²⁴⁴ This proposal is intended to help minimize the conflict and to permit disagreement among nations to focus on the substantive rather than the procedural aspects of antitrust policy. In this way, nations can move closer to resolving contested issues of substantive law.

CONCLUSION

The international conflicts raised by enforcement of American antitrust laws abroad, although they will not be completely eliminated by anything short of an international treaty, certainly can be mitigated in an effort to promote international comity. This Comment makes proposals that, if implemented, would serve to alleviate the tensions caused by antitrust suits involving foreign commerce. First, American courts should exercise restraint in asserting jurisdiction over cases involving foreign actors. Jurisdiction should be based on proof by the plaintiff that the allegedly anticompetitive acts in question in fact had "direct, substantial and reasonably foreseeable effects" on American commerce. Additionally, the doctrine of *forum non conveniens* should apply to such antitrust suits. Second, once jurisdiction is asserted, this Comment proposes that parties limit their evidence gathering activities abroad. This would lessen the likelihood that the sovereignty of foreign governments will be undermined, thereby encouraging such governments to aid in the search for documents located abroad. Finally, the range of potential damage awards should be broadened to take into account situations in which foreign governments compelled or actively encouraged the performance of allegedly anticompetitive acts. These proposals would promote more effective enforcement of American antitrust laws abroad and would better protect international comity. In a world in which no nation acts truly independently, these goals deserve consideration.

²⁴⁴ See *ABA Probe*, *supra* note 4, at 262.