THE APPLICATION OF U.S. ANTITRUST LAW TO FOREIGN CONDUCT: HAS HARTFORD FIRE EXTINGUISHED CONSIDERATIONS OF COMITY?

SCOTT A. BURR

1. INTRODUCTION

The exercise of jurisdiction by U.S. courts over activities occurring outside the borders of the United States has sparked difficult questions about the appropriate reach of U.S. law in a shrinking world. The application of U.S. antitrust law to the behavior of foreign or multinational entities abroad has created the most incendiary and confusing of situations.

Addressing this problem is difficult because the major industrial nations have markedly different antitrust laws and policies in these matters and the relevant U.S. antitrust statutes contain only cryptic clues as to their territorial scope. As a result, U.S. courts have struggled to sketch out the territorial reach of antitrust laws case by case. The courts' numerous specific rules have provided little guidance to the foreign parties who must contend with them. Indeed, opinions applying the rules to activities abroad have been scorned by foreign courts, have triggered the issuing of conflicting

---

* J.D., 1988, The Dickinson School of Law; LL.M. in International and Comparative Law 1993, Georgetown University Law Center. The author practices complex commercial litigation and international law in Philadelphia.

1 See Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 2 W.L.R. 81, 94 (H.L.) (Wilberforce, L.) ("It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack.").

2 The Sherman Act begins by referring to every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1 (1988). The Clayton Act defines "commerce" as "trade or commerce among the several States and with foreign nations." Id. § 12.

3 See British Nylon Spinners Ltd. v. Imperial Chem. Indus., [1954] 3 W.L.R. 505 (Ch.) (declaring that an order of a U.S. court enforcing an antitrust decree by enjoining the English defendant from performing its contracts to assign to English plaintiffs exclusive manufacturing and marketing rights is "an assertion of an extraterritorial jurisdiction which we do not recognize").
injunctions 4 and given rise to a spate of foreign statutes
designed to thwart discovery in U.S. proceedings. 5

Perhaps the most extreme manifestation of other nations’
furor at the extraterritorial application of U.S. antitrust law
is the United Kingdom’s “Clawback Act.” 6 In addition to
denying recognition to U.S. decrees, the Clawback Act does
not permit the recovery of punitive damages. 7

During the summer of 1993, the United States Supreme
Court’s decision in Hartford Fire Insurance v. California, 8
fueled the flames of controversy by ruling that a U.S. court
should not consider the interests of a foreign sovereign unless
there is a “true conflict” between U.S. law and the law of the
foreign state. 9 According to the Court, a “true conflict” exists
only when foreign law requires a defendant to violate U.S. law,
or when compliance with both the laws of the United States
and those of the defendant’s country is impossible. 10

Never before has the Court taken so aggressive a stance on
the extraterritorial application of U.S. antitrust law. The

4 See Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d
909, 955 (D.C. Cir. 1984) (granting the plaintiff an injunction prohibiting
the remaining defendants from seeking another injunction in England
against the plaintiff’s antitrust suit in the United States, after some
defendants had already obtained such an injunction in England).

5 See Jean Gabriel Caste, The Extraterritorial Effects of Antitrust Law,
179 RECUEIL DES COURS D’ACADEMIE DE DE DROIT INTERNATIONAL 9, 80-92
(1988) (summarizing discovery—blocking legislation in the United Kingdom,
Canada, Australia and France); Thomas Scott Murleys, Note, Compelling
Production of Documents in Violation of Foreign Law: An Examination and
Reevaluation of the American Position, 50 FORDHAM L. REV. 877, 877 n.1
(1982) (citing several blocking statutes).

6 The Protection of Trading Interests Act, 1980, ch. 11, § 2 (U.K.); see
also Erika Nijenhuis, Comment, Antitrust Suits Involving Foreign
Commerce: Suggestions for Procedural Reform, 135 U. PA. L. REV. 1003,

7 The protection of Trading Interests Act, 1980, ch. 11, § 6 (U.K.)
(Recovery of Awards of Multiple Damages); see also Andreas F. Lowenfeld,
Sovereignty, Jurisdiction, and Reasonableness: A Reply to A.V. Lowe, 75
Act, 1980 a deplorable measure—a step backward both as a matter of
international law and . . . as a matter of English law.”); Note, Enjoining the
Application of the British Protection of Trading Interests Act in Private


9 Id. at 2919.

10 Id.
notion of comity\textsuperscript{11} was swept away, while the Court placed greater importance on other factors, including the defendants' express purpose to affect U.S. commerce, and the substantial nature of the effect produced.\textsuperscript{12} In \textit{Hartford Fire}, these other factors outweighed the supposed conflict. Accordingly, the Court exercised jurisdiction and applied U.S. law.\textsuperscript{13}

Historically, U.S. courts have followed the recognized domestic conflict of laws theories of the time to determine whether to apply U.S. antitrust law extraterritorially. The Supreme Court's ruling in \textit{Hartford Fire} is a troubling departure from this established trend. The Court announced a test for determining the presence of a "true conflict" between U.S. antitrust law and foreign law that is not grounded in conflict of laws theory. The approach announced by the Court will result in an aggressive outward reach by U.S. courts, as the dissent ominously forecasted in \textit{Hartford Fire}.\textsuperscript{14} This assertive stance will likely have a detrimental effect on the United States' relationship with its trading partners and lead to the enactment of retaliatory legislation by foreign sovereigns.\textsuperscript{15}

This Article addresses the proper application of U.S. antitrust law to foreign conduct in the aftermath of \textit{Hartford Fire}. Section 1 reviews the historical approaches to the application of U.S. antitrust law to foreign conduct and their relationship to the prevailing domestic conflict of laws theory. Section 2 discusses in detail the \textit{Hartford Fire} decision. In

\textsuperscript{11} "Comity" is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." Hilton v. Guyton, 159 U.S. 113, 163-64 (1895). Comity is a discretionary doctrine "enjoin[ing] forbearance in the exercise of legitimate jurisdiction when another sovereign also has legitimate jurisdiction under international law." Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 AM. J. INT'L L. 280, 281 n.1 (1982) (quoting Energy Antimonopoly Act of 1979 (Part I): Hearings Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 779 (1979) (statement of Monroe Leigh)).

\textsuperscript{12} \textit{Hartford Fire}, 113 S. Ct. at 2919.

\textsuperscript{13} Id.

\textsuperscript{14} Id.

Section 3, the Hartford Fire decision is evaluated in terms of modern domestic conflict of laws theory, the international legal concept of foreign sovereign compulsion, and the accepted rules of statutory construction. Finally, in Section 4, an "effects"-type scale for the application of U.S. antitrust law to foreign conduct is proposed.

2. APPROACH TO EXTRATERRITORIAL ANTITRUST CONFLICT RESOLUTION

Through the years, U.S. courts have applied three approaches to determine whether to apply U.S. antitrust law to foreign conduct. Each of the approaches was inspired by, or originated in, the domestic conflict of laws theory of its day.

2.1. The First Restatement: A Strict Territorial Approach

The first approach applied to the reach of U.S. antitrust law was the "vested rights" theory of conflict of laws, based on the theories of Joseph Beale and the first Restatement of Conflict of Laws. The "vested rights" approach directed the forum court to apply the law of the state where the rights of the parties vested. The methodology involved a two-step analysis: first, the forum classified the lawsuit into a "basic" legal category—e.g., torts, contracts, property; and second, the forum court localized the significant event in a particular jurisdiction and applied the law of that state. This approach, which prevailed in U.S. courts for the first half of this century, excluded application of U.S. law to foreign activities with consequences in the United States, even though the "place of wrong" rule of the First Restatement—Conflicts selected the law of the place of injury if it differed from the law of the place where the defendant acted:

16 See Joseph H. Beale, A Treatise on the Conflict of Laws 1929 (1935) (arguing that a sovereign always wishes to apply its law to events in its territory); Restatement of the Law of Conflict of Laws (1934) [hereinafter First Restatement—Conflicts].

17 See First Restatement—Conflicts §§ 377, 378. The First Restatement specifies the law of the place of the wrong for nearly all issues in torts. For contracts, the rule was the "place of making." And, for property, the First Restatement required the application of the law of the situs.

https://scholarship.law.upenn.edu/jil/vol15/iss2/2
The theory of the ... suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, but equally determines its extent.18

This rigid territorial approach was announced by the Supreme Court in the case of American Banana Co. v. United Fruit Co.19 in 1909. American Banana was a suit instituted under the Sherman Act by an Alabama corporation against a New Jersey corporation. The plaintiff alleged that the giant United Fruit Company had caused the government of Costa Rica to interfere with the operation of the plaintiff's banana plantation in that country and had prevented the plaintiff from buying bananas from others for export and sale. Speaking for the Court, Justice Holmes categorically rejected the application of U.S. law to conduct beyond its borders.20

In support of his position, Holmes cited Slater v. Mexican National Railroad,21 which had determined the law applicable to the wrongful death of a railroad employee. In Slater, the employee was a Texas resident fatally injured in the course of his employment in Nuevo Laredo, Mexico. The railroad that employed him was incorporated in Colorado and ran trains from Texas into Mexico.22 Holmes held that Mexican law controlled and that a suit could not be maintained in a U.S. court even though Mexican law only provided for recovery from wrongful death damages in modifiable installments.23 Thus under a First Restatement—Conflicts analysis, the plaintiff's rights had vested in Nuevo Laredo, Mexico. Accordingly, Holmes concluded that no U.S.
court had the "power to make a decree of this kind."\footnote{24} The suit was dismissed and the plaintiffs were advised to sue "in Mexico, on the other side of the river."\footnote{25}

\section*{2.2. The Second Restatement: A Balancing of Interests Approach}

A subsequent approach to the extraterritorial application of U.S. antitrust law gave maximum accommodation to the relevant policies of the states having contact with the parties and the transaction.\footnote{26} This approach is based on the "most significant relationship" test set forth in the Second Restatement—Conflicts.\footnote{27}

\footnote{24} Id.\footnote{26} Id. at 129.\footnote{27} See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter SECOND RESTATEMENT—CONFLICTS].\footnote{27} Id. § 145. The Second Restatement—Conflicts codified an existing trend in choice of law cases toward applying the state law with the most significant relationship to the litigation. Section 145 provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in [Section] 6.

(2) Contacts to be taken into account in applying the principles of [Section] 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

In 1987, the American Law Institute ("ALI") published a new restatement of foreign relations law, seeking to establish order among the various approaches to choice of law questions in the United States and the European Union. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter THIRD RESTATEMENT—FOREIGN RELATIONS]. The ALI concluded that under international law a state has jurisdiction to prescribe law on the basis of territoriality (including effects) or nationality, but only if the exercise of jurisdiction is not unreasonable. Id. §§ 402, 403(1). Section 403(2) provides that the reasonableness of the exercise of jurisdiction over a person or activity is to be determined by evaluating all relevant factors, including:

(a) the link of the activity to the territory of the regulating state,
The Second Restatement—Conflicts focuses on identifying the state with the most significant relationship to the particular issues involved on the basis of seven general choice of law principles:28 (1) the needs of interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) the certainty, predictability and uniformity of result, and (7) the ease in determination and application of the law to be applied. These factors evince a concern for three basic principles: governmental interests, party interests, and forum administration. Accordingly, the Second Restatement—Conflicts approach grants considerable leeway to the forum court in balancing the interests involved. It was this

---

28 Second Restatement—Conflicts, supra note 26, § 6.
balancing of interests approach that displaced the strict territorial approach of *American Banana.*

The balancing of interests approach was first applied by U.S. courts in 1945. In *United States v. Aluminum Co. of America (Alcoa),* Judge Learned Hand of the Second Circuit held the Sherman Act applicable to agreements abroad if they were intended to and did have consequences in the United States. Jurisdiction was denied if there was a showing of effect but not of intent, given that "Congress . . . did not intend the Act to cover" such cases due to the possibility of "international complications.

In 1976, however, the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America,* announced that the test enunciated in *Alcoa* was incomplete because it failed to consider fully the interests of other nations. The court stated:

An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted . . . .

. . . . [T]he court should then determine whether in the face of [the conflict] the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction . . . [a]s a matter of international comity and fairness . . . .

*Timberlane* involved an antitrust claim alleging that Bank of America, which was incorporated in the United States, had

---

29 See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l, 493 U.S. 400, 407 (1990) (noting that "American Banana was squarely decided on the ground (later substantially overruled) that the antitrust laws had no extraterritorial application") (citation omitted).

30 148 F.2d 416 (2d Cir. 1945). The U.S. Supreme Court could not obtain a quorum because too many justices were disqualified and therefore certified the case to the Second Circuit. See JAMES R. ATWOOD & KINGMAN BREWSTER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD § 6.05 at 147 (2d ed. 1981).

31 148 F.2d at 443-44.

32 Id. at 443.

33 549 F.2d 597 (9th Cir. 1976), cert. denied, 472 U.S. 1032 (1985).

34 Id. at 613-15.
conspired to keep Timberlane out of the Honduran lumber business by prevailing on Honduran officials to seize its facilities in that country. In defense, the respondents claimed that Honduras' activities constituted an act of state, and thus were protected against antitrust action. In determining whether U.S. jurisdiction was warranted in this context, the court advocated a balancing test considering the following 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 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 effect; and
(7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

In its first hearing, the court emphasized that it was essential to determine the extent to which there was "potential for interference with our foreign relations." The court stressed that a foreign state's sovereignty, policy or motivation should not be challenged, particularly when the foreign state's public policy was at stake. On appeal following remand, the court found that Honduran law "intimately regulate[d]...
private commercial activity,” promoting investment and capital growth in Honduras in an attempt to foster domestic competitiveness in world markets. The court noted that extraterritorial application of U.S. antitrust law “create[d] a potential conflict with the Honduran government’s effort to foster a particular type of business climate.”

In comparing the relative significance of effects in the United States and abroad, the court noted that Bank of America’s activities had a significant impact on the Honduran economy, as they affected domestic employment, taxes collected in foreign currency and overall investment in domestic industry. The court determined that these factors outweighed any potential anticompetitive effect on U.S. commerce. The court also pointed out that all illegal activity took place outside the United States. For these reasons, the court ruled that the United States should not exercise jurisdiction. The court summarized its comity analysis by noting:

The potential for conflict with Honduran economic policy and commercial law is great. . . . The evidence of intent to harm American commerce is altogether lacking. The foreseeability of the anticompetitive consequences of the allegedly illegal actions is slight. Most of the conduct that must be examined occurred abroad. The factors that favor jurisdiction are the [U.S.] citizenship of the parties and, to a slight extent, the enforcement effectiveness of United States law. We do not believe that this is enough to justify the exercise of federal jurisdiction over this case.

Many courts adopted the precedent set in Timberlane. Several variations of the comity balancing test have also been applied by subsequent courts. The Third Circuit in

---

40 749 F.2d 1378, 1384 (9th Cir. 1984), cert. denied, 472 U.S. 1032 (1985).
41 Id.
42 Id. at 1386.
43 Id.
Mannington Mills, Inc. v. Congoleum Corp., for example, expanded the Timberlane test by suggesting that the balancing test be applied twice: first, in determining whether jurisdiction exists, and second, in determining whether to exercise jurisdiction, taking into account considerations of comity. The Mannington court also expanded the list of factors to be considered in determining whether to assert jurisdiction. Factors relevant to this analysis include the following: (1) the availability of a remedy abroad; (2) the possible effect on foreign relations; and (3) whether an order for relief imposed abroad would also be acceptable if imposed in the United States.

2.3. Currie's Interest Analysis: The True Conflicts Approach

The third approach to determining the territorial scope of U.S. antitrust law is the true conflicts approach. Professor Brainerd Currie first introduced the concept of a “true conflict” in his “governmental interest analysis” approach to resolving choice of law questions. Under Currie’s theory, a court must always apply forum law unless some party suggests the application of the laws of another state. If a foreign law is suggested, the court is to determine the governmental policies to be enforced by the forum. Having identified those policies, an interest analysis is then performed to identify the circumstances in which each state would wish to see its law applied. Currie’s approach does not involve judicial balancing of policies.

Currie’s theory identifies four scenarios: (1) false conflict, (2) true conflict, (3) the disinterested forum, and (4) the

45 595 F.2d 1287 (3d Cir. 1979).
46 Id. at 1294.
47 Id. at 1297-98.
49 Id. at 183.
50 Id.
51 For instance, if an out-of-state plaintiff sought a punitive damages recovery, the forum state would have no interest in asserting its law granting punitive damages.
"unprovided for case." First, a "false conflict" exists when only one state has a legitimate interest in the application of its law to resolve the issue. In this situation, the court simply applies the law of the state with the interest. Second, a "true conflict" exists when the relevant laws not only differ, but each state has a "legitimate interest" in the application of its law to resolve the issue. In such a situation, the court should apply the forum state's law. Third, if the forum has no interest of its own to further in the matter, i.e., it is a "disinterested forum," but a conflict exists between the laws of two other states, then Currie suggested that the disinterested forum either act like a legislature and make a value judgment as to which law it thinks is better, or apply the law that most resembles its own (on the theory that the forum legislation has already been determined to be more sound). Lastly, if no state has a policy interest in applying its own law, an "unprovided-for-case" exists, and Currie advocated applying forum law.

52 For a classic example of a false conflict, see Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963). In Babcock, the plaintiff rode as a guest in the defendant's automobile from Rochester, N.Y. to Ontario, Canada. The defendant lost control of his car in Ontario and thereby injured the plaintiff. Ontario had a "guest statute" that immunized drivers from liability stemming from injury to their passengers. New York did not have a similar law. Id. at 281. The New York Court of Appeals found that only New York had an interest in applying its policy: "Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law." Id. at 284. By contrast, New York's interest lay in requiring tortfeasors to compensate victims. Id.

At least one commentator believes that the term "false conflicts" has a broader definition, which includes cases where the forums have unequal interests. Peter K. Westin, Comment, False Conflicts, 55 CAL. L. REV. 74 (1967).

53 Babcock, 191 N.E.2d at 285.

54 Currie, supra note 48, at 357.

55 Brainerd Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROBS. 754 (1963). Currie thought that such "unprovided-for-cases" would rarely arise because states would usually have interests. Id. at 765. Nonetheless, he found the prospect so troubling that he created a hypothetical situation in which neither state would care about the result. Brainerd Currie, Survival of Actions: Adjudication Versus Automation in the Conflict of Laws, 10 STAN. L. REV. 205, 229 (1958). In his hypothetical case, a California resident injures an Arizona resident in Arizona. Id. Before the plaintiff can bring suit, the California resident dies. California allows survival of tort actions presumably because it finds compensating plaintiffs more important than protecting estates from depletion by lawsuit.
An example of Currie’s approach to the “true conflict” scenario is the decision in Foster v. Leggett. The Kentucky court was faced with a complex situation in a guest statute case. The plaintiff’s decedent was a Kentucky resident, while the defendant was a former Kentuckian, now domiciled across the Ohio River in Ohio. The defendant, however, worked in Kentucky and maintained a room at the YMCA near his place of employment. The accident occurred in Ohio on a day trip which started and was to end in Kentucky. The defendant and the decedent had worked together for many years and had been dating for several months. Ohio’s guest statute barred recovery by a guest absent willful and wanton misconduct by the driver. Kentucky had no such rule. The court rejected any weighing of interests and applied Kentucky law, stating that “[w]hen the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law. The basic law is the law of the forum, which should not be displaced without valid reasons.”

The true conflicts approach is a presumption in favor of application. If U.S. interests are affected because conduct abroad causes significant effects here, the U.S. law applies. Any protests of foreign litigants and their governments will be resolved at the governmental level by changes in U.S. or foreign law and by intergovernmental agreements.

This approach was announced in 1984 by the D.C. Circuit in Laker Airways Ltd. v. Sabena, Belgian World Airlines. In Laker, the U.S. court faced a head-on jurisdictional conflict: the United Kingdom was attempting to assert exclusive jurisdiction in a case involving the regulation of international air transportation, an area in which the policies of the United States and the United Kingdom conflicted. The court rejected Timberlane’s comity formula as inadequate to resolve the
competing interests.60

The substantive dispute in this case involved a claim by a U.K. businessman, Freddie Laker, that several British and U.S. airlines conspired to put him out of business after he instituted a competing, low-budget London-New York shuttle. The defendant, British Airways, sought an injunction in the U.K. courts to prevent Laker from proceeding with his claim in the U.S. court system. Based on British Airways' argument that it was merely complying with British governmental orders in applying its tariff schedule, the injunction was granted. In response, Laker sought an injunction in the United States barring any remaining defendants from seeking protection in the United Kingdom. The U.S. district court granted Laker's motion, and ultimately, the D.C. Circuit affirmed.61

In reaching this decision, Judge Wilkey first noted the practical difficulties courts face in attempting to identify, evaluate and weigh foreign interests and policies and the further difficulty of attempting to conduct a neutral balancing of the competing interests. More generally, the court noted that it is in precisely the context of a "true conflict" between U.S. and foreign interests that balancing is most difficult.62

Judge Wilkey suggested that the court examine whether each nation has a reasonable basis for prescriptive (legislative) jurisdiction. To ascertain this, Wilkey argued that the court should only look to the prescribing state's interests in determining whether its contacts with the transaction justify the court's acceptance of the case.63

In making this assessment, the court found several balancing factors listed in Timberlane to be relevant: specifically, the presence or absence of an intent to affect U.S. foreign commerce, an actual effect on such commerce, situs of the conduct and location of the parties and nationality of the parties.64 The court, however, did not take into account foreign interests in determining whether to assert jurisdiction.

60 Id. at 950.
61 Id. at 956.
62 Id. at 948-50.
63 See id.
64 Id. at 948 n. 145. These factors are also listed as relevant under the principles of reasonableness in the Third Restatement—Foreign Relations § 403(2)(a)-(c) (1986).
Therefore, certain factors listed in *Timberlane*, such as degree of conflict with foreign law or policy and likelihood of conflict with regulation by other states, were not considered. The importance of regulation to the regulating state was also deemed irrelevant. To the court, a judicial balancing of competing foreign and domestic interests would be improper. In particular, the court noted:

We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom. It is the crucial importance of these policies which has created the conflict. A proclamation by judicial fiat that one interest is less "important" than the other will not erase a real conflict.

Applying this analysis, the *Laker* court concluded that both countries had reasonable bases for jurisdiction. In taking this position, the court conceded that the exercise of jurisdiction by the United States would be a source of conflict. The court, however, reasoned that it was up to the political branches of the government, not the judiciary, to allocate exclusive jurisdiction between the countries. Until such allocation occurs, foreign interests should not be deemed to outweigh U.S. interests once the basic jurisdictional threshold of "direct, substantial, [and] reasonably foreseeable, anticompetitive effect on U.S. commerce" is established.

---

65 731 F.2d at 949. The latter factor refers to principles suggested in the *Third Restatement—Foreign Relations* § 403(2)(h).

66 731 F.2d at 949. *But see Third Restatement—Foreign Relations* § 403(2)(c)-(e) (listing this factor as relevant).

67 731 F.2d at 949 (citation omitted).

68 See id. at 926.

69 Id. at 955.

70 Justice Blackmun, citing *Laker* in his concurrence in *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, noted that "[i]t is the Executive that normally decides when a course of action is important enough to risk affronting a foreign nation or placing a strain on foreign commerce. It is the Executive, as well, that is best equipped to determine how to accommodate foreign interests along with our own." 482 U.S. 522, 552 (1987) (Blackmun, J., concurring) (citation omitted).
3. THE Hartford Fire Decision

The Timberlane/Laker debate has created a controversy among the federal circuits as to the proper approach to conflict resolution in antitrust cases. The Third, Fifth, and Tenth circuits have accepted the Timberlane comity analysis, while the D.C. and Seventh circuits have severely criticized it. The issue was placed squarely before the Supreme Court in Hartford Fire Insurance Co. v. California. While not explicitly rejecting a Timberlane-like analysis, the Court makes clear in its opinion that U.S. courts should not reflexively invoke the Timberlane comity test to avoid adjudicating Sherman Act cases attacking restrictive practices and cartelization conducted abroad.

3.1. The Facts

The Hartford Fire case arose in 1988 when the attorneys general of eight states and many private plaintiffs filed antitrust suits against several U.S. and U.K. insurance companies. The complaints contended that the insurance companies had violated the Sherman Act by agreeing to alter certain terms of insurance coverage and agreeing not to offer certain other types of coverage. Included among the defendants were a number of London-based reinsurers that, according to the plaintiffs, had conspired to: (1) restrict the terms on which reinsurance would be written; (2) refuse to reinsure certain risks; (3) write all North American casualty reinsurance agreements with a pollution exclusion; and (4) boycott retrocessional reinsurance agreements that included certain North American property risks, unless the

---


72 See Laker, 731 F.2d at 939-41; In re Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980).


original insurance contained certain exclusions.\textsuperscript{75}

The U.K. defendants moved to dismiss the complaint against them on the ground that the Sherman Act should not apply to conduct carried out by non-Americans entirely outside the United States that was lawful where it occurred.\textsuperscript{76}

The district court held that the U.K. defendants' challenged foreign conduct was subject to jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA").\textsuperscript{77} According to the district court, the "plaintiffs . . . adequately alleged that a decision not to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States has a direct effect on the availability of primary insurance in the United States."\textsuperscript{78}

Applying the three-part test laid down by the Ninth Circuit in Timberlane,\textsuperscript{79} however, the district court concluded that upon consideration of the test's international comity factor, extraterritorial jurisdiction should not be asserted.\textsuperscript{80}

\textsuperscript{75} See id.
\textsuperscript{76} Id. at 471-72.
\textsuperscript{77} Id. at 486. The relevant section of the FTAIA reads:

Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than important trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title shall apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

\textsuperscript{78} 723 F. Supp. at 486.

\textsuperscript{79} Under the Timberlane inquiry, a court examines: "(1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness." 749 F.2d at 1382. See also supra § 2.2.

\textsuperscript{80} 723 F. Supp. at 487-90.
court observed that the long-standing practices in the London reinsurance market challenged by the complaints were “openly conducted in conformity with English law” and were “directed primarily at reducing [the British defendants’] exposure to certain risks and controlling losses, a legitimate business purpose.” Accordingly, the district court declined to exercise jurisdiction.

On appeal, a Ninth Circuit panel affirmed the district court’s holding that the alleged effects in the United States were sufficient under the FTAIA, but reversed the lower court’s conclusion that international comity required a dismissal. In assessing whether comity should be deemed to preclude the exercise of jurisdiction by U.S. courts, the panel reasoned that the enactment of the FTAIA had a profound effect on the Timberlane comity test: “We do not believe a Timberlane analysis . . . can be unaffected by the statute.” The panel evaluated the Timberlane factors and, as to the “degree of conflict with foreign law or policy,” stated:

The district court found that application of the antitrust laws to the London reinsurance market ‘would lead to significant conflict with English law and policy.’ The British [amicus curiae] brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction.

After evaluating five of the six other factors of the Timberlane test, the panel concluded that the only consideration pointing toward non-application of U.S. law was the conflict with U.K. policy and that this was insufficient to overcome “the weight of the findings already made under the Foreign Trade Antitrust Improvements Act.”

The Supreme Court granted certiorari on the issue of whether “the court of appeals properly assess[ed] the extraterritorial reach of the U.S. antitrust laws in light of this

---

81 Id. at 488.
82 Id. at 490.
83 938 F.2d at 932-34.
84 Id. at 932.
85 Id. at 933 (citations omitted).
86 Id. at 934.
https://scholarship.law.upenn.edu/jil/vol15/iss2/2
Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?"87

3.2. The Foreign Defendants' And British Government's Positions

On appeal, the U.K. defendants argued that established principles of comity counselled against subjecting them to liability under the U.S. antitrust laws for conduct which they allegedly committed while offering reinsurance in U.K. markets.88 The U.K. industry, according to the defendants, was comprehensively regulated by the U.K. government. The U.K. government has taken the position that U.S. antitrust law should not be applied against U.K. insurers for most conduct undertaken outside of U.S. borders.89

The U.K. government formally opposed the application of U.S. antitrust law to the U.K. reinsurers,90 reiterating what it told the Ninth Circuit and what that court had accepted: "To subject British nationals to substantial legal liability for conduct in London which the district court properly found was 'conducted in conformity with English law . . . [for] a legitimate business purpose' would raise a substantial conflict with U.K. law and policy."91 The U.K. government argued that the Court should decline to exercise jurisdiction because the legislative history of the FTAIA indicates that the statute was "meant to apply only within the territorial jurisdiction of the U.S."92 Even if the Court decided to apply the FTAIA extraterritorially, the U.K. Government argued

---

87 Hartford Fire Ins. Co. v. California, 113 S. Ct. at 2900 n.9 (citation omitted). The Supreme Court granted certiorari on two other issues, as well. These questions involved the scope of the McCarran-Ferguson Act and are not relevant to the present discussion. Id. n.8 (citation omitted). The U.K., Canadian and U.S. governments filed amicus curiae briefs, as did a number of insurance entities.
88 Brief for Petitioners in No. 91-1128 at 22-27.
89 Id. at 23.
90 See Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 10-26 (No. 91-1128) [hereinafter U.K. Brief].
91 Id. at 13.
92 Id. at 10, 16-21.
that U.S. courts should opt against the exercise of jurisdiction "because of considerations of international comity."\textsuperscript{93}

3.3. The Domestic Plaintiffs' And U.S. Government's Positions

The plaintiffs argued that there was no conflict with British law or policy, and that, indeed, the conduct alleged in the complaints would have formed the basis of liability under British law if the conduct were to be evaluated under British rather than U.S. law.\textsuperscript{94} Further, according to the plaintiffs, even if a conflict existed, the balancing test under \textit{Timberlane} supported jurisdiction because most of the factors favored the application of U.S. law.\textsuperscript{95}

The U.S. government argued that a \textit{Timberlane}-like comity analysis should be performed only when there is a "true conflict."\textsuperscript{96} According to the U.S. government, a conflict for

\textsuperscript{93} \textit{Id.} at 10.

\textsuperscript{94} See Brief for Respondent States in No. 91-1128 at 26-38.

\textsuperscript{95} \textit{Id.} at 38-41.

\textsuperscript{96} Brief for United States as Amicus Curiae Supporting Respondents, at 27 (Nos. 91-1111 and 91-1128).

The U.S. Justice Department has adopted the position that the weighing of foreign interests is a matter of comity and prosecutorial discretion rather than a matter of law. The International Antitrust Division of the U.S. Justice Department has developed guidelines for determining when to prosecute anticompetitive conduct. These guidelines parallel the type of jurisdictional analysis used by courts following the \textit{Timberlane} decision. See Antitrust Enforcement Guidelines for International Operations, 4 Trade Reg. Rep. (CCH) ¶ 13,109.10 (Dep't Justice Nov. 10, 1988). The Department first requires a showing that the anticompetitive conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Foreign Restraints on U.S. Exports—Consumer Injury, 4 Trade Reg. Rep. (CCH) ¶ 13,108 (Dep't Justice Apr. 3, 1992). It then applies a comity analysis, similar to that employed in \textit{Timberlane}, which attempts to balance the interests of the U.S. government in preserving markets and protecting U.S. consumers against the interests of the affected foreign sovereign in promoting its own laws and policies. \textit{Id.} The Justice Department has indicated that it considers a number of factors in its comity analysis, including the following:

1) [the] relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
2) the nationality of the persons involved in or affected by the conduct;
3) the presence or absence of a purpose to affect United States consumers or competitors;
4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
comity purposes exists only if "(1) a foreign government has directed the defendants to engage in the disputed conduct, or (2) the defendants could not have avoided engaging in the disputed conduct without frustrating clearly articulated policies of the foreign government." The U.S. government asserted that in applying the Timberlane test in this case, both of the courts below had erroneously concluded that application of the U.S. antitrust laws would create a conflict with British law. The United States argued that this conclusion was based on a "misunderstanding of the type of conflict that is relevant for purposes of comity analysis." Finally, the United States argued that even assuming that the Timberlane analysis was correctly applied in the case, the standard was not met.

3.4. The Majority Decision

Justice Souter, joined by Chief Justice Rehnquist and Justices White, Blackmun and Stevens, held that since the alleged foreign conduct at issue was "meant to produce and did in fact produce some substantial effect in the United States," the Sherman Act applied to that foreign conduct. The states, the Court noted, alleged that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States, and that their conduct in fact produced a substantial effect in the United States.

According to Justice Souter, "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

---

5) the existence of reasonable expectations that would be furthered or defeated by the action; and
6) the degree of conflict with foreign law or articulated foreign economic policies.

BARRY E. HAWK, 1 UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 152.1 (1991). The Department will challenge foreign conduct only if it concludes, as a matter of prosecutorial discretion, that an assertion of jurisdiction would be reasonable. Id. at 152.3.

97 Id. at 28.
98 Id. at 27.
99 Id. at 28.
100 Hartford Fire Ins. Co. v. California, 113 S. Ct. at 2909.
101 See id. at 2908-11.
102 Id. at 2909.
noted that when Congress enacted the FTAIA, it declined to express a view on whether a court with jurisdiction under the Sherman Act should abstain from exercising such jurisdiction on the ground of international comity.\textsuperscript{103} Nonetheless, Souter declared that the Court need not decide that question because, even assuming an affirmative answer, "international comity would not counsel against exercising jurisdiction in the circumstances alleged here."\textsuperscript{104}

The Court found that there was no "true conflict" between U.S. and British law.\textsuperscript{105} It was argued that a conflict between U.S. and British law arose because the challenged conduct was consistent with British law and policy. The Court, however, relying on Section 415 of the Third Restatement—Foreign Relations, held that a true conflict does not exist when a person subject to regulation by two nations can comply with the laws of both.\textsuperscript{106}

The Court observed that the British reinsurers did not argue that British law required them to act in a fashion prohibited by U.S. law, nor did they argue that their compliance with the laws of both countries was otherwise impossible.\textsuperscript{107} Thus, according to the Court, there was no "true conflict" and, therefore, no need to consider whether the U.S. court should decline to exercise its jurisdiction on the basis of international comity.\textsuperscript{108}

3.5. The Dissenting Opinion

In a dissent, Justice Scalia, joined by Justices O'Conner, Kennedy and Thomas, voiced sharp disagreement with the Court's "conclu[sion] that no 'true conflict' counseling nonapplication of United States law ... exists unless compliance with United States law would constitute a violation of another country's law."\textsuperscript{109} The dissent argued that under the factors set forth in Section 403 of the Third Restatement—

\textsuperscript{103} See id. at 2910.
\textsuperscript{104} Id.
\textsuperscript{105} See id. at 2908-11.
\textsuperscript{106} See id. at 2910.
\textsuperscript{107} See id. at 2911.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 2921-22 (emphasis in original).
*Foreign Relations*, any nation having a basis for jurisdiction to prescribe a law must refrain from exercising that jurisdiction if such an exercise of jurisdiction would be unreasonable. Justice Scalia wrote that:

Rarely would these factors point more clearly against application of United States law... I think it imaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

Justice Scalia argued that the majority "completely misinterpreted" the *Third Restatement—Foreign Relations*, and characterized the majority's view that no true conflict exists "unless compliance with United States law would constitute a violation of another country's law," as a "breathtakingly broad proposition, which contradicts the many cases discussed earlier." Justice Scalia and his dissenting colleagues predicted that the majority's holding "will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners."

4. **The Fallout Of Hartford Fire: The Remains Of Comity**

Following the Court's decision in *Hartford Fire*, it is unlikely that defendants could successfully invoke the principle of international comity in a U.S. antitrust case. The Court specifically noted that in enacting the FTAIA, Congress declined to express a view on whether a court with Sherman Act jurisdiction ever should decline to exercise that jurisdiction on the grounds of international comity. Nonetheless, the Court found that comity would not require abstention from the exercise of jurisdiction in *Hartford Fire*, because the British
defendants did not contend that in the absence of a "true conflict" the court should refrain from exercising jurisdiction.\textsuperscript{115}

Thus, under the \textit{Hartford Fire} approach, a U.S. court has jurisdiction under the Sherman Act over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."\textsuperscript{116} If there exists such a substantial effect, only in cases of "true conflict" between U.S. and foreign law will a court have the opportunity to consider whether that conflict requires abstention from the exercise of jurisdiction on the basis of comity.

\textbf{4.1. The Court's Notion Of A "True Conflict"}

In \textit{Hartford Fire}, Justice Souter defines a "true conflict" as (1) when the foreign law requires the defendant to act in a fashion prohibited by U.S. law, or (2) when compliance with the laws of the United States and the defendant's country is otherwise impossible.\textsuperscript{117} Rarely, if ever, will such a "true conflict" be found.\textsuperscript{118} Justice Souter's definition of a "true conflict" is an unjustifiably narrow construction, with no basis in modern conflict of laws theory.

\textbf{4.2. The Modern Meaning Of A "True Conflict" and Its Resolution}

The majority of states in this country reject Currie's straight "governmental analysis" in resolving choice of law questions.\textsuperscript{119} Most states require that following the determination that a "true conflict" exists (e.g., when two or

\textsuperscript{115} Id.
\textsuperscript{116} Id. at 2909.
\textsuperscript{117} Id. at 2911.
more states have laws that differ and each state has an interest in applying its laws to the issue), a subsequent weighing of the states’ interests must be performed to determine which state has the *most* significant relationship to the conduct or would be *least impaired* by the application of the other states’ substantive law.\textsuperscript{120} In effect, the modern approach is a hybrid that tempers Currie’s forum-preferential view with the balancing of interests approach of the *Second Restatement—Conflicts*.

A few examples are illustrative of this modern approach. In *Hataway v. McKinley*,\textsuperscript{121} the parents of Grady Hataway brought a wrongful death action against a teacher for the death of their son in an Arkansas rock quarry.\textsuperscript{122} The Tennessee Supreme Court remanded the case to apply Tennessee law, after the trial court had applied Arkansas law as the place where the injury occurred. Initially, the *Hataway* court determined that a “true conflict” existed between Tennessee and Arkansas law\textsuperscript{123} because Tennessee at that time was a contributory negligence state while Arkansas applied comparative fault to negligence issues.\textsuperscript{124} The two states had differing wrongful death statutes as well. Arkansas allowed “recovery for the pecuniary injuries . . . and mental


\textsuperscript{121} Id. at 54. Grady Hataway took a scuba diving class from the defendant Robert McKinley at Memphis State University. Hataway died at an Arkansas rock quarry where the class went scuba diving as part of an exercise. *Id.*

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 55.
anguish resulting from the death’” while Tennessee went further to allow recovery for “mental and physical suffering.” The court applied the Second Restatement—Conflicts “most significant relationship” test to the case, and determined that Tennessee law applied to the case.

In Travelers Indemnity Co. v. Lake, the Delaware Supreme Court applied Delaware law and held that an insured driver could recover against the insurance carrier for an accident that occurred in Quebec, Canada. The court determined that there was a “true conflict” because Quebec law limited recovery to $29,400, while Delaware law allowed recovery to the full extent of the insurance policy. The Delaware court applied the most significant relationship test and concluded that Delaware law should be applied because Quebec had no real interest in the litigation.

In Hubbard Manufacturing Co. v. Greeson, an Indiana resident brought a wrongful death action against an Indiana manufacturer for the death of an Indiana resident that occurred while he was using a defective lift in Illinois. The Indiana Supreme Court noted that a “true conflict” of law existed because Indiana applies the defense of contributory negligence while Illinois uses a comparative fault scheme. The court applied the “most significant relationship” test and determined that Illinois had minimal connections to the cause of action. Therefore, the court applied Indiana law because Indiana had the most significant relationship with the litigation.

Contrary to Justice Souter’s definition, these cases illustrate that a “true conflict” does not require that the alleged unlawful conduct be compelled by the law of the foreign state or that it be impossible for the defendant to comply with both the law of the foreign state and the forum state. Rather, a “true conflict” requires only that the laws of

---

125 Id.
129 Id. at 60.
128 Id. at 48.
129 515 N.E.2d 1071 (Ind. 1987).
130 Id. at 1072.
131 Id. at 1073.
132 Id. at 1074.

https://scholarship.law.upenn.edu/jil/vol15/iss2/2
two or more states differ with respect to the treatment of the alleged conduct at issue.

In addition, when a difference exists between the substantive laws of two states in the United States and each state has an interest in applying its law to the conduct involved (i.e., a “true conflict” in domestic conflict of laws parlance), a subsequent interest based analysis is conducted to determine which state has the greater interest in applying its law to the alleged conduct. In other words, after finding a “true conflict” under a pure Curriean analysis, the court shifts to a Second Restatement—Conflicts analysis of balancing the interests involved, i.e., a comity analysis.

Justice Souter’s opinion, however, does not make clear whether such a comity analysis would be proper if in fact a “true conflict,” as he defined it, were found. Indeed, as is discussed in the next section, if such a “true conflict” exists, a subsequent comity analysis may not even be necessary because of the international legal concept of foreign sovereign compulsion and accepted rules of statutory construction.

4.3. Has The Foreign Sovereign Compulsion Defense Been Consumed By Hartford Fire?

The Court’s approach to conflict resolution in Hartford Fire is antithetical to any modern conflict of laws theory, and it confuses the foreign sovereign compulsion doctrine with the type of conflict that requires balancing in a comity analysis. Under the Court’s approach, a conflict sufficient to trigger a comity analysis exists, if at all, only where there is foreign sovereign compulsion.

The foreign sovereign compulsion defense immunizes private entities from liability for actions compelled by foreign governments. The bases for this defense are notions of fairness to the defendant, the belief that we should not punish involuntary conduct, and comity. Courts recognize that the imposition of antitrust liability on private parties acting in compliance with foreign law implicitly condemns that law. In this respect, imposing liability is seen as an “unwarranted

---

intrusion" into the affairs of a foreign state.\textsuperscript{134}

In the vast majority of litigated cases, including \textit{Hartford Fire}, the foreign conduct has been consistent with, permitted by, encouraged or otherwise approved of, but not compelled by, foreign law. In these instances, compliance with U.S. law has not constituted a violation of foreign law.\textsuperscript{135} As in \textit{Hartford Fire}, in most cases litigated to date, the defendants' conduct in a foreign state was wholly legal and consistent with the economic policy of the foreign state, even though the conduct was not expressly mandated.\textsuperscript{136}

As a consequence of the approach to conflict resolution adopted by the Court in \textit{Hartford Fire}, there is now no basis for engaging in a balancing of competing interests. If a U.S. court finds a "true conflict" (when the defendant's conduct that violated U.S. law was compelled by the foreign law), no subsequent analysis of the foreign state's interests in applying its law would be required. Under the doctrine of foreign sovereign compulsion, U.S. antitrust laws must give way to the foreign law.

The Court's approach is also seemingly at odds with the U.S. government's longstanding position on the use and

\textsuperscript{134} Commentators point to section 403 of the \textit{Third Restatement—Foreign Relations}, which suggests that it would be unreasonable to exercise jurisdiction to prevent conduct that is "compelled by a foreign sovereign." \textit{Third Restatement—Foreign Relations} § 403.


\textsuperscript{136} See, e.g., United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968). The \textit{Third Restatement—Foreign Relations} draws a sharp distinction between foreign compulsion cases, which it treats in section 441, and cases involving overlapping state interests and the likelihood of conflict. In the latter instance, in which the conflict need not present the sort of impossibility of compliance that would amount to a violation of due process if both commands are enforced, section 403(3) states that "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, [including those set out in] Subsection (2); a state should defer to the other state if that state's interest is clearly greater." \textit{Third Restatement—Foreign Relations} § 403(3).
recognition of the foreign sovereign compulsion doctrine. While "mere encouragement or permission" is insufficient to invoke the defense, the U.S. Justice Department considers the level of compulsion in determining whether to prosecute a case involving conflicting commands.\(^{137}\) In particular, "considerations of international comity may lead the Department not to challenge anticompetitive conduct that is not strictly compelled by a foreign sovereign but has clearly arisen from the decisions and actions of the foreign sovereign and is intended to promote significant national economic interests of the sovereign."\(^{138}\)

4.4. Has Hartford Fire Incinerated The Canons Of Statutory Construction In The Antitrust Context?

The Court's decision in *Hartford Fire* also ignores the well-established canon of interpretation that statutes should not be construed to apply extraterritorially to conflict with foreign local law, absent a clearly expressed legislative purpose to the contrary.\(^{139}\) Although U.S. antitrust law has been applied to foreign conduct, the "canon of construction" against extraterritorial application prevents application of other U.S. laws to events abroad.\(^{140}\) Justice Souter's opinion fails to address why the antitrust laws should be treated differently.

As recently as 1991, in *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*,\(^{141}\) the

\(^{137}\) HAWK, *supra* note 96, at 625.

\(^{138}\) Id. at 553.

\(^{139}\) *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991); *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 923 F.2d 678 (9th Cir. 1991) (holding that the Railway Labor Act does not apply to collective bargaining agreements allegedly breached by the hiring of foreign nationals for intra-European flights), *opinion withdrawn*, 966 F.2d 457 (9th Cir. 1992) (withdrawing the opinion for mootness and remanding to the district court to determine whether the judgment—that the Act did not apply extraterritorially—should be vacated for mootness).

\(^{140}\) *Aramco*, 111 S. Ct. at 1230 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). For use of this canon in *American Banana*, see 213 U.S. at 357 ("[I]n case of doubt [a court should construe] any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.").

\(^{141}\) 111 S. Ct. 1227
Supreme Court ruled that Title VII of the Civil Rights Act of 1964 does not apply extraterritorially to prohibit discrimination in Saudi Arabia against a U.S. citizen by a Delaware corporation. The employee alleging discrimination, though born in Lebanon, was a naturalized U.S. citizen, employed in Houston by a wholly-owned subsidiary of Arabian American Oil Co., before being transferred at his request to Saudi Arabia.

In rejecting the application of U.S. law to the foreign conduct, the Court relied on the canon of construction that beguiled Justice Holmes in American Banana: "[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."142 The Court concluded that if Congress wants Title VII to protect U.S. citizens employed abroad by U.S. companies, Congress may amend Title VII to do so expressly, and in the process can "calibrate its provisions in a way that we cannot."143 Chief among the "calibrations" mentioned is exempting employers from liability if their conduct is compelled by the country in which a claimant is employed.144

In the Civil Rights Act of 1991, Congress responded to the Court's ruling and abrogated Aramco by adding to the Act's definition of "employee": "[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."145 Congress also provided, as the Aramco decision suggested, for a "sovereign compulsion" defense.146 This defense, however, when appropriate, can be recognized by courts and administrators without specific Congressional authorization.147

---

142 Id. at 1230 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).
143 Id. at 1236.
144 See id. at 1234.
146 Id. § 109(b).
147 See United States v. First Nat'l City Bank, 396 F.2d 897, 901-05 (2d Cir. 1968) (recognizing that the defense of sovereign compulsion might deter the court from issuing a subpoena duces tecum in an antitrust investigation, but rejecting the defense as not proven); THIRD RESTATEMENT—FOREIGN RELATIONS § 441(1)(a) (“In general, a state may not require a person to do an act in another state that is prohibited by the law of that state . . . .”).
Aramco is a classic "false conflict" case. The U.S. policies underlying Title VII were fully applicable to the facts in Aramco, and the policies would have been violated if U.S. law was not applied. Moreover, the application of Title VII would not have interfered with any purpose that Saudi Arabia wished to have advanced, nor would it have violated Aramco's justified expectations. Thus, the territorial imperative was not cogent because no policy of the state where the act occurred was offended by holding the defendant liable under the law of the United States, the parties' domicile.

In contrast to the facts in Aramco, application of U.S. law to the defendants in Hartford Fire was explicitly objected to by the foreign state as an unwarranted interference with its own comprehensive regulation of the defendants. Thus, there was a greater impetus for the Court to exercise judicial restraint when considering the proper reach of the Sherman Act under the facts of Hartford Fire than under the facts of Aramco.

5. After Hartford Fire: Where Do We Go From Here?

As the discussion in Section 3 demonstrates, the opinion in Hartford Fire raises many questions. Justice Souter has announced a conflict resolution rule that has no analog in domestic conflict of laws theory,confuses the foreign sovereign compulsion doctrine, and departs from generally understood rules of statutory construction.

By requiring the presence of a "true conflict" (in which compliance with the laws of a foreign state compels the foreign defendant to engage in conduct violative of U.S. antitrust law) before it will consider comity, the Court has made it unlikely that a conflict will be found in which a U.S. court should decline the exercise of jurisdiction. If and when such a situation occurs, the U.S. court will be bound to decline

---

148 In dissent, Justice Scalia recognized this canon of construction, but found that with regard to antitrust laws, the question "of whether that presumption should control is bound by precedent in the antitrust field, citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Continental Ore. Co. v. Union Carbide Corp., 370 U.S. 690 (1962); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Hartford Fire, 113 S. Ct. at 2918, 2919.
jurisdiction not on the basis of comity, but on the grounds of
the foreign sovereign compulsion doctrine or the act of state
document.\textsuperscript{149}

The \textit{Hartford Fire} decision brings to an end the debate
concerning the propriety of a \textit{Timberlane} comity analysis.
While not explicitly rejecting the \textit{Timberlane} approach or
endorsing the \textit{Laker} approach, the Court's conflict resolution
test will result in the outcome advocated by Judge Wilkey in
the international conflict of laws context and Professor
Brainerd Currie in the domestic conflict of laws context—the
application of the forum state's law when the forum has any
interest at all in the conduct at issue. Unless Congress
devises rules governing jurisdiction in this situation, U.S.
courts will be free to exercise extraterritorial jurisdiction even
when the foreign interests are deemed substantial, as long as
the conduct at issue was not compelled.

While the “true conflict” rule is flawed, the Court was
correct in affirming the Ninth Circuit's decision. The
plaintiffs’ complaint alleged that the British defendants
entered into an agreement to use “their best endeavors to
ensure that all U.S.A. and Canadian exposed insurance/ reinsurance business ... [would] only be written where the
original business includes a seepage and pollution exclusion
wherever legal and applicable.”\textsuperscript{150} The Ninth Circuit agreed
with the district court that the claims at issue conflicted with
foreign law, because Great Britain had a long-established
tradition of regulating the London insurance market. The
court found, however, that this factor was outweighed by the
other \textit{Timberlane} factors. Most notably, the court found that
substantially all of the effects of the reinsurers' conduct took
place in the United States. “[T]he actions of the foreign
defendants ha[ve] had the kind of ‘real economic consequences’
for the American economy that strongly weigh in favor of the
exercise of jurisdiction.”\textsuperscript{151} Property insurance and

\textsuperscript{149} The Court does not address whether in the event of a “true conflict”
a comity analysis is proper. If a court, however, finds a true conflict such
an analysis would be unnecessary.

\textsuperscript{150} See Complaint at ¶ 112.

\textsuperscript{151} \textit{In re} Insurance Antitrust Litig., 938 F.2d 919, 933 (9th Cir. 1991),
aff'd in relevant part and rev'd in part sub nom, Hartford Fire Ins. Co. v.

https://scholarship.law.upenn.edu/jil/vol15/iss2/2
reinsurance policies for U.S. risks excluded seepage, pollution and contamination coverage, or provided such coverage only at increased prices.\textsuperscript{152}

The Ninth Circuit applied the correct approach, emphasizing the degree of effect that the foreign conduct had on the United States, in deciding whether to engage in a comity analysis.\textsuperscript{153} Indeed, the Ninth Circuit noted that the enactment of the FTAIA in 1982 had substantially diminished the weight to be given to the interests of a foreign state when deciding whether to apply U.S. antitrust law.\textsuperscript{154}

In an increasingly interdependent world—with the advent of such economic arrangements as the European Union and the North American Free Trade Agreement—national and multinational companies operating abroad should be held accountable to the United States when their foreign conduct adversely affects U.S. commerce in violation of domestic economic law.\textsuperscript{155} If the prescriptions of U.S. regulatory legislation are not applied beyond its territorial frontiers, cartelists will be encouraged to seek antitrust havens from which to conduct their operations.\textsuperscript{156} Indeed, Section 415 of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{152} Complaint at ¶\textsuperscript{¶} 114, 139.
\item \textsuperscript{153} \textit{In re} Insurance Antitrust Litig., 938 F.2d at 932 ("the relative significance of effects on the United States").
\item \textsuperscript{154} \textit{See id.} at 931-33.
\item \textsuperscript{155} \textit{Cf.} First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 772 (1972) (Douglas, J., concurring) (asserting that parties availing themselves of U.S. courts should expect to be subject to judgment as well); Laker, 731 F.2d at 924 (observing that denial of jurisdiction would harm Laker's principal American creditors); United States v. Imperial Chem. Indus., 100 F. Supp. 504, 511 (S.D.N.Y. 1951).
\item \textsuperscript{156} To aid in preventing this occurrence and reduce conflict between states, the United States has entered into various agreements on mutual cooperation in enforcement of antitrust laws. Perhaps the most significant agreement yet concluded is that of September 26, 1991 between the United States and the EU. Agreement Regarding the Application of Antitrust Laws, Sept. 23, 1991, U.S.-EEC, 30 I.L.M. 1491. The Agreement provides for notification of enforcement activities that may affect important interests of the other party (art. II), exchange of information on enforcement activities and priorities accompanied by discussion of policy changes that are under consideration (art. III), and cooperation and coordination in enforcement activities (art. IV). Significantly, the Agreement recognizes that activities in the territory of one party may "adversely affect important interests of the other Party." Id. art. V(1). The Agreement seeks to avoid conflicts over enforcement activities (art. VI(3)), and to this end states criteria similar to those in section 403 of the Third Restatement—Foreign Relations. Id. art.
\end{itemize}
\end{footnotesize}
the Third Restatement—Foreign Relations succinctly recognizes this reality:

Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.\(^{157}\)

If the unlawful conduct of foreigners is intended to have a substantial impact on domestic commerce and does in fact have such an effect, U.S. courts should preside over related antitrust actions unless the U.S. executive branch clearly expresses a contrary opinion, or unless Congress has enacted a specifically applicable prohibition.\(^{158}\) The legislative purpose in enacting the FTAIA was to make the application of the Sherman Act to foreign conduct more predictable. The FTAIA has replaced the \textit{ad hoc} judgments about international comity required by the Timberlane balancing test\(^{159}\) with an

\(^{157}\) Third Restatement—Foreign Relations § 415(2). See also Laker, 731 F.2d 909.

\(^{158}\) It is well-settled that the conduct of foreign affairs is committed to the exclusive authority of the political branches of government. U.S. Const. art. I, § 8; art. II, § 2. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments"). The Executive Branch is the constitutional representative of the United States with regard to foreign nations. United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936) ("[T]he President alone has the power to speak or listen as a representative of the nation.").

\(^{159}\) The Court in Laker made a comprehensive examination of those decisions in which jurisdiction was declined under the Timberlane interest balancing approach. The court concluded that:

A pragmatic assessment of those decisions adopting an interest balancing approach indicates \textit{none where United States jurisdiction was declined} when there was more than a de minimis United States interest . . . When push comes to shove, the domestic forum is rarely unseated.

\textit{Laker}, 731 F.2d at 950-51 (emphasis in original) (citations omitted). Commentators have also severely criticized Timberlane's demand that the judiciary engage in weighing national interests, noting that it is not in

https://scholarship.law.upenn.edu/jil/vol15/iss2/2
objective standard that focuses on the effects of export trade on domestic commerce. The FTAIA standard is whether export conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce.

Although the FTAIA, by its terms, does not apply to import commerce, Congress clearly stated that the FTAIA does not in any way reduce the applicability of the Sherman Act to import trade such as that involved in *Hartford Fire*. That the "direct, substantial and reasonably foreseeable" test does not apply to products sold into the United States by foreign producers is indefensible. It would be difficult to defend a construct of the FTAIA that permitted greater immunity for imports directly into the United States than for trade aimed outside the United States which has an incidental effect on U.S. commerce.


See H.R. REP. No. 97-686 at 9, reprinted in 1982 U.S.C.C.A.N. at 2494 ("it is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law . . . [t]o remove any possible doubt, the Subcommittee amendment . . . modified the legislation to make clear that it applied only to 'export' trade"); 128 CONG. REC. H18,953 (daily ed. Aug. 3, 1982) (statement of Sen. McClory) (noting that the FTAIA "does not address our domestic trade nor, for that matter, our import trade since imports invariably have an impact on our domestic trade").

PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 236a (1992 Supp.) (concluding that the better view is that FTAIA "merely codifies a general understanding of when American antitrust law should be concerned about restraints abroad that might affect United States interests").

As early as 1985, following the adoption of the FTAIA, the U.S. Senate addressed directly the idea of comity. Senate Bill 397 would have required U.S. courts in private antitrust suits to dismiss "suits in which the adverse effects on foreign interests outweighs the plaintiff's interest in prosecuting the antitrust claim." See *Foreign Trade Antitrust Improvement Act*.
Until the Court directly addresses whether there is any role for comity, and in the absence of further Congressional action, the most utilitarian perspective is for businesses and courts to view antitrust cases as falling into three categories based upon the degree of impact the challenged conduct has on U.S. commerce.

In cases where the challenged conduct has virtually none or a de minimis effect on U.S. commerce, courts should not apply U.S. antitrust law and the issue of comity should not be considered.164

Conversely, in cases where the challenged conduct has a "direct, substantial and reasonably foreseeable" effect on U.S. commerce, courts should apply U.S. antitrust law regardless of the outcome under an interest balancing analysis.165

Finally, in cases where the challenged conduct has more than a "minimal" but less than a "substantial" effect on U.S. commerce, courts should engage in an interest balancing analysis and apply U.S. antitrust law if relevant factors favor the United States.166

This classification system emphasizes the purpose and effect of the challenged foreign conduct. It is faithful to the FTAIA, and fully consistent with domestic conflict of laws theory. Further, it properly limits the courts' role in foreign

---


165 See, e.g., Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982); In re Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980).

policy decisions. Concomitantly, it provides a degree of predictability for businesses to gauge their activity and to make informed decisions with respect to the liability they may face if their activity affects U.S. commerce.

6. CONCLUSION

While the reasoning of the Supreme Court in *Hartford Fire* is questionable, the result achieved was necessary. This decision heralds the outreach of U.S. economic regulatory law to foreign conduct affecting the U.S. market. The Court’s approach to conflict resolution will encourage private plaintiffs, state attorneys general and U.S. government enforcement agencies to aggressively pursue conduct outside the United States that is lawful where it occurs. In response to this aggressive behavior, foreign governments will resort to the use of “blocking” statutes, and engage in intergovernmental negotiations, to defend what they perceive to be legitimate sovereign interests.

U.S. courts, however, must enforce Congressional economic regulations. Courts cannot ignore the important public policies underlying the Sherman Act and other economic regulations. U.S. courts must assert jurisdiction over persons in foreign nations who conspire to violate U.S. law and who intend to cause or actually cause substantial effects on American domestic markets.