

DIAMONDS ARE FOREVER? IMPLICATIONS OF UNITED STATES ANTITRUST STATUTES ON INTERNATIONAL TRADE AND THE DE BEERS DIAMOND CARTEL

Diamonds are forever—or at least they should be, given the over-inflated prices Americans pay for them. Many Americans hold diamonds in high esteem, cherishing them as symbols of love and affection. Perhaps this explains why Americans are willing to pay far more for diamonds than they should. On the other hand, perhaps the real reason is the diamond cartel and the inability of the United States Government to apply the antitrust laws for the protection of the American public as they were originally intended.

Americans typically end up purchasing a diamond that they mistakenly believe has high extrinsic value, and for other reasons that cannot be rationally explained. The American people sought to prevent these types of situations from occurring almost a hundred years ago when they enacted the first antitrust statute.¹ Now, the average lay person may not even know the legal definition of “antitrust,” which very likely only elicits the notion that the government “protects” consumers by restricting monopolies.² No doubt people would be surprised to discover that they are paying inflated prices because the United States Government has been unable to enforce the spirit of the antitrust laws against the large, powerful international diamond cartel. Indeed, the business of importing and selling diamonds in the United States is but one example of the failure of United States antitrust laws against international cartels.

The United States will become more dependant on international trade for its economic growth and survival as the global economy becomes more pervasive.³ That trade must be fair, not only to foreign countries, but also to the United States. By studying and understanding the lack of control United States antitrust statutes have on the diamond industry, the United States will be in a better position to solve not only the diamond problem, but also the problem of other monopolistic industries.

1. See W.W. THORNTON, A TREATISE ON COMBINATIONS IN RESTRAINT OF TRADE § 7, at 10 (2d ed. 1928).

2. A *monopoly* is “[a] privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity.” BLACK’S LAW DICTIONARY 1007 (6th ed. 1990). Two or more monopolistic producers acting in concert comprise a *cartel*, i.e. “[a] combination of producers of any product joined together to control its production, sale, and price, so as to obtain a monopoly and restrict competition in any particular industry or commodity.” *Id.* at 215 (6th ed. 1990).

3. See, e.g., Michael E. Porter, *Changing Patterns of International Competition*, 28 CAL. MGMT. REV. 9 (Winter 1986).

Part I of this Comment discusses the origins of antitrust laws, the introduction of those laws in the United States, and the international application of antitrust laws by the United States. Part II explores the organization and nature of the diamond cartel in order to formulate goals for this area of law. Part III presents past and current applications of American antitrust statutes on the diamond cartel. Finally, Part IV discusses solutions and impediments to the diamond monopoly problem.

I. THE ANTITRUST LAWS⁴

Antitrust laws have existed for at least a thousand years, dating as far back as the year 483.⁵ One famous case that questioned the legality of monopolies arose in 1602 in what Lord Coke reported as “The Case of the Monopolies,” the case of *Darcy v. Allen* decided by the King’s Bench of Great Britain.⁶ The case discussed several early theories as to why monopolies and cartels should be eliminated: they harm competitors, deprive others of the ability to practice a trade, and injure the public by advancing higher prices and poorer quality.⁷

A. Antitrust Laws in the United States

Theories similar to those expressed in *Darcy v. Allen* began to develop in the United States in the second half of the 19th century because of rising concern over abusive practices by corporate giants.⁸ The American law on antitrust and restraint of trade soon followed from English common law.⁹

4. The efficacy and wisdom of the antitrust laws has long been questioned. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). This Comment does not directly enter that debate. Since the antitrust laws currently exist, the focus is on how those laws can and should be applied against sophisticated foreign companies who deal in the United States market.

5. THORNTON, *supra* note 1, § 20, at 32 (“In A.D. 483 Emperor Zeno issued to the Praetorian Prefect of Constantinople the following edict: ‘We command that no one may presume to exercise a monopoly . . .’”).

6. *Id.* § 23, at 36 (identifying *Darcy v. Allen*, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B.1602)).

7. *Id.* at 37.

8. 21 CONG. REC. 2462 (“Can it be that with this vast power Congress can not protect the people from combinations in restraint of trade that are unlawful by every code of civil law adopted by civilized nations?”) (statement of Sen. Sherman). See also WILLIAM R. ANDERSEN & C. PAUL ROGERS III, *ANTITRUST LAW: POLICY AND PRACTICE* § 1.02, at 8 (1985) (“The statute’s popular name, ‘The Antitrust Law,’ signifies the congressional purpose to declare unlawful the large and powerful business organizations which wielded essentially unchecked economic power . . .” (quoting E. KINTNER, *FEDERAL ANTITRUST LAW*, 125-29, 240-42 (1980))).

9. THORNTON, *supra* note 1, § 34, at 77.

Realizing the need to enact and enforce antitrust laws in the United States,¹⁰ the United States Government responded to public concern in 1890 by enacting the Sherman Antitrust Act,¹¹ which prohibited the existence of monopolies and cartels within the United States. Additional antitrust statutes have since been enacted to augment perceived gaps in the Sherman Act, and to regulate anti-competitive economic activity within the country.¹² The Department of Justice summarized the purpose of the various United States antitrust laws as follows:

The U.S. antitrust laws are the foundation of our broad national commitment to competition based on efficiency—to providing consumers with goods at the lowest price that efficient business operation can justify, and to allowing enterprises to compete on the basis of their own merit.¹³

A private party can bring an antitrust claim to recover treble damages if it is “injured” in its business or property.¹⁴ The United States Government can also enforce the antitrust laws in criminal and civil proceedings through the Department of Justice (DOJ) and the Federal Trade Commission (FTC).¹⁵ With respect to international trade, the United States International Trade Commission is also empowered to act specifically when imports threaten to violate the Sherman Act.¹⁶

10. 21 CONG. REC. 2457 (1890) (“It is to arm the federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property and trade of the people of the United States.”) (statement of Sen. Sherman).

11. Enacted July 2, 1890. THORNTON, *supra* note 1, § 78, at 1. Currently 15 U.S.C.A. §§ 1-2 (1993).

12. *E.g.*, the Clayton Act of 1914 (prohibited acquisitions of companies that would lessen trade), the Federal Trade Commission Act of 1914 (directed FTC to oversee competitive behavior), the Robinson-Patman Act of 1936 (outlawed price discrimination), and the Celler-Kefauver Act of 1950 (prohibited acquisitions of company assets that would lessen trade).

13. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 2 (1977).

14. ANDERSEN & ROGERS, *supra* note 8, § 2.01, at 47.

15. *Id.* The importance of antitrust laws to the United States can be seen in the organizational structure of the agencies. The DOJ is composed of several major divisions, one of which is the Antitrust Division, whose first assigned task is, “[g]eneral enforcement, by criminal and civil proceedings, of the Federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization.” 28 C.F.R. § 0.40 (1993). Similarly, one of the major divisions of the FTC is the Bureau of Competition, which is “responsible for enforcing Federal antitrust and trade regulation law under section 5 of the Federal Trade Commission Act, the Clayton Act, and a number of other special statutes which the Commission is charged with enforcing.” 16 C.F.R. § 0.16 (1993).

16. 19 U.S.C. § 1337 (Supp. 1993). Section (a)(1) allows the Commission to act when unfair methods of competition and unfair acts in the importation of articles into the United States threaten to “restrain or monopolize trade and commerce in the United States.” 19 U.S.C. § 1337(a)(1)(A)(iii) (Supp. 1993).

B. *International Application of United States Antitrust Laws*

Founded on the Interstate Commerce Clause of the United States Constitution,¹⁷ the Sherman Act was enacted in 1890 to eliminate monopolies and their detrimental effects *in the United States*.¹⁸ However, not all goods sold in the United States were manufactured within its borders; therefore, the question remained as to whether the laws should be applied to foreign companies operating outside of the United States that exported goods *into* the country.¹⁹

The Sherman Act contains language that sheds some light on that question. Section 1 provides that: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, *or with foreign nations*, is hereby declared to be illegal. . . ." ²⁰ Section 2 further provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, *or with foreign nations*, shall be deemed guilty of a felony. . . ." ²¹ Therefore, by its own terms, the Sherman Antitrust Act also applies to trade with foreign nations. This appears to be the Congressional intent as expressed by Senator Sherman when he argued for the enactment of the Sherman Act: "Unlawful combinations, unlawful at common law, now extend to all the States and interfere with our foreign and domestic commerce *and with the importation and sale of goods*" subject to duty under the laws of the United States.²² This would suggest that the Act condemns anticompetitive behavior by foreign companies dealing in American markets.

Thus, the threshold question becomes whether principles of international law support the application of such a broad statute internationally. To answer that question, a study of the evolution of the power of a sovereign state to enforce its laws is helpful.

17. THORNTON, *supra* note 1, § 63, at 172; § 78, at 196 (Sherman Act founded on U.S. Const. art. I, § 8, cl. 3).

18. See THORNTON, *supra* note 1, § 7, at 9-10 (quoting 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman)).

19. ANDERSEN & ROGERS, *supra* note 8, § 8.01, at 897. Senator Sherman, however, clearly saw the Act as being applicable to any foreign company who dared conspire in the trade of goods in the United States: "It is true that if a crime is committed outside of the United States it can not be punished in the United States. But if an unlawful combination is made outside of the United States and in pursuance of it property is brought within the United States such property is subject to our laws." 21 CONG. REC. 2461 (1890). He stated further, "I do not see what harm a foreigner can do us if neither his person nor his property is here. He may combine or conspire to his heart's content if none of his co-conspirators are here or his property is not here." *Id.*

20. 15 U.S.C. § 1 (1890) (emphasis added).

21. *Id.*

22. 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman).

There are three fundamental principles of jurisdiction in international law.²³ Under the “territorial principle,” a sovereign nation has virtually complete power to regulate what transpires within its own borders.²⁴ The “nationality principle” maintains that a sovereign country may prosecute its own citizens for national crimes committed anywhere in the world.²⁵ Finally, the “protective principle” dictates that a sovereign nation may, within in its own jurisdiction, prosecute a *foreign* citizen for acts that have taken place abroad in contravention of the sovereign’s laws and to the detriment of the sovereign’s citizens.²⁶ Those recognized principles of international law suggest that a country is free to enact antitrust laws and assume jurisdiction to enforce those laws *within its own borders* against: (a) all persons committing contravening acts within the borders of that country, (b) its own citizens committing contravening acts within other countries, and (c) foreign nationals committing contravening acts in a foreign country against the interests of the sovereign.

The United States Government has not always recognized its power to enforce antitrust laws internationally, most notably under the protective principal.²⁷ International trade was a mere novelty in 1890; there was little thought of regulating antitrust violations on an international scale.²⁸ As Justice Holmes stated in *American Banana Company. v. United Fruit Company*:²⁹ “[T]he 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.”³⁰ Justice Holmes opinion also illustrated that the United States was not prepared to exercise the nationality principle to prosecute United States citizens for violations of American antitrust laws abroad: “[T]he acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states.

23. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 and 403 (1987).

24. See *id.* § 402(1) (1987). See also MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 105 (1987).

25. See *id.* § 402(2) (1987). See also AKEHURST, *supra* note 24, at 105; *United States v. Curtiss-Wright*, 299 U.S. 304, 318 (1936) (upholding a Presidential ban on shipments of arms to Bolivia by United States companies).

26. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(1)(c) and 402(3) (1987). See also *The Lotus Case (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (upheld jurisdiction of Turkey to try a French sailor for an accident on the high seas in which Turkish citizens were killed in violation of *Turkish law*).

27. See generally Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need For Reassessment*, 51 FORDHAM L. REV. 201 (1982).

28. *Id.*

29. 213 U.S. 347 (1909) (Sherman Act not applicable to acts of a United States company that instigated Costa Rican government to assist in the restraint of trade).

30. *Id.* at 356 (citing his opinion in *Slater v. Mexican National Railroad Co.*, 194 U.S. 120, 126 (1904)).

It is surprising to hear it argued that they were governed by the act of Congress.”³¹

The language of *American Banana* stating that the lawfulness of an act must be determined by the law of the country where the act was *done* clearly would bar application of American antitrust laws to companies operating in foreign nations. The theory was that no antitrust violation occurred if the noncompetitive activity transpired in a foreign country—even if the ultimate destination of the goods controlled by the monopoly is the United States.

In 1945, Learned Hand viewed the international implications of the antitrust laws in a different light. In *United States v. Aluminum Co. of America (ALCOA)*, he noted that: “[A]ny 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.”³² He then went on to formulate the classic “effects” antitrust test: “Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.”³³

By 1952, the Supreme Court retreated from its *American Banana* position in *Steele v. Bulova Watch Co.*³⁴ While not explicitly overruling *American Banana*, the Court did “explain” that “the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States.”³⁵ In 1962 the Court further stated in *Continental Ore Co. v. Union Carbide and Carbon Corp.*³⁶ that “A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.”³⁷

Since Learned Hand first formulated the territorial effects test, United States courts have recognized the test as the basis of extraterritorial jurisdiction of the United States in antitrust matters. For example, in the landmark 1976 case, *Timberlane Lumber Co. v. Bank of America*, the Ninth Circuit noted that: “[T]here 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 com-

31. *Id.* at 355.

32. 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.).

33. *Id.* at 444.

34. 344 U.S. 280 (1952) (district court had jurisdiction to entertain suit to enjoin United States company from using plaintiff's trademark on watches assembled in Mexico).

35. *Id.* at 288 (citing *ALCOA* with approval).

36. 370 U.S. 690 (1962) (plaintiff allowed to maintain suit against defendants for alleged monopolistic elimination of suppliers).

37. *Id.* at 704-05 (again citing *ALCOA* with approval).

merce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”³⁸ There is now wide recognition of this principle, as stated in the *Restatement (Third) of the Foreign Relations Law of the United States*:

Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominately outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principle purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.³⁹

The U.S. Supreme Court now believes that United States antitrust laws unquestionably apply to foreign activity. As Justice Souter explained in his 1993 decision in *Hartford Fire Insurance Company v. California*:⁴⁰ “Although the proposition was perhaps not always free from doubt, . . . it 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.”⁴¹ The application of the United States antitrust statutes to foreign companies that export goods into the United States has come full circle since the Congressional debates on the Sherman Act. United States courts now recognize that the Sherman Act extends to any monopolistic act conducted in a foreign country that affects the domestic trade of the United States.⁴²

That is not to say, however, that United States antitrust laws are vigorously enforced against all international industries. For instance, one case of international monopolistic behavior remains in the diamond industry.⁴³ That industry is essentially dominated by one group, the De

38. 549 F.2d 597, 613 (9th Cir. 1976).

39. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 415(2) (1987). Some countries, however, protest the assertion of U.S. extraterritorial jurisdiction. See, e.g. WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, § 2.16 at 111 (1991); GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 445-47 (1989).

40. 113 S. Ct. 2891 (1993) (district court should not have refused to exercise Sherman Act jurisdiction over foreign reinsurers under principles of international comity).

41. *Id.* at 2909. See also *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) (United States companies failed to establish that Japanese manufacturers entered into an illegal conspiracy which caused cognizable injury to United States firms); *ALCOA*, 148 F.2d at 444 (United States firm guilty of antitrust violations as evidenced by its monopolistic position in aluminum production market).

42. *Continental Ore*, 370 U.S. at 704. See also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 (1987).

43. DAVID E. KOSKOFF, *THE DIAMOND WORLD* 6, 325 (1981). This Comment relies heavily on four major works dealing with De Beers and the diamond cartel: KOSKOFF, *supra*; EDWARD J. EPSTEIN, *THE RISE & FALL OF DIAMONDS* (1982); MURRAY SCHUMACH, *THE DIAMOND PEOPLE* (1981); and STEFAN KANFER, *THE LAST EMPIRE: DE BEERS, DIAMONDS, AND THE WORLD* (1993). At the time the books were published, Kanfer was an editor and critic for Time magazine and several journals, Schumach was a recently retired reporter after

Beers diamond cartel, which controls the supply of most diamonds mined and sold in the world.⁴⁴ If the diamond cartel is indeed monopolizing the trade of diamonds in the United States, the antitrust laws can and should be enforced against them—just as they would against any national industry.

II. GOALS IN APPLYING UNITED STATES ANTITRUST LAWS TO THE DIAMOND CARTEL

In order to formulate the goals to be achieved through the application of United States antitrust laws to the diamond cartel, it is essential to define the nature of the diamond industry. The wide reach and influence of monopolization in the industry must be examined. The organization that controls the cartel, De Beers, must also be examined in order to fully understand the significance of its role within the industry.

A. *The Monopolization of the Diamond Industry*

People are generally familiar with two of the most precious commodities in the world today, gold and diamonds. Purchasers of diamond rings would likely be surprised to learn the cost of the diamond compared to that of the gold frame. Contrasting pure gold to “D-Flawless” diamonds—the finest and rarest of the various grades of diamonds—illustrates an intriguing disparity.⁴⁵ As of January 7, 1994, D-Flawless round diamonds were trading wholesale at an average of \$15,500 for a one-carat stone.⁴⁶ One troy ounce of one-carat D-Flawless diamonds would thus cost \$2,418,000.⁴⁷ In comparison, one troy ounce of pure gold was trading for \$389 at the same time!⁴⁸ What can account for such a wide difference in prices?⁴⁹

forty years with the New York Times, Epstein was a professor of political science who wrote widely on international politics and business, and Koskoff was a practicing attorney.

44. KOSKOFF, *supra* note 43, at 6; EPSTEIN, *supra* note 43, at 157.

45. KOSKOFF, *supra* note 43, at 2-3. Diamonds are graded by two sets of letters. The first letter refers to the *color* of the diamond: D (the best—colorless) through Z (the worst—light yellow). The second set of letters refers to the *clarity* of the diamond: IF (Internally Flawless), VVS1 (Very Very Small Inclusions 1), VVS2, VS1 (Very Small Inclusions 1), VS2, SI1 (Small Inclusions 1), SI2, SI3, I1 (Imperfect 1), I2, I3. The “D-Flawless diamond” would therefore be categorized as either D-IF. Note: The purchase price of a diamond is also influenced by its *carat-weight* (weight of the diamond measured in carats), how it is *cut* (which influences how the diamond handles light), and its *shape* (e.g., brilliant or round, marquise, pear, heart, oval, emerald, and baguette).

46. RAPAPORT DIAMOND REPORT, Jan. 7, 1994, at 24. Note that the price reflects an opinion of New York asking prices. *Id.* at 23. Also, the listed prices *varied* depending on the ultimate size of the stone purchased, i.e. a .01-carat D-IF stone was trading at \$910 per carat, a .50-carat for \$8000 per carat, a 1-carat for \$15,500 per carat, and a 5-carat for \$55,000 per carat. *Id.* at 23-24. The prices listed are for round diamonds; “fancy” shape stones are priced even higher. *Id.* at 25-26. Finally, the prices do not reflect dealer mark-up, which can range from 50% on a high-priced item to 140% for a low-priced item. *Id.* at 5.

47. There are 156 one-carat diamonds in one troy ounce. KOSKOFF, *supra* note 43, at 3. \$15,500 x 156 = \$2.4M.

48. WALL ST. J., Jan. 7, 1994, at C1.

The answer to that question lies in the monopolization of the diamond industry by one company, De Beers Consolidated Mines, Ltd.⁵⁰ According to one commentator, diamonds are a “multibillion dollar business revolving around an attractive pebble that has an intrinsic [actual] value of from \$2 to \$30 a carat. It’s higher value in the marketplace is principally an artificial one, attributable mostly to the strong hand of De Beers that keeps up the price.”⁵¹ The result: “Today De Beers is very likely the most cash-rich business entity in the world.”⁵² As a company, De Beers is considered as powerful as some nations:

De Beers feeds out the goods at such rate as it determines, at whatever price it dictates, to whichever of the thousands of diamond-cutting enterprises it favors. It decides the fate of the diamond-processing industry in every country in which there is one, and whether any other countries will have significant processing industries . . . it has the power to move nations and a grim willingness to use it.⁵³

1. Corporate Structure of De Beers

De Beers Consolidated Mines, started in 1888, owes its monopolistic roots to its founder, Ernest Oppenheimer, and his son Harry.⁵⁴ De Beers as an organization is a complex corporate group directed by two parent corporations: De Beers Consolidated Mines Limited, incorporated in South Africa, and De Beers Centenary AG, incorporated in Switzerland.⁵⁵ The later corporation was formed in 1990, when the shareholders of De Beers Consolidated Mines rearranged the company so that a Swiss company would

49. A casual reader may attribute it to the physical properties of the objects, i.e. the fact that gold can be melted down and combined to increase its size, whereas a diamond must be taken as it is found and (because of the cutting and polishing process) can only be reduced in size. If this conclusion were true, diamonds prices would not have to be artificially controlled.

50. De Beers is now a large conglomerate controlled by the principal parents, De Beers Consolidated Mines, Ltd and De Beers Centenary AG. See Part II(A)(1), *infra*, for a discussion of the De Beers corporate group structure.

51. KOSKOFF, *supra* note 43, at 7. The De Beers Central Selling Organization sold \$4.36 billion in rough diamonds in 1993, its best year ever. RAPAPORT DIAMOND REPORT, Jan. 7, 1994, at 1. See Part II(A)(i), *infra*, for a discussion of the organizational structure of De Beers.

52. KOSKOFF, *supra* note 43, at 28.

53. *Id.* at 6.

54. *Id.* at 21-22. See also EPSTEIN, *supra* note 43, at 17. Despite being a publicly traded company, note 250, *infra*, to this day De Beers is considered a family firm. KOSKOFF, *supra* note 43, at 27-28. There were four Oppenheimers on both the De Beers Consolidated Mines and De Beers Centenary AG Board of Directors in 1992. DE BEERS CENTENARY AG / DE BEERS CONSOLIDATED MINES LIMITED, 1992 ANNUAL REPORT 21, 57 (1993) [hereinafter DE BEERS REPORT]. BNA reported that the Oppenheimer family also has a number of its “close associates” on the board of the company. *Gold Producer Fails to Substitute Hold Separate Order for Injunction*, Antitrust & Trade Reg. Rep. (BNA), No. 1414 (May 4, 1989).

55. De Beers Consolidated Mines, Ltd., the principal parent, was first registered on 12 March 1888. DE BEERS REPORT, *supra* note 54, at 23. The company was split to form a second parent, De Beers Centenary AG, on 23 March 1990. *Id.* at 58.

“conduct the foreign business of the De Beers group.”⁵⁶ The companies are so intertwined that they share a common annual report and Board of Directors,⁵⁷ and trade their shares as a linked unit.⁵⁸

The De Beers group also consists of various subsidiary corporations, structured under one of the two parents and formed in various countries. In 1992, De Beers characterized the “major subsidiaries” of the parents as follows:

*De Beers Consolidated Mines Limited*⁵⁹

<i>Subsidiary Company</i>	<i>Incorporated In</i>	<i>Percentage Held</i>
Debex Limited	South Africa	100%
Ultra High Pressure Units Limited	South Africa	50%
The Diamond Corporation Limited	South Africa	100%
De Beers Industrial Diamond Division	South Africa	100%
Orama Holding Limited	South Africa	100%
De Beers Holdings Limited	South Africa	100%
Sea Diamond Corporation Limited	South Africa	100%
De Beers Marine Limited	South Africa	100%
De Beers Industrial Diamonds Limited	South Africa	100%
Griqualand West Diamond Mining Company	South Africa	73%
Finsch Diamonds Limited	South Africa	80%
Consolidated Company Bultfontein Mine	South Africa	68%
Premier Diamond Mining Company Limited	South Africa	100%
Olivia Properties Limited	South Africa	100%
Theta Properties North Limited	South Africa	100%
Theta Properties South Limited	South Africa	100%
De Beers Services Limited	Namibia	100%
Marine Diamond Corporation Limited	Namibia	100%
Marine Group Investments Limited	Namibia	100%
De Beers Prospecting Botswana Limited	Botswana	100%

56. *Id.* at 22.

57. *See, e.g., id.* Their Boards of Directors have the same members, with the exception that De Beers Consolidated Mines has two additional members (19 versus 17 members). *Id.* at 21, 57.

58. *See* STANDARD AND POOR'S CORPORATION, STOCK REPORTS—OVER THE COUNTER AND REGIONAL EXCHANGES (1993) (report number 3664); DE BEERS REPORT, *supra* note 54, at 36, 69.

59. DE BEERS REPORT, *supra* note 54, at 54.

*De Beers Centenary AG*⁶⁰

<i>Subsidiary Company</i>	<i>Incorporated In</i>	<i>Percentage Held</i>
Centenary Holdings	Luxembourg	100%
DCS Corporation AG	Switzerland	100%
Scandiamant AB	Sweden	50%
Debid Limited	Australia	100%
The Diamond Corporation Botswana Limited	Botswana	100%
De Beers Industrial Diamond Division (Ireland)	Ireland	100%
De Beers Industrial Diamonds (Ireland)	Ireland	100%
International Diamond Products	Ireland	50%
Ultra High Pressure Systems (Ireland)	Ireland	50%
Ultra High Pressure Units (Ireland)	Ireland	50%
De Beers Industrial Diamonds (Japan) Limited	Japan	100%
CDM Limited	Namibia	100%
CDM Properties Limited	Namibia	100%
Exclusive Properties Limited	Namibia	100%
CDM Prospecting Limited	Namibia	100%
Namib Finance Corporation Limited	Namibia	100%

It is interesting that in each case De Beers stated the percentages as those "held directly or indirectly."⁶¹ Also, the De Beers group consists of numerous "associated companies" and has scores of "listed" and "unlisted investments" in still other companies, not to mention its virtual control of the immense Anglo American Corporation.⁶² It is therefore impossible to

60. *Id.* at 82.

61. *Id.* at 54, 82. For example, Luxembourg-based Minorco, S.A. is not listed. BNA reported that Anglo American Corporation of South Africa, De Beers, and the Oppenheimer family own about 67% of Minorco. *Lapse of Minorco's Bid Prompts Participants to Reappraise Stances*, Antitrust & Trade Reg. Rep. (BNA), No. 1418 (June 1, 1989); *Target Has Standing to Challenge Attempted Takeover Under Clayton Act Section 7*, Antitrust & Trade Reg. Rep. (BNA), No. 1409 (Mar. 30, 1989). See *infra* note 61 regarding the connection between De Beers and Anglo American.

62. DE BEERS REPORT, *supra* note 54, at 51-53, 81. Standard and Poor's states that its principal investment is a 38.6% holding in Anglo American Corporation of South Africa, one of the world's largest mining groups. STANDARD AND POOR'S CORPORATION, STOCK REPORTS—OVER THE COUNTER AND REGIONAL EXCHANGES (1993) (report number 3664). In 1992 De Beers Centenary AG confirmed the 38.6% interest. DE BEERS REPORT, *supra* note 54, at 22, 53. Anglo American, on the other hand, holds a 32.5% voting interest in De Beers Consolidated. *Id.* at 37. The Anglo / De Beers group controls over 1,300 business, including financial houses, breweries, vineyards, automobile assembly plants, explosive factories, travel agencies, paper manufacturers, farms, copper and coal mines, and the world's largest platinum mine." Peter Fuhrman, *Harry Oppenheimer, African Empire Builder, Is Smiling Again*, FORBES, Sept. 16, 1991, at 130. KANFER, *supra* note 43, at 5, 8. Anglo and De Beers also share the same corporate headquarters, located at 44 Main Street in Johannesburg, South Africa. *The Oppenheimer Empire: South Africa's Family Affair*, ECONOMIST, July 1, 1989, at 59. KANFER, *supra* note 43, at 268. Regarding a recent unsuccessful attempt by De Beers to control an even larger share of the gold market, see Consolidated Gold Fields, PLC v. Anglo-American Corp. of South Africa, Ltd., 698 F. Supp. 487 (S.D.N.Y. 1988), *aff'd in part, rev'd in part sub nom.* Consolidated Gold Fields, PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989) (hostile takeover of Consolidated Gold Fields by De Beers interests prevented on antitrust grounds); KANFER, *supra* note 43, at 360-68. FUGATE, *supra* note 39, § 6.4, at 449-50 (also claiming De Beers controls the world's largest gold producers); *Gold Producer's Eleventh-Hour Effort Fails to*

determine the actual number of intermediary companies and the pseudonyms involved.

The marketing arm of the De Beers group is known as the Central Selling Organization (CSO), whose function is explained in detail in Part II(2), *infra*.⁶³ The London-based CSO as an organization is jointly controlled by both parents: De Beers Centenary AG consists of "De Beers' former interests in the elements situated outside South Africa of the Central Selling Organization," whereas De Beers Consolidated Mines controls "the interests in the South African elements of the Central Selling Organization."⁶⁴

The problems such complex organizational arrangements and characterizations can have on enforcement actions cannot be over-emphasized. Consider the example of the Diamond Trading Company, Ltd. (DTC). The DTC was indicted in the first DOJ antitrust case against the De Beers group.⁶⁵ Commentators claim that De Beers is referred to as the DTC in Western countries.⁶⁶ The trade publication of the United States diamond industry refers to the DTC in connection with De Beers.⁶⁷ The problem? "Diamond Trading Company" is not listed in any financial statement contained in the 1992 De Beers annual report. It cannot be defunct because the diamond report was issued after the annual report. It must therefore be either an unreported subsidiary, an associated company, or an investment; or, it must be the pseudonym of some other company whether reported or not. Perhaps it is the pseudonym of a reported associated company of which De Beers Consolidated Mines owns 50%: "The Diamond Purchasing and Trading Company (Proprietary) Limited."⁶⁸ If that is the case, and the name was not subsequently changed, the complexity of the problem is illustrated by the fact that the DOJ indicted a company under a pseudonym.

Undue Roadblock to Takeover, Antitrust & Trade Reg. Rep. (BNA), No. 1418 (June 1, 1989) (also noting that the "Anglo group" is the largest gold producer in the non-communist world with 20.3% of production). In conjunction with the De Beers interest, some claim the Oppenheimer family controls the company. KOSKOFF, *supra* note 43, at 29-30. KANFER, *supra* note 43, at 5. BNA also reported that the Oppenheimer family "has a number of its members and close associates" on the board of the company. *Gold Producer Fails to Substitute Hold Separate Order for Injunction*, Antitrust & Trade Reg. Rep. (BNA), No. 1414 (May 4, 1989). The district court in *Consolidated Gold Fields* stated that "E. Oppenheimer & Sons Limited, a company allegedly controlled by Oppenheimer, owns 8.2% of Anglo outright." 698 F. Supp. at 491.

63. According to two commentators, in addition to the DTC, note 66, *supra*, De Beers is also known as the CSO in Western countries. See EPSTEIN, *supra* note 43, at 12; KOSKOFF, *supra* note 43, at 6.

64. DE BEERS REPORT, *supra* note 54, at 22, 58. See also Steve Coll, *Asian Prosperity Spawns Conspicuous Consumption Middle Class Buying Up Consumer Goods*, WASH. POST, Mar. 22, 1994, at A01 (The CSO is based at 17 Charterhouse Street in London).

65. See Part III(A), *infra*, for a description of the case.

66. See EPSTEIN, *supra* note 43, at 12; KOSKOFF, *supra* note 43, at 6. The DTC is also claimed to share the same office with the CSO, *supra* note 64. *The Oppenheimer Empire: South Africa's Family Affair*, ECONOMIST, July 1, 1989, at 59.

67. RAPAPORT DIAMOND REPORT, Jan. 7, 1994, at 13, 18-19.

68. DE BEERS REPORT, *supra* note 54, at 53.

2. De Beers and the Diamond Industry

De Beers mines 30% of the world's total caratage of diamonds, and is the selling vehicle for most of the world's other diamond producers through its CSO.⁶⁹ As a result, De Beers and its subsidiaries control some 80% of the world's output of gem-quality diamonds,⁷⁰ giving them an obvious and powerful hold on the diamond industry.⁷¹

What of the remaining "uncontrolled" percentage of diamond output? "Other than De Beers, the great producers are now all controlled by governments: Sierra Leone, the [former] Soviet Union, Zaire, Angola, and Tanzania. It is the cooperation of each that gives De Beers its monopoly power in the diamond world."⁷² As for the former Soviet Union, on July 25, 1990, the now defunct central government signed a controversial five-year contract granting De Beers exclusive distributor rights for the entire rough diamond supply of Russia.⁷³ For the most part, the communist and former-communist countries deal only with De Beers.⁷⁴ While some would like to alter those arrangements, it has been noted that "no major producer has successfully broken ranks altogether with the CSO."⁷⁵

"Control of output" is only one part of the diamond equation, demand being the other. For De Beers, control of both supply and demand is the best insurance to keep the price of diamonds high.⁷⁶ "Both sides of the equation are manipulable and manipulated to keep diamonds 'rare' in the

69. KOSKOFF, *supra* note 43, at 6.

70. De Beers claims that it "markets around 80 per cent of the world's diamond production." DE BEERS REPORT, *supra* note 54, at 12 (1993). See also Robert C. Toth, *Strapped Soviets 'Dump' Diamonds On World Market*, MIAMI HERALD, Oct. 20, 1984, at 8A (quotes the 80 per cent figure from the United States Department of Mines). Kanfer places the figure at 90%. KANFER, *supra* note 43, at 8, 368. See Part II(A)(1), *supra*, for a discussion of De Beers subsidiary companies.

71. Elisabeth Rubinfien, *Russia's Diamond Industry Is Debating Loosening Marketing Ties to De Beers*, WALL ST. J., Jan. 26, 1994, at A11 (De Beers maintains control by contracting with most of the producing countries. "Diamond producers who work with De Beers generally agree to sell all of their diamonds through [De Beers] under a system known as 'single-channel marketing.' De Beers mixes diamonds from around the world into assortments for buyers and releases only as many as it calculates won't disrupt prices.").

72. KOSKOFF, *supra* note 43, at 71.

73. See *Soviet Loan Stands—De Beers*, L.A. TIMES, Aug. 13, 1990, at P3; *Russia Challenges Soviet Government on Diamond Exports*, BOSTON GLOBE, Aug. 12, 1990 at 69; Leslie Shepherd, *Russian Republic Says Soviet Contracts Invalid*, PHILADELPHIA INQUIRER, Aug. 12, 1990, at A4. See also KANFER, *supra* note 43, at 369-370. Standard and Poor's states that the contract was between De Beers Centenary (the second parent) and the Rosalmazzoloto, the Russian diamond authority. STANDARD AND POOR'S CORPORATION, STOCK REPORTS—OVER THE COUNTER AND REGIONAL EXCHANGES (1993) (report number 3664).

74. See EPSTEIN, *supra* note 43, at 17-19, 115-116, 183-198; KOSKOFF, *supra* note 43, at 94-98. See also Steven Mufson, *The Rocks And a Hard Place—De Beers Worried Over Russian Gems*, WASH. POST, Jan. 15, 1992, at F1.

75. See *Russia Challenges Soviet Government on Diamond Exports*, BOSTON GLOBE, Aug. 12, 1990, at 69; *Canadian Diamond Mines May Lead to a Challenge of the De Beers System*, CHIC. TRIB., Feb. 14, 1994, at 8.

76. KOSKOFF, *supra* note 43, at 127.

meaningful sense: valuable.”⁷⁷ It is astonishing how effectively De Beers is able to control both supply and demand.

On the supply side, the De Beers “Diamond Trading Company [DTC] decides what to supply and how much to supply, whom to supply, when to supply, and where to supply [and, of course, the price of the supply].”⁷⁸ As De Beers itself admits, during times of diamond market setbacks, its policy is to “maintain price stability by adjusting supplies to its clients . . . while maintaining its purchases from producers at a reasonable level in terms of quota arrangements.”⁷⁹ Indeed, De Beers speaks with pride when discussing its horizontal hold over world suppliers:

The year under review was a testing one for De Beers and the whole diamond industry. That we should have come through it with stability restored in the market and, indeed, with a small price increase in February this year, is proof again of the efficacy of De Beers’ system of marketing rough diamonds through a single channel, and of the major world producers’ commitment to that system. It is especially in such times that the Central Selling Organization (CSO) fulfills the function for which it was created, and proves its worth not only to producers but to all the other sections of the industry that benefit from its stabilising [sic] role.⁸⁰

As for the demand for gem-quality diamonds by the general populace, many contend that there is none beyond that created by De Beers.⁸¹ For

77. *Id.* at 272.

78. *Id.* at 126. See EPSTEIN, *supra* note 43, at 59-65. See also Francesca Chapman, *Industry Virtual Monopoly De Beers Holds 80 % of World Supply*, PHILADELPHIA DAILY NEWS, Feb. 7, 1994 at 24 (“A recent edition of PBS’s ‘Frontline’ reported that fewer than 200 wholesalers have the right to buy diamonds from De Beers. By controlling the mines and restricting the flow of diamonds, the documentary reported, the cartel is able to keep diamond prices artificially high”). The process of the initial diamond sale in London is as follows: “The world’s diamond supply is transported from mine heads to [CSO offices located at] Charterhouse Street, where it is sorted, valued and then resold to an invitation-only group of diamond cutters and wholesalers known as ‘sightholders.’ The sightholders in turn produce finished loose diamonds or diamond jewelry and sell these to manufacturers, retailers or the public.” Steve Coll, *Asian Prosperity Spawns Conspicuous Consumption Middle Class Buying Up Consumer Goods*, WASH. POST, Mar. 22, 1994, at A01. See also Part II(A)(1), *supra*, regarding the DTC and its relation to De Beers.

79. DE BEERS REPORT, *supra* note 54, at 12. Because of the ties De Beers has to Anglo American, this language in the annual report was persuasive evidence to the district court in *Consolidated Gold Mines* that antitrust violations could occur if an injunction were not issued to stop the stock trading of the hostile takeover target. 698 F. Supp. at 501.

80. DE BEERS REPORT, *supra* note 54, at 3 (statement of J. Ogilvie Thompson, Chairman).

81. See, e.g. EPSTEIN, *supra* note 43, at 9-13; Patricia McLaughlin, *Marketing is Forever*, PHILADELPHIA INQUIRER, June 9, 1985, at 35. Interest in gem-quality diamonds by more affluent groups has, however, existed for quite some time. See e.g. KANFER, *supra* note 43, 8-11. Knowledge of diamonds has existed since biblical times, and ladies of nobility have worn diamonds since at least 1396. S. TOLANSKY, *THE HISTORY AND USE OF DIAMONDS* 13-17, 85-87 (1962). Diamonds were also used in the highest degrees of state orders and decorations. For example, in 1714 Peter the Great founded the diamond-studded Order of Saint Catherine The Great Martyr as an award to female nobility. ROBERT WERLICH, *ORDERS AND DECORATIONS OF ALL NATIONS, ANCIENT AND MODERN, CIVIL AND MILITARY* 363-64 (2d ed. 1974). Similarly, in 1861 Queen Victoria of Great Britain instituted The Most Exalted Order of the Star of India which contained diamonds, followed in 1878 by the Imperial Order of the Crown of

instance, it coined the popular slogans "A Diamond is Forever"⁸² and "The anniversary gift that says you'd marry her all over again."⁸³ Credited with developing the international diamond engagement ring tradition,⁸⁴ De Beers suggests that several months' salary should be spent on a diamond ring to show affection properly.⁸⁵ De Beers itself brazenly boasts of its ability to create and sustain demand:

Through the work of its Consumer and Advertising Division, De Beers' success in establishing the image of diamonds as the ultimate gift of love is highlighted by the almost universal recognition of the slogan 'A diamond is forever.' There can be few companies that have mounted and sustained for over half a century a worldwide consumer campaign on behalf of an entire industry.⁸⁶

The De Beers "control of output" is simply a complete monopolistic control of the vast majority of the diamond industry.⁸⁷ De Beers' control of diamonds, which encompasses both the supply and demand sides of the equation, has been most effective. "The [De Beers] DTC has been more successful than most central bankers or finance ministers, none of whom can claim to have preserved the value of their currency for as long a period as the DTC can boast: Diamond prices have increased steadily since 1934,

India, an award bearing diamonds and pearls for ladies of nobility. *Id.* at 203, 205. Also, in 1889 (one year after the birth of De Beers) King Wilhelm II of Prussia awarded Generalfeldmarschall Helmuth von Moltke the Crown and Diamonds device to his Pour le Mérite. JOHN R. ANGOLIA & CLINT R. HACKNEY, JR., *THE POUR LE MÉRITE AND GERMANY'S FIRST ACES* 70 (1984).

82. KANFER, *supra* note 43, at 271-72 (noting that diamonds are not forever, but can be shattered, chipped, or burned). Koskoff, *supra* note 43, at 273. See also EPSTEIN, *supra* note 43, at 128. The phrase was coined in 1948. De Beers made the phrase a "Diamond is Forever" the company logo in 1949.

83. KOSKOFF, *supra* note 43, at 275.

84. *Id.* See also EPSTEIN, *supra* note 43, at 133. KANFER, *supra* note 43, at 271-72.

85. See Patricia McLaughlin, *Marketing is Forever*, PHILADELPHIA INQUIRER, June 9, 1985, at 35.

86. DE BEERS REPORT, *supra* note 54, at 10. Additionally, De Beers noted that, "[i]n 1993 the Consumer and Advertising Division is set to create an even more powerful impact globally through the enhanced use of television. This powerful medium has been selected as the ideal vehicle for the exciting new 'Shadows' advertising campaign. 'Shadows', launched in Europe in 1992, is being shown in more than 20 countries and will be seen by over 300 million potential purchasers of diamond jewellery [sic]." *Id.* at 11. De Beers is also active in introducing the diamond myth to developing countries. As expressed by one commentator: "The challenge facing Mehta's Suraj Diamonds (India) Ltd. and his backers at the De Beers international diamond cartel is to persuade 400 million-plus Indian women, many of them trapped by lonely, arranged marriages and feudal family values, that diamonds are their best friend." Steve Coll, *Asian Prosperity Spawns Conspicuous Consumption Middle Class Buying Up Consumer Goods*, WASH. POST, Mar. 22, 1994, at A01. De Beers even coined a new slogan for the Asian marketing campaign: "For Me. For Now. Forever." *Id.* "In marketing terms, the slogan is a spearhead of the diamond cartel's accelerating campaign to conquer Asia's dynamic consumer culture." *Id.*

87. See EPSTEIN, *supra* note 43, at 9-11.

without suffering significant setbacks.”⁸⁸ That, according to De Beers, is precisely the goal: “Stability has always been recognized as essential to the diamond industry . . . because the price fluctuations that are accepted as normal in the case of most raw materials would destroy public confidence in the value of gem diamonds, which in terms of consumer spending are a luxury.”⁸⁹

It is considered common knowledge throughout the precious gem world that most of the world’s diamond trade occurs in New York and Los Angeles.⁹⁰ As De Beers controls the majority of the diamond trade, it is also pervasively known that this family business controls the American diamond market with its exports.⁹¹ De Beers itself admits that “Retail sales of jewellery [sic] in 1992 were strongest in the US.”⁹² As one author describes diamond trading in America, “The industry thrives in a frenzy of competition, but lives in the long shadow of the omnipotent South African monopoly—the De Beers Syndicate—that long ago set the pattern for multinational cartels.”⁹³ The result of De Beers’ efforts have been astonishing. By controlling the production and distribution of diamonds—in conjunction with the psychological probing of consumer minds that underlies its advertising—De Beers was able to elicit \$2.1 billion, at the wholesale level, from the American people in one year alone.⁹⁴

The “true” value of the diamonds purchased by the American public, however, is alarming. When it comes time to resell their diamonds, buyers find that they are worth only a fraction of the original cost.⁹⁵ The De Beers advertising stories, suggesting that diamonds are valuable (and thus can be resold for enormous prices), are extremely misleading.⁹⁶ In fact, people are psychologically inhibited from attempting to sell their diamonds, for, if they did, the price of diamonds would most likely collapse.⁹⁷ In summary, after

88. KOSKOFF, *supra* note 43, at 130. Indeed, several authors suggest that diamonds, unlike any other commodity, beat inflation because of De Beers’ success. See SCHUMACH, *supra* note 43, at 191-211 (1981); EPSTEIN, *supra* note 43, at 12. The problem is that they can never be sold for what they are worth because of the De Beers diamond cartel, i.e. all diamond dealers are afraid to buy quality gems from anyone other than De Beers. See EPSTEIN, *supra* note 43, at 229-237. See also Part II(A)(1), *supra*, regarding the DTC and its relation to De Beers.

89. DE BEERS REPORT, *supra* note 54, at 12.

90. KOSKOFF, *supra* note 43, at 263. See also EPSTEIN, *supra* note 43, at 199 (“[M]ost of the diamonds in the world are sold to American customers.”) The initial sale of the diamonds to wholesalers, however, occurs in London. See *supra* note 78.

91. See EPSTEIN, *supra* note 43, at 57; SCHUMACH, *supra* note 43, at 104.

92. DE BEERS REPORT, *supra* note 54, at 4.

93. SCHUMACH, *supra* note 43, at 14.

94. EPSTEIN, *supra* note 43, at 138-39 (De Beers sold \$2.1 billion dollars in wholesale diamonds in the United States in 1979).

95. *Id.* at 237.

96. *Id.*

97. *Id.* at 252-53. See also Betty Lee, *Stone-cold choices; Diamonds May Be an Investor's Best Friend, But Only After You've Cracked the Market's Decidedly Icy Surface*, CANADIAN BUSINESS, Nov. 1986, at 169 (“It’s no secret in the trade that the [De Beers] cartel has always discouraged the sale of diamonds for investment on the theory (which was eventually proven

creating a market for their goods, De Beers artificially manipulates both prices and supply to obtain the maximum amount of money it can from the consumer.⁹⁸

B. Goals of Antitrust Law

The DOJ perfectly stated the goal of antitrust law with respect to the diamond cartel in its 1977 *Antitrust Guidelines for International Operations*:

Antitrust enforcement by the United States Government has two major purposes with respect to international commerce. The first is to protect the American consuming public by assuring it the benefit of competitive products and ideas produced by foreign competitors as well as domestic competitors. Competition by foreign producers is particularly important when imports are or could be a major source for a particular product, or where the domestic industry is dominated by a single firm or a few firms. An agreement or set of private agreements designed to raise the price of such imports or to exclude them from the domestic market raises most serious antitrust concerns. . . . In general, foreign firms, including state-owned and controlled firms, will be expected to observe the prohibitions of our antitrust laws, and to benefit from enforcement of those laws in the same manner as domestically incorporated enterprises.⁹⁹

There can be but one primary goal in this area of law: fair application of the antitrust statutes against international cartels. The statutes must be enforced against all monopolistic firms that harm the American public; and, if necessary, additional legislation must be enacted to achieve that end. Despite the international implications, it is important that the United States also protect the American public and American companies from monopolistic foreign firms which, directly *or* indirectly, import goods into the United States at unrealistic prices. The DOJ agrees:

To protect U.S. consumer welfare, however, the Department's enforcement efforts must sometimes reach foreign defendants and conduct that arguably occurs outside the territorial limits of the United States. For example, an international cartel of private producers cannot agree to impose higher prices on U.S. consumers with impunity simply by holding its cartel meetings outside the United States.¹⁰⁰

This logic would seem to include the conduct of De Beers. Unfortunately, the De Beers syndicate may not appreciate the quest for fairness and

correct) that buying and selling for profit would cause violent price fluctuations"; thus, De Beers engages in advertising to convince consumers that diamonds "should never be resold.")

98. KOSKOFF, *supra* note 43, at 277-78.

99. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 4-5, 9 (1977).

100. DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 1 (1988).

justice. As one expert noted: "In its quest for power and profit, the Syndicate will, if it can, ignore the laws of other nations, even of a country as powerful as the United States."¹⁰¹ Dealing with such an organization with enough wealth to secure the best legal resources in the world has, and will continue to be, a difficult problem for the United States. Nevertheless, the United States will have to surmount these challenges if it ever hopes to ultimately solve the De Beers problem.

III. UNITED STATES V. THE DE BEERS GROUP

The United States has confronted the De Beers monopoly twice and is in the process of confronting it a third time.¹⁰² After analyzing those cases, current United States antitrust law will be analyzed to judge the potential success of a wide scale fourth attempt.

A. The First Response to Diamond Monopolization¹⁰³

DEBEERS I

The DOJ first began investigating the diamond monopoly in the early 1940's when Mr. Oppenheimer refused to stockpile large amounts of rough diamonds in Canada for American war production.¹⁰⁴ Not only was De Beers in a position to impede the war effort, but there was also considerable concern that De Beers was "playing both sides of the fence" by supplying both the Allied and Axis powers.¹⁰⁵ The DOJ concluded in 1944 that "[t]he United States is paying monopoly prices for an essential material

101. SCHUMACH, *supra* note 43, at 80-81; *see also* KOSKOFF, *supra* note 43, at 324-25; EPSTEIN, *supra* note 43, at 199-210.

102. Two related antitrust cases deserve mention. The first was a civil case filed by the DOJ: *United States v. Diamond Dealers Club, Inc., and Diamond Center, Inc.*, 1955 Trade Cas. (CCH), ¶ 67,987 (No. Civ. 76-343 S.D.N.Y. filed June 23, 1953), discussed in Part III(D)(1), *infra*, dealt with diamond dealers. The case is not covered in this section because no De Beers parent or subsidiary was a named party. The second case was filed by a private party against two De Beers affiliates: In *Consolidated Gold Fields*, *supra* note 62, a hostile takeover of Consolidated Gold Fields by De Beers affiliates was prevented on antitrust grounds. The case is not covered in detail because it does not deal directly with the issue of De Beers' influence on the United States diamond market. *See supra* notes 61-62 for a discussion of the relationship between De Beers and the affiliates.

103. *United States v. De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., Diamond Trading Co., Ltd., Societe Generale de Belgique, Societe Miniere du Beceka, Societe Internationale Forestiere et Minere Du Congo, Companhia De Diamantes de Angola, Consolidated African Selection Trust, Ltd., Sierra Leone Selection Trust, Ltd., Russell Johnson Parker, Lute J. Parkinson, Herbert H. Breeland, Albert E. Thiele, Solomon R. Guggenheim, Glendenin J. Ryan and George K. Sturm*, 1948-1949 Trade Cas. (CCH) ¶ 62,248 (No. Civ. 29-446, S.D.N.Y. filed Jan. 29, 1945).

104. EPSTEIN, *supra* note 43, at 90-91, 199. *See also* KANFER, *supra* note 43, at 228-29.

105. EPSTEIN, *supra* note 43, at 93-96. *See also* KANFER, *supra* note 43, at 229-30.

needed in wartime production”¹⁰⁶ and that, had De Beers been a United States company, the antitrust laws would have been violated.¹⁰⁷

Since De Beers was a South African corporation, however, the DOJ was forced to find some basis of jurisdiction over the activities of De Beers before it could prosecute.¹⁰⁸ The FBI interviewed leading New York diamond dealers to verify that De Beers transacted business in the United States, but was confronted with secrecy by insiders in the domestic diamond industry.¹⁰⁹ While the DOJ discovered that all transactions with American dealers occurred in London,¹¹⁰ it relied mainly upon the existence of a number of bank accounts in New York “maintained for the purpose of paying for advertising, publicity, public relations work, and purchases of machinery, tools and supplies”; “extensive and expensive” advertising and publicity campaigns in the United States conducted by an advertising agency on behalf of De Beers; the sporadic sale of diamonds by De Beers in the United States; that representative of De Beers visited the United States; and that De Beers affiliates maintained an office, made substantial purchases, and arranged export licenses.¹¹¹

A civil suit was brought against the De Beers parent company and several affiliated companies charging them with “an unlawful combination and conspiracy restraining foreign commerce” in the United States “in industrial and gem diamonds, in violation of the Sherman Anti-Trust and Wilson Tariff Acts.”¹¹² As one of the results of the conspiracy, the DOJ specifically alleged that the United States was “prevented from accumulating a stockpile of industrial diamonds . . . for military purposes.”¹¹³

Jurisdiction eventually fell through, and the case was dismissed in 1948.¹¹⁴ The district court found that the maintenance of bank accounts which were used to facilitate transactions within the district were merely incidental to the main business of the defendants, and that the purchase of equipment, the maintenance of an office, and the carrying on of an extensive advertising campaign in the district by De Beers affiliates did not warrant a finding that defendants were “doing business” in the district so as to be liable

106. EPSTEIN, *supra* note 43, at 92 (quoting the Justice Department indictment).

107. *Id.* at 93.

108. EPSTEIN, *supra* note 43, at 93.

109. *Id.*

110. *Id.*

111. 1948-1949 Trade Cas. (CCH), ¶ 62,248. *See also* De Beers Consolidated Mines, Ltd., et. al. v. United States, 325 U.S. 212 (1945) (DOJ sought injunction to restrain defendants from removing assets in banks and other property from United States. The Court held that the preliminary injunction was improperly entered because, under the Sherman Act and the Wilson Tariff Act, the district court had no jurisdiction in the suit to enter a money judgment); 1944-1947 Trade Cas. (CCH), ¶ 57,373; 1944-1947 Trade Cas. (CCH) ¶ 57,354.

112. 1944-1947 Trade Cas. (CCH), ¶ 53,354.

113. *Id.*

114. 1948-1949 Trade Cas. (CCH), ¶ 62,248.

to process of service.¹¹⁵ Ruling under section 12 of the Clayton Act, the court found that the activities *did* constitute “transacting of business,” but that they did *not* reach the level of “doing of business” necessary for the court to sustain jurisdiction.¹¹⁶

*B. The Second Response to Diamond Monopolization*¹¹⁷

DEBEERS II

The second United States Government case against the De Beers group consisted of both criminal and civil actions, and was filed against a De Beers subsidiary and two United States companies.¹¹⁸ The government alleged that the companies conspired to fix prices and allocate customers and territories for the sale of diamond abrasive in violation of section 1 of the Sherman Act.¹¹⁹ Unlike DEBEERS I, the case did not deal with gem-quality diamonds that the typical American consumer purchases.¹²⁰ Instead, it dealt with diamond “abrasive,” or diamond “grit,” a commodity that is considered vital to American industries.¹²¹

As in DEBEERS I, obtaining jurisdiction against De Beers proved to be a problem because De Beers conducted all of its American business outside of the United States (using upwards of 300 different companies and corporate pseudonyms, and a series of unrelated distributors).¹²² De Beers opened the door to American jurisdiction, however, when it sent grit to the United States on consignment for sale.¹²³ In the indictment, however, the DOJ became tangled in the complex De Beers organizational web and named De Beers Industrial Diamond Division, Ltd. of Johannesburg, South Africa as

115. *Id.*

116. *Id.* See also FUGATE, *supra* note 39, § 3.6 at 226; EPSTEIN, *supra* note 43, at 93, 200

117. United States v. De Beers Industrial Diamond Division, Ltd., Anco Diamond Abrasives Corp., and Diamond Abrasives Corp., [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH), ¶ 45,074, Crim. No. 74 C 1151, Civ. No. 74 Civ. 5389 (S.D.N.Y. filed Dec. 10, 1974).

118. *Id.*

119. *Id.* See also 1976-1 Trade Cas. (CCH), ¶ 60,825.

120. *Id.*

121. SCHUMACH, *supra* note 43, at 81 (“Diamond grit has experienced great adaptability and rapid growth in industry because of its unique mechanical properties, including its superb resistance to high temperatures, abrasion, and acids, its extremely high thermal conductivity, and the fact that diamond is the hardest of all known substances. Because of these unique properties, diamond grit is considered indispensable to the communications, electrical, constructions, electronics, mining, metalworking, automotive, aircraft, and other industries which have ultrahard materials, close tolerances, fine finishes, interchangeability, speed, and precision. In 1972, there were approximately 16.1 million carats of diamond grit consumed in the United States. There are no facilities in the United States for the commercial mining of natural diamond grit.” (quoting the indictment)).

122. EPSTEIN, *supra* note 43, at 202. KANFER, *supra* note 43, at 317. See also Part II(A)(1), *supra*, regarding the De Beers corporate structure.

123. KOSKOFF, *supra* note 43, at 324. See also EPSTEIN, *supra* note 43, at 201-210.

a defendant.¹²⁴ De Beers undoubtedly established that De Beers Industrial Division of Johannesburg was the wrong subsidiary and therefore not a proper party.¹²⁵ The Justice Department was eventually forced to substitute De Beers Industrial Diamond Division (Ireland), Ltd. (the subsidiary of the group responsible for marketing the grit) in place of the South African subsidiary in order to establish the link necessary for jurisdiction.¹²⁶

Due to the wealth of evidence against it, in 1976 the subsidiary entered a plea of *nolo contendere* on the criminal charges; it was fined \$40,000 and entered into a rather insignificant consent decree in the civil case.¹²⁷ While it is noteworthy that the De Beers parent was absent from the indictment, clearly because of the jurisdictional issue, the DOJ explained that any De Beers firm engaged in the sale of diamond grit would be bound the injunctive provisions.¹²⁸

The commentators were not pleased with the result: "In agreeing to the settlement, the government implicitly acknowledged that De Beers Consolidated does not do business within the United States; that it [is] beyond the reach of the [U.S.] antitrust laws."¹²⁹ That may have been true in 1975. As illustrated by the 1993 decision in *Hartford Fire*, however, United States courts now view the international application of the antitrust laws differently. Current antitrust law *may* now be able to reach the De Beers cartel despite its use of avoidance tactics.

124. [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH), ¶ 45,074.

125. See EPSTEIN, *supra* note 43, at 210.

126. [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH), ¶ 45,074. See also KOSKOFF, *supra* note 43, at 325.

127. [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH), ¶ 45,074 (criminal plea made July 15, 1976; civil consent decree filed July 1, 1976 and entered Dec. 8, 1976). See SCHUMACH, *supra* note 43, at 82; EPSTEIN, *supra* note 43, at 210. See also 1978-1 Trade Cas. (CCH), ¶ 62,056; United States v. De Beers Industrial Diamond Div. (Ireland), Ltd., et. al., 1976 WL 1399 (S.D.N.Y. Dec. 8, 1976) (consent decree); 1976-1 Trade Cas. (CCH), ¶ 60,825. The *nolo contendere* plea is significant because the defendant does not admit or deny the charges. BLACK'S LAW DICTIONARY 1048 (6th ed. 1990). See ANDERSEN & ROGERS, *supra* note 8, § 2.02, at 52 ("Most government antitrust cases (eighty percent or more) never are tried but rather are settled, generally by a device known as a consent decree. Consent decrees, which are used by the Antitrust Division [of the DOJ] as well as by the FTC, are in effect court approved negotiated settlements in which the defendant agrees to restrain its behavior in some way in return for the government's cessation of the case.")

128. [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH), ¶ 45,074.

129. KOSKOFF, *supra* note 43, at 325.

C. *The Third Response to Diamond Monopolization*¹³⁰

DEBEERS III

DEBEERS III arose from a civil suit brought against General Electric by a former employee, in which it was alleged that the company had entered into price fixing agreements with De Beers to control the international price of industrial diamonds.¹³¹ Alerted by the allegations in that suit, the DOJ started an antitrust investigation into the matter.¹³² On February 17, 1994, a federal grand jury in the Southern District of Ohio indicted De Beers Centenary AG, General Electric, and two individuals.¹³³ The one-count indictment alleged that De Beers and General Electric conspired to raise list prices of industrial diamonds worldwide.¹³⁴ Because De Beers and General Electric allegedly conspired as competing distributors of the diamonds, the theory of the case will revolve around a horizontal restraint of trade.

The case will be significant in how it resolves two important questions. First, acquiring jurisdiction over De Beers was a difficult problem in both DEBEERS I and DEBEERS II. How will jurisdiction be sustained in this case? De Beers already appears to be contesting jurisdiction, as expressed by a De Beers spokesman in Johannesburg, South Africa, when asked whether De Beers would stand trial in Ohio.¹³⁵ The response of the spokesman was simply that "We don't do business in the U.S."¹³⁶ This would infer that De Beers either does not "effect" the United States diamond market (necessary to establish subject matter jurisdiction), or does not have

130. *United States v. General Electric Co., De Beers Centenary AG, Peter Frenz, and Philippe Liotier*, 6 Trade Reg. Rep. (CCH) ¶ 45,094 (crim. No. CR-2-94-019, S.D. Ohio Feb. 17, 1994)).

131. *Antitrust Division is Probing Price Fixing in Diamond Industry*, Antitrust & Trade Reg. Rep. (BNA), No. 1563 (Apr. 30, 1992) (listing *Russell v. General Electric Co.*, No. C-1-92-343 (S.D. Ohio Apr. 21, 1992)). The civil suit apparently prompted a defendant in an unrelated civil case brought by General Electric to seek to amend their complaint to allege the worldwide conspiracy. See *Defendants Can't Amend Counterclaims*, Antitrust & Reg. Rep. (BNA), No. 1602 (Feb. 18, 1993) (identifying *General Electric Co. v. Sung*, No. 89-40094-GN (D. Mass., Jan. 6, 1993)). The court denied the motion because it would have "unduly prejudice[d]" General Electric. *Id.*

132. *Antitrust Division is Probing Price Fixing in Diamond Industry*, Antitrust & Trade Reg. Rep. (BNA), No. 1563 (Apr. 30, 1992)

133. 6 Trade Reg. Rep. (CCH) ¶ 45,094.

134. *Id.* See also *Industrial Diamond Manufacturers Indicted for Conspiring to Fix Prices*, Trade Reg. Rep. (CCH), No. 303 (Feb. 22, 1994); *General Electric, De Beers Face Charges of Fixing Prices of Industrial Diamond*, Antitrust & Trade Reg. Rep. (BNA), No. 1652 (Feb. 24, 1994); William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1; John Mintz, *GE, De Beers Indicted On Price-Fixing Charges Firms Accused of Bid to Hike Diamond Prices*, WASH. POST, Feb. 18, 1994, at D1.

135. William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1.

136. *Id.* De Beers also failed to appear for the arraignment in March. See Richard B. Schmitt, *U.S. Antitrust Effort May Use Private-Detective Firm*, WALL ST. J., May 6, 1994, at B5.

sufficient “minimum contacts” with the United States (necessary to sustain personal jurisdiction). Those issues are discussed in more detail in Part III(D), *infra*.

Second, this is another case against a De Beers parent—De Beers Centenary AG of Switzerland—and not a mere subsidiary as in DEBEERS II. Will the parent successfully claim that it was not directly responsible for the alleged conduct? In the past De Beers utilized some 300 different companies and corporate pseudonyms to avoid “contact” with the United States, thereby shielding itself from United States jurisdiction.¹³⁷ As noted in DEBEERS II, De Beers was able to use that intricate maze of companies to force the substitution of another subsidiary for the original South African defendant.¹³⁸ De Beers will no doubt again rely on such complex corporate structures to insulate itself from jurisdiction.

Despite these problems, the DOJ nevertheless appears ready to pursue the case, having already obtained the indictment.¹³⁹ Perhaps the time has come where the facade of “uninvolved” corporate structures and subsidiaries will not protect the parent from allegations of antitrust violations. The observer should be advised, however, that DEBEERS III deals strictly with industrial grade diamonds. As such, any legal order that may result from the case should have no effect on the retail diamond market or the prices the average consumer will pay for a gem quality diamond.

However, the resolution of these issues will have an impact on the prosecution of a subsequent case against De Beers dealing with restraints of gem quality diamonds. Despite the industrial diamond limitation, the importance of the case has not gone unnoticed to business commentators, who noted that the case would be “one of the most far-ranging and hard-fought cases in antitrust annals.”¹⁴⁰ Perhaps it will provide the DOJ with the experience and incentive to revisit DEBEERS I and pursue the larger area

137. EPSTEIN, *supra* note 43, at 202. KANFER, *supra* note 43, at 317.

138. [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH), ¶ 45,074. See also KOSKOFF, *supra* note 43, at 325; EPSTEIN, *supra* note 43, at 210. The DOJ is acutely aware of this problem. It has been reported that they are considering hiring a private-detective firm to gather information on De Beers' corporate arrangements. See Richard B. Schmitt, *U.S. Antitrust Effort May Use Private-Detective Firm*, WALL ST. J., May 6, 1994, at B5 (“Others say the government may be looking for help in proving that certain individuals or companies under investigation were in fact affiliated with De Beers.”)

139. The DOJ previously stated its opinion with respect to cases such as De Beers: “Conduct relating to U.S. import trade that harms consumers in the United States may be subject to the jurisdiction of the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved. Thus, for example, applying the Sherman Act to restrain or punish a private international cartel the purpose and effect of which is to restrict output and raise prices to U.S. consumers may be both appropriate and necessary to effective enforcement of that Act.” DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 29 (1988). Also, the DOJ is considering employing the services of a prominent private-detective firm to bolster its case against De Beers. See Richard B. Schmitt, *U.S. Antitrust Effort May Use Private-Detective Firm*, WALL ST. J., May 6, 1994, at B5.

140. William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1.

of monopolization in which De Beers engages, the natural gem-quality diamond market. This Comment will now turn to that problem.

D. Applying Current United States Antitrust Law

There are four steps that must be satisfied to prosecute De Beers under current antitrust law: (1) subject matter jurisdiction must be established; (2) in personam jurisdiction must be satisfied; (3) international comity considerations must be addressed; and (4) a violation of the antitrust statutes must be proven. (While jurisdiction and comity are typically threshold questions that would be addressed by a court *before* considering an alleged violation, they are, in fact, the more difficult legal issues and will be addressed last in this Comment).

In addition, because De Beers is a corporate group, the question of who the proper defendant is must also be addressed. This discussion will follow the analysis of the four steps necessary to establish a successful antitrust case.

1. Establishing a Violation

Two broad theories by which an antitrust claim can be successfully prosecuted are the "vertical restraint of trade theory" and the "horizontal restraint of trade theory."¹⁴¹ This Comment will use those theories to analyze possible violations of antitrust laws by De Beers.¹⁴²

a. Vertical Restraint of Trade

Vertical restraints involve agreements between firms at different levels of the distribution system to restrain competition, e.g. suppliers conspiring with wholesalers or retailers.¹⁴³ Mr. Edward Epstein, author of *The Rise & Fall of Diamonds*, outlines six "rules of the game" that diamond buyers must follow in order to do business with De Beers; these rules provide an excellent framework for an analysis of antitrust violations on the theory of vertical restraint of trade:

141. See generally ANDERSEN & ROGERS, *supra* note 8, §§ 6.01-.06 at 643-805 (vertical restraint of trade), and §§ 4.01-.02, at 247-345 (horizontal restraint of trade).

142. Other theories may be available to prosecute defendants for antitrust violations, e.g. theories based on merger (both vertical and horizontal, as well as conglomerate) and price discrimination (the Robinson-Patman Act). Additionally, the discussion that follows is a *survey* of representative antitrust cases and issues, and is not intended to be an exhaustive analysis of all antitrust law and precedent that could be brought to bear against De Beers.

143. See generally ANDERSEN & ROGERS, *supra* note 8, §§ 6.01-.06 at 643-805, for a discussion of vertical restraint of trade.

1. No one may question the authority of the Diamond Trading Company to decide who gets which diamonds;
2. There shall be no haggling over the price of diamonds, because De Beers fixes the price that buyers must pay;
3. Take the entire box of diamonds that is offered to you, or take none at all and risk being rejected as a future buyer;
4. No client may resell uncut diamonds without a special dispensation from De Beers, which must control the world stockpile of uncut diamonds in order to maintain prices;
5. Clients will supply De Beers with information to assess the diamond market by filling out a questionnaire detailing inventory and sales [price] aspects of their business; and
6. Diamonds must never be sold to resellers who undercut the market, because the illusion must be maintained that diamonds never decrease in value; thus, De Beers does not allow "price wars."¹⁴⁴

Establishing a violation can be the most difficult part of the case because of evidentiary considerations—obtaining acceptable proof. Assuming that these rules could be verified by the DOJ,¹⁴⁵ these rules could form the basis of a successful antitrust action based on the theory of vertical restraint of trade, i.e. restraints imposed by the supplier (De Beers) on the resellers both by mandating pricing maintenance and by implementing distribution restrictions.¹⁴⁶

The existence of both a distribution restriction and a price maintenance agreement is evidenced by De Beers' rule 6, *supra*. Rule 6 essentially requires a reseller to sell only to the ultimate consumer or to a reseller who will charge a higher price.¹⁴⁷ The purpose of the rule, according to Epstein, is to prevent price wars and to maintain the price of diamonds.¹⁴⁸ If a reseller sold diamonds to another reseller at a reduced cost, the market price of diamonds, as set by De Beers, would fall.¹⁴⁹ Similarly, the existence of distribution restrictions is further evidenced by De Beers rule 4, *supra* (which prevents resellers from selling uncut diamonds to other resellers

144. EPSTEIN, *supra* note 43, at 60-65.

145. The impediments to verification and accumulation of evidence are discussed in Part IV, *infra*.

146. *Id.* Another form of vertical restraint that De Beers arguably practices is excluding competing firms from the market, e.g., refusing to allow sales to certain resellers in order to maintain its monopoly. See De Beers Rules 3-6, *supra*. For the sake of brevity, this Comment will focus on the more obvious behavior of resale price maintenance and distribution restrictions suggested by Rules 4 and 6.

147. EPSTEIN, *supra* note 43, at 60-65.

148. *Id.*

149. *Id.*

as this would impede the ability of De Beers to mandate the price of uncut diamonds).¹⁵⁰

De Beers maintains these pricing mandates and distribution restrictions by imposing severe penalties: a violator will either be forced to buy worthless diamonds at an inflated cost for several years or will be forever rejected as an eligible buyer.¹⁵¹ In essence, the goal is to punish resellers who jeopardize the continued existence of the monopoly.

These facts establish classic antitrust violations. First, Rule 6, which dictates that diamonds may not be sold to resellers who undercut the market, is an illegal pricing arrangement in violation of the Sherman Act: As far back as 1911, in *Dr. Miles Medical Company v. John D. Park & Sons, Company*,¹⁵² the U.S. Supreme Court held that: “[A]greements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.”¹⁵³ Likewise, minimum price agreements comparable to Rule 6 were held to be in violation of the Sherman Act by the Supreme Court in *United States v. Paramount Pictures*.¹⁵⁴

Second, Rules 4 and 6 are illegal distribution restrictions in violation of the antitrust laws as they restrict to whom diamonds can be sold in order to further the monopoly. As the U.S. Supreme Court stated in *United States v. Arnold, Schwinn & Company*:

Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. . . . If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.¹⁵⁵

In each case, explicit agreements obligating resellers to such conduct are not required; in *Federal Trade Comm’n v. Beech-Nut Packing Co.*,¹⁵⁶ the Court recognized that violations of the Sherman Act occurred when an *implied* agreement would “unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.”¹⁵⁷ De Beers punishes

150. *Id.*

151. *Id.* at 64.

152. 220 U.S. 373 (1911) (price fixing by drug manufacturer held to be in violation of the Sherman Act).

153. *Id.* at 408.

154. 334 U.S. 131, 143-44 (1948) (motion picture producers, distributors, and exhibitors violated Sherman Act due to agreements to restrict trade).

155. 388 U.S. 365, 379 (1967) (bicycle manufacturer violated Sherman Act by restricting trade of bicycles after transferring ownership of them to distributors).

156. *Federal Trade Comm’n v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (upheld FTC cease and desist order prohibiting price fixing with respect to defendant’s products).

157. *Id.* at 453 (interpreting *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919) as not requiring the existence of a formal agreement, but merely a tacit agreement).

those who resell uncut diamonds by refusing to deal with them in order to maintain their monopoly.¹⁵⁸ Those who knowingly continue to deal under these terms are therefore participating in implied agreements not to resell, and are committing antitrust violations even though formal explicit agreements dictating such conduct may not exist.¹⁵⁹

A Note on "The Rules" and the Collection of Evidence

Rules similar to those discussed, *supra*, were the basis of a 1953 DOJ antitrust case against two diamond trade associations in the United States.¹⁶⁰ In *United States v. Diamond Dealers Club, Inc., and Diamond Center, Inc.*,¹⁶¹ a suit was brought against the associations under section 1 of the Sherman Act.¹⁶²

The result of the litigation was a consent decree that enjoined the associations from (1) restricting, restraining or preventing the importation diamonds into, and the exportation of diamonds out of, the United States; (2) hindering, restricting, restraining or preventing any diamond dealer from participating in free and unlimited trade in diamonds with any other dealer; (3) forcing, urging or coercing any diamond dealer not to deal with another dealer; and (4) imposing or attempting to impose any assessment, fines, expulsion or other penalty upon members for dealing with any another dealer.¹⁶³ It also required the associations to "abolish any instrumentality of control, surveillance or information designed to implement and restriction or restraint on diamond imports or exports."¹⁶⁴

The associations were ordered to serve a copy of the decree on each of its members, and to expel any present or future member who violated the prohibitions.¹⁶⁵ In addition, the associations gave the DOJ authority to interview officers and employees of the associations, and to access all books, ledgers, accounts, correspondence, memorandums and other records and documents in the possession or under the control of the associations.¹⁶⁶ If

158. EPSTEIN, *supra* note 43, at 60-65. Because most producers contract with De Beers' CSO, if the wholesalers cannot buy from De Beers, their ability to remain in the diamond industry is severely hampered. See Francesca Chapman, *Industry Virtual Monopoly De Beers Holds 80 % of World Supply*, PHILADELPHIA DAILY NEWS, Feb. 7, 1994, at 24.

159. See also *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939) ("it was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." The defendants were found liable for Sherman Act violations); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723 (1944) (an arrangement whereby dealers would be bound to sell at locally prevailing prices and only to the public violated the Sherman Act).

160. 1955 Trade Cas. (CCH), ¶ 67,987.

161. 1955 Trade Cas. (CCH), ¶ 67,987, No. Civ. 76-343 (S.D.N.Y. filed June 23, 1953).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

Epstein is correct and “The Rules” continue to exist, diamond dealers must fear the De Beers cartel more than the DOJ. The consent decree, at least, gives the DOJ an easier way to collect evidence for a future suit.

b. Horizontal Restraint of Trade

Horizontal restraints involve agreements between competitors at the same distribution level to restrain competition, e.g. when several sellers at the same level enter into an agreement to fix prices.¹⁶⁷ DEBEERS III is based on the horizontal theory of antitrust, because De Beers and General Electric are competitors at the same distribution level.¹⁶⁸ Similarly, De Beers’ contracts with other major producers for the supply of their diamonds would, if at all, be covered under the horizontal theory of antitrust because each of the producers is (or at least has the capacity to be “but for” the agreement) a direct competitor of De Beers.¹⁶⁹

Not all cooperation among producers is considered an antitrust violation, however, as noted by Justice Brandeis in *Chicago Bd. of Trade v. United States*:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.¹⁷⁰

The DOJ accepts the premise of this logic: “Nearly all productive activity involves cooperation that limits the independent commercial decision making of the parties and that therefore literally could be said to restrain trade.”¹⁷¹

To differentiate the proper from the improper, the U.S. Supreme Court compels the use of two tests, the “rule of reason” and per se condemnation

167. See generally ANDERSEN & ROGERS, *supra* note 8, §§ 4.01-.02, at 247-345, for a discussion of horizontal restraint of trade.

168. See William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1.

169. See *De Beers In Control*, PITTSBURGH POST-GAZETTE, Feb. 7, 1994, at A3 (“the cartel signs contracts with producers that guarantee steady sales and prices, but occasionally imposes quotas.”); *Canadian Diamond Mines May Lead To A Challenge of the De Beers System*, CHIC. TRIB., Feb. 14, 1994, at 8 (“Secretive De Beers has managed to regulate world diamond prices for 60 years through deals that require producers to sell via its CSO. The CSO seeks to prevent a diamond glut from hitting the market, buying and holding stones when prices are weak and then selling when prices rise.”) These allegations are confirmed by De Beers itself. See DE BEERS REPORT, *supra* note 54, at 12.

170. 246 U.S. 231, 238 (1918) (Brandeis, J.).

171. U.S. DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 6 (1988).

tests.¹⁷² The DOJ continues to use these two analysis methods, differentiating their applicability by the conduct involved:

The Department condemns as per se unlawful “naked” restraints of trade that are so inherently anticompetitive and so rarely beneficial that extensive analysis of their precise competitive effects is unnecessary. . . . On the other hand, the Department applies a rule-of-reason analysis to agreements that involve some form of economic integration that goes beyond the mere coordination of the parties’ decisions on price or output and that in general may generate procompetitive efficiencies.¹⁷³

The “rule of reason” provides some flexibility for the producers to establish that procompetitive efficiencies may be obtain from coordination, and is therefore would be a harder test for the DOJ to meet. In *Standard Oil of N.J. v. United States*, the landmark “rule of reason” case, the Court outlined the three areas that are determinative of the reasonableness of a defendant’s monopolizing activities: (1) the purpose of the arrangement; (2) the character (power) of the parties; and (3) the necessary effect of their actions.¹⁷⁴ Whether the conditions which differentiate proper from improper conduct under the “rule of reason” can be successfully applied to De Beers’ conduct with the other diamond producers is questionable. The result is certainly one in which reasonable people could differ. On the one hand, it can be argued that the only reason De Beers has contracts with the producers is to artificially control the supply of diamonds, and *not* to assist the market. On the other hand, it can be argued that De Beers must engage in cooperative agreements with producers or the producers would not be able to afford to mine diamonds.

The need for a simpler test in terms of debating the conduct of De Beers is certainly called for. The per se approach, held to be non-exclusive with the rule of reason in *United States v. Trenton Potteries Co.*, provides the needed test.¹⁷⁵ As stated by Justice Stone in *Trenton Potteries*, the act of price-fixing versus mere cooperation can never be tested by a reasonableness standard:

The aim and result of every price-fixing agreement, if effective, is in the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged

172. See *Standard Oil of N.J. v. United States*, 221 U.S. 1 (1911) (adopting the “rule of reason”); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (holding that per se condemnation and “rule of reason” are not mutually exclusive).

173. DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 6 (1988).

174. *Standard Oil*, 221 U.S. at 65-67.

175. *Trenton Potteries*, 273 U.S. at 400.

because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation in economic conditions.¹⁷⁶

The Court affirmed the rigid *per se* approach condemning all price-fixing arrangements in *United States v. Socony Vacuum Oil Co. (Madison Oil)*, a case with facts strikingly similar to the De Beers situation.¹⁷⁷ In *Madison Oil*, the oil refining industry was depressed much the way the diamond industry would be if market forces were allowed to control; that is, demand was decreased and the supply was increasing.¹⁷⁸ To alleviate the situation, a group of major refining companies informally agreed to buy all surplus gasoline from independent producers in order to dispose of it in an organized manner so as to not depress prices.¹⁷⁹ The Court held that the arrangement managed to keep prices above the level that competitive conditions in the industry would otherwise have brought about.¹⁸⁰ The Court rejected the argument that the arrangement served to stabilize the market, stating that the approach had “no legal justification” and that the reasonableness of the prices was no defense.¹⁸¹ The result was clear:

[M]arket manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a break on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. . . . Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.¹⁸²

While the “rule of reason” approach may be favored when questionable cases of cooperation are in issue, in *Arizona v. Maricopa County Medical Soc’y* the Court affirmed that the *per se* approach remains the approach when price-fixing is the issue.¹⁸³ Indeed, in *Catalano, Inc. v. Target Sales, Inc.*

176. *Id.* at 397-98 (Stone, J.).

177. 310 U.S. 150 (1940).

178. *Id.* at 170-71.

179. *Id.* at 179, 191.

180. *Id.* at 219-20.

181. *Id.* at 220-21.

182. *Id.* at 223.

183. 457 U.S. 332, 347 (1982) (“We have not wavered in our enforcement of the *per se* rule against price fixing.”).

the Court has even held that the effect of the agreement on price need only be *indirect* to be per se illegal.¹⁸⁴

In order to prove a violation for price-fixing under the per se approach, “proof that there was a conspiracy [an agreement], that its purpose was to raise prices, and that it caused or contributed to a price raise is proof of the actual consummation or execution of a conspiracy under section 1 of the Sherman Act.”¹⁸⁵ The problem of proving an agreement is acute in DEBEERS III; De Beers and General Electric deny that an agreement to fix prices existed and the DOJ will be put to its proof at least with respect to General Electric.¹⁸⁶

In the long run, however, De Beers itself may not be saved—it acknowledges that it engages in contracts (agreements) to obtain the major producer’s output of diamonds.¹⁸⁷

That these contracts amount to price fixing is evident from De Beers’ own admissions:

THE policy of De Beers, as leader of the diamond industry, is to maintain the long-term stability and prosperity of the industry as a whole. To that end, De Beers and its associates in the diamond business established and built up the CSO, which markets around 80 per cent of the world’s diamond production, meeting so far as possible the needs of the individual cutting centres [sic] for the rough diamonds that are produced. Although the trend of retail demand continues upwards, setbacks in the world market do occur from time to time, usually affecting sales of particular sizes or qualities of diamonds, and stocks in the cutting centres [sic] also fluctuate. The CSO’s policy during these periods is to maintain price stability by adjusting supplies to its clients in the cutting centres [sic] to demand, while maintaining its purchases from producers at a reasonable level in terms of quota arrangements. Undue curtailment of production is thereby avoided and the CSO, drawing on its large financial resources, is able to hold the temporary excess of production in stock until demand improves. Stability has always been recognised [sic] as essential to the diamond industry, in the first place because the price fluctuations that are accepted as normal in the case of most raw materials would destroy public confidence in the value of gem diamonds, which in terms of consumer spending are a luxury . . .

¹⁸⁸

It is striking how similar the De Beers policy is to the policy of the oil companies condemned by the Court in *Madison Oil*. The oil companies were held in violation because the buying programs affected market prices: “So

184. 446 U.S. 643, 647-48 (1980) (per curiam). This is not true with respect to vertical agreements. See, e.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 734-35 (1988) (“This notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected . . .”).

185. *Madison Oil*, 310 U.S. at 219-20. See also *Catalano*, 446 U.S. at 647.

186. See William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1.

187. See DE BEERS REPORT, *supra* note 54, at 1, 12.

188. *Id.* (emphasis added). Since the statements were contained in its annual report, they may be considered admissions of a party-opponent under FED. R. EVID. 801(d)(2)(A).

far as cause and effect are concerned it is sufficient in this type of case if the buying programs of the combination resulted in a price rise and market stability which but for them would not have happened.”¹⁸⁹ It was irrelevant that some unaffected suppliers of oil remained: “For it is indisputable that competition was restricted through the removal by respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets.”¹⁹⁰ Indeed, the method of price-fixing used by the oil companies, that of purchasing the surplus, to keep the market from becoming depressed was illegal:

Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade the power to fix prices exists if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist . . .¹⁹¹

It would appear that De Beers, by its own admission, has conceded that it engages in horizontal antitrust violations.

While De Beers attempts to justify its practices under the rubric of protection of producers, dealers, cutters, jewelers, and customers,¹⁹² there is not much De Beers could do to legally justify its actions. As noted in *Madison Oil*, neither the adverse effect of the agreement nor the power to control the market need be established.¹⁹³ Similarly, as expressed in *Maricopa County Medical Soc’y*, it is no defense that the agreements have “procompetitive justifications,”¹⁹⁴ or even that the judiciary does not have experience with the antitrust implications and necessities of the particular industry.¹⁹⁵

189. *Madison Oil*, 310 U.S. at 219.

190. *Id.* at 220.

191. *Id.* at 223-24.

192. DE BEERS REPORT, *supra* note 54, at 12 (1993) (H.F. Oppenheimer, the former Chairman of De Beers, discussed “protection” as a justification for these practices).

193. *Madison Oil*, 310 U.S. at 218 (“Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”); *id.* at 225 n.59 (discussing power to control the market).

194. *Maricopa County Medical Soc’y*, 332 U.S. at 351 (“The respondents’ principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.”).

195. *Id.* at 349 (“We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry.”); *Id.* at 351 (“the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules,

2. Establishing Subject Matter Jurisdiction

Obtaining subject matter jurisdiction over foreign companies was a difficult hurdle through the time of *DEBEERS I*.¹⁹⁶ However, since the 1945 decision in *ALCOA*, the courts have viewed the extraterritorial application of United States antitrust laws differently and are more receptive to recognizing subject matter jurisdiction over foreign companies that violate the Sherman Act.¹⁹⁷

Three steps now recognized as the threshold for granting subject matter jurisdiction to a United States court over a foreign defendant in an antitrust action. First, there must be a statutory grant of authority for a federal court to exercise jurisdiction.¹⁹⁸ For civil actions, the federal question aspect of the Sherman Act meets the legislative requirement of 28 U.S.C. section 1331.¹⁹⁹ Second, there must be proof of a restraint affecting or intended to affect American foreign commerce. Finally, the plaintiff must show that the effect is substantially large enough to present a cognizable injury.²⁰⁰

In 1993, the U.S. Supreme Court reaffirmed these principles in *Hartford Fire Insurance Company v. California*.²⁰¹ In that case, the complaint alleged that London reinsurers violated the Sherman Act by conspiring to coerce primary insurers in the United States to restrict certain types of insurance coverage, thereby depriving residents of California of coverage under these types of insurance.²⁰² The Court held that the district court had jurisdiction over Sherman Act claims because it was alleged that "the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect."²⁰³

which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.'" (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

196. See Part I(B), *supra*. Note, however, that *DEBEERS I* was decided on considerations of personal jurisdiction. See 1948-1949 Trade Cas. (CCH), ¶ 62,248.

197. See Part I(B), *supra*.

198. See, e.g., *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

199. 28 U.S.C. § 1331 (1993) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The court would therefore have original jurisdiction for a Sherman Act claim, as it is a federal law).

200. *Timberlane*, 549 F.2d at 613 (summarizing antitrust case law to date in upholding Sherman Act jurisdiction for acts that maintained control of the Honduran lumber export business). A third required test, international comity considerations, is addressed in Part III(C)(4), *infra*.

201. *Hartford Fire*, 113 S. Ct. at 2910.

202. *Id.* at 2908 (London reinsurer conspired to limit coverage of certain types of commercial general liability, pollution liability, and property contamination liability insurance).

203. *Id.* at 2909. See also *Matsushita Elec.*, 475 U.S. at 582 n.6 ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."); *Continental Ore*, 370 U.S. at 704.

Facts similar to that of the London reinsurers also exist with respect to De Beers: Rules 4 and 6 indicate that De Beers engages in unlawful conspiracies to affect the market for diamonds in the United States.²⁰⁴ De Beers' conduct also produces the requisite substantial effect on American commerce: It creates demand for a commodity that has no demand²⁰⁵ and little extrinsic value,²⁰⁶ and it receives some \$2 billion a year for the commodity from the American people.²⁰⁷ Also, by controlling 80% of the world's output of the commodity,²⁰⁸ by definition it controls the market in which most of the commodity is sold—the American market.²⁰⁹

Because De Beers restrains the trade of diamonds with the intent to affect American diamond commerce, and because those restraints inflict an enormous economic injury on the American public, subject matter jurisdiction undoubtedly exists. The fact that De Beers engages in “straw man” tactics such as exchanging the title to the diamonds in London is irrelevant;²¹⁰ De Beers knowingly does business with United States resellers under an agreement that requires the resellers to restrict trade,²¹¹ and by which it has a substantial effect on American commerce.²¹²

De Beers will undoubtedly argue the same exclusion that it is now claiming in DEBEERS III: “We don't do business in the U.S.”—perhaps hoping to support a finding that it therefore cannot affect the United States market.²¹³ It is difficult to imagine such a response when its own annual report boasts such statements as:

- ◆ “Retail sales of diamond jewellery [sic] in 1992 were strongest in the US.”
- ◆ “[S]ales of diamond jewelry in the US as well as other consuming countries held up well against other luxury products.”

204. See Part III(C)(2), *supra* for an antitrust analysis of the alleged De Beers Rules.

205. See EPSTEIN, *supra* note 43, at 9-13. See also Patricia McLaughlin, *Marketing is Forever*, PHILADELPHIA INQUIRER, June 9, 1985, at 35.

206. EPSTEIN, *supra* note 43, at 237.

207. *Id.* at 138-39.

208. DE BEERS REPORT, *supra* note 54, at 12.

209. See EPSTEIN, *supra* note 43, at 57; SCHUMACH, *supra* note 43, at 104.

210. See Part III(D)(5), *infra*, for a discussion of applicable law as it relates to such tactics.

211. See EPSTEIN, *supra* note 43, at 57; SCHUMACH, *supra* note 43, at 104.

212. See *supra* notes 204-09. See Nat'l Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981) (no anti-competitive effects to U.S. commerce). See also DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 78 (1988), in which the DOJ expressed its agreement. In a hypothetical case, 25% of the product was consumed in the United States. The Guidelines conclude, “In view of the large percentage of world X-ore production that is sold in the United States, it seems clear that the cartel would have a direct, substantial, and reasonably foreseeable effect on U.S. import trade.”

213. William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1.

- ◆ “Towards the end of the year consumer demand for diamond jewelry in the US improved, with sales both at Thanksgiving and Christmas some 10 per cent better than the year before.”
- ◆ “CSO sales at the first three sights of the year have been good . . . partly from increased polished exports to the United States.”
- ◆ “Another factor that may influence sales is the proposed further releases from the US stockpile of diamonds.”²¹⁴

The De Beers claim is nevertheless futile even if it does not “directly” engage in the United States market: De Beers starts with ownership of the diamonds; it engages in monopolistic conduct when passing title to the diamonds; the majority of the diamonds end up in the United States; and the sale of those diamonds have a direct and substantial effect on American commerce.

3. Establishing In Personam Jurisdiction

In order to establish *in personam* jurisdiction over a foreign defendant, a two-step test must be satisfied. First, as stated by the U.S. Supreme Court in *Omni Capital International v. Wolff & Co.*, an appropriate long-arm statute that authorizes service of process on the defendant is required.²¹⁵ Second, as stated by the Court in *International Shoe v. Washington*, due process requires that “minimum contacts” with the forum be established such that the “maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²¹⁶

a. Step One—Statutory Authority

No less than three statutes may provide authority to serve De Beers with a civil suit. First, 15 U.S.C. section 21(f) provides the requisite authorization to the FTC for antitrust claims, allowing “anyone duly authorized by the

214. DE BEERS REPORT, *supra* note 54, at 4, 13.

215. 484 U.S. 97, 111 (1987). Congress responded by adding a general statutory authorization in FED. R. CIV. P. 4(f) and (k)(2) (1993). The Advisory Committee noted that subdivision (f) “provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which extraterritorial service was authorized by state or federal law. The new rule eliminates the requirement of explicit authorization.”

216. 326 U.S. 310, 316 (1945) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The nature of the “forum”—whether it must be a single state, or whether it can be the entire nation—is a perplexing problem that will be addressed, *infra*.

commission” to serve complaints, orders, and other processes of the commission board.²¹⁷

Second, section 12 of the Clayton Act also provides for service of process in antitrust claims against corporations:

Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.²¹⁸

In DEBEERS I, the district court dismissed the suit after finding that De Beers *did* “transact business” in the United States, but that it did *not* reach the level of “doing business” necessary for the court to sustain jurisdiction.²¹⁹ The interpretation of section 12 of the Clayton Act has since changed. In the leading case on the subject decided around the time of DEBEERS I, *United States v. Scophony Corp. of America*, the U.S. Supreme Court altered the interpretation of section 12.²²⁰ According to one commentator:

The Court also showed a disposition, at least as to antitrust cartel cases, to dispense with the fine distinctions of earlier cases and to practically eliminate, in foreign trade cases, the distinction between “doing business” and “transacting business.” . . . The result in that case [DEBEERS I] might well be different today in light of *Scophony*.²²¹

Under section 12 of the Clayton Act, the question becomes whether the De Beers group still “transacts business” in the United States as it did in DEBEERS I. This question will be addressed, *infra*, with the discussion on minimum contacts.

Finally, the newly-enacted Federal Rules of Civil Procedure 4(k)(2) may eliminate the need to use either of the previous statutes:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States [i.e., minimum contacts], serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.²²²

217. 15 U.S.C. § 21(f) (Supp. 1993) (authority is vested in the FTC, the International Trade Commission, and other administrative agencies.).

218. 15 U.S.C. § 22 (1993).

219. 1948-1949 Trade Cas. (CCH), ¶ 62,248. See also FUGATE, *supra* note 39, § 3.6 at 226; EPSTEIN, *supra* note 43, at 93, 200.

220. 333 U.S. 795 (1948).

221. FUGATE, *supra* note 39, § 3.8, at 235-36.

222. FED. R. CIV. P. 4(k)(2) (Supp. 1994).

The effect of Rule 4(k)(2) will also be addressed, *infra*, with the discussion on minimum contacts.

When dealing with criminal matters, the problems become more complicated. For instance, the Federal Rules of Criminal Procedure require that the defendant must be served with a summons.²²³ The government is limited, however, on where it can serve the summons—it can only be served “at any place within the jurisdiction of the United States.”²²⁴ This suggests that the summons may only be served within the territorial limits of the United States.²²⁵ There is also the problem of the required presence of the defendant during the trial.²²⁶ The issues in the criminal context are complex as illustrated by the problem the DOJ had with DEBEERS III—it had to wait until a De Beers executive visited the United States, which one eventually did for a golf tournament.²²⁷ If the De Beers representative had not visited the United States, short of a perfected extradition agreement, the U.S. Supreme Court in *United States v. Alvarez-Machain* suggests that the only *other* way to obtain the defendant in a criminal matter is to *kidnap him* and bring him into United States territory!²²⁸

b. Step Two—Minimum Contacts

Establishing the Proper Test

Using the *International Shoe* test, the requisite finding must be that the defendant has engaged in at least “minimum contacts” with the state in question.²²⁹ On a cursory view, De Beers arguably has such minimum contacts in that it sells diamonds to American resellers with the expectation that those diamonds will be marketed in the American stream of commerce. Like the defendants in *International Shoe*, it can be argued that the activities

223. Fed. R. Crim. Proc. 4, 18 U.S.C. (1986).

224. Fed. R. Crim. Proc. 4(d)(2), 18 U.S.C. (1986).

225. Under the “territorial principle,” a sovereign nation has virtually complete power to regulate what transpires within its own borders. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1987). See also FUGATE, *supra* note 39, § 3.4, at 214 (“Accordingly, it would not appear to be possible legally to serve a foreign national with a subpoena in a criminal case outside of the United States.”).

226. Fed. R. Crim. Proc. 43(a) and (c)(1), 18 U.S.C. (1976).

227. See William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST.J., Feb. 22, 1994 at A5.

228. 112 S. Ct. 2197 (1992) (Mexican citizen kidnapped in Mexico by United States-hired operatives and brought to the United States to answer for a crime committed in Mexico in violation of United States law. The extradition treaty between the United States and Mexico did not directly prohibit the kidnapping, so the Court reasoned that the forcible abduction did not “prohibit” the defendant’s trial in a United States court “for violations of the criminal laws of the United States.” Such conduct may nevertheless be illegal under international law. See *id.* at 2201-02 (Stevens, J., dissenting).

229. *Id.* at 319.

of De Beers are neither “irregular nor casual,” but “systematic and continuous.”²³⁰

When deciding *International Shoe*, however, the Court was deciding whether the defendant had sufficient minimum contacts with the State of Washington.²³¹ The test it formulated was with respect to a state in the Union, not contacts with the United States as a whole. The question remains whether the minimum contacts test can be applied on the basis of *national* contacts. As one commentator has expressed the problem:

The distinction between national and state contacts can have considerable practical importance. Many foreign defendants have fairly significant contacts with the United States as a whole, but do not have substantial contacts with any particular state of the Union. When this is the case, a national contacts test may provide the only means for a U.S. court to exercise jurisdiction over the foreign defendant.²³²

The threshold question is whether the due process clause allows a “national contacts” test.²³³ In the Advisory Committee Notes to the new Federal Rules of Civil Procedure 4(k)(2), Congress stated that it believes such a test exists:

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. . . . The Fifth Amendment requires that any defendant have affiliating contacts *with the United States* sufficient to justify the exercise of personal jurisdiction over that party.²³⁴

At least one Circuit has held that a “national contacts” test can be utilized under the 5th Amendment due process clause in an extraterritorial assertion of jurisdiction in an antitrust case.²³⁵ The Ninth Circuit in *Go-Video, Inc. v. Akai Elec. Co.* agreed with the district court that the

230. *International Shoe*, 326 U.S. at 320.

231. *Id.* (State of Washington satisfied constitutional Due Process requirements and properly exercised jurisdiction over foreign corporation).

232. BORN & WESTIN, *supra* note 39, at 70.

233. *Id.*

234. FED. R. CIV. P. 4(k)(2) (Supp. 1994) (emphasis added).

235. For circuit decisions endorsing a national contacts test in a non-extraterritorial / non-antitrust federal question setting, see *Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (2d Cir. 1974) (action under Securities Exchange Act); *United States v. Jim Walters Corp.*, 651 F.2d 251, 256 (5th Cir. 1981) (action to enforce subpoena duces tecum under Federal Trade Commission Act); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985), *rev'd on other grounds sub nom.*, *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311 (1992) (action under Securities Exchange Act); *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671-72 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988) (action under Racketeer Influenced and Corrupt Organizations Act); *United Electrical, Radio & Machine Workers of Am. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992) (action under Employee Retirement Income Security Act); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (action under Securities Exchange Act); *Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994) (action under Securities Exchange Act).

nationwide service provision of the Clayton Act justified a national contacts test.²³⁶ The court was faced with a constitutional challenge to the national contacts analysis but found that, when a statute authorizes nationwide service of process, such an analysis is appropriate.²³⁷ The court reviewed the argument that the relevant contacts inquiry should focus on the nation as a whole based on the fact that the sovereign in a federal question case is the United States.²³⁸ They decided, however, to base their decision on “the concrete language of a statute under which Congress has, as it is unquestionably empowered to, authorized nationwide service of process.”²³⁹

Using the rationale expressed in *Go-Video*, the Congressional proposition in the Federal Rules of Civil Procedure 4(k)(2) Advisory Committee Notes that the Fifth Amendment requires contacts “with the United States” should be persuasive in establishing the national contacts test throughout the country.²⁴⁰

Analysis of the Minimum Contacts Test

In *Asahi Metal Industry Co. v. Superior Court*, a non-antitrust case, the U.S. Supreme Court discussed the minimum contacts test with respect to aliens.²⁴¹ While the Court in a footnote stated that it did not have occasion there to determine whether Congress could authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts,²⁴² the case is interesting because the defendant did not have agents, offices, or property in the state in question; nor did it advertise, solicit business, or control the distribution system in the state.²⁴³ The Court noted that minimum contacts through the “stream of commerce” are not enough; a “substantial connection” must exist between the nonresident company and the state in question.²⁴⁴ According to a plurality of the *Asahi* court, the substantial connection necessary for a finding of minimum contacts must “come about by an action of the defendant purposefully directed toward the forum State,”²⁴⁵ i.e., an “intent or purpose to serve the market in the

236. 885 F.2d 1406, 1414-16 (9th Cir. 1989).

237. *Id.* at 1415-1416.

238. *Id.*

239. *Id.*

240. FED. R. CIV. P. 4(k)(2) (Supp. 1994).

241. 480 U.S. 102 (1987) (exercise of jurisdiction over Japanese manufacturer would be unreasonable and unfair because they did not have intent to serve forum market).

242. *Id.* at 113 n.*. The Court again declined to answer the question in *Omni Capital*, 484 U.S. at 102 n.5.

243. *Asahi*, 480 U.S. at 112.

244. *Id.* at 109.

245. *Id.* at 112.

forum state.”²⁴⁶ Conduct which may indicate such an intent or purpose include advertising in the forum state;²⁴⁷ and creating, controlling, or employing the distribution system that brings the nonresident companies’ goods into the forum state.²⁴⁸

Assuming a national contacts test does exist, De Beers arguably meets the guidelines set forth in *Asahi*: (1) it established a distribution system whereby it sells diamonds to American resellers (albeit in London) with the express purpose that those diamonds be marketed in the United States; (2) it controls the distribution system that brings its diamonds into the United States by threatening resellers with the loss of De Beers diamonds (“The Rules”); and (3) it engages in heavy advertising in the American market in order to promote demand for its product in the United States. Furthermore, De Beers (1) owns and maintains copyrights in the United States;²⁴⁹ (2) trades its stock on a United States stock exchange;²⁵⁰ and (3) has definite

246. *Id.*

247. *Id.*

248. *Id.*

249. De Beers has registered three advertising copyrights with the U.S. Copyright Office: PA168738 (“Reflections” registered 2-11-83), PA155904 (“The Hint” registered 10-26-81), and PA151044 (“A Gem of an Evening” registered 6-30-82). Based on three rather novel questions of law, the copyright registrations may be useful to establish that the requisite national contacts exist: (1) Does the registration of intellectual property equate to maintaining property in the United States for the purpose of judging national contacts? The question could be decided by whether the “locus of existence” of the “property” remains with the owner (in this case in South Africa), or attaches to the property as it would with a physical object (which, in this case, manifests itself when displayed as advertising). (2) Does the fact that a copyright has been registered contribute to its contacts? Like the defendant in *International Shoe*, De Beers “receive[s] the benefits and protections of the [copyright] laws of the [United States], including the right to resort to the courts for the enforcement of its rights.” 326 U.S. at 320. (3) Does the act of registering a copyright contribute to its contacts? At least one circuit court has been approached with the last argument: In *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distr. Pty. Ltd.*, 647 F.2d 200 (D.C. Cir. 1981), the plaintiff argued that the foreign defendant “may have acted in the District in connection with their registration” of a trademark. *Id.* at 205 n.11. Judge Ginsburg, writing for the court, dismissed the argument without addressing the issue, basing her decision on a “governmental contacts” exception that was “grafted” to the particular long-arm statute used to obtain jurisdiction in that case. *Id.*

250. De Beers Consolidated Mines, Ltd. is traded on NASDAQ; Standard and Poor’s reports its ticker symbol as DBRSY and its security number as 240253-30. STANDARD & POOR’S CORPORATION, S&P DAILY STOCK PRICE RECORD NASDAQ 202 (July-Sept. 1993). The two parents of the De Beers group, De Beers Consolidated Mines, Ltd. and De Beers Centenary AG, trade as a linked unit. STANDARD AND POOR’S CORPORATION, STOCK REPORTS—OVER THE COUNTER AND REGIONAL EXCHANGES (1993) (report number 3664). DE BEERS REPORT, *supra* note 54, at 36, 68. De Beers does not invest their shares directly in the United States, but issues American Depository Receipts (ADRs). See, e.g. ADRS, WALL ST. J., Mar. 23, 1994, at C8 (symbol DBEER). As the district court explained in *Consolidated Gold Mines*, “[a]n ADR allows the ownership and voting interest in a foreign corporation’s securities to be traded here, even though those securities are not registered here. See 17 C.F.R. §§ 229, 230, 239.13 (1988). However, in order to remain exempt from registration in the United States, the foreign corporation itself or the government that incorporated it must make filings with the SEC pursuant to SEC Rule 12g3-2.” 698 F. Supp. at 490. The Plaintiff argued that the ADRs provided sufficient *national* contacts to sustain personal jurisdiction, but the court refused to find jurisdiction on that basis because the plaintiff could not refute the defendants claim that it did not facilitate the trading of the ADRs. *Id.* at 494. See also *Williams v. Canon, Inc.*, 432 F. Supp. 376, 379, 381 (C.D. Cal. 1977) (ADRs not relevant in establishing personal

advertising agreements with United States diamond wholesalers.²⁵¹ The combination of those factors arguably establish De Beers has an “intent or purpose to serve the market” in the United States.²⁵²

With respect to this myriad of national contacts, De Beers would undoubtedly argue the same exclusion that it is now claiming in DEBEERS III: “We don’t do business in the U.S.”—perhaps hoping to support a finding that it therefore cannot have any contacts.²⁵³ De Beers undoubtedly believes that, by conducting all of its American business outside of the United States, and by using different corporate pseudonyms and a series of unrelated distributors, it will continue to shield itself from United States antitrust liability.²⁵⁴ De Beers must remember, however, that a finding of “transacting business” is a requirement of *only* section 12 of the Clayton Act; such a finding is not required in the application of Federal Rules of Civil Procedure 4(k)(2).²⁵⁵ Thus, De Beers may be amenable to service based on its “national contacts” alone, whether or not it engaged in “transacting business.” Also, as alluded to in *Scophony*, because De Beers has such a substantial connection with the United States, the grounds for obtaining personal jurisdiction over the syndicate may exist under the Clayton Act “transacting business” test despite De Beers use of “straw man” tactics.

Whatever test is ultimately used, given the unusually wide-reaching impact of De Beers’ conduct on the American people, *not* hailing them into a United States court would offend traditional notions of fair play and substantial justice.

jurisdiction based on state contacts with California because they were incidental to the defendant’s business and were sold by its agent in New York). *But cf.* Newport Components, Inc. v. NEC Home Electronics, Inc., 671 F. Supp. 1525, 1540 (C.D. Cal. 1987) (the same court found that it was proper to consider the trading of ADRs for purposes of establishing personal jurisdiction under a *national* contacts test).

251. A recent advertisement appearing in The Smithsonian is signed by “De Beers” and includes its slogan “A diamond is forever.” SMITHSONIAN ASSOCIATES, THE SMITHSONIAN 55 (Nov. 1993). The advertisement states: “If you are considering an important diamond gift . . . simply call . . . 1-800-241-9444.” On calling the number, it connected to Lieber and Solow, a wholesaler of diamonds in Manhattan. Giving De Beers the benefit of the doubt that it does not have an ownership interest in Lieber and Solow, at a minimum it must have *at least* an oral contract to either (1) provide free advertising and the potential customers generated by that advertising, or (2) allow the use of its name to influence diamond buyers in the United States. *See also* U.S. NEWS & WORLD REPORT, May 30, 1994, at 48 (another similarly signed De Beers Advertisement lists a second telephone number—800-553-5753). *See* Part III(D)(5), *infra*, regarding the possible use of an agency theory to obtain jurisdiction.

252. *Asahi*, 480 U.S. at 112.

253. William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1.

254. EPSTEIN, *supra* note 43, at 202.

255. *See* 15 U.S.C. § 22 (1993); *Scophony*, 333 U.S. 795.

4. International Comity Considerations

When a foreign company is involved, an additional issue must be addressed—whether its connections to the United States are sufficiently strong to justify an assertion of extraterritorial authority.²⁵⁶ This requires the court to satisfy international comity considerations after finding jurisdiction.²⁵⁷

Comity refers “to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”²⁵⁸ Justice Scalia described it as “the respect sovereign nations afford each other by limiting the reach of their laws.”²⁵⁹ Comity considerations have several facets.

a. Sovereign Immunity

The first consideration is *sovereign immunity*. This rule of customary international law dictates that courts of one sovereign state generally do not have jurisdiction to entertain suits against another state.²⁶⁰ The doctrine is not applicable to this case since De Beers is a private corporation, rather than a foreign government.²⁶¹ Additionally, the sovereign immunity rule generally does not apply to commercial acts by a foreign state.²⁶²

256. *Timberlane*, 549 F.2d at 613 (discussing the need to consider international comity when deciding to exercise Sherman Act jurisdiction). The U.S. Supreme Court in *Hartford Fire* specifically refused to address the question of “whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity.” *Hartford Fire*, 113 S. Ct. at 2910. Indeed, other than the “conflict of laws” comity consideration, the Court noted that “[w]e have no need in this case to address other considerations that *might* inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.” *Id.* at 2911 (emphasis added).

257. *Hartford Fire*, 113 S. Ct. at 2910 n.24 (“[C]oncerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.”).

258. *Societe Nationale Industrielle Aerospatiale (SNIA) v. United States District Court*, 482 U.S. 522, 543 n.27 (1987) (Hague Evidence Convention applies to pending discovery demands).

259. *Hartford Fire*, 113 S. Ct. at 2920 (Scalia, J., dissenting).

260. *International Ass’n of Machinists and Aerospace Workers (IAM) v. Org. of the Petroleum Exporting Countries*, 649 F.2d 1354, 1357 (9th Cir. 1981) (act of state doctrine bars exercise of jurisdiction against OPEC for alleged price fixing of crude oil prices in violation of Sherman Act). The rule has also been codified in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 (1976).

261. This would most likely be true even if the government of South Africa owned minority shares in DeBeers. See William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535 (1991).

262. *Foreign Sovereign Immunities Act*, 28 U.S.C. § 1605(a)(2). See also *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (1981) (sovereign immunity cannot be used as a defense by Nigeria to repudiate \$1 billion in cement contracts and unilaterally modify letters of credit issued to pay for cement); *IAM*, 649 F.2d at 1357 (under the restrictive theory, sovereign immunity does not apply to state commercial activities).

b. Act of State

The second consideration—the *act of state doctrine*—is “a policy of judicial abstention from inquiry into the validity of an act by a foreign government.”²⁶³ Similar to the “political question” doctrine in domestic law,²⁶⁴ it was the basis by which another well-known monopolistic cartel, OPEC, avoided antitrust liability in the United States.²⁶⁵ This doctrine similarly is not applicable to De Beers because it is not a foreign government.

c. Sovereign Compulsion

The third comity consideration—the defence of *sovereign compulsion*—shields defendants from liability when they act in obedience to a foreign government mandate.²⁶⁶ This doctrine is likewise inapplicable because South Africa (the home country of De Beers) *discourages* monopolies,²⁶⁷ and Europe (the home of numerous De Beers subsidiaries) *bans* monopolies through the European Economic Community.²⁶⁸

d. Conflict of Laws

A fourth and final comity consideration is *conflict of laws*, which allows a court to dismiss an action if domestic law conflicts with foreign law and policy.²⁶⁹ As noted in *Hartford Fire*, the mere lack of an antitrust statute in those foreign jurisdictions will not suffice to show a foreign “policy”;

263. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979) (issuance of patents by foreign power does not involve act of state or sovereign compulsion doctrines); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act of state doctrine bars challenge to Cuban decree).

264. *IAM*, 649 F.2d 1354 at 1358-59. See also *Timberlane*, 549 F.2d at 605-06.

265. *IAM*, 649 F.2d at 1361-62.

266. *Mannington Mills*, 595 F.2d at 1293.

267. See Stephen Levenberg & Maas Van Den Berg, *Mergers and Acquisitions*, INT'L FIN. L. REV. 43 (Supp. May 1992) (“The Maintenance and Promotion of Competition Act, 1979 (the Competition Act) provides for the maintenance and promotion of competition in South Africa as well as for the prevention of restrictive practices”).

268. Treaty Establishing the European Economic Community, The Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11. (Article 85 prohibits “any agreements between enterprises, and decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market.” Article 86 maintains that “[t]o the extent to which trade between any Member State may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market, or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.”). Nevertheless, the United Kingdom, at least, does not seem interested in pursuing De Beers. See e.g. *UK Agency Won't Probe Conduct of De Beers in Diamond Market*, Antitrust & Trade Reg. Rep. (BNA), No. 1431 (Aug. 31 1989) (according to statement made by Sir Gordon Borrie, Director General of the Office of Fair Trading).

269. *Hartford Fire*, 113 S. Ct. at 2910. See also *SNIA*, 482 U.S. at 555.

being consistent with the law is not to state that a conflict exists.²⁷⁰ In any event, this doctrine is also not applicable to this case because South Africa and the European Community have laws that discourage, rather than compel, monopolistic conduct.²⁷¹

A related conflict of laws comity consideration arises when a domestic law conflicts with *international law* rather than the law of the home nation of the foreign defendant. Writing in dissent in *Hartford Fire*, Justice Scalia illustrated this consideration:

'[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.' . . . [This canon] is relevant to determining the substantive reach of a statute because 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.²⁷²

Turning to the *Restatement (Third) of the Foreign Relations Law of the United States*, Justice Scalia noted that a nation should refrain from exercising its "legislative jurisdiction" to prescribe law "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."²⁷³ Because the activity occurred primarily in the United Kingdom; the defendants were British corporations and subjects having their principal place of business outside of the United States; and Great Britain had a regulatory scheme that covered the conduct, Justice Scalia felt that it would be "unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable."²⁷⁴

The same can be said of *De Beers*. That is, the title to the diamonds passes in the United Kingdom; the defendants would be South African and Swiss corporations and subjects having their principal place of business outside of the United States; and both South Africa and European Economic Community have a regulatory scheme that covers antitrust conduct.

270. *Hartford Fire*, 113 S. Ct. at 2910.

271. See notes 267-68, *supra*, regarding the existence of antitrust laws in South Africa and the European Economic Community.

272. *Hartford Fire*, 113 S. Ct. at 2919 (Scalia, J., dissenting) (citing *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C.J.) and referencing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401-416 (1987)).

273. *Id.* at 2921 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987)). By citing § 235 of the Restatement, which defines legislative jurisdiction as "the authority of a state to make its law applicable to persons or activities," Justice Scalia also noted that such jurisdiction is "quite a separate matter from 'jurisdiction to adjudicate'" as defined in § 231 of the Restatement. *Id.*

274. *Id.*

If it were not for the 5-4 majority of the *Hartford Fire* Court that limited the role of comity (including international law limitations),²⁷⁵ a suit against De Beers would undoubtedly collapse on this one point. The currently endorsed comity test appears to be simply whether there is a direct conflict of laws.²⁷⁶ With this test in place, comity considerations do not prevent a United States court from exercising jurisdiction against De Beers in an antitrust action primarily because De Beers is not a sovereign state and because its conduct is not dictated by any foreign law or policy.²⁷⁷

5. Naming the Proper Defendant—the Corporate Group Issue²⁷⁸

The obstacles involved in establishing subject matter and in personam jurisdiction, addressing international comity considerations, and proving a violation of the antitrust laws, represent only one aspect of the De Beers problem. Another aspect of the problem exists in that “De Beers” is a corporate group that (1) consists of two parent corporations and at least 36 wholly- or substantially-owned subsidiary corporations; (2) dominates numerous associated companies; (3) controls an incalculable number of intermediary companies; (4) holds countless investment interests in still other companies;²⁷⁹ and (5) engages in the use of pseudonyms.²⁸⁰ Who exactly is the proper defendant? To appreciate the complexities stemming from the organizational structures employed by De Beers, a general survey of the theories of group responsibility that would bear on a comprehensive suit against the group is in order.

For purposes of bringing an antitrust enforcement action, it would appear that the best defendants are the two parents—they hold the reigns of the De Beers empire. The facts would tend to support such an assertion. For instance, the discussion of antitrust violations in Part III(D)(1), *supra*, centered primarily on the conduct of the Central Selling Organization, which is directly controlled by the two parents.²⁸¹ With the complex structure of

275. *Id.* at 2895, 2910-11.

276. *Id.* at 2910-11 (The court refused to address the issue of whether a court should decline to exercise Sherman Act jurisdiction on grounds of international comity. They concluded the discussion by stating that “[w]e have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity”) (emphasis added).

277. Comity considerations may, however, affect the relief a court could grant, e.g. comity considerations will not allow relief to conflict with foreign law. *Steele*, 344 U.S. at 289. Where no such conflict exists, however, “the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside the territorial jurisdiction.” *Id.* at 289.

278. See generally BORN & WESTIN, *supra* note 39, at 104-18; PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL LAW* (1983).

279. See Part II(A)(1), *supra*, for a discussion on the corporate structure of De Beers.

280. EPSTEIN, *supra* note 43, at 202.

281. See Parts II(A)(1) and III(D)(1), *supra*, for a discussion of the De Beers’ parents role in managing the CSO.

the group however, such an assertion may not be effectively sustained. De Beers regularly uses “straw man” tactics in the form of multiple layers of intermediary companies involved in its various worldwide transactions in order to protect the parents from jurisdiction and liability.²⁸² Likewise, any order against any one De Beers unit, whether a parent or not, would be completely ineffective unless the order affected each possible subsidiary and intermediary that De Beers could erect to circumvent the order.

The problem is complicated further by the distinction of jurisdiction and liability. As one commentator expressed it, the conclusion “that a foreign parent is subject to U.S. *jurisdiction* because of its U.S. subsidiary’s activities does not necessarily mean that the foreign company will be liable *on the merits* because of its subsidiary’s liability. Corporate veil-piercing standards for jurisdiction and liability often differ significantly, and jurisdiction can exist where liability does not.”²⁸³ While the theories are generally similar, the problem is nevertheless doubled by the requirement to do a different “group analysis” for both procedural (jurisdiction) and substantive law (liability) purposes.

At least three theories can be used to find the parent and subsidiary responsible for the actions of each (and thus subject to jurisdiction and liable for the actions of each): (1) the “alter ego” / “piercing the corporate veil” / “instrumentality” doctrine; (2) the agency relationship doctrine; and (3) the enterprise law doctrine.²⁸⁴

a. Theory One—Alter Ego

Procedural

The first theory is whether the subsidiary having contacts with the United States is merely the “alter ego” of the parent.²⁸⁵ In the landmark U.S. Supreme Court case, *Cannon Manufacturing Co. v. Cudahy Packing Co.*, Justice Brandeis set the traditional standard as being whether the parent and subsidiary maintain separate and distinct corporate entities.²⁸⁶ In that case, the Court found that “[t]he corporate separation, though perhaps formal, was real. It was not pure fiction.”²⁸⁷ While the case continues to be followed,²⁸⁸ some courts follow a less rigorous standard:

282. See EPSTEIN, *supra* note 43, at 202 (claiming that De Beers normally conducts all of its American business outside of the United States, using upwards of 300 different corporate pseudonyms and a series of “unrelated” distributors).

283. BORN & WESTIN, *supra* note 39, at 104-05.

284. See BORN & WESTIN, *supra* note 39, at 105, 112. See generally BLUMBERG, *supra* note 278.

285. BORN & WESTIN, *supra* note 39, at 105.

286. 267 U.S. 333, 335 (1925) (Brandeis, J.).

287. *Id.*

288. See, e.g. Hargrave v. Fireboard Corp., 710 F.2d 1154 (5th Cir. 1983).

Lower courts have considered a variety of factors in determining whether a subsidiary is the alter ego of its parent. Although generalization is difficult, recurring issues include: (1) Are the same individuals officers and directors of both corporations; (2) are separate tax returns, bank accounts, corporate records, and minutes of corporate meetings maintained; (3) how extensively and intensively does the parent control the subsidiary's day-to-day operations; (4) how have the two corporations previously described their relationship; and (5) how do the two corporations account and pay for goods and services rendered to one another? A number of courts have detailed lengthy lists of factors that bear on alter ego decisions.²⁸⁹

Substantive

Blumberg contends that "imposition of liability involves a more stringent test than the assertion of jurisdiction."²⁹⁰ Discussing what he calls the "instrumentality" rule as restated in *Lowendahl v. Baltimore & Ohio Railroad*,²⁹¹ he points out that the party seeking to disregard the subsidiary corporate entity must establish:

- (1) That the parent controls and dominates the subsidiary to such a degree that the subsidiary is a mere "instrumentality" of its parent;
- (2) That through its domination and control of the subsidiary, the parent is perpetrating a fraud or working an injustice;
- (3) That these elements result in an unjust loss or injury to the complainant.²⁹²

Blumberg goes on to list a checklist of 14 factors that the courts have looked at when deciding whether these conditions have been met.²⁹³

Analysis

The primary problem with the alter ego doctrine in an analysis of the De Beers group is the lack of information. Without knowing complex organizational arrangements within the group, it is impossible to analyze even the less rigorous standard of the jurisdictional application let alone the substantive requirements. Also, the alter ego doctrine assumes a parent-subsidiary relationship; by definition it could not reach "unaffiliated" intermediaries that are truly not owned by the De Beers group. Finally, there is a built-in assumption that the subsidiary can be the alter ego of the parent, but not

289. BORN & WESTIN, *supra* note 39, at 110 (citing as examples *Miles v. American Tel. & Tel. Co.*, 703 F.2d 193 (5th Cir. 1983) and *Fish v. East*, 114 F.2d 777 (10th Cir. 1940)).

290. BLUMBERG, *supra* note 278, § 3.07 at 75.

291. 247 A.D. 144, 287 N.Y.S. 62, *aff'd* 272 N.Y. 360, 6 N.E.2d 56 (1936).

292. BLUMBERG, *supra* note 278, § 1.02.1 at 14.

293. *Id.* at 16-17.

vice-versa. Therefore, the acts of the subsidiaries could not be used to bind the parents of De Beers.

b. Theory Two—Agency Relationship

Procedural

The second possible basis of multiple jurisdiction across the group exists in the agency relationship doctrine. Under this doctrine, “a foreign corporation may be subjected to the general jurisdiction of the forum if the corporation has systematically and continuously conducted business within the forum through the agency of another party, including a subsidiary or an entirely unaffiliated party.”²⁹⁴ The benefits of this approach are that (1) it allows jurisdiction to attach to De Beers based on the acts of its “unaffiliated” wholesalers and retailers in the United States,²⁹⁵ and (2) under traditional agency law, any corporation (parent or subsidiary) may act as an agent for another corporation.²⁹⁶

At least two tests can be used under the agency doctrine. One test used to determine whether an agency relationship exists such that jurisdictional can be asserted measures the phrase “systematically and continuously conducted business.” One example of such a test is whether the purported agent does all of the business which the defendant would otherwise have to do. For instance, as stated by the Second Circuit in *Gelfand v. Tanner Motor Tours*, such an agency relationship exists when the defendant’s agent “provides services beyond ‘mere solicitation’ and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services.”²⁹⁷

Another example of the “systematically and continuously conducted business” test is whether the foreign defendant uses the agent to further its business in the forum. The D.C. Circuit essentially applied this type of test in *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distr. Pty.*²⁹⁸ The court found that the business conducted by a New York importer / distributor could be used as the basis for jurisdiction against a foreign defendant,

294. BORN & WESTIN, *supra* note 39, at 112.

295. *See, e.g.,* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 423 (9th Cir. 1977) (“Although it has not always been designated as such in the cases, there is much authority for such a “general agency” theory of “presence,” and it is clear that whether the alleged general agent was a subsidiary of the principal or independently owned is irrelevant.”); Great American Ins. Co. v. Katani Shipping Co., S.A., 429 F.2d 612, 614 (9th Cir. 1970) (jurisdiction against foreign corporation with no resident officers, directors, employees, or property in California sustained based on acts of its resident agent).

296. BLUMBERG, *supra* note 278, § 1.02.2 at 21.

297. 385 F.2d 116, 121 (2d Cir. 1967) (citing *Frummer v. Hilton Hotels International, Inc.*, 227 N.E.2d 851, 853 (N.Y. 1967)).

298. 647 F.2d 200 (D.C. Cir. 1981) (en banc).

because the defendant used the importer to develop and serve a market in the United States.²⁹⁹ The court noted that the arrangements to develop and serve the market made the district court a “fair and reasonable” forum.³⁰⁰

A second test used to determine whether an agency relationship exists for jurisdictional purposes is based on traditional common law agency principals. As expressed in *Wells Fargo & Co. v. Wells Fargo Express Co.*:

While the mere existence of a parent-subsidiary relationship has been held in itself to constitute insufficient evidence of control so as to subject the parent to service for the acts of the subsidiary under the agency rationale, if a common law agency is found to exist, the parent may properly be served.³⁰¹

Distinguishing the type of test used in *Gelfand* (a “general agency” test), the court noted that this is a separate and distinct test (a “special agency” test).³⁰² The court explained that the general agency test used in *Gelfand* requires that “substantial activities” be carried on for the benefit of the principal,³⁰³ i.e. not “mere solicitation.”³⁰⁴ Under the special agency test, however, the plaintiff need only show the existence of an agency relationship for the purpose of transacting business or committing the torts complained of.³⁰⁵ If such a showing is made, the activities of the agent would be imputed to the foreign principal, thereby providing jurisdiction “for actions arising from those activities.”³⁰⁶

Substantive

The test used to determine whether an agency relationship exists for substantive law liability purposes is likewise based on traditional common law principles. As stated by Blumberg, “[t]he traditional concept of agency refers to a special legal relationship between separate legal persons as a result of which the acts of one are attributable to the other with attendant legal consequences.”³⁰⁷ The explanation of the *Wells Fargo* court applies in the context of liability as well as jurisdiction, i.e. on a showing of the existence of an agency relationship for the purpose of transacting business or

299. *Id.* at 203.

300. *Id.*

301. *Wells Fargo*, 556 F.2d at 420.

302. *Id.* at 422.

303. *Id.* at 422-23.

304. *Id.* at 423 (citing *Gelfand*, 385 F.2d at 121).

305. *Id.* at 422.

306. *Id.*

307. BLUMBERG, *supra* note 278, § 1.02.2 at 21.

committing the torts complained of, the activities of the agent would be imputed to the foreign principal for liability purposes.³⁰⁸

As a general proposition, agency relationships exist when the principal manifests to the agent that the agent may act on his account, and the agent consents to so act.³⁰⁹ A contract between the principal and the agent is not required; manifestations can be expressed in such forms as "written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account."³¹⁰ The manifestations of consent can also be created by acquiescence and silence.³¹¹

Analysis

A recent De Beers advertisement in *The Smithsonian* illustrates one way that the agency doctrine can be used to uphold jurisdiction against De Beers.³¹² That advertisement, which contained the De Beers name, extended an invitation to consumers to call a telephone number to receive literature on diamonds and the name of the nearest diamond retailer. The telephone number is connected to Lieber and Solow, a wholesaler of diamonds located in New York.

Using the *Gelfand* general agency test, jurisdiction may be sustained because the defendant's agent (Lieber and Solow) "provides services . . . and these services are sufficiently important to the foreign corporation (De Beers) that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."³¹³ The question is whether the services provided by Lieber and Solow go "beyond 'mere solicitation'."³¹⁴ In *Gelfand*, the defendant's use of an agent to book reservations did go beyond mere solicitations.³¹⁵

Using the logic of the *Kaiser Stuhl* approach, successful use of the general agency test against De Beers becomes more probable. In *Kaiser Stuhl*, Judge Ginsburg stated that "[t]he Australian defendants thus have arranged for introduction of wine into the United States stream of commerce with the expectation (or at least the intention and hope) that their products will be shelved and sold at numerous local outlets in diverse parts of the country," and later that the defendants "thus have chosen a course of conduct that renders sales of their wine here not merely foreseeable, but affirmatively

308. *Wells Fargo*, 556 F.2d at 422.

309. RESTATEMENT (SECOND) AGENCY § 15 (1984).

310. *Id.* § 26. See also *id.* § 15, cmt. a.

311. *Id.* § 43. See also *id.* § 26, cmt. d; § 15, cmt. a.

312. See *supra* note 251 regarding use of this fact to support minimum contacts with the United States.

313. *Gelfand*, 385 F.2d at 121.

314. *Id.*

315. *Id.*

welcomed. Unquestionably, they have a stake in, and expect to derive benefits from, a market for their goods in the District.”³¹⁶

The same can be said for De Beers. The purpose of the advertising and referral service is to build customer interest, thereby allowing the introduction of De Beers diamonds into the United States stream of commerce with the expectation that the diamonds will be sold. By deciding to make an arrangement with a New York diamond wholesaler to facilitate this plan, De Beers chose a “course of conduct that renders sales of their [diamonds] here not merely foreseeable, but affirmatively welcomed. Unquestionably, they have a stake in, and expect to derive benefits from, a market for their goods” in the United States.

This logic may also be useful under the *Wells Fargo* special agency test, i.e. an agency for the purpose of transacting business in the form of diamond sales was created. The activities of the agent could therefore be imputed to the principal De Beers, providing jurisdiction “for actions arising from those activities”—the restraint of trade. The issue with the special agency test is whether restraints of trade actually *arise from* the activities carried on by the agent.

While there is a strong temptation to conclude that De Beers’ subsidiaries and unaffiliated intermediaries (such as Lieber and Solow) do the work that De Beers would otherwise have to do (*Gelfand*), develop and serve the diamond market in the United States on behalf of De Beers (*Kaiser Stuhl*), and engage in the agency relationship for the purpose of transacting business from which restraint of trade results (*Wells Fargo*), the caveat expressed by Judge Learned Hand in *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.* cannot be forgotten: A subsidiary can become the agent of the parent only “when both intend that relation to arise, for agency is consensual.”³¹⁷ This final requirement based on traditional common law agency principals becomes crucial. Did a truly consensual principal-agency relationship exist? With the Lieber and Solow example, perhaps. Because of the high cost of advertising and the fact that Lieber answers the phone number published by De Beers, at a minimum a manifestation of consent to a principal-agent relationship can be inferred by the conduct of the parties.³¹⁸ This conclusion may not flow so easily from other business relationships, where the connection to De Beers may be more difficult to establish.

316. *Kaiser Stuhl*, 647 F.2d at 203, 205 (Ginsburg, J.).

317. 31 F.2d 265, 267 (2d Cir. 1929) (L. Hand, J.). See also RESTATEMENT (SECOND) AGENCY § 15 (1984) (“An agency relation exists *only* if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act. (emphasis added)).

318. See RESTATEMENT (SECOND) AGENCY §§ 15, 26 (1984).

c. Theory Three—Enterprise Law

A problem remains with the second theory: Who contracted with Lieber and Solow for the advertising and referral service? If it was not a De Beers parent, jurisdiction and liability could only be sustained against the subsidiary that made the contract.³¹⁹ A third theory may provide a way to hold the parent liable as well.

This theory, perhaps the best approach to obtaining both jurisdiction and reciprocal liability over the entire group, is the Enterprise Law doctrine—a development “in areas as diverse as torts, antitrust, jurisdiction, and venue.”³²⁰ As expressed by Phillip Blumberg in *The Law of Corporate Groups*, “[t]raditionally, the law has viewed each corporation as a separate legal entity, with separate rights and obligations. For legal purposes, a bright line of distinction was drawn between the corporation and its shareholders.”³²¹ He goes on to advocate “enterprise law” as an alternative to the previous two approaches, stating that this doctrine “looks at the corporate group as a unit rather than at the various entities to which the fragmented operations of the group have been allocated by the parent for the convenience of the group as a whole.”³²² His argument is forceful:

The solution to the procedural question should rest on the underlying policies and purposes of the procedural statute or rule, on the one hand, and the economic realities of the enterprise, on the other. That the enterprise may have been divided into various corporate constituents for its own convenience should have little significance if the policies of the procedural statute or rule are better served by its application to the various components of an integrated enterprise as a group.³²³

In the substantive context of liability the U.S. Supreme Court adopted enterprise law in the area of antitrust in the case *Copperweld Corp. v. Independence Tube Corp.*, noting that:

[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousness, but one. They are not unlike a multiple team of horses drawing a vehicle under control of a single driver. With or without a formal “agreement,” the subsidiary acts for the benefit of the parent, its sole shareholder. . . . a parent and a wholly owned subsidiary always have

319. Unless, of course, a second agency analysis provided a way to hold the parent liable for the acts of the subsidiary-agent that did the contracting.

320. BLUMBERG, *supra* note 278, § 1.03 at 24.

321. *Id.* § 1.01.1 at 1 (1983).

322. *Id.* § 1.03 at 24.

323. *Id.* § 1.03 at 24-25. See also PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* (1993).

a “unity of purpose or a common design.” They share a common purpose whether or not the parent keeps a tight reign over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interests.³²⁴

Analysis

Now that the doctrine of enterprise law is established, it could prove useful in reigning in the De Beers group. It should be noted, however, that *Copperweld* held that the defendant and its wholly owned subsidiary “are incapable of conspiring with each other for purposes of section 1 of the Sherman Act”—thus *excluding* antitrust liability.³²⁵ While this holding eliminates the possibility of finding antitrust violations *between* the De Beers parents and subsidiaries, it does *not* extend to violations *by* the De Beers group in its interactions with non-affiliated parties. Also, the adoption of enterprise law could conceivably work in the “other direction” as well, i.e. to hold each wholly owned subsidiary responsible for an antitrust violation by the parent. (Note, however, that the logic behind the theory as expressed in *Copperweld* does not support holding the De Beers subsidiaries liable for the acts of the parents).

It is interesting to note that the DOJ presented the enterprise law theory in DEBEERS I almost fifty years ago.³²⁶ They asserted that (1) De Beers owned 80% of the shares of defendant Diamond Corporation; (2) defendant Diamond Trading Company was wholly owned jointly by De Beers and Diamond Corporation; (3) Sir Ernest Oppenheimer was the Chairman of the Board of all three; and (4) the members of the Board of Directors was identical across the three companies.³²⁷ The court stated: “Apparently, it is the Government’s position that for the purpose of ascertaining if the defendants are ‘doing business’ in this district it is to be inferred that the act of any one of them, is the act of all, because of their close relationship.”³²⁸ The court avoided the argument, asserting that it was not important in deciding whether to grant the motion to dismiss the case.³²⁹ In the future, however, perhaps such factual findings could support the use of modern enterprise law theory against De Beers.

324. 467 U.S. 752, 771-72 (1984).

325. *Id.* at 777.

326. *See* 1948-1949 Trade Cas. (CCH), ¶ 62,248.

327. *Id.*

328. *Id.*

329. *Id.*

IV. SOLUTIONS AND IMPEDIMENTS TO THE
DIAMOND MONOPOLY PROBLEM³³⁰

The most obvious solution to the De Beers problem is enforcement of the existing antitrust laws. Enforcement is only one of the many possible solutions to the De Beers problem, however. At least seven potential solutions to the problem exist, ranging in difficulty and complexity:

1. Bring An Enforcement Action Against De Beers
2. Prosecute Resellers in the United States
3. Eliminate the Misleading Advertising
4. Strengthen Existing Antitrust Laws
5. Impose Import Duties on South African Diamonds
6. Assist in Establishing Another Diamonds Supplier
7. Ban De Beers Diamonds from the United States

This Comment will discuss each of these potential solutions, and will examine possible impediments and alternatives to those solutions.

OPTION 1

Bring An Enforcement Action Against De Beers

The most straight-forward solution is to lodge an antitrust action against De Beers and its myriad of subsidiaries and associated companies. As noted in Part III(D)(1), *supra*, case law supports the proposition that De Beers has violated those laws and *can* be held accountable for its conduct in a United States court if either (1) the existence of the De Beers “rules” can be proven, or (2) the existence of horizontal agreements to maintain prices can be proven.

Impediment 1: The first problem with this approach is that the United States is dealing with a large cash-rich organization—a syndicate that has been labelled “omniscient and omnipotent.”³³¹ It is difficult to control a secret organization³³² with a network of informants³³³ and its own police force—the De Beers’ International Diamond Security Organization.³³⁴

330. See also HAWK, *supra* note 27 (discusses need to more stringently enforce antitrust statutes internationally).

331. SCHUMACH, *supra* note 43, at 78. The De Beers / Anglo American group have a combined market capitalization of \$21 billion. Peter Fuhrman, *Harry Oppenheimer, African Empire Builder, Is Smiling Again*, FORBES, Sept. 16, 1991, at 130. See also KANFER, *supra* note 43, at 372 (“riches of the Oppenheimer empire” exceed \$21 billion).

332. EPSTEIN, *supra* note 43, at 93.

333. *Id.* at 60-65.

334. SCHUMACH, *supra* note 43, at 118.

Likewise, it is hard to envision any effective remedy other than to impose a tremendous fine. It would be onerous, however, to collect any such fine because De Beers does not hold a considerable amount of assets in the United States that could be attached.³³⁵

Impediment 2: Enforcement efforts by the DOJ may be sabotaged from within the Executive branch. First, United States foreign trade policy may indicate that the United States Government is unwilling to interfere with imports of desirable commodities, as evidenced by the fact that the United States was reluctant to impose sanctions against South Africa for its apartheid practices because of the importance of diamonds.³³⁶ Second, it has been suggested that De Beers is a major contributor to the American political parties and would be able to exert considerable political pressure.³³⁷ Third, some Executive branch agencies interfere with antitrust enforcement. For instance, when the DOJ opened a grand jury investigation of a similar cartel (dealing with Uranium), its efforts were hampered by the actions of the State Department, who sought to have the investigation terminated.³³⁸ Similarly, when Westinghouse brought a private antitrust action against the Uranium cartel, the State Department influenced several governments to appear as amici on the question of jurisdiction.³³⁹ Fourth, the South African government may also be able to exert diplomatic pressure on the State Department to aide De Beers—one of few South African companies in a position to rebuild the weak South African economy.³⁴⁰

335. See EPSTEIN, *supra* note 43, at 93.

336. E.g., *President Chides News Media for Role in Regan Controversy*, L.A. TIMES, July 19, 1986, at 1-13 (White House Chief of Staff Regan suggested the United States would do nothing to sanction South Africa because of the importance of diamonds).

337. EPSTEIN, *supra* note 43, at 207 (“On August 4, 1974, the Justice Department received information that the ‘De Beers organization is a large contributor to both political parties and should this investigation get to a stage where cases are actually filed [the antitrust division] would probably receive much political pressure.’”).

338. See Wayne D. Collins, *The Coming of Age of EC Competition Policy*, 17 YALE J. INT’L L. 249 (1992) (reviewing SIR LEON BRITTON, *COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET* (1991)).

339. See *id.*; In re Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980) (the DOJ prevailed in District Court through a default judgment. The court stated: “[S]hockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction.” *Id.* at 1256. The Seventh Circuit nevertheless affirmed the exercise of jurisdiction and the default judgment. *Id.* at 1258). See also FUGATE, *supra* note 39, § 2.16, at 111.

340. The De Beers / Anglo American, *supra* note 62, group employs some 250,000 people in South Africa, and is considered “the most important private sector group in South Africa.” Howard Preece, *Anglo American Corporation*, FORBES, May 25, 1992, at SA13. The group also accounts for nearly 10% of the Gross National Product of South Africa. Peter Fuhrman, *Harry Oppenheimer, African Empire Builder, Is Smiling Again*, FORBES, Sept. 16, 1991, at 130. Oppenheimer (former chairman of De Beers), “is convinced that Anglo American [and De Beers] can play the key role in lifting Africa out of the quicksand of poverty, charity and bureaucratism.” *Id.* The argument of De Beers chairman Julian Ogilvie Thompson is forceful: “What the South African economy most critically needs is major encouragement of the private sector, including those companies which are large enough and efficient enough to meet

Impediment 3: Proof. Evidence is required both to assess De Beers contacts with the United States, and to establish that it engages in anticompetitive conduct. While many arguments were made in this Comment that De Beers does have national contacts with the United States, a particular court may nevertheless require evidence of actual assets, offices, or agents.³⁴¹ Also, verification of the De Beers “rules” or agreements to horizontally restrain trade would undoubtedly be a problem. To obtain evidence, the FBI would have to seek affidavits and statements by diamond wholesalers and retailers in the United States, perhaps based in part on the *Diamond Dealers Club* consent decree discussed in Part III(D)(1)(a), *supra*. It would nevertheless undoubtedly be faced with the problem of secrecy.³⁴²

Alternative Strategy: The “admissions” doctrine in the Federal Rules of Evidence may provide an easier solution to establishing a violation of the antitrust laws, considering the exposition of De Beers conduct and policies contained in its annual report.³⁴³ If the policies outlined in that statement can be connected to the United States market, proof may not be as difficult as it seems. Further proof that De Beers has “minimum contacts” with the United States, imports diamonds into the United States, and has a substantial impact in the United States market, apart from its own admissions, may also be found in U.S. Customs import records. Formal entry is required for all commercial goods with a value in excess of \$1250.³⁴⁴ Believing it is

international competition head on.” Howard Preece, *Anglo American Corporation*, FORBES, May 25, 1992, at SA13. *But see infra* note 395 regarding the desire of the African National Congress to break up the conglomerate.

341. In DEBEERS III, the DOJ is considering using a private-detective firm to aid in collecting such evidence. See Richard B. Schmitt, *U.S. Antitrust Effort May Use Private-Detective Firm*, WALL ST. J., May 6, 1994, at B5 (“Some lawyers speculate that [private detective firm] Kroll may have information about assets that De Beers owns in the U.S., which could provide a legal basis for a court’s asserting jurisdiction over the company.”)

342. EPSTEIN, *supra* note 43, at 93.

343. See DE BEERS REPORT, *supra* note 54, at 1 and 12. Also, De Beers admits that it “markets around 80 per cent of the world’s diamond production,” and that the retail sale of diamonds was strongest in the United States. DE BEERS REPORT, *supra* note 54, at 4 and 12. Admissions may be made offered against a party-opponent if the statement is “the party’s own statement, in either an individual or a representative capacity.” Fed. R. Evid. 801(d)(2)(A) (1993). The statements made in the annual report were arguably made in a representative capacity. If not, it can be argued that De Beers adopted a belief in the truth of the statements by publishing them, thus falling under Fed. R. Evid. 801(d)(2)(B). The statements can also be used as admissions against all related De Beers firms, because the statement was made “by a coconspirator of a party [the parent] during the course and in furtherance of the conspiracy.” Fed. R. Evid. 801(d)(2)(E). The firms within De Beers are coventurers in a conspiracy to restrain trade. Pendency is satisfied because the conspiracy is still in existence. Finally, the statements furthered the conspiracy by enticing investors to purchase the stock of the parents; the capital generated by the stock sales was necessary to continue to conspiracy.

344. Importers make a formal entry by using U.S. Customs Form 3461, U.S. Customs Form 7501 (entry summary), and a commercial invoice. 19 C.F.R. § 142.3 (1993), 19 U.S.C. 1484 (1993). See generally DEPARTMENT OF THE TREASURY, IMPORTING INTO THE UNITED STATES (1991).

shielded by transferring title to the diamonds in London,³⁴⁵ there is nothing to suggest that De Beers hides its name when doing so.³⁴⁶ Also, most import information is currently available electronically in the U.S. Customs Automated Commercial System.³⁴⁷ This system may be useful for U.S. Customs to conduct an analysis of sources of diamond imports into the United States.³⁴⁸

OPTION 2

Prosecute Resellers in the United States

The second solution is to bring an antitrust action against those who implement De Beers' anticompetitive strategies in the United States—the resellers.

United States nationals and residents currently purchase De Beers diamonds in London for sale in the United States, the fact of which could possibly be established through the import records.³⁴⁹ While not under a formal distribution contract with De Beers,³⁵⁰ these resellers could nevertheless be viewed as engaging in anticompetitive behavior in violation of the Sherman Act by either conforming to the De Beers "rules" or acting as De Beers de facto agents. As noted by the DOJ, "the form of agreement is not

345. Because De Beers distributed the diamonds in London and title transferred outside of the United States, the judge ruled in *DEBEERS I* that De Beers was not "doing business" in the United States and could not be held accountable under Sherman Act. 1948-1949 Trade Cas. (CCH), ¶ 62,248; EPSTEIN, *supra* note 43, at 93, 199-200. There is also a practical reason De Beers does so: Customs regulations state that, "A nonresident corporation (i.e., one which is not incorporated within the Customs territory of the United States or in the Virgin Islands of the United States) shall not enter merchandise for consumption unless it: (a) Has a resident agent in the State where the port of entry is located who is authorized to accept service of process against such corporation." 19 C.F.R. § 141.18 (1993).

346. There may be another solution: The commercial invoice required under 19 C.F.R. § 142.3(a)(3) must describe the merchandise, the approximate value of the merchandise, and the "name and complete address of the foreign individual or firm who is responsible for invoicing the merchandise, ordinarily the manufacturer/seller, but where the manufacturer is not the seller, the party who sold the merchandise for export to the U.S., or made the merchandise available for sale." 19 C.F.R. § 142.6 (a)(1), (2), and (5) (1993). To eliminate the possibility of distancing De Beers from the diamonds exported to the U.S., Congress could require a listing of the chain of title to all precious gems.

347. "The Automated Commercial System (ACS) is the comprehensive tracking, controlling and processing system of the U.S. Customs Service" and has been in existence since 1984. U.S. CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY, OVERVIEW—AUTOMATED COMMERCIAL SYSTEM 1. It also allows importers limited access to the system to electronically file entries through the Automated Broker Interface (ABI). *See id.*; 19 C.F.R. § 143.0, et. seq. (1993).

348. 19 U.S.C. § 1411, approved December 20, 1993, directed the Secretary of the Treasury to establish the National Customs Automation Program (NCAP), an upgrade to the current ACS. 19 U.S.C. § 1411 (Supp. 1994). The NCAP is an "automated and electronic system for processing commercial importations" which will provide the ability to select certain entries and provide summaries. *Id.*

349. *See supra* note 344 regarding U.S. Customs entry requirements.

350. According to Koskoff, the lack of a distribution contract was a problem in *DEBEERS II*. KOSKOFF, *supra* note 43, at 325.

controlling; an informal undertaking embodied in a single conversation may be just as punishable as the same undertaking contained in a complete contract.”³⁵¹

Impediment 1: If De Beers is a major contributor to American political parties, there is also the possibility of political pressure from both Congress and from within the executive branch.³⁵² This apparently was not a problem, however, in the *Diamond Dealers Club* case.

Impediment 2: The problem of proof also exists with the resellers. While it may not be difficult to prove the connection between the resellers and De Beers through the use of U.S. Customs import records, the FBI would nevertheless most likely be confronted with secrecy.³⁵³ Perhaps information could be obtained through the *Diamond Dealers Club* consent decree discussed in Part III(D)(1)(a), *supra*. The FTC may also be able to circumvent this barrier with its wide reaching statutory access to business information under the Federal Trade Commission Act.³⁵⁴

OPTION 3

Eliminate the Misleading Advertising

The advertising of diamonds in the United States is exceptionally important in furthering the aims of the diamond cartel. Indeed, it is one of the primary means by which De Beers controls the diamond industry.³⁵⁵

In section 5(a)(1) of the Federal Trade Commission Act, Congress legislated that “[u]nfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce, are declared illegal.”³⁵⁶ The legal standard which the FTC must meet to establish that an advertisement is deceptive is not rigorous. It need only

351. DEPARTMENT OF JUSTICE, ANTI-TRUST GUIDE FOR INTERNATIONAL OPERATIONS 5 (1977). See also *Interstate Circuit*, 306 U.S. at 226-27 (“it was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it”).

352. See note 337, *supra*, regarding the political clout of De Beers in the United States.

353. See EPSTEIN, *supra* note 43, at 93.

354. 15 U.S.C. §§ 46(a) and 46(h) (Supp. 1993).

355. See e.g., DE BEERS REPORT, *supra* note 54, at 10-11. See also EPSTEIN, *supra* note 43, at 9-13; Patricia McLaughlin, *Marketing is Forever*, PHILADELPHIA INQUIRER, June 9, 1985, at 35.

356. 15 U.S.C. § 45(a)(1) (Supp. 1993).

show a "capacity to deceive" in the advertisement.³⁵⁷ The fact that an expert would not be deceived by the advertisement is irrelevant.³⁵⁸

De Beers advertises heavily.³⁵⁹ The advertisements certainly have a capacity to deceive: De Beers suggests that diamonds are rare and highly valuable (and therefore good investments), and that a person must spend several months' salary to show affection properly.³⁶⁰ In its annual report, however, De Beers destroys this notion by claiming that price fluctuations must be curtailed via price stabilization mechanisms in order to avoid "destroy[ing] public confidence in the value of gem diamonds."³⁶¹ The reality not expressed in the advertising is that diamonds are plentiful (but highly controlled to further the illusion that they are rare) and have little actual value.³⁶² Furthermore, the idea that diamonds are the ultimate gift of love that requires spending a certain amount is an unfounded notion established solely by De Beers' advertising.³⁶³ The FTC should stop these practices by issuing a cease and desist order³⁶⁴ or by imposing a fine.³⁶⁵

Alternative Strategy: At a minimum Congress could require disclosures to consumers that the resale value diamonds is highly subjective and that the consumer may realize only a fraction of the purchase price if the diamonds are ever resold. Congress already has taken it upon itself to require disclosures relating to other products, most notably cigarettes.³⁶⁶ Taking such action with respect to diamond advertising would at least begin the process of breaking down the monumental myths surrounding diamonds that have been created by De Beers.³⁶⁷

357. *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944) (upheld FTC cease and desist order to stop using the word "rejuvenescence" on skin cream).

358. *FTC v. Standard Education Soc.*, 302 U.S. 112, 116 (1937) (upheld FTC order on advertising encyclopedia prices); *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1933) (upheld finding that name of a type of wood was misleading).

359. See EPSTEIN, *supra* note 43, at 9-13.

360. See Patricia McLaughlin, *Marketing is Forever*, PHILADELPHIA INQUIRER, June 9, 1985, at 35.

361. DE BEERS REPORT, *supra* note 54, at 10, 12.

362. *Jewelry Industry Sees Big Turnaround in Sales*, L.A. TIMES, Feb. 21, 1994, at D4 ("De Beers has successfully perpetrated the illusion of the diamond as a rare and valuable stone. In reality, diamonds are plentiful but tightly distributed."); *Is It a Crack Or a Scratch? De Beers*, ECONOMIST, Sept. 12, 1992, at 76 ("[D]iamonds are plentiful and would be cheap but for the global cartel operated by De Beers.") See also EPSTEIN, *supra* note 43, at 237.

363. DE BEERS REPORT, *supra* note 54, at 10. See also Patricia McLaughlin, *Marketing is Forever*, PHILADELPHIA INQUIRER, June 9, 1985, at 35.

364. 15 U.S.C. § 45(b) (Supp. 1993).

365. 15 U.S.C. § 45(l) (Supp. 1993).

366. See 15 U.S.C. § 1331 (Supp. 1993) (establishes a Federal program to deal with cigarette labelling and advertising by requiring warnings on the hazards of cigarette smoke).

367. See KOSKOFF, *supra* note 43, at 273, 275; EPSTEIN, *supra* note 43, at 9-13, 128, 133. See also DE BEERS REPORT, *supra* note 54, at 10-11.

Impediments: Again, there is the possibility of political pressure within Congress and towards the FTC by both Congress and the executive branch.³⁶⁸ Additionally, if the FTC decided to handle the problem with trade rule regulations (in that the diamond market is an industry), problems would undoubtedly arise during the mandatory notice and hearing process.³⁶⁹

OPTION 4

Strengthen Existing Antitrust Laws

Congress is not blind to the De Beers problem. As noted in the BNA *Antitrust & Trade Regulation Report*:

Among a variety of proposals to be considered shortly on Capital Hill involving possible trade sanctions against South Africa, subcommittees of the House Foreign Affairs Committee are contemplating insertion of an antitrust provision in the proposed legislation. . . . One element of the package would state, as the sense of Congress, that the President should direct the Justice Department to conduct an investigation, under federal antitrust law, of the South African-controlled international diamond cartel. House sources maintained that South Africa's De Beers controls 80% to 85% of the rough diamond market in gemstones and has acted to limit diamond trade to maintain high prices.³⁷⁰

There is a more direct way that Congress could alleviate the problem—by strengthening existing antitrust laws. The idea of modifying antitrust laws is not new. Since the time the Sherman Act was first enacted, various additional antitrust statutes have been enacted to delineate unacceptable antitrust behavior.³⁷¹ Some have been enacted to deal specifically with the international aspects of antitrust, such as the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).³⁷² Unfortunately, this particular statute is limited by its own terms in that it does not apply to foreign imports into the United States, but rather exports from the United States.³⁷³

368. See note 337, *supra*, regarding the political clout of De Beers in the United States.

369. 15 U.S.C. § 57b-3 (Supp. 1993).

370. *House Panels Would Urge Probe of Diamond Cartel*, *Antitrust & Trade Reg. Rep.* (BNA), No. 1359 (Mar. 31, 1988).

371. *E.g.*, the Clayton Act of 1914 (prohibited acquisitions of companies that would lessen trade), the Federal Trade Commission Act of 1914 (directed FTC to oversee competitive behavior), the Robinson-Patman Act of 1936 (outlawed price discrimination), the Celler-Kefauver Act of 1950 (prohibited acquisitions of company assets that would lessen trade), and the Hart-Scott-Rodino Act of 1976 (DOJ and FTC must be informed of prospective mergers that could affect antitrust).

372. *E.g.*, Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6 (1982).

373. Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6 (1982). See also HAWK, *supra* note 27.

Statutes such as the FTAIA further illustrate that Congress is aware that antitrust problems exist with international trade. Congress should consider similar legislation that would clarify existing case law such as *Hartford Fire* to avoid any possible negative interpretations of the extraterritorial reach of the antitrust statutes as applied to foreign concerns. For example, it could state that the Sherman Act specifically applies to those foreign concerns who knowingly import goods into the United States, even if the entity violating the Act uses complex resale arrangements in order to be several levels removed from the actual importers so as to avoid subject matter jurisdiction. This would also solve the international law comity issue raised by Justice Scalia in his dissent *Hartford Fire*; he indicated that an assertion of legislative jurisdiction by the United States would be considered reasonable by the courts if Congress made a statutory indication of the assertion.³⁷⁴ Similarly, Congress could state a clear policy on corporate parent responsibility in the antitrust arena, i.e. that the use of “straw man” tactics and complex corporate structures are no defense to a Sherman Act claim if the seller knowingly sells the goods with the intent that the goods be resold in the United States.

OPTION 5

Impose Import Duties on South African Diamonds

One would think that the imposition of high import duties on South African diamonds would make the transaction costs too high for De Beers to continue doing business in the United States market. De Beers would be forced to either pull out of the market altogether or increase the price of its diamonds beyond that which consumers would be willing to pay.

Impediment: The United States once tried to impose duties on imported diamonds. The costs of the enforcement effort exceeded the benefit of the revenue-raising scheme, and in reality was ineffective:

Once upon a time diamond smuggling into the United States was undertaken principally to save duties and excise taxes totaling 20 percent on polished and 10 percent on rough. In those days the professional diamond smugglers constituted a great industry, a well-ordered system of transportation operating something like United Parcel, and with the same reliability and regularity—and integrity. Only an infinitesimal percentage of the smuggled goods were detected, and the smuggling rings would make good any losses. Customs couldn't compete.³⁷⁵

374. *Hartford Fire*, 113 S. Ct. at 2918-19 (Scalia, J., dissenting) (“[t]he question of this case is whether, and to what extent, Congress has exercised that undoubted legislative jurisdiction in enacting the Sherman Act. . . . Through it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe”).

375. KOSKOFF, *supra* note 43, at 265.

The United States could do little more than abolish duties on diamonds in January of 1981.³⁷⁶

While the United States could impose such a duty on only South African diamonds, it would be extremely difficult to segregate South African diamonds from other diamonds. It could possibly be accomplished under agreements with certain suppliers, such as Russia and Canada, if those suppliers were not affiliated with the CSO, and if mechanisms were established to prevent their diamonds from being commingled with CSO diamonds.

OPTION 6

Assist in Establishing Another Diamonds Supplier

Another way to protect the American public is to assist in the establishment of another major diamond producer, thereby increasing competition. While De Beers controls the exports of most of the world's diamond producing countries,³⁷⁷ the United States may find a solution in Russia. The threat from Russia, one of the world's largest diamond countries, disturbs De Beers.³⁷⁸

On July 25, 1990, the now defunct central government of the Soviet Union signed a controversial contract granting De Beers exclusive distributor rights for the entire diamond supply of Russia.³⁷⁹ Being in need of hard currency,³⁸⁰ the Soviet Union entered a five-year, \$5 billion contract with De Beers.³⁸¹ The state of Russia, however, which had declared its independence on June 12, apparently would like to repudiate the contract and declare it void so as to market the diamonds itself.³⁸²

376. *Id.* at 265-66. There is currently no duty on diamonds. See UNITED STATES INTERNATIONAL TRADE COMMISSION, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES 71-73 (1994). (The Harmonized Tariff Schedule of the United States is not published in the U.S. Code, but is maintained by the International Trade Commission. See 19 U.S.C. § 1202 (Supp. 1993)).

377. KOSKOFF, *supra* note 43, at 71.

378. KOSKOFF, *supra* note 43, at 71. See also Steven Mufson, *The Rocks And a Hard Place—De Beers Worried Over Russian Gems*, WASH. POST, Jan. 15, 1992, at F1.

379. See *Soviet Loan Stands—De Beers*, L.A. TIMES, Aug. 13, 1990, at P3; *Russia Challenges Soviet Government on Diamond Exports*, BOSTON GLOBE, Aug. 12, 1990, at 69.

380. EPSTEIN, *supra* note 43, at 18.

381. *Russia Challenges Soviet Government on Diamond Exports*, BOSTON GLOBE, Aug. 12, 1990, at 69; Leslie Shepherd, *Russian Republic Says Soviet Contracts Invalid*, PHILADELPHIA INQUIRER, Aug. 12, 1990, at A4.

382. See *Soviet Loan Stands—De Beers*, L.A. TIMES, Aug. 13, 1990, at P3. *Russia Challenges Soviet Government on Diamond Exports*, BOSTON GLOBE, Aug. 12, 1990, at 69. See also *Is It a Crack Or a Scratch? De Beers*, ECONOMIST, Sept. 12, 1992, at 76 ("Rumours of a huge stockpile of diamonds in Russia persist . . . Starved of cash, Russia may succumb to the temptation to sell some of its hoard.") At a minimum, the Russian government would like to increase the contract price. Vladimir Kvint, *Sorry, Mr. Oppenheimer*, FORBES, Feb. 15, 1993, at 42 ("If the Russians are playing rough with De Beers, it's because they badly need foreign

The United States should consider encouraging Russia to repudiate the contract made by the Soviets as (1) contrary to a capitalist system which the Russian government has been implementing,³⁸³ and (2) void as an illegal contract that Russia is under no obligation to honor.³⁸⁴ The United States could also offer Russia special incentives to break the contract, such as providing them with special opportunities to market their diamonds directly in the United States. Besides being in our best interests to bolster the languishing Russian capitalist system and strengthen diplomatic relations,³⁸⁵ such an alliance would also solve the effects of the De Beers problem as it impacts the American consumer.

The United States may also find a solution in Canada. It has been reported that Canada is in the process of building the first diamond mine in Canada's arctic, and that it may be one of the world's richest diamond deposits—large enough to challenge De Beers for control of the world diamond market.³⁸⁶ There is concern, however, that the mining companies will sell the diamonds through the De Beers' CSO, which already controls most of the world's producers.³⁸⁷ Solutions involving the Canadian mines could include (1) enticing Canada to prevent any contracting between the Canadian mines and CSO (perhaps via future NAFTA amendments), and (2)

exchange . . . Squeezing more money out of De Beers is one way to get it.") *But see Russia Vows Aid on Gems*, N.Y. TIMES, May 19, 1994, at C19 (reporting that Russia "remained committed" to the five-year contract).

383. See Michael Parks, *Yeltsin's Cabinet OKs Its Boldest Reform Plan*, L.A. TIMES, June 26, 1992, at A1 ("The 3-year program is intended to put Russia firmly on a road to capitalism"); Richard Boudreaux, *2 Years After Coup, Russia is Committed to Capitalism*, L.A. TIMES, Aug. 15, 1993, at A5. Implementing a capitalist economy, Russia would economically harm itself by honoring the anticompetitive contract. The same arguments used to enact the Sherman Act, *supra* notes 8 and 10, apply equally to Russia.

384. Russia had already declared its independence when the Soviet Union made the contract. The Soviet Union was therefore without the sovereign power necessary to make the contract with respect to the state of Russia. Russia is therefore not bound to honor the contract. A second argument that the successor state of Russia is not liable for the contracts of the predecessor state of the Soviet Union may also be viable. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 184 ("States, not their governments, are subjects of international law. So long as the state remains the same, a succession of governments does not affect the state's international legal rights and duties.") and 185-86 ("Generally, except for territorial agreements, successor states, as distinguished from successor governments, are not bound by the international agreements of their predecessors."). The Russian government took over a successor state—Russia—not the old government of the former Soviet Union. There is also the possibility of aiding Russia without violating the contract: "[J]oint ventures are already being set up in Moscow to polish diamonds, which the Russians could sell in the West without violating any agreement with De Beers, whose contracts cover only rough diamonds." *Is It a Crack Or a Scratch? De Beers*, ECONOMIST, Sept. 12, 1992, at 76. See also Vladimir Kvint, *Sorry, Mr. Oppenheimer*, FORBES, Feb. 15, 1993, at 42.

385. See Sergei Khrushchev, *Capitalism and Chaos: Russia's Next Implosion*, WASH. POST, Aug. 16, 1992, at C3; Mona Charen, *Give Capitalism Time To Thrive in Russia*, ST. LOUIS POST DISPATCH, Apr. 13, 1993, at 3B.

386. *Canadian Diamond Mines May Lead to a Challenge of the De Beers System*, CHIC. TRIB., Feb. 14, 1994, at 8.

387. *Id.*

assisting in a "joining of forces" between the Canadian and Russian mining operations.

Impediments: While there is a strong desire to provide aid to Russia,³⁸⁸ political pressure could prevent this from occurring.³⁸⁹ Also, introducing low-price competition too abruptly could cause the collapse of the diamond market and bring about the worthlessness of consumer diamond investments.³⁹⁰ Finally, the countries may find that it is to their economic advantage to mimic De Beers, thereby enjoying the artificially high profits diamonds generate.

Related Solution: Gem-quality diamonds can be synthetically manufactured.³⁹¹ People would be virtually unable to distinguish a synthetic diamond from a mined diamond.³⁹² The machinery and presses for the process, however, are extremely expensive to set up.³⁹³ The United States could consider subsidizing the machinery and processes necessary to synthesize diamonds. The subsidy could be as minor as favorable income tax incentives.

OPTION 7

Ban De Beers Diamonds from the United States

The United States could simply ban the import of De Beers diamonds altogether either through legislative action or through the broad enforcement ability of the International Trade Commission.³⁹⁴

388. See *President is Eager to Send Russia Aid*, ST. LOUIS POST DISPATCH, Sept. 23, 1993, at 6A (encouraging Congress to approve \$2.5 billion); Michael Ross, *1.6 Billion for Russia Backed in Congress*, L.A. TIMES, Apr. 6, 1993, at A1.; Ann Devroy, *Clinton Said to be Considering Boost in Level of Aid to Russia*, WASH. POST, Mar. 30, 1993, at A17 (from \$700 million).

389. See *supra* note 337 regarding the political clout of De Beers in the United States.

390. EPSTEIN, *supra* note 43, at 252-53. See also Patricia McLaughlin, *Marketing is Forever*, PHILADELPHIA INQUIRER, June 9, 1985, at 35.

391. EPSTEIN, *supra* note 43, at 168-70. See KANFER, *supra* note 43, at 272-73 regarding the synthetic manufacture of diamond grit.

392. EPSTEIN, *supra* note 43, at 168-70.

393. *Id.* It is interesting to note that General Electric discovered how to synthetically manufacture gem quality diamonds. *Id.* The recent indictment in DEBEERS III alleges that they conspired with De Beers to manipulate prices of synthetic industrial grade diamonds. See William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1; John Mintz, *GE, De Beers Indicted On Price-Fixing Charges Firms Accused of Bid to Hike Diamond Prices*, WASH. POST, Feb. 18, 1994, at D1. The allegation illustrates the problem that it is easier to join the cartel rather than undercut the market and produce less profit.

394. 19 U.S.C. § 1337(d) (1980) ("If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States.")

Impediments: The problem that existed when duties were imposed on diamonds would most reoccur if the De Beers commodity was completely banned—smuggling. Alternatively, De Beers could establish an intricate network of pseudonym selling organizations overnight in order to avoid the ban. There is also the problem of establishing an adequate alternative supplier not affiliated with De Beers so that the demand for diamonds in the United States could be adequately met. Given the power of De Beers in the industry, this is highly unlikely unless the United States took affirmative steps to establish such a supplier as suggested in the previous solution. As for a ban on *all* imported diamonds, the government may likely find that the American public is not ready to stop buying diamonds, no matter what the cost.

CONCLUSION

In all fairness, apart from the United States antitrust violations, there is much to admire about De Beers. While nations have risen and fallen, De Beers has flourished for over 100 years, enduring through a global depression, two world wars, the decolonization of South Africa, and the imposition of economic sanctions against that country; it is now weathering the trials inherent in eliminating apartheid in South Africa.³⁹⁵ It completely controls a prosperous worldwide industry through arrangements that lock up most of the world's supply of diamonds from mining through retailing.³⁹⁶ It ensures consistent demand for its product through decades of extraordinary advertising and marketing genius.³⁹⁷ It has been able to consistently increase the price of its product over the years without suffering a serious

395. De Beers is now facing a new crisis at home that could threaten its access to South African diamond mines (or even its own existence): "The African National Congress is opposed to the big firms' concentrated economic power." *The Unbundling Begins: South African Conglomerates*, *ECONOMIST*, May 15, 1993, at 84. There is speculation that the ANC will seek the breakup of conglomerates such as De Beers, and eliminate cross-directorships (through which competing companies share directors). *Id.* Foreseeing the inevitable, De Beers (and other South African conglomerates) "have systematically dispersed their operations and capital throughout the world." See Antero Pietila, *The Challenge Ahead in S. Africa: Money*, *NEWSDAY*, May 4, 1994, at A37. See also KANFER, *supra* note 43, at 372. But see Peter Fuhrman, *Harry Oppenheimer, African Empire Builder, Is Smiling Again*, *FORBES*, Sept. 16, 1991, at 130 ("Oppenheimer thinks the answer lies in . . . encouraging the black community to build its stake in the capitalist system. . . . Winning over the opposition by giving them a piece of the action is a technique Oppenheimer has succeeded with before. . . . Oppenheimer thinks the backs can be co-opted to capitalism and to a harmonious multiracial society.") To achieve this end, it has been reported that Anglo, *supra* note 62, is attempting to improve conditions in South Africa by increasing efforts to educate and train blacks, narrowing pay differentials between black and white, promoting blacks to skilled jobs, giving blacks the same housing subsidies whites receive, and offering free shares of the company. *The Oppenheimer Empire: South Africa's Family Affair*, *ECONOMIST*, July 1, 1989, at 59.

396. See KOSKOFF, *supra* note 43, at 126-27; EPSTEIN, *supra* note 43, at 59-65.

397. See KOSKOFF, *supra* note 43, at 273-75; EPSTEIN, *supra* note 43, at 9-13, 128-33. See also DE BEERS REPORT, *supra* note 54, at 10.

setback despite the fact that its resale value is low.³⁹⁸ As for the antitrust violations, the fact that De Beers has successfully employed complex organizational arrangements to avoid United States antitrust laws for as long as it has is a testimonial to the exceptional organizational management and legal talent employed by the De Beers group.³⁹⁹

There is still the problem of the antitrust violations, however. If De Beers wishes to sell its diamonds in the United States forum, it should be bound by the laws and obligations that everyone else engaging in that forum must respect. Whether the antitrust laws are right or wrong, they do exist and De Beers—no matter how powerful or admirable—should not be allowed to avoid them where others cannot.

Should the United States “trust” De Beers to be fair in its application of its monopolistic business practices? Consider the statement of Mr. H.F. Oppenheimer, the former Chairman of De Beers:

Whether this measure of control amounts to a monopoly I would not know, but if it does, it is certainly a monopoly of a most unusual kind. There is no one concerned with diamonds, whether as producer, dealer, cutter, jeweller or customer, who does not benefit from it. It protects not only the shareholders of diamond companies, but also the miners they employ and the communities that are dependant on their operations ... We are very conscious of our responsibilities not only to our shareholders, not only to the industry as a whole and to the consuming public, but also to the governments of the countries in which we operate.⁴⁰⁰

It is difficult to see how the American people benefit from monopolization and price-fixing.⁴⁰¹ The consumer cannot benefit when De Beers establishes exorbitant prices for a commodity that has little actual value. The consumer cannot benefit when De Beers admittedly maintains those artificial prices through price stabilization schemes.⁴⁰² It is difficult to see how De Beers is conscious of its responsibility to the consuming public when it takes a insignificant product once unknown to the general populace, and then convinces those people through massive advertising campaigns that the product is the ultimate way of expressing love.⁴⁰³ It is also difficult to see how De Beers is conscious of its responsibility to the governments of the

398. See KOSKOFF, *supra* note 43, at 130; SCHUMACH, *supra* note 43, at 191-211 (1981); EPSTEIN, *supra* note 43, at 12.

399. See EPSTEIN, *supra* note 43, at 202.

400. DE BEERS REPORT, *supra* note 54, at 12 (statement of H.F. Oppenheimer).

401. The DOJ apparently agrees. DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 36 (1988) (“[T]hese Guidelines make plain the Department’s commitment to prosecute naked restraints of trade, such as horizontal price fixing, bid rigging, and market allocation, which by their nature have no plausible connection to achieving significant integrative efficiencies that benefit U.S. consumers and that almost certainly reduce output and/or raise prices to the detriment of U.S. consumers” (emphasis added)).

402. DE BEERS REPORT, *supra* note 54, at 12.

403. *Id.* at 10.

countries in which it operates when it violates the laws of its largest market, the United States.⁴⁰⁴

Given the recent indictment, the De Beers response would undoubtedly be “We don’t do business in the U.S.”—somehow inferring that the American public are not its consumers.⁴⁰⁵ The American people deserve better than open monopolization amongst such preposterous obfuscation. It is manifestly unjust to allow a large portion of the American public to be taken advantage of by foreign organizations while, at the same time, touting the importance of enforcing the antitrust laws.⁴⁰⁶ Instead of trusting De Beers to ensure that the public benefits from monopolization, it is time for the United States Government to ensure that the public benefits from NO monopolization, whether “unusual” or otherwise. It is also time to show American businesses that they are not the only ones who have to abide by the spirit and letter of the antitrust laws.

The courts appear ready to do their part to correct the injustices by applying American antitrust laws evenly to those international businesses that wish to partake of the benefits of the American market. With DEBEERS III, the Justice Department also appears ready to send the signal that it will enforce its antitrust laws no matter how large and powerful the foreign concern is.⁴⁰⁷ Taking action against De Beers beyond the limited focus of an industrial diamond indictment is the next logical step.

Difficult issues remain for which there are no simple solutions. Those issues must, however, be solved. As the global economy widens, the United States will become more dependent on international trade for its economic growth and survival. It remains to be seen, however, whether the Legislative and Executive branches are willing to risk jeopardizing that trade by imposing the same strict antitrust standards on foreign producers as they do on domestic businesses. One thing is for certain—how the United States handles its affairs with foreign nations will become more crucial as the level

404. See EPSTEIN, *supra* note 43, at 57; SCHUMACH, *supra* note 43, at 104.

405. William M. Carley, *Price-Fixing Charges Put GE and DeBeers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994 at A1.

406. See DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 1 (1988) (“The U.S. antitrust laws are the legal embodiment of our nation’s commitment to a free market economy. The competitive process, unimpeded by privately and governmentally imposed barriers, ensures the most efficient allocation of resources and the maximization of consumer welfare.” This language suggests that the antitrust laws underpin our capitalist society).

407. Commenting on the recent indictment of De Beers, Anne Bingaman, current Assistant Attorney General in charge of the Antitrust Division, stated that “[t]he Antitrust Division will not tolerate anticompetitive acts by two firms who dominate their worldwide markets, or sophisticated schemes that are used to fix prices and to disguise criminal activity. The Division will actively pursue such international cartels.” 6 Trade Reg. Rep. (CCH), ¶ 45,094. See Cindy Skrzycki, *The Regulators: Reversing Reagan Policy—At Justice, Anne Bingaman Beefs Up the Trustbusters*, WASH. POST, Apr. 19, 1994, at C01. See also DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 78-79 (1988). The DOJ published hypothetical case discussions to illustrate how and when it would apply antitrust law. Case 14, International Cartel Activities, is revealing in that unusually parallels many De Beers activities.

of its involvement in international trade increases. Can the United States allow the American people to be harmed as a by-product of that trade?

Dale J. Montpelier *

* B.S. 1986, *magna cum laude*, Syracuse University; M.B.A. 1992, San Diego State University; J.D. candidate 1994, California Western School of Law. My appreciation to the Law Review and library staffs for their efforts; the many professors who have answered countless questions; Professors John Morris, John Noyes and Gloria Sandrino for reading the manuscript and providing their insights; and, especially to Katherine Young for her continual encouragement and assistance.