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Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)

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I. INTRODUCTION

Within the last several years two approaches have been taken to tempering the extraterritorial application of the United States antitrust laws. In October 1982 the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA") was signed into law.[1] In addition, for the past four years the American Law Institute has been engaged in an effort to revise thoroughly the Restatement of Foreign Relations Law of the United States. It is expected that this effort will culminate in May 1986 with the promulgation of the Restatement of Foreign Relations Law of the United States (Revised) (the "Restatement (Revised)").[2] These two efforts take different, and in certain respects inconsistent, positions on the sensitive matter of antitrust jurisdiction. The purpose of this article is to analyze

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1. 15 U.S.C. §§ 1 (note), 6a, 45(a) (1982).

2. In March 1981 the American Law Institute published Tentative Draft No. 2 of the Restatement of Foreign Relations Law of the United States (Revised), which contained several provisions applicable to the exercise of antitrust jurisdiction. These provisions were reworked and republished in April 1985 within Tentative Draft No. 6. This article discusses three sections of the Restatement (Revised): §§ 402, 403, and 415. The text of these and any other sections used throughout this article, unless otherwise indicated, is that contained in Tentative Draft No. 6, which was tentatively approved during the 1985 Annual Meeting of the American Law Institute, May 14-17, 1985. A tentative final draft of the entire Restatement (Revised), including the versions of §§ 402, 403, and 415 contained in Tentative Draft No. 6, was prepared in mid-July, 1985. Written comment on its provisions will be accepted until early December, 1985. Thereafter a final version will be prepared and submitted for a vote to promulgate at the 1986 meeting. This final version will be the tentative final version, except as to any changes made by the Reporters and Council of the ALI in response to written submissions. *See* Statement Regarding Preparation of Final Version of the Restatement of Foreign Relations Law, distributed at the 1985 Annual Meeting. (A copy of this statement is on file at the office of the University of Cincinnati Law Review). Although the text of §§ 402, 403, and 415 contained in Tentative Draft No. 6 cannot be deemed the final version of these sections, it is unlikely that the final version of them will differ in substance from that contained in Tentative Draft No. 6.

these efforts and to show some of their common points and differences.

Concern over an excessively expansive extraterritorial application of the United States antitrust laws is well known.[3] Our trading partners abroad have publicly protested,[4] and some of them have passed retaliatory legislation.[5] It is quite clear, however, that the FTAIA is not directly responsive to our trading partners' concerns. While the circumspections in application of the antitrust laws which it effects may in some respects meet their concerns, the FTAIA was not passed for the purpose of accomodating our trading partners. Any advantage the FTAIA provides them is largely incidental.[6] The aim of the Restatement (Revised) on this

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3. *See, e.g.,* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 365-72 (2d ed. 1970); PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffin ed. 1979); Henry, *The United States Antitrust Laws: A Canadian Viewpoint,* CAN. Y.B. INT'L L. 249 (1970); Jacobs, *Extraterritorial Application of Competition Laws: An English View,* 13 INT'L LAW 645 (1979); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980,* 75 AM. J. INT'L L. 257 (1981); Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws,* 15 INT'L LAW 585 (1981); Triggs, *Reach of U.S. Anti-Trust Legislation: The International Law Implications of the Westinghouse Allegations of a Uranium Producers' Cartel,* 12 MELB. U.L. REV. 250 (1979); International Law Association, Report on the Fifty-First Conference at Tokyo 569-73 (1964). *See generally* 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 8.14-.23 (2d ed. 1981).

4. *See, e.g.,* Note of July 27, 1978, from British Embassy in Washington to the Department of State, BRIT. Y.B. INT'L L. 352 (1979); Note of Nov. 8, 1978, from Canadian Secretary of State for External Affairs to the United States Ambassador in Ottowa, CAN. Y.B. INT'L L. 335 (1979); Consultative Shipping Group (CSG) Secretariat, United States Policy Towards Regulation of Liner Shipping (January, 1978), BRIT. Y.B. INT'L L. 386 (1978)(CSG is a shipping conference comprised of numerous European countries and Japan); Hilder, *Holders of 100,000 Transatlantic Tickets Must Pay Fare of Flights, Britain Says,* Wall St. J., Oct. 26, 1984, at 35, col.3. *See generally* 1 J. ATWOOD & K. BREWSTER, *supra* note 3, §§ 4.04-.15.

5. *See, e.g.,* Law No. 80-538, 1980 J.O. 1799, *reprinted and translated in* 75 AM. J. INT'L L. 382-83 (1981)(France); Evidence Amendment Act (No. 2), N.Z. Stat. 173, No. 27 (1980)(New Zealand); Protection of Trading Interests Act, c. 11 (1980)(United Kingdom); Foreign Anti-Trust Judgments (Restriction of Enforcement), No. 13, Austl. Acts P. (1979)(Australia); Uranium Information Security Regulations, Can. Stat. O. & Regs. 76-644 (Sept. 21, 1976), *amended by* Can. Cons. Regs., ch. 366 (Canada).

6. The legislative history of the FTAIA stresses the need for certainty with respect to the applicable standard of review and the need to loosen the strictures of the antitrust laws, both for the benefit of the United States participants in foreign commerce. *See infra* notes 15-17 and 21 and accompanying text (legislative history). However, at the beginning of several days of hearings on a bill, which in modified form became the FTAIA (see note 14 and accompanying text), Rep. Peter Rodino did note the concern of our allies over the uncertain and expansive application of these laws. He stated that "[s]ome foreign animosity toward U.S. antitrust enforcement might also be eliminated, because the domestic effects standard being proposed would limit the reach of our antitrust laws in a manner consistent with our major trading partners." *Foreign Trade*

point, in contrast, is to balance the legitimate concerns of the United States and other nations. The interests of the various states affected by a particular business practice are to be taken into account as part of the process of determining whether a court has jurisdiction over a matter.[7]

II. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982

A. The Export Trading Company Act of 1982

The FTAIA and the Export Trading Company Act of 1982 (the "ETCA") together comprise Public Law No. 97-290, which President Reagan signed into law on October 8, 1982.[8] The stated legislative purpose of the ETCA is, in part, to encourage increased export of United States goods and services by facilitating the formation of export trading companies and by easing the application of the antitrust laws to certain export trade activities.[9]

Antitrust Improvements Act of 1981: Hearings on H.R. 2326 Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 97th Cong., 1st Sess. (1981)(introductory remarks of Rep. Rodino) [hereinafter cited as *1981 Hearings*].

7. *See infra* notes 147-50 and accompanying text (further discussion of contrasting approaches of Restatement (Revised) and FTAIA on balancing of state interest analysis).

8. 15 U.S.C. §§ 4001-4003 (1982)(Title I), 12 U.S.C. §§ 372, 635a-4, 1841, 1843 (1982)(Title II); 15 U.S.C. §§ 4011-4021 (1982)(Title III); 15 U.S.C. §§ 1 (note), 6a, 45(a) (1982)(Title IV).

9. The codified legislative purpose of the ETCA is "to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers . . . and by modifying the application of the antitrust laws to certain export trade." 15 U.S.C. § 4001(b) (1982). This legislative purpose does not apply to the FTAIA because it is a separate title within Public Law No. 97-290. It stands independent from the other titles, with no cross references to or use of the defined terms from the other titles.

As enacted, § 102(b) of Pub. L. 97-290, which states the purpose of the ETCA, used the term "Act" instead of "Chapter" in the first line, thereby creating confusion as to whether § 102 applies only to the ETCA or to the entire Pub. L. 97-290. *See id.* § 4001 (note). The reference is clarified in the United States Code by use of the word "Chapter." *See id.* § 4001(b). Furthermore, the Conference Report on the Export Trading Company Act of 1982 indicates that the definitions contained in Title 1 are confined to that title. H. CONF. REP. No. 294, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2501-02. The point is not very significant because the legislative history of the FTAIA reflects substantially the same purpose as that set forth in § 102(b) of Pub. L. 97-290. *See infra* notes 14-17 and accompanying text (legislative history of FTAIA).

For an analysis of the ETCA, see Bruce & Peirce, *Understanding The Export Trading Company Act and Using (Or Avoiding) Its Antitrust Exemptions,* 38 BUS. LAW. 975 (1983); Golden & Kolb, *The Export Trading Company Act of 1982: An American Response to Foreign Competition,* 58 NOTRE DAME LAW. 743 (1983); *see also* B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 20 (Supp. 1982); Acheson, *The Export Trading Company Act: A Year Downstream,* 18 INT'L LAW. 389

Under Title III of the ETCA, persons may seek a certificate of review from the Secretary of Commerce for their export trade activities.[10] To obtain a certificate of review, the applicant must establish to the Secretary's satisfaction that the export trade activity meets certain criteria. The applicants must demonstrate, among other things, that the export trade activities for which they seek the certificate will not substantially lessen domestic competition nor substantially restrict the export trade of any competitor.[11] One consequence of obtaining the certificate is that criminal and civil actions may not be brought by the government against the applicant on the ground that the conduct covered by the certificate violates the antitrust laws.[12] Although the statute does not immunize the certificate holder from private damage or injunctive relief actions for violation of the antitrust laws, any recovery in such suits is limited to actual damages plus expenses.[13]

B. The Purposes of the FTAIA

The FTAIA stands as a separate and independant title within Public Law No. 97-290.[14] Although the FTAIA does not contain

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(1984); Hawk, *International Antitrust Policy and the 1982 Acts: the Continuing Need for Reassessment,* 51 FORD. L. REV. 201 (1983) [hereinafter cited as Hawk, *International Antitrust Policy*]; Shenefield, *Extraterritoriality in Antitrust,* 15 L. & POL'Y INT'L BUS. 1109 (1983); Swan, *International Antitrust: The Reach and Efficacy of United States Law,* 63 Ore. L. Rev. 177, 211 (1984); Victor, *The Export Trading Company Act of 1982: New Antitrust Protection for Exporters (and New Opportunities for Lawyers),* 52 ANTITRUST L.J. 917 (1984).

Relations with respect to the certification procedures are contained in 48 Fed. Reg. 10,596 (1983)(to be codified at 15 C.F.R. § 325.1-.14).

10. 15 U.S.C. § 4012 (1982).

11. *Id.* § 4013.

12. The parameters of this immunity from governmental prosecution are not explicit in the statutory language. Section 306(a) of the ETCA states that "[e]xcept as provided in subsection (b), no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued which is based on conduct which is specified in, and complies with the terms of, a certificate [of review]." *Id.* § 4016(a). This section does not mention public civil or criminal prosecutorial actions. Section 306(b)(1) of the ETCA provides that a person injured as a result of conduct covered by a certificate may sue for damages or injunctive relief. *Id.* § 4016(b). Because this subsection provides for private suits, § 306(a) must apply to governmental actions. *See* Bruce & Peirce, *supra* note 9, at 1010-12; Golden & Kolb, *supra* note 9, at 778-79.

13. 15 U.S.C. § 4016 (1982).

14. The genesis of the FTAIA is H.R. 2326, the Foreign Trade Antitrust Improvements Act of 1981, introduced by Reps. Rodino and McClory in 1981. H.R. 2326, 97th Cong, 1st Sess., 127 CONG. REC. 3538 (1981). This bill was referred to the House Committee on the Judiciary and in turn to its Subcommittee on Monopolies and Commercial Law. The Subcommittee held three days of hearings on the bill in March, April, and June, 1981. *See 1981 Hearings, supra* note 6; *see also* Garvey, *The Foreign Trade Antitrust Improvements Act of 1981,* 14 L. & POL'Y INT'L BUS. 1 (1982). The Subcommittee

an explicitly enacted legislative purpose, as does the ETCA,[15] the purposes of the FTAIA are set forth clearly in its legislative history. These purposes substantially mirror the codified legislative purposes of the ETCA. First, the FTAIA is intended to "encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services."[16] Second, the FTAIA is intended to amend the Sherman Act and the Federal Trade Commission Act to articulate a statutory test for determining whether United States antitrust jurisdiction exists over certain international transactions.[17] Again, these purposes do not evidence a desire to curb application of the antitrust laws as an accomodation to our trading partners. The legislation is intended primarily to ease the application of these laws against United States firms engaged in export trade so that the firms may compete more effectively.

With respect to its first objective, the FTAIA was put forth by its sponsors and others as a straight-forward alternative means of facilitating exports without the cumbersome certificate of review procedure codified in the ETCA.[18] The ETCA and the FTAIA operate cumulatively, although they are two separate circumscriptions of the same antitrust laws.[19] They provide two-fold relief for

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introduced H.R. 5235 as a substitute for the original version of the bill. *See* H.R. 5235, The Foreign Trade Antitrust Improvements Act of 1982, 97th Cong., 1st Sess., 127 CONG. REC. H9670 (daily ed. Dec. 15, 1981). The House Committee on the Judiciary unanimously reported H.R. 5235, as amended. H.R. REP. NO. 686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2487 [hereinafter cited as HOUSE REPORT]. The House passed H.R. 5235. 128 CONG. REC. H4984 (daily ed. Aug. 3, 1982). During the conference on the ETCA, H.R. 5235 was added as a separate title to obtain House approval of the ETCA. *See* Moore, *Late Addition May Prove to be Key to Export Act,* Legal Times, Oct. 11, 1982, at 1; *see also* 128 CONG. REC. H8341-50 (daily ed. Oct. 1, 1982)(Conference Report on S.734, Export Trading Company Act of 1981); Bruce & Peirce, *supra* note 9, at 977-78 n.18-20 (legislative history of FTAIA).

15. *See supra* note 9 (purpose of ETCA).

16. HOUSE REPORT, *supra* note 14, at 2; *see* 128 CONG. REC. H4981 (daily ed. Aug. 3, 1982)(Rep. Rodino explaining purposes of FTAIA).

17. HOUSE REPORT, *supra* note 14, at 2-3; *see* 128 CONG. REC. H4981 (daily ed. Aug. 3, 1982)(Rep. Rodino explaining purposes of FTAIA).

18. *See, e.g., 1981 Hearings, supra* note 6, at 1-2 (introductory remarks of Rep. Rodino), 70 (Shenefield statement), 96 (Atwood statement); Bruce & Peirce, *supra* note 9, at 977-78 (legislative history of FTAIA).

19. The definition of antitrust laws in § 103(a)(7) of the ETCA includes §§ 1-7 of the Sherman Act, which in turn have been amended by § 402 of the FTAIA. 15 U.S.C. §§ 6a & 4002(a)(7) (1982). Because § 402 provides relief for conduct outside the United States by direct amendment of the Sherman Act, the utility of the certification procedure is certainly diminished. Enterprises engaged in the export trade can take advantage of either the certification procedure, or rely on § 402, or both. *See generally* Golden & Kolb, *supra* note 9, at 780-81; Moore, *supra* note 14, at 1.

the United States export trade, freeing it from certain constraints in order to compete more effectively in the world market.[20] At the same time the FTAIA and the ETCA provide little relief to our trading partners from what they perceive as an excessive application of antitrust laws to conduct engaged in within their territories and by their citizens.

Congress did consider the separate objective subject matter test[21] of the FTAIA to be an advantage to our trading partners.[22] However, Congress did not believe that enactment of a codified standard represented a significant change from present law.[23] Moreover, while the codified standard limits the application of the Sherman Act somewhat, our trading partners' concern is more centered on application of our law to conduct in their countries which nevertheless would be reviewable even under the new standard, or on the use of our discovery techniques.

C. *The FTAIA Amendments to the Sherman Act*

1. INTRODUCTION

The FTAIA component of Public Law No. 97-290 consists of two substantive sections. One, section 402, amends the Sherman Act;[24] the other, section 403, amends section 45 of the Federal

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20. The legislative history is replete with opinions to the effect that the antitrust laws in fact do not hinder the export trade. *See e.g., 1981 Hearings, supra* note 6, at 43-44 (Rahl statement), 71 (Shenefield statement); HOUSE REPORT, *supra* note 14, at 4. It was thought that there existed nonetheless a perception, especially among executives of small and medium-size companies, that the antitrust laws hamper efficiency in export activities. *1981 Hearings, supra* note 6, at 10 (Baldridge statement); HOUSE REPORT, *supra* note 14, at 4.

21. *See infra* notes 97-119 and accompanying text (explanation of FTAIA's objective standard for determining jurisdictional reach of Sherman Act).

22. The House Report states that this standard is "[a] clear benchmark . . . for businessmen, attorneys and judges as well as our trading partners." HOUSE REPORT, *supra* note 14, at 2-3. And it ventured the thought that the "clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets." HOUSE REPORT, *supra* note 14, at 14.

23. *See infra* note 107 and accompanying text (legislative history of FTAIA and ideas of commentators).

24. 15 U.S.C. §§ 1-7 (1982). Section 402 provides:

> The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:
>
> SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import 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, or a person

Trade Commission Act.[25] Before considering the FTAIA modifications of the Sherman Act in detail, several preliminary observations may be useful.

First, the FTAIA directly amends two of the antitrust laws, the Sherman Act and section 45 of the Federal Trade Commission Act. By contrast, the ETCA does not change any antitrust law. Instead, it provides limited immunity from scrutiny under *all* antitrust laws for conduct covered by the certificate of review. The ETCA defines antitrust laws as virtually all state and federal antitrust laws.[26] Hence, while the ETCA does not amend any of the antitrust laws, it makes all of them partially inapplicable to conduct covered by the certificate of review. The cumulative protection afforded by the FTAIA and the ETCA is apparent. For example, the ETCA provides partial immunity from attack under the Sherman Act for conduct covered by the certificate. However, that same conduct may already have been exempted from antitrust challenge by virtue of the FTAIA's direct amend-

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engaged in such trade or commerce in the United States; and

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

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

Id. § 6a.

25. *Id.* § 45(a). Section 403 provides:

Section 5(a) of the Federal Trade Commission Act (U.S.C. 45(a)) is amended by adding at the end thereof the following new paragraph:

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial and reasonably foreseeable effect—

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

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

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the peration of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

Id. § 45(a). Because of the substantive similarity between §§ 402 and 403, this article concentrates on § 402, the amendment to the Sherman Act.

26. Section 103(a)(7) of the ETCA provides: "For purposes of this title . . . (7) the term 'antitrust laws' means the antitrust laws as defined in subsection (a) of the first section of the Clayton Act . . . section 5 of the Federal Trade Commission Act to the extent that section 5 applies to unfair methods of competition, and any State antitrust or unfair competition law." *Id.* § 4002(a)(7); *see supra* note 19 (further discussion of definition of antitrust laws).

ment of the Sherman Act. Second, the FTAIA's amendment of the Sherman Act and the Federal Trade Commission Act leaves these statutes and the case law interpretations of them unaffected unless they are directly changed by the FTAIA. Finally, the FTAIA has nothing to do with issues of personal jurisdiction. It qualifies the subject matter jurisdiction of the Sherman Act and the Federal Trade Commission Act and narrows the ambit of damages for violations of these statutes.

2. The Revisions of the Sherman Act by the FTAIA

a. The First Revision: The Bifurcation of Foreign Commerce

Section 402 of the FTAIA contains three substantive revisions to the Sherman Act. It narrows the scope of application of the Sherman Act (the introduction and subsection (1)), codifies the effects standard (subsection (1)), and narrows the scope of injury (last sentence). The first of the three changes to the Sherman Act contains two significant departures from prior law on the threshold question of what kind of conduct is cognizable under the Sherman Act. Prior to the FTAIA, section 1 of the Sherman Act proscribed contracts, conspiracies, and similar conduct in restraint of trade "among the several States, or *with foreign nations.*"[27] Similarly, section 2 prohibited every monopoly or attempt to monopolize any part of the trade or commerce "among the several States, or *with foreign nations.*"[28]

As evolved in the case law and commentary, restraints of trade with foreign nations had traditionally been divided into import trade or commerce (into the United States), export trade or commerce (out of the United States),[29] and, to a lesser extent, totally foreign trade or commerce (neither into nor out of the United States).[30] The same methodology and, generally speaking, the same standards were used to review anti-competitive conduct

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27. 15 U.S.C. § 1 (1982) (emphasis added).

28. *Id.* § 2 (emphasis added).

29. 1 J. Atwood & K. Brewster, *supra* note 3, §§ 6.01-.22; 1 W. Fugate, Foreign Commerce and the Antitrust Laws §§ 2.19-.20 (3d ed. 1982); 1 E. Kintner, Federal Antitrust Law § 7.5-.6 (1980).

30. *See* Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws,* 43 Antitrust L.J. 521 (1974) [hereinafter cited as Rahl, *Foreign Commerce Jurisdiction*]; Rahl, *American Antitrust and Foreign Operations: What is Covered?,* 8 Corn. Int'l L.J. 1 (1974) [hereinafter cited as Rahl, *American Antitrust*]; *see also* 128 Cong. Rec. H4981 (daily ed. Aug. 3, 1982).

occurring in any of the three categories of foreign commerce.[31] The type of foreign commerce affected by the restraint was less critical.

The FTAIA represents a clean break from that approach. The Sherman Act's notion of restraints of trade or commerce among foreign nations has been bifurcated by the FTAIA into two separate classes of foreign commerce. Depending on the category into which the conduct is placed, different legal consequences will follow. One category consists of import trade and commerce; the other is comprised of export trade and commerce and totally foreign trade and commerce. The parenthetical phrase "(other than import trade and import commerce)"[32] is used in the introductory portion of section 402 to distinguish the import commerce category from the other categories of foreign commerce and to assure that the two components of the other category are treated in exactly the same manner.[33]

As a consequence of this bifurcation of foreign commerce, two separate regimes of antitrust law now exist in the foreign commerce setting. The language of the introductory portion of section 402—"This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless"[34]—means that the remainder of section 402 is inapplicable to import commerce restraints. Consequently, traditional antitrust standards and doctrine, unaffected by section 402, will continue to be employed in reviewing alleged anti-competitive practices involving import commerce. Conversely, conduct involving exports or totally foreign trade or commerce will be subject to, or have the advantage of, depending on one's perspective, the more rigorous standards of section 402(1) and (2) of the FTAIA. The

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31. Examples of cases involving the three categories of foreign commerce are: (1) imports into the United States: United States v. Aluminium Co. of Am., 148 F.2d 416 (2d Cir. 1945); United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962); (2) exports from the United States: Continential Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Minnesota Mfg. & Mining Co., 92 F. Supp. 947 (D. Mass. 1950); and (3) neither imports nor exports: Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement, 451 F.2d 727 (2d Cir. 1971), *cert. denied,* 406 U.S. 406 (1972); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied,* 398 U.S. 1095 (1969); Dominicus Americana Bohia v. Gulf & Western Indus., Inc., 473 F. Supp. 680 (S.D.N.Y. 1979).

32. 15 U.S.C. § 6a (1982).

33. HOUSE REPORT, *supra* note 14, at 9-10.

34. 15 U.S.C. § 6a (1982).

legislative history is clear on this point,[35] as is the statutory language.

The ultimate importance of this distinction between import commerce on the one hand and exports and totally foreign commerce on the other is uncertain. As yet there has been little judicial construction or application of section 402.[36] The answer depends on whether the other substantive portions of section 402 alter the Sherman Act to the extent that use of section 402(1) and (2) leads to different results than use of the old version of the Sherman Act.

From the perspective of our trading partners, however, the distinction may be somewhat dismaying. The application of the Sherman Act has been tightened with respect to the export trade, for the benefit of United States exporters. But conduct involving imports into the United States will continue to be reviewed as though section 402 did not exist. Many of the cases which have caused great concern abroad are those involving imports into the

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35. The House Report states that the "other than import trade" phrase was used to make "clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not." HOUSE REPORT, *supra* note 14, at 10. The Report also states that "the intent of [§ 402] is to establish that the proscriptions of the Sherman Act do not apply to export or purely foreign commerce unless the conduct has a direct, substantial and reasonably foreseeable anticompetitive effect on domestic or import commerce, or a domestic export opportunity." *Id.* at 14. In his explanation of H.R. 5235 on the floor of the House of Representatives, Rep. McClory stated that the bill "does not address our domestic trade, nor for that matter, our import trade since imports invariably have an impact on our domestic trade. Moreover, it was our judgment that imports were doing rather well, perhaps too well, and did not need the assistance of this legislation." 128 CONG. REC. H4981-82 (daily ed. Aug. 3, 1982).

36. As of late May, 1985, Eurim-Pharm. Gmbh v. Pfizer, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,208 (S.D.N.Y. 1984), was the only case found in which § 402 was applied. In this case the plaintiff, a West German distributor of pharmaceutical products, sued Pfizer, Inc. and several of its wholly-owned subsidiaries which were engaged in business in Europe. The plaintiff alleged that the defendants and others engaged in a price fixing and market allocation scheme in Europe in order to maintain the market position of one of Pfizer's antibiotics, Vibramycin, after the expiration of certain patents. The defendants allegedly sold the drug only to distributors and others who agreed to resell only in specified markets and at specified prices. As a consequence of this scheme, Pfizer, Inc. allegedly maintained a substantial share of the world market for the drug. The defendants moved to dismiss the complaint on the ground that the plaintiff failed to allege the requisite effect on United States import or domestic commerce. The court granted this motion. In her opinion the judge noted that international business transactions are now governed by § 402 and that this statute requires a showing that the alleged anti-competitive conduct has the requisite effect on United States domestic or import commerce. She found that plaintiff failed to demonstrate how the alleged price fixing and market sharing scheme in Europe had the prescribed effect here. *Id.*

United States. In *United States v. Aluminum Co. of America,*[37] the foreign aluminum producers imposed a quota on production and sale of aluminum, including restraints on imports into the United States. The OPEC price agreements referred to in *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*[38] clearly affected the price at which petroleum products would be sold here. Of course, the tightened scrutiny of conduct totally in foreign trade does restrict application of the antitrust laws and will probably change the results of some cases in which jurisdiction was found to exist under the old Sherman Act.[39]

The clarity of both the statutory language and the legislative history regarding the distinction between imports and other foreign commerce notwithstanding, there is a risk that the parenthetical phrase "(other than import trade or import commerce)" will be read out of the statute. It is fairly easy for the eye to skip to section 402(1)(A) in which the same words "import trade or import commerce" are used and for one to conclude that the direct, substantial, and reasonably foreseeable standard set forth in that subsection applies also to conduct involving import trade or import commerce.[40] When the introductory portion of section 402 and subsection (1) are read together, it is apparent that the codified effects standard of subsection (1) applies to conduct other than that involving import trade or commerce, i.e., to conduct involving export or totally foreign trade or commerce, that has the requisite effect on domestic trade or import or export trade. Section 402(1)(A) does not mean that the codified effects standard is to be used to review restraints on import trade or commerce. The somewhat confusing structure of section 402 and the fact that a careful reading of the section results in two separate regimes of subject matter jurisdiction, one for imports and one for all else, may cause courts to overlook the parenthetical and to apply the separate rules of section 402(1) and (2) to all foreign commerce cases.

While the fact of this dichotomy between imports on the one hand and all else on the other may be admitted, the line separating

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37. 148 F.2d 416 (2d Cir. 1945).

38. 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd.,* 649 F.2d 1354 (9th Cir.), *cert. denied,* 454 U.S. 1163 (1981).

39. See *infra* notes 41-44 and accompanying text for a discussion of recent cases, the outcome of which might be different if § 402 were applicable.

40. *See* B. HAWK, *supra* note 9, at 22 (Supp.).

the two is not bright. On the export and totally foreign commerce side, some points seem clear. Totally foreign activities will come under the restrictive provisions of section 402(1) and (2), as will conduct in export commerce. Hence, the outcome of recent cases such as *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*[41] and *Industrial Investment Development Corp. v. Mitsui & Co.,*[42] which involve essentially foreign activities having very little effect in the United States, and *Waldbaum v. Worldvision Enterprises, Inc.*[43] and *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co.,*[44] involving restraints in the export trade of the

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41. 404 F.2d 804 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1093 (1969). The defendants, United States corporations, were engaged in the business of carrying cargo between Taiwan and South Vietnam. The ultimate purchase of the cargo was financed by the Agency for International Development, which conditioned the financing on the use of American flag vessels and crews. The plaintiffs were United States companies with qualified vessels and crews which attempted to enter this market. The defendants excluded the plaintiffs from the shipping conferences and engaged in predatory pricing for the purpose of keeping the plaintiffs out of the Taiwan-South Vietnam market. The court found that jurisdiction existed under the Sherman Act. Arguably this case does not involve totally foreign trade, but rather the export trade in United States merchant marine services. *See id.* at 813; Bruce & Peirce, *supra* note 9, at 988-89 (discussion of *Pacific Seafarers*). This distinction is not important for § 402 purposes because the same standards apply to totally foreign or export commerce. *See* Shenefield, *supra* note 9, at 1119.

42. 671 F.2d 876 (5th Cir. 1982), *cert. denied,* 104 S. Ct. 393 (1983). In this case, plaintiff United States corporation sued defendants, a Japanese corporation, its United States subsidiary, and an unrelated Indonesian corporation, claiming that defendants conspired to prevent plaintiff from harvesting timber in Borneo and exporting it to the United States. Defendants controlled the logging rights and exported all of the timber to Japan. This conduct was totally foreign to the United States. However, because of it a competitor was prevented from potentially importing timber into the United States. The court found that jurisdiction existed under the Sherman Act. 671 F.2d at 884. *See* Bruce & Peirce, *supra* note 9, at 987-88 (discussion of *Industrial Investment*).

43. 1978-2 Trade Cas. (CCH) ¶ 62,378 (S.D.N.Y. 1978). The plaintiff, a South African film library, sued the defendant, a United States exporter of films, for block booking of films. The plaintiff was required to pay for films it did not want in order to obtain those it desired. The court denied the defendant's summary judgment motion made on jurisdictional grounds because the plaintiff had alleged that the tying arrangement had the effect of foreclosing other United States exporters from the South African market. *Id.* at 76,257; *see* Bruce & Peirce, *supra* note 9, at 993-94 (discussion of *Waldbaum*).

44. 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977). The plaintiff, the developer of an Italian oil refinery, sued the defendant, a United States corporation, alleging that the defendant conspired with Exxon's Italian crude oil distributor in violation of the Sherman Act. The defendant submitted a higher bid for the engineering services required by the refinery than that submitted by a competing United States company. In return for accepting this higher bid, the plaintiff would receive a favorable crude oil supply contract from Exxon's Italian crude oil distributor. The court held that jurisdiction existed, finding that the impact on United States commerce was shown by the allegation that the trade in the export of design and engineering services was restrained. *Id.* at 70,783-70,785; *see* Bruce & Peirce, *supra* note 9, at 993 (discussion of *Industria Siciliana*).

United States, may be different if section 402 had been applicable. In each of these cases the courts determined that it was appropriate to apply the antitrust laws despite a tenuous connection with or effect on United States foreign commerce.[45]

b. The Meaning of the "Conduct Involving" Requirement of Section 402 of the FTAIA

As section 402 states, all foreign commerce cases, except import cases, will be subject to the more rigorous scrutiny of subsections (1) and (2). The different treatment of import commerce from all other foreign commerce is a function of how broadly or narrowly the import trade category is construed. To make the distinction, courts will contrast the import trade aspects of a particular transaction with the totally foreign aspects.[46] To the extent that the import trade provision is broadly construed, conduct otherwise thought to be totally foreign, and thus subject to the more rigorous scrutiny of section 402(1) and (2), will be excluded from this scrutiny, and *vice versa*.

The language of section 402 allows this elasticity in the interpretation of the import trade provision. The introductory portion of section 402 provides that "[s]ection 1-7 of this title shall not apply to *conduct involving* trade or commerce (other than import trade or import commerce) with foreign nations unless . . . ."[47] The use of the words "conduct involving" as applied to the subject matter jurisdictional inquiry represents a change from prior law;[48] it is the other significant matter raised by the first of section 402's three substantive changes to the Sherman Act.

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45. *See* Shenefield, *supra* note 9, at 1119. The House Report noted that the statute would probably change the result of the *Pacific Seafarers* case because of the totally foreign character of the restraint. HOUSE REPORT, *supra* note 14, at 9-10. The Report notes the *Waldbaum* and *Industria Siciliana* cases in connection with its discussion of the various formulations of the effects test. *Id.* at 5.

46. The contrast will more likely be between the import aspects and the totally foreign, rather than between the import and export aspects, because most often the particular restraint will not include both exports and imports. *But see* notes 94-96 and accompanying text (discussion of restraints involving both imports and exports). Also, it would be rather difficult to interpret the facts of an import restraint as a restraint on exports and *vice versa*.

47. 15 U.S.C. § 6a (1982)(emphasis added). For an application of this same concept to export commerce, see *infra* notes 134-40 and accompanying text.

48. *See* Fugate, *The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act,* 15 VAND. J. TRANSNAT'L L. 673, 705 (1982). For example, in each of the four cases mentioned in notes 41-44 and accompanying text, jurisdiction was found because of some effect on United States export or import commerce, not because there was "conduct involving imports or exports."

The legislative history provides little guidance as to the contours of the "conduct involving" concept. It would appear, however, that the developed rationales used to support Sherman Act subject matter jurisdiction in the interstate commerce setting could provide a useful means for analyzing some of the dimensions of the "conduct involving" requirement. In the interstate commerce setting, the subject matter jurisdiction of the Sherman Act is said to encompass conduct either in the flow of interstate commerce or conduct affecting interstate commerce.[49] The latter includes conduct of intrastate nature having an effect on interstate commerce.[50] It is generally agreed that the foreign commerce clause of the old Sherman Act was approached in the same manner. The subject matter jurisdiction of the foreign commerce clause embraced both conduct in the flow of foreign commerce and conduct affecting foreign commerce.[51] The cases in the foreign commerce setting do not appear to dwell on the distinction. *United States v. Aluminum Co. of America* and the many cases applying its effects test,[52] concentrate on whether the conduct has the requisite effect in the United States or on United States commerce. Judge Hand in *Alcoa* did not consider whether subject matter jurisdiction existed because the restraints were on the flow of foreign com-

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49. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAWS ¶¶ 232-233 (1978); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 708-12 (1977); 16 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 4.03 (1985).

50. In McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980), petitioner sued respondents, who were real estate brokers, and their trade association transacting business in the greater New Orleans area, alleging that respondents' adherence to a fixed rate of brokerage commissions constituted a conspiracy to fix prices. Petitioners argued that the respondents activities were in the flow of interstate commerce because they assisted their clients in obtaining financing and title insurance for the purchase of residential real estate from sources outside Lousiana. Respondents moved to dismiss the complaint on jurisdictional grounds, contending that their activities were local in nature and did not substantially affect interstate commerce. The district court dismissed the complaint on the basis of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The dismissal was affirmed by the circuit court. The Supreme Court noted the breadth of Sherman Act jurisdiction under the "in the flow of" or "effect on" interstate commerce theories. The Court reversed the lower court, holding that to establish jurisdiction the plaintiff must allege, and if controverted prove, either that the defendant's conduct was itself in interstate commerce or, "if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain,* 444 U.S. at 242.

51. *See* 1 W. FUGATE, *supra* note 29, § 2.17; 1 E. KINTNER, *supra* note 29, § 7.4; L. SULLIVAN, *supra* note 49, at 714-15; 16 J. VON KALINOWSKI, *supra* note 49, § 5.01; Fugate, *supra* note 48, at 705; Rahl, *Foreign Commerce Jurisdiction, supra* note 30, at 523.

52. *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); *see also infra* notes 103-06 and accompanying text for cases applying the *Alcoa* effects test.

merce. He looked for an intended and actual effect in the United States.[53] Nevertheless, the conduct in the flow of commerce and conduct affecting commerce theories present useful devices with which to analyze the "conduct involving" concept.

Preliminarily it should be recognized that the parenthetical language "(other than import trade and import commerce)" is ambiguously positioned in the introductory sentence. Because the words "conduct involving" do not appear within the parenthetical, it is possible to construe the introductory portion of section 402 very broadly to mean that the Sherman Act does not apply to conduct involving foreign commerce, other than to *anything relating to* import trade or commerce, unless the requirements of subsections (1) and (2) are met. This construction is too broad and is unwarranted. The parenthetical is linked to the "conduct involving" concept. Hence, the introductory portion of section 402 should be construed to mean that the Sherman Act is inapplicable to *conduct involving* foreign commerce, other than to conduct involving import trade or commerce, unless the provisions of subsections (1) and (2) are met.

This reading leads directly to the question of what "conduct involving" means. It could mean only conduct or restrictive practices which are themselves in import trade or commerce, such as price fixing, tie-in, or reciprocal purchase agreements or market divisions made and implemented with respect to products or services being imported into the United States. Or it could include even local conduct or activities affecting the import commerce of the United States. If so, it is unclear whether the effect must be directly on import commerce or whether local conduct that impacts upon an enterprise engaged in import commerce is sufficient. If the "conduct involving" requirement is interpreted more broadly to include restraints affecting import commerce, as well as those in import commerce, conduct that

53. *Alcoa,* 148 F.2d at 444. There may be less reason to dwell on the distinction in the foreign commerce setting. The constitutional issues inherent in the interstate commerce clause and the resulting need to distinguish interstate from intrastate commerce are not present in the foreign commerce setting. This is especially so if the conduct in question occurred outside the United States. When the facts show conduct within the United States which is alleged to affect foreign commerce, the distinction between intrastate and foreign commerce raises the same constitutional issues. For a discussion of the applicability of § 402 to conduct within the United States having an effect on export commerce, see *infra* notes 134-40 and accompanying text.

otherwise might be considered totally foreign[54] might be brought into the import commerce side of the dichotomy.

The "conduct involving" requirement raises several related issues. It is unclear whether the requirement includes only restraints actually or presently affecting import commerce or if it includes conduct having a potential effect on imports as well. Also, is there a quantum threshold which must be met before the activity is deemed to be "conduct involving" import commerce?

The facts of *Timberlane Lumber Co. v. Bank of America*[55] can be used to consider these questions and to apply an analysis using the flow of commerce and affecting commerce theories. In this case, Timberlane attempted to establish a lumber operation in Honduras by purchasing the assets of a bankrupt company located there. The lumber was to be imported into the United States. The defendants included the principals of lumber companies engaged in business in Honduras, their financial supporter, Bank of America, and its employees. The defendants allegedly conspired to prevent Timberlane from operating its business, thereby preserving control of the Honduran lumber export business in the hands of interests tied to the Bank of America. Timberlane alleged numerous acts of the defendants in furtherance of this conspiracy. The defendants refused to settle the debts of Timberlane's bankrupt predecessor, which Timberlane had assumed and offered to settle; instead, they used a provision in the law of Honduras to obtain a court order embargoing Timberlane's business. In addition, the defendants caused the arrest of the manager of Timberlane's Honduras operations and published defamatory articles regarding Timberlane.[56]

Timberlane alleged that this conduct violated sections 1 and 2 of the Sherman Act as well as the Wilson Tariff Act.[57] The district court dismissed the complaint on act of state grounds and also because these activities had no direct and substantial effect on foreign commerce.[58] The circuit court, in the now well-known

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54. Conduct within the United States which affects import commerce could also be conduct involving import commerce under this broader variant. *See infra* notes 134-40 and accompanying text.

55. 549 F.2d 597 (9th Cir. 1976).

56. *Id.* at 604-05; *see* 1 J. ATWOOD & K. BREWSTER, *supra* note 3, §§ 6.10-.14. The authors note the similarity of these facts to those of American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

57. *See* 15 U.S.C. § 8 (1982).

58. *Timberlane,* 549 F.2d at 601.

opinion of Judge Choy,[59] vacated the dismissal and remanded the case. This opinion set forth a tripartite analysis for determining whether it is appropriate for a court to exercise jurisdiction to review under the antitrust laws conduct engaged in outside the United States.[60]

Much of the defendants' conduct in this case was of a local nature, confined to activities in Honduras, but was intended to affect, and apparently did affect, the business of an importer into the United States.[61] A court today considering a complaint alleging these facts as a basis of a cause of action for violation of the Sherman Act must determine whether, by reason of section 402, the Sherman Act is applicable. To assist in this determination the court might adapt the in the flow of or affecting commerce theories

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59. *See, e.g,* Gill, *Two Cheers for Timberlane,* 10 REVIEW SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE 3 (1980); Ongman, *"Be No Longer a Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope,* 71 NW. U.L. REV. 733 (1977); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns,* 77 COLUM. L. REV. 1247 (1977); Recent Developments, 18 HARV. INT'L L.J. 701 (1977).

60. The circuit court instructed the district court to consider whether it was appropriate to assume jurisdiction over the case according to a three-part test. The test requires a determination: (i) that there has been some effect, actual or intended, on United States foreign commerce; (ii) that there has been a burden or restraint sufficient to present a cognizable injury to the plaintiffs and consequently a violation of the antitrust laws; (iii) that the interests of, and links to, the United States, including the magnitude of effect on United States foreign commerce, are sufficiently strong *vis-a-vis* those of other nations to justify an assertion of extraterritorial authority. *Timberlane,* 549 F.2d at 613.

On remand, the district court applied this analysis and granted defendants' motion to dismiss for lack of subject matter jurisdiction. On the first element, it found an effect on United States commerce, although it was one barely above *de minimus.* On the third element, it found the balance to be in favor of Honduras. On the second, it found that Timberlane did not have standing because it suffered no corporate injury. Timberlane Lumber Co. v. Bank of Am., 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd,* 749 F.2d 1378 (9th Cir. 1984). This opinion on remand contains a more complete statement of facts than was available from the record on which Judge Choy's statement of facts was prepared. The district court on remand, when performing the balancing of interest analysis, employed all of the seven elements Judge Choy considered relevant. *See infra* note 156 (factors to be considered). The circuit court, in reviewing the district court judgment, made its own determination as to each of these elements. In its assessment, the interests in five of the seven indicated that jurisdiction ought not be exercised. The circuit court concluded that although there was some effect on United States commerce, it was insubstantial, and that enforcement of the antitrust laws would lead to a significant conflict with Honduran law and policy. *Timberlane,* 749 F.2d at 1384-86; *see* Messen, *Antitrust Jurisdiction Under Customary International Law,* 78 AM. J. INT'L L. 783 (1984).

61. It is unclear from the facts of *Timberlane* whether such conduct actually affected the import commerce of the United States. The facts as developed on remand show that Honduran lumber imported into the United States constituted only a miniscule portion of the United States lumber market. 749 F.2d at 1385.

from the interstate commerce setting, modifying them slightly so that they would apply to import commerce.

A court could thus inquire whether the conduct is in the flow of import commerce or whether it affects import commerce. In this foreign commerce setting a two step analysis would be required whereas, in the interstate commerce setting, only one step is required. In an interstate commerce case, if the court determines that the conduct is either in the flow of or affects interstate commerce, subject matter jurisdiction attaches. In the foreign commerce setting, the suggested in the flow of or affects import commerce tests are not subject matter jurisdiction tests. These tests, or whatever standards a court uses to determine whether the activities constitute "conduct involving" import commerce, are instead preliminary tests indicating which subject matter jurisdiction test is applicable. If a court following this approach determines that the conduct is neither in the flow of nor affects import commerce, it would then review the facts under the more rigorous standard of section 402(1) and (2). Alternatively, if the court determines that the conduct involves import commerce, because it is either in the flow of or affects import commerce, the court would apply one of the myriad effects tests[62] to determine if it could exercise subject matter jurisdiction. The answer to this preliminary question would probably dictate, however, the answer to the subject matter question, especially if the conduct is considered to affect import commerce.

Under the narrower flow of import commerce approach, the conduct in the *Timberlane* case probably would not be considered conduct involving imports because of its local character. Consequently, Sherman Act subject matter jurisdiction would exist only if the more rigorous requirements of section 402(1) and (2) were met. If the reviewing court were to apply the broader affects import commerce rationale, the facts might be deemed to fit within the "conduct involving" import commerce exception.[63]

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62. See *infra* notes 103-06 and accompanying text for a discussion of the effects tests.

63. On the facts of *Timberlane,* if the defendants were previously exporting their timber to the United States, it may be more difficult to demonstrate that the conduct meets even the affects imports test. The defendants' conduct in Honduras prevented Timberlane from participating in the Honduran timber export business. It is not sufficient to demonstrate that there was an effect on a participant in import commerce. Rather, it must be shown that the defendant's conduct has the requisite effect on import commerce. *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 3, § 6.08; Rahl, *American Antitrust, supra* note 30, at 6. If the defendants already were exporting from

The legislative history of the FTAIA does not address the "conduct involving" question. It offers no guidance as to whether the suggested in the flow of or affects import commerce analysis is appropriate. The ETCA and the FTAIA are primarily designed to free United States exporters from overly rigorous applications of the antitrust laws.[64] Yet, at the same time, there is a recognition that conduct affecting imports may adversely affect United States consumers, and consequently the laws must be applied more stringently in such cases.[65] Because United States consumers could be injured as much by local conduct clearly affecting imports as by conduct directly in import commerce, there is some basis for adopting the broader interpretation.

Yet to do so may raise the spectre of excessive application of the Sherman Act. This in turn provides the incentive for a narrower interpretation. On the facts of *Timberlane,* the conduct in question took place in a foreign country and was engaged in partially by nationals of that state. A narrow construction of the "conduct involving" requirement would avoid the potential embarrassment of applying United States law in such a situation. Using the broader affects import commerce approach in the "conduct involving" inquiry, but tempering its application with the balancing of state interest analysis suggested by *Timberlane,*[66] would likewise avoid potential embarrassment. Because of the dichotomy of foreign commerce in the introductory portion of section 402, a broad interpretation of "conduct involving" import commerce narrows correspondingly the application of section 402's more rigorous scrutiny. There may be an incentive to narrowly construe the "conduct involving" element in order to give the

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Honduras and into the United States, arguably Timberlane's absence, though caused by defendants, did not affect imports. In Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972), the defendant unsuccessfully made a similar argument. This case involved a dispute over certain oil concession rights. The defendant argued that there was no effect on United States commerce because it, like the plaintiff, intended to import the oil into the United States. Accordingly, there was no subject matter jurisdiction because the affecting foreign commerce element was lacking. The court rejected this argument, noting that "[w]hen control of an item in commerce is wrested from one competitor to another, the commerce of the article is to that extent 'affected' regardless of the ultimate disposition of the commodity." 331 F.Supp. at 103 n.5. This language equates an effect on a competitor with an effect on competition.

64. *See supra* notes 14-17 and accompanying text for further discussion of the legislative history of the FTAIA.

65. *See, e.g.,* HOUSE REPORT, *supra* note 14, at 9.

66. For a discussion of the balancing of state interest analysis employed by the *Timberlane* courts, see *supra* note 60 .

participants the advantage of section 402 when the activities in question involve American participants. However, the legislative history demonstrates a desire to assist only the export activities of American companies.[67]

Recent decisions of the Supreme Court involving Sherman Act subject matter jurisdiction under the interstate commerce clause suggest a basis for arguing that the broader affecting import commerce approach is an appropriate interpretation of the "conduct involving" element. The affecting interstate commerce theory evolved to avoid the rigidity of the in the flow of commerce requirement and to thereby better effect the purpose of the Sherman Act.[68] The same could be said of the affecting import commerce rationale. There have been numerous Supreme Court opinions dealing with this issue. *Hospital Building Co. v. Trustees of Rex Hospital*[69] is one of the recent ones.[70]

The facts in *Hospital Building Co.* are similar to those in *Timberlane*. Petitioner and respondent were corporations engaged in the business of operating hospitals in Raleigh, North Carolina. Petitioner intended to move and expand its facility. The complaint alleged that respondent Trustees, several individual respondents, and others conspired to block this relocation. Respondents allegedly conspired to delay and, if possible, block the issuance of the necessary state authorization for the planned expansion. After the authorization was received, respondents continued their obstructionist activity by such tactics as the institution of frivolous litigation and publication of adverse information regarding the expansion.

Petitioners alleged that these actions were taken to restrain and monopolize the trade in hospital service in the Raleigh area in violation of sections 1 and 2 of the Sherman Act. Petitioner identified several aspects of interstate commerce adversely effected by respondents' anticompetitive conduct, including the percentage

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67. In this regard Rep. McClory's statement to the effect that imports do not require the aid of the more rigorous rules of § 402 is pertinent. *See supra* note 35 (further discussion of House Report and Rep. McClory's statement regarding FTAIA).

68. *See* 1 P. AREEDA & D. TURNER, *supra* note 49, ¶ 232; L. SULLIVAN, *supra* note 49, at 708-14.

69. 425 U.S. 738 (1976).

70. *See also* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); Burke v. Ford, 389 U.S. 320 (1967); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948). *See generally* 1 W. FUGATE, *supra* note 29, § 2.9.

of its supplies purchased from out-of-state sources, the number of patients coming from other states, the proportion of petitioner's revenue coming from out-of-state insurance companies and governmental agencies, the amount of the management fee based on revenues paid to its parent, an out-of-state corporation, and the amount of the financing for the expansion expected from out-of-state lenders.[71]

The district court dismissed the complaint in part because petitioner failed to state the requisite effect on interstate commerce.[72] The circuit court affirmed the dismissal, holding that the allegations were inadequate to support a conclusion that the conduct was either in or would have a substantial effect on interstate commerce.[73] The Supreme Court reversed, stating that the interstate commerce nexus for Sherman Act jurisdiction can be met by wholly local restraints which substantially and adversely affect interstate commerce. The Court explained that if interstate commerce "feels the pinch it does not matter how local the operation which applies the squeeze."[74] The Court reviewed the allegations in the complaint and determined that if respondents succeeded in blocking the hospital, petitioner's volume of out-of-state supply purchases, revenues, and management fees would be different than if the expansion were completed, and that the out-of-state financing would not be used at all if completion of the hospital was blocked. The Court concluded that this combination of factors established a substantial effect on interstate commerce.[75] The circuit court had based its affirmance of the dismissal in part on the indirect effect on interstate commerce presented by the facts, finding that the effect was merely a consequence of the intrastate restraint in the Raleigh area.[76] The Supreme Court concluded that conduct not directed at interstate commerce can be deemed to affect interstate commerce if it alters substantial patterns of interstate commerce.[77]

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71. Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 739-41 (1976).

72. Hospital Building Co. v. Trustees of Rex Hospital, 511 F.2d 678, 680 (4th Cir. 1975)(en banc).

73. *Id.* at 684.

74. *Hospital Building Co.*, 425 U.S. at 743 (quoting Gulf Oil Corp. v. Copps Paving Co., 419 U.S. 186, 195 (1974); United States v. Womens' Sportswear Ass'n, 336 U.S. 460, 464 (1949)).

75. *Id.* at 744.

76. *Hospital Building Co.*, 511 F.2d at 684.

77. *Hospital Building Co.*, 425 U.S. at 744. The Supreme Court in McLain v. Real

Following this reasoning, it could be argued that even fairly local conduct directed at a participant in the market could be deemed to be conduct affecting import commerce and thereby "conduct involving" import commerce. If, because of the defendant's activities, the import commerce aspects of a plaintiff's business are different than they would be otherwise, and these aspects are substantial, then on the rationale of *Hospital Building Co.*, the defendant's conduct would be "conduct involving" import commerce.

Likewise, by analogy to *Hospital Building Co.*, a plaintiff probably ought not be required to demonstrate, as part of the "conduct involving" inquiry, that a defendant intended to affect import commerce.[78] The circuit court's view of the facts in that case led it to conclude that the conspiracy did not have a substantial effect on interstate commerce because the conduct was directed at intrastate commerce.[79] The Supreme Court specifically found that conclusion unwarranted. It held that purpose or intent to affect interstate commerce is not necessary. It is sufficient, according to the Court, to demonstrate that the conduct impacts on a business activity which has substantial interstate commerce aspects.[80]

Also, a plaintiff probably need not demonstrate that a defendant's conduct had an actual effect on import commerce. It should be sufficient to show that the import commerce aspects surrounding a plaintiff's business would be different, and substantially so, in the absence of a defendant's anti-competitive conduct. Cases in the past have entertained Sherman Act jurisdiction on the basis of potential effects on foreign commerce.[81] The Supreme Court

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Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980), applied the same approach and relied in part on *Hospital Building Co.* to support its finding that the fixed commissions there in question constituted a restraint affecting interstate commerce. The facts of this case are stated in note 50, *supra*. Professor Rahl, in presenting his thesis that the Sherman Act covers all conduct occurring in the course of foreign commerce, makes this same point. He notes that the effect need not be adverse in the sense that the volume of commerce must be reduced. He believes that the commerce must "in some way be distorted from the path it would take if competition were not illegally interfered with." Rahl, *Foreign Commerce Jurisdiction, supra* note 30, at 524.

78. The facts of *Timberlane* do evidence some intent. Defendants in that case attempted to keep Timberlane out of the market of exporting timber out of Honduras and into the United States. Likewise, probably in most cases an intent to affect plaintiff's import business could be shown.

79. *Hospital Building Co.*, 511 F.2d at 684.

80. *Hospital Building Co.*, 425 U.S. at 745.

81. Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 393 (1983); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949). *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 3, § 6.08.

cases, by analogy, support a continuation of that approach. In *Hospital Building Co.*, the defendant's conduct resulted in a distortion of the future course of interstate commerce. Because of this conduct the out-of-state financing would not be required, there would be no expansion and, hence, no increase in purchases of supplies, billings to insurance carriers, or patients from out-of-state.[82]

More importantly, the distinction between actual and potential effects on commerce is vague in this context. In many instances a defendant's conduct has aspects of both. In *Hospital Building Co.* the present, actual effect of the defendants' conduct was to prevent a change in the interstate aspects of the plaintiff's business. Had it not been for the defendants' activities, the expansion of the hospital would have taken place; this would have resulted in the changes in volume and types of interstate commerce stated by plaintiff. Likewise, in *Timberlane* the present effect of the defendants' conduct was to prevent Timberlane from engaging in business in Honduras. The present effect distorted import commerce from what it might have been otherwise.

It does appear that a certain quantum of impact on import commerce would be required under the conduct affecting import commerce variant of "conduct involving." This issue was never clearly resolved under the old Sherman Act. There is support for the proposition that the quantum of effect on foreign commerce is irrelevant to the subject matter jurisdiction issue and goes only to the reasonableness of the conduct.[83] Some cases have formulated the *Alcoa* effects test to authorize jurisdiction when there is any effect on foreign commerce beyond a purely *de minimus* one.[84] However, the more usual formulation of the *Alcoa* effects test is that there must be at least a "substantial" or "appreciable" effect on foreign commerce.[85]

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82. *Hospital Building Co.*, 425 U.S. at 744. This opinion merely reviews the adequacy of the pleadings. The opinion does not pass on the sufficiency of the proofs of effect on interstate commerce. The case was remanded, and was tried. Plaintiff Hospital Building Company was awarded a treble damage judgment at trial, which was reversed on appeal. The jurisdictional issue was not raised on appeal. 691 F.2d 678 (4th Cir. 1982).

83. *See, e.g.*, 1 E. KINTNER, *supra* note 29, § 7.4; L. SULLIVAN, *supra* note 49, at 710 & 714.

84. *See, e.g.*, Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 483 F. Supp. 680 (S.D.N.Y. 1979); Todhunter-Mitchell & Co. v. Anheuser-Bush, Inc., 383 F. Supp. 586 (E.D. Pa. 1974).

85. *See, e.g.*, National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

The line of Supreme Court cases from the interstate commerce setting clearly requires that the effect be substantial to support jurisdiction under the affects commerce rationale.[86] This requirement does force courts to engage in line-drawing with respect to degrees or quantum of effects. This same difficulty would attend use of the effect on import commerce rationale. In an attempt to ease this burden, the Supreme Court has been willing to consider the issue of substantiality in a practical economic sense rather than only as a matter of assessing dollar volume or percentages.[87]

If a substantial effect on import commerce requirement is read into the affecting import commerce variant of "conduct involving," one element of the section 402(1) codified effects standard—substantial effect—would also be used in the "conduct involving" determination. In the interstate commerce setting the substantial effect element for subject matter jurisdiction is satisfied if the restraint affects a substantial amount of interstate commerce; the restraint itself need not be substantial.[88] In the foreign commerce setting, however, the substantial effects standard generally has required that the restrictive practice itself have a substantial effect.[89] To the extent that there is a meaningful distinction between the two, the foreign commerce version of substantial effects should be used for the "conduct involving" inquiry. It

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86. *See, e.g.,* Hospital Building Co. v. Trustees of Rex Hospital, 511 F.2d 678 (1975); Rassmussen v. American Dairy Ass'n, 472 F.2d 517 (9th Cir.), *cert. denied,* 412 U.S. 950 (1973); *see* 16 J. VON KALINOWSKI, *supra* note 49, § 4.03.

87. *See* Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 745 (1975); Goldfarb v. Virginia State Bar, 421 U.S. 773, 784 n.11 (1975); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954).

88. In McLain v. Real Estate Bd. of New Orleans, Inc., the Supreme Court noted that it was sufficient for petitioners "to demonstrate a substantial effect on interstate commerce generated by the real estate agents' brokerage activity." 444 U.S. 232, 241-42 (1980). It was not necessary for petitioners to show that the conspiracy to fix real estate commissions itself had a substantial effect on interstate commerce. *See* 1 W. FUGATE, *supra* note 29, § 2.9; *see also* Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 743 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975); L. SULLIVAN, *supra* note 49, at 710.

89. *See, e.g.,* Report of the Attorney General's National Committee to Study the Antitrust Laws 76 (1955)("We feel that the Sherman Act applies only to those arrangements . . . which have such substantial anti-competitive effects on this country's trade or commerce . . . with foreign nations as to constitute unreasonable restraints."); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) [hereinafter cited as RESTATEMENT (SECOND)]; B. HAWK, *supra* note 9, at 35-39. Professor Rahl's thesis that the Sherman Act applies to conduct in or having a substantial effect on commerce (*see infra* notes 91 and 136) would support a broader reading of the substantial effect requirement, comparable to the approach in the interstate commerce cases.

would be confusing to use both versions, one for "conduct involving" purposes and the other for the effects test. Ultimately the foreign commerce version would be used either as part of the codified effects standard for export or totally foreign conduct or under many versions of the *Alcoa* standard for import cases.

It is less clear whether a substantial effect on import commerce would be required under the conduct in the flow of import commerce variant. Anticompetitive conduct in the flow of interstate commerce triggers Sherman Act jurisdiction without a need to demonstrate any effect on interstate commerce. Such conduct, because it is in commerce, must affect commerce.[90] Similarly, conduct in the flow of import commerce could be considered "conduct involving" import commerce without a showing of effect.[91] The analogy to the interstate commerce cases may not be apt here. The in the flow of interstate commerce analysis is the subject matter test. The "conduct involving" inquiry is a preliminary one, designed to determine the applicable subject matter test. Because a showing of at least some, but usually a substantial, effect will be required under the various subject matter jurisdiction tests, there is reason to require the same showing at the preliminary "conduct involving" inquiry. By so doing the futile exercise of determining that the conduct is "conduct involving" import commerce, and then that the quantum of effect on United States commerce is not sufficient to support jurisdiction, will be avoided.

The parameters of the "conduct involving" exception to section 402 are uncertain at this point. Certainly this concept will include anti-competitive conduct in import commerce, such as market divisions or price fixing with respect to goods or services being imported. It probably also will include local conduct engaged in for the purpose of affecting imports. If interpreted more broadly it also could include local conduct directly impacting upon import commerce.

Extending the concept to this last type of activity clearly requires careful line drawing by the courts. For example, if a domestic competitor of Timberlane engaged in an anticompetitive practice

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90. *See* L. SULLIVAN, *supra* note 49, at 708 (discussion of meaning of commerce).

91. Professor Rahl argues, analogously to the interstate commerce cases, that if the conduct occurs as part of a transaction itself in export or foreign commerce there is no need to prove effect. The substantial and direct effect elements in the jurisdictional inquiry are relevant only in those cases in which the conduct is not in the flow of, but affects, foreign trade. Rahl, *Foreign Commerce Jurisdiction, supra* note 30, at 523.

in this country directed at Timberlane's business here, that practice might reduce Timberlane's profitability. A less profitable Timberlane may be a less viable competitor in the import sector because its volume of imports could be curtailed or the price of its products could be higher. Consequently, the domestic anticompetitive practice may have some impact on import commerce. This conduct should not be construed to fall within the "conduct involving" import concept. However, the defendants' conduct as stated in the *Timberlane* opinion[92] was clearly directed at Timberlane's import business, even though local in character. The conduct could, under a broad reading of conduct affecting import commerce, fit within the "conduct involving" concept. Extension of the concept to cover conduct like that described in *Timberlane* or *Hospital Building Co.* is not too strained an expansion. The defendants in those cases reasonably should have recognized that one consequence of their activities would be to adversely affect plaintiff's import business. Such an expansion has the advantage of not limiting section 402 to conduct in the flow of import commerce and to those cases in which the plaintiff can meet the difficult burden of proving that the defendant intended to affect imports.[93]

Section 402's narrowing of the ambit of Sherman Act applicability by creating an import or all else dichotomy, raises other issues.

Restraints can involve both imports and exports. For example, if United States and foreign producers agreed upon a world-wide market division, allocating the United States market to the United States companies in exchange for their forbearance in certain foreign markets, the arrangement would affect both imports and exports. Presumably an agreement among the United States participants to allocate only foreign markets would affect only exports and thus would be analyzed under the separate rules of section 402(1) and (2). A competitor of the participants to this

92. *See supra* notes 55-56 and accompanying text for the facts of *Timberlane.*

93. The difficulty in proving intent has led courts to employ the "general intent" concept whereby intent is proven from conduct. *See infra* note 113 and accompanying text (courts employing general intent). Under this rationale the conduct in *Timberlane* could be said to prove intent to affect imports. If courts are not free to examine the conduct, and deduce from it a motive, the "conduct involving" concept would be limited to conduct in the flow of import commerce, and perhaps to cases of specific intent to affect imports. If, alternatively, they are free to examine conduct, they ought to be able to do so both for the purpose of divining intent and to take into account the factual consequences of the conduct, its impact on import commerce.

latter export allocation could recover only if it could prove injury to its United States businesses.[94] A world wide market allocation, however, may keep prices high in the United States and elsewhere. Because the arrangement would affect prices of goods sold in the United States, it would affect imports. This arrangement would resemble a classic international territorial cartel. The legislative history of the FTAIA contains some consideration of this type of an arrangement. Concern was expressed that the proposed legislation, which became section 402, would sanction participation in such an arrangement by United States companies.[95] The House Judiciary Committee considered this point and resolved it pragmatically by concluding that such cartels would likely have the effect here required by the codified effects standard. Instead of determining whether such arrangements are to be governed by import or export standards, Congress concluded that the effects of such cartels would violate the export commerce standard.[96] Obviously, this conclusion supports the interpretation that such conduct is governed by section 402.

c. The Second Revision: The Articulation of a Statutory Standard for Determining the Jurisdictional Reach of the Sherman Act

As codified in section 402(1), the Sherman Act shall not apply to conduct involving trade with foreign nations, other than import trade, unless such conduct "has a direct, substantial and reasonably foreseeable effect"[97] on either domestic trade,[98] import trade, or the export trade of a person engaged in such trade in the United States.

This codification of a jurisdictional standard fulfills the second purpose of the FTAIA.[99] The codification presents businesspeople

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94. *See* HOUSE REPORT, *supra* note 14, at 10.

95. *1981 Hearings, supra* note 6, at 46.

96. HOUSE REPORT, *supra* note 14, at 13. Professor Hawk contends that cartels having an effect on United States import or domestic commerce would be excluded from the FTAIA. B. HAWK, *supra* note 9, at 22 (Supp.). For a discussion of whether § 402 takes precedence over domestic standards for conduct having an effect on interstate and export commerce, see *infra* notes 134-40 and accompanying text.

97. 15 U.S.C. § 6a(1)(A) & (B) (1982).

98. The phrase in § 402(1)(A) "on trade or commerce which is not trade or commerce with foreign nations" must refer to domestic commerce. *Id.* § 6a(1)(A). Although this language is somewhat indirect, it is accurate. So long as the effect is on some category of trade which is not foreign trade, that is domestic interstate or intrastate trade, this portion of the test is met. *See* Fugate, *supra* note 48, at 705.

99. *See* HOUSE REPORT, *supra* note 14, at 6.

and attorneys with an explicit standard against which to assess whether certain conduct will trigger application of the Sherman Act. Such certainty previously has existed as a practical matter with respect to the public enforcement of the antitrust laws by the Justice Department. In the 1977 Guides for International Operations, the Justice Department clearly stated that the antitrust laws should be applied to overseas transactions when there is a "substantial and foreseeable effect on United States commerce."[100] Although it recognized that this enforcement guide could be relied on, Congress was concerned with private enforcement. It believed that the various formulations of the jurisdictional standard made planning problematic.[101] Judge Hand's intent, coupled with some effect on United States commerce standard, as articulated in *Alcoa,*[102] has been reformulated in myriad ways. Among other variants, it has become an effects only test,[103] a direct or substantial effects test,[104] a direct and substantial effects test,[105] and a some effects, regardless of whether they are intended or substantial, test.[106] Accordingly, some legislative guidance seemed appropriate.

Congress did not believe that the codified standard represented a significant departure from the law as articulated in the cases

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100. U.S. Department of Justice, Antitrust Division, Antitrust Guide for International Operations 6 (1979) [hereinafter cited as Antitrust Guide]; *see* Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations,* 11 CORN. INT'L L.J. 215 (1978).

101. HOUSE REPORT, *supra* note 14, at 6 & 9.

102. 148 F.2d 416, 443 (2d Cir. 1945).

103. *See* Sabre Shipping Corp. v. American President Lines, 285 F. Supp. 949 (S.D.N.Y. 1968), *cert. denied sub nom.* Japan Line, Ltd. v. Sabre Shipping Corp., 407 F.2d 173 (2d Cir.), *cert. denied sub nom.* Japan Line, Ltd. v. Sabre Shipping Corp., 395 U.S. 922 (1969).

104. *See* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972).

105. *See* United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962); United States v. General Elec. Co., 115 F. Supp. 835 (D.N.J. 1953); United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), *aff'd & modified,* 341 U.S. 593 (1951).

106. *See* National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). For a fairly complete listing of the variant forms of the jurisdictional standard, see *1981 Hearings, supra* note 6, at 224-27 (Statement of American Bar Association, Section of Antitrust Law); *see also* HOUSE REPORT, *supra* note 14, at 5; 1 J. ATWOOD & K. BREWSTER, *supra* note 3, §§ 6.07-.08; 1 E. KINTNER, *supra* note 29, § 7.4.

Because the cases do not assess the facts against several variations of the standard, it is uncertain whether these different formulations contribute to different results; that is, whether jurisdiction would be found if a vaguer standard were employed. *See* 1 E. KINTNER, *supra* note 29, § 7.4 (concluding that they do not); *1981 Hearings, supra* note 29, at 227 (Statement of American Bar Association, Section of Antitrust Law)(same).

and the Antitrust Guide. Instead, the House Report described the standard as a clarification of existing law and practice.[107] The codified standard combines the elements previously used into an inclusive test, consisting of three separate elements: the effect must be direct, substantial, and reasonably foreseeable.[108]

Because the standard consists of three separate elements, reasonable foreseeability would probably be satisfied by proof of the reasonable foreseeability of any effect of the conduct on the listed categories of commerce. Proof that the direct and substantial consequences of the conduct were reasonably foreseeable probably is not required. There is little explication of the direct[109] and substantial elements of the standard in the legislative history. The prior case law continues to be applicable in their interpretation.

The reasonable foreseeability element is discussed in some detail in the legislative history. The intent standard was not used because of its inherent subjectivity and focus on assessment of motive.[110] Instead, because of these perceived defects in the intent standard, the legislation employs what was thought to be a more objective standard.[111] It is somewhat difficult then to accept the conclusion that this codified standard is a mere clarification of past law. Whether, as a practical matter, application of the new standard will result in cases being decided differently than they would have been under the intent element remains to be seen. Conceptually the two are quite different.

The House Report describes the reasonably foreseeable element as a variant of the reasonable person standard. "The test is whether the effects would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown."[112] The difficult burden of proof in the subjective intent test has led some courts to employ the general intent principle. Under this standard, intent can be proven from

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107. HOUSE REPORT, *supra* note 14, at 2-3. Some commentators also believe that the § 402 standard represents little if any change from prior law and practice. *See* B. HAWK, *supra* note 9, at 22 (Supp.); Shenefield, *supra* note 9, at 1119.

108. Hence, conduct having a direct and very substantial effect on United States commerce, but somehow not a reasonably foreseeable effect, would not trigger application of the Sherman Act under this standard.

109. For a discussion of the direct effect element, see Golden & Kolb, *supra* note 9, at 784; Swan, *supra* note 9, at 212-13.

110. HOUSE REPORT, *supra* note 14, at 9.

111. *Id.* at 2.

112. *Id.* at 9.

conduct because one naturally intends the consequences following from conduct.[113]

The reasonable foreseeability test of section 402(1) is somewhere between the general intent test and the specific intent standard, but more toward the latter. The reasonable foreseeability test is not a superfluous element in the standard. Proof of direct and substantial effect would not prove reasonable foreseeability, as they would intent under the general intent principle. Perhaps this is an additional advantage to the reasonable foreseeability formulation. The concept of reasonable foreseeability gets at something different from intent. The direct and substantial elements do not so immediately relate to it as they do to intent. Therefore, proof of the first two elements is less likely to be deemed to satisfy the third.

Undoubtedly, however, proof of the direct and substantial consequence of the practice will be used to inform the reasonable foreseeability element. The more direct and substantial the effect, the more likely that the reasonable person would have foreseen it. Nevertheless, proof of actual intent to affect United States commerce is not required under this element. Instead it is sufficient for a plaintiff to show that the reasonable person exercising practical business judgment would have realized that the conduct would have an effect on United States commerce.

Although Congress believed that the reasonable foreseeability element would simplify the standard and make it more certain, this change is not without cost. The reasonable foreseeability element, by Congress's own interpretation, is an adaptation of the familiar tort and corporate law reasonable person standard. It is likely that use of this element has added a different variable into the jurisdictional question. The same subjectivity and difficult burden of proof aspects of the intent standard may have been its advantage. Because of these factors, a successful jurisdictional challenge, based on lack of intent, may have been less likely.[114]

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113. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161 (E.D. Pa. 1980); Fleishman Distilling Corp. v. Distillers Co., 395 F. Supp. 221 (S.D.N.Y. 1975); Sabre Shipping Corp. v. American President Lines, 285 F. Supp. 949 (S.D.N.Y. 1968), *cert. denied sub nom.* Japan Line, Ltd. v. Sabre Shipping Corp., 407 F.2d 173 (2d Cir.), *cert. denied sub nom.* Japan Line, Ltd. v. Sabre Shipping Corp., 395 U.S. 922 (1969). *See generally* 1 J. ATWOOD & K. BREWSTER, *supra* note 3, at §§ 6.07-.08.

114. In Fleischman Distilling Corp. v. Distillers Co., 395 F. Supp. 221, 226-27 (S.D.N.Y. 1975), the court concluded that an allegation of conspiracy to restrain United States trade should satisfy the intent requirement at the pleading stage, because an

Intent would be easy to prove, especially under the general intent principle. The reasonable foreseeability element, because of its familiarity, may provide defendants with a more fertile ground on which to challenge jurisdiction.[115]

The reasonable foreseeability element makes the time of measurement critical. Assume that a defendant engages in an anticompetitive practice having a direct and substantial, but initially unforeseeable, effect, and that the practice continues for some period of time. After several months, as evidence of the consequences of the restraint mounts, the question of its reasonable foreseeability may be different from that at the beginning of the period. If the court finds that initially the effect was not reasonably foreseeable, but that it was reasonably foreseeable after a period of six months, the section 402(1) standard would be met at the end of six months and the Sherman Act would be applicable from that point forward. There would not be subject matter jurisdiction with respect to the conduct occuring prior to that time.[116] Obviously, the same point can be made as well with respect to the direct and substantial elements of the standard. A practice having a direct and foreseen effect, but initially an insubstantial one, would not trigger application of the Sherman Act. The jurisdictional standard would be met as soon as the effect became substantial. This point seems to be more critical with respect to the reasonable foreseeability element because of the relative ease with which a challenge can be made on the grounds of reasonable foreseeability.

There are several other related points to be made regarding the section 402(1) jurisdictional standard. The section 402(1) standard is intended to play a limited role. The House Report clearly states that this standard merely sets forth the threshold

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allegation of conspiracy contains an implicit claim of intent. In Sanib Corp. v. United Fruit Co., 135 F. Supp. 764, 766 (S.D.N.Y. 1955), the court held that an agreement between United Fruit and its subsidiaries to terminate supplies to plaintiff's Honduran plant, thereby preventing plaintiff from importing into the United States, "obviously was intended to, and in fact did, affect the interstate and foreign commerce." It is difficult to find cases in which the complaint was dismissed for lack of subject matter jurisdiction. *See* B. HAWK, *supra* note 9, at 35; Griffin, *supra* note 100, at 227. However, more recently this has happened. See the cases cited in note 121.

115. Certainly in many cases proof of anticompetitive conduct and the substantial consequences of it will show purpose or at least reasonable foreseeability. Moreover, if the reasonable foreseeability element requires, as is suggested, only a showing that any effect was reasonably foreseeable, it may be fairly easy for plaintiff to establish this element of the standard.

116. *See* House Report, *supra* note 14, at 9.

subject matter jurisdictional test for export and totally foreign commerce cases.[117] A plaintiff's showing of a direct, substantial, and reasonably foreseeable effect merely enables the court to take cognizance of the case. Proof of these elements does not prove the substantive violations of the statute. With respect to a section 2 monopolization case, the section 402(1) standard could not prove the case because the elements of the cause of action differ from the section 402 standard. In the rule of reason cases, care must be taken not to meld the jurisdictional standard and the substantive elements of plaintiff's case.[118] Proof of the direct, substantial, and reasonably foreseeable effect does not prove the reasonableness of the restraint.[119] It is clear from both the statutory language and the legislative history that meeting the jurisdictional standard does not constitute proof of the substantive violation. There is a lack of clarity, however, as to whether a proffer of proof of a substantive violation is necessary to satisfy the jurisdictional standard. Subsection 402(2) raises this concern.

The structure of section 402(1) and (2) requires the interpretation that two separate conditions must be met before subject matter jurisdiction can be exercised. First, the subsection (1) codified effects test must be met, and second, the direct, substantial and foreseeable effect found under subsection (1) must "[give] rise to a claim under the provisions of sections 1 through 7 of this title [the Sherman Act], other than this section."[120] Subsection (2) was added to make it explicit that conduct involving beneficial effects is not subject to the antitrust laws.[121] Congress was con-

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117. HOUSE REPORT, *supra* note 14, at 11; *see also* 128 CONG. REC. H4981 (daily ed. Aug. 3, 1982).

118. *See* 1 W. FUGATE, *supra* note 29, § 5.2.

119. *Id.* Mr. Fugate argues that once the jurisdictional test has been met, the quantum of the effect has no bearing on whether the practice constitutes a reasonable or an unreasonable restraint of trade.

120. 15 U.S.C. § 6a(2) (1982).

121. HOUSE REPORT, *supra* note 14, at 11. Reference is made in the House Report to National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981). In that case, National Bank of Canada instituted an action in the federal district court for the Southern District of New York to enjoin Interbank Card Association and Bank of Montreal from implementing a plan by which National Bank's Master Card credit card business would be discontinued. The circuit court affirmed the district court's dismissal of the complaint. It concluded that there must be some showing of an anticompetitive effect of the conduct in the United States before subject matter jurisdiction could be asserted. *Id.* at 8. A similar conclusion was reached in Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981), *cert. denied,* 455 U.S. 1001 (1982); *see also* Eurim-Pharm. Gmbh v. Pfizer, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,208 (S.D.N.Y. 1984).

cerned that if the jurisdictional standard of subsection (1) was stated without this qualifying language, the standard would be susceptible to the expansive reading that conduct having no anticompetitive effect in the United States, or even having a pro-competitive effect here, would be reviewable under the Sherman Act.[122] Such an interpretation may give rise to an even more expansive extraterritorial jurisdiction, to the consternation of our trading partners. It may also be inconsistent with the theory of international law that a state has a right to assert its jurisdiction over conduct having an effect within its territory that is harmful or that constitutes an element of crime.[123]

The use of the word "effect" in section 402(2), in conjunction with the subsection (1) requirement that conduct have a direct, substantial, and foreseeable effect, may result in a reading of the "giving rise to a claim" language as requiring or allowing a court to review the reasonableness of the effect at the jurisdictional stage. It would be more appropriate if a court merely would consider whether the effect on United States commerce results from an activity typically considered to give rise to an antitrust violation, such as price fixing or tie-in. Had subsection (2) been phrased in parallel language to subsection (1), e.g., "such *conduct*

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122. *1981 Hearings, supra* note 6, at 259 (Statement of the American Bar Association Section of International Law, at 9).

123. In *Alcoa,* Judge Hand stated, "it is settled law . . . that any state may impose liability even upon persons not within its allegiance for conduct outside its border that has consequences within its borders, *which the state reprehends.*" (emphasis added). United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945). The Restatement (Second) provides that:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
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> (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 having reasonably developed legal systems.

RESTATEMENT (SECOND), *supra* note 89, § 18. *See generally* Haight, *International Law and Extraterritorial Application of the Antitrust Laws,* 63 YALE L.J. 639 (1954); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws,* 33 BRIT. Y.B. INT'L L. 146 (1957). *But see* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402(1)(c) (Tent. Draft No. 6 1985) [hereinafter cited as RESTATEMENT (REVISED)].

[having a direct, substantial, and foreseeable effect] gives rise to," it would more readily lend itself to this limited inquiry.[124]

Although the purpose of section 402(2) is clear, it is less certain whether the subsection adds anything not covered by prior law or other provisions of section 402. Under the old version of the Sherman Act it would be difficult to find a case in which a court assumed jurisdiction over conduct that did not have anticompetitive consequences for United States commerce.[125] In the cases usually considered to be at the outer limit of jurisdiction, the courts have strained to find an anticompetitive effect on United States commerce in order to justify jurisdiction.[126] To the extent that an anticompetitive effect is constructed, section 402(2) would be satisfied. Moreover, it is unlikely that a court would conclude that the codified effects standard was satisfied by a showing of only procompetitive effects.

The absence of any statement in section 402 regarding the balancing of interest or comity analysis raises a final point regarding the jurisdictional test of section 402. Section 402 stands as a complete statement of the subject matter jurisdiction of the

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124. The second element of the *Timberlane* tripartite analysis is similar to § 402(2). "[A] greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to plaintiffs and, therefore, a civil violation of the antitrust laws." Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976). This element is contrasted to the first which requires only a showing of some effect on foreign commerce. Professor Hawk raises the same concern with respect to the second element of the *Timberlane* test as is expressed here regarding § 402(2). B. HAWK, *supra* note 9, at 43. Judge Choy modified this second element later in the *Timberlane* opinion to mean that the effect need be only of a type cognizable as a violation. "We conclude, then, that the problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?" *Timberlane,* 549 F.2d at 615. This latter formulation is more compatible with the suggested interpretation for § 402(2).

Section 402(2) is part of the subject matter jurisdiction determination. The precise role of the comparable provision in the *Timberlane* analysis is not clear. Atwood and Brewster believe that Judge Choy considered the second element to bear on the substantive scope of the Sherman Act, rather than on the subject matter jurisdiction question. 1 J. ATWOOD & K. BREWSTER, *supra* note 3, § 6.13.

125. *But see infra* note 136 and accompanying text (discussion of significance of place of conduct).

126. In Dominicus Americana Bohia v. Gulf & Western Indus., Inc., 473 F. Supp. 680 (S.D.N.Y. 1979), for example, the plaintiff alleged that the defendants, a United States corporation and the Dominican Republic's Tourist Information Center, conspired to monopolize the tourist facilities in one part of the Dominican Republic. The court found subject matter jurisdiction to exist on the theory that the defendants' conduct had an effect on United States export commerce because tourists "were 'exported' to take advantage of the services provided in the Dominican Republic." *Id.* at 688.

Sherman Act, at least with respect to export and totally foreign commerce. The absence of any reference to the now familiar comity or balancing of state interest analysis of the *Timberlane* opinion[127] creates the inference that such an analysis is not part of the subject matter jurisdiction determination. The House Report states that it is not a subject matter jurisdiction question, but rather a separate issue that a court may address.[128] In language surely not comforting to our trading partners, the House Report takes a neutral position on the issue of whether the comity issue should be addressed by a court.[129] The lack of any positive statement regarding the balancing of interest analysis certainly allows a court to decline to employ such analysis, and indeed may embolden a court to so decline on the theory that Congress does not consider it important. Moreover, the current concern over the utility of the balancing of interest analysis[130] may provide

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127. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976); *see also* Industrial Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), *vacated on other grounds,* 460 U.S. 1007 (1983), *cert. denied,* 104 S. Ct. 393 (1983); Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981), *cert. denied,* 455 U.S. 1001 (1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

128. The House Report states that "*[i]f a court determines that the requirements for subject matter jurisdiction are met,* this bill [H.R. 5235] would have no effect on the courts' ability to employ notions of comity." HOUSE REPORT, *supra* note 14, at 13 (emphasis added)(citing *Timberlane*).

129. The House Report states that "the bill [H.R. 5235] is intended neither to prevent nor encourage additional judicial recognition of the special international characteristics of transactions." HOUSE REPORT, *supra* note 14, at 13. In explaining the bill on the floor of the House of Representatives, Rep. McClory made a somewhat more affirmative statement. He noted that the bill established a rule of non-coverage. It determines when the Sherman Act does not apply. He stated that not every practice falling within the § 402 standard would be actionable as a matter of law. "H.R. 5235 in no way affects the authority of a court to consider such matters [as the notion of comity] in cases where there is an anticompetitive domestic effect arising from exports or foreign trade." 128 CONG. REC. H4982 (daily ed. Aug. 3, 1982).

Professor Hawk argues that § 402 should not be interpreted as a rejection of the *Timberlane* balancing of interest analysis. He notes the expressly neutral position taken in the House Report, and suggests that § 402 should be considered simply as a refinement of the first step of the *Timberlane* analysis. B. HAWK, *supra* note 9, at 22-23 (Supp.).

By way of contrast, § 40 of the Restatement (Second) provides that when two states have authority to prescribe rules which may require inconsistent conduct, each state is required by international law to consider modifying the exercise of its enforcement jurisdiction in light of, among other factors, the vital interests of each state, the extent of the hardship imposed on a person by inconsistent enforcement actions, and the nationality of the person affected.

130. *See* Laker Airways, Ltd. v. Sabena, Belgian World Airways, 731 F.2d 909 (D.C. Cir. 1984); Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine,* 23

an additional incentive to a court to decline to apply it in the absence of any statutory requirement that it do so.

Use of the balancing of interest analysis should be a concomitant to section 402. Coupling the analysis with the "conduct involving" inquiry would allow a court to develop a flexible approach in interpreting "conduct involving" without undue concern that jurisdiction would automatically be exercised over activities in which another state has an interest.[131]

d. The Third Revision: The Scope of Damages

The third, and perhaps most straight forward, of the substantive issues addressed in section 402 is a statement in the last sentence of the section on the ambit of damages.[132] This provision is not part of the subject matter jurisdiction determination. It delineates the scope of liability for certain Sherman Act violations. If the Sherman Act is applicable because export or totally foreign restraints have had a direct, substantial, and reasonably foreseeable effect on the export trade of a person engaged in such trade in the United States, the only reviewable conduct is that which causes injury to the export business in the United States. The first substantive issue raised by section 402—the dichotomy between import trade and other foreign trade—has narrowed the ambit of liability. A plaintiff can sue for injunctive relief or damages on the basis of conduct found to be in export trade or totally foreign trade only if the effect of such conduct is direct, substantial, and reasonably foreseeable. Such effect must be either on the domestic commerce or import commerce (subsection 402(1)(A)) or the export commerce of a person engaged in such commerce in the United States (subsection 402(1)(B)).

The last sentence of section 402 means that if subject matter jurisdiction exists solely because the requisite effect of the conduct is on the export trade, the plaintiff, presumably the entity whose export trade was affected, can recover only for the injury suffered

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VA. J. INT'L L. 395 (1983); Juenger, *Conflict of Laws: A Critique of Interest Analysis,* 32 AM. J. COMP. L. 1 (1984); Kadish, *Comity and the International Application of the Sherman Act: Encouraging Courts to Enter the Political Arena,* 4 N.W.J. INT'L L. & BUS. 130 (1982); Maier, *Interest Balancing and Extraterritorial Jurisdiction,* 31 AM. J. COMP. L. 579 (1983).

131. *See generally* 1 W. FUGATE, *supra* note 29, § 2.9.

132. "If sections 1 through 7 of this title 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 the export business in the United States." 15 U.S.C. § 6a (1982).

in the United States. Although such person may be either a domestic or foreign entity, the ambit of damages is limited to injury to the export trade in the United States.[133] If, on the other hand, the restrictive practice has the requisite effect on domestic or import commerce, this limitation does not apply, and the statute leaves open the possibility that damages may be sought for broader consequences of the conduct. Again, this provision, like the codified effects standard, is not applicable to conduct involving import commerce.

D. Other Issues Raised by Section 402

By implication the FTAIA answers questions not clearly resolved under the old Sherman Act. Was conduct engaged in within the

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133. The facts of Todhunter-Mitchell Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610 (E.D. Pa.), *modified,* 383 F. Supp. 586 (E.D. Pa. 1979), are interesting to consider on this point. The defendant prohibited its distributors in Miami and New Orleans from reselling any of its beer for export to the Bahamas. This restraint was imposed to protect the exclusivity of Anheuser's distributor in the Bahamas. The plaintiff, a Bahamian corporation engaged in the business of distributing beer in the Bahamas thus was unable to purchase the defendant's beer for resale there. The plaintiff alleged that this conduct constituted a *per se* violation of § 1 of the Sherman Act. The defendant argued that the Sherman Act ought not be applied to grant relief to a foreign corporation for injury suffered in a foreign country. The court noted that the defendant was a Missouri corporation and that the act constituting the antitrust violation occurred primarily in the United States. The court found subject matter jurisdiction to exist because the restraint affected the flow of exports. 375 F. Supp. at 624-25, *modified,* 383 F. Supp. at 587-88. It relied on Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance, 451 F.2d 727 (2d Cir. 1971), as a basis for concluding that the foreign citizenship of plaintiff Todhunter-Mitchell did not preclude it from bringing suit. In *Muller* a Swiss corporation sued a French corporation. The district court refused to dismiss the antitrust suit, noting that the defendant had offices in the United States and the conduct in furtherance of its antitrust claim occurred here. *Todhunter-Mitchell,* 375 F. Supp. at 625.

If § 402 were in effect, it could be argued that plaintiff could not recover. By the last sentence of § 402, if jurisdiction existed only because of § 402(1)(B), plaintiff would be limited to recovery for injury to its export business in the United States. On the facts in this case plaintiff had no such business and, accordingly, could not recover. Bruce and Peirce, *supra* note 9, at 994-95, note that while the purpose of Anheuser's conduct was to advantage its Bahamian distributor, thereby affecting United States exports, the conduct took place in the United States. The United States distributors were forbidden to sell to the plaintiff. They suggest an argument the plaintiffs might raise to support its right to recover for injury suffered in the Bahamas. Because the defendant's conduct took place in the United States, § 402 is inapplicable. The restraint was in interstate commerce, not foreign commerce. The plaintiff is thus, under the approach of Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), able to state a claim for its worldwide damages. For a discussion of the applicable standard for conduct restraining interstate and foreign commerce, see *infra* notes 134-40 and accompanying text.

United States but having its only anticompetitive effect outside its territory violative of the old Sherman Act?[134] Was such conduct to be reviewed against the interstate or foreign commerce requirements of that statute? Clearly, under section 402, the effects of such conduct occurring in export or foreign commerce must be felt in United States commerce before jurisdiction could be exercised. With respect to restraints on import commerce, it is likewise thought that jurisdiction does not exist without an effect on United States foreign or domestic commerce.[135] However, less attention has been focused on the place of the conduct.[136] The

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134. In illustrating the uncertainty surrounding the application of the Sherman Act to conduct intended to have, and in fact having, its only effect outside the United States, Atwood and Brewster raise the hypothetical situation of General Motors and Ford agreeing in Detroit that their cars manufactured here would not be exported to Iceland for less than $10,000 per car. They state that no clear answer can be given as to whether this agreement violates the Sherman Act. 1 J. ATWOOD & K. BREWSTER, *supra* note 3, § 7.03; *see* B. HAWK, *supra* note 9, at 46.

135. *See* Antitrust Guide, *supra* note 100, at 5-6; 1 W. FUGATE, *supra* note 29, §§ 2.20-.21.

136. In Todhunter-Mitchell Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610, 624-25 (E.D. Pa. 1974), *modified,* 383 F. Supp. 586 (E.D. Pa. 1979), Anheuser's conduct prohibiting its Miami and New Orleans distributors from selling to plaintiffs was carried out in this country. The court acknowledged that the purpose and effect of the restraint were to eliminate competition in a foreign market. But it concluded that subject matter jurisdiction existed because the result was achieved by restricting trade in this country. Conduct here having its intended effect outside the United States supported jurisdiction. *See also* United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

The approach is compatible with Professor Rahl's thesis that foreign commerce embraces conduct in and conduct affecting foreign commerce and that the substantial effect on commerce requirement applies only to the latter. Consistent with the interstate commerce cases, separate effect need not be shown for conduct in the flow of interstate or foreign commerce. Accordingly, an effect in this country is not required, and the Sherman Act can reach conduct violating the Act even if the only effect is outside the United States. Rahl, *Foreign Commerce Jurisdiction, supra* note 30, at 523-27; Rahl, *American Antitrust, supra* note 30, at 6-8. Presumably such conduct, not having an effect here, must be engaged in within the United States for there to be any basis for jurisdiction.

The position of the Justice Department, to the contrary, is that there must be an effect on United States consumers or export opportunities before jurisdiction can attach, regardless of the place of the conduct. Antitrust Guide, *supra* note 100, at 7; Address by Douglas E. Rosenthal (Chief, Foreign Commerce Section, Antitrust Division, Department of Justice), "Subject Matter Jurisdiction in U.S. Export Trade," before the American Society of International Law (April 23, 1977), *partially reprinted in* 71 AM. SOC'Y INT'L L. PROC. 214-15 (1977). Mr. Rosenthal contended that restraints in export trade injuring only persons in foreign markets may not be subject to the jurisdiction of United States courts. The conduct he referred to was undertaken within the United States. *See* B. HAWK, *supra* note 9, at 45-52. This continues to be the Justice Department's position. *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 3, § 7.04 (Supp. 1984)(referring to speech before World Trade Institute seminar by chief of Justice Department's Foreign Commerce Section); 1 W. FUGATE, *supra* note 29, § 2.25.

legislative history of the FTAIA is replete with discussion of one of its purposes: to enable United States companies to compete abroad and to free such companies from the constraints of the Sherman Act, absent the requisite effect here.[137] Congress was not limiting its concern to activities of United States companies that take place outside this country. Congress's intent was to assist United States companies in their export activities. Such activities also would entail conduct within the country. Consequently, conduct engaged in within the United States should be reviewed under the FTAIA if it is conduct involving export or totally foreign commerce.[138] This conclusion raises the troublesome question of the applicable subject matter test for conduct which is a restraint of both interstate and foreign (export or totally foreign) commerce. Is such conduct to be reviewed under section 402 or the old Sherman Act or both? Section 402(1) states that the Sherman Act is not applicable to conduct involving foreign commerce, other than import commerce, unless there is the requisite effect. Therefore, all conduct in foreign commerce, including that which is also a restraint of domestic commerce, should be viewed as foreign commerce and reviewed only under section 402. Although it is murky on this point, the legislative history does support this conclusion. The House Report notes rather ambiguously that if a domestic export cartel were to have a spillover effect on commerce within this country, "the cartel's conduct would fall within the reach of our antitrust laws."[139] The reference to "our antitrust laws" is not specific. However, the Report continues on to note that the impact on domestic commerce "would, at least over time, meet the test of a direct, substantial, and reasonably foreseeable effect on domestic commerce."[140] Again, it is unclear whether review of the subject matter juris-

137. HOUSE REPORT, *supra* note 14, at 2, 7, & 10; 128 CONG. REC. H4981 (daily ed. Aug. 3, 1982).

138. *See 1981 Hearings, supra* note 6, at 258 (Statement of American Bar Association Section on International Law, at 7) in which it is noted that H.R. 5235, "[b]y ignoring where the conduct takes place and instead considering where the conduct's effect is felt, . . . corresponds to the traditional antitrust theory." Because the FTAIA does not deal with import commerce, the uncertainty still exists in that sphere. However, it is unlikely that conduct involving imports would be challenged if there is no effect here. The question of the applicable standard for review of such conduct does remain open. It is uncertain whether restrictive practices regarding imports carried out in the United States will be considered against the subject matter jurisdiction tests for domestic or foreign conduct.

139. HOUSE REPORT, *supra* note 14, at 13.

140. *Id.*

diction over activities restraining foreign and domestic commerce only under section 402 would yield a different result than if the conduct were reviewed under the standards applicable to activities that are domestic both as to place of conduct and effect. This question raises all of the previously considered questions regarding the breadth of the "conduct involving" element. To the extent that "conduct involving" export commerce is interpreted broadly, activities otherwise reviewable as being totally in interstate commerce will be brought within section 402. Ironically, a broad interpretation of this term with respect to exports may afford companies greater freedom from constraints of the Sherman Act, yet a broad interpretation may result in greater scrutiny for import commerce.

III. THE RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)

The other movement to modify the extraterritorial application of United States law is the current effort of the American Law Institute to redraft the Restatement of Foreign Relations Law of the United States. In 1981 the ALI disseminated Tentative Draft No. 2, Part IV of which dealt with jurisdiction, among other issues. The sections dealing with jurisdiction were revised and republished in 1985 in Tentative Draft No. 6.[141] Although important and controversial, the jurisdictional principles of the Restatement (Revised) are only a small portion of this wide-ranging work. The most recent version of the text of the sections relevant to this discussion have been available for only a short time. However, some general comments on the approach of the Restatement (Revised) approach can be made, and this approach can be contrasted with that of the FTAIA.

Certainly Congress could not wait for final approval of the Restatement (Revised) before proceeding to enact the FTAIA. However, the differences in approach of these two efforts are nevertheless unfortunate, perhaps more for the Restatement (Revised) than for the FTAIA.[142]

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141. *See supra* note 2 (explanation of revisions of Restatement).

142. It has been observed that the Restatement of Foreign Relations Law of the United States is especially important because of the relative paucity of case law in this area and the intertwining of domestic law with international law and relations. Therefore, a specific legislative effort at odds with this Restatement would seem to adversely affect the stature of the Restatement. Houck, *The New ALI Restatement of Foreign Relations Law of the United States - Problems for Practioners,* 26 PRIVATE INVESTORS ABROAD 37 (Southwestern Legal Foundation 1983).

It should be noted that the jurisdictional principles of the Restatement (Revised) are not a statement of United States domestic law regarding jurisdiction, as is the FTAIA. Instead, the principles state certain precepts of international law which are said to circumscribe domestic law and are to be applied both domestically and internationally. These precepts establish when the exercise of jurisdiction to prescribe law is appropriate and minimize the conflict among states in their exercise of jurisdiction.[143] The Restatement (Revised) approach is to first set forth general principles with respect to the exercise of jurisdiction[144] and then to state more specific rules for the exercise of jurisdiction in various subject matter areas. Sections 402 and 403 of the Restatement (Revised) articulate the general principles governing the prescription of jurisdiction. Section 415 sets forth the specific application of these principles to the antitrust area.[145]

Section 402 states the bases upon which a nation state may exercise jurisdiction to prescribe its law.[146] One of the most striking features of section 402 of the Restatement (Revised) is its introductory phrase. The introductory phrase clearly states that section 402 is entirely modified by section 403. Section 403(1) provides that "Even when one of the bases for jurisdiction under [section] 402 is present, a state *may not* exercise jurisdiction to prescribe law with respect to the activities, relations, status or interests of persons or things having connections with another state or states

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143. *See* RESTATEMENT (REVISED), *supra* note 123, Introduction; Part IV, Introductory Note; Chapter 1, Subchapter A, Introductory Note.

144. Restatement (Revised) § 401 describes three aspects of the exercise of jurisdiction: jurisdiction to prescribe, adjudicate and enforce. A state exercising its jurisdiction to prescribe makes "its law applicable to the activities, relations, or status of persons, or interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." *Id.* § 401.

145. The application of these principles to the other subject matter areas are contained in: §§ 411-13 jurisdiction to tax; § 414 jurisdiction to control foreign subsidiaries of United States corporations; and § 416 securities transactions.

146. Restatement (Revised) § 402 reads in its entirety as follows:

> § 402. Bases of Jurisdiction to Prescribe
> Subject to § 403, a state has jurisdiction to prescribe law with respect to
> (1) (a)conduct a substantial part of which takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory;
> (c) conduct outside its territory which has or is intended to have substantial effect within its territory;
> (2) the activities, status, interests or relations of its nationals outside as well as within its territory; or
> (3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or a limited class of other state interests.

Id. § 402.

when the exercise of such jurisdiction is unreasonable."[147] Section 403 continues on to list factors to be evaluated to determine if the exercise of jurisdiction would be unreasonable in a given case.

Hence, in sharp contrast to the FTAIA, which is silent with respect to the balancing of state interest analysis, the Restatement (Revised) provides that a state must undertake a balancing of interest analysis before it may exercise jurisdiction. If, as a result of this analysis, a court seeking to exercise jurisdiction concludes that to do so would be unreasonable, the court would violate international law if it exercised jurisdiction. Comment a to section 403 states that the principle that an exercise of jurisdiction is unlawful if it is unreasonable is established in United States law and has emerged as a principle of international law.[148] Satisfaction

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147. *Id.* § 403 (1) (emphasis added). Restatement (Revised) § 403 reads in its entirety as follows:

§ 403. Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to the activities, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate,

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;

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

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

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

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

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by other states.

(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state is expected to evaluate its own as well as the other state's interest in exercising of jurisdiction in light of all the relevant factors, including those set out in Subsection (2); and to defer to the other state if that state's interest is greater.

Id. § 403.

148. *Id.* § 403, comment a.

of the principle of reasonableness is a precondition to the exercise of jurisdiction by any state, and this principle is the fulcrum by which conflicting assertions of jurisdiction by states are minimized. By the Restatement's (Revised) approach, the balancing of interest analysis is not a matter of comity, as it is in *Timberlane;* rather, it has been elevated to a mandatory principle of law.[149] This movement has understandably caused a great deal of controversy.[150]

The failure of Congress to require explicitly the balancing of state interest analysis could be viewed as a statement contrary to the emerging principle of international law referred to in section 403, comment a, and in turn this failure may cast doubt on the status of the principle. Section 402 of the FTAIA is silent on this

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149. The interest balancing analysis in *Timberlane* is an application of Kingman Brewster's exhortation for a "jurisdictional rule or reason." K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 301-06, 446-48 (1958). Mr. Brewster, in this work, and Messrs. Atwood and Brewster in the revision of it, argue that although the interest analysis may be a matter of comity, rules of conflicts of laws dictate that the analysis be undertaken. *See* 2 J. ATWOOD & K. BREWSTER, *supra* note 3, § 19.05.

The mandatory nature of the state interest analysis under international law is not new to the Restatement in §§ 402 and 403 of the Restatement (Revised). Section 40 of the Restatement (Second) contains a comparable provision, limited to situations in which two states have asserted jurisdiction. *See supra* note 129 (explanation of Restatement (Second) § 40). Sections 402 and 403 are not so limited. By their terms, a court or agency seeking to exercise jurisdiction to prescribe or apply law on its own initiative, or at the request of one of the parties, must engage in the interest balancing anaylsis, even though the other state has not previously asserted jurisdiction over the matter. This could lead to state A's concluding that it would be unreasonable to assert jurisdiction, because by its analysis state B has a more significant interest in the matter, and state B in turn not exercising jurisdiction. Section 403(3) covers the converse situation. By it, if both states A and B conclude that the exercise of jurisdiction is reasonable, and they exercise their jurisdiction in conflicting ways, jurisdiction must be moderated by the principle of reasonableness. The state with the lesser, although reasonable, interest would be expected to cease its exercise of jurisdiction. *See* RESTATEMENT (REVISED), *supra* note 123, § 403, comments d and e; Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7 (1984).

150. *See, e.g.,* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); Maier, *supra* note 149; Messen, *Antitrust Jurisdiction Under Customary International Law,* 78 AM. J. INT'L L. 783 (1983); Robinson, *Conflicts of Jurisdiction and the Draft Restatement,* 15 L. & POL'Y INT'L BUS. 1147 (1983). During the 1985 Annual Meeting of the American Law Institute a motion was made to eliminate the mandatory nature of the reasonableness inquiry. The motion failed. Also at the 1981 Annual Meeting of the American Law Institute, during the discussion of these sections as stated in Tentative Draft No.2, a motion was made to amend § 402(1)(a), (b), and (2) to provide that the principle of reasonableness not apply to them. The motion failed. Proceedings, 58th Annual Meeting of The American Law Institute 275-86 (1981). During the discussion of the motion, it was recognized that § 402(1)(c) presented the most common setting for clashes of assertion of jurisdiction by states; the motion would have allowed the reasonableness principle to apply to that subsection.

point and, therefore, not literally inconsistent with the position of the Restatement (Revised). Because the legislative history recognizes the right of a court to engage in the balancing of interest analysis,[151] it can be argued convincingly that the reasonableness analysis is an additional step which a court must take, along with the subject matter determination under FTAIA section 402, before jurisdiction can be exercised.[152] However, FTAIA section 402 states that subject matter jurisdiction exists if the requisite effect is found on United States commerce. A court would be free to apply the Sherman Act if it finds subject matter jurisdiction.[153] In contrast, the Restatement (Revised) provides that as a matter of international law a state may not exercise jurisdiction if it would be unreasonable to do so.[154] The determination of whether exercise of jurisdiction in a particular case is reasonable requires the balancing of state interest analysis.[155]

The elements to be considered in the balancing of interest analysis of the Restatement (Revised) differ somewhat in breadth from those used in *Timberlane* and its progeny.[156] As listed in these

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151. *See supra* notes 128-29 and accompanying text (explanation of legislative history of FTAIA).

152. RESTATEMENT (REVISED), *supra* note 123, § 415, comment k notes the need of United States courts in antitrust cases to find subject matter jurisdiction. It states that the existence of subject matter jurisdiction does not eliminate the need to make the reasonableness inquiry for international purposes.

153. *See supra* notes 128-29 and accompanying text (explanation of legislative history of FTAIA). Mr. Fugate believes that the FTAIA enables a court to exercise jurisdiction immediately on finding that the tests of § 402 are met, without regard to the comity analysis. 1 W. FUGATE, *supra* note 29, § 2.15 (Supp.); Fugate, *Antitrust Aspects of the Revised Restatement of Foreign Relations Law,* 25 VA. J. INT'L L. 49, 61 (1984).

154. RESTATEMENT (REVISED), *supra* note 123, § 403(1).

155. *Id.* § 403(2).

156. *Id.* § 403(2)(a)-(h). As articulated in Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976), the factors to be considered are: (1) degree of conflict with foreign law or policy; (2) nationality or allegiance of parties and location or principal places of business of corporations; (3) extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of the effects of the activity in the United States as compared with those elsewhere; (5) the extent to which there is explicit purpose to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

In Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979), the list of items to be considered in the balancing analysis was expanded to read: (1) degree of conflict with foreign law or policy; (2) nationality of parties; (3) relative importance of the alleged violation of conduct here as compared to that abroad; (4) availability of a remedy abroad and the pendency of litigation there; (5) existence of intent to harm or effect 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 party will be placed in position of being required to perform an

cases, the factors are centered on the relative interests of the states involved and the practicality of a court in one state taking jurisdiction and issuing orders with respect to entities or events in the other.[157] The list in Restatement (Revised) section 403 includes these general notions, but broadens the inquiry to consider whether the exercise of jurisdiction is important to the international political, legal, and economic system and is consistent with the traditions of the international system.[158]

Sections 402 and 403 of the Restatement (Revised) do not require a showing of any adverse effect of the conduct in a state before jurisdiction can be exercised. Section 402(1)(c) provides that a court may take jurisdiction over conduct outside the state "which has or is intended to have substantial effect within its territory."[159] In contrast, the FTAIA requires that there be an anticompetitive effect in the United States for a United States court to take subject matter jurisdiction.[160] Nonetheless, this difference may be of little significance because the interest balancing analysis of the Restatement (Revised) would most likely moderate assertions of jurisdiction over conduct not having harmful effects.

Section 415 of the Restatement (Revised)[161] is described as applying the principles of sections 402 and 403 to the exercise of

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act illegal in either country, or be placed under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) whether the order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; (10) whether a treaty with the affected nation has addressed the issue.

157. *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 3, §§ 6.10-.11; B. HAWK, *supra* note 9, at 39-44; Kestenbaum, *Antitrust's "Extraterritorial" Jurisdiction: A Progress Report on the Balancing of Interests Test,* 18 STAN. J. INT'L L. 311 (1982); Swan, *supra* note 9, at 199-208;

158. RESTATEMENT (REVISED), *supra* note 123, § 403(2)(e) & (f). It has been suggested that the factors to be included in the interest analysis ought to be reformulated to take even greater account of the needs of the interdependent world community, and perhaps to place less emphasis on the interests of the competing nation states. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law;* 76 AM. J. INT'L L. 280, 300-03, 317 (1982); *see also* Swan, *supra* note 9, at 206-07.

159. RESTATEMENT (REVISED), *supra* note 123, § 402(1)(c).

160. *See supra* notes 120-23 and accompanying text.

161. RESTATEMENT (REVISED), *supra* note 123, § 415 reads in its entirety as follows:

> § 415. Jurisdiction to Apply Antitrust Laws: Law of the United States
>
> (1) Any agreement in restraint of United States trade made in the United States, and any conduct or agreement in restraint of such trade carried out in significant measure in the United States, is subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct.
>
> (2) Any agreement in restraint of United States trade made outside of the United States, and any conduct or agreement in restraint of such trade carried

jurisdiction in antitrust matters within the United States.[162] Unlike sections 402 and 403, section 415 purports to state United States domestic law.[163] The three subsections of section 415 delineate categories of conduct of varying degrees of interest to the United States, from the most to the least compelling. The three subsections make no distinctions as to the types of commerce affected by the agreements or the conduct they describe. The old Sherman Act's division of commerce into commerce among the states or with foreign nations and FTAIA section 402's distinction between import and export or totally foreign commerce, are not relevant for purposes of section 415. Because the scheme of section 415 would allow jurisdiction to be exercised with respect to all conduct, domestic or foreign, fitting within the parameters of the subsections, it could be argued that section 415 authorizes a broader assertion of jurisdiction than the Sherman Act as amended by the FTAIA.[164]

Under subsection 1 of section 415 any agreement in restraint of United States trade made in the United States and any conduct in restraint of such commerce, if carried out predominately in the United States, is subject to United States jurisdiction, without any showing of the nationality of the participants or locus of the effects. By the terms of this section, the United States could exercise jurisdiction to challenge an agreement made here by United States or foreign persons even if the effects were felt entirely outside the United States.[165]

Subsection 2 is largely a variant of the *Alcoa* effects test.[166] If the purpose of the conduct, carried out predominately outside the

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out predominantly outside of the United States, is 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.

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

162. *Id.* § 415, comment a.

163. Section 415 is captioned "Jurisdiction to Apply Antitrust Laws: Law of the United States." *Id.* § 415.

164. The Reporters' Notes acknowledge this possibility. *Id.* § 415, Reporters' Notes No. 8.

165. Under Restatement (Revised), *supra* note 123, § 415(1) the United States would have jurisdiction to challenge the hypothetical agreement referred to in note 134. Although Section 415 would allow jurisdiction to be asserted over export conduct, the purpose of the ETCA and the FTAIA is to limit such assertions as a matter of domestic law.

166. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945)(effects test).

United States, is to affect United States commerce, and if there is some effect on that commerce, United States courts may assert jurisdiction. Along the line of *Alcoa,* a principal purpose coupled with any effect beyond the *de minimus* is sufficient to support jurisdiction. It is unclear whether the purpose element of section 415(2) means only something analogous to specific intent, or if notions like general intent inferred from conduct would be sufficient. Use of the words "a principal purpose" supports the conclusion that a specific purpose to affect United States commerce is required.[167] It is not clear why a "purpose" test rather than the more usual "intent" standard from *Alcoa* was employed, or whether there is an intended distinction between the two.

Subsection (3) would authorize jurisdiction over other agreements or conduct in restraint of United States trade only if the effect on United States commerce is substantial and if the assertion of jurisdiction is not unreasonable. The factual distinction between the conduct described in subsections (2) and (3) is largely that subsection (2) is limited to purposeful conduct having some effect on United States commerce, while subsection (3) covers conduct not meeting the purpose requirement of subsection (2), but having a substantial effect on United States commerce.

It seems to be automatically or presumptively reasonable for the United States to exercise jurisdiction over conduct described in sections 415 (1) and (2). Apparently a court confronted with these types of conduct need not apply separately the interest balancing analysis of section 403. Functionally, subsections (1) and (2) do not require a separate showing of reasonableness; instead, the language of these subsections incorporates the reasonableness inquiry. The assumption underlying these subsections seems to be that the balance is in favor of authority to exercise jurisdiction over conduct falling within them.[168]

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167. Restatement (Revised) § 415, comment a describes the purpose element in a way approaching specific intent. It notes that § 415(2) is a special formulation of the rules of § 402(1)(c) "in that it states that if a principal purpose of the challenged activity is to interfere with the commerce of the United States . . . ." jurisdiction is presumptively reasonable. RESTATEMENT (REVISED), *supra* note 123, § 415, comment a.

168. *Id.* The comment notes that it would rarely be a problem to meet the reasonableness standard with respect to subsection (1) conduct and that an exercise of jurisdiction with respect to subsection (2) conduct is presumptively reasonable. The concession in the comment that all conduct described in § 415 is subject to the overriding principle of reasonableness is literally more moderate than the position taken in Tentative Draft No. 2 in which the statement was made that assertion of jurisdiction over subsections (1) and (2) conduct is clearly reasonable.

The statement in comment a to section 415 to the effect that an exercise of jurisdiction by the United States is at least presumptively reasonable with respect to conduct falling within subsections (1) and (2) relieves a court of the need to undertake the balancing analysis in some cases. This is particularly true in subsection (1) cases, which involve conduct at least predominately in the United States that restrains commerce. The conclusion is less convincing with respect to subsection (2) conduct, which is conduct predominately outside the United States that is intended to and does affect United States commerce. Subsection 2 presumptively would authorize jurisdiction in such cases as *Alcoa* and perhaps *Timberlane*. Because the assertion of jurisdiction over conduct of non-United States citizens taking place outside the United States is one of the excesses for which the United States is criticized, there is concern that section 415 may do little to moderate application of the antitrust laws in such situations.

If the reasonableness analysis were performed when restraints fitting within subsections 415 (1) and (2) were reviewed, the conflict between the FTAIA and the Restatement (Revised) would largely disappear. The first of the reasonableness factors to be considered within section 403 is the extent to which the activity takes place within or "has substantial, direct and foreseeable effect in or upon the regulating state."[169] Because this is essentially the codified effects standard of the FTAIA, its use would make the two efforts congruent.

The words "a principal purpose" of subsection (2) also become critical with respect to conduct falling within subsections (2) and (3). A broad interpretation of this language will move into subsection (2) conduct which would otherwise be reviewable only after a determination under section 403 that the exercise of jurisdiction is reasonable. Such an interpretation would undo the entire balancing scheme which the Restatement (Revised) seeks to accomplish. This interpretation of the interrelationship of subsections (2) and (3) supports the conclusion that the purpose element of subsection (2) should be construed narrowly, analogously to specific intent. To limit these words to instances in which there is an explicit articulated purpose to affect United States trade, although possible, may make the subsection largely useless. In most situations the agreement will be entered into or conduct engaged in for the purpose of achieving some specific

169. *Id.* § 403(2)(a).

personal advantage for the participants. The participants may realize that as a consequence of their conduct United States trade will be affected. Subsection (2) requires that *a* principal purpose, not *the* principal purpose, be to affect United States trade. Thus, conduct engaged in for personal motives, with knowledge of the consequential effect on United States trade, may or may not be sufficient.

IV. Conclusion

The Restatement (Revised) and the FTAIA proceed differently regarding the extraterritorial application of the antitrust laws. There are also some similarities between the two. The FTAIA does not require the reasonableness analysis that the Restatement (Revised) requires. Yet to the extent that a court believes it must employ this analysis, either for reasons of comity or in compliance with a precept of international law, the central aim of the Restatement (Revised) is satisfied. Assuming the reasonableness analysis is employed, the FTAIA probably circumscribes application of the Sherman Act more than the Restatement (Revised) requires. Section 402 of the FTAIA's codified effects standard and the FTAIA's scope of damages provision are narrower, in terms of requirements, than section 415 of the Restatement (Revised). Motive or purpose has been consciously abandoned in the FTAIA whereas it remains a significant factor in the scheme of the Restatement (Revised).

While these two efforts at moderating antitrust jurisdiction are probably not substantively at odds, they are different. Insofar as export restraints are concerned, the FTAIA is more restrictive than the Restatement (Revised). It is unlikely, however, given the fact that United States law was recently revised, that the provisions of the Restatement (Revised) would soon be incorporated into statutory law.