COMMENT

EXTRATERRITORIAL ANTITRUST JURISDICTION: CONTINUING THE CONFUSION IN POLICY, LAW, AND JURISDICTION

INTRODUCTION

An upstart American company establishes a supply relationship with a foreign distributor. The domestic company supplies the design and makes consistent orders, building its business over the course of three years with imports from the foreign distributor. Suddenly, supply from the foreign distributor stops. The company finds that it cannot gain any additional supply from the same country due to a trade association agreement granting distributors a pattern and design registration right. This right prohibits any manufacturers in that country from supplying other distributors with the same product design.[1] The American company files suit in federal district court alleging market division[2] in violation of the Sherman Act.[3]

This action raises the problem of whether the federal court has extraterritorial jurisdiction[4] over the foreign distributor—an area of unpredictability prompting one commentator to note that "the only consistency in the Supreme Court's antitrust jurisprudence is the Court's inconsistency."[5] The opportunity for the American company to present the merits of its case may be completely dependent on the circuit within which the federal district court hearing the case resides. Likewise, the foreign company may be drawn into litigation for acts wholly committed in its own country. This uncer-

1. These facts parallel those of *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), discussed *infra* Part II.D.

2. Market division occurs when competitors agree what products they will sell to particular buyers, thus effectively removing any competition between them.

3. 15 U.S.C. §§ 1-7 (1994).

4. In the context of this Comment, "extraterritorial jurisdiction" refers to the power of United States courts to adjudicate disputes involving alleged Sherman Act violations by a foreign entity occurring outside the United States.

5. Dean Brockbank, *The 1995 International Antitrust Guidelines: The Reach of U.S. Antitrust Law Continues to Expand*, 2 J. INT'L LEGAL STUD. 1 (1996).

tainty in whether the case will go so far as a hearing on the merits has a disruptive effect on the competitiveness of American companies in an increasingly globalized economy requiring more outward-looking and cooperative economic policy measures.[6] In a world moving rapidly toward free trade and development of multinational corporations, an untangling and clarification of the current jurisdictional chaos is necessary to prepare for the complex antitrust issues that the new international economy will bring.[7]

In *Hartford Fire Insurance Co. v. California*,[8] a 5-4 decision, the Supreme Court allowed extraterritorial extension of the Sherman Act[9] to adjudicate the alleged violations of several British reinsurers. The reinsurers were accused of having conspired with domestic carriers to influence the availability of certain coverages in the American commercial insurance market.[10] This decision is viewed as establishing two threshold questions which courts must answer before extending extraterritorial jurisdiction.[11] First, was the conduct in question "meant to produce and did it in fact produce some substantial effect" in the United States?[12] This question reestablishes the "intended effects test" first set forth by the Second Circuit[13] in *United States v. Aluminum Co. of America*[14] (*ALCOA*). Second, courts must determine whether there "is in fact a true conflict[15] between domestic and foreign law,"[16] a question effectively eliminating the "jurisdictional rule of reason" established by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*.[17]

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6. Kenneth W. Dam, *Extraterritoriality in an Age of Globilization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 297 (1994).

7. *See* John H. Chung, Comment, *The International Antitrust Enforcement Assistance Act of 1994 and the Maelstrom Surrounding the Extraterritorial Application of the Sherman Act*, 69 TEMP. L. REV. 371, 403-08 (1996); Bret Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U. L. REV. 907, 932 (1997).

8. 509 U.S. 764 (1993).

9. 15 U.S.C. §§ 1-7 (1994).

10. 509 U.S. at 773-76.

11. *See* Brockbank, *supra* note 5, at 12.

12. 509 U.S. at 796.

13. The Second Circuit was sitting as the court of last resort, as the Supreme Court lacked a quorum at the time. Federal courts, including the Supreme Court, followed this decision until *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

14. 148 F.2d 416 (2d Cir. 1945). In *ALCOA*, an agreement formed outside the United States between a Canadian company and a European aluminum producer attempted to limit aluminum ingot imports into the United States. *Id.* at 439-41.

15. In the context of Justice Souter's opinion, a "true conflict" would exist if the defendant would violate the laws of one sovereign by complying with the laws of another. 509 U.S. 764, 799 (1993).

16. *Id.* at 798.

17. 549 F.2d 597 (9th Cir. 1976) [hereinafter *Timberlane I*]. There, the Ninth Circuit established a series of questions and factors to guide courts in determining jurisdiction over foreign violators of antitrust law. The suggested factors focused on accounting for concerns

In the wake of the Supreme Court's *Hartford Fire* decision, commentary abounded on the new standard the Court had established for extending the reach of United States antitrust enforcement abroad.[18] Both courts and scholars have interpreted Justice Souter's opinion in *Hartford Fire* to discount the necessity of comity considerations unless there is a "true conflict" of law between sovereigns.[19]

Just as the courts and enforcement agencies had settled into the *Hartford Fire* two-part test, the Ninth Circuit reintroduced the *Timberlane* factors test.[20] In *Metro Industries Inc. v. Sammi Corp.*,[21] the court applied the jurisdictional rule of reason to determine whether the court could extend jurisdiction to anticompetitive conduct in Korea.[22] Writing for the three-judge panel, Judge Wiggins stated the following: "While *Hartford Fire Ins.* overruled our holding in *Timberlane II*[23] that a foreign government's encouragement of conduct which the United States prohibits would amount to a conflict of law, it *did not* question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane I*."[24] The court then applied the comity factors from *Timberlane I* and found jurisdiction proper.[25] Other circuits have addressed similar questions of the effect of *Hartford Fire* on the comity question with varying results.[26] Thus, the de-

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of international comity. *See* Chung, *supra* note 7, at 394 (1996).

18. *See, e.g.*, Brockbank, *supra* note 5, at 12 ("Justice Souter outlined a rule that all but did away with the notion of comity."); Chung, *supra* note 7, at 398 ("[T]he Supreme Court effectively narrowed the inquiry into the balance of domestic and international interests."); Varun Gupta, Note, *After Hartford Fire: Antitrust and Comity*, 84 GEO. L.J. 2287, 2299 (1996) ("*Hartford Fire* effectively overrules *Timberlane*. . . ."); Sumner, *supra* note 7, at 930 ("The Supreme Court recently rejected the third prong of the *Timberlane* analytical framework.").

19. 509 U.S. at 798; *see also* Brockbank, *supra* note 5, at 12; Chung, *supra* note 7, at 398.

20. *Timberlane I*, 549 F.2d at 613-14.

21. 82 F.3d 839 (9th Cir. 1996).

22. *Id.* at 845-47.

23. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Assoc., 749 F.2d 1378 (9th Cir. 1984) [hereinafter *Timberlane II*].

24. 82 F.3d at 846 n.5 (emphasis added).

25. *Id.* at 845-47.

26. *See, e.g.*, United States v. Nippon Paper Indus. Co. Ltd., 109 F.3d 1, 8 (1st Cir. 1997) ("Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth has been stunted by *Hartford Fire*."); In re Maxwell Communication Corp., 93 F.3d 1036, 1049 (2d Cir. 1996) ("International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.").

Prior to the enactment of the FTAIA, subject matter jurisdiction was also an area of uncertainty for courts adjudicating international antitrust disputes. However, the FTAIA's two-step test, (1) "direct, substantial and reasonably foreseeable effect," and (2) U.S. courts can obtain jurisdiction, suggests that Congress has conferred subject matter jurisdiction and that the exercise of jurisdiction relies more on questions of personal jurisdiction and comity analysis. *See* Robert Shank, *The Justice Department's Recent Antitrust Enforcement Policy: Toward a "Positive Comity" Solution to International Competition Problems?*, 29 VAND. J.

bate among the circuits remains as intense as it was before *Hartford Fire*.

Part I of this Comment explores the role of international comity in the context of Sherman Act enforcement. Part II briefly traces the development of current tests for asserting antitrust jurisdiction considering international comity, focusing specifically on the current confusion among the circuits contrasted with the views of post-*Hartford Fire* commentators. Part III probes criticisms of legislative attempts to clarify the jurisdiction federal courts may exercise in international antitrust enforcement actions. Part IV reviews the evolution of executive branch antitrust policy in the wake of judicial and congressional actions. Part V discusses the reaction of the international community to United States antitrust enforcement efforts. Finally, Part VI suggests possible resolutions to the current confused state of foreign antitrust action jurisdiction that may work to realize more consistent, predictable jurisdictional findings in international antitrust disputes.

I. INTERNATIONAL COMITY CONCERNS: THE DELICATE BALANCE

To avoid the risk of diplomatic and trade repercussions, federal courts that exercise jurisdiction when enforcing the Sherman Act must consider the comity of nations. The comity of nations is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation."[27] Generally, international law has recognized that a foreign nation has the authority to "prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory."[28] This principle is modified by the "effects" doctrine whereby the United States can "prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory."[29] Thus, the laws of a foreign actor's country of residence as well as the Sherman Act can govern anticompetitive market conduct abroad.

In the exercise of comity, one nation refrains from enforcement of its interests.[30] Ideally, the sovereign with the greatest interest in the controversy will be allowed to pursue resolution.[31] But in United States efforts to enforce

TRANSNAT'L L. 155, 172-75 (1996). *But see* Dam, *supra* note 6, at 309-10 (discussing the use of subject matter jurisdiction analysis as opposed to jurisdiction to prescribe in *Hartford Fire*).

27. BLACK'S LAW DICTIONARY 267 (1990). *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 164 (1895) ("[T]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.").

28. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 402(1)(a) (1986) [hereinafter RESTATEMENT (THIRD)].

29. *Id.* § 402(1)(c).

30. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 n.1 (1982).

31. Gupta, *supra* note 18, at 2293.

antitrust measures, it is precisely the determination of the sovereign having the greatest interest which presents the greatest difficulty.[32] Courts struggle to find consistent methodologies for measuring these interests.[33]

Congress follows uncertainty in the courts with legislation that is meant to establish guidelines but instead tends to conflict with international law even more.[34] For example, in an effort to clarify United States policy regarding the extraterritorial reach of antitrust laws, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982.[35] The Act denies jurisdiction over foreign conduct relating to exports with certain exceptions; but the Act's exceptions are so broad that the jurisdictional denial is in practice meaningless.[36]

Meanwhile, in an effort to avoid derailing executive branch foreign policy, courts and the Congress often hesitate to act extraterritorially at all.[37] Acknowledging the importance of comity among nations, Congress limits the extraterritorial reach of promulgated laws.[38] However, the Constitution places no prohibitions on Congress extending the reach of enacted law to govern conduct outside the United States.[39] Should Congress enact a law whereby a clear intent to legislate extraterritorially is indicated, the courts must enforce that law even though it conflicts with international law.[40]

II. Federal Courts and International Comity in Antitrust Enforcement: Searching for an Answer

The Sherman Act was enacted in 1890 to facilitate protection of the American consumer in a free and unfettered market economy. The Act's

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32. *See Timberlane I*, 549 F.2d 597, 613 (9th Cir. 1976) (noting that "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-à-vis those of other nations, to justify an assertion of extraterritorial authority").

33. *See* Chung, *supra* note 7, at 399 ("These diverse tests and all their permutations have created jurisdictional chaos.").

34. *See* Gupta, *supra* note 18, at 2297-99.

35. 15 U.S.C. § 6(a) (1994).

36. *See* Brockbank, *supra* note 5, at 16; *infra* Part III.

37. David B. Massey, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419, 432 (1997).

38. Under the RESTATEMENT (THIRD), a state has jurisdiction to prescribe law with respect to (1) persons, acts, property, or events occurring within its territory; (2) conduct outside its territory that has or is intended to have a substantial effect within its territory; (3) its nationals outside its territory as well as within; and (4) crimes against its security or its vital economic interests. § 402. Jurisdiction is also limited by the "reasonableness" requirement of § 403.

39. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.").

40. *Id.* at 248 (whether Congress has exercised authority to enforce its law extraterritorially is a matter of statutory construction).

bold proclamation was the following: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[41]

Since its enactment, judicial, legislative, and executive bodies have struggled to adopt guidelines that allow consistent, predictable application of the Act to violations in foreign commerce.[42] As global markets develop[43] and free trading blocks[44] become the order of the modern commercial era, debate has intensified both domestically and abroad about what the appropriate scope of the Act is regarding foreign commerce.[45] Additionally, debate rages on the appropriate forum for enforcing antitrust law against foreign entities.[46]

The United States Supreme Court summarized the intent and goals of the Sherman Act in *Northern Pacific Railway Co. v. United States*:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest equality, and the greatest material progress, while at the same time providing an environment conducive to the preservations of our democratic political and social institutions.[47]

Though detailed in purpose, the Sherman Act failed to establish any clear guidelines on the limits of enforcement in international antitrust dis-

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41. 15 U.S.C. § 1 (1994).

42. "Foreign commerce," as used in this Comment, describes activities associated with trade or commerce between the United States and foreign parties.

43. *See, e.g., General Agreement on Tariffs and Trade* (GATT)—forming the World Trade Organization (WTO).

44. *E.g., North American Free Trade Agreement*, Dec. 17, 1992, Can.-Mex.-U.S. (NAFTA); *Treaty Establishing the European Economic Community* (EEC TREATY).

45. *See* Joseph P. Griffin, *Possible Resolutions of International Disputes over Enforcement of U.S. Antitrust Laws*, 18 STAN. J. INT'L L. 279 (1982). The American Bar Association has suggested a system whereby federal agencies would notify the State Department two weeks before taking any action carrying potentially serious issues of international comity. *Id.* at 292-93. Professor Griffin further notes that, for every declaration of diplomatic support, there have been five diplomatic protests of United States antitrust cases. *Id.* at 282. *See also* Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 274 (1982) (suggesting that agencies issue formal statements or appearances at request of foreign parties); RESTATEMENT (THIRD) § 403 reporter's note 1 (citing examples of European states questioning applications of U.S. jurisdiction as "exorbitant").

46. *See, e.g.*, Roscoe B. Starek, III, *International Cooperation in Antitrust Enforcement and Other International Antitrust Developments*, text of prepared remarks for delivery during the "Antitrust 1997" Conference in Washington, D.C., Oct. 21, 1996, *available in* 1996 WL 683123; Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997).

47. 356 U.S. 1, 4 (1958).

putes.[48] Since the Act's enactment, courts have struggled with determining just where jurisdiction begins and ends when foreign commerce is involved. The result is a hodgepodge of judicially constructed tests and factors.[49] Both the Supreme Court and circuit courts have attempted for over one hundred years to develop a mechanical process for determining when they have jurisdiction over foreign antitrust disputes, only to confuse the demarcation hopelessly.[50]

A. Expanding the Reach of the Sherman Act

For much of the early history of Sherman Act enforcement, the courts took the view that Congress had not intended to extend its reach extraterritorially. In the 1909 decision of *American Banana Co. v. United Fruit Co.*,[51] the Supreme Court determined that antitrust laws do not extend outside the borders of the United States because Congress did not clearly indicate an intent to apply the Act extraterritorially.[52] However, when the Court applied this view to the facts presented in *American Banana*, the first signs of judicial confusion about how to analyze international antitrust disputes became apparent. The *American Banana* Court looked only to direct actions taken in Costa Rica, ignoring any strategic activity taken in the United States by the Alabama-based defendant.[53] In that case, the plaintiff American corporation was attempting to cultivate fruit in Costa Rica for export to the United States. The plaintiff claimed that the defendant, also an American corporation holding a virtual monopoly in the trade, had engaged in anticompetitive practices in violation of the Sherman Act, including instigating Costa Rican army seizures of plaintiff's property and new railway.[54]

At that time, the international view was that a nation had exclusive sov-

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48. Phillip E. Areeda & Donald F. Turner, 1 ANTITRUST LAW § 109b, at 22-23 (1978). *See also* Henry C. Pitney, Note, *Sovereign Compulsion and International Antitrust: Conflicting Laws and Separating Powers*, 25 COLUM. J. TRANSNAT'L L. 403, 406 (1987) (noting "great uncertainty" as to extraterritorial reach of the Sherman Act). *But see* Barry E. Hawk, *The Sherman Act: The Second Century*, 59 ANTITRUST L.J. 161 (1990) ("[L]egislative history of the Sherman Act evidences a clear intent to prohibit foreign cartels."); Dale J. Montpelier, *Diamonds Are Forever? Implications of the United States Antitrust Statutes on International Trade and the De Beers Diamond Cartel*, 24 CAL. W. INT'L L.J. 277, 280 (1994) ("Act condemns anticompetitive behavior by foreign companies dealing in American markets."); James R. Atwood & Kingman Brewster, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 2:2-2:3, at 22-26 (3d ed. 1997) (asserting that plain language of the Act and legislative history evidences congressional intent to regulate imports with the Sherman Act).

49. *See* Chung, *supra* note 7, at 399.

50. *Id.*

51. 213 U.S. 347 (1909).

52. *Id.* at 357 ("[I]n case of doubt . . . any statute [should be interpreted] to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.").

53. *Id.* at 354-55.

54. *Id.*

ereignty and jurisdiction within its own boundaries.[55] Writing for the majority, Justice Holmes voiced skepticism over the idea of extending the Court's reach to adjudicate acts occurring outside the United States.[56] An additional complication facing the Court and mitigating against extending jurisdiction was the legal status of the defendant's acts under the laws of Costa Rica.[57] The Court determined that any action taken in United States courts would interfere with the authority of another sovereign's freedom to regulate commerce as it saw fit.[58] The Court refused to extend jurisdiction to reach the activity.[59]

This precedent was followed until 1945 when Judge Learned Hand wrote for the majority in *ALCOA*.[60] With that opinion, jurisdictional uncertainty was introduced into the courts and has remained constant ever since.[61] In *ALCOA*, the United States filed a complaint alleging an anticompetitive cartel between foreign corporations from Great Britain, Germany, Switzerland, and Canada.[62] Specifically, the United States government alleged that "Limited," a Canadian corporation established by ALCOA to assume its foreign properties, was part of a foreign cartel intending to fix a quota on aluminum imported to the United States.[63] The issue before the court was whether Congress intended antitrust liability to attach to a foreign entity allegedly engaged in anticompetitive conduct outside the United States.[64] Harmonizing antitrust jurisdiction with international law developments,[65] Judge Hand created the "intended effects test" by asserting: "[I]t is settled

55. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 186 (1992).

56. 213 U.S. at 355.

57. *Id.* at 356. The Court concluded the following:

> But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

Id.

58. *Id.*

59. *Id.* at 359.

60. 148 F.2d 416 (2d Cir. 1945). In *ALCOA*, an agreement formed outside the United States between a Canadian company and a European aluminum producer attempted to limit aluminum ingot imports into the United States. *Id.* at 439-41.

61. *See* Barry E. Hawk, 1 UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 13 (1989 Supp.) ("Criticism focused on three related concerns: 1) jurisdictional overbreadth and lack of sensitivity to foreign interests; 2) uncertainty of the substantive rules; and 3) adverse impact on U.S. firms.").

62. 148 F.2d at 442.

63. *Id.* at 439, 442.

64. *Id.* at 443.

65. Kramer, *supra* note 55, at 192-93.

law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[66]

After *ALCOA*, courts and enforcement agencies began the task of attempting to give meaning to the term "intended effects."[67] The *ALCOA* court gave no guidelines for what severity of effect was required.[68] While the tests used to measure these "effects" vary depending upon which court or enforcement agency is investigating the alleged illegality,[69] results have been consistent.[70] Also, enforcement agencies and the courts have differed in interpretations of the "intent" required.[71]

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66. 148 F.2d at 443.

67. *See, e.g.*, *Timberlane I*, 549 F.2d 597, 612-13 (9th Cir. 1976) (holding that "some effect—actual or intended—on American foreign commerce" must exist; effect must be "sufficiently large to present a cognizable injury to the plaintiffs"); ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (1977) (requiring substantial effect on commerce of United States) [hereinafter 1977 GUIDELINES].

68. *ALCOA*, 148 F.2d at 444-45.

69. *See, e.g.*, *Timberlane I*, 549 F.2d at 612-13 (holding that "some effect-actual or intended-on American foreign commerce" must exist; effect must be "sufficiently large to present a cognizable injury to the plaintiffs"); Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) ("[I]t is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimus."); Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974) (conduct must "directly affect the flow of foreign commerce into or out of this country"); United States v. Watchmakers of Switz. Info. Ctr., Inc., 1963 Trade Cas. (CCH) ¶ 70,600, 77,457 (S.D.N.Y. 1962) (conduct must have "substantial and material effect upon our foreign and domestic commerce"), *order modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965); United States v. Timkin Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949) (conduct must have "a direct and influencing effect on trade . . . between the United States and foreign countries"), *modified*, 341 U.S. 593 (1951); United States v. General Elec. Co., 82 F. Supp. 753, 891 (D.N.J. 1949) (conduct must have "deleteriously affected [United States] commerce"); United States v. National Lead Co., 63 F. Supp. 513, 527 (S.D.N.Y. 1945) (conduct must have "suppress[ed] imports into and exports from the United States"), *aff'd*, 332 U.S. 319 (1947); 1977 GUIDELINES, *supra* note 67, at 6-7 (requiring substantial effect on U.S. commerce).

70. *See* House Comm. on the Judiciary, Legislative History of the Foreign Trade Antitrust Improvements Act of 1982, H.R. Rep. No. 686, 97th Cong., 2d Sess. 5-6 (1982) [hereinafter Legislative History]. "[D]espite the variations in wording, 'there is, with rare exception, no significant inconsistency between judicial precedents and the Justice Department's view of the effects test.'" *Id.* (quoting Section of Antitrust Law, American Bar Ass'n, Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading 22 (1981)); *cf.* *Timberlane I*, 549 F.2d at 611 ("Nor is it quite clear what the 'direct-indirect' distinction is supposed to mean.").

71. *See, e.g.*, 1977 GUIDELINES, *supra* note 67, at 6-7 (foreseeable effect on U.S. commerce required); Zenith Radio Corp v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1189 & n.65 (E.D. Pa. 1980) (requires general intent to affect U.S. commerce; deemed to intend natural consequences of acts); Sabre Shipping Corp. v. Am. President Lines, Ltd., 285 F. Supp. 949, 953 (S.D.N.Y. 1968) (no intent required).

B. Limitations on the Effects Test

In its wake, the *ALCOA* court left the "intended effects test."[72] This measuring device for extending jurisdiction hinged on whether the foreign conduct was meant to produce or did produce a substantial effect in the United States.[73] The broad possibilities of applying the effects test prompted defendants to search for defenses based on comity limits. In *Occidental Petroleum Corp. v. Butte Gas & Oil Co.*, the defendant successfully used the act of state doctrine to avoid United States jurisdiction over an antitrust claim against it.[74] This doctrine, first espoused in *Underhill v. Hernandez,*[75] had developed to bar United States courts from sitting in judgment of acts taken by a foreign sovereign within its own territory.[76] The plaintiff in *Occidental Petroleum* alleged that the defendants conspired with an Arab sheikdom to misappropriate offshore waters previously granted to Occidental. Specifically, Occidental claimed that the defendant had coerced a sheikdom to issue a decree claiming the offshore waters in which Occidental had rights.[77] Since the court could not sit in judgment of the sovereign's act of claiming ownership of the waters, the defendant could not be adjudicated under the antitrust laws.[78] Thus, the act of state doctrine can limit antitrust complaints hinging upon the anticompetitive acts committed by sovereigns.[79]

In recent years, courts have narrowed the applicability of the act of state doctrine to antitrust actions. In *United States v. Sisal Sales Corp.*, for example, the Supreme Court held that, though prompted by an official Mexican decree, there was no bar to jurisdiction available to shield the defendant's conduct via the act of state doctrine.[80] The Court based its decision on facts

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72. 148 F.2d 416, 444-45. The *ALCOA* court found that, once the United States had proved intent to affect imports, the burden shifted to the defendants to show that the agreement had no effect. *Id.* at 445.

73. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

74. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curium*, 461 F.2d 1261 (9th Cir. 1972).

75. 168 U.S. 250 (1897). Prior to invocation by antitrust defendants, the doctrine had been exercised in actions over Cuban nationalizations of property belonging to U.S. citizens and companies following the Cuban revolution. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

76. *Occidental Petroleum*, 331 F. Supp. at 108 (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

77. *Id.* at 99-101.

78. *Id.* at 108.

79. *Id.* at 109-10. *See also* International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 568-69 (C.D. Cal. 1979) (holding that OPEC was not subject to United States antitrust jurisdiction because the Foreign Sovereign Immunities Act and "act of government" doctrine precluded assertion of jurisdictional authority), *aff'd*, 649 F.2d 1354 (9th Cir. 1981).

80. 274 U.S. 268, 275-76 (1927).

showing that the defendant had initiated the conspiracy from within the United States and had actively lobbied the Mexican government to make the decree the defendant was claiming had prompted the defendant's conduct.[81] The Court reaffirmed its decision years later in *Continental Ore Co. v. Union Carbide and Carbon Corp.*,[82] stating that a sovereign's mere approval of the defendant's actions did not invoke the act of state doctrine.[83] Since *Continental Ore*, American courts have rarely found that foreign interests and policies rise to the level of an official act of state.[84]

A second comity-based defense to antitrust actions brought in American courts is that of sovereign compulsion. Considered a derivative of the act of state doctrine,[85] the party asserting the defense must show that a foreign government is compelling it to engage in the questioned conduct, thus not being liable under the laws of another nation for that conduct.[86] In *Interamerican Refining Corp. v. Texaco Maracaibo*,[87] the plaintiffs alleged that Texaco Maracaibo conspired to refuse oil sales to Interamerican.[88] The defendants claimed that the refusal to sell was not the product of anticompetitive conspiracy, but instead stemmed from the government of Venezuela's oil boycott, prohibiting the defendants from selling oil to Interamerican.[89] A United States district court agreed, holding that "[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of sovereign."[90] The defendant was found not to be subject to United States antitrust jurisdiction.[91]

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81. *Id.* at 276.

82. 370 U.S. 690 (1962).

83. *Id. See also* Alfred Dunhill of London Inc. v. The Republic of Cuba, 425 U.S. 682, 694-95 (1976) (holding that the key inquiry is the level of government involvement in the specific acts alleged. If alleged activity was independent of government involvement, act of state doctrine does not act as a bar to jurisdiction.).

84. Chung, *supra* note 7, at 388.

85. *Cf. Timberlane I*, 549 F.2d 597, 606 (9th Cir. 1976) (suggesting that sovereign compulsion is a "corollary" of the act of state).

86. Pitney, *supra* note 48, at 403. Another possible defense to exercise of jurisdiction is the doctrine of *forum non conveniens*, allowing the dismissal of a case if there is "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or "when the chosen forum [is] inappropriate because of considerations affecting the court's own administration and legal problems." Piper Aircraft v. Reyno, 454 U.S. 235, 241 (1981) (internal citations and quotations omitted).

87. 307 F. Supp. 1291 (D. Del. 1970).

88. *Id.* at 1292.

89. *Id.* at 1293.

90. *Id.* at 1298.

91. *Id.* However, a finding of sovereign compulsion requires specific proof of compulsion. If a foreign nation issued a decree to a defendant, but did not require that party to engage in a certain course of conduct, then the activity would not rise to sovereign compulsion. *See* United States v. Watchmakers of Switzerland Info. Ctr. Inc., 1963 Trade Cas. (CCH) ¶ 70,600, at 77,456-57 (S.D.N.Y. 1962) (noting that, if defendant's activities were required under foreign law, United States court has no right to condemn activities), *order modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

Though still recognized, the sovereign compulsion doctrine has not constituted a significant limiting factor to United States jurisdiction over international antitrust disputes.[92] The Supreme Court has considered the defense only once, in *Continental Ore*, where it found that the defense did not apply.[93] Additionally, courts have required that the sovereign must force the defendant's action. The defendant cannot have had any legal option to refuse taking the action compelled by the sovereign; otherwise the defense is unavailable.[94] Consequently, the strict compulsion requirement has limited the use of this defense.[95]

C. Recent Developments and Confusion in the Courts

Courts managed consistent results in the exercise of jurisdiction while applying different methodologies before the Ninth Circuit decided *Timberlane Lumber Co. v. Bank of America*[96] in 1976. In *Timberlane I*, the Ninth Circuit held that exercise of extraterritorial jurisdiction in antitrust actions should always be reasonable.[97] To that end, the court balanced a series of comity factors to determine whether United States court jurisdiction was reasonable considering prescriptive comity.[98]

Timberlane's main allegation was that the Bank of America had conspired with the Honduran government and several Honduran corporations to eliminate it from the Honduran lumber export business.[99] Specifically, Timberlane contended that the Bank of America had conspired unlawfully to subordinate its property interests in a milling plant located in Honduras that Timberlane was acquiring to produce lumber.[100] Bank of America assigned the mill interests to a co-conspirator, who enforced court-ordered attachment

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92. Pitney, *supra* note 48, at 411-14 (contending that (1) courts fear that regular dismissals pursuant to sovereign compulsion would leave a large loophole in U.S. antitrust law; (2) courts are suspicious of compulsion allegations especially when the government action confers a benefit on the defendant; and (3) there is no reason to apply sovereign compulsion doctrine when the government's action appears illegal under its own laws).

93. *See Continental Ore*, 370 U.S. at 707 (finding that defendant is not afforded sovereign compulsion defense in antitrust action when Canadian law did not compel discriminatory pricing).

94. Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979) ("The defense [of sovereign compulsion] is not available if the defendant could have legally refused to accede to the foreign power's wishes.").

95. Pitney, *supra* note 48, at 412.

96. *Timberlane I*, 549 F.2d 597 (9th Cir. 1976).

97. *Id.* at 613.

98. *Id.* at 614. Prescriptive comity, as used by Justice Scalia in his *Hartford Fire* dissent, is the "respect sovereign nations afford each other by limiting the reach of their laws." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993).

99. 549 F.2d at 604.

100. *Id.* Timberlane was attempting to purchase a milling plant previously owned by the Lima family, who had experienced financial difficulties in 1971. During the process of acquisition, the family transferred interests in the operation to its creditors, all of whom were ultimately in debt to Bank of America. *Id.*

of the property.[101] In addition, the appointed "intervenor," a court-appointed officer assigned to prevent loss in property value, used Honduran troops to shut down the mill.[102] Uneasy with the inconsistencies of effects-based jurisdictional determinations,[103] the *Timberlane* court set forth a three-part test for determining jurisdictional power.[104] First, Sherman Act jurisdiction requires an intended or actual effect on American foreign commerce.[105] Second, the plaintiff must show that a cognizable injury exists to which United States antitrust laws should apply.[106] Third, there must be an inquiry into factors expressing international comity concerns, including

1. the degree of conflict with foreign law or policy;
2. the nationality or allegiance of the parties;
3. the locations or principal places of business of corporations;
4. the extent to which enforcement by either state can be expected to achieve compliance;
5. the relative significance of effects on the United States as compared with those elsewhere;
6. the extent to which there is explicit purpose to harm or affect American commerce;
7. the foreseeability of such effect; and
8. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[107]

This third prong, entitled the "jurisdictional rule of reason,"[108] was an attempt to reconcile domestic and foreign interests.[109]

Timberlane was the first meaningful attempt to create a rule of United States antitrust jurisdiction that took international concerns fully into account.[110] However, the difficulty of applying a test calling for analysis of complex domestic and international concerns resulted in greater confusion

101. *Id.* The Honduran attachment was known as an "embargo." Under Honduran law, an "embargo" is a court-ordered attachment on the property, registered with the Public Registry, precluding the sale of the property without court order. *Id.*

102. *Id.* at 604-05.

103. *Id.* at 611. The Ninth Circuit recognized that, even among American courts, there is no consensus on how far or under what rationale jurisdiction should extend. This is evidenced by the various permutations of the "effects test" in case law. *See, e.g.*, *Occidental Petroleum*, 331 F. Supp. at 102-03 (advocating "direct or substantial effects" test), *aff'd*, 461 F.2d 1261 (9th Cir. 1972); United States v. Watchmakers of Switzerland Info. Ctr., Inc., 1963 Trade Cas. (CCH) ¶ 70,600 at 77,456-57 (S.D.N.Y. 1962) (advocating "direct and substantial effects" test), *order modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

104. 549 F.2d at 613.

105. *Id.*

106. *Id.*

107. *Id.* at 614 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF UNITED STATES § 40 [hereinafter RESTATEMENT (SECOND)]).

108. *Id.* at 613.

109. *Id.* at 611.

110. *See* Chung, *supra* note 7, at 394.

about when the exercise of jurisdiction was proper.[111] This confusion in the courts after *Timberlane I* led to a resurgence of the effects doctrine.[112]

In *Mannington Mills, Inc. v. Congoleum Corp.*,[113] the Third Circuit held that jurisdiction may be justified solely by finding intended effects in the United States, but that the court could decline jurisdiction if it found compelling international interests.[114] The *Mannington* court found that the defendant's alleged attempts to defraud patent authorities were intended to affect United States Foreign commerce, thereby justifying jurisdiction under *ALCOA*'s intended effects test alone.[115] However, the court then remanded the case, after justifying jurisdiction via the intended effects test, by using a *Timberlane*-type test to evaluate international interests.[116]

The difficulty of consistent application of the jurisdictional rule of reason was not limited to *Mannington*. In *Laker Airways Ltd. v. Sabena*,[117] the United States Court of Appeals for the District of Columbia also returned to the *ALCOA* intended effects test, noting mistrust of the jurisdictional rule of reason in doing so.[118] The *Laker* court justified exercising jurisdiction over

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111. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 948-50 (D.C. Cir. 1984) (suggesting that balancing test would require enormous discovery, including production of political policy papers); *see also* Griffin, *supra* note 45, at 295-97 (1982) (stating that "American and foreign judges . . . question the competence of judges to evaluate the diplomatic, national security, and international economic issues raised by the factors [of the *Timberlane I* test]" and forecasting that more court use of the jurisdictional rule of reason is likely to produce inconsistent definitions and application).

112. *See* Chung, *supra* note 7, at 394; *see also* Allison J. Himelfarb, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of "Extraterritoriality,"* 17 U. PA. J. INT'L ECON. L. 909, 924 (1996).

113. 595 F.2d 1287 (3d Cir. 1979).

114. *Id.* at 1296-98. In *Mannington Mills*, the court confronted an allegation of fraudulently secured patents, which, if true, would subject the defendant to Sherman Act liability. *Id.* at 1290. The plaintiff asserted that Congoleum had made material misrepresentations to foreign patent authorities regarding the performance and specifications of its vinyl floor covering. *Id.* Mannington further alleged that Congoleum threatened to enforce its fraudulent patents by maintaining frivolous infringement suits in the foreign countries, a threat which Congoleum followed through on in New Zealand, Canada, Australia, and Japan. *Id.*

115. *Id.* at 1291-92.

116. *Id.* at 1297.

117. 731 F.2d 909 (D.C. Cir. 1984).

118. *Id.* at 922, 948. In *Laker*, a British airline filed an antitrust action against several domestic and foreign competitors alleging a concerted conspiracy to drive Laker out of the airline industry. *Id.* at 916. Laker alleged that members of the International Air Transport Association (IATA) conspired to fix fares for transatlantic flights at a predatory level to erode Laker's clientele, and thereafter to raise fares when Laker was run out. *Id.* Laker also claimed that the defendants interfered with its attempts to restructure its debt and to continue operations. *Id.* In the complicated procedural history, the British defendants responded to the original Laker complaint by seeking injunctions from the High Court of Justice of the United Kingdom to prohibit Laker from instituting an antitrust action in a United States district court. *Id.* at 915. The British defendants successfully obtained temporary injunctions against Laker. *Id.* at 918. To counter, Laker filed a motion for preliminary

the defendants, alleged to have participated in an international conspiracy to eliminate Laker Airways from the no-frills segment of the airline industry, on the basis of concurrent prescriptive jurisdiction.[119] The court relied on principles of territoriality as a foundation for jurisdiction, reasoning that a state has the right to control and regulate activities occurring within its borders.[120] The court then found that, as a consequence of territorial jurisdiction, conduct outside a state's boundaries intended to have or having substantial effect within those boundaries may be regulated by the affected state as well.[121]

In finding jurisdiction by essentially using the intended effects test, the *Laker* court used a significant part of its opinion to argue that jurisdiction based on effects is not asserting jurisdiction extraterritorially.[122] The court held that a foreign entity doing business in the United States should expect to be subject to United States antitrust law for conduct affecting domestic commerce.[123] The court further held that, even if some of the conduct occurred outside the United States, the entire transaction would still be subject to United States court scrutiny because of the effects intended within.[124] Additionally, the court expressly voiced its skepticism of the jurisdictional rule of reason.[125] Citing decisions from the Second and Seventh Circuits rejecting the rule of reason,[126] the court expressed doubt about the ability of the judiciary to weigh international political interests as required by the jurisdictional rule of reason.[127]

In 1993, with the circuits split, the Supreme Court confronted the issue

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injunction in the district court to prevent the remaining defendants from instituting similar actions in British courts. *Id.* at 918-19. Laker's motion was granted, and KLM and Sabena appealed.

119. *Id.* at 917, 921-22. Prescriptive jurisdiction in the international context is exercised when a state prescribes rules of conduct reaching outside its territory that are binding on a foreign party. *See* RESTATEMENT (THIRD) § 402 (state has jurisdiction over parties, or parties with interests, within state's territory).

120. *Id.* at 922.

121. *Id.*

122. *Id.* at 923.

123. *Id.*

124. *Id.*

125. *Id.* at 948.

126. National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981); *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1978). In addition, two years after the *Laker* decision, the Supreme Court implicitly reaffirmed the effects doctrine in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 583 n.6 (1986).

127. *Laker*, 731 F.2d at 948. Writing for the majority, Judge Wilkey questioned the validity of the balancing test on four counts: (1) It is almost impossible to balance interests when a court has to weigh domestic interests versus foreign law specifically calculated to thwart those domestic interests; (2) the judiciary is not the proper forum for balancing interests, as it is limited in its ability to make a well-reasoned analysis of complicated international policy initiatives; (3) the adoption of balancing of interests does not necessarily promote comity; and (4) the additional considerations in the jurisdictional rule of reason are unlikely to advance conflict resolution. *Id.* at 948-49.

of extending Sherman Act jurisdiction over international parties in *Hartford Fire Insurance Co. v. California.*[128] The Court reaffirmed the effects test and, according to most commentators, relegated the jurisdictional rule of reason to obscurity.[129]

In *Hartford Fire*, nineteen states and various private parties filed suit against several domestic insurers and a group of London reinsurers, alleging an international conspiracy to restrict the commercial insurance market.[130] Specifically, the plaintiffs alleged that the London reinsurers had entered into agreements, primarily in London, to limit coverage terms on commercial insurance policies, effectively limiting the types of insurance coverage available in the United States.[131] Because the conduct at issue, the agreements between the reinsurers and insurers, took place primarily in London, the Court had to consider whether principles of international comity cautioned against exercising jurisdiction over the London-based reinsurers.[132]

Prior to reaching the Supreme Court, a California district court applying the *Timberlane I* tripartite analysis, including the jurisdictional rule of reason, had dismissed the case on the ground that international comity precluded exercising jurisdiction.[133] The Ninth Circuit found that the Sherman Act was in conflict with British law as to the agreements,[134] but reversed after further finding that the remaining factors demanded the exercise of jurisdiction.[135]

The Supreme Court, in a narrow 5-4 vote that included a vigorous dissent by Justice Scalia on the Court's comity analysis,[136] affirmed the Ninth Circuit's finding that exercise of jurisdiction was proper.[137] However, the Court relied on a different analysis in reaching this conclusion.[138] The Court reaffirmed the *ALCOA* effects test, stating that "[i]t is now well established that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[139] In declining to engage in comity analysis, the Court rendered what commentators have characterized as a substantial limitation to application of the juris-

128. 509 U.S. 764, 795-96 (1993).

129. *See supra* note 18 and accompanying text.

130. 509 U.S. at 774-76. Reinsurers provide coverage to primary insurers that allows insurance companies to avoid bearing all of a given risk themselves. The ability to share this risk allows primary insurers to take on more risk while maintaining reserves of funds for claims payment, as usually mandated by state insurance laws.

131. *Id.*

132. *Id.* at 795-76.

133. *In re* Ins. Antitrust Litig., 723 F. Supp. 464, 487-90 (N.D. Cal. 1989).

134. This is the first factor requiring consideration under the *Timberlane I* test. 549 F.2d 597, 614 (9th Cir. 1976).

135. *In re* Ins. Antitrust Litig., 938 F.2d 919, 934 (9th Cir. 1991).

136. 509 U.S. at 800.

137. *Id.* at 799.

138. *Id.* at 796.

139. *Id.*

dictional rule of reason:[140] Absent a conflict of law between the United States and the state of the foreign actor, balancing comity issues is unnecessary.[141] In so doing, the Court effectively limited consideration of comity to those approximating the problems giving rise to the act of state or sovereign compulsion defenses,[142] namely whether the "person subject to regulation by two states can comply with the laws of both."[143]

In his dissent, Justice Scalia referenced several circuit court cases, including *Timberlane* and *Mannington*, for support of his contention that international comity consideration was proper when attempting to extend enforcement of the Sherman Act extraterritorially.[144] The dissent drew additional support from the *Restatement (Third)*, which had adopted comity consideration factors paralleling those of *Timberlane*'s jurisdictional rule of reason.[145] Justice Scalia argued that "a nation having some 'basis' for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction 'with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.'"[146] In applying the *Restatement*'s factors, the dissent contended that United States law should not be applied in light of international comity.[147]

After *Hartford Fire*, the course for federal courts seemed clear.[148] First, courts should look to whether the foreign conduct was intended to produce, and in fact did produce, some substantial effect in the United States.[149] Second, if the effects test is satisfied, principles of international comity should be considered only if "there is in fact a true conflict between domestic and

140. *See supra* note 18 and accompanying text.

141. 509 U.S. at 795-96.

142. *See* discussion of judicial tests *supra* Part II.B.

143. 509 U.S. at 799 (quoting RESTATEMENT (THIRD) § 403, cmt. e).

144. *Id.* at 817.

145. *Id.* at 818-19.

146. *Id.* (quoting RESTATEMENT (THIRD) § 403(1)). The "reasonableness" inquiry turns on five primary (but not exclusive) factors, including 1) the extent to which the activity takes place in the United States, RESTATEMENT (THIRD) § 403(2)(a); 2) the connections "between the regulating state and the person principally responsible for the activity to be regulated," such as nationality, residence, or economic activity, *id.* at § 403(2)(b); 3) "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," *id.* at § 403(2)(c); 4) "the extent to which another state may have an interest in regulating the activity," *id.* at § 403(2)(d); and 5) "the likelihood of a conflict with regulation by another state." *Id.* at § 403(2)(e).

147. 509 U.S. at 819 ("Rarely would these factors point more clearly against application of United States law"). *But see* Massey, *supra* note 37, for a thorough analysis of RESTATEMENT (THIRD) international comity statements, arguing that it did not represent the state of international comity law, but rather, was a statement of what the commentators thought the law should be.

148. *See, e.g.*, Brockbank, *supra* note 5, at 15; United States v. Nippon Paper Indus. Co., Ltd., 109 F.3d 1, 8-9 (1st Cir. 1997) (finding jurisdiction valid as conduct had substantial and intended effect within the United States).

149. 509 U.S. at 798.

foreign law."[150]

D. The Rebirth of Timberlane I: *More Uncertainty in the Circuits*

Though the test established by *Hartford Fire* seemed clear to commentators,[151] the Ninth Circuit was not convinced. Following *Hartford Fire*, the Ninth Circuit in *Metro Indus. v. Sammi Corp.* had the opportunity to address the issue of what role international comity considerations play in determining extraterritorial extension of the Sherman Act.[152]

In *Metro*, an importer and wholesaler of kitchenware sued a foreign export company, along with two of its domestic subsidiaries.[153] Metro had supplied the Korean distributor with models of a new stainless steel steamer, requesting that Sammi develop samples and prepare to supply the steamers.[154] Sammi registered the design with the Korean Holloware Association and began to supply Metro with steamers.[155] The association granted registration rights for patterns and designs of particular products based on shape, appearance, and color of the product.[156] Registration gave the design holder the exclusive right to export a particular design for three years, with a right to extend the registration.[157]

Two years into the export arrangement, Metro experienced disruptions in deliveries from Sammi.[158] Metro alleged that (1) Sammi blocked its attempts to secure steamers from other Korean sources by using the registration system and (2) the Korean design registration system constituted market division that was a *per se* violation of the Sherman Act.[159] The district court granted summary judgment for the defendant.[160]

Though upholding a grant of summary judgment by the district court,[161] the Ninth Circuit held that the *Timberlane I*[162] comity analysis factors were still appropriate, *Hartford Fire* notwithstanding.[163] In a footnote to the court's jurisdictional rule of reason analysis in *Metro*, the court stated the following: "While *Hartford Fire Ins.* overruled our holding in *Timberlane II*[164] that a foreign government's encouragement of conduct which the United

150. *Id.*
151. *See supra* note 18 and accompanying text.
152. 82 F.3d 839 (1996).
153. *Id.* at 841.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 841.
160. *Id.* at 842.
161. *Id.* at 849.
162. 549 F.2d 597 (9th Cir. 1976).
163. 82 F.3d at 846 n.5.
164. 749 F.2d 1378 (9th Cir. 1984).

States prohibits would amount to a conflict of law, it did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane I*."[165] After finding that comity considerations under the *Timberlane I* test did not compel declining jurisdiction, the court affirmed the district court's decision because Metro could not show an antitrust injury.[166]

The rule for extending the Sherman Act extraterritorially in the First Circuit follows *Hartford Fire*. In *United States v. Nippon Paper Industries Co.*,[167] the First Circuit allowed extension of jurisdiction because the defendant's activities, though committed abroad, had a substantial and intended effect on the United States.[168] There, the government charged the defendant Japanese company with agreeing to fix the price of thermal fax paper throughout North America.[169] In denying the defendant's appeal to international comity, the court said the following: "[C]omity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by *Hartford Fire*."[170]

The Second Circuit recognizes yet another variation of the rule from *Hartford Fire*. There, the court in *In re Maxwell*[171] cited *Hartford Fire* for the principle that "[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction."[172] After finding a true conflict between British and American law, Judge Cardamone continued the opinion with a *Timberlane*-type analysis, reaching the conclusion that international comity concerns precluded application of American law.[173] Though *Maxwell* concerned an action in bankruptcy, at least one district court in the Second Circuit has read the opinion as establishing a threshold requirement of true conflict in antitrust actions involving extraterritorial jurisdiction.

In *Filetech S.A.R.L. v. France Telecom*,[174] Judge Haight examined the

165. 82 F.3d at 846 n.5.

166. *Id.* at 848.

167. 109 F.3d 1, 8-9 (1st Cir. 1997).

168. *Id.*

169. *Id.* at 2.

170. *Id.* at 8.

171. 93 F.3d 1036 (2d Cir. 1994). In *Maxwell*, the death of British media magnate Robert Maxwell and the ensuing bankruptcy of his British corporation resulted in the bankruptcy court initiating adversarial proceedings against British and French banks. The action brought British law in conflict with American avoidance laws. *Id.* at 1054-55.

172. *Id.* at 1049 (quoting Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993)).

173. *Id.* at 1054-55.

174. 978 F. Supp. 464 (S.D.N.Y. 1997). *Filetech* involved the limitation by French law of the release of telephone information, namely no-call solicitation lists, to other phone directory providers. Calling a party listed on the no-call list was a violation of French law; however, lists released by the primary government-contracted phone company did not specify who had requested to be on this list. Thus, the directory listings were not saleable to

various tests of the circuits since *Hartford Fire*.[175] He determined that, in the Second Circuit, "a party seeking dismissal of a Sherman Act case on ground of international comity must first demonstrate that a true conflict exists between the Sherman Act and relevant foreign law."[176] He viewed the Second Circuit's rationale in *Maxwell* as establishing identification of "a true conflict of law as the threshold requirement, the condition precedent, the *sine qua non* of any international comity analysis."[177] Judge Haight determined that, once this threshold barrier is passed, comity analysis in the Second Circuit follows the same factors as *Timberlane I* and the *Restatement (Third)*.[178]

Each circuit has viewed the holding of *Hartford Fire* as establishing a different role for concerns of international comity. After reinstituting the *Timberlane I* factor test, the Ninth Circuit now considers international comity in all antitrust cases involving foreign conduct.[179] The First Circuit interprets *Hartford Fire* as reestablishing the intended effects test and allowing consideration of international comity only in situations approximating those similar to the act of state defense.[180] In essence, a foreign sovereign must require the defendant to act in a manner incompatible with the Sherman Act where compliance with both is impossible.[181] In the Second Circuit, the threshold requirement of having a true conflict between the law of the United States and the law of a foreign sovereign must be fulfilled to allow consideration of international comity.[182] Thus, even after *Hartford Fire*, results of an action claiming violation of the Sherman Act by a foreign actor may depend in large part on the circuit chosen. As the international community moves towards breaking down trade barriers to foster a more global economy, this variation in jurisdictional tests may place United States trading interests at a disadvantage. Foreign states have reacted to jurisdictional uncertainty by enacting legislation that provides certainty for their own trading interests by stifling American antitrust enforcement efforts.[183]

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marketing companies due to the risk of violating French law by calling a party on the no-call list. The United States subsidiary of a French directory publisher filed suit to gain access to the no-call list, claiming monopolization in violation of the Sherman Act. *Id.* at 467-70.

175. *Id.* at 472-77.

176. *Id.* at 478.

177. *Id.*

178. *Id.* at 481-82. THE RESTATEMENT (THIRD) section 403(2) parallels the *Timberlane I* factors. The factors in *Timberlane I* were drawn from the RESTATEMENT'S prior edition. *See Timberlane I*, 549 F.2d 597, 614 n.31 (9th Cir. 1976) (citing section 40 of the RESTATEMENT (SECOND) as a source of the factors to be considered in applying a jurisdictional rule of reason to the exercise of extraterritorial jurisdiction in antitrust cases).

179. *See, e.g.*, Metro Indus. v. Sammi Corp, 82 F.3d 839, 847 (9th Cir. 1996).

180. *See, e.g.*, United States v. Nippon Paper Indus. Co., Ltd., 109 F.3d 1, 8 (1st Cir. 1997).

181. *Id.*

182. *Filetech*, 978 F. Supp. at 478.

183. *See infra* footnotes 235-44 and accompanying text. Foreign states have enacted legislation to block discovery efforts, reclaim damage awards, and allow courts to decline

III. CONGRESSIONAL ATTEMPTS TO STRUCTURE THE DEBATE

In recent years, Congress has attempted to legislate guidelines for antitrust enforcement in the foreign commerce arena. The Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA")[184] and the International Antitrust Enforcement Assistance Act of 1994 ("IAEAA")[185] are two examples of this effort. Unfortunately, these efforts have made the landscape of international enforcement less clear. The statutes have created more variations to the judicial determination of jurisdiction. The question that arises is, who makes the determination, the enforcement agency bringing the action or the judiciary?[186]

The FTAIA was enacted to clarify the test for determining United States antitrust jurisdiction over international commerce.[187] The resulting test primarily protects American consumers and exporters rather than protecting foreign consumers or producers.[188] Congress narrowly tailored the FTAIA to maintain the judicial flexibility of the comity doctrine in light of the then recent *Timberlane I* jurisdictional rule of reason.[189] In drafting the legislation, Congress included the following:

> [T]he bill is intended neither to prevent nor to encourage additional judi-

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to enforce judgments by U.S. courts.

184. 15 U.S.C. § 6(a) (1994). Section 6(a) provides, in relevant part, that

> [United States antitrust law] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless:
> such conduct has a direct, substantial and reasonably foreseeable effect
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States;
> (2) such effect gives rise to a claim under the provisions or this Act other than this section.
> If [the Sherman Act] appl[ies] to such conduct only because of . . . paragraph (1)(B), then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.

185. 15 U.S.C.S. §§ 6201-12 (Supp. 1995).

186. *See* Chung, *supra* note 7, at 403-08.

187. 15 U.S.C. § 6(a).

188. *See* Legislative History, *supra* note 70, at 2 ("Some observers raised questions about the status of import transactions under H.R. 2326 and urged the Subcommittee to make clear that the legislation had no effect on the application of antitrust laws to imports. . . . To remove any possible doubt, the Subcommittee amendment (H.R. 5235, as introduced) modified the legislation to make clear that it applied only to 'export' trade. . . . It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not.").

189. Robert C. Reuland, *Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT'L L.J. 159, 160, 199 (1994).

cial recognition of the special international characteristics of transactions. If a court determines that the requirements for the subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction.[190]

Thus, the Act provides no clarification of when to invoke jurisdiction for antitrust violations by an importer, leaving the current judicial tests in full effect.[191]

As a response to foreign states blocking discovery requests, Congress in 1994 enacted the IAEAA to facilitate discovery of evidence in antitrust actions internationally.[192] The statute authorizes the Department of Justice and the Federal Trade Commission to provide evidence of antitrust violations to foreign states on a reciprocal basis.[193] Under the Act, the Attorney General and the Federal Trade Commission can join the United States with foreign nations in binding, bilateral agreements to provide for the exchange of discovery in antitrust actions. Prior to congressional action, the concept of bilateral discovery agreements had been tested with Canada, Australia, and Germany.[194] The United States had already entered into a discovery exchange agreement with Canada,[195] gaining access to discovery materials, and resulting in the successful prosecution of a Japanese company for antitrust violations.[196]

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190. Legislative History, *supra* note 70, at 10 (citations omitted).

191. Gupta, *supra* note 18, at 2297.

192. 15 U.S.C.S. §§ 6201-12. *See* 140 Cong. Rec. S15021 (1994) (statement of Senator Thurmond) ("It is appropriate and necessary for our antitrust authorities to be given better tools for obtaining evidence abroad, because antitrust violations increasingly involve transactions and evidence which are located abroad or in more than one country."); House Comm. on the Judiciary, Legislative History of the International Antitrust Enforcement Assistance Act H.R. Rep. No. 772, 103rd Cong., 2d Sess. 7 (1994) (stating that purpose of IAEAA was to enhance antitrust enforcement). The House Report quoted testimony of former Assistant Attorney James F. Rill: "In some circumstances where we had every reason to believe that a violation might be occurring that was restricting U.S. exports . . . we were not able to take effective action because the evidence was extremely difficult, if not impossible, very time consuming to obtain." *Id.* at 12.

193. International Antitrust Enforcement Assistance Act of July 19, 1994, Pub. L. No. 103-438, 108 Stat. 4597 (1994).

194. *See* Memorandum of Understanding Between the Government of the United States of America and Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, *reprinted in* 46 ANTITRUST & TRADE REG. REP. (BNA) No. 1156, at 560 (Mar. 15, 1984) (cooperative antitrust agreement); Canada-United States: Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, 24 I.L.M. 1092 (agreement for the exchange of antitrust discovery). *See also* Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation of Antitrust Matters, *reprinted in* 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1071, at 36 (July 1, 1982) (cooperative antitrust agreement).

195. *Id.*

196. *See Tokyo Fax Paper Firms Settle Division Price Fixing Charges*, 69 ANTITRUST & TRADE REG. REP. (BNA) No. 1732 at 399 (Oct. 5, 1995) (noting that, in United States v. Kanzaki Specialty Papers, Inc., cooperation between United States and Canada led to

Though the IAEAA contributes to discovery in pursuit of prosecuting antitrust conduct on an international scale, it may also add to the confusion of extraterritorial jurisdiction determination. Under section 6203, a federal district court can issue an order for discovery on request of the Attorney General.[197] The Attorney General would make the request for a foreign state seeking to gain discovery from sources within the United States.[198] In so doing, the bilateral agreement would allow the Attorney General to make the same request of a foreign state.[199] This ability to request discovery materials from foreign states without a court order is a change from the prior requirement that discovery production orders should be issued only by a court of competent jurisdiction after the enforcement authority files a complaint and after the court has made a threshold jurisdictional inquiry.[200] Under the IAEAA, discovery production orders may issue simply by an antitrust enforcement authority applying to a district court under the terms of a bilateral agreement. This change clouds the jurisdictional question further by making it unclear as to whether the enforcement authority or the court is making the determination.[201]

Under both the FTAIA and the IAEAA, jurisdictional confusion in the courts continues. In fact, several aspects of each Act obscure the landscape of antitrust extraterritorial jurisdiction even further. In the absence of clear direction from the Supreme Court, a more focused and extensive legislative scheme addressing jurisdictional issues may be required.

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breakup of fax paper cartel).

197. 15 U.S.C.S. § 6203. Section 6203 provides the following in relevant part:

> JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES.
> (a) Authority of the District Courts. On the application of the Attorney General made in accordance with an antitrust mutual assistance agreement in effect under this Act, the United States district court for the district in which a person resides, is found, or transacts business may order such person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist a foreign antitrust authority with respect to which such agreement is in effect under this Act
> (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or
> (2) in enforcing any of such foreign antitrust laws.

198. *Id.*

199. H.R. Rep. No. 772, 103rd Cong., 2d Sess. 7 (1994) ("These specifications are designed primarily to require that the arrangement be reciprocal . . . that the foreign antitrust authority provide similar antitrust investigatory assistance in return. . . .").

200. *Cf.* Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka and Yokota*, 46 RUTGERS L. REV. 821, 861-62 (1994) (sufficient factual showing of all-encompassing conspiracy among contractors, suppliers, and subcontractors along vertical chain must hurdle difficult threshold jurisdictional test).

201. *See* Chung, *supra* note 7, at 406.

IV. EVOLUTION OF EXECUTIVE BRANCH ANTITRUST POLICY

In 1977, the Department of Justice (DOJ) released the Antitrust Guide to International Operations.[202] The DOJ published the Guide with the intent of providing domestic companies with international operations some framework for determining what conduct abroad might be prosecuted under the Sherman Act.[203] In this initial incarnation of the guidelines, the DOJ presented their enforcement policies through a series of hypothetical business situations, illustrating for domestic business executives with international operations when and how the DOJ would apply antitrust law.[204] Though the 1977 Guidelines contained little explicit discussion of policy,[205] both the discussion and the hypothetical cases explained an enforcement policy founded on existing case law.[206] The policy was straight-forward: The DOJ would seek to prosecute anticompetitive conduct abroad that was affecting United States commerce, whether the effects be suffered by exporters, importers, or consumers.[207]

The Antitrust Enforcement Guide to International Operations (1988)[208] provided much more discussion of DOJ policy than its 1977 predecessor. As in the 1977 Guidelines, the 1988 Guidelines used hypothetical scenarios to exemplify guideline application. However, the Guidelines went further by stating explicit DOJ theories that would reduce antitrust enforcement abroad.[209] The 1988 Guidelines marked a DOJ retreat from existing case law on extraterritorial jurisdiction and proposed that jurisdiction be exercised only when foreign anticompetitive conduct affected American consumers.[210] In contrast to the 1977 Guidelines, the DOJ clearly indicated a refusal to acknowledge that the Sherman Act offered any substantial protection for domestic exporters.[211] The Guidelines seemed to acknowledge the trend toward

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202. 1977 GUIDELINES, *supra* note 67.

203. *See* Brockbank, *supra* note 5, at 20.

204. *Id.*

205. Donald I. Baker & Bennett Rushkoff, *The 1988 Justice Department International Guidelines: Searching for Legal Standards and Reassurance*, 23 CORNELL INT'L L.J. 405, 406 (1990) (noting that the 1977 GUIDELINES contained only eight and a half pages of discussion followed by fourteen case hypotheticals with explanations).

206. *Id.* at 412.

207. *Id.* at 412, 413, 427; 1977 GUIDELINES, *supra* note 67, at 4-5.

208. ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, *reprinted in* 55 ANTITRUST & TRADE REG. REP. (BNA) No. 1391 (Nov. 17, 1988) (Special Supp.) [hereinafter 1988 GUIDELINES].

209. Baker & Rushkoff, *supra* note 205, at 410 (105 pages of theory preceding eighteen hypothetical cases, each with a more lengthy discussion than in the 1977 GUIDELINES).

210. *Id.* at 406 (comparing the 1977 GUIDELINES with the 1988 GUIDELINES); 1988 GUIDELINES, *supra* note 207, at § 4.1, n.159.

211. *Id.* at 415. *See also* Brockbank, *supra* note 5, at 24 ("1988 Guidelines emphasized that American exporters were not of primary concern in application of antitrust laws").

reasonable comity analysis.[212] However, in keeping with the FTAIA, the 1988 Guidelines also seemed to require a preliminary effects test, set forth in what later became a significant footnote:

> Although the FTAIA extends jurisdiction under the Sherman Act to conduct that has a direct, substantial and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned *only* with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.[213]

This footnote resulted in a more limited "effects" inquiry that worked to limit the DOJ's extraterritorial application of antitrust laws to only those situations where an effect on American consumers was threatened.[214] The DOJ's departure from case law made the 1988 Guidelines more theoretical than practical, more a statement of what the law should have been rather then what is was.[215]

The DOJ ended its self-imposed limitation on antitrust enforcement internationally in 1992, rescinding footnote 159 in the wake of *Hartford Fire*.[216] In rescinding the footnote, the DOJ declared that it would take "action against conduct occurring overseas that restrains United States exports, whether or not there is a direct harm to U.S. consumers. . . ."[217] This rescission during the Bush Administration was apparently approved of by the Clinton Administration, as the latest version of the DOJ's Guidelines continued the shift from consumer protection to domestic exporter protection.

In 1995, the DOJ once again issued guidelines that exhibited a change in enforcement emphasis.[218] Relying in large part on *Hartford Fire*,[219] the

212. The 1988 GUIDELINES, *supra* note 208, at § 5 explained that

> [i]n performing a comity analysis, the Department first asks what laws or policies of the arguably interested foreign jurisdictions are implicated by the conduct in question. In many cases, there will be no actual conflict between the antitrust enforcement interests of the United States and the laws or policies of the foreign sovereign. For example, the anticompetitive conduct in question may also be prohibited under the laws of the foreign sovereign. If that is true, then there should be no conflict with the laws of the foreign sovereign resulting from application of the U.S. antitrust laws. The same is true when the anticompetitive conduct is neither encouraged nor prohibited under the national laws or policies of a foreign sovereign.

213. 1988 GUIDELINES, *supra* note 208, at § 4.1, n.159 (emphasis added).

214. Shank, *supra* note 26, at 165.

215. *See* Baker & Rushkoff, *supra* note 205, at 406, 414, 415.

216. *Id.*

217. *DOJ Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports*, *reprinted in* 62 ANTITRUST & TRADE REG. REP. (BNA) No. 1560, at 483 (Apr. 9, 1992).

218. UNITED STATES DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, *reprinted in* 68 ANTITRUST & TRADE REG. REP. (BNA) No. 1707 (Special Supp.) (Apr. 6, 1995) [hereinafter

DOJ adopted a more aggressive, pro-enforcement stance regarding international antitrust violations.[220] Though similar to both the 1977 and 1988 Guidelines in generalized format,[221] the emphasis of the 1995 Guidelines was different in that it included jurisdiction to enforce the Sherman Act internationally.[222] On releasing the Guidelines, Diane P. Wood, Antitrust Division Deputy Assistant Attorney General, stated that three fundamental principles emerged from the 1995 Guidelines. First, government agencies would enforce antitrust laws to the "fullest extent."[223] Second, enforcement would not discriminate on nationality grounds or location of the conduct.[224] And third, principles of international comity would be observed.[225] However, the third principle proved to be absent from practical application of the Guidelines in all but a *Hartford Fire* "true conflict" sense.

In addressing the DOJ's position regarding international comity, the 1995 Guidelines detailed eight factors that would be considered when determining whether to prosecute foreign anticompetitive conduct.[226] But in claiming that these factors would be considered, the DOJ made no statement

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1995 GUIDELINES].

219. 509 U.S. 764 (1993).

220. *See* Brockbank, *supra* note 5, at 22 (quoting Antitrust Department official as stating that the 1995 GUIDELINES reflect a "pro-enforcement stance").

221. The 1995 GUIDELINES had a discussion section followed by hypothetical cases explaining how the DOJ would make its determinations about whether enforcement action was warranted. Like those issued previously, the general purpose of the 1995 GUIDELINES was to provide a framework that would inform the decisions of those domestic and foreign companies involved in international operations with possible effects in the United States. *See cf.* Brockbank, *supra* note 5, at 20 (same purpose as past guidelines); Carol Aciman, *Reengineering the International Corporation: Application of U.S. Antitrust Law to Non-U.S. Conduct Affecting Foreign Markets, Consumers or Producers*, 10-SPG INT'L L. PRACTICUM 5, 6 (1997) (urging practitioners to review 1995 Guidelines for indications of enforcement intentions).

222. 1995 GUIDELINES, *supra* note 218, at § 1; Brockbank, *supra* note 5, at 22.

223. Diane P. Wood, *The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction, Address Before the American Bar Association Antitrust Section* (Apr. 5, 1995), *available in* Westlaw, 1995 WL 150745 (D.O.J.).

224. *Id.* at *2.

225. *Id.* at *3.

226. 1995 GUIDELINES, *supra* note 218, at § 3.2. The DOJ stated it would consider

> the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.

Id.

about what weight the various factors carry toward determining if extraterritorial jurisdiction is appropriate.[227] Furthermore, after stating the various comity factors to be considered, the Guidelines then cite *Hartford Fire* for the proposition that no conflict exists for international comity consideration where an alleged violator can comply with the laws of both countries.[228] The 1995 Guidelines then state that evaluations of foreign antitrust laws and policies will be made; where United States enforcement measures are deemed by the DOJ to be better able to resolve the "competitive problem," however, the DOJ and FTC will pursue the enforcement.[229]

The result of the DOJ's expanded view of jurisdiction, as illustrated in the 1995 Guidelines, was to confuse the practical limits of the Sherman Act's reach even further. The Guidelines were met with significant criticism from the international trading community: DOJ enforcement actions might be limited only by how far American exports flowed in the international stream of commerce.[230] The DOJ asserted that, once agencies had determined that extending jurisdiction was proper, judicial review of comity considerations was unnecessary.[231] This statement in effect lobbied for two judicial standards: one of no judicial comity analysis for public action and *Hartford Fire* "true conflict" analysis[232] for private action.[233]

In addition, the evolution of DOJ enforcement policy from the 1977 Guidelines' effects on commerce, to the 1988 Guidelines' effects on consumers, to the expansive 1995 Guidelines' *Hartford Fire* conflict limitation has contributed to international mistrust of United States antitrust enforcement. This mistrust results in little incentive for the international community to refrain from enacting laws designed to defeat the exercise of Sherman Act enforcement.[234] Little incentive exists to join with the United States in sharing discovery and cooperating in enforcement activities as contemplated by

227. *See* Brockbank, *supra* note 5, at 28 (policy statement in 1995 GUIDELINES that international comity will be considered "rings hollow").

228. 1995 GUIDELINES, *supra* note 218, at § 3.2.

229. *Id.*

230. Aciman, *supra* note 221, at 6 (acknowledging criticism that domestic policy is being used to assert jurisdiction anywhere U.S. goods and services flow outside the U.S.).

231. 1995 GUIDELINES, *supra* note 218, at § 3.2, states the following:

> In cases where the United States decides to prosecute an antitrust action, such a decision represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The Department does not believe that it is the role of the courts to "second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances."

Id. (quoting United States v. Baker Hughes, Inc., 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990)).

232. *See supra* note 14.

233. *See* Dam, *supra* note 6, at 319-22 (discussing the use of the jurisdictional rule of reason in private action versus public action).

234. *See* discussion of international legislative responses *infra* Part V.

the IAEAA[235] when official DOJ policy proposes dismissing conflict with foreign antitrust law deemed ineffective.[236]

V. INTERNATIONAL MISTRUST OF UNITED STATES ANTITRUST POLICY

The history of court opinions, enforcement policies, and antitrust statutes clarifies the reason behind international mistrust of United States antitrust enforcement: inconsistency.[237] One significant result of this confusion is the suspicion of United States antitrust actions by the international community.[238] Foreign states take various measures specifically to defeat the effect of United States enforcement, allowing those foreign governments to give their resident trading entities predictability in their United States commercial interactions.[239] Allowing avoidance of treble damage awards[240] via "claw-back" provisions[241] and discovery or judgment blocking[242] are just a few examples of how governments have hindered United States antitrust enforcement. At the root of these efforts is resentment of what is perceived as an invasion of sovereignty, namely the United States extending its law to

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235. 15 U.S.C.S. §§ 6201-12 (Supp. 1995).

236. The DOJ may be taking steps to change international perceptions. The Department formed the International Competition Policy Advisory Committee in November 1998 to advise the DOJ's Antitrust Division on international antitrust policy and competition-related matters. The committee is composed of experts from the academic, business, labor, legal, and economic communities. According to Assistant Attorney General Joel I. Klein, the division is seeking guidance and assistance on methods for dealing with the emerging global economy. The committee's first meeting occurred in February 1998, when it gathered information from Antitrust Division officials and opened discussions on future enforcement policy. *ICPAC Begins Deliberations on Formation of Coherent International Antitrust Policy*, 66 U.S.L.W. 2533 (Mar. 10, 1998).

237. *See* Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 788-89 (1984) (comparing contrary views on federal court jurisdiction in international antitrust actions).

238. Hawk, *supra* note 61, at 13-20 (international criticism of inconsistent federal antitrust law application creates uncertainty for U.S. businesses attempting to plan operations around federal antitrust regulation).

239. *See infra* Part V.

240. The United States is the only country allowing a treble damages remedy whereby a private plaintiff can recover three-fold damages from the defendant. *See* Griffin, *supra* note 45, at 302 ("Because it is viewed as penal by foreigners, the treble damage remedy is one of the principal irritants in international antitrust disputes.").

241. Atwood & Brewster, *supra* note 48, § 4.17 (discussing foreign laws that attempt to thwart efficacy of antitrust awards). Through "claw-back" provisions, foreign nations allow their domestic companies held liable in U.S. for treble damage awards to file an action in the foreign nation to recover the excess damages.

242. *See, e.g.*, Seung Wha Chang, *Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts Within the Pacific Community*, 16 HASTINGS INT'L & COMP. L. REV. 295, 298-303 (1993) (discussing blocking laws of Canada, Australia, Japan, and Korea); Cira, *supra* note 45, at 248-60 (discussing measures taken by foreign sovereigns to avoid U.S. antitrust enforcement).

adjudicate foreign commerce disputes affecting foreign interests.[243]

Another somewhat bizarre reason for the international community taking measures to block application of American antitrust laws is rooted in the recent efforts to clarify application of the laws. For example, *Hartford Fire's* true conflict test provides an incentive for a foreign nation to enact anticompetitive laws as a protective measure.[244] Because Justice Souter's opinion claimed that jurisdiction was proper absent a defendant's inability to comply with the laws of both sovereigns, foreign nations are encouraged to create a conflict as a protective measure.[245] Thus, the resolution of *Hartford Fire* and the official adoption of that approach in the 1995 Guidelines[246] has established a strange irony in Sherman Act enforcement: A statue designed to promote free market principles is enforced in a manner that encourages efforts to impede international commerce.[247]

This international community mistrust of United States antitrust enforcement efforts poses significant challenges, if not risks, at this particular juncture in history.[248] The global economy is here.[249] Economic unions are forming in every corner of the world. Asia, North America, Europe, and more have concluded or are negotiating treaties for international commerce.[250] It is essential to United States economic interests that the antitrust policy affecting international commerce at least be clear and predictable.[251] International competition agreements require stable antitrust policies to facilitate any discussion of cooperation and international consistency among trading partners.[252] In turn, this cooperation is necessary to have the promised benefit of a "global" economy and to realize the meaning of "trading partners" in actual practice rather than a mere label.[253]

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243. RESTATEMENT (THIRD) § 401(b).

244. *See* Dam, *supra* note 6, at 307-08 ("one perverse and no doubt unintended consequence").

245. *Id.*

246. *See* discussion *supra* Part IV.

247. Dam, *supra* note 6, at 308.

248. Richard O. Cunningham & Anthony J. LaRocca, *Harmonization of Competition Policies in a Regional Economic Integration*, 27 LAW & POL'Y INT'L BUS. 879 (1996).

249. Robert Reich, THE WORK OF NATIONS: PREPARING OURSELVES FOR THE 21ST CENTURY CAPITALISM, chs. 10, 25 (1991). *See also* 1 STAFF OF FEDERAL TRADE COMMISSION, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE, ch. 1A (1996), *reprinted as* 424 TRADE REG. REP. (CCH), Extra Edition 1-11 (June 11, 1996).

250. *See, e.g., General Agreement on Tariffs and Trade* (GATT); *North American Free Trade Agreement*, Dec. 17, 1992, Can.-Mex.-U.S. (NAFTA); *Treaty Establishing the European Economic Community* (EEC TREATY).

251. Hon. Christine A. Varney, Commissioner, U.S. Federal Trade Commission, The Federal Trade Commission and International Antitrust, Address Before Fordham Corporate Law Institute 23rd Annual Conference on International Antitrust Law & Policy (New York Oct. 17, 1996), *available in* Westlaw, 1996 WL 672397.

252. *Id.*

253. "[A]ntitrust issues are increasingly world issues." Fox, *supra* note 46, at 1; *see also* Himelfarb, *supra* note 112, at 953-54 (discussing benefits of converging antitrust con-

VI. TOWARD EXERCISING JURISDICTION CONSISTENTLY

The history of Sherman Act enforcement via the federal courts has proven to be a mixed bag.[254] Predictability of result depends greatly on which circuit hears the case.[255] Likewise, legislative efforts to clarify the jurisdictional problem have serious flaws that inject greater confusion into the picture.[256]

The current trend toward bilateral agreements between trading partners is a positive step, but this method of establishing agreement on antitrust enforcement does not come without inherent drawbacks.[257] First, the agreement is just between trading partners, thereby limiting the effect of its enforceability to only the parties. Second, these compacts must be individually negotiated, varying from agreement to agreement.[258] This individual negotiation will bear differences, possibly significant, between the various agreements, providing only a partial answer to the current problem of inconsistency in application of enforcement policy.[259] Furthermore, this inconsistency is exacerbated by the time required to negotiate individual agreements. The lengthy process would overlap elected administrations with a possible difference in views between administrations affecting the substance of agreements.[260] The result could be what is now a difference in enforcement emphasis becoming a difference in agreement emphasis. Lastly, the years of international mistrust of United States antitrust enforcement make even trading partners hesitant to enter into agreements encompassing anti-competition provisions.[261] Consequently, bilateral agreements present a short-term step toward clarifying the antitrust enforcement landscape, but fall short of being a long-term solution. These agreements also fail to establish the stable antitrust policy on the broader international scale that is necessary to foster American economic interests in the developing global economy.[262]

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cepts between EU and United States to facilitate trade).

254. *See* discussion of judicial tests for jurisdiction, *supra* Part II.

255. *Id.*

256. *See* discussion of legislative measures affecting jurisdiction exercise, *supra* Part III.

257. *See* Fox, *supra* note 46, at 13-14.

258. *See* Griffin, *supra* note 45, at 304-05.

259. *See* Chung, *supra* note 7, at 411.

260. *Cf.* Brockbank, *supra* note 5, at 34 (noting change in enforcement activity by then new Clinton Administration); Aciman, *supra* note 221, at 8-9 (advising multinational corporations on actions to take in light of Clinton Administration antitrust activism).

261. Canada entered an agreement with the United States in 1985 regarding cooperation on criminal antitrust matters; however, agreement on non-criminal matters was not reached until 1995. *See supra* note 194; *Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*, State Dept. No. 95-205 (Aug. 3, 1995), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,503.

262. *See supra* Part IV.

To capture the trust of the international trading community as the global economy expands, a change from isolated determinations of foreign anticompetitive act jurisdiction by the courts, the legislature and government agencies must be coordinated on a scale larger than individual bilateral agreements can affect.[263] A clear line of demarcation must separate the issues over which the United States will enforce the Sherman Act and those it will not.[264]

One possible resource for coordinating international antitrust policy is the World Trade Organization (WTO).[265] By working with the nations involved, the WTO may be able to produce a unified and consistent competition policy, thereby ensuring competitive markets and laying a foundation for predictability on when enforcement actions will be instituted.[266] Though originally lacking any ability to resolve conflicts in competitive policy,[267] the WTO has recently taken steps to determine whether the organization is a viable forum for normalizing international competition policy.[268] A possible format for this approach involves having WTO signatories adopt a basic policy of having no unreasonable restraints on trade.[269] The WTO would then act as arbitrator in disputes between member nations involving anticompetitive practices violating the basic agreement.[270] An initial hurdle for this approach would be ensuring that the antitrust laws of the member nations accounted for this proposed global trade principle.[271] This move toward WTO resolution of international competition issues holds promise as a prescriptive device.[272] Consistent multilateral global policy addressing anticom-

263. *Cf.* Fox, *supra* note 46, at 12 (suggesting "intertwining" trade and antitrust policy to strike a balance in addressing concern that broader policy would risk United States' competitive advantage); Chung, *supra* note 7, at 411 (promoting establishment of a specialized international agency to resolve international antitrust disputes).

264. *See* Chung, *supra* note 7, at 409.

265. *See* Fox, *supra* note 46, at 9.

266. *Id.* at 23-24. *But see* Shank, *supra* note 26, at 187 (arguing that a multilateral antitrust standard is unrealistic and unworkable due to conflicts of national interests between parties).

267. J.G. Castel, Q.C. & C.M. Gastle, *Deep Economic Integration Between Canada and the United States, the Emergence of Strategic Innovation Policy and the Need for Trade Law Reform*, 7 MINN. J. GLOBAL TRADE 1, 12 (1998).

268. *See* Edward Krauland et al., *International Legal Developments in Review: 1996, Business Regulation, International Trade*, 31 INT'L LAW. 433, 435 (1997) (WTO formed a working group in 1996 to investigate relationship between trade and competition policy); INTERNATIONAL ANTITRUST CODE WORKING GROUP, DRAFT INTERNATIONAL ANTITRUST CODE AS A GATT-MTO-PLURILATERAL TRADE AGREEMENT, July 10, 1993, *reprinted in* 65 ANTITRUST & TRADE REG. REP. (BNA) No. 1628, S-1 at 24 (Aug. 19, 1993) (providing draft of proposed international antitrust rules and recommending WTO as proper body to implement).

269. *See* Fox, *supra* note 46, at 23-24.

270. *Id.* at 24.

271. *Id.*

272. *Cf. id.* at 23-24 (describing current problems faced with differing standards of antitrust enforcement and their resolution through a baseline WTO standard); Gupta, *supra*

petitive activities would resolve the problems raised by diverse United States jurisdictional tests and should also remove foreign protectionist measures now shielding some anticompetitive practices.[273]

Unfortunately, the roadblocks to normalizing this method of global competition appear insurmountable. Any attempt to normalize competition policy on a global scale will encounter significant resistance. The United States, with proven competition laws, is suspicious of a global standard.[274] Other nations with substantial international trade but little historical competition policy, such as Japan and Great Britain, are equally suspicious of a WTO body making competition policy.[275] These countries, historically avoiding extensive competition law and perceiving themselves as victims of United States antitrust enforcement policy, are unlikely to agree to a global body imposing an international standard higher than their own.[276] Finally, new entrants into the international trading community, such as countries that were a part of the former Soviet Union, view the competition laws enacted to spur growth as a symbol of their newly acquired sovereignty.[277] Requiring these nations to sign on to an international competition policy would likely be compared symbolically to the lack of sovereign autonomy they experienced under the former Soviet system.[278] Consequently, the prospects of having competition policy regulated from a single global perspective appear remote in the near term.

But the rush to find new methods to deal with international trading competition conflicts may be premature. The United States judiciary has a long history of adjudicating antitrust disputes.[279] Prior to *Hartford Fire*,[280] federal courts were using tests that varied in one form or another, but essentially resulted in consistent outcomes.[281] In the short term, little justification exists for looking further than the judiciary for certainty in determining foreign antitrust jurisdiction that considers international comity.

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note 18, at 2317 (discussing the prescriptive nature of antitrust law).

273. With a baseline agreement on how and when antitrust action will be pursued, "claw-back" provisions and blocking laws may become unnecessary.

274. *See* Starek, *supra* note 46, at 17 (U.S. concerns on lowest common denominator approach); Fox, *supra* note 46, at 12 (U.S. reluctant to change in light of perceived comparative advantage); Christian Johnson et al., *Presentation: U.S. Antitrust Laws and the Global Market: National and Extraterritorial Enforcement*, 9 LOY. CONSUMER L. REP. 169, 177 (1997) (WTO unlikely to take action when countries involved cannot or will not on their own). *But see* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 379 (1997) (U.S. gives WTO first competition law dispute because of "turf" struggle within U.S. enforcement agencies).

275. *See* Waller, *supra* note 274, at 384.

276. *Id.*

277. *Id.* at 384-85.

278. *Id.*

279. The Sherman Act became law in 1890.

280. 509 U.S. 764 (1993).

281. *See supra* Part II for a discussion of tests used in foreign antitrust disputes and the results obtained.

As the Ninth Circuit demonstrated in *Timberlane I*,[282] the federal judiciary is more than capable of devising methods for considering international comity in international antitrust disputes.[283] The Supreme Court left the circuits to consider these factors until the 1993 *Hartford Fire* decision. Justice Souter's language in *Hartford Fire*[284] and the hesitation of the courts since that decision to extend jurisdiction without some type of comity analysis[285] lend support to the view that the jurisdictional rule of reason does have a role to play in international antitrust actions.[286]

To allow the judiciary an opportunity to establish greater credibility with the international community for their determinations of jurisdiction, the Supreme Court must establish a uniform analysis of international comity in antitrust disputes. The role of the United States in the economics of rapidly growing international trading is far too important to allow as many different tests as there are circuits. In the absence of a clear rule, the DOJ has gone so far as to suggest that the judiciary not review decisions to take enforcement actions against foreign conduct made by the Executive Branch.[287] This suggestion by the DOJ may have merit for public enforcement actions supported by the input of federal agencies involved in international relations;[288] however, a large number of competition disputes are brought in private actions without government participation.[289] In this context, a judiciary using the *Hartford Fire* true conflicts comity test could do the most harm to future trade relations.[290] Thus, some form of jurisdictional rule of reason followed by all federal courts is needed to foster consistent results in public and private enforcement actions. Such consistency would allow trading partners of

282. 549 F.2d 597 (9th Cir. 1976).

283. *See Timberlane I* comity factors, *supra* Part II.C; 549 F.2d 597, 614 (9th Cir. 1976). *See also* Johnson et al., *supra* note 274, at 184 (discussing ability of the judiciary to adjudicate antitrust disputes).

284. 509 U.S. at 798 ("[I]nternational comity would not counsel against exercising jurisdiction in the circumstances alleged here.").

285. *See* discussion *supra* Part II.D.

286. *See* Dam, *supra* note 6, at 319 ("[O]ne may conclude that the jurisdictional rule of reason has more certainty and workability than sometimes argued.").

287. 1995 GUIDELINES, *supra* note 218, at § 3.2 ("The Department does not believe that it is the role of the courts to 'second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.'") (internal citations omitted).

288. *See* Dam, *supra* note 6, at 319-20. *But see* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument For Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998). Prof. Dodge contends that the judiciary is better suited to invoke a unilateral approach, like that of the *Hartford Fire* intended effects test, when making jurisdictional inquiries. *Id.* at 161. He argues that unilateral jurisdictional decisions can better compensate for legislatures sustaining competitive trade advantages by underregulating domestic companies engaged in export trade. *Id.* at 156-58. Dodge suggests judicial unilateralism, or rather the desire to avoid it, will encourage the international community to negotiate agreement on competition policy more quickly than approaches that consider international comity. *Id.* at 167.

289. *Id.* at 324-28.

290. *Id.*

the United States to predict how and when American antitrust law will be applied.[291]

CONCLUSION

In the midst of a rapidly expanding global marketplace with regional trading blocks vying for a competitive position, the long-developing United States international antitrust policy has yet to make predictable when jurisdiction will be extended extraterritorially. As the international community moves toward free trade agreement, domestic corporations are hindered by the consequences of that disarray, which include "claw-back" provisions, judgment blocking, discovery blocking, diplomatic protests, and foreign nations' hesitation to enter antitrust enforcement agreements.

As the industrialized nations and emerging countries align with a vision of the one-world global economy and the promise it holds, they must commit to establishing international agreement in their antitrust policies.[292] The United States should be a participant in this vision, if not a leader. To become a leader, the judiciary and non-judicial policymakers, legislative or executive, must establish clear extraterritorial jurisdiction guidelines that are (1) predictable and consistent, (2) in harmony with the sovereignty concerns of the international community, (3) protective of American consumers, and (4) protective of American business engaged in international competition.

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291. *Id.*

292. Cunningham & LaRocca, *supra* note 248, at 901 ("Nations committed to trade liberalization will not allow inconsistent or discriminatory application of competition laws to nullify the benefits gained from dismantling formal trade barriers.").

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