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Mannington Mills, Inc. v. Congoleum Corp.: A Further Step Toward a Complete Subject Matter Jurisdiction Test

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NOTES

Mannington Mills, Inc. v. Congoleum Corp.: A Further Step Toward a Complete Subject Matter Jurisdiction Test

Jurisdiction of the American courts under the Sherman Act[1] has been extended to certain activities which take place outside of the United States.[2] Such an extension is required by the inclusion of a foreign commerce provision in the antitrust laws that states that restraints of trade or attempts to monopolize "among the several states, *or with foreign nations*"[3] are violations of U.S. law.

The exact reach of the Sherman Act to activities that take place within foreign nations or that involve foreign law is not clear. United

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1 15 U.S.C. §§ 1-7 (1976).

2 *See* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) [hereinafter referred to as *Alcoa*].

Jurisdiction is usually absolute over activities that occur within a sovereign's boundaries. This notion of territorial jurisdiction is ingrained in American law. *See* The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812). The corollary to this notion is that a nation normally does not have jurisdiction over activities outside its boundaries. *But see* note 4 *infra*. There are, however, three generally accepted exceptions to the general rule of territorial jurisdiction. The first exception is the nationality principle which allows a state jurisdiction to prescribe rules for its nationals wherever they may be found. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965) [hereinafter cited as RESTATEMENT]. The second exception, referred to as the protective principle, permits a state to exercise jurisdiction over activities that threaten the state's security or governmental operations, no matter where they occur or whom performs them. *Id.* at § 33. The third exception, sometimes referred to as the universality principle, allows a state to exercise extraterritorial jurisdiction over piracy and other crimes of universal interest. *Id.* at § 34 & § 34, Reporter's Note 2. For a further discussion of these bases of jurisdiction, see J. RAHL, COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICTS 392-402 (1970).

3 15 U.S.C. §§ 1-2 (1976) (emphasis supplied).

States courts, however, generally have taken jurisdiction over foreign activities only when those activities *affect* U.S. foreign commerce.[4] A single standard for determining the degree of the effects necessary before American courts will acknowledge jurisdiction never has been clearly articulated. Several standards have emerged. Jurisdiction has been asserted when the activities were "*intended* to affect imports and exports . . . [and] is shown actually to have had *some* effect of them."[5] Jurisdiction has been asserted even when "the combination affected the foreign commerce of this country"[6] without any indication of the degree of effects needed or the necessity of an intent to affect it. On the other hand, some courts assert jurisdiction over foreign acts and contracts which have "a *substantial and material* effect upon our foreign and domestic commerce."[7]

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[4] The classic statement of this extraterritorial reach of jurisdiction was made in *Alcoa*, 148 F.2d at 443. In this case, Judge Learned Hand decleared that "it is settled law . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. . . ." *Id.*

The *Alcoa* court based jurisdiction on effects that occurred within the United States, although the challenged activities took place outside the United States. The effects doctrine has been adopted by the *Restatement*:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory or causes an effect within its territory, if either
> a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
> b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

RESTATEMENT, *supra* note 2, at § 18.

It has been suggested by some commentators that effects on U.S. foreign commerce are not always necessary to exercise extraterritorial jurisdiction of the Sherman Act. Professor James Rahl advocates this notion: "I offer the following formula, however, as an attempt to state the scope of the statute as to foreign activities: . . . the Act reaches a restraint or monopolization either (1) if it occurs *in the course of* foreign commerce, *or* (2) if it *substantially affects* either foreign or interstate commerce." Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521, 523 (1974). *See also* J. RAHL, *supra* note 2, at 50-89; Ongman, *"Be No Longer a Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdiction*, 71 NW. U.L. REV. 733, 741-743 (1977).

For a good compilation of cases and the different formulas describing the type of effects needed to support jurisdiction, see Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199, 206-219 (1977).

[5] United States v. Aluminum Co. of America, 148 F.2d at 445 (emphasis supplied).

[6] Thomsen v. Cayser, 243 U.S. 66, 88 (1917). This case did point, however, to the fact that while the foreign activities affected U.S. foreign commerce, the combination "was put into operation" in the United States. *Id.*

[7] United States v Watchmakers of Switz. Info. Center, Inc., [1963] TRADE CAS. ¶ 77,457 (CCH) (S.D.N.Y. 1962). The Department of Justice's view of what type of conduct falls within the extraterritorial jurisdiction of the Sherman Act is: "When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place." U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST GUIDE FOR INTERNATIONAL

Whatever the degree of effects required for the assertion of Sherman Act jurisdiction in the context of United States foreign commerce, three exceptions to its exercise have arisen even when the effects on such commerce are substantial enough to support a Sherman Act violation.[8] The first and most prevalent exception is the act of state doctrine which precludes American courts from inquiring into the validity of the acts that a recognized foreign sovereign performs within its own territory. This doctrine has been part of American law since 1897 when the Supreme Court decided *Underhill v. Hernandez*.[9] The second exception, which closely parallels the act of state doctrine, is the foreign compulsion doctrine. Under this exception, if a foreign sovereign compels a party to act in violation of the Sherman Act, such compulsion is a valid defense to an antitrust suit. This exception was first enunciated in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*[10] in which the court granted defendants' motion for summary judgment, holding that the defendant oil companies had a complete defense to the plaintiff's antitrust charge since they had been compelled by Venezuelan regulatory authorities to engage in a boycott designed to deny the plaintiff Venezuelan crude oil.

A third exception to the exercise of jurisdiction in a situation involving substantial effects on U.S. commerce was introduced in 1976 in *Timberlane Lumber Co. v. Bank of America*.[11] In that case, the notion of international comity was thrust into the jurisdictional equation. The *Timberlane* court decided that effects on U.S. commerce should not be the only basis for extraterritorial jurisdiction: "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 in a given case as a matter of international comity and fairness."[12] This case requires American courts to balance the American interests in preventing harm to United States commerce against possible conflicts with foreign sov-

OPERATIONS (rev. ed. Mar. 1, 1977), *reprinted in* [1977] ANTITRUST & TRADE REG. REP. (BNA) No. 799 at E-6 *and* [1977] 2 TRADE REG. REP. (CCH) No. 266, at 6. The *Antitrust Guide* was a cooperative effort between the Justice Department and representatives of the President's Export Council. It was designed to provide information about the Department of Justice's likely enforcement action in various factual situations that raise antitrust questions as they occur in ordinary business transactions.

[8] The first two exceptions are well-established in American law; the third is relatively new. *See* notes 9 and 10 and accompanying text *infra*.

[9] 168 U.S. 250 (1897).

[10] 307 F. Supp. 1291 (D. Del. 1970).

[11] 549 F.2d 597 (9th Cir. 1976).

[12] *Id* at 613.

ereigns if American authority is asserted. After weighing the factors present in a given situation, a court may decide to refrain from exercising its jurisdiction.[13]

Questions concerning the act of state doctrine and the role of comity in antitrust subject matter jurisdiction determinations were central issues in the recent Third Circuit case of *Mannington Mills, Inc. v. Congoleum Corp.*[14] In *Mannington*, defendant Congoleum Corp., an American company, used patents that it owned in foreign countries to exclude plaintiff Mannington Mills, Inc., also an American company, from those foreign markets. Mannington Mills claimed that Congoleum's foreign patents had been obtained through fraudulent representations to foreign sovereigns and therefore breached American standards. Thus, Mannington Mills claimed, Congoleum should not be able to use these patents in order to restrain U.S. foreign commerce. In bringing the suit, Mannington was anticipating that the court would extend the holding of *Walker Process Equipment, Inc. v. Food Machinery Corp.*[15] to foreign patents. In *Walker Process*, a similar claim was successful with respect to domestic patents. The central questions that evolved in *Mannington* were whether the court possessed subject matter jurisdiction over plaintiff's claim and whether jurisdiction should be exercised if it was present.

The *Mannington* court answered these central questions as follows. First, the court decided that it did possess subject matter jurisdiction over the claim. The court then explained why the act of state doctrine did not apply under the facts of the case. Finally, in an extension of the *Timberlane* holding, the court decided that it may properly abstain

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13 *Id.* at 614-15. This note will argue that the comity factors may result in the determination that the court does not have subject matter jurisdiction. *See* text accompanying notes 87-89 *infra*.

14 595 F.2d 1287 (3d Cir. 1979).

15 382 U.S. 172 (1965). In *Walker Process*, the Supreme Court decided that a patentee's attempted enforcement of a patent obtained by fraud from the U.S. Patent Office may result in liability against the patentee under § 2 of the Sherman Act. *Id.* at 176-77. The fraud and the facts relating to monopolization, of course, would have to be proved at trial. *Id* at 178. Mannington wanted the court to extend this reasoning to apply to holders of foreign patents.

In *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), the Supreme Court affirmatively answered the question whether a "United States District Court has jurisdiction to award relief to an American corporation against acts of trade-mark infringement and unfair competition consummated in a foreign country by a citizen and resident of the United States." *Id.* at 281. The plaintiff, Bulova, had brought suit under the Lanham Act, 15 U.S.C. §§ 1050-1127 (1976), against Steele for manufacturing watches in Mexico under the name Bulova. Steele interposed as a defense his due registration in Mexico on the mark Bulova. 344 U.S. at 282. By the time the case reached the Supreme Court, however, Mexico's courts had nullified the defendant's registration of Bulova. This difference is crucial from the *Mannington* facts. The *Steele* Court concluded: "The question, therefore, whether a valid foreign registration would affect either the power to enjoin or the propriety of its exercise is not before us." 344 U.S. at 289.

from jurisdiction if principles of comity so dictate. The case was remanded to the district court in order to make this determination.

After summarizing the facts and opinion of the case in greater detail and providing the reader with some background of the act of state doctrine, this note will analyze the act of state and comity issues in *Mannington*. Two conclusions follow from this analysis. First, by accurately analyzing the act of state doctrine as it has developed in the courts, the *Mannington* court correctly decided that Mannington's cause of action did indeed circumvent the act of state doctrine. This decision, in turn, reveals certain inadequacies of the doctrine. These inadequacies lead to the second conclusion: A single balancing test which includes comity factors should be formulated for a subject matter jurisdiction determination. Such a test would place the effects upon U.S. commerce on one side of the balance and foreign interests in the activity on the other side. The court then would have to decide which interests outweigh the others in a given case. Jurisdiction thus would depend on a sliding scale of effects on U.S. commerce—the greater the foreign interests involved, the greater must be the effects on commerce for the courts to take jurisdiction. This approach differs from the one mandated by the court in *Mannington*, which directed the court to first determine whether jurisdiction exists by analyzing the effects that the challenged activity has on commerce and then determine whether the court should abstain from exercising such jurisdiction based on comity factors.

THE *MANNINGTON* DECISION

Congoleum Corp. owns patents in the United States[16] and twenty-seven foreign countries[17] relating to the process in the manufacture of chemically embossed vinyl floor covering. In litigation involving essentially the same facts but setting forth different legal theories, the United States District Court for the District of New Jersey held that Mannington Mills, Inc., an American company engaged in the manufacture of floor coverings, did not hold a license to use Congoleum's foreign pat-

[16] The validity of these patents was sustained in *Congoleum Industries' Inc. v. Armstrong Cork Co.*, 510 F.2d 334 (3d Cir. 1975), *aff'g*, 339 F. Supp. 1036 (E. D. Pa. 1972) *and* 366 F. Supp. 220 (E.D. Pa. 1973), *cert. denied*, 421 U.S. 988 (1975).

[17] The countries are Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, the Federal Republic of Germany, France, Greece, India, Ireland, Israel, Japan, Mexico, the Netherlands, New Zealand, Pakistan, Peru, the Phillipines, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and Venezuela. Brief for Appellant at 6, Mannington Mills, Inc. v. Congoleum Industries, Inc., 595 F.2d 1291 (3d Cir. 1979).

ents.[18] Mannington then commenced an action[19] against Congoleum claiming that Congoleum violated the Sherman Act by procuring foreign patents through fraudulent misrepresentations to foreign patent offices and undertaking actual and threatened enforcement of these foreign patents for the purpose of monopolizing and restraining the export trade of the United States in the chemically embossed vinyl flooring market.[20]

In an unreported decision of the United States District Court for the District of New Jersey,[21] the court granted defendant Congoleum's motion to dismiss the complaint for failure to state a claim upon which relief could be granted.[22] Mannington promptly appealed the decision and the Court of Appeals for the Third Circuit vacated the district court's dismissal of the Sherman Act claim and remanded the case.[23]

The Court of Appeals opinion may be divided into three sections for purposes of analysis. In the first section, the court concluded that an American court has subject matter jurisdiction over the claim asserted by Mannington.[24] The court decided that since Mannington alleged conduct on the part of defendant that ultimately resulted in harm to plaintiff's export business, subject matter jurisdiction did exist under

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[18] Mannington Mills, Inc. v. Congoleum Industries, Inc., 197 U.S.P.Q. 145 (D.N.J. 1977). Mannington Mills received a license to use such patents in 1968, but the license was revoked by Congoleum Industries (predecessor in interest to Congoleum Corp.) effective January 31, 1975. The court in this case upheld the revocation.

[19] After the district court found for Congoleum on the license claim of Mannington, a consent order was vacated thus allowing Congoleum to enforce its foreign patents in foreign courts. While the motion to vacate the order was before the district court, Mannington sought leave to file an amended complaint setting forth the Sherman Act claims. Leave was granted except for one claim, which was subsequently brought under a separate suit and which forms the basis of the case under study in this note. As to the claims in the other case, the district court granted summary judgment for Congoleum on August 31, 1978, but the Court of Appeals for the Third Circuit reversed part of this judgment on August 1, 1979.

[20] Brief for Appellant at 10-11, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1291 (3d Cir. 1979).

[21] The decision was rendered in an oral opinion on April 24, 1978, and an order was signed on May 1, 1978, dismissing the complaint.

[22] FED. R. CIV. P. 12(b)(6). The court also dismissed, with prejudice for failure to state a claim, Mannington's allegation that Congoleum breached private obligations under the Paris Convention and the Pan-American Convention. Mannington's claim that Congoleum's actions constituted unfair competition under the common law of the state of New Jersey was dismissed without prejudice for want of pendent jurisdiction. These claims will not be discussed in this note.

[23] *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). The circuit court affirmed the district court's decision with respect to Mannington's treaty claim, but vacated the district court's decision with respect to New Jersey's unfair competition common law cause of action.

[24] The court also noted that in personam jurisdiction is present over both parties. 595 F 2d at 1291.

the Sherman Act.[25]

In the second part of the decision, the court explained why neither the act of state doctrine nor the defense of foreign sovereign compulsion barred the adjudication of Mannington's claims. The act of state doctrine was defined by the court as "a policy of judicial abstention from inquiring into the validity of an act by a foreign government."[26] The defense of foreign sovereign compulsion was noted as "similar in effect but somewhat conceptually distinct"[27] from the act of state doctrine. The court rejected both doctrines stating: "We are unable to accept the proposition that the mere issuance of patents by a foreign power constitutes either an act of state, as that term has developed under case law, or an example of governments' compulsion."[28] The court left no doubt as to its view that the granting of patents was not the type of sovereign activity for which the act of state doctrine had been developed to protect. "[T]he granting of the patents per se, *in substance ministerial activity*, is not the kind of governmental action contemplated by the act of state doctrine or its correlative, foreign compulsion."[29]

Having disposed of the first two possible exceptions to the exercise of jurisdiction, the court turned to the area of comity in the third section of its decision. Under the heading "Comity, Abstention, and International Repercussions," the court discussed the question of whether the jurisdiction, although vested, should be exercised.[30] The plaintiff contended that since Congoleum's foreign patents had been obtained from the foreign countries by conduct unacceptable by American standards,[31] antitrust liability should be extended to defendants.[32] This would be true despite the fact that the patent was valid under the laws of the foreign nations. By pursuing this line of argument, Mannington avoided asking the American court to declare the foreign patents invalid under the issuing countries' laws.

Realizing that a judgment against Congoleum would have effects

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25 The court implicity assumed that the effects on the export trade were substantial: "It can no longer be doubted that practices of an American citizen abroad having a *substantial* effect on American foreign commerce are subject to the Sherman Act. . . . Therefore, we are satisfied that the district court did have jurisdiction in this case." 595 F.2d at 1292.

26 *Id.*

27 *Id.* at 1293.

28 *Id.* at 1293-94.

29 *Id.* at 1294 (emphasis supplied).

30 *Id.*

31 This is a contention plaintiff would have to prove at a trial on the merits if *Walker Process* is followed. *See* note 15 and accompanying text *supra*.

32 *See* note 15 *supra*.

abroad,[33] the court decided that a balancing test, weighing the competing interests of the U.S. and other countries, should be undertaken before jurisdiction is exercised. In determining which factors should be considered in the balancing test, the court turned to the decision in *Timberlane Lumber Co. v. Bank of America*[34] and gleaned ten factors[35] to be evaluated before jurisdiction is exercised. These factors, several of which involve difficult judgments as to the importance of the conduct involved to the countries concerned and the possible effects on U.S. foreign relations, have to be evaluated with respect to each of the countries in which Congoleum holds a patent. With this said, the Court of Appeals for the Third Circuit remanded the case to the district court for further proceedings.

A concurring opinion was filed by Judge Adams which differed from the majority in three major respects. First, the concurring judge believed that the *Walker Process* rationale *is* applicable to the procurement of foreign patents.[36] Second, the concurring judge thought that a court cannot decide that it has subject matter jurisdiction under the Sherman Act and yet refrain from its exercise because of international comity considerations. Judge Adams stated: "[I]t seems that those considerations are properly to be weighed at the outset when the court determines whether jurisdiction *vel non* exists, or in fashioning the decree."[37] Finally, the concurring opinion concluded that jurisdiction should be exercised in the present case and possible international reper-

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[33] The court noted that a "judgment against Congoleum in this country would have direct and ripple effects abroad." 595 F.2d at 1296.

[34] 549 F.2d 597 (9th Cir. 1976). *Timberlane* involved an antitrust action brought against the Bank of America for allegedly conspiring with its Honduran subsidiaries to restrain plaintiff from milling lumber in Honduras and exporting it to the United States.

[35] The factors the court enumerated are as follows:

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

595 F.2d at 1297-98. Many of these factors are in turn derived from § 40 of the *Restatement*, note 2 *supra*.

[36] 595 F.2d at 1299.

[37] *Id.*

cussions should be dealt with only in formulating a remedy.[38]

Judge Adams' insistence that jurisdiction should be exercised in this case essentially stems from the notion that Congoleum was not compelled to violate American law even though Congoleum was obeying the laws of a foreign nation. Judge Adams believes that international comity becomes significant only when foreign law requires conduct inconsistent with the Sherman Act.[39] He therefore would remand the case to the district court in order to allow Mannington to try to prove that, as required by *Walker Process*, Congoleum procured the foreign patents through fraud and that such conduct resulted in monopolization of a relevant market of the United States foreign trade.[40]

A Brief Look at the Act of State Doctrine

In order to understand whether the act of state doctrine was correctly rejected as inapplicable to plaintiff's cause of action in *Mannington*, it is first necessary to understand some of the history, bases, and development of the doctrine in American law. The act of state doctrine was first enunciated over eighty years ago in *Underhill v. Hernandez*.[41] In that case, the plaintiff sued the commander of a revolutionary army in Venezuela for damages resulting from the commander's refusal to grant the plaintiff a passport, the plaintiff's forced confinement to his home, and the harassment that the plaintiff received from soldiers in the revolutionary army. The revolutionary army later became part of the legitimate government of Venezuela recognized by the United States. In refusing to allow the plaintiff a recovery, Chief Justice Fuller announced what has become the classic formulation of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[42]

Although the act of state doctrine began with *Underhill*, much of the present understanding of the doctrine and its basis in American law stems from the decision in *Banco Nacional de Cuba v. Sabbatino*.[43] In

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38 *Id.* at 1302.

39 *Id.*

40 *Id.* at 1303.

41 168 U.S. 250 (1897).

42 *Id.* at 252.

43 376 U.S. 398 (1964). In *Sabbatino*, the defendant, an American commodity broker, had contracted to purchase sugar from a Cuban corporation whose main owners were Americans. Before the shipment of the sugar, Cuba expropriated the sugar company's property. A ship carrying the sugar was allowed to leave Cuba only after the defendant executed a contract, similar to the one entered into with the corporation, with an arm of the Cuban government. The plaintiff,

that case, the Supreme Court held that the act of state doctrine is not compelled "either by the inherent nature of sovereign authority [or] . . . by some principle of international law."[44] *Sabbatino* nevertheless raised the act of state doctrine to nearly constitutional dimensions. While the doctrine is not required by the United States Constitution, according to the *Sabbatino* Court, it does have " 'constitutional' underpinnings."[45]

Sabbatino concluded that the basis for the act of state doctrine that gives rise to its constitution-like status is the American system of government which mandates the separation of powers. The doctrine is designed to help preserve the proper sphere of action of each branch of government and insure that actions of one branch are not unduly hindered by another branch of the government. The act of state doctrine's "continuing vitality depends on its capacity to reflect the proper distinction of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[46] The judiciary generally should not pass on the validity of foreign states' acts for this may hinder the executive branch in carrying on foreign relations and conflicts between the branches should be avoided whenever possible. It should be noted, however, that the Court was careful to point out that the doctrine does not "*irrevocably* remove from the judiciary the capacity to review the validity of foreign acts of state."[47]

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who was the assignee of the second contract, instituted this suit to recover the proceeds of the bill of lading. The district court granted summary judgment for the defendants on the grounds that the Cuban expropriation decree violated international law, and this decision was affirmed by the Court of Appeals for the Second Circuit. The Supreme Court reversed this judgment.

44 *Id.* at 421. The idea that the act of state doctrine is not generally accepted in international law also is stated in the *Restatement*: "International law does not generally require a state to give effect to the law of another state, and the law established the act of state doctrine as an exception to this general rule." RESTATEMENT, *supra* note 2, at § 41, comment (a).

45 376 U.S. at 423.

46 *Id.* at 427-28.

47 *Id.* at 423 (emphasis supplied). One reaction to the *Sabbatino* case was the passage of the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1976). This statute prohibits the interposition of the act of state doctrine to suits such as *Sabbatino,* which involve foreign sovereign acts that are contrary to international law. The statute states in relevant part:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection.

22 U.S.C § 2370(e)(2) (1976).

The act of state doctrine also may not apply if the executive branch has clearly indicated that it has no objection to the examination by a court of the validity of the act of a foreign state

A recent Second Circuit case extended the coverage of the act of state doctrine in order to preclude a cause of action which would require the American court to examine the motivation behind a foreign sovereign's acts even though the validity of the act itself is not directly challenged. In *Hunt v. Mobil Oil Corp.*,[48] an independent oil producer brought an antitrust action against the Seven Sisters, the seven major oil companies,[49] for allegedly encouraging the Libyan government to nationalize plaintiff's Libyan oil concession. Hunt maintained, however, that he was not challenging the validity of the nationalization but was instead suing defendants for their role in the nationalization.[50] The Court of Appeals for the Second Circuit held that the claim was non-justiciable, reasoning that judging the motivation behind the act could not be separated from judging the validity of the act. Antitrust liability therefore could not be attributed to the defendants unless the plaintiff could prove that *but for* their combination or conspiracy Libya would not have moved against it. Thus, the court refused to separate Libya's motivation from the validity of its seizure and defendant's actions were shielded by the involvement of the foreign sovereign.[51]

Hunt also serves to illustrate that the act of state doctrine is applicable to antitrust suits. The first application of the doctrine to antitrust

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Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maat-Schappij, 210 F.2d 375 (2d Cir. 1954).

48 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1978).

49 These are: Mobil, Exxon, Shell, Texaco, Standard of California, British Petroleum, and Gulf.

50 Neither the Libyan government nor any Libyan officials were made defendants to the action.

51 550 F.2d at 77. One complicating factor in the case was that previously the U.S government had officially characterized the motivation of the Libyan government in the expropriation as an aggressive act designed as a political reprisal against the United States. It would then be even more difficult for the court to find that Libya had acted solely at the instigation of the defendants.

For the view that *Hunt* is an unwarranted extension of the act of state doctrine, see Note, *The Pitfalls of Act of State Analysis in the Antitrust Context: A Critique of Hunt v. Mobil Oil*, 6 DEN. J. INT'L L. & POL'Y 749 (1977).

In *Occidental Petroleum Corp. v Buttes Gas and Oil Co.*, 331 F. Supp. 92 (D.C. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1971), *cert. denied*, 409 U.S. 950 (1972), the act of state doctrine was interposed to bar the plaintiff's claim that the defendant had induced a foreign sovereign, the Ruler of Sharjah, to claim ownership of, and thus interfere with, the plaintiff's oil concession.

A different line of reasoning may be seen in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979). In that case, a Sherman Act cause of action was brought which alleged that the defendants had damaged the plaintiffs by causing the cancellation of a Forestry Agreement which led to the Indonesian government denial of a timber cutting license. Despite the involvement of the Indonesian government in plaintiff's damages through the denial of the license, the act of state doctrine was rejected in the case because "neither the validity of those [timber] regulations nor the legality of the behavior of the Indonesian government [in denying the license] is in question here." 594 F.2d at 49.

suits occurred, however, seventy years earlier in *American Banana Co. v United Fruit Co.*[52] In that case, plaintiff argued that the American defendant, a New Jersey corporation, had monopolized and restrained trade by allegedly instigating the Costa Rican government to interfere with the operation of plaintiff's banana plantation in Costa Rica. The Supreme Court held that the defendants' acts were legal under the jurisdiction where they occurred and were not to be judged by American standards. The Court stated:

> For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.[53]

Much of the *American Banana* holding, however, has been undercut by later developments. For example, the notion that jurisdiction depends solely upon the location of the actor has not been preserved especially in the realm of the antitrust laws.[54] Despite this erosion, the act of state doctrine continues to be applied to antitrust claims.[55]

THE *MANNINGTON* APPROACH TO JURISDICTION

At first glance, it would appear that any suit involving a foreign patent would fall within the ambit of the act of state doctrine since the act of granting a patent by its nature, always involves the act of a foreign sovereign. Such a generalization, however, is inappropriate. The involvement of a foreign sovereign in an activity, though a necessary condition, is not alone sufficient to bring an action within the act of state doctrine. Additional inquiries are necessary before the doctrine will be applied by a court to shield a party from antitrust liability.

These additional inquiries in the area of granting a patent may begin with a simple question. Does the granting of a patent conform to

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52 213 U.S. 347 (1909).

53 *Id.* at 356.

54 *See* note 4 *supra.*

55 The act of state doctrine may bar adjudication of an antitrust cause of action even when effects on the U.S. are demonstrated; *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), is one example.

One final note should be added to this brief examination of the act of state doctrine. Not all foreign acts of states are protected by the act of state doctrine from an inquiry by the American courts. In *Alfred Dunhill of London, Inc., v. Republic of Cuba*, 425 U.S. 682 (1976), the Court declined to apply the doctrine in a case involving Cuba's refusal to return payments mistakenly made by Dunhill's for cigars purchased before the Cuban expropriation of the cigar business. Four justices of the Court were in favor, however, of separating public from commercial acts of state and applying the doctrine only to the former. Whether commercial acts of state will remain outside the act of state's coverage remains to be seen.

the characteristics of acts of a foreign sovereign which traditionally have been held to fall within the act of state doctrine? The *Mannington* court said no. The granting of a patent was "in substance ministerial activity."[56] Such a statement dismisses the possible importance of the grant of a patent to a particular issuing country. Granting of a patent essentially can be viewed as granting a monopoly to a private party. The ease or difficulty with which one obtains a patent in a given country may well refelct that country's policy of promoting industry or economic growth. This may be especially true if the issuing country attaches conditions to a patent, such as a requirement that the patent be actively worked. While Mannington stressed that it was not asking to have the foreign patents declared invalid, it should be noted that the effect of the requested remedy is nearly the same, at least with regard to American companies, since an unenforceable patent is of little value to an American company.

Despite the rather loose characterization of the importance of patents, the court still may be correct in its rejection of the act of state doctrine in this case. The involvement of a foreign sovereign is one's activities is not always enough to shield such actions from antitrust liability in the United States. In *Timberlane Lumber Co. v. Bank of America*,[57] the plaintiffs brought an antitrust action against the Bank of America for allegedly interfering with plaintiff's lumber operations in Honduras. The plaintiff alleged that the Bank of America was the force behind frivolous suits, instituted against it in the Honduran courts, that placed an "embargo" on the plaintiff's property.[58] The plaintiff alleged that the court officer appointed to oversee its property was on the payroll of the Bank of America. The Court of Appeals for the Ninth Circuit held that the act of state doctrine did not protect the defendant's actions despite the fact Honduran officials and the Honduran court were involved in some of the activity. In *Timberlane*, the court held that "mere governmental approval or foreign governmental involvement which the defendants had arranged does not necessarily provide a defense."[59] The fact that a foreign government may be involved, in some way, in a private party's conduct is a necessary but not sufficient condition to trigger the act of state doctrine. The court stated that "[i]t is apparent that the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign

56 595 F.2d at 1294.

57 549 F.2d 597 (9th Cir. 1976).

58 The suit against Timberlane was brought by one of its creditors, on a claim assigned by the Bank of America, despite Timberlane's willingness to settle the claim out of court.

59 549 F.2d at 606.

government."[60]

Mannington takes the "imprimatur" argument to its logical end. Obtaining a patent essentially involves obtaining the approval of the issuing country to have the privilege of being free from competition in a certain limited field of endeavor. The private party initiates the government action.[61] Congoleum was not forced to obtain patents from foreign governments, and it could not use the fact that foreign governments had granted such patents as a shield to U.S. antitrust law liability if the procurement of the patents do not meet American standards.[62] The logic of the analysis is compelling only as far as the act of state doctrine is concerned. Why a foreign patent applicant should have to meet American standards of conduct is a perplexing question that goes to the merits of the dispute and not to the jurisdictional question.

Mannington's interpretation of the act of state doctrine is supported by several Supreme Court cases that indicate that receiving foreign approval of one's acts will not always shield one from antitrust liability. In *United States v. Sisal Sales Corp.*,[63] the defendants were alleged to have secured a monopoly of interstate and foreign commerce in sisal.[64] As part of the conspiracy to secure such a monopoly, it was alleged that the governments of Mexico and Yucatan cooperated in the defendant's efforts. Favorable laws, which were solicited by the defendant and passed by the governments of Mexico and the Yucatan, forced other buyers out of the market.[65] Despite the foreign government's involvement, the Court held that the plaintiff's claim was justiciable in the American courts. The act of state doctrine presented no bar to the adjudication of this suit.[66] The Court distinguished *American Banana*[67] on the grounds that because at least part of the alleged conspiracy in *Sisal Sales* took place in the United States, American courts had jurisdiction.[68]

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60 *Id.*

61 It is a rare case, indeed, where a patent is thrust upon an individual.

62 This is true if the foreign patents are used to restrain U.S. foreign trade by blocking a competitor's trade. In other words, the plaintiff still must show that defendant's actions affect U.S. foreign commerce or, at least, are in U.S. foreign commerce.

63 274 U.S. 268 (1926).

64 "Sisal is the fiber of the henequen plant, a native of Mexico, and from it is fabricated . . . the binder twine used for harvesting our grain crops." 274 U.S. at 272.

65 *Id.* at 273.

66 It should be noted that the act of state doctrine was not mentioned by name in the case.

67 *See* notes 52-55 and accompanying text *supra*.

68 The Court stated:

> Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein [and] . . . not merely of something done by another government at the instigation of private parties. True, the conspirators were

A foreign government's involvement in an alleged conspiracy also did not bar adjudication in *Continental Ore Co. v. Union Carbide & Carbon Corp.*[69] The defendants had allegedly monopolized trade in ferrovanadium and vanadium oxide,[70] and the plaintiff complained that as a result of the defendant's restraint of trade, it could not receive enough of the metals to stay in business. Part of the plaintiff's business problem stemmed from plaintiff's exclusion from the Canadian metals market. Continental Ore, the plaintiff, alleged that Electro-Met of Canada, a wholly owned subsidiary of the defendant, Union Carbide, excluded the plaintiff from the Canadian market. The plaintiff alleged that Electro-Met while ostensibly acting as the exclusive purchasing agent for the Metals Controller of Canada, was actually acting under Union Carbide's direction for the purpose of carrying out a conspiracy to restrain and monopolize the vanadium industry.[71] The Supreme Court held that plaintiff's cause of action against Union Carbide was not barred by the act of state doctrine despite the Canadian government's apparent approval of Union Carbide's activities. Union Carbide's subsidiary argued that it was acting as an arm of the Canadian government and hence its activities, including the exclusion of the plaintiff from the market, could not be examined by an American court. The Supreme Court rejected this contention by deciding that the claim was justiciable as long as the plaintiffs "do not question the validity of any action taken by the Canadian Government or by its Metal Controller."[72]

The involvement of a foreign sovereign in the granting of patents does not reach the level of placing the plaintiff's claims within the act of state doctrine. The plaintiffs in *Mannington* heeded the warning given in *Continental Ore* and avoided questioning the validity of any actions taken by foreign sovereigns. Mannington carefully refrained from asking the American court to render the foreign patents invalid.[73] Rather, the plaintiffs claimed that the defendant's procurement of foreign patents did not meet American standards of conduct and hence the patent

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aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States.

274 U.S. at 276.

69 370 U.S. 690 (1961).

70 Vanadium oxide is converted into ferrovanadium which is used by steel companies as an alloy in hardening steels.

71 370 U.S. at 703.

72 *Id.* at 706.

73 The court noted: "Mannington emphasizes that it is not challenging the right of a foreign government to confer patents under its own requirements and indeed does not seek to have the patents at issue adjudged invalid." 595 F.2d at 1290.

holder should be barred from using the patents in order to monopolize U.S. foreign trade.

The conclusion that the act of state doctrine does not bar jurisdiction of the cause of action in *Mannington* may be confirmed in another approach to the issue. Aside from the inquiry as to whether the granting of a patent has the traditional characteristics of a sovereign act that falls within the act of state doctrine, another test may be used to decide if such acts fall within the doctrine's purview. Since the act of state doctrine results in an abstention by the American courts from inquiring into the validity of a foreign act, it is helpful to determine how the American courts have treated such an act in other contexts. In terms of foreign patent granting, American courts have not always treated that act as sacrosanct. American court decisions affecting the use of foreign patents are not uncommon.

Several cases illustrate that American courts are not always adverse to ordering a party to restrict its use of a foreign patent. In *United States v. Imperial Chemical Industries*,[74] the defendants were involved in alleged violations of the Sherman Act effected through agreements involving exclusive licensing and exchange of patents between American and British companies. To prevent such violations, the district court directed Imperial Chemicals (ICI), a British corporation, to grant immunity under its patents.[75] The court characterized its actions in the following way:

> [A]cting on the basis of our jurisdiction in personam, we are merely directing ICI to refrain from asserting rights which it may have in Britain, since the enforcement of those rights will serve to continue the effects of wrongful acts it has committed within the United States affecting the foreign trade of the United States.[76]

The British courts did not appreciate having the holder of a British patent "forced" by U.S. courts to limit its use of the patent. As Sir Raymond Evershed stated in the Court of Appeal:

> [I]t seems to me, with all deference to the judgment of the district judge, to be an assertion of an extra-territorial jurisdiction which we do not recognize for the American courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American courts.[77]

This situation may be contrasted with the one in *Mannington* in which an American national's use of its foreign patents is restricted. It may be

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74 105 F. Supp. 215 (S.D.N.Y. 1952).

75 Expert testimony had been introduced expressing the opinion that "granting immunities is contrary to British public policy." 105 F. Supp. at 229.

76 *Id.* at 228.

77 British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., 3 All. E.R. 88, 91 (Ch. 1954).

more difficult for a foreign sovereign to complain when an American national is ordered to do something by an American court. This would seem to be especially true in situations such as the one in *Mannington* where no claim is made that the defendant would be violating foreign law if an American court ordered it not to enforce its patents. The *Restatement (Second) of the Foreign Relations Law of the United States* notes "A state has jurisdiction to prescribe a rule of law . . . attaching legal consequences to conduct of a national of the state wherever the conduct occurs. . . ."[78] Presumably this rule even applies to the extent that an American court could call an American national's acts illegal when even though the acts were legal in the country where they were performed.

The United States Supreme Court has approved the curtailment of a foreign patent holder's right in several other cases. In *United States v. National Lead*,[79] the Supreme Court upheld a district court's injunction restraining the defendants from attempting to enforce any rights under any of its foreign patents. The injunction was granted to enjoin violations of the Sherman Act accomplished through the pooling of patents and allocation of markets. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[80] the Supreme Court approved a district court injunction which effectively enjoined enforcement of foreign patents against an American company. The injunction was granted to prevent antitrust violations.

Although it could be maintained that the issue that American courts have sometimes enjoined the enforcement of foreign patents is a "red herring,"[81] the fact remains that in the past a foreign government's imprimatur on a patent has not removed the patent activity from the purview of the American courts. The fact that American courts have enjoined the enforcement of foreign patents lends credence to the notion that the granting of a patent is not the type of sovereign act that the American courts will abstain from interference.

The analysis in this section leads to the conclusion that the Third Circuit correctly rejected the act of state doctrine a jurisdictional bar to Mannington's claim. This result raises the possibility that a court may have to reach a decision on the merits of Mannington's unusual claim. It is beyond the scope of this note to comment on how the court should

78 RESTATEMENT, *supra* note 2, at § 30(1)(a).

79 332 U.S. 319 (1947).

80 395 U.S. 100 (1968).

81 Brief for Appellee, at 16 n.15, Mannington Mills Inc. v. Congoleum Corp., 595 F.2d 1291 (3d Cir. 1979).

deal substantively with the claim. Whether an American court should decide that a holder of a foreign patent may not restrain U.S trade by the use of that patent, if it were procured by standards unacceptable under American law, is a difficult one. Such a decision would undermine the ability of foreign countries to set lower standards for the granting of patents than those imposed by the United States. The very fact that the act of state doctrine does not bar such a cause of action, however, may point to inadequacies inherent in the doctrine. It is true that Mannington's cause of action avoids questioning the validity of any action taken by a foreign sovereign. Clearly, however, a foreign sovereign's act, such as the granting of a patent, would be detrimentally affected by a ruling in an American court granting the relief Mannington seeks. As was noted above, foreign courts previously have expressed displeasure when an American court restricted the use of foreign patents. Foreign reactions to a decision that would render those patents a virtual nullity may be expected to be considerably harsher. This analysis indicates that the act of state doctrine may inadequately take into account foreign nations' interests in a given activity when jurisdiction is extended beyond traditional territorial limitations. The developing area of international comity as a part of antitrust subject matter jurisdiction determinations may help fill this gap.

THE DEVELOPING "COMITY ABSTENTION DOCTRINE"

The act of state doctrine was correctly rejected in *Mannington*. But what the court gave to plaintiff with one hand, it may have taken away with the other when the majority decided that the district court may abstain from exercising its jurisdiction if principles of international comity so require. According to *Mannington*, the abstention doctrine, which requires the weighing of comity factors[82] that militate against exercising jurisdiction, was derived from *Timberlane Lumber Co. v. Bank of America*.[83] Therefore, although the *Mannington* court concluded that the district court had subject matter jurisdiction and that the act of state doctrine did not bar adjudication of the claim, the

[82] The term comity was defined in an early case as the "recognition which one nation allows within its territory 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 or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895).

The concept of comity as used in the *Timberlane* case is very broad. It includes consideration of the potential for conflict with foreign law or policy if the American court decides to exercise jurisdiction. The *Timberlane* case isolated several factors that should be included in the comity consideration. *See* note 35 *supra*.

[83] 549 F.2d 597 (9th Cir. 1976).

case was remanded to the district court to "allow an evaluation of the factors counselling for or against the exercise of jurisdiction."[84]

Timberlane, in a section of the opinion entitled "Extraterritorial Reach of the United States Antitrust Law,"[85] concluded that the effects test by which the American courts have traditionally determined extraterritorial jurisdiction under the Sherman Act was unsatisfactory because it ignores the interests of foreign nations.[86] The *Timberlane* court proposed the idea that the effects on American commerce should be weighed against the interests of other nations in the challenged activity stating:

> A tripartite analysis seems to be indicated. . . . [T]he antitrust laws require in the first instance that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil *violation* of the antitrust laws. . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.[87]

Mannington separated the first two parts of this analysis from the third. The first two were used to determine subject matter jurisdiction and the third was reserved for ascertaining whether abstention was appropriate. This analysis may be slightly different than what was proposed in *Timberlane* for it is not entirely clear that *Timberlane* mandated such a separation. It is suggested here that a better approach would be to combine all three parts of the analysis at the outset to determine whether subject matter jurisdiction exists. This approach would create a sliding scale of effects. Such a sliding scale would allow consideration of the other nations' interests without foregoing the exercise of jurisdiction if the effects on American commerce are substantial enough to outweigh these interests. The greater the importance of other nations' interest, the greater the magnitude of effects that have to be shown before the American court has subject matter jurisdiction. Substantial foreign interests may be outweighed, however, if a great enough effect on American commerce is evidenced. The single test approach has the advantage to bringing to the fore the problem of comity.

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84 595 F.2d at 1298.
85 549 F.2d at 608.
86 *Id.* at 611-12.
87 *Id.* at 613.

It has the same disadvantage as the *Mannington* approach, however, in that it still may lead to much uncertainty as to how a court will judge the importance of activities to other nations vis-a-vis the interests of the United States in their effects upon American foreign commerce.

Timberlane, itself, is not clear about the question whether the tripartite analysis is to be one test for subject matter jurisdiction. Acting Assistant Attorney General Shenefield stated that "*Timberlane* is not an extension of the effects doctrine. . . . [Judge Choy in *Timberlane*] thus held that where considerations of comity do not weigh heavily in favor of applying U.S. law, our courts, as a matter of *law*, not merely as a matter of discretion, lack subject matter jurisdiction."[88] The *Mannington* court, however, split the comity question from the subject matter jurisdiction inquiry.

The comity inquiry and balancing test, although difficult for a court to administer, is a logical complement to the underlying rationale for the act of state doctrine expressed in *Sabbatino*. If the basis of the act of state doctrine is to preserve the separation of powers and insure that the judiciary does not interfere with the executive in the conduct of foreign relations, it seem fair to say that this principle should be carried over to situations where a traditional "act of state" is not involved and yet the potential for interference with foreign relations is great. Such is the case with the extraterritorial application of the U.S. antitrust laws; thus, the idea of bringing comity considerations into the question seems well justified. The concurrance in *Mannington* expressed this when it stated: "[I]t seems that . . . [comity] considerations are properly to be weighed at the outset when the court determines whether jurisdictional *vel non* exists, or in fashioning the decree."[89]

The *Mannington* court remanded the case for a consideration of the comity factors although some of them may be readily applied. The American nationality of both the plaintiff and the defendant, and the consequent ease of making a court order effective, are factors which would lower the level of effects required before jurisdiction could be asserted. There is no indication that the defendant would be violating foreign law if it was ultimately ordered not to enforce its foreign patents. This factor would also set up a low effects barrier to jurisdiction. The most important factors are those which also happen to be the most

88 Remarks of John H. Shenefield, Acting Ass't Attorney General, before A.B.A. Section of Int'l Law 17-18 (Aug. 9, 1978), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,386 (1978). For the view that *Timberlane* did split the comity inquiry from the subject-matter jurisdiction inquiry, see 46 FORDHAM L. REV. 354 (1977).

89 595 F.2d at 1299.

difficult ones to judge. Determining the degree of conflict with foreign law or policy, if jurisdiction is exercised, requires the court to analyze the patent system of foreign countries in order to determine the importance of those systems to each foreign sovereign. This involved examination may lead to different results. Some countries may indeed consider patent granting as no more than a bookkeeping function while others may consider it a crucial function. The danger of interfering with U.S. relations with these countries, by exercising jurisdiction over a cause of action that may indirectly render these patents unenforceable, is greatly different between these countries. The court's obligation to consider comity in deciding whether jurisdiction exists is by no means a frivolous one. Furthermore, the complexity of the problem is also not to be considered lightly and a multifarious test may have to be the answer.

A recent case in the United States District Court of the Southern District of New York continues the trend towards the consideration international comity as a factor in determining whether subject matter jurisdiction over an antitrust suit should be exercised if it exists. In *Dominicus Americana Bohio v. Gulf and Western Industries, Inc.*,[90] the plaintiff brought an antitrust cause of action against the defendant, Gulf and Western, for allegedly interfering with the plaintiff's efforts to develop tourist facilities in the Dominican Republic.[91] Part of the activities complained of by the plaintiff involved the Dominican government. The plaintiff alleged that the defendants had convinced local officials to prohibit charter flights from landing at the airport if the flights were transporting guests to the plaintiff's facilities. Also, the defendant allegedly delayed construction and altered the route of a roadway being built by the government to the disadvantage of plaintiff's business.[92]

The district court decided that the record in the case was inadequate to make a reasoned decision on the "ten factors relevant to the issue of jurisdiction."[93] The court noted that the proper standard for determining whether subject matter jurisdiction exists is "a balancing test that weighs the impact of the foreign conduct on United States commerce against the potential international repercussions of asserting jurisdiction."[94] Without deciding which method it would use, the court

90 473 F. Supp. 680 (S.D.N.Y. 1979).

91 The defendant owned and operated already existing tourist facilities in the Dominican Republic.

92 473 F. Supp. at 685.

93 *Id.* at 688. *See* note 35 *supra*.

94 473 F. Supp. at 687.

noted the different approaches advocated by the majority and concurring opinion in *Mannington*.[95] Although the concurring opinion wanted to use the balancing analysis at the outset to determine whether subject matter jurisdiction exists, the majority in *Mannington* decided that the effects test should be first used to determine if jurisdiction exists and then apply the "foreign relations impact factors" to determine if abstention is appropriate.[96]

While leaving unresolved the question of which approach it would advocate, *Dominicus Americana Bohio* did add an additional link to the formation of the comity question analysis in antitrust subject matter jurisdiction determinations. The district court explicitly placed the burden upon the defendants to show that jurisdiction should not be exercised in a given case. The court stated that "the defendants must bear the burden of demonstrating that foreign policy considerations outweigh the need to enforce the antitrust laws where the foreign commerce of the United States is affected."[97]

The next step in the development of the comity doctrine will be the most interesting and significant one. To date, no antitrust cause of action involving American foreign commerce has been rejected by the federal courts on the basis of comity considerations. Once such a decision is made, if ever, the scale for the balancing test will become calibrated and a better idea of what constitutes the somewhat vague "foreign relations impact factors" will become known. Until the time as such a decision is rendered, the probability of a court abstaining from jurisdiction based on such factors remains difficult to calculate.

CONCLUSION

Concern for other nations' interests and United States relations with these nations must be considered whenever American courts extraterritorially apply U.S. laws. The act of state doctrine has been developed to deal with such concerns, but it may not always go far enough in its consideration of those interests.

Seemingly opposite trends have developed in the courts regarding this idea. On the one hand, the act of state doctrine has been narrowed by some circuits, thereby allowing the adjudication of more cases. On

95 *See* text accompanying notes 16-40 *supra*.

96 473 F. Supp. at 688.

97 *Id.* Placing such a burden on the defendant is unusual because the subject-matter jurisdiction inquiry goes to the court's interests and not necessarily to the parties' interest. The court should ask the parties to address the issue of whether either party initially had broached the jurisdiction question. Under the test proposed in this note, if comity issues, when objectively considered, point to no jurisdiction, the court has no subject-matter jurisdiction.

the other hand, the notion of comity is said to permit abstention in cases in which no act of state is involved. The *Mannington* opinion reflects this conflict. The Court of Appeals for the Third Circuit finds the act of state doctrine inapplicable to foreign grants of patents but admonishes the district court to not exercise jurisdiction if principles of comity so warrant. The granting of a patent may not fall within the act of state doctrine but that activity nonetheless may be quite important to the issuing country. It is suggested in this note that the comity question should be placed in the subject matter jurisdiction equation to balance American interests in the free flow of U.S. foreign commerce against other nations' interests and possible interference with the conduct of U.S. foreign relations. This approach may compensate for some inadequacies of the act of state doctrine in cases such as *Mannington* that do not fall within the traditional act of state doctrine and yet contain potential for interference with significant foreign interests or U S. foreign relations. The comity factor may bar jurisdiction in such cases. This approach may also represent a refinement of the effects test traditionally used since the *Alcoa* case. No pre-determined degree of effects on American foreign commerce can be fixed before subject matter jurisdiction is said to be present. Rather, the level of effects required for such jurisdiction depends on the other side of the balance—the importance of foreign interests in the activity and possible interference with foreign relations if jurisdiction is exercised.

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