CHAPTER 5
UNSOLVABLE CONFLICTS

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This chapter looks at some of the problems within the areas discussed in prior chapters, and poses questions such as: 1) does concurrent jurisdiction give one court the power to decide that no court should preside over a matter by ordering a foreign court to close its doors to a complainant? 2) what theory of conflict resolution is to be used in matters of concurrent jurisdiction? and 3) which branch of government is best suited to decide these types of questions?

Case Note on the Uranium Cases

The series of contract and antitrust cases against foreign and domestic uranium producers in the 1970s proved to be among the most controversial cases applying American law to conduct taking place abroad. The uranium cases ultimately forced reappraisal of American antitrust policy in the international area as well as producing continuing diplomatic tension between the United States and such otherwise close allies as Great Britain, Canada, and Australia.

In the 1950s and 1960s the American uranium market was closed to imports. Because of the loss of this enormous market foreign producers created a system of market allocation outside of the United States in order to survive. Subsequently, President Nixon removed the restrictions on uranium imports into the United States. In a very short period of time the price of uranium rose several times above the historical United States price.

This price increase had a devastating impact on U.S. firms such as Westinghouse which had contracted with electrical utilities to supply their long-term uranium needs at prices now far below the price Westinghouse would have to pay on the world market. Following the revelation of certain documents concerning the operation of a worldwide uranium cartel Westinghouse and other uranium purchasers sought relief from their contractual obligations. In addition, numerous private antitrust suits were brought in both federal and state courts seeking treble damages for the alleged price-fixing of uranium. The Justice Department then began a criminal grand jury investigation of the uranium industry. Thus began a decade long struggle between the United States and plaintiffs in U.S. courts and the foreign defendants and their home governments opposing the exercise of U.S. jurisdiction, U.S. discovery mechanisms, and the merits of the antitrust claims themselves.

Under the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, a U.S. court may direct a "Letter of Request" to a foreign court asking it to obtain evidence for an American judicial proceeding. There are, however, limitations on the

extent to which foreign courts will execute such Letters of Request. Some of these became evident in 1977, when Westinghouse sought to obtain evidence from Great Britain and other countries of a worldwide uranium cartel which it claimed had rendered its contracts to deliver uranium to various utilities commercially impractical.

In unanimously holding that Westinghouse's Letter of Request should not be enforced, the British House of Lords relied, first, on the fact that the Letter sought broad document discovery of a kind that is not permitted in great Britain under the Hague Convention. Article 23 of the Convention specifically permits contracting states to declare that they "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries"; and Britain, like virtually all of the other contracting states, executed such a declaration. The House of Lords next found that the information asked for was privileged, not only under British law, but in light of the U.S. constitutional guarantee against self-incrimination. The American Justice Department attempted to help Westinghouse overcome this objection by writing a letter which stated that the English witnesses would be given immunity and which added that the evidence sought was critical for the Justice Department's grand jury investigation. The result was to give the House of Lords another reason for denying Westinghouse's request. It found that the evidence was not merely being sought for a "civil or commercial" matter, which is what the Hague Convention is limited to, but was also going to be improperly used in a government grand jury investigation. Finally, the House of Lords relied upon Article 12 of the Hague Convention which allows a state to refuse to execute a Letter of Request where it "considers that its sovereignty or security would be prejudiced thereby."

Having failed to obtain the evidence it was seeking under the Hague Convention, Westinghouse sought the same documents under the Federal Rules of Civil Procedure. It was initially unsuccessful in trying to subpoena those documents located in Canada when it sought the documents for purposes of defending its contract case. However, Westinghouse had better luck in a treble damage action which it commenced against the alleged members of the uranium cartel in the Northern District of Illinois. The Chicago court entered an order compelling discovery of the foreign documents. Canada and the other countries which supported the uranium cartel had promulgated laws which specifically prohibited the production of those documents. But the district court ruled that such conflicting foreign legislation should not be considered in determining whether to order production and should be taken into account only at a later point in determining what sanctions to impose for noncompliance.

This portion of the casenote is adapted from Blechman, Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere: An Appraisal of American Developments and Foreign Reactions, Antitrust Law Journal 1197 (1981).

In the Uranium case, the Seventh Circuit assumed without discussion that the decision as to whether to exercise jurisdiction was a matter within the discretion of the trial judge. Consequently, it held that this determination could be reversed only if the trial judge abused his

discretion. Furthermore, the Seventh Circuit ruled that, in exercising his discretion, the trial judge was not bound to take into account the kind of comity considerations originally set forth in *Timberlane*. Instead, he could decide to exercise jurisdiction based solely on the complexity of the litigation, the seriousness of the charges and the recalcitrance of the defendants. The trial court was thus expressly permitted to ignore conflicts with foreign law and policy that had been asserted by the governments of Great Britain, Canada, Australia and South Africa in briefs amici curiae. Indeed, the Seventh Circuit went so far as to express its shock that these governments had "subserviently" presented for the defendants their case with respect to subject matter jurisdiction.

United States v. Gulf Oil Corp., Criminal No. 78-123.

On May 9, 1978, the Department of Justice filed a misdemeanor information against Gulf Oil Corporation charging a violation of Section 1 of the Sherman Act arising out of Gulf's alleged participation in an international Uranium cartel between 1972 and 1974.

Attorney General Griffin B. Bell said the charge was contained in a one-count criminal information filed in U.S. District Court in Pittsburgh that concluded an 18-month investigation conducted by a federal grand jury in the District of Columbia.

The information stated that Gulf produces and sells uranium in the United States and, through its Canadian subsidiary, Gulf Minerals, Canada, Ltd., in Canada.

Assistant attorney General John H. Shenefield, in charge of the Antitrust Division, said the criminal information charges Gulf with conspiring with other uranium producers between February, 1972, and December, 1974, to fix the prices at which the companies sold foreign-source uranium to United States middlemen, to sell to United States middlemen only at discriminatorily high prices, and to refuse to sell to Westinghouse Electric Corporation, a United States middleman.

Middlemen are companies--including brokers, nuclear reactor manufacturers, and nuclear fuel fabricators--that purchase uranium for resale.

The criminal information alleges that, between 1971 and 1975, Gulf and other producers of foreign-source uranium were members of an international uranium cartel, the Uranium Marketing Research Organization, that agreed to stabilize prices for foreign-source uranium and to allocate uranium sales among its membership.

Agreements on the discriminatory treatment of United States middlemen, charged as a Sherman Act violation in the criminal information, are also alleged to have been terms of the cartel arrangement.

During the alleged conspiracy period, United Sates middlemen, including Westinghouse,

purchased or attempted to purchase substantial quantities of foreign-source uranium, according to the government. Such uranium is generally imported into the United Sates where it is subjected to a number of processes that change it into a form suitable for use as a nuclear fuel.

On June 2, 1978, defendant was fined $40,000 on a *nolo contendere* plea.

In re: Uranium Antitrust Litigation Westinghouse Electric Corp. v. Rio Algom Ltd.
617 F.2d 1248 (7th Cir. 1980)

In October of 1976, plaintiff-appellee, Westinghouse Electric Corporation, filed a complaint alleging anti-trust violations against twenty-nine foreign and domestic uranium producers. All of the defendants were duly served with process; however, nine foreign defendants chose not to appear. On February 2, 1977, the District Court entered defaults pursuant to Rule 55(a) of the Federal Rules of Civil Procedure against each of the nine defaulting defendants. In August 1977, Westinghouse moved for entry of final judgment against the defaulters on the issue of liability. On January 3, 1979, the District Court granted the motion for entry of default judgment against the defaulting defendants.

On January 12, 1979, Westinghouse moved ex parte for a temporary restraining order and for a preliminary injunction seeking to require the defaulting defendants to give twenty days' prior notice to the Court of any transfers of assets in excess of $ 10,000 out of the United States. In support of the motion, counsel for Westinghouse submitted an affidavit stating that several of the defaulters, and particularly Rio Tinto Zinc Corp. Ltd. of London, held substantial assets in the United States through wholly owned subsidiaries. Westinghouse counsel further stated that there was reason to believe that those assets were being, or were about to be, removed from the United States to avoid execution on the default judgment entered on January 3, 1979.

On January 15, 1979, the District Court temporarily restrained transfers in excess of $ 10,000 pending a hearing on January 24. On the latter date, the District Court entered the preliminary injunction sought by Westinghouse.

Notice of the TRO was served on the defaulting defendant, Rio Tinto Zinc Corp. (RTZ), in London, on January 17, 1979. Rio Algom Limited in Canada was served with notice of the TRO that same day. It was later learned that within hours after notice of the TRO, RTZ instructed employees of its subsidiaries to transfer as much money as possible out of American bank accounts and into Canada. Approximately three million two hundred thousand dollars were transferred from the accounts of Atlas Alloys to Rio Algom Limited in Canada. Neither the plaintiff nor the District Court were given notice of these transfers, in apparent violation of the TRO and the subsequent preliminary injunction.

On January 25, 1979, Atlas Alloys moved for an exemption from the preliminary injunction, seeking to make arms length purchases of steel or metal products in the ordinary course of business in amounts of less than $ 40,000. Approximately one month later, Atlas Alloys gave

twenty days' advance notice that it intended to pay its defaulting parent, Rio Algom Limited approximately $ 1.6 million dollars, which had been owed to Rio Algom Limited for some time. Westinghouse moved to enjoin the proposed transfer and sought to require Atlas Alloys to pay the funds into a trust account under the jurisdiction of the District Court. The District Court heard argument on the question and indicated that a ruling would be forthcoming shortly. In the interim, Atlas Alloys transferred about.$ 1.2 million dollars to its defaulting parent by means of writing 124 separate checks for amounts slightly less than $ 10,000. On March 27, 1979, the District Court enjoined the transfer of the $ 1.6 million dollars, and required that the funds be deposited in a trust account with the Court. The Court also found that five out of six of Atlas Alloys' top officers and directors were also officers and directors of the defaulting defendant, Rio Algom Limited. The District Court further found that the monies which Atlas Alloys sought to transfer out of the United States to its parent, Rio Algom Limited in Canada, were assets of Rio Algom Limited here in the United States and that the entirety of Atlas Alloys is an asset of Rio Algom Limited.

On March 27 and April 2, 1979, Atlas Alloys gave further notice of its intent to make transfers of an additional $ 168,000 to its defaulting parent. Westinghouse again moved to enjoin these transfers, and to have the monies deposited in a trust account. At this time Westinghouse also moved for further injunctive relief against Atlas Alloys based on the discovery of Atlas Alloys' practice of transferring funds out of the United States by means of checks written for amounts slightly under $ 10,000. At that point Atlas Alloys had written 481 checks for a total of $ 3.9 million dollars to its defaulting parent.

On May 4, 1979, the District Court entered a third injunction. The Court enjoined the proposed transfer of $ 168,000 from Atlas Alloys and, based on evidence of the transfers to Rio Algom Limited, the Court granted further injunctive relief requiring that all transfers of funds be approved by the Court upon twenty days' prior written notice, regardless of amount.

Westinghouse also moved for similar injunctive relief to preserve the assets of Rio Algom Corporation, the wholly-owned subsidiary of Atlas Alloys. Rio Algom Corporation is a Delaware corporation engaged in uranium mining in Utah. In its motion Westinghouse sought to enjoin Rio Algom Corporation from making deposits in bank accounts outside the United States; from making any transfers out of the United States without twenty days' prior notice to the Court; requiring Rio Algom to deposit the revenues of its Utah mining operation in United States banks; and enjoining the officers, directors and employees of the defaulting Rio Algom Limited from making withdrawals from bank accounts of Rio Algom Corporation. On June 20, 1979, the District Court granted Westinghouse's motion for a preliminary injunction. The Court likened the situation respecting Rio Algom Corporation to the actions of its parent, Atlas Alloys. The Court noted that the single difference was that Rio Algom Corporation, unlike Atlas Alloys, was a defendant in the anti-trust action. The Court concluded, however, that the injunction would in no way impair Rio Algom Corporation's ability to defend on the merits.

The three injunctions against the defaulters in respect to the assets of Atlas Alloys and the one injunction against Rio Algom Corporation comprise the first interlocutory appeal pending

before this Court. The Court has jurisdiction to consider these injunctions pursuant to 28 U.S.C. § 1292(a)(1). The Court heard oral argument on the appropriateness of the injunctions on September 20, 1979.

Shortly after the Court heard oral argument on the first appeal, Rio Algom Corporation, Gulf Oil Corporation, and an additional group of answering defendants led by the Getty Oil Corporation filed a petition for further interlocutory review. The District Court certified that the issues raised in this appeal are controlling questions of law to which there is room for substantial disagreement, and that the matter is appropriate for interlocutory review pursuant to 28 U.S.C. § 1292(b). This Court concurred with the District Court and accepted the matter for immediate review.

This appeal arises out of an Order of September 17, 1979, in which the District Court denied motions filed by the answering defendants seeking to postpone any hearing on damages as to the defaulting defendants until after trial on the merits. The appellants claim that the January 3, 1979, entry of default judgment and the subsequent determination to proceed to a damages hearing are an abuse of discretion by the District Judge. The appellants claim that the entry of judgment against the defaulting defendants prior to adjudication on the merits as to the answering defendants is prohibited by Frow v. De La Vega, 82 U.S. (15 Wall.) 552 (1872) and that they will be severely prejudiced by a determination as to damages against the defaulting defendants.

The Frow case involved the entry of a default judgment against one defendant in a multi-defendant action. De La Vega filed a complaint claiming that eight defendants had conspired to defraud him of title to a tract of land. Frow defaulted while the other defendants contested the allegations and won on the merits. Subsequently, Frow successfully petitioned the Supreme Court to vacate the default judgment.

When the District Judge entered default judgment on January 3, 1979 against the nine defaulters, he considered the applicability of Frow to the present action. The Court found that the judgment "pro confesso" entered in Frow was akin to the modern day default judgment under Rule 55(b). Nevertheless, the Court concluded that the entry of default judgment was appropriate. The District Judge reasoned that the 1961 amendments to Rule 54(b) permitting a final adjudication as to one or more but fewer than all of the parties to an action requires a balancing between the "premature decision making" addressed in Frow and the "pragmatic needs of the litigants in complex multiple party actions."

In striking that balance, the District Judge concluded that three factors outweighed the policies set out in Frow : the need for partial final judgments in complex modern civil actions; the possibility that the foreign defaulters might conceal or transfer assets subject to execution by United States Courts; and the seriousness of the charges in the complaint, together with the willful and deliberate avoidance of those charges by the defaulting defendants.

The appellants contend that this determination by the District Judge, and his subsequent

decision to proceed to damages are contrary to Frow, and therefore an abuse of discretion.

As an alternative basis for his holding, the District Judge relied on Rule 37(b) of the Federal Rules of Civil Procedure. That rule simply permits the imposition of sanctions against parties who fail to attend depositions, serve answers to interrogatories, or respond to requests for inspection. While the rule does not mention default judgment as a sanction for failure to participate in discovery, the entry of a default judgment for failure to participate in discovery has been upheld by the Supreme Court. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1977).

In addition to these issues raised by the appellants, a significant issue has been raised by amici curiae. The amici request that this Court remand the case to the District Court to conduct an analysis of the international ramifications of this case in order to determine whether subject matter jurisdiction exists, and whether it should be exercised. Because the concerns of the amici curiae call into question the Court's jurisdiction, those matters must be resolved at the outset.

I. JURISDICTION

The governments of Australia, Canada, South Africa and the United Kingdom of Great Britain and Northern Ireland have filed briefs as amici curiae. The principal thrust of the amici's briefs is to call into question the jurisdiction of the United States District Court over this controversy. We view the jurisdictional issue as two-pronged: (1) does subject matter jurisdiction exist; and (2) if so, should it be exercised?

The jurisdictional reach of the Sherman Act to conduct outside the United States was not favorably received at the outset. However, that view was later eroded, and the Act was applied to conduct outside the United States so long as some of the acts occurred within the United States and the parties were American. In United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2nd Cir. 1945), Judge Learned Hand articulated what is known as the "intended effects" test. In Alcoa Judge Hand reasoned that agreements made outside of the United States which restrain trade or commerce within the United States have the same effect as similar agreements entered into within our borders. Since "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends," he concluded that Congress did intend to apply the Act to conduct abroad so long as the intended effect of that conduct is prohibited by the Act. Since Alcoa, United States Courts have exercised jurisdiction over antitrust activity outside the United States so long as there is an intended effect on American commerce.

In its complaint Westinghouse alleges that twenty domestic and nine foreign corporations conspired to fix the price of uranium in the world market. The alleged meetings at which Westinghouse claims prices were agreed upon took place in France, Australia, South Africa, Illinois, the Canary Islands and England. At the present state of this litigation, there has been no opportunity for fact-finding.[20] We must therefore accept all properly pleaded allegations as true for purposes of determining jurisdiction. Accordingly, the picture which emerges is one of

concerted conduct both abroad and within the United States intended to affect the uranium market in this country. While the governments of the foreign participants in this alleged conspiracy are actively and admittedly sympathetic to the economic determinism of the defaulters, there is no claim that the alleged conduct of the defaulters is mandated by those governments. We therefore conclude that Westinghouse's allegations against the defaulters do fall within the jurisdictional ambit of the Sherman Act, as defined in Alcoa.

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n20. Indeed, so long as the nine defaulting foreign corporations refuse with specific support of their respective Governments to appear and contest the allegations of the complaint, including those upon which jurisdiction is asserted, they have made it virtually impossible to arrive at any further findings.

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The amici, in particular the United Kingdom contend that Alcoa is "no longer to be accepted by United States Courts as "settled law' ", in light of the recent opinions of the United States Courts of Appeals in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) and Mannington Mills, Inc. v. Congoleum Corporation, 595 F.2d 1287 (3rd Cir. 1979). In those cases the Courts were faced with a dismissal of an antitrust claim brought by an American company against an American corporation for conduct in a foreign country; and against a foreign subsidiary of an American corporation for illicit conduct abroad. Each Court began its analysis with the questions of whether the complaint stated a claim and whether subject matter jurisdiction existed. Both Courts answered those questions in the affirmative. In each case the Court reversed the District Court and remanded the case for a determination as to whether jurisdiction should be exercised. The Third Circuit set forth factors for the District Court to consider in resolving that question. Those factors were employed by the Court in Mannington Mills.

The United Kingdom relies primarily on the comment in Timberlane that "The effects test by itself is incomplete because it fails to consider other nations' interests." This amicus curiae contends the critical discussion of the Alcoa effects test has undermined its continuing viability as the standard of extraterritorial jurisdiction of the Sherman Act. We do not read Timberlane so broadly. The "jurisdictional rule of reason" espoused in Timberlane is that while an effect on American commerce is the necessary ingredient for extraterritorial jurisdiction, considerations of comity and fairness require a further determination as to "whether American authority should be asserted in a given case." The clear thrust of the Timberlane Court is that once a district judge has determined that he has jurisdiction, he should consider additional factors to determine whether the exercise of that jurisdiction is appropriate.

We conclude that nothing in Timberlane is inconsistent with our determination that Westinghouse's allegations of concerted conduct by foreign and domestic corporations are sufficient to confer jurisdiction on the District Court, under Alcoa. We turn now to the question of whether jurisdiction should be exercised in the present case.

In this case, unlike the situation in Timberlane and Mannington Mills, there has been a determination by the District Court as to whether jurisdiction should be exercised. In the order of January 3, 1979, and the order of September 17, 1979, the District Judge considered the unique circumstance presented in this case, and determined, in the exercise of his discretion, to proceed. Our task is to decide whether he abused his discretion in reaching that conclusion. We find that he did not.

In granting the requested default judgment, the District Court considered three factors: the complexity of the present multi-national and multi-party action; the seriousness of the charges asserted; and the recalcitrant attitude of the defaulters. The District Judge concluded that those factors all weighed heavily in favor of proceeding to judgment and damages.

The amici suggest that the District Court abused its discretion by not considering the factors set out in Mannington Mills in reaching this determination. While the considerations recommended in that case certainly provide an adequate framework for such a determination, we can hardly call the failure to employ those precise factors an abuse of discretion. First, the Mannington Mills factors are not the law of this Circuit. Second, even assuming their adoption by this Court, the circumstances here are distinct from those found in Timberlane and Mannington Mills. In those cases the defendants appeared and contested the jurisdiction of the District Court. In the present case, the defaulters have contumaciously refused to come into court and present evidence as to why the District Court should not exercise its jurisdiction. They have chosen instead to present their entire case through surrogates. Wholly owned subsidiaries of several defaulters have challenged the appropriateness of the injunctions, and shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction. If this Court were to remand the matter for further consideration of the jurisdictional question, the District Court would be placed in the impossible position of having to make specific findings with the defaulters refusing to appear and participate in discovery. We find little value in such an exercise.

We conclude that given the posture of this case, and the circumstances before the District Court, the Judge did not abuse his discretion in proceeding to exercise his jurisdiction. We therefore decline to remand the case to the District Court as requested by the amici curiae.

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III. THE INJUNCTIONS

Atlas Alloys, Inc. and Rio Algom Corporation appeal the orders enjoining the defaulting defendants from transferring assets out of the United States without prior approval of the Court. Appellants argue that the injunctions are erroneous because they are bottomed on an erroneously entered default judgment; that the District Court lacked the power to enter the injunctions; and assuming the Court was empowered to enter the injunctions, they are tantamount to an attachment of assets and, therefore, are an abuse of discretion.

We reject appellants' argument that the injunctions must be overturned because they are predicated on an erroneous default judgment. That argument assumes that Frow v. De La Vega prohibits the entry of default judgment in this case. Our prior discussion of the inapplicability of Frow to this action resolves that question and needs no further repetition here. Indeed, the starting point of our analysis is that the District Court's use of injunctive power was pursuant to a valid default judgment.

Appellants argue that the District Court lacked the power to enter the injunctions. Appellants' contention is that absent a final default judgment there are only three sources upon which these injunctions could be predicated: Rules 64 and 65 F.R.C.P. and the inherent equity powers of the district court. Appellants insist that none of those sources permit the Court to enter these injunctions. Westinghouse relies primarily on general equity powers in its argument in support of the injunctions. We find that both the inherent equity powers of Federal Courts and the All Writs Act, 28 U.S.C. @ 1651(a) confer upon the district court power to enjoin the transfer of assets in this case.

The situation confronting the district court was extraordinary. In order to avoid execution on the default judgment, Rio Algom Limited instructed its American subsidiaries to transfer their assets to Canada. The defaulting defendant circumvented and even ignored the district court's restraining order in an effort to transfer funds out of the United States. Had the Court not exercised its injunctive powers the default judgment would have been rendered meaningless.

Federal Courts are empowered to restrain the removal of assets from the United States through injunctive relief. Such equitable relief is particularly appropriate when a default judgment has been entered. Since a preliminary injunction seeks to preserve the status quo ante litem, (Seagrams Distillers Corp. v. New Cut Rate Liquors, 221 F.2d 815 (7th Cir. 1955)), it is also an appropriate means of maintaining the status quo as of the time the default judgment was entered. Given our conclusion that the default judgment was a proper exercise of the district court's discretion, it seems evident that the Court was empowered to enter all equitable orders necessary to preserve that judgment.

We also find support for the district court's authority to enter these injunctions in the All Writs Act, 28 U.S.C. @ 1651(a). That Act simply empowers Federal Courts to enter such writs as are necessary to preserve the jurisdiction of the Court. In the anti-trust context, the Act has been recognized as an effective tool for preserving the status quo. The Act has been relied on for the entry of injunctive relief when necessary to preserve the jurisdiction of the district court over a Sherman Act claim. If the defaulting corporations continued to transfer their assets out of the United States, the district court would be unable to enter any effective judgment as to damages. While the Court would not technically be robbed of subject matter jurisdiction, the Court's default judgment would be rendered meaningless and the Court would be powerless to enter any effective relief as to the defaulters. Confronted with such a situation, the District Court was empowered to enter any injunctive relief necessary to preserve its jurisdiction.

We note that in De Beers Mines Ltd. v. United States, 325 U.S. 212 (1945), the Court overturned a preliminary injunction against the removal of assets which had been entered pursuant to the All Writs Act. In De Beers, as in the present case, the injunction was entered to prevent defendants from removing assets out of the United States, thereby avoiding enforcement of a final decree of the Court. In De Beers, however, there was no judgment against the parties who were enjoined. The motion for preliminary injunction was filed with the complaint and was supported only by the unproven allegations in the complaint and an affidavit stating that the defendants "could quickly withdraw their assets from the United States." Id. In the present case the defendants have confessed to the allegations of the complaint by their failure to contest those allegations, and a valid judgment has been entered against them. Indeed, the Court in De Beers suggested that had the injunction been pursuant to a final decree it would have been sustained.

The All Writs Act empowers Federal Courts to protect their jurisdiction. The injunction in De Beers did not serve to preserve the Court's jurisdiction and was therefore not within the ambit of the Act. The injunctions in the present case, however, aid the Court in the exercise of its powers; i.e., in enforcing its judgment. For that reason, De Beers does not preclude use of the All Writs Act powers in this case.

Rio Algom Corporation and Atlas Alloys, Inc. argue that assuming the Court was empowered to enter the injunctions in this case, the Court abused its discretion in doing so. The enjoining of transfers of assets was, in effect, an attachment. An attachment or sequestration of assets prior to final judgment, they argue, is simply an abuse of the Court's equity powers.

The cases relied upon by appellants all involve a prejudgment sequestration of assets or diversity claims in which state attachment procedures govern. We find those cases inapposite. Here there has been a judgment entered against the defendants whose assets have been sequestered. In that situation, courts have permitted equitable restraints on assets because the default serves as an admission to the allegations in the complaint. When a violation of law is present, Courts have considerable discretion in fashioning equitable orders to prevent the removal of assets from the United States.

The district court's exercise of discretion in entering a preliminary injunction is measured against four prerequisites:

(1) The plaintiffs have no adequate remedy at law and will be irreparably harmed if the injunction does not issue;

(2) The threatened injury to the plaintiffs outweighs the threatened harm the injunction may inflict on the defendant;

(3) The plaintiffs have at least a reasonable likelihood of success on the merits; and

(4) The granting of a preliminary injunction will not disserve the public interest.
We find each of those prerequisites met in this case.

There is no remedy at law which could effectively prevent the removal of the defaulter's assets from the jurisdiction of the United States Courts. Indeed, defaulters' conduct is particularly suited for equitable remedies. With regard to the requisite threat of irreparable harm, it is evident that without the Court's use of injunctive powers the plaintiffs' ability to satisfy the judgment would be seriously jeopardized.

The Court's injunctive orders do not place an onerous burden on the defaulting defendants. The Court's orders simply require prior approval of transfers of funds and permits transactions in the ordinary course of business. However, the threatened injury to plaintiff from the continued withdrawal of assets is substantial. We find that the scale tips in favor of the injunctions.

Since a judgment of liability has been entered against the defaulting defendants, there is clearly more than a reasonable likelihood of success on the merits. While it is conceivable that the defendants might prevail on the merits in the final analysis, plaintiff has a substantial likelihood of success against the defaulters at this posture of the litigation.

Finally, the injunctions of the District Court do not disserve the public interest. To the contrary, the entry of these injunctions serves a strong national interest in effective and meaningful enforcement of the American anti-trust laws. As the District Court correctly pointed out, the pattern of conduct engaged in by the defaulters "can only disserve the public interest" and the public interest is best served by "a firm insistence that they (the defaulters) respond to the orderly processes, the lawful processes, yes, the due process of his Court."

We conclude that the district court did not abuse its discretion in enjoining the transfer of funds out of the United States and that each injunction should be and hereby is affirmed.

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V. CONCLUSION

Section 1292(b) of the Judicial Code provides appellate courts with a flexible tool for interlocutory review of complex and controlling questions of law. Interlocutory review is permitted to assure orderly and efficient administration of complex cases. Our decision today should be viewed in that context. Our conclusion is that Frow does not control this case and that the entry of default judgment was not an abuse of discretion. Nevertheless, the question of damages must await resolution of the issue of liability as to all parties. As a practical matter, Westinghouse must elect whether to abandon its claim against the answering parties and pursue the question of damages solely against the defaulters, or proceed to the merits on the entire claim. Should Westinghouse choose the latter course, the judgment against the defaulters will remain interlocutory until a judgment on the merits is reached.

Our result today is mandated by the nature of joint and several liability. While the liability of each defendant presents separate and distinct issues entirely independent of each other, there is a

single unified damage to the plaintiff. The defaulting defendants have confessed to the Westinghouse allegations by their refusal to appear. The defaulters may have to accept full responsibility for the damage ultimately proven by Westinghouse as a result of that default.

The cause is REMANDED to the District Court to proceed in accordance with the views herein expressed.

NOTE

1. Why would an antitrust defendant default if it would be held liable for damages not withstanding the outcome of the case on the merits regarding remaining defendants?
2. Was the role of the defendant's governments appropriate?
3. Who were the real party in interest in this case, the private parties, the foreign governments, or the United States?
4. Is this the type of controversy that can be decided in the courts?
5. For other aspects of the Uranium litigation see United Nuclear Corp. v. General Atomic Corp., 96 N.M. 155, 629 P.2d 231, 315-16 (1980), appeal dismissed, 451 U.S. 901 (1981)(refusing to order production of documents in violation of foreign law but requiring defendants to seek all available waivers allowing production); In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F. 2d 992 (10th Cir. 1977)(denying contempt where discovery barred by Canadian blocking statute where third-party non-defendant had sought waivers in good faith and did not profit from inability to produce information).
6. The next case illustrates a similar intractable conflict. Despite the very different tone of the opinion, how is the result any different from the main Uranium opinion set forth above?

Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

We review today the limits of a federal court's power to conserve its adjudicatory authority over a case properly filed with the court when, instead of actively raising all defensive claims in the federal court, the named defendants initiate suits in foreign tribunals for the sole purpose of terminating the federal court's adjudication of the litigation. Three months after Laker Airways, Ltd. ("Laker") filed an antitrust action in United States District Court for the District of Columbia against several defendants, including domestic, British, and other foreign airlines, the foreign airlines filed suits in the High Court of Justice of the United Kingdom seeking an injunction forbidding Laker from prosecuting its American antitrust action against the foreign defendants. After the High Court of Justice entered interim injunctions against Laker, the Court of Appeal issued a permanent injunction ordering Laker to take action to dismiss its suit against the British airlines. In the meantime, Laker responded by requesting injunctive relief in the United States District Court, arguing that a restraining order was necessary to prevent the remaining American defendants and the additional foreign defendants Laker had named in a

subsequent antitrust claim from duplicating the foreign defendants' successful request for an English injunction compelling Laker to dismiss its suit against the defendants.

If these defendants had been permitted to file foreign injunctive actions, the United States District Court would have been effectively stripped of control over the claims -- based on United States law -- which it was in the process of adjudicating. Faced with no alternative but acquiescence in the termination of this jurisdiction by a foreign court's order, United States District Judge Harold H. Greene granted Laker's motion for a preliminary injunction restraining the remaining defendants from taking part in the foreign action designed to prevent the district court from hearing Laker's antitrust claims.

Two of the defendants enjoined from taking part in the English proceeding, KLM Royal Dutch Airlines ("KLM") and Societe Anonyme Belge d'Exploitation de la Navigation Aerienne ("Sabena") now contend on appeal that the court abused its discretion. Their arguments are essentially two-fold: first, that the injunction tramples Britain's rights to regulate the access of its nationals to judicial remedies; second, that the injunction contravenes the principles of international comity which ordinarily compel deference to foreign judgments and which virtually always proscribe any interference with foreign judicial proceedings.

Our review of the limited available facts strongly suggests that both the United States and Great Britain share concurrent prescriptive jurisdiction over the transactions giving rise to Laker's claim. Ordinarily anti-suit injunctions are not properly invoked to preempt parallel proceedings on the same in personam claim in foreign tribunals. However, KLM and Sabena do not qualify under this general rule because the foreign action they seek to join is interdictory and not parallel. It was instituted by the foreign defendants for the sole purpose of terminating the United States claim. The only conceivable benefit that KLM and Sabena would reap if the district court's injunction were overturned would be the right to attack the pending United States action in a foreign court. This would permit the appellants to avoid potential liability under the United States laws to which their business operations and treaty obligations have long subjected them. In these circumstances there is ample precedent justifying the defensive use of an anti-suit injunction.

The injunction does not transgress either the principles of international comity or nationality-based prescriptive jurisdiction on which KLM and Sabena rely. Limitations on the application of comity dating from the origins of the doctrine recognize that a domestic forum is not compelled to acquiesce in pre- or post-judgment conduct by litigants which frustrates the significant policies of the domestic forum. Accession to a demand for comity predicated on the coercive effects of a foreign judgment usurping legitimately concurrent prescriptive jurisdiction is unlikely to foster the processes of accommodation and cooperation which form the basis for a genuine system of international comity. Similarly, the mere fact of Laker's British juridical status simply does not erase all other legitimate bases of concurrent jurisdiction, as appellants suggest. Thus, the appellants' arguments that the district court abused its discretion fall well short of their mark.

The claims raised by KLM and Sabena do pose serious issues regarding the Judiciary's role in accommodating the conflicting implementation of concurrent prescriptive jurisdiction. We have necessarily inquired into the source of the conflict facing the courts of the United States and United Kingdom, and probed the extent to which the judicial processes may effectively be employed to resolve conflicts like the present one. Given the inherent limitations on the Judiciary's ability to adjust national priorities in light of directly contradictory foreign policies, there is little the Judiciary may do directly to resolve the conflict. Although the flash point of the controversy has been the anti-suit injunctions, the real powder keg is the strongly mandated legislative policies which each national court is bound to implement. Thus, it is unlikely that the underlying controversy would be defused regardless of the action we take today.

Because the principles of comity and concurrent jurisdiction clearly authorize the use of a defensive preliminary injunction designed to permit the United States claim to go forward free of foreign interference, we affirm the decision of the district court.

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C. Paramount Nationality

We turn now to the appellants' argument that Laker's nationality requires the United States District Court to defer to the injunctions issued by the courts of the United Kingdom.

KLM and Sabena do not dispute the power of the United States District Court to issue the injunction. They contend rather that the district court abused its discretion by issuing an anti-suit injunction instead of relinquishing its jurisdiction, staying its proceedings, or adopting some other vehicle of conflict resolution. Appellants are therefore in the contradictory position of supporting the right of English courts to issue an anti-suit injunction, but opposing the United States District Court's issuance of the same kind of injunction. The only way appellants can differentiate between the two injunctions is to focus on the nationality of Laker.

The similarity of the injunctions is underscored by the way Sabena phrased the issue posed by this case: "which sovereign, the United States or Great Britain, has the right to determine whether British law permits Laker to conduct private treble damage actions in the United States." As counsel for Sabena recognized at oral argument, whether British law permits or proscribes certain activities is primarily a matter for the British courts to determine. On parity of reasoning the availability of treble damage actions in United States courts is a question of United States law. Appellants' case thus hinges entirely on the consequences attending the existence in one court of nationality-based jurisdiction over Laker.

Appellants attempt to prioritize the authority of the courts to proceed in cases of concurrent jurisdiction by arguing that the nationality of the plaintiff gives the plaintiff's state an inherent advantage which displaces all other jurisdictional bases. They label this principle "paramount nationality," and present this as the theory of conflict resolution to be used when concurrent jurisdiction is present: "assuming that two or more states exercise jurisdiction over Laker's

allegations, the state with jurisdiction over its national must have the paramount right to determine whether and, if so, where litigation by that national may go forward."

We are asked to recognize an entirely novel rule. Although a court has power to enjoin its nationals from suing in foreign jurisdictions, it does not follow that the United States courts must recognize an absolute right of the British government to regulate the remedies that the United States may wish to create for British nationals in United States courts. The purported principle of paramount nationality is entirely unknown in national and international law. Territoriality, not nationality, is the customary and preferred base of jurisdiction. Moreover, no rule of international law or national law precludes an exercise of jurisdiction solely because another state has jurisdiction. In fact, international law recognizes that a state with a territorial basis for its prescriptive jurisdiction may establish laws intended to prevent compliance with legislation established under authority of nationality-based jurisdiction.

All proposed methods of avoiding conflicts stemming from concurrent jurisdiction indicate that nationality of the parties is only one factor to consider, not the paramount or controlling factor. Appellants have not cited any cases where the principle has been followed as a method of choosing between competing claims of jurisdiction, despite the numerous occasions when the principle could have been decisive. As this paucity of case law implies, significant adverse consequences would attend the adoption of this rule, and we decline to do so.

The rationale behind the claim of paramount nationality seems to be that particularly important foreign sovereign prerogatives are infringed when a foreign national sues in domestic courts against the wishes of a foreign state. However, this argument ignores the stronger policy interests of the domestic forum. If a country has a right to regulate the conduct of its nationals, then a fortiori it has the power to regulate the activities of its very governmental organizations, such as its courts, which it establishes and maintains for the purpose of furthering its own public policies.

United States courts must control the access to their forums. No foreign court can supersede the right and obligation of the United States courts to decide whether Congress has created a remedy for those injured by trade practices adversely affecting United States interests. Our courts are not required to stand by while Britain attempts to close a courthouse door that Congress, under its territorial jurisdiction, has opened to foreign corporations. Under the nationality base of jurisdiction, Britain can punish its corporations for walking through that courthouse door, but it cannot close the American door. Thus, although British courts can sanction their citizens for resorting to United States antitrust remedies, United States courts are not required to cut off the availability of the remedy.

The position advanced by appellant would require United States courts to defer to British policy when there is no statement by Congress that it does not wish the courts to provide the remedy. Appellants' argument that there is no absolute duty to exercise jurisdiction has no merit in this context. It is based on abstention and forum non conveniens cases, which in turn are premised on the availability of a second forum that can fully resolve the plaintiff's claims. In this

case, the English Court of Appeal has admitted that there is no other forum for Laker's claims.

Besides lacking any basis in national or international law, and besides ignoring important domestic interests, the paramount nationality rule would generate more interference than it would resolve. Legislation based on nationality tends to encourage chauvinism and discrimination without enhancing international comity. The paramount nationality rule would be no exception. Foreign plaintiffs in our courts could routinely face public policy challenges in their domestic courts, while our courts would be required to stay proceedings pending foreign authorization. On the other hand, as the district court noted, United States courts could use corporate nationality as a pretext to interject themselves in foreign proceedings involving United States corporations and subsidiaries.

The paramount nationality rule would also be impractical to administer. It would be difficult or impossible to determine when the nationality of a corporation is sufficiently strong that legitimate territorial contacts should be nullified. There are at least five competing methods of determining nationality of a corporation. Multiple countries could simultaneously assert controlling jurisdiction over one "national" corporation based, for example, on shareholder nationality, state of incorporation, or other corporate links to a particular forum. There would be no paramount nation in this situation. The conflicts associated with concurrent jurisdiction would continue to confront the courts.

Finally, KLM and Sabena are not British nationals. Thus, their claims are fundamentally different from those advanced by British Airways and British Caledonian. Nothing gives KLM or Sabena a supreme right to vindicate the British national interests that may be implicated by Laker's suits. Sabena, at least, is specifically entitled to the protection of United States antitrust laws under its air services agreement. KLM no doubt would expect the same protection. No rule of paramount nationality should free them from obligation under United States antitrust laws and at the same time protect them from other corporations' violations. Contrary to appellants' arguments, Laker's nationality is clearly an insufficient basis to reverse the district court.

D. International Comity

Appellants and amici curiae argue strenuously that the district court's injunction violates the crucial principles of comity that regulate and moderate the social and economic intercourse between independent nations. We approach their claims seriously, recognizing that comity serves our international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure.

"Comity" summarizes in a brief word a complex and elusive concept -- the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain. However, the central precept of comity teaches that, when possible, the decisions of

foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced -- the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations.

Comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation states. As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.

However, there are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act. Case law on the subject is extensive and recognizes the current validity of this exception to comity.

Opinions vary as to the degree of prejudice to public policy which should be tolerated before comity will not be followed, but by any definition the injunctions of the United Kingdom courts are not entitled to comity. This is because the action before the United Kingdom courts is specifically intended to interfere with and terminate Laker's United States antitrust suit.

The district court's anti-suit injunction was purely defensive -- it seeks only to preserve the district court's ability to arrive at a final judgment adjudicating Laker's claims under United States law. This judgment would neither make any statement nor imply any views about the wisdom of British antitrust policy. In contrast, the English injunction is purely offensive -- it is not designed to protect English jurisdiction, or to allow English courts to proceed to a judgment on the defendant's potential liability under English anticompetitive law free of foreign interference. Rather, the English injunction seeks only to quash the practical power of the United States courts to adjudicate claims under United States law against defendants admittedly subject to the courts' adjudicatory jurisdiction. The Court of Appeal itself recognized that there is no other forum available for resolution of Laker's claims.

It is often argued before United States courts that the application of United States antitrust laws to foreign nationals violates principles of comity. Those pleas are legitimately considered. In conducting this inquiry, a court must necessarily examine whether the antitrust laws were clearly intended to reach the injury charged in the complaint. If so, allowing the defendant's

conduct to go unregulated could amount to an unjustified evasion of United States law injuring significant domestic interests. This is one context in which comity would not be extended to a foreign act. On the other hand, if the anticompetitive aspect of the alleged injury is not appreciable; the contacts with the United States are attenuated; and the actions of foreign governments denote the existence of strong foreign interests, then comity may suggest a lack of Congressional intent to regulate the alleged conduct. In this context, comity may have a strong bearing on whether application of United States antitrust laws should go forward.[109]

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n109 In this case, the injuries alleged in Laker's complaints are clearly within the scope of the antitrust laws; the interests at stake in Laker's action here are primarily those of United States consumers and lenders; and Congress has expressly allowed foreign corporations to sue for violations of the Sherman and Clayton Acts. Regulation of the appellants' conduct is entirely consistent with their treaty obligations to conduct business here without participating in predatory or discriminatory pricing practices. Thus, "it is the Sherman Act's applicability, rather than its inapplicability, that is supported by consideration of the 'comity' factors."

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However, the appellants' plea to comity is fundamentally different. KLM and Sabena contend that comity compels us to recognize a decision by a foreign government that this court shall not apply its own laws to corporations doing business in this country. Thus, the violation of public policy vitiating comity is not that the evasion of United States antitrust law might injure United States interests, but rather that United States judicial functions have been usurped, destroying the autonomy of the courts. Under the position advanced by appellants, the United States District Court would no longer be free to rule that comity prevented the United States from exercising prescriptive jurisdiction over the defendants, since that determination would be made as of right by a separate forum.[110]

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n110 A defendant's claims that foreign law forbids a foreign national from prosecuting a United States antitrust action should be made initially in the United States District Court free from the coercive threat of a possible anti-suit injunction. If justified by principles of comity or the lack of sufficient implication of United States interests, that claim could be granted. In making such a ruling the district court would not necessarily be required to resolve unsettled questions of foreign law, such as whether the foreign plaintiff would violate foreign law by suing under United States antitrust claims, since the district court would have discretion to stay the action pending a special proceeding in the foreign court brought for the limited purpose of resolving that issue, if the status of the foreign law were unclear.

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In this latter context we cannot rule that the district court abused its discretion to protect its jurisdiction. Between the state courts, the Full Faith and Credit Clause has not been held to compel recognition of an anti-suit injunction. A fortiori, the principles of comity do not prevent proceeding in the face of a foreign injunction.

Comity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing res judicata to be pled in defense. The appeal to the recognition of comity by the American court in order to permit the critical issues to be adjudicated in England, which is the

plea made by appellants here, thus comes based on a very strange predicate. Since the action seeking to determine Laker's right to recover for anticompetitive injuries was first instituted in the United States, the initial opportunity to exercise comity, if this were called for, was put to the United Kingdom courts. No recognition or acceptance of comity was made in those courts. The appellants' claims of comity now asserted in United States courts come burdened with the failure of the British to recognize comity.

Although reciprocity may no longer be an absolute prerequisite to comity, certainly our law has not departed so far from common sense that it is reversible error for a court not to capitulate to a foreign judgment based on a statute like the British Protection of Trading Interests Act, designed to prevent the court from resolving legitimate claims placed before it. We cannot forget that the foreign injunction which creates an issue of comity or forbearance was generated by the English Executive's deliberate interference with a proceeding which had been ongoing in the American courts for over six months. Deference to the English courts is now asked in a situation in which all the English courts are doing is supporting and acquiescing in the action taken by their executive. There never would have been any situation in which comity or forbearance would have become an issue if some of the defendants involved in the American suit had not gone into the English courts to generate interference with the American courts.

There is simply no visible reason why the British Executive, followed by the British courts, should bar Laker's assertion of a legitimate cause of action in the American courts, except that the British government is intent upon frustrating the antitrust policies of the elective branches of the American government. The effort of the British therefore is not to see that justice is done anywhere, either in the United States or British courts, but to frustrate the enforcement of American law in American courts against companies doing business in America. Absent a clear treaty concluded by the United States Executive Branch, this simply cannot be agreed to by the courts of the United States.

Nothing in the British Executive order and directions suggests that they are entitled to comity. The order and directions purport to counteract United States regulation of international trade outside its territorial jurisdiction. The Protection of Trading Interests Act and the order govern "any person in the United Kingdom who carries on business there." They forbid any person in the United Kingdom from furnishing "any commercial document in the United Kingdom," or "any commercial information [apparently regardless of location] which relates to the said Department of Justice investigation or the grand jury or the District Court proceedings." Even United States airlines would be swept within these broad directives, but for the directions' specific exclusion of United States carriers.

The English Executive has thus issued an order to every airline in the world doing business in England to refuse to submit to the jurisdiction of the American court and not to submit any documents from England pursuant to an order of the American court. If the exercise of "extraterritorial" jurisdiction under United States antitrust laws can ever be described as arrogant, the order and directions issued by the British Government certainly bear the same characteristic. United States antitrust laws are enforced where there is an impact in the United States, but only

after an adjudication in the United States courts of a violation. Here the English Executive has presumed to bar foreigners from complying with orders of an American court before there is an adjudication by a court on the merits of the dispute.

Moreover, since oral argument before this court, the English Secretary of State has interpreted the order and directions to bar the furnishing of any "commercial information," even that located exclusively within United States territory. On the basis of this interpretation the British Government has refused to permit Laker's use of commercial information contained in documents situated in the United States to respond to interrogatories propounded by Trans World Airlines. The orders thus interfere with any attempt by Laker to use any commercial information, whether located in the United Kingdom or the United States, to proceed against any of the defendants, whether British or American.

This development completely undermines the appellants' strongest argument in favor of the application of comity -- namely, that all United States interests protected under the antitrust laws could be adequately enforced through means other than a treble damage suit, such as a civil or criminal action brought by the Government, or a creditors' class action. Since the British Government is refusing to permit Laker to proceed with its suit even insofar as it relates to American defendants, it is clear that it would prevent Laker's participation in any proceeding designed to vindicate United States interests allegedly harmed as a result of injuries suffered by Laker and its customers. Thus, Laker would be hampered in assisting the plaintiffs in any alternative action. Without crucial information provided by the injured party, Laker, any other suit would be procedurally doomed to failure, regardless of its merits. Therefore, comity can not be extended on the grounds that the British directions protect solely British interests while permitting the United States to vindicate its own policies; the truth, the reality, is far different.

If we are guided by the ethical imperative that everyone should act as if his actions were universalized, then the actions of the British Executive in this particular matter scarcely meet the standard of Kant. For, if the United States and a few other countries with major airlines enacted and enforced legislation like the Protection of Trading Interests Act, the result would be unfettered chaos brought about by unresolvable conflicts of jurisdiction the world over. If we were to forbid every American airline and every foreign airline doing business in the United States from producing documents in response to the summons of an English court, or a French court, or a German court, and the French and the German governments were to enact and enforce similar legislation, there could be no complete resolution of any legal dispute involving airlines around the world. The operations of the airlines would be snarled in a criss -cross of overlapping and tangled restrictions to the extent that no airline could be certain of its legal obligations anywhere. Thus, even the practical consequences that would flow from a grant of comity counsel against deferring to the British injunctions triggered by the Protection of Trading Interests Act.

There is nothing in the nature of the parties which suggests comity should be exercised. Laker appears before the court as a voluntary plaintiff, under no compulsion to sue. Laker prosecutes its action here subject to sanctions that may be issued against it in the United

Kingdom. Thus, there is no suggestion that comity should be exercised to avoid hardship to a party who might otherwise be caught between the inconsistent imperatives of two forums.

No facts have been presented here suggesting that the antitrust suit adversely affects the operations of foreign governments. Laker is a privately owned airline. To the extent KLM and Sabena are governmentally owned, they are non-British. The ownership of these airlines implicates no significant interests of Britain as a state. The parties have not seriously asserted otherwise.

Similarly, the parties have not invoked either the sovereign immunity doctrine or the act of state doctrine, which insulate from review those foreign governmental actions which are not compatible with judicial scrutiny in our domestic courts. That neither of these doctrines even arguably would apply here is further evidence that no significant British or other governmental interest would be violated by Laker's suit.

Although unlikely, it may subsequently be shown that there was sufficient foreign governmental involvement that enforcement of United States antitrust laws is not appropriate. In that event, any of several other well-established principles could be invoked in favor of the defendant. However, these are hurdles that are more appropriately cleared at later stages in the proceeding when the facts are fully developed.

Finally, we note that the district court did grant comity to the English orders and proceedings to the extent it could do so consistently with its duty to defend its jurisdiction. The court offered to narrow the scope of its preliminary injunction if KLM or Sabena would submit language permitting the defendants to proceed in Great Britain without leaving them free to secure orders which would interfere with the district court's pending litigation. KLM and Sabena ignored this invitation precisely because their sole purpose is the interference with this action. KLM and Sabena cannot now argue that the district court abused its discretion by entering an overly restrictive injunction in violation of comity.

Now a word about the position of our dissenting colleague. We submit that the dissent relies on a skewed view of comity, ignoring the significant prejudice to the administration of justice in our courts under United States laws in order to accommodate the strongly asserted views of the British Executive and Judiciary. However laudatory the impulse to adjust and compromise, we are unable to plunge ahead as the dissent advocates. The path to "the seemly accommodation of . . . competing national interests" eked out by the dissent turns comity into quicksand, snares the district court in the very pitfalls which it attempted to avoid, and leads the parties and the district court to a result so vague and ill-defined that it cannot possibly solve the problems raised by the actions of the two governments. This position is neither legally tenable nor pragmatically dictated by the extraordinary circumstances of this litigation.

The interpretation of international comity propounded by the dissent is a weak reed indeed under the aggravated facts of this case; it does not rest upon any legal precedent, and ignores the previously recognized limits on the doctrine. The central authority quoted, Hilton v. Guyot, recognizes that comity never obligates a national forum to ignore "the rights of its own citizens

or of other persons who are under the protection of its laws." Laker's United States creditors and consumers are entitled to the protection of United States antitrust laws. Furthermore, although not a United States citizen, as a corporation operating within the United States, Laker qualifies as an "other person" entitled to the protection of United States law. Heretofore comity has never been thought to require mandatory deferral to a foreign action primarily intended to cut off these domestic interests.

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There are other weighty reasons why the absence of any current expression of affirmative United States interest should not be fatal to Laker's antitrust action. The American Executive has been in contact with the British Executive seeking to iron out differences under the Bermuda II Treaty. It may very well be that since the State Department is seized with the responsibility for negotiations with the British it has advised the Antitrust Division that it would be inappropriate for that division to take an adversary position in the ongoing private civil suit at this time.

The sensitive status of current negotiations may even preclude the Department of State from actively participating in this litigation. Significantly, the British Government is not involved in this litigation either, presumably confining itself to consultation and to the creation and interpretation of the executive orders giving rise to the controversy. This counsels against inviting the Executive to present the views of the United States on remand. Unless and until the views of the American Executive are made known, the absence of any Executive expression of United States sovereign or other interests should not be a bar to proceeding with Laker's suit, or to the protection of jurisdiction to hear the claim.

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F. Judicial Reconciliation of Conflicting Assertions of Jurisdiction

We recognize that the district court's injunction, precipitated as it was by preemptive interim injunctions in the High Court of Justice, unfortunately will not resolve the deadlock currently facing the parties to this litigation. We have searched for some satisfactory avenue, open to an American court, which would permit the frictionless vindication of the interests of both Britain and the United States. However, there is none, for the British legislation defines the British interest solely in terms of preventing realization of United States interests. The laws are therefore contradictory and mutually inconsistent.

1. Nature of the Conflict

The conflict faced here is not caused by the courts of the two countries. Rather, its sources are the fundamentally opposed national policies toward prohibition of anticompetitive business activity. These policies originate in the legislative and executive decisions of the respective counties.

Congress has specifically authorized treble damage actions by foreign corporations to redress

injuries to United States foreign commerce. Equally significant, Congress has designed the private action as a major component in the enforcement mechanism. The treble damage aspect of private recoveries is the centerpiece of that enforcement mechanism.

We find no indication in either the statutory scheme or prior judicial precedent that jurisdiction should not be exercised. Legitimate United States interests in protecting consumers, providing for vindicating creditors' rights, and regulating economic consequences of those doing substantial business in our country are all advanced under the congressionally prescribed scheme. These are more than sufficient jurisdictional contacts under United States v. Aluminum Co. of America and subsequent case law to support the exercise of prescriptive jurisdiction in this case. Congress has been aware of the decades-long controversy accompanying the recurrent assertion of jurisdiction over foreign anticompetitive acts and effects in the United States dating back nearly forty years but has, with limited exceptions, not yet chosen to limit the laws' application or disapprove of the consistent statutory interpretation reached by the courts. Thus, aside from the unprecedented foreign challenge to the application of the antitrust laws, there is nothing in either the facts alleged in the complaint or the circumstances of the litigation which suggests jurisdiction should not be exercised in Laker's suit.

The English courts have indicated that they, too, have acted out of the need to implement their mandatory legislative policy, and not out of any ill will towards our courts or the substantive law we are bound to follow. Although the injunctive relief sought by British Airways and British Caledonian set the stage for a direct conflict of jurisdiction, until action by the political branches of the English Government the English courts remained largely acquiescent to Laker's invocation of United States jurisdiction. Justice Parker's well reasoned judgment initially denied the injunctive relief sought by British Airways and British Caledonian. That judgment was rendered even after the district court issued the injunction under appeal here.

However, the government of the United Kingdom is now and has historically been opposed to most aspects of United States antitrust policy insofar as it affects business enterprises based in the United Kingdom. The British Government objects to the scope of the prescriptive jurisdiction invoked to apply the antitrust laws; the substantive content of those laws, which is much more aggressive than British regulation of restrictive practices; and the procedural vehicles used in the litigation of the antitrust laws, including private treble damage actions, and the widespread use of pretrial discovery. These policies have been most recently and forcefully expressed in the Protection of Trading Interests Act.[138]

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n138 Although we take issue with the combative, intrusive method of frustrating United States jurisdiction through which the British Executive has exported these policies, contrary to the implications of the dissent we do not find the British views to be inherently distasteful or unreasonable.

We reject any suggestion that the standard of justice under British antitrust laws, which provide only for single damages, is inferior to the treble damage provisions of United States laws. Both sets of laws are designed to provide full justice to litigants, although the particular form and availability of remedies differs somewhat due to the divergent legislative intent behind the laws. We are not asked and do not purport to pass judgment on the British

attitude, but only resolve the extent of the United States District Court's discretion to execute its duty of upholding United States laws in the instant circumstances.
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The nature of the direct conflict between the political-economic policies of the two countries is put into focus by considering whether the British Government would have been likely to attempt to stop Laker from suing in United States courts if Laker brought a suit other than an antitrust action. If Laker had sued the American defendants for fraud, or on a contract claim for failure of performance, the British would not have been at all interested in intervening, irrespective of the financial condition of Laker at the time it brought the suit. The indifference would not lessen whether British Airways and British Caledonian were included in the group sued by Laker in the United States court. It is the hated application of United States antitrust laws to conduct involving British corporations that has triggered the involvement of the British Government, and ultimately, the British courts.

Under the provisions of the Protection of Trading Interests Act, after Justice Parker refused relief, the English Secretary of State issued an order and directions prohibiting all those carrying on business in the United Kingdom, with the exception of United States designated air carriers, from complying with United States antitrust measures arising out of the provision of air carriage by United Kingdom designated airlines under the terms of the Bermuda II Treaty. Because these directions reflected the firm conclusion of the British Executive Branch that British trading interests were being threatened by Laker's antitrust claim, they presented an entirely different situation to the Court of Appeal than that which Justice Parker had faced. The restrictions placed on the British airlines by these orders "fundamentally altered" the perceived ability of the Court of Appeal to permit concurrent actions. Because the directions of the British Executive blocked British Caledonian and British Airways from complying with Laker's discovery requests, the court concluded that the British airlines could not thereafter adequately defend themselves. According to the Court of Appeal, this rendered Laker's claim "wholly untriable" and was therefore "decisive."

Thus, to a large extent the conflict of jurisdiction is one generated by the political branches of the governments. There is simply no room for accommodation here if the courts of each country faithfully carry out the laws which they are entrusted to enforce. The Master of the Rolls expressed hope that "the courts of the two countries will . . . never be in conflict. The conflict, if there be conflict, will be purely one between the laws of the two countries, for which neither court is responsible." We echo that hope.

2. Judicial Interest Balancing

Even as the political branches of the respective countries have set in motion the legislative policies which have collided in this litigation, they have deprived courts of the ability meaningfully to resolve the problem. The American and English courts are obligated to attempt to reconcile two contradictory laws, each supported by recognized prescriptive jurisdiction, one of which is specifically designed to cancel out the other.

The suggestion has been made that this court should engage in some form of interest balancing, permitting only a "reasonable" assertion of prescriptive jurisdiction to be implemented. However, this approach is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law. Interest balancing in this context is hobbled by two primary problems: (1) there are substantial limitations on the court's ability to conduct a neutral balancing of the competing interests, and (2) the adoption of interest balancing is unlikely to achieve its goal of promoting international comity.

a. Defects in the Balancing Process

Most proposals for interest balancing consist of a long list of national contacts to be evaluated and weighed against those of the foreign country. These interests may be relevant to the desirability of allocating jurisdiction to a particular national forum. However, their usefulness breaks down when a court is faced with the task of selecting one forum's prescriptive jurisdiction over that of another.

Many of the contacts to be balanced are already evaluated when assessing the existence of a sufficient basis for exercising prescriptive jurisdiction. Other factors, such as "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by other states" are essentially neutral in deciding between competing assertions of jurisdiction. Pursuing these inquiries only leads to the obvious conclusion that jurisdiction could be exercised or that there is a conflict, but does not suggest the best avenue of conflict resolution. These types of factors are not useful in resolving the controversy.

Those contacts which do purport to provide a basis for distinguishing between competing bases of jurisdiction, and which are thus crucial to the balancing process, generally incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing. One such proposed consideration is "the degree to which the desirability of such regulation [of restrictive practices] is generally accepted." We doubt whether the legitimacy of an exercise of jurisdiction should be measured by the substantive content of the prescribed law. Moreover, although more and more states are following the United States in regulating restrictive practices, and even exercising jurisdiction based on effects within territory, the differing English and American assessment of the desirability of antitrust law is at the core of the conflict. An English or American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary.

The court is also handicapped in any evaluation of "the existence of justified expectations that might be protected or hurt by the regulation in question." In this litigation, whether the reliance of Laker and its creditors on United States antitrust laws is justified depends upon whether one accepts the desirability of United States antitrust law. Whether the defendants could justifiably have relied on the inapplicability of United States law to their conduct alleged to have

caused substantial effects in the United States is based on the same impermissible inquiry. The desirability of applying ambiguous legislation to a particular transaction may imply the presence or absence of legislative intent. However, once a decision is made that the political branches intended to rely on a legitimate base of prescriptive jurisdiction to regulate activities affecting foreign commerce within the domestic forum, the desirability of the law is no longer an issue for the courts.

The "importance of regulation to the regulating state" is another factor on which the court cannot rely to choose between two competing, mutually inconsistent legislative policies. We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom. It is the crucial importance of these policies which has created the conflict. A proclamation by judicial fiat that one interest is less "important" than the other will not erase a real conflict.

Given the inherent limitations of the Judiciary, which must weigh these issues in the limited context of adversarial litigation, we seriously doubt whether we could adequately chart the competing problems and priorities that inevitably define the scope of any nation's interest in a legislated remedy. This court is ill-equipped to "balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate." When one state exercises its jurisdiction and another, in protection of its own interests, attempts to quash the first exercise of jurisdiction "it is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions."

Besides the difficulty of properly weighing the crucial elements of any interest balancing formula, one other defect in the balancing process prompts our reluctance to adopt this analysis in the context of preservation of jurisdiction. Procedurally, this kind of balancing would be difficult, since it would ordinarily involve drawn-out discovery and requests for submissions by political branches. There was no time for this process in the present case. Either jurisdiction was protected or it was lost. It is unlikely that the employment of a hasty and poorly informed balancing process would have materially aided the district court's evaluation of the exigencies and equities of Laker's request for relief.

b. Promotion of International Comity

We might be more willing to tackle the problems associated with the balancing of competing, mutually inconsistent national interests if we could be assured that our efforts would strengthen the bonds of international comity. However, the usefulness and wisdom of interest balancing to assess the most "reasonable" exercise of prescriptive jurisdiction has not been affirmatively demonstrated. This approach has not gained more than a temporary foothold in domestic law. Courts are increasingly refusing to adopt the approach. Scholarly criticism has intensified. Additionally, there is no evidence that interest balancing represents a rule of international law. Thus, there is no mandatory rule requiring its adoption here, since Congress cannot be said to have implicitly legislated subject to these international constraints.

If promotion of international comity is measured by the number of times United States jurisdiction has been declined under the "reasonableness" interest balancing approach, then it has been a failure. Implementation of this analysis has not resulted in a significant number of conflict resolutions favoring a foreign jurisdiction. A pragmatic assessment of those decisions adopting an interest balancing approach indicates none where United States jurisdiction was declined when there was more than a de minimis United States interest. Most cases in which use of the process was advocated arose before a direct conflict occurred when the balancing could be employed without impairing the court's jurisdiction to determine jurisdiction. When push comes to shove, the domestic forum is rarely unseated.

Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws. The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus, courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests. This partially explains why there have been few times when courts have found foreign interests to prevail.

The inherent noncorrelation between the interest balancing formula and the economic realities of modern commerce is an additional reason which may underlie the reluctance of most courts to strike a balance in favor of nonapplication of domestic law. An assertion of prescriptive jurisdiction should ultimately be based on shared assessments that jurisdiction is reasonable. Thus, international law prohibits the assertion of prescriptive jurisdiction unsupported by reasonable links between the forum and the controversy.

However, it does not necessarily follow, as the use of interest balancing as a method of choosing between competing jurisdictions assumes, that there is a line of reasonableness which separates jurisdiction to prescribe into neatly adjoining compartments of national jurisdiction. There is no principle of international law which abolishes concurrent jurisdiction. Since prescriptive jurisdiction is based on well recognized state contacts with controversies, the reality of our interlocked international economic network guarantees that overlapping, concurrent jurisdiction will often be present. There is, therefore, no rule of international law holding that a "more reasonable" assertion of jurisdiction mandatorily displaces a "less reasonable" assertion of jurisdiction as long as both are, in fact, consistent with the limitations on jurisdiction imposed by international law. That is the situation faced in this case: the territoriality and nationality bases of jurisdiction of the United Kingdom and the United States are both unimpeached.

In our federal system of parallel sovereign courts, several lines of cases recognize that prescriptive jurisdiction is often shared among several forums. Those forums may participate in interforum compacts that provide a basis for allocating jurisdiction to one forum over another. Similarly, the problems associated with overlapping bases of national taxation in international law are directly addressed by numerous bilateral and multilateral treaties rather than a judicially developed rule of exclusive jurisdiction grounded in a prioritization of the relative reasonableness of links between the state and the taxed entity. Because we see no neutral

principles on which to distinguish judicially the reasonableness of the concurrent, mutually inconsistent exercises of jurisdiction in this case, we decline to adopt such a rule here.[173]

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n173 It may be that a rule of law should be developed allocating exclusive prescriptive jurisdiction to the forum with the most significant nexus to the underlying conduct. Given the inherent difficulty of administering an interest balancing formula, it is doubtful that a rule of exclusive jurisdiction based on a common conception of reasonableness will be developed by national courts. The current litigation underscores this point: in the decades since the United States began applying its antitrust laws to overseas conduct substantially affecting its territorial interests, neither the United States' nor United Kingdom's courts have accepted the other courts' definition of the legitimate scope of prescriptive jurisdiction in the antitrust area. It is to be hoped that the political branches of government will eventually negotiate practical solutions, such as those undergirding the area of international taxation, which, through their reciprocal ordering of national regulation, render academic the issue of whether a country would otherwise have the sovereign right to exert its authority in a particular manner.

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III. CONCLUSION

The conflict in jurisdiction we confront today has been precipitated by the attempts of another country to insulate its own business entities from the necessity of complying with legislation of our country designed to protect this country's domestic policies. At the root of the conflict are the fundamentally opposed policies of the United States and Great Britain regarding the desirability, scope, and implementation of legislation controlling anticompetitive and restrictive business practices.

No conceivable judicial disposition of this appeal would remove that underlying conflict. Because of the potential deadlock that appears to be developing, the ultimate question is not whether conflicting assertions of national interest must be reconciled, but the proper forum of reconciliation. The resources of the Judiciary are inherently limited when faced with an affirmative decision by the political branches of the government to prescribe specific policies. Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association. These forums should and, we hope, will be utilized to avoid or resolve conflicts caused by contradictory assertions of concurrent prescriptive jurisdiction.

However, in the absence of some emanation from the Executive Branch, Laker's suit may go forward against appellants. Laker seeks to recover for injuries it allegedly sustained as a result of the defendants' conduct in violation of United States antitrust laws. The complaint alleges a conspiracy to drive out of business a corporation permitted by United States treaty to operate within the United States and conducting substantial business here. If Laker's allegations are

proved, the intended and actual effect in the United States are clear since Laker, which was carrying up to one out of every seven transatlantic passengers, was subsequently forced into liquidation. Resolution of Laker's lawsuit would further the interests protected under United States law, since American creditors' interests in open forums, and consumers' interests in free competition may be vindicated.

Under these circumstances, judicial precedent construing the prescriptive jurisdiction of the United States antitrust laws unequivocally holds that the antitrust laws unequivocally holds that the antitrust laws should be applied. That jurisdiction is well within the bounds of reason imposed by international law. Because the factual circumstances of this case made a preliminary injunction imperative to preserve the court's jurisdiction, and because that injunction is not proscribed by the principles of international comity, the district court acted within its discretion.

The decision of the district court is therefore Affirmed.

PROBLEM FOR CLASS DISCUSSION

Litigating an International Antitrust Case
ABA Antitrust Section Spring Meeting
April 2, 1992
Hypothetical

Go-Copier Company ("Go-Copier") is a New York corporation engaged in the business of manufacturing and distributing photocopiers. Go-Copier also owns certain United States patent rights to the technology for color/binder/copiers ("CBCs"). CBCs, copiers equivalent in size and price to personal fax machines, can reproduce, in color, any printed materials, photographs, or artwork and then can bind the copies in much the same way that books are made and bound.

Go-Copier presently lacks the facilities and the patent rights to certain parts necessary for the manufacture of CBCs. As a result, since 1987, it has approached numerous domestic and foreign photocopier manufacturers that have the necessary facilities and patent rights seeking to enter into CBC production and/or licensing arrangements. The manufacturers approached by Go-Copier included Japanica Company, Japan Company, Japan-America Company (a wholly-owned United States subsidiary of Japan Company), French Company, CanaFrench Company (a partly-owned Canadian subsidiary of French Company), and English Company. Go-Copier actually began highly publicized production negotiations with Japanica Company in early 1988 and the parties quickly appeared to reach a tentative production agreement.

Before the proposed agreement between Go-Copier and Japanica was executed, the American Authors and Publishers Society ("AAPS") held a press conference during which AAPS president Jack Galenti declared that AAPS would vigorously oppose all attempts to manufacture or sell CBCs in the United States. Galenti stated that AAPS believes that the

manufacture, sale and use of traditional photocopiers encouraged copyright infringements by facilitating the unauthorized reproduction and distribution of copyrighted works. According to Galenti, the manufacture, sale and use of CBCs--which, if produced, are capable of creating, at low cost to the creator, virtually exact copies of books and magazines containing even the most detailed color photographs and drawings--would lead to significantly more such copyright infringements. Therefore, Galenti vowed that if CBCs were manufactured and sold in the United States, AAPS would lobby Congress for the imposition of compulsory copyright royalties on all photocopiers.

Shortly after the AAPS press conference, the Japanese-European Photocopier Manufacturers Organization ("JEPMO"), the trade organization to which all major Japanese and European photocopier manufacturers including Japanica belong, met with AAPS in France. JEPMO was founded by Japan Company, a corporation wholly owned by the Japanese government. The Japanese government, through its Ministry of International Trade and Industry ("MITI"), actively encouraged the formation of JEPMO and, once JEPMO was formed, requested that all Japanese photocopier companies participate therein. After the meeting, AAPS released a statement declaring that JEPMO members would not produce CBCs.

One week later, AAPS representatives met with representatives from the French Ministry of Trade ("FMT") and demanded that France take action to prevent the proliferation of CBCs. News stories reporting upon the meeting stated that AAPs representatives promised that the FMT representatives would receive lifetime "Book of the Month Club" memberships if the requested action was taken and that, in response, an FMT representative blinked her eyes twice at the French AAPs representative. Three days after the meeting, the FMT, citing its concern for the intellectual property rights of French artists, issued a proclamation prohibiting any corporations doing business in France from manufacturing or licensing parts for CBCs.

Two days later, Japan-America Company and JEPMO, on behalf of all of its members, petitioned Japanese English and Canadian tribunals, seeking judicial declarations, that several of Go-Copier's patents were invalid. Go-Copier defended these actions.

Go-Copier's negotiations with Japanica Company, which had stalled in the face of these developments, fell through almost immediately thereafter. All other photocopier manufacturers subsequently approached by Go-Copier about the production of CBCs refused even to enter into negotiations with Go-Copier and Go-Copier's efforts to find a production partner were soon abandoned.

The next month, the photocopier prices charged by all JEPMO members in North America dropped dramatically. When questioned by a reporter from Gossip Sheet Magazine about the U.S. and Canadian price decreases, a Japan Company representative responded that he believed that his American competitors were incompetent and that he wished they would get out of the photocopier market. The response was quoted in the next issue of Gossip Sheet Magazine. At approximately the same time, photocopier prices in Europe stabilized at significantly higher levels.

Go-Copier brought an action alleging violation of Section 1 of the Sherman Act against Japanica, Japan Company, Japan-America Company, French Company, CanaFrench Company, and English Company (collectively, "Defendants") in federal district court for the Southern District of New York. Go-Copier charged that it had been unable to manufacture, market and/or license CBCs in North America because Defendants conspired to prevent the same by (i) concertedly refusing to deal with Go-Copier and (ii) initiating multiple patent invalidity lawsuits against Go-Copier in foreign countries. Go-Copier also charged that Defendants, in retaliation for Go-Copier's attempts to introduce CBCs in the North American photocopier market, agreed to drive Go-Copier from that market by predatorily pricing all photocopiers sold there by defendants.

Prior to the alleged institution by Defendants of a North American photocopier price decrease, Go-Copier controlled 25 percent of the North American photocopier market. However, since the alleged price decrease, its market share has declined to 15 percent. On the other hand, Defendants' market shares have increased. Today, they are the largest manufacturers and distributors of photocopiers in North America and Worldwide. In fact, now, five of the six defendants together control more than 70 percent of photocopier sales in North America. The sixth defendant, Japan Company, does not directly sell its photocopiers in North America or have offices in the United States. However, the market share of its subsidiary, Japan-America Company, which acts as its sales agent in the area, has increased.

French Company, a French corporation, also does not have offices in North America. It does, however, own a 14 percent interest in AmeriFrench Company, a New York corporation with New York offices that is not a defendant in this action. French Company, which is licensed by France to manufacture and sell photocopiers manufactured by a technology developed by French government scientists and which pays royalties to the French government on all its sales, is required under its licenses with France to maintain membership in JEPMO.

Go-Copier served Japan-America with process at its New York headquarters. Japanica, English Company and CanaFrench Company were served at their respective foreign headquarters. Japan Company and French Company were served with process at their United States subsidiaries.

Three days after Go-Copier initiated its New York action, English Company brought suit in an English tribunal seeking an injunction forbidding Go-Copier from prosecuting its American antitrust action against English Company. The English court temporarily enjoined such action. Further, immediately after the injunction was issued by the English court, the Japanese government lodged a protest with the U.S. State Department. As a result, the State Department informed the court that its adjudication of Go-Copier's claims against the Japanese defendants could adversely effect United States foreign policy toward Japan.

ISSUES FOR DISCUSSION BY PANEL I:

- Obtaining personal jurisdiction over the various defendants

- Service of process issues, involving signatories and non-signatories to the Hague Convention

- The existence of subject matter jurisdiction, including considerations of comity

- Discovery on jurisdictional issues

- The timing of the filing of motions relating to service and jurisdiction

- The application of the forum non conveniens doctrine in international litigation

For example, Panel I could analyze the merits of the following motions:

1. Motion by Go-Copier for a temporary restraining order barring other defendants from joining the British action.

2. Motion by Defendants to dismiss for lack of subject matter jurisdiction.

3. Motions by Japan Company and French Company (each individually) to dismiss for: (1) lack of personal jurisdiction; and (2) improper service of process; Motion by Go-Copier to compel discovery on jurisdictional issues.

4. A Forum Non Conveniens Motion by the Japanese defendants.

Assume that the Court granted Go-Copier's pending motions and denied Defendants' pending motions. Pursuant to Rules 28(b) and 34 of the Federal Rules of Civil Procedure, Go-Copier then served upon each defendant numerous discovery requests that, among other things, demanded that Defendants permit the videotaping of the depositions of foreign witnesses and provide, at Defendants' cost, translations of all documents that are not in English. Additionally, Go-Copier noticed the deposition of the president of Japanica, requesting that he appear in the United States.

Go-Copier also served subpoenas upon the New York offices of Non-Party Company, an English corporation, requesting documents concerning certain JEPMO activities. Non-Party Company is a member of JEPMO but not a party to the instant litigation.

French Company refused to comply with Go-Copier's discovery requests, basing its refusal upon the French blocking statute. Japanica also refused to comply, claiming that the procedures required by the Hague Convention (Evidence) had not been followed. AmeriFrench responded that it had no documents, as they had all been transferred to the offices of its parent company in France. French Company refused to comply because of the stay issued by the English tribunal. CanaFrench and Japan-America refused to comply because their parent company directed them not to. Non-Party Company moved to quash. The president of Japanica refused to appear in the United States.

ISSUES FOR DISCUSSION BY PANEL II:

- Invocation of blocking statutes
- Production of documents and witnesses from abroad
- Taking of depositions abroad
- Moving documents outside the jurisdiction
- Special defenses based upon the foreign sovereign compulsion, act of state, and Noerr-Pennington doctrines

For example, Panel II could analyze the merits of the following motions:

1. Motion by Defendants to dismiss: (1) on the basis of the foreign sovereign compulsion defense; (2) under the Noerr-Pennington doctrine; and (3) under the Act of State doctrine.

2. Motion by Japan Company to dismiss on the basis of the foreign sovereign immunity defense.

3. Motion by Go-Copier to compel discovery from Japan-America Company and CanaFrench Company of documents (and English translations thereof) belonging to them and their parent companies.

4. Motion by Go-Copier to compel discovery from or impose sanctions upon French Company and AmeriFrench Company.

5. Motion by Go-Copier to compel the president of Japanica to appear in the United States to be deposed and to compel discovery from Japanica.

6. Motion by Non-Party Company to quash the subpoena served on its New York office.

Assume that discovery was concluded and the case to trial before a jury.

The officers of several of the foreign defendants, none of whom speak English, came to New York to testify. However, many witnesses, most of whom also do not speak English, were not present. At trial, Go-Copier attempted to introduce into evidence the videotaped depositions of absent witnesses. Additionally, Go-Copier attempted to introduce into evidence the Gossip Sheet Magazine story quoting the Japan Company representative as stating that his American competitors are incompetent.

Go-Copier also sought to introduce the testimony of a person present at the AAPS-FMT meeting who claims that the representative of Japanica Company blinked her eyes twice at a French AAPs representative. Go-Copier contended that this is evidence that said FMT representative accepted a bribe from AAPS, claiming that it is customary for French nationals to blink twice at each other to signify acceptance of proposals. Go-Copier attempted to call an "expert witness" to testify that this is indeed a French custom.

The jury returned a guilty verdict. Go-Copier was awarded three million dollars in damages that were then trebled. Additionally, Defendants were enjoined from: (i) refusing to deal with Go-Copier and (ii) engaging in predatory pricing in the United States and were compelled to license to Go-Copier certain United States patents that they own and that are important to CBC development.

After paying its portion of the judgment, CanaFrench Company immediately requested that the Canadian Attorney General declare the judgment unenforceable under Canada's "clawback" statute and permit CanaFrench Company to sue Go-Copier for the return of the damages paid. Further, the French government lodged a formal protest of the verdict with the U.S. State Department.

<u>ISSUES FOR DISCUSSION BY PANEL III</u>:

- Preparation of foreign witnesses

- Use of videotaped depositions

- Handling foreign witnesses before jury
- Use of experts on foreign customs
- Admissibility of evidence of a foreign conspiracy
- Proof of foreign law
- Translation of documents and testimony
- Rule 403 motions

- Enforcement of judgments

For example, Panel III could analyze the merits of the following motions:

1. Motion by Defendants to exclude all evidence of and about blinking.

2. Motion by the Japanese defendants under Rule 403 (Fed. R. Evid.) to exclude the Gossip Sheet story.

Panel III could also discuss issues including: jury selection, court appointment of an interpreter, the appropriateness of the relief granted (in light of foreign government protests, comity and other considerations), and Defendants' exercise of available options (including their rights to appeal and/or bring actions under any applicable "clawback" statutes).