A Unified Theory of Transnational Procedure

Spencer Weber Waller

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation


Available at: http://scholarship.law.cornell.edu/cilj/vol26/iss1/3
Spencer Weber Waller*

A Unified Theory of Transnational Procedure

Introduction

Transnational litigation in the United States is riddled with a set of overlapping doctrines which the courts must confront before actually adjudicating the merits of a dispute. The litigants and the courts frequently must address questions of subject matter jurisdiction or jurisdiction to prescribe, antisuit injunctions, service of process, personal jurisdiction, venue, choice of law, choice of discovery rules, forum non conveniens, and other preliminary questions.

This article contends that the separate and sequential analysis of these doctrines is outmoded, inefficient, and costly to the interests of the parties, the United States, and the transnational litigation process. Currently, courts repetitively analyze each of the various gatekeeping doctrines through nearly identical open-ended balancing processes which the courts and the litigants are ill-equipped to handle. This process is wasteful and filled with error. It also fails to recognize that each of these doctrinally separate provisions is really part of the same fundamental inquiry—whether a United States court is an appropriate forum for the resolution of the dispute through rules of decision and procedure of its own choosing.

* Associate Professor of Law, Brooklyn Law School. B.A., University of Michigan; J.D., Northwestern University Law School. The author gratefully acknowledges a summer research stipend provided by Dean David G. Trager and Brooklyn Law School and wishes to thank all his colleagues both within and outside of Brooklyn Law School for their patience in allowing him to pester them regarding this project over the last year. In particular, thanks go to Ronald A. Brand, Maryellen Fullerton, Jeffrey Stempel, and Louise Teitz, who took the time to comment on drafts of the paper, and to Elizabeth Stern and Tracey Bernstein for their research assistance.

1. The term “transnational litigation” is used throughout this article to refer to litigation in United States courts involving one or more foreign parties, foreign transactions, or conduct with consequences or effects within the United States. This article focuses primarily on disputes with foreign private parties but would encompass foreign public entities and government units. Transnational litigation in this sense would include disputes traditionally viewed as involving either public or private international law.

All parties involved in transnational litigations would benefit from the abandonment of the current doctrinal confusion in favor of a single unified approach to the determination of the appropriateness of a United States court as the forum for resolving the merits of transnational disputes. I propose as that unified approach a single omnibus comity inquiry conducted as early as possible in the litigation process.

This unified approach offers the advantage of consolidating and accelerating consideration of the same group of factors which courts now consider at various stages of the litigation under different burdens of proof and standards of review. Parties and courts would be forced to confront, at the outset of the litigation, the real issue of whether the United States has any direct and substantial interest in the resolution of the dispute. The result would be less cost, less delay, as well as more domestic and international legitimacy for the resolution of disputes in the United States, if the courts were to make principled, evidence-based rulings of their interests and bases for adjudicating a transnational dispute.

Part I of this article examines the current doctrinal mess in which the courts have required the endless repetition of the same or similar balancing tests for most of the important procedural and jurisdictional issues in transnational litigation. Part II analyzes the redundancy of these doctrines and argues that each of these doctrinal tests is a subpart of the larger question—whether the United States is an appropriate forum for the resolution of the dispute on the merits. Part III then argues that the current process can be replaced by a unified omnibus motion imposed as a matter of federal common law in both state and federal courts as a result of the preeminent and exclusive role of federal law in matters touching on foreign relations and foreign commerce. Finally, Part IV proposes the preparation and adoption of a Manual for Transnational Procedure as a means to achieve the implementation of the unified theory and to guide courts in the difficult path of balancing United States and foreign interests and applying comity principles in transnational litigation.

I. The Doctrinal Stew

The explosive growth of transnational litigation has forced courts in the United States to consider how to apply traditional procedural and jurisdictional doctrines to foreign persons and disputes arising outside of the United States. United States courts currently may adjudicate such disputes, but must consider the implications of international comity before proceeding. This consideration of comity has manifested itself in the requirement of considering the foreign interests involved in the specific dispute and comparing the importance of the foreign interests to those of the United States. This type of balancing approach has been a favorite of the federal courts, and almost every transnational procedural doctrine now calls for some form of interest balancing.
A. Jurisdiction to Prescribe and Subject Matter Jurisdiction

Jurisdiction to prescribe is the ability of a nation to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, executive act or order, administrative rule or regulation, or judicial decision.\(^2\) Jurisdiction to prescribe is a concept of international law which focuses on the propriety of one nation prohibiting conduct affecting more than one nation. Although it often overlaps with concerns over subject matter jurisdiction in United States law, the focus is somewhat different than that of subject matter jurisdiction, which concerns the allocation of jurisdiction between state and federal courts.\(^3\)

The development of both of these concepts in the United States arose primarily in the application of the United States antitrust laws to collusive conduct taking place abroad.\(^4\) The definitive application of the antitrust laws to conduct wholly outside the United States came in the Second Circuit's decision in United States v. Aluminum Co. of America.\(^5\) The Alcoa court held that U.S. courts had jurisdiction over the cartel activities of bauxite producers outside of the United States where the conduct was intended to, and actually did, affect the United States.\(^6\) In so holding, the Alcoa court considered economic effects within the United States to be indistinguishable from actual conduct within our borders.\(^7\)

Because of the perceived expansion and abuse of the intended effects test,\(^8\) the American Law Institute sought to limit the effects test in

\(^2\) Restatement (Third) of the Foreign Relations Law of the United States § 401(a) (1987) [hereinafter Restatement (Third)].
\(^3\) Id. § 401 cmt. c.
\(^4\) United States foreign commerce antitrust cases have presented a blend of concepts from both subject matter jurisdiction and jurisdiction to prescribe. While the question of whether Congress intended the antitrust laws to apply to foreign conduct abroad is a matter of Constitutional and statutory law, the courts have approached extraterritoriality in antitrust actions differently from other areas. The courts in most other areas have limited their inquiry to whether the text of the federal statute or its legislative history explicitly provides for extraterritorial application. In the area of antitrust and certain economic regulatory schemes, the courts have employed a comity based approach, balancing the interests of the United States and the affected foreign nation. This approach is quite similar to the process used in determining whether the United States had jurisdiction to prescribe the harmful conduct as a matter of international law.
\(^6\) 148 F.2d at 443.
\(^7\) Id. at 444-45.
\(^8\) Later decisions interpreted Alcoa expansively. See cases collected in Note, Extraterritorial Application of the Antitrust Laws, 69 HArv. L. Rev. 1452 (1956).
two significant ways in its Restatement (Second) of the Foreign Relations Law of the United States. The Second Restatement modified the effects test so that a state would have jurisdiction over conduct outside its territory only if there was a direct, substantial, and foreseeable effect within its territory.

The Second Restatement also proposed an interest balancing test to avoid contradictory legal rulings where two or more states may have jurisdiction under the effects test. Section 40 of the Second Restatement states:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.


10. *Id.* § 18. Section 18 states in full:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

11. *Id.* § 40.
America.12 Timberlane involved an alleged conspiracy to prevent the plaintiff from milling lumber in Honduras and exporting it to the United States, in order to aid competitors financed by the Bank of America.

Following the dismissal of the complaint under the traditional effects test, the Ninth Circuit rejected the effects test as incomplete because of the test's failure to consider other nations' interests. The Court announced a new three-part test stating:

[The antitrust laws require in the first instance that there be some effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws. Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.13]

The Court stated that a court should weigh the following elements in determining whether or not to exercise jurisdiction:

1. the degree of conflict with foreign law or policy;
2. the nationality, location, and principal places of business of the parties;
3. the extent to which enforcement by either state can achieve compliance;
4. the relative significance of the effects on the United States as compared with those elsewhere;
5. the existence of an intent to harm or affect American commerce;
6. the foreseeability of such effect; and
7. the relative importance of conduct in the United States as compared with conduct abroad.14

Timberlane has been widely, but not universally, followed.15 The

---

12. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976), on appeal following remand, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 472 U.S. 1032 (1985).
13. Id. at 613 (citations omitted).
14. Id. at 614.
15. Although influential, the balancing of interest approach endorsed by Timberlane has never been expressly adopted by the Supreme Court and has not been followed by all of the federal appellate courts. The Second Circuit in National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981), has adopted a variation of the Alcoa test requiring proof of an actual anticompetitive effect within the United States in order to confer jurisdiction over conduct outside the United States. The Seventh Circuit continues to apply the Alcoa intended effects test. In re Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980). The D.C. Circuit also has rejected the Timberlane approach. Laker Airways Ltd. v. Sabena, Belgium World Airlines, 731 F.2d 909 (D.C. Cir. 1984). See generally Spencer Weber Waller, International Trade and U.S. Antitrust Law § 5.08 (1992) (discussing the continued use of effects test and other alternative approaches to comity in foreign commerce antitrust cases); Spencer Weber Waller, Bringing Meaning to Interest Balancing in Transnational Litigation, 23 Vand. J. Transnat'l L. 925, 928 n.8 (1991) (hereinafter Waller, Bringing
Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.* adopted its own version of the *Timberlane* balancing test, using a slightly different list of factors. Another variation of *Timberlane* adopted by the Fifth Circuit would require a similar balancing of United States and foreign national interests, not as an exercise in comity, but as an affirmative element of jurisdiction.

The Third Restatement of Foreign Relations Law sought to codify reasonableness as a principle of international law. It permits jurisdiction over conduct which was either intended to produce significant effects within a jurisdiction, or which in fact produced such effects if such jurisdiction is "reasonable." The Restatement measures reasonableness through a laundry list of factors similar to those outlined in *Timberlane, Mannington Mills*, and the Second Restatement.

---

*Meaning to Interest Balancing* (discussing limited application of comity based balancing tests outside of antitrust law).

17. *Mannington Mills* sets forth ten factors to be considered:
   1. The degree of conflict with foreign law or policy;
   2. The nationality of the parties;
   3. The relative importance of the alleged violation of conduct here compared to that abroad;
   4. The availability of a remedy abroad and the pendency of litigation there;
   5. The existence of intent to harm or affect American commerce and its foreseeability;
   6. The possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
   7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
   8. Whether the court can make its order effective;
   9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and
   10. Whether a treaty with the affected nations has addressed the issue.

*Id.* at 1297-98.

19. Restatement (Third), supra note 2, § 403.
20. *Id.* § 402 (Introductory Note). Although the balancing of interests is mandatory to determine reasonableness under the *Restatement*, it is unclear whether the *Restatement* requires a state to defer to another state with greater interests in a particular controversy. Section 403(3) of the *Restatement Third* states that following the balancing of interests, a state "should" defer to a foreign state with greater interests.

21. Section 403 of the *Restatement Third* requires a consideration of all factors, including:
   a) the link of the activity to the territory of the regulatory state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
   b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
   c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such
The decisions applying the different versions of the balancing test for jurisdiction to prescribe have brought little content to the process. For example, after the remand in the *Timberlane* litigation, the district court again dismissed the complaint by applying the new balancing test. The Ninth Circuit ultimately affirmed the dismissal in conclusory fashion, stating:

It follows that all but two of the factors in *Timberlane*’s comity analysis indicate that we should refuse to exercise jurisdiction over this antitrust case. The potential for conflict with Honduran economic policy and commercial law is great. The effect on the foreign commerce of the United States is minimal. The foreseeability of the anticompetitive consequences of the allegedly illegal actions is slight. Most of the conduct that must be examined occurred abroad. The factors that favor jurisdiction are the citizenship of the parties and, to a slight extent, the enforcement effectiveness of United States law. We do not believe that this is enough to justify the exercise of federal jurisdiction over this case.

Even where courts cite the Restatement, they are often doing nothing more than justifying an intuitive result rather than engaging in a sophisticated balancing of interests.

B. Personal Jurisdiction

Notions of comity and interest balancing have spread to the analysis of personal jurisdiction in transnational litigation. Traditionally, a defendant must have at least “minimum contacts” with the forum for the assertion of jurisdiction to comport with the notions of fundamental fairness implicit in the Due Process Clause of both the Fifth and Fourteenth Amendments of the United States Constitution. The minimum contacts must have a basis in “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum activities, and the degree to which the desirability of such regulation is generally accepted;

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

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

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

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

h) the likelihood of conflict with regulation by another state.

23. 749 F.2d at 1386.

State, thus invoking the benefits and protections of its laws.”

The Supreme Court has expanded the minimum contacts test in transnational litigation to include the concept of comity and has used interest balancing to determine whether the assertion of personal jurisdiction over a foreign defendant is reasonable. In *Asahi Metal Industry Co. v. Superior Court*, the Court considered a product liability suit brought by an American consumer against a Japanese manufacturer of motorcycle tires. The Japanese defendant brought an indemnity claim against the Taiwanese company which manufactured the tire valves. Following a settlement between the American plaintiff and the Japanese defendant, the Supreme Court held that the United States did not have personal jurisdiction over the claim between the two foreign parties.

A majority of the Court held that the extension of personal jurisdiction over the Taiwanese defendant would offend “traditional notions of fair play and substantial justice.” The Court held that the reasonableness of personal jurisdiction over a foreign defendant depended upon:

1) the burden on the defendant;
2) the interests of the forum state;
3) the plaintiff's interest in obtaining relief;
4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and
5) the shared interests of the several States in furthering fundamental substantive social policies.

The Court concluded that the U.S. interests in the dispute were “slight,” and the assertion of jurisdiction by the United States would impose great burdens on the Taiwanese defendant. The Court stated:

[T]he Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state. Great care and reserve should be exercised when extending our notions of personal jurisdiction

---


28. *Id.* at 112. The Court split evenly as to whether the Taiwanese corporation's awareness that its products were entering into United States commerce was sufficient to satisfy the minimum contacts test for personal jurisdiction. *Id.* at 107, 112.

29. *Id.* at 113 (citing *International Shoe*, 326 U.S. at 316, and *Milliken v. Meyer*, 311 U.S. 457, 469 (1940)).

30. *Id.* at 113 (citing *World-Wide Volkswagen*, 444 U.S. at 292).

31. *Id.* at 114. The Court also noted the probable jurisdiction of both the Japanese and Taiwanese courts and the difficult choice of law questions if the United States court asserted jurisdiction. *Id.*
C. Choice of Discovery Rules

Comity concerns also have pervaded the discovery process in transnational litigation. In transnational litigation, courts must decide whether the parties may proceed under the Federal Rules of Civil Procedure or must use the more cumbersome and restrictive procedures of the Hague Convention on the Taking of Evidence in Civil and Commercial Matters, to which the United States is a signatory. Because of the difficulties associated with the use of the Hague Convention, a conflict developed in both state and federal court over whether the Hague Convention was the required, or preferred, method for obtaining discovery of evidence abroad.

The Supreme Court addressed this issue in Société Nationale Industrielle Aérospatiale v. United States District Court, holding that the Hague

32. Id. at 115 (citations omitted).

The impact of Asahi has been muted by three developments. First, the Supreme Court in Burnham v. Superior Court of California, Marin, 495 U.S. 604 (1990), upheld personal jurisdiction based on personal service of process on a defendant physically within California on a transient basis. If the result of Burnham is applied to a foreign defendant who is physically present in the United States at the time of service, then much of the rationale of Asahi will be eviscerated. Second, Asahi did not resolve the legality of personal jurisdiction based upon the defendant's act of knowingly placing goods into the stream of commerce in the United States. Since the Supreme Court split equally on this issue, the lower courts have continued to apply the "stream of commerce" theory without any further balancing of interests where the law of the circuit or state supreme court permits. See, e.g., Dehmlow v. Austin Fireworks, 963 F.2d 941 (7th Cir. 1992); Gulf Consol. Servs., Inc. v. Corinth Pipeworks, S.A., 898 F.2d 1071 (5th Cir. 1990); Irving v. Owens-Corning Fiberglass Corp., 864 F.2d 383 (5th Cir. 1989); Mason v. F. LLI Luigi, 832 F.2d 383 (7th Cir. 1987); Cox v. Hozelock, 411 S.E.2d 440 (N.C. App. 1992). Cf., Morris v. SSE, Inc., 843 F.2d 489 (11th Cir. 1988). Finally, Asahi has been undermined by the tendency of courts to rely on the traditional minimum contacts analysis to demonstrate the reasonableness of asserting personal jurisdiction over a foreign defendant. Koteen v. Bermuda Cablevision, Ltd., 913 F.2d 973, 975 (D.C. Cir. 1990); Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 913 (9th Cir. 1990); Falkirk Mining Co. v. The Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990).

33. Convention of the Taking of Evidence Abroad in Civil or Criminal Matters, opened for signature Mar. 18, 1970, T.I.A.S. No. 7444, 23 U.N.T.S. 2555. Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States are signatories to this convention.

34. Taking evidence under the Hague Convention is very different from traditional discovery under the Federal Rules of Civil Procedure. See generally WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW, supra note 15, § 7.08. For a detailed examination of the procedures applicable in each signatory to the Hague Convention, see BRUNO RISTAU, 1 INTERNATIONAL JUDICIAL ASSISTANCE § 5 (1984).

35. A letter rogatory or letter of request remains the exclusive vehicle to obtain discovery from a third party witness. See Fed. R. Civ. P. 28. If the country in which the third party witness is located is not a signatory to the Hague Convention, then the foreign court may enforce the letter rogatory or letter of request as a matter of comity.

Convention was neither the exclusive nor the preferred method of seeking foreign located discovery from a party. The Court relied on a comity approach and required courts to select the applicable discovery rules on a case-by-case basis by balancing:

1) the particular facts of the case;
2) the sovereign interests of the two legal systems; and
3) the likelihood that the choice of discovery rules will be effective.

As is the case with much judicial comity analysis, the post-**Aérospatiale** decisions have not been particularly sophisticated. Most courts have avoided the delicate balancing process called for in **Aérospatiale** and have simply allocated the burden of proof to the party opposing the use of the Federal Rules.

D. Conflicts of Law

The development of modern conflicts theory has involved a similar movement towards a broad balancing of interests test. The Second Restatement of Conflicts of Law expressly adopted a balancing system in order to select the forum with the center of gravity or most significant relationship with the dispute. Section 6 of the Restatement requires consideration of:

1) the needs of the interstate and international systems,
2) the relevant policies of the forum,
3) the relevant policies of other interested states including their interests in having their law applied to the particular issue,
4) the protection of party expectations,
5) the basic policies underlying the particular field of law,
6) the objectives of certainty, predictability, and uniformity of result, and
7) the ease of determining and applying the law previously identified as applicable.

The Second Conflicts Restatement then analyzes various substantive areas of law and sets forth contacts and other factors which courts should apply in light of the policies outlined in Section 6. For example, in the tort area, Section 145 of the Second Restatement requires a consideration of such factors as:

a) the place where the injury occurred,
b) the place where the conduct causing the injury occurred,
c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.42

The decision process in jurisdictions applying so-called "interest analysis" in choice of law determinations is somewhat more complicated because they employ a similar vocabulary with a different meaning from that used in other areas of transnational procedure.43 In interest analysis, the court seeks to determine whether the forum has any appreciable interest in the application of its law to a particular dispute where the legislature or the common law is silent as to the reach of the rule of decision.44 The court's primary task is the identification of false conflicts where the forum has no real interest in the application of its law.45 This approach often manifests itself as a one-way analysis of the interests of the forum, rather than an explicit balancing of the substantive interests of two or more forums.46

Unfortunately, nothing in the field of conflicts of law is simple. Brainerd Currie, one of the founders of interest analysis, has expressly argued against any explicit balancing of state interests in the event of a "true" conflict.47 Another branch of interest analysis would expressly balance the substantive interests of the potential fora in search of "the better law" to apply to a dispute.48 To further complicate matters, all aspects of interest analysis have been subject to heavy criticism,49 with commentators offering a plethora of eclectic combinations of approaches, solutions, and replacements.50

42. Id. § 145.
43. See Waller, Bringing Meaning to Interest Balancing, supra note 15, at 948-51.
44. See generally BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAWS (1963).
45. Id. at 60.
46. See Waller, Bringing Meaning to Interest Balancing, supra note 15, at 948-51.
47. CURRIE, supra note 44, at 182, 606, 610, 617 (1963); Brainerd Currie, Notes on Methods and Objectives in the Conflicts of Law, 1959 DUKE L.J. 171, 176.
E. Forum Non Conveniens

The doctrine of forum non conveniens as applied by the Supreme Court in *Gulf Oil Corp. v. Gilbert* and *Piper Aircraft Company v. Reyno* incorporates the most complete, but discretionary, interest balancing by a federal district court in transnational litigation. The doctrine of forum non conveniens permits a court to abstain from the exercise of jurisdiction where the forum chosen by the plaintiff is manifestly unjust to the defendant and a more convenient forum exists for the resolution of the dispute. The Supreme Court has indicated that a district court must explicitly consider and balance both public and private factors including:

1) the relative ease of access to sources of proof;
2) the availability of compulsory process for the attendance of unwilling witnesses;
3) the costs of obtaining attendance of willing witnesses;
4) the need to inspect the premises or physical subject of the dispute;
5) all other practical problems that make trial of a case easy, expeditious, and inexpensive;
6) the administrative difficulties flowing from court congestion;
7) the local interest in having localized controversies resolved at home;
8) the familiarity of the tribunal with the law to be enforced;
9) the avoidance of unnecessary conflicts of law and foreign law problems; and
10) the unfairness of burdening citizens in an unrelated forum with jury duty.

Under this vague and open-ended balancing test, the court may decline to hear the case where, on balance, it is inconvenient to do so, as long as another jurisdiction is better able to resolve the dispute. The district court should refuse to dismiss the action unless the balancing of interests strongly favors the movant. However, the court may still dismiss the action despite proper subject matter jurisdiction, personal jurisdiction, and satisfaction of the other gatekeeping provisions.

While parties may make a forum non conveniens motion at any time during the litigation, the district court may consider the timing of the

---


53. Although a forum non conveniens dismissal requires that there be an alternate forum capable of resolving the dispute and providing some remedy, the governing law and procedure need not be as favorable to the plaintiff as it is in the United States. *Reyno*, 454 U.S. at 247-52. Nor is a foreign plaintiff’s selection of the United States as a forum accorded significant weight. *Id.* at 255-56.
54. *Reyno*, 454 U.S. at 241 n.6; *Gulf Oil*, 330 U.S. at 508-09.
55. *Gilbert*, 330 U.S. at 511.
56. *Id.* at 508.
motion in conducting the balancing of interests mandated by the Supreme Court. The district court’s decision is reviewable only for an abuse of discretion, such as a failure to weigh a relevant factor or the improper consideration of irrelevant matters.

F. Antisuit Injunctions

The final principal strand of the transnational procedural doctrine emphasizing interest balancing relates to parties’ attempts to prevent their opponents from proceeding against them in foreign jurisdictions, or to prevent their opponents from interfering with the jurisdiction of the forum hearing the dispute. Both the offensive and defensive variety of such action fall under the rubric of “antisuit injunctions.”

The cases have adopted a relatively narrow concept of interest balancing in the area of antisuit injunctions. The D.C. Circuit in Laker Airways Ltd. v. Sabena, Belgium World Airlines has limited antisuit injunctions to those situations necessary to protect the court’s jurisdiction or the critical public policies of the forum. The Second Circuit in China Trade and Development Corp. v. M.V. Choong Young adopted a similarly narrow position.

Both courts explicitly rejected the approach of earlier cases which required a broader consideration of:

1) the frustration of a policy in the enjoining forum;
2) the vexatiousness of the foreign action;
3) the threat to the court’s jurisdiction;
4) whether the forum proceedings threaten other equitable interests; and
5) whether adjudication in separate actions would result in delay, inconvenience, expense, inconsistency or a race to judgment.


61. 731 F.2d 909 (D.C. Cir. 1984).

62. 837 F.2d 33 (2d Cir. 1987).

Although the courts appear to reject the specific considerations proposed by the earlier line of cases, they have not rejected the concept of balancing itself. Both the D.C. Circuit and the Second Circuit have explicitly cited comity concerns as the basis for limiting the use of antisuit injunctions. Comity has always called for the analysis of foreign interests and the deference to those important interests in the absence of some overriding domestic interest. Ironically, the doctrine of comity underlies the broad interest balancing concept which is what the courts purported to limit in this particular context.

G. The Worst of All Possible Worlds

The current system is wasteful, inefficient, and unfair. Each separate gatekeeping provision is time consuming and costly. Taken together, the cost of discovery, briefing, and argument make litigation impossible for all but the most massive cases with unlimited legal budgets. Litigating even more than one of these issues sequentially can easily render litigation impractical for small and medium sized disputes.

The present system creates powerful incentives to avoid transnational litigation in the United States at all costs. The system is particularly burdensome in tort and related statutory types of actions where the parties do not have the luxury of specifying in advance the desired judicial or arbitral forum. The present system also contributes to the present impasse where no foreign nation has been willing to enter into a treaty with the United States obligating the enforcement of U.S. judgments.

The three district court opinions in the Laker litigation reflect the classic but unnecessary repetition of the balancing approaches developed under the different doctrinal tests. The Laker case was an antitrust action filed by Laker Airways' bankruptcy trustee in the United States District Court for the District of Columbia. The trustee alleged a conspiracy by American, British, or other foreign airlines to put Laker Airways out of business. The British defendants obtained injunctions and equivalent orders under the British Protection of Trading Interests Act prohibiting Laker from proceeding against them in England. Laker then sought an injunction to prevent the remaining defendants from pursuing any similar antisuit injunctions in foreign courts.

64. See Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1213 (D.C. Cir. 1989); China Trade, 837 F.2d at 35-36; Laker Airways, 731 F.2d at 928, 956.
65. Id.
66. Anecdotal and personal experience suggest that no dispute involving less than one half million dollars will justify the kind of litigation budget to support multiple motion practice.
67. See generally Ronald A. Brand, Enforcing Foreign Judgments in the United States and United States Judgments Abroad (1992). To the contrary, some nations have enacted blocking statutes affirmatively barring the enforcement of United States judgments under specified circumstances. See, e.g., Protection of Trading Interests Act 1980, ch. 11 (Eng.).
The district court granted the injunction, reasoning that because
Laker would not be able to proceed in the courts of Great Britain, the
denial of Laker's antitrust claims in the United States would effectively
preclude Laker from having any remedy at all and that such irreparable
injury far outweighed the harm the foreign air carriers doing business in
the United States would suffer from having to defend the lawsuit on the
merits in the United States.\textsuperscript{68} While the court recognized that the ques-
tion before it was closely related to the questions of jurisdiction to pre-
scribe and forum non conveniens, it expressly deferred consideration of
those issues as premature.\textsuperscript{69}

Less than two months later, the court tackled the question of forum
non conveniens. In a separate opinion, the court granted the plaintiff's
motion for partial summary judgment eliminating the defendant's
affirmative defense of forum non conveniens.\textsuperscript{70} The court noted that
much of the prior opinion was dispositive of this issue\textsuperscript{71} and held that a
dismissal on forum non conveniens was not appropriate since Great
Britain could not and would not provide a forum for the resolution of
the plaintiff's antitrust claims.\textsuperscript{72}

Six months later, the court returned to the crux of the matter—
namely whether the United States or Great Britain was the exclusive or
preferred forum for the resolution of the merits of the dispute. The
court confirmed its own jurisdiction and appointed an amicus to repre-
sent the interests of the plaintiff in the United States litigation to the
extent that it was barred from doing so as a result of the British judicial
and administrative orders.\textsuperscript{73} The status quo was ultimately affirmed by
the Court of Appeals as the court held that there was nothing a United
States court could do to interfere with foreign injunctions, but that the
court was entitled to protect its own jurisdiction from further
encroachment.\textsuperscript{74}

The most casual inquiry shows the redundancy of the court's
approach.\textsuperscript{75} The court had already decided every element of a forum

\textsuperscript{68} Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1136-39
\textsuperscript{69} Id. at 1135.
\textsuperscript{71} Id. at 813.
\textsuperscript{72} Id. at 817.
\textsuperscript{73} 577 F. Supp. 348 (D.D.C. 1983).
\textsuperscript{74} 731 F.2d 909 (D.C. Cir. 1984).
\textsuperscript{75} Similarly, in the litigation concerning the 1978 oil spill from the Amoco Cadiz
off the north coast of France, the court engaged in precisely the same repetitive doc-
trial analyses and balancing of interests that unnecessarily added extensive delays
and expense to the resolution of an admittedly complex and large scale litigation. In
re Oil Spill by the Amoco Cadiz off the Coast of Fr. on Mar. 16, 1978, 93 F.R.D. 840
(N.D. Ill. 1982); In re Oil Spill by the Amoco Cadiz off the Coast of Fr. on Mar. 16,
1978, 491 F. Supp. 170 (N.D. Ill. 1979), aff'd, 699 F.2d 909 (7th Cir. 1983); In re Oil
Spill by the Amoco Cadiz off the Coast of Fr. on Mar. 16, 1978, 491 F. Supp. 161
(N.D. Ill. 1979) (repetitive use of balancing tests to decide motions involving the
Foreign Sovereign Immunities Act, the act of state doctrine, subject matter jurisidic-
tion, personal jurisdiction, forum non conveniens, and foreign discovery issues).
non conveniens motion in holding that there was no available forum outside the United States. Similarly, the court had resolved every element of the question of jurisdiction to prescribe in deciding that the United States courts had sufficient interest in the dispute to enjoin further attempts to interfere with their jurisdiction. An omnibus motion decided under the unified theory would have been faster and cheaper, by piercing to the real core of the dispute. It would have yielded the same result and hardly could have acerbated the tensions between the United States and Great Britain. In fact, a more straightforward assertion of the sufficiency of the United States interest at the outset of the dispute probably would have reduced the tension.

II. Connecting the Threads with a Unified Theory

Court has all but acknowledged the unity of transnational procedure by requiring essentially the same comity test for each procedural issue. The existing doctrines have come to be defined too much by the differences in the timing of their consideration and the standard of appellate review, rather than by the questions they ask and the allocation of power between courts and litigants.  

What is lacking so far is a global unifying vision of reducing these transnational procedural and jurisdictional questions into a single inquiry.  

These various doctrinal strands can be most profitably viewed as subparts of a larger inquiry: whether the United States court is an appropriate forum for the resolution of the dispute through rules of decision of its own choice. Each doctrinal strand examines a tiny subpart of this question. The problem is that the current system does so in a repetitive, fragmented, and ad hoc manner up to the beginning of the trial on the merits. Courts repeatedly seek to answer similar or identical questions using open-ended balancing methodologies, which the parties and the court are ill-equipped to handle.  

United States courts should confront the larger inquiry definitively at the outset of the litigation in a single omnibus determination of the sufficiency of United States interests and whether foreign interests so outweigh conflicting U.S. interests in a particular dispute to warrant deference on comity grounds. The courts should require the parties, and their governments, to confront these issues as early as practicable and render their binding rulings.  

The unification process should not be halted merely because certain of the doctrines tend to emphasize institutional consideration and national interests, while others tend to emphasize personal privilege and private contacts with a forum. This is a false distinction that obscures more than it reveals. The consideration of both public and private factors simply demonstrates that the field of transnational procedure combines traditional aspects of public and private international law.  

The courts should recognize that the current system asks multiple versions of the same question and rarely provides a different answer to any of the subparts. By considering an omnibus motion near the begins...
ning of the proceeding, the court can consolidate an important inquiry in a cost-effective manner. The parties can conserve their time and resources, and the court can be spared the necessity to delve constantly into the merits of the case in order to consider gatekeeping matters. Discovery could be limited to those facts necessary to resolve the gatekeeping questions, just as initial discovery in class action litigation normally is limited to the facts necessary to decide class certification.\textsuperscript{80}

In most cases, the court and the parties should be prepared to confront the issues inherent in the omnibus motion within six months of the initiation of the litigation. Through its inherent powers to control its own docket and its scheduling powers under Rule 16 of the Federal Rules of Civil Procedure, the court can advance or postpone this date upon a showing of good cause. If the court ultimately learns information which caused it to question the validity of its initial determination of the omnibus motion, it could always reconsider the matter.

The courts then must construct a single omnibus test to decide a motion that raises all of the gatekeeping provisions. The consolidation of the various tests already being used is perhaps the easiest part of the change. Without regard to the labels previous used, it could be as general as a test for reasonableness,\textsuperscript{81} or as detailed as a multifactor list combining all of the contacts, policies, and interests considered in the existing doctrine.\textsuperscript{82} However, the enumeration of the specific factors to be considered and balanced are far less important than consolidation and the confrontation of the common issues raised in a principled manner.\textsuperscript{83}

The courts should not be deterred from confronting the merits of the dispute in resolving the omnibus motion. Such "quick looks" are an accepted part of both courts' consideration of most so-called procedural issues and the current balancing of interest process in transnational disputes, which depends in part on the nature of the alleged conduct of the defendant. Through consolidation, the court would only peek once at the merits of the dispute, and only to the extent that it sheds light on whether the United States court should entertain the dispute. The court should focus its inquiry of whether it is legally or practically competent to adjudicate the dispute on the merits without gravely damaging the interests of the United States as a nation.\textsuperscript{84} If the answer is no, the parties must go elsewhere to litigate. If the answer is yes, then the courts must select the rules of decision which will govern the proceeding.

\textsuperscript{80} Manual for Complex Litigation Second § 30.12 Moore's Federal Practice (1986) [hereinafter MCL2d].
\textsuperscript{81} See Restatement (Third), supra note 2, § 403 (proposed originally to deal with jurisdiction to prescribe).
\textsuperscript{82} See supra notes 2-65 and accompanying text.
\textsuperscript{83} The burden of proof normally will remain on the private parties since the United States and foreign governments often are reluctant to participate in private litigation, especially at the trial level. See Waller, Bringing Meaning to Interest Balancing, supra note 15, at 954.
\textsuperscript{84} Id.
Regardless of the sophistication of courts’ balancing of interests, consolidation would still save parties substantial time and money and force courts to take such motions more seriously as they would only have one opportunity to consider gatekeeping issues. The court and the parties would not have the tactical opportunities to raise and resolve these issues again and again throughout the pretrial phase of the litigation in increasingly discretionary formats. Instead, the parties would have to marshal their best evidence for a single omnibus consideration of these issues. The court similarly would concentrate its limited resources to get the answer right the first time, or face reversal on appeal, rather than being able to correct its rulings down the line through later motions and such discretionary vehicles as forum non conveniens where the standard on appeal is much more favorable.  

A unified theory cannot force other countries to recognize that the United States should have the exclusive or primary control over a particular dispute. Conversely, other nations cannot bar the United States from proceeding where it is appropriate to do so, even if it is appropriate or preferred to proceed elsewhere. The unified theory, however, is powerful enough to require a United States court, in a manner consistent with the Constitution, federal common law, and international law, to answer the single threshold question of whether the United States has a sufficient stake to proceed at all. That in itself would be a major step forward.

II. Implementing the Unified Theory as a Matter of Binding Federal Common Law

There are several potential obstacles that might impede the operation of the unified theory set forth above. Conducting the balancing process in a single unified inquiry should be constitutional and should satisfy the due process constraints on the exercise of personal jurisdiction as long as the court explicitly finds both minimum contacts and reasonableness as set forth in *Asahi* 85. Little, if anything, more would be needed to satisfy

85. The question arises whether the considerable time and effort of the court and the parties should be directed to the selection of the best available forum rather than merely an appropriate forum. Unfortunately, to do so would run head on into the concept of concurrent jurisdiction, and the prospect of parallel proceedings, as a fundamental principle of the international law. *See* S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 9 (holding that international law did not bar Turkey from prosecuting French officers on French flag vessel causing collision resulting in death of Turkish citizens); Laker Airways, Ltd. v. Sabena, Belg. World Airlines, 731 F.2d 909, 935-36 (D.C. Cir. 1984) (holding that neither England nor United States was the exclusive or primary forum for litigation over demise of airline flying between United States and Great Britain). As this author has noted elsewhere, a search for an exclusive or primary forum for the resolution of any given dispute is probably illusory. *See* Alan M. Simon & Spencer Weber Waller, *A Theory of Economic Sovereignty: An Alternative to Extraterritorial Jurisdictional Disputes*, 22 STAN. J. INT’L L. 337 (1986); Spencer Weber Waller & Alan M. Simon, *Analyzing Claims of Sovereignty in International Economic Disputes*, 7 NW. J. INT’L L. & BUS. 1 (1985).

86. *See supra* notes 25-32 and accompanying text.
isfy the nebulous due process limitations in the choice of law area. Such a single inquiry should also satisfy the requirements for jurisdiction to prescribe under international law. As set forth in a landmark decision of the Permanent Court of International Justice, the Lotus case, there are few international law constraints on a nation's assertion of jurisdiction. The single inquiry also should satisfy traditional and expanded modern formulations of comity and the emerging reasonableness standard as set forth in the Restatement of Foreign Relations Law. The single inquiry on its face would not appear to violate any treaties or conventions to which the United States is a party. The unified theory could also be applied to satisfy the most favored nation and national treatment principles which have arguably risen to the level of being rules of customary international law.

A. Uniformity and Erie

Principles of federalism do require close scrutiny of whether federal courts could constitutionally formulate a binding single test as a matter of federal common rule covering federal question cases, diversity litigation, and state court proceedings. While this is an important question, federalism concerns ultimately do not prove to stand in the way of the implementation of the unified theory as proposed.

It is the federal government which has the constitutional power to conduct foreign affairs and regulate commerce with foreign nations. The explicit stripping of state authority in these fields was one of the principal bases for creating the Constitution as an alternative to the Arti-

87. See supra notes 40-50 and accompanying text.
89. S.S. Lotus (France v. Turkey) 1927 P.C.I.J. (ser. A) No.9. Lotus concerned a collision between a Turkish and French vessel which resulted in the death of Turkish nationals. Turkey sought to prosecute the French officers that were believed to be responsible for the fatal collision. The two nations asked the Permanent Court of International Justice to decide the narrow question of whether international law prohibited Turkey from prosecuting a criminal act which was assumed to have taken place on French territory but produced harmful effects on Turkish territory. A majority of the Permanent Court held that international law did not prohibit the exercise of jurisdiction under these circumstances. The court thus created a powerful, but not definitive, endorsement of the effects doctrine.
91. RESTATEMENT (THIRD), supra note 2, § 403.
93. Id. art. III.
cles of Confederation. The Supreme Court also has indicated that the federal government's ability to conduct foreign affairs existed as a fundamental aspect of sovereignty from the time of formal independence from Great Britain.

There has been an unbroken string of federal decisions prohibiting the states from interfering with the setting of foreign policy and from taking any action which threatens to interfere with the exclusive role of the federal government in this area. These cases have relied upon the commerce clause, the supremacy clause, and notions of express and implied preemption to hold that the area of foreign relations is off limits to the states.

The earliest cases interpreting the Constitution established that state policies would be subordinated to the treaties and executive agreements of the federal government. The Supreme Court in *Gibbons v. Ogden* held that the power to regulate commerce with foreign nations was an express grant of power to the federal government which the states could not be permitted to impede or frustrate. Cases like *United States v. Curtiss-Wright Export Corp.* and *Missouri v. Holland*, which may be controversial for other reasons, uniformly hold that it is the federal government which is the "sole organ" for the conduct of foreign affairs. These cases go as far as holding that in foreign affairs, state borders and state sovereignty disappear, and the United States must act as a single entity with no role for state interference.

The presence of foreign affairs considerations can limit or bar state action within even the most traditional spheres of state sovereignty and law making. For example, the Supreme Court in *Japan Line, Ltd. v. County of Los Angeles* overturned a local property tax scheme affecting foreign property which may well have been constitutional under the Commerce Clause if applied exclusively to domestic property. Similarly,

---


98. 22 U.S. (9 Wheat) 1, 187-89 (1824).

99. 299 U.S. 304 (1936) (executive order prohibiting arms sales to South American countries during hostilities in 1930s constitutional given broad interpretation of Executive Branch foreign affairs powers and broad construction of Congressional delegations of authority in foreign affairs matters).

100. 292 U.S. 416 (1920) (upholding constitutionality of treaty restrictions involving migratory birds based on foreign affairs powers).


102. 441 U.S. 434 (1979). See also *Xerox Corp. v. County of Harris, Tex.*, 459 U.S. 145 (1982) (invalidating local property tax on goods manufactured in Mexico and stored in bonded warehouse awaiting international shipment).
in Zschernig v. Miller, the Supreme Court invalidated a state probate law which involved explicit foreign policy judgments about the rights of American citizens to inherit, on a reciprocal basis, in other countries.

Federalism in the context of foreign affairs means a diminution and potentially the extinction of the role of the states. The concerns that animate the doctrine of Erie R.R. Co. v. Tompkins evaporate in this context. Erie's predecessor, Swift v. Tyson, held that federal courts were free to fashion a general federal common law in diversity actions in federal court. Erie reversed Swift to the extent that Swift had authorized federal courts to create general federal common law. However, Erie addressed only the question of whether the Federal Judiciary Act of 1789 authorized the creation of general federal common law to displace state common law rules in diversity actions. The decision addressed no other basis as a potential source for the application of federal common law, since no other source of federal authority was applicable to the diversity tort action at issue in Erie.

Erie did not forbid the application of federal common law to matters of an exclusively or predominantly federal nature. While it is often difficult to determine the precise boundaries of the federal domain in other contexts, foreign affairs and foreign commerce are matters that Erie leaves untouched. The Constitution, through the foreign affairs

---

104. 304 U.S. 64 (1938).
106. 41 U.S. (16 Pet.) 1 (1842). More specifically, Swift held that § 34 of the Federal Judiciary Act of 1789 should be interpreted as calling for the application of state constitutional and legislative rules, rather than common law rules, in federal diversity actions.
107. 304 U.S. at 78 ("There is no federal general common law").
powers of the executive branch, the commerce clause, the supremacy clause, as well as the inherent sovereignty of the United States as a nation under international law, eliminate much of what would otherwise present a difficult federalism issue.

One of the more difficult components to fit in this framework is the doctrine of forum non conveniens. While the federal doctrine of forum non conveniens is applied in both federal question and diversity litigation, the courts have not yet suggested that states are preempted either from adopting different versions of the doctrine or from abolishing it altogether. In fact, several states have abolished the doctrine through legislation or judicial decision. Commentators such as Allan Stein have suggested that court access devices such as forum non conveniens may serve traditional and legitimate state interests which federal courts should respect under *Erie.*

Regardless of the correctness of this assertion in garden variety domestic litigation, the result should be different for transnational litigation. Notions of comity, federalism, supremacy, and the constitutional aspects of foreign affairs and foreign economic regulation suggest that a federal court may forbid a state from keeping its courts open where the United States as a nation lacks a substantial interest in a dispute.

Whatever leeway normally enjoyed by the states does not carry over into the transnational arena. As Professor Stein ultimately acknowledges: "Questions about international comity are, in effect, questions of foreign affairs that should be subject to a uniform federal policy."

The inherently federal nature of transnational procedure is demonstrated by the fact that most of the evolving Federal Rules of Transnational Procedure have arisen in the context of Supreme Court decisions setting forth rules of decisions binding on both federal and state courts. For example, the Supreme Court has declared that federal law controls the enforceability of forum selection clauses in transnational disputes. The application of the minimum contacts test in the international arena as set forth in *Asahi* arose in the context of a state court product liability dispute. The open-ended balancing test for

---


113. Stein, *Erie and Court Access, supra* note 79.

114. This assertion should be no more controversial than the assertion that a state may not keep its court open to a dispute where the parties lack minimum contacts to the forum or the act of state doctrine dictates judicial abstention.


choice of discovery rules in *Aerospatiale* also arose in a diversity product liability and wrongful death action.

Similarly, the Supreme Court in *Sabattino* explicitly held that the act of state doctrine is a rule of decision binding on both state and federal courts. As a corollary to the act of state doctrine, both state and federal courts further are bound by a foreign government's interpretation of its own legal pronouncements.

The legitimacy of uniform federal law in transnational litigation is implicit in the nature of the balancing test mandated in every Supreme Court case in this area. In requiring the balancing of the interests of the United States and foreign nations involved, the Court has recognized that even nominally private disputes can involve important federal and international interests that must be considered in determining whether to assume jurisdiction. This process requires the parties to stand in the shoes of their governments and present arguments on issues that go far beyond the boundaries of the dispute that brought them before the court. The resulting public nature of the decision process and its actual and potential effects on the diplomatic and economic interests of the United States as a nation fit nicely within the traditional exclusive federal powers in this area. Any lack of uniformity in state rules inherently threatens federal interests, especially because the United States is responsible at the international level for the state court decisions.

B. Uniformity and *Klaxon*

The only serious limitation on the development of a unified theory of transnational procedure through binding federal common law appears to arise in the area of conflicts of law. In *Klaxon Co. v. Stentor Electric Mfg. Co.*, the Supreme Court has indicated that the policies underlying the *Erie* doctrine require the application of state conflict of law rules when the underlying rule of decision is provided by state law.

The Supreme Court in *Day & Zimmerman, Inc. v. Challoner* applied *Klaxon* to determine whether Texas or Cambodian law should apply in a federal diversity wrongful death suit involving premature detonation of an artillery shell in Cambodia. The trial court declined to apply Texas

---

118. 376 U.S. at 421-27.
120. In doing so, the Supreme Court may well have demolished the public/private distinction which has hampered the development of a unified field of international law. See Joel R. Paul, *The Isolation of Private International Law*, 7 *Wis. Int'l L.J.* 149 (1988).
121. See Waller, *Bringing Meaning to Interest Balancing*, supra note 15.
122. *Restatement (Third)*, supra note 2, § 207; *Moore, Federalism and Foreign Relations*, supra note 105, at 285, (citing PHILLIP C. JESSUP, *THE USE OF INTERNATIONAL LAW* 101 (1959); JOHN BASSETT MOORE, *DIGEST OF INTERNATIONAL LAW* 837 (1906) (United States payment of indemnity because of failure of New Orleans officials to prevent lynching of Italian citizens)).
123. 313 U.S. 487 (1941).
conflict of law rules which would have required the application of the substantive law of Cambodia, as Cambodia was the place of the accident. The district court chose to apply the substantive law of Texas and its principle of strict liability, reasoning that Cambodia had no sufficient interest in the dispute to justify the application of its law. On appeal, the Fifth Circuit affirmed.

The Supreme Court reversed in a two page *per curiam* opinion holding that the federal court was required to proceed in exactly the same manner as if it were a state court hearing the same dispute. The Court stated:

A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits. The Court of Appeals in this case should identify and follow the Texas conflicts rule.

*Challoner* was an unfortunate interruption in the process of identifying and applying the exclusive federal interest in the regulation of foreign relations and foreign commerce that affects the United States. The initial decision of whether Cambodian or American law should be applied to this dispute concerns the interests of the United States as an entity, and not the interests of any of its political subdivisions. Nonetheless, the decision in *Challoner* does not negate the utility of the unified test, but merely modifies its application. Unless and until the Supreme Court is prepared to acknowledge the unique federal status of transnational litigation, the unified test must take into account the requirements of *Klaxon* and *Erie* and incorporate by reference state conflicts rules in state court litigation and federal diversity actions.

The omnibus balancing test as proposed is capable of incorporating state conflicts rules when necessary. The court may never reach the conflicts question if it concludes that the United States is not an appropriate place to resolve the dispute. The difficulty in selecting or applying the applicable law may itself help determine that the United States is not an appropriate forum. If the United States is an appropriate forum, then the court would normally have to decide through its own conflicts rules

125. Id. at 3.
126. Id. at 3-4.
127. 512 F.2d 77 (5th Cir. 1975), vacated and remanded, 423 U.S. 3 (1975).
129. Id. at 4-5.
130. The actual outcome of *Challoner* appears to be harmless since Cambodia presumably has no interest in the outcome of the case regardless of whose law is applied.
what law to apply to resolve the dispute. *Challoner* only affects the latter
process and constrains the court in limited circumstances in determining
which internal United States rules should apply to select the applicable
law.

C. Avoiding the Need for Statutory Change

While the federal courts have the power to create a unified theory as a
binding federal common law of transnational procedure, the question
remains whether the unified theory should be implemented through
statutory change. Approaching the issues of transnational procedure
through legislation or amendment to the Federal Rules of Civil Proce-
dure would bring both certainty and legitimacy to the field of transna-
tional procedure, but would also create severe problems. Statutory
change requires a sufficient critical mass of congressional concern that
seems unlikely given a congested legislative calendar. Such a consensus
would be difficult to achieve and could take years to develop. Achieving
such change through amendment to the Federal Rules of Civil Proce-
dure also requires the active participation and concurrence of the
Supreme Court, which so far has been content to develop the area
through piecemeal federal common law rules.

Even if the Congress or the Supreme Court support a statutory
change, a set of transnational procedure rules would require a complete
consensus as to all of the details—the factors to be balanced, the weight
to be given to each factor, the type of evidence to be used in the balanc-
ing process, and the standard of decision and appellate review. If a new
statute or rule were adopted, the courts would still have to engage con-
stantly in the interpretation and implementation of the statute in light of
the complex, fact-sensitive balancing process.

No statute or rule could possibly address every aspect of the pro-
cess involved in weighing the U.S. and foreign interests in a transna-
tional dispute litigated in the United States courts. Preserving the
federal common law aspects of the present system but systematizing,
unifying, and accelerating the timing of the balancing process can bring
both efficiency and meaning to the process, while allowing flexibility for
experiment when novel problems arise.  

133. The strengths and weaknesses of relying on statutory change are embodied in
the proposed *Conflicts of Jurisdiction Model Act* (*"CJMA"*). See James Wawro,
Model Act, Report of ABA Subcommittee on Conflicts of Jurisdiction). See generally,
Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of
Jurisdiction and Multiple Proceedings*, 26 Int’l L. 21 (1992). The CJMA was drafted by
a subcommittee of the Litigation Committee of the American Bar Association Section
of International Law and Practice, including this author, to address the issue of
antisuit injunctions.

The CJMA calls for an initial determination at the outset of the litigation that a
court represents the primary or best forum to resolve the dispute. CJMA § 1. Under
the CJMA, the court normally must determine within six months of the initiation of
IV. A Proposed Manual for Transnational Procedure

What is needed is not so much statutory change or amendment to the Federal Rules of Civil Procedure, but the promulgation of a Manual for Transnational Litigation. Such a Manual would be premised on the success of the Manual for Complex Litigation Second ("MCL2d") which has guided, but not altered, the application of the Federal Rules of Civil Procedure in complex civil litigation. The MCL2d and its predecessors have been developed and refined since 1950 to address the proliferation of class action, multiparty, multidistrict, and other types of complex litigation. It has always been explicitly premised on the assumption that modern oversized litigation could be managed in an appropriate manner through the sophisticated application of existing procedural rules.

The court must then determine if it should proceed to resolve the dispute on the merits or defer to one of the other available fora. In this respect, the CJMA appears closer to an international application of the concept of forum conveniens. See Stein, Forum Non Conveniens, supra note 76, at 844-46; Albert A. Ehrenzweig, Transient Rule, supra note 76, at 312-14; Inglis, Forum Conveniens, supra note 76.

In making this determination under the CJMA, the court must consider the same familiar factors from other doctrines and balance as many as fourteen open-ended factors relating to the interests of the United States and foreign court. CJMA § 3. The CJMA then sets forth the types of evidence to consider in the balancing process. Id. § 4.

The CJMA uses a carrot and stick approach to enforcement matters. A judgment by a court selected as the proper forum under the CJMA is accorded presumptive validity, while a conflicting judgment of any other court need not be enforced.

The CJMA has had a substantial impact in a relatively short time. Connecticut has enacted the CJMA by statute: Act Concerning International Obligations and Procedures, Public Act No. 91-324. The CJMA is under consideration by California and various bar associations in the United States and abroad. See Teitz, Taking Multiple Bites of the Apple, supra at 25 n.17; Conflicts of Jurisdiction and Enforcement of Foreign Judgments, California Law Revision Commission, Staff Draft and Recommendation, May 11, 1992.

While the CJMA is a step towards the right direction, it raises several problems. First, the CJMA comes dangerously close to an assertion of a doctrine of exclusive or primary jurisdiction which is inconsistent with the customary international law norm of concurrent jurisdiction. See supra note 85. Second, by casting the CJMA as a uniform law for adoption by states and other nations, there is an implicit assertion of helplessness in the absence of the adoption of the CJMA as positive law by statute or treaty. Finally, the CJMA was intended primarily to address the question of antisuit injunctions and did not explicitly consider the broader ramifications of all aspects of transnational litigation.

134. MCL2d, supra note 80.
The MCL2d approaches complex litigation by focusing on the need for intensive and effective judicial management of complex matters, the role of counsel in the expediting of litigation process, and the early formulation and resolution of procedural and discovery issues through conferences and timetables.\textsuperscript{137} The MCL2d provides additional guidance on the settlement, trial, and appeal of complex cases.\textsuperscript{138} It then applies these principles in a variety of specific settings.\textsuperscript{139} Finally, the MCL2d contains various checklists, forms, orders, and supplementary material on attorneys fees and sanctions to assist the court and parties.\textsuperscript{140}

The time is ripe for a Manual for Transnational Litigation ("MTL"). Transnational litigation represents the next tidal wave of litigation sweeping down on both state and federal courts. Foreign parties and foreign located evidence play a significant part in the full range of commercial and tort litigation coming before the courts and are no longer confined to the more sophisticated federal statutory causes of actions such as antitrust or securities regulation. The cases involving transnational procedural issues now arise most often in general commercial, products liability, and tort litigation.\textsuperscript{141} Asahi, Aerospatiale, and Reyno are all standard tort litigation which could arise in any state or federal court.

The need for a MTL is all the more pressing given the lack of familiarity, expertise, or interest in either the state or federal judiciary in matters dealing with public international law, international commercial law, or transnational litigation. Until recently, few courts saw such issues at all, let alone building up a body of expertise in the research and resolution of the complicated issues involved. Not only was there little opportunity for systematic judicial training,\textsuperscript{142} most courts were further.

\textsuperscript{138} \textit{Id.} §§ 21.6, 22-3, 25.
\textsuperscript{139} These include class actions, multidistrict litigation, criminal cases, and specific civil matters such as antitrust, mass disaster, securities, takeover, employment discrimination, and patent litigation. \textit{Id.} §§ 30-33.
\textsuperscript{140} \textit{Id.} §§ 40-42.
\textsuperscript{141} An interesting example is a breach of contract and fraud case filed in the Central District of California involving an Illinois and a California corporation litigating over the performance of a long term printing contract. On the face of the complaint, the lawsuit appeared to be a garden variety diversity commercial dispute. However, the litigation quickly assumed international proportions because the California plaintiff was a wholly owned subsidiary of a Danish corporation whose chairman lived in Sweden. The president of the California subsidiary at the time of the dispute was a Finnish citizen who had returned home to Helsinki by the time the litigation proceeded to discovery. A portion of the dispute related to the performance of machinery which had been manufactured in Canada and Germany. In addition, when the plaintiff terminated the printing contract with the defendant, it switched to a Dutch printing company. \textit{See} International Masters Publishers, Inc. v. Bradley Printing Co., et. al., Case No. CV 89-2143 (AWT).
\textsuperscript{142} The expansion of both the LEXIS and Westlaw databases to include international and foreign legal materials may be the most positive development in providing courts meaningful access to the tools needed to comprehensively research international law issues. \textit{See}, \textit{e.g.}, \textit{Basic Documents, available in LEXIS}, in International Economic Law file available under the International Law library.
burdened by the lack of library and research facilities to address international law issues. At its best, the MTL could bring together judges, practitioners, and scholars in the drafting of a comprehensive manual covering all aspects of transnational procedure which the MCL2d and the other sources on complex litigation virtually ignore.

The MTL would assist courts in rationalizing their treatment of transnational litigation. It should include analysis of all of the current doctrines that the courts face in transnational litigation as well as the basic principles of international law. In addition to the jurisdictional and procedural doctrines discussed in this article, the MTL ideally should include issues of service of process, the act of state doctrine, sovereign immunity, the foreign compulsion defense, the enforcement of foreign judgments in the United States, and the enforcement of United States judgments abroad. The MTL must emphasize the unity of these doctrines and their role in the litigation process, acknowledging and accommodating the legitimate interests of affected foreign countries.

Discovery abroad should be the next broad area of focus. The MTL should analyze the unilateral and multilateral mechanisms for discovery of evidence abroad as part of the broader transnational litigation process. It should also address the international legitimacy of the United States approach to that process. Here, the courts and the parties need to be sensitized to the fact that in most civil law jurisdictions, the litigation process is judicially controlled and any discovery conducted by the court is quite limited. Without such information, the parties and the courts cannot conduct a meaningful analysis of the choice of discovery rules or understand why a foreign nation would ever have a legitimate interest in avoiding the use of the broader lawyer controlled Federal

---

143. See Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report, 24 INT'L LAW 903 (1990). In an encouraging note, the American Society of International Law will soon conduct training session for federal judges in basic international law doctrine. However, this training will be limited to federal judges initially and cover only the fundamentals of public international law.

144. The current MCL2d acknowledges the complexity of transnational litigation but only devotes seven pages to the subject, all relating to extraterritorial discovery. MCL2d, supra note 80, at 86-93.

Similarly, the Complex Litigation Project of the American Law Institute focuses on the consolidation of mass tort and contract litigation across state and federal district lines and the resulting conflict of law issues and addresses transnational litigation only in passing. See American Law Institute, Complex Litigation Project (Tent. Draft No. 3, 1992).

Finally, the Restatements prepared by the American Law Institute normally are limited to a treatment of a particular doctrinal area such as Conflict of Laws. At the other extreme, the Restatement (Third) of Foreign Relations Law attempts to restate, systemize, and reform a vast area of international law topics including the nature of international law and its relationship to United States law, persons in international law, international agreements, the law of the sea, the law of the environment, the protection of persons, international economic relations, and remedies for violations of international law. While Part IV of the Restatement covers jurisdiction and judgments, it is not focused on the litigation process.
Concentrating on the process of litigation is a natural way to highlight the unity that is absent under the current system. The courts need to be as active and managerial as in any complex case, and must intervene early and set schedules for the presentation, briefing, argument, and decision of an omnibus motion on procedural and jurisdictional matters. As in other types of complex litigation, the court should use its full managerial powers through initial conferences, scheduling orders, and waves of discovery to unify these considerations into omnibus motions and require the filing and resolution of such motions as early as possible.

The sequencing of motions and modes of discovery set forth in the MCL2d is based upon the Court's inherent powers to control its own docket and the express powers contained in Rules 16, 26, 37, and 42 of the Federal Rules of Civil Procedure. These powers are more than sufficient to provide a basis for a similar requirement of an omnibus motion covering transnational jurisdiction and procedure.

The courts could then rely upon the MTL to assist them and the parties in analyzing the complex constellation of interests and contacts in performing the required balancing of interests. The court can then enter binding orders before proceeding to a decision on the merits. The MTL would assist the court and the parties in referring to materials both in the United States and abroad which would document the interests at stake in a particular litigation. The material could easily be broken down by subject matter, as in the current MCL2d, since the intensity of United States and foreign interests may differ dramatically depending on whether the disputes concern antitrust, securities, product liability, contract, or other statutory or common law issues.

The MTL should include the full text of any multilateral or bilateral treaties such as the Hague Conventions on Service of Process and the Taking of Evidence that are applicable to litigation in the United States. The MTL should also include a full complement of forms, model pleadings, and draft orders so that parties and the court would not have to reinvent the wheel each time a routine request is made.

A well crafted MTL is likely to become a definitive source of guidance given the lack of familiarity, interest, and experience of most courts in transnational issues. The MTL could also play an important role in bringing meaning to the interest balancing process and in creating an evidentiary based record, as opposed to using primarily rhetorical arguments as to the contacts and interests to be balanced by the

145. The MTL also needs to discuss the various foreign privacy and blocking laws that may interfere with the production of discovery materials. It needs to separate the question of which discovery rules apply from the question of whether U.S. discovery obligations will ever be excused on the grounds of conflicting foreign law requirements.

146. MCL2d, supra note 80, § 20.1.

147. See Waller, Bringing Meaning To Interest Balancing, supra note 15, at 948.
The widespread adoption of the procedures of the MCL2d suggest a similarly important role for a MTL. The MCL2d has been widely cited by both federal and state courts in addressing its chosen subject matter. The MTL can guide courts and practitioners in coming to grips with the internationalization of United States civil procedure and show the way to the management of such transnational disputes in a cost effective, efficient, and fair manner.

Conclusion

Courts in the United States have addressed gatekeeping issues in transnational litigation seriatim as a result of historical and constitutional reasons rather than for reasons of logic or efficiency. The various doctrines of jurisdiction to prescribe, subject matter jurisdiction, personal jurisdiction, choice of law, and forum non conveniens in transnational litigation are all separately conceived responses to the growing assertiveness of United States courts over conduct abroad by foreign entities.

The balancing of interests system which evolved is collapsing under its own weight. The courts and parties are asked, as many as six times in any particular litigation, to engage in a complicated, unstructured, time consuming, and expensive balancing process prior to the resolution of the merits of the dispute. The nearly identical nature of these doctrinally distinct tests is increasingly obvious each time the Supreme Court speaks regarding an aspect of transnational procedure.

The time has come to discard the labels and combine these inquiries into an omnibus inquiry of why a United States court should resolve a particular dispute and what rules should govern its resolution. Facing up to this more candid inquiry as early as possible would bring clarity and legitimacy to principled decisions where the litigants and the United States have strong interests in resolving the disputes in our courts. Poor decisions would be deterred through open and candid scrutiny subject to significant appellate review, rather than being obscured by a haze of doctrinal formalism.

The omnibus test can be implemented as a matter of binding federal common law without statutory change and save time and resources for both courts and the parties. Currently, courts revisit the same issues with uneven results throughout the litigation and with varying degrees of discretion and appellate review. With the implementation of the omnibus test, the focus properly shifts to the real issue hidden in the current system—the determination of a balancing of interests test based

---

148. Id. at 951.
149. A LEXIS search in March 1992 for “Manual pre/3 Complex Litigation” retrieved over six hundred federal cases citing the Manual for Complex Litigation.
150. A similar LEXIS search in March 1992 retrieved 35 reported state decisions citing the Manual for Complex Litigation primarily for issues relating to class actions, settlements, attorneys fees, and the handling of discovery issues.
on evidence and not merely rhetoric. A correct and proper balancing can be facilitated through the diligence of the parties and the court guided by the collective experience embodied in a Manual for Transnational Litigation.