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COMMENTS

SHERMAN GETS JUDICIAL AUTHORITY TO GO GLOBAL: EXTRATERRITORIAL JURISDICTIONAL REACH OF U.S. ANTITRUST LAWS ARE EXPANDED

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INTRODUCTION

Recently, a number of Japanese manufacturers conspired[1] to artificially raise the price of facsimile paper sold in the United States.[2] The manufacturers accomplished this conspiracy[3] by selling the paper to their distributors contingent upon a restriction that the distributors charge an exaggerated price for the paper.[4] The manufacturers committed these acts under the assumption that they were beyond the jurisdictional reach of United States antitrust laws[5] because they conducted all of their illegal acts in Japan.[6]

Companies operating within the United States are subject to strict antitrust laws prohibiting the type of actions these Japanese

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1. John Gibeaut, *Sherman Goes Abroad: Landmark Decision OKs International Antitrust Prosecution*, A.B.A. J., July 1997, at 42. Two of the Japanese companies charged with the conspiracy pleaded guilty. *Id.*

2. United States v. Nippon Paper Indus., 109 F.3d 1, 2 (1st Cir. 1997).

3. Antitrust laws prohibit price fixing whether the actor intended the result to raise, depress, fix, or stabilize the price of the good being manipulated. LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 4:11, at 4-21 (3d ed. 1996).

4. *Nippon Paper*, 109 F.3d at 2. The distributors consisted of independent firms also located in Japan with subsidiaries in the United States where the manufacturers ultimately accomplished the price fix. *Id.*

5. The pertinent antitrust laws include the Sherman Act and the Clayton Act. Sherman Act §§ 1-7, 15 U.S.C. §§ 1-7 (1994); Clayton Act §§ 1-16, 15 U.S.C. §§ 12, 13, 14-19, 20, 21, 22-27 (1994).

6. *See* United States v. Nippon Paper Indus., 944 F. Supp. 55, 62 (D. Mass. 1996) (noting that the manufacturers committed the criminal conduct completely in Japan).

firms undertook.[7] Congress intended these antitrust laws restrict unfair competition.[8] However, American antitrust laws would actually enable the very conduct Congress intended to prohibit if these manufacturers were correct in assuming that they were immune from American laws simply because they conducted their illegal activities abroad. If courts had accepted this interpretation, foreign firms would have an unfair advantage over domestic firms. American antitrust laws would act to constrain domestic firms' business practices while allowing foreign firms to avoid these constraints by conducting their business arrangements abroad.

Fortunately, these Japanese manufacturers were mistaken in their belief that they were beyond the reach of United States' antitrust laws. It has been over fifty years since the Second Circuit[9] determined that United States antitrust laws can, in certain circumstances, apply to wholly extraterritorial[10] conduct.[11] Although the circumstances set forth above describe the first "criminal" antitrust prosecution based on wholly extraterritorial conduct;[12] the handling of criminal prosecutions should be the same as that of "civil" antitrust prosecutions.[13]

This Comment will discuss why courts should give criminal antitrust prosecutions the same extraterritorial reach as that historically given civil antitrust cases. Part I discusses the history of antitrust laws with regard to the role of civil and criminal

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7. *See generally* Sherman Act § 1 (stating that conspiracies in restraint of trade are illegal).

8. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1296 (3d Cir. 1979) (concluding that Congress enacted the United States antitrust laws to protect the free flow of competition); *see also U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations*, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, at S-3 (Nov. 17, 1988) [hereinafter *Antitrust Enforcement*] (explaining that "[t]he U.S. antitrust laws are the legal embodiment of our nation's commitment to a free market economy").

9. The Supreme Court certified the Second Circuit Court of Appeals to sit as a court of last resort. United States v. Aluminum Co. of Am., 148 F.2d 416, 421 (2d Cir. 1945). *See generally* 15 U.S.C. § 29 (1994) (granting authority for the Supreme Court to certify a Circuit Court to sit as a court of last resort where there is no quorum or in the event of disqualification).

10. Extraterritorial conduct refers to conduct committed "beyond the physical and juridical boundaries of a particular state or county." BLACK'S LAW DICTIONARY 588 (6th ed. 1990).

11. *See Aluminum Co. of Am.*, 148 F.2d at 444 (applying United States antitrust laws where the violator intends his conduct to affect, and where the conduct actually does affect, the United States).

12. *Nippon Paper*, 109 F.3d at 2. In *Nippon Paper*, the court concluded that a criminal prosecution based on wholly extraterritorial conduct is "uncharted terrain" without direct authority. *Id.* at 4.

13. *Id.* at 9. The court also explained that the Sherman Act applies to wholly extraterritorial conduct in both civil and criminal cases where there is intent to affect the United States and there is an actual affect in the United States. *Id.*

antitrust actions and sets out the evolution of the extraterritorial reach provided civil antitrust actions. Part II describes the parallelism that exists between civil and criminal antitrust actions and discusses the different protections provided to defendants in criminal actions versus civil actions. Part III proposes that case precedent warrants criminal enforcement of the Sherman Act against wholly extraterritorial conduct and urges steps that the government should take to make such enforcement possible.

I. THE UNITED STATES ANTITRUST LAWS AND THEIR JURISDICTIONAL SCOPE

Congress designed antitrust laws, whether applied to activities committed domestically or abroad, to protect the public's welfare.[14] Antitrust laws do this by mandating the most productive use of, and allocation of, resources.[15] These antitrust laws accomplish this by protecting free access to America's markets and encouraging competition.[16] Section A discusses the enforcement of the relevant antitrust laws. Section B narrates how it became settled law that United States antitrust laws apply to foreign conduct that is meant to produce, and does in fact produce, an effect in the United States.[17]

A. Elements of the Relevant Laws

Sections 1 and 2 of the Sherman Act[18] provide the foundation for both civil and criminal actions alleging antitrust activity.[19] Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies that restrain domestic and/or foreign trade.[20] Section 2 of the Sherman Act prohibits monopolization, whether attempted or actual and conspiracies to monopolize domestic and/or foreign trade.[21] Either the United States attorneys,[22] state

14. *Antitrust Enforcement*, *supra* note 8, at S-3.

15. *Id.* at S-5.

16. Department of Justice, *An Antitrust Primer for Federal Prosecutors*, Sept. 1994, *available in* 1994 WL 637072 (F.T.C), at *1 [hereinafter *Antitrust Primer*].

17. *See Aluminum Co. of Am.*, 148 F.2d at 443 (explaining that it is "settled law" that a state can enforce its laws for conduct committed abroad if the conduct produces consequences in that state even though the actor is not a citizen).

18. Sherman Act §§ 1, 2.

19. *Nippon Paper*, 944 F. Supp. at 64.

20. Sherman Act § 1. Section 1 states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

21. Sherman Act § 2. Section 2 states that "[e]very 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 . . . ." *Id.*

attorney generals,[23] or private citizens[24] may bring civil suits under the Sherman Act. Congress has limited criminal enforcement of the Sherman Act to the Department of Justice ("DOJ").[25]

Civil suits brought by either state attorney generals, acting as *parens patriae*,[26] or private citizens may result in an award of treble damages[27] plus the cost of bringing the suit, including reasonable attorney's fees.[28] Criminal prosecution of the Sherman Act can result in a fine up to $10,000,000 for corporations or $350,000 for individuals; imprisonment for up to three years; or, both a fine and imprisonment.[29] Congress has also provided an alternative fine of twice the gross pecuniary gain resulting from a violation of the Sherman Act.[30]

Although Section 1 of the Sherman Act states that any restraint of trade[31] is illegal, courts interpret this language to only apply to "unreasonable" restraints on trade.[32] In determining

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22. Sherman Act § 4. The United States attorneys must bring actions in equity to restrain violations of the Sherman Act. *Id.*

23. Clayton Act § 4c. The Act states in pertinent part:

> Any attorney general in the name of a State may bring a civil action . . . as *parens patriae* on behalf of a natural persons residing in such State . . . to secure monetary relief . . . for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.

Id. (emphasis added).

24. Clayton Act §§ 4, 15. Section 4 provides that, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . ." Clayton Act § 4. Section 15 provides that, "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief. . . against threatened loss or damage by a violation of the antitrust laws . . . ." Clayton Act § 15.

25. *Antitrust Enforcement*, *supra* note 8, at S-3 n.4.

26. *Parens patriae*, among other things, "is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people . . . ." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). It is under this that the state attorneys general have authority to bring antitrust actions on behalf of the citizens of their state. Clayton Act § 15c.

27. Treble damages equal three times the damages sustained as a result of the antitrust violation. Clayton Act § 4; Clayton Act § 4c.

28. Clayton Act § 4; Clayton Act § 4c.

29. Sherman Act §§ 1, 2.

30. *Antitrust Primer*, *supra* note 16, at *2.

31. *See* Sherman Act § 1 (declaring that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal").

32. *See* United States v. All Star Indus., 962 F.2d 465, 468-69 (5th Cir. 1992) (explaining that the Supreme Court has always interpreted the language as prohibiting only unreasonable restraints on trade); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102 (C.D. Cal. 1971) (holding that it is only unreasonable restraints on trade that the laws prohibit). *See also Antitrust Enforcement*, *supra* note 8, at S-6 (explaining that if the courts did not only prohibit unreasonable restraints of trade then the laws would require the courts to consider almost all productive activity illegal

whether a particular action violates Section 1 of the Sherman Act by causing an "unreasonable" restraint on trade, the courts follow two rules.[33] The first rule, termed the per se rule,[34] does not require conclusive evidence of motive or actual effect on United States' trade or commerce.[35] This rule applies to activities that courts have found "so egregiously anticompetitive 'that they are conclusively presumed illegal without further examination . . . .'"[36] Activities consistently considered per se illegal include: price fixing agreements; bid rigging; allocation of customers or territories; and agreements to boycott.[37] Once a court establishes a per se violation of the Sherman Act,[38] a defendant may not offer evidence to rebut

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because it usually involves cooperation between parties).

33. *See* Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988) (noting that the rule of reason ordinarily applies when a court decides whether conduct violates the antitrust laws, but that the per se rule is appropriate where conduct is egregiously anticompetitive); Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 7-8 (1979) (concluding that certain conduct that is clearly anticompetitive is presumed to be illegal under the per se rule and that it does not need to be examined under the typical rule of reason test applied in antitrust cases); *All Star*, 962 F.2d. at 469 (explaining that courts only consider acts as "per se" illegal when they blatantly violate the antitrust laws while the courts analyze all other conduct on a "case-by-case" basis under the rule of reason to determine whether it violates the antitrust laws).

34. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (announcing the term "unlawful per se" to describe the idea that price fixing agreements implicitly violate the Sherman Act).

35. Russ & Segalla, *supra* note 3, § 4:9, at 4-18.

36. *All Star*, 962 F.2d at 469. The court went on to explain that the policy behind the per se rule is to withdraw the courts from the accounting function that is necessary for a determination of whether particularly blatant anticompetitive conduct actually unreasonably restrains commerce in the industry involved. *Id.* at 469 n.7. *See Antitrust Enforcement*, *supra* note 8, at S-6 (explaining that the DOJ considers blatant restraints on trade that lack any redeeming quality as per se illegal without further review).

37. *See Aluminum Co. of Am.*, 148 F.2d at 427 (noting that some conduct is unlawful no matter how beneficial it may be, including territory allotment and price fixing); *All Star*, 962 F.2d at 469 (deciding that agreements to fix prices are among the activities considered as per se illegal); *Antitrust Enforcement*, *supra* note 8, at S-6 (providing price fixing and big rigging as examples of per se illegal conduct); Russ & Segalla, *supra* note 3, § 4:9, at 4-18 (including price fixing, bid rigging, allocation of territory and customers, and agreements to boycott as per se illegal activities); *Antitrust Primer*, *supra* note 16, at *3 (concluding that price fixing, bid rigging, and allocation of territory and customers is per se illegal).

38. The typical per se illegal activities, price fixing, bid rigging, and customer or market allocation are more likely to occur when a particular set of conditions are present. *Antitrust Primer*, *supra* note 16, at *5. The conditions that lead to this type of activity include a small number of sellers, a small number of buyers, lack of substitutes for the goods sold, and situations where the goods are so standardized there is no margin for diversification. *Id.* at *5-6.

the presumption of illegality.[39] The DOJ usually confines criminal prosecution of the Sherman Act to those activities that are per se illegal.[40]

The second rule courts utilize in determining whether conduct places an "unreasonable" restraint on trade is the "rule of reason."[41] The rule of reason applies to activities that courts have not classified as per se illegal.[42] This test permits a court to determine whether a restrictive activity imposes an unreasonable restraint on trade only after the court has weighed all the relevant factors.[43] One relevant factor in determining whether certain activities unreasonably restrain trade is whether those activities would increase market productivity, thereby actually creating a more competitive marketplace.[44] Another factor is whether the benefits such activity may produce actually exceed the risk of harm from the corresponding restraint of trade.[45]

In order to successfully prosecute an action under Section 2 of the Sherman Act, the prosecution or plaintiff must prove three elements: (1) that the defendant had the specific intent to monopolize; (2) that the defendant succeeded in, or there is a dangerous probability that the defendant will succeed in, achieving a monopoly; and (3) that the defendant has monopolistic power in the relevant market.[46] However, some respected legal scholars, including Judge Learned Hand, have claimed that it is "nonsense" to interpret Section 2 of the Sherman Act as requiring any "specific" intent.[47] The purposes of Section 1 and 2 of the Sherman Act is one and the same, the protection of competition in United States' markets.[48]

B. Evolution of Sherman's Jurisdiction

Section 1 of the Sherman Act expressly prohibits "every contract, combination, . . . or conspiracy, in restraint of trade or

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39. *Id.* at *3.

40. *Id.*; *Antitrust Enforcement*, *supra* note 8, at S-6.

41. *All Star*, 962 F.2d at 469.

42. *Id.*

43. *Id.*

44. *Antitrust Enforcement*, *supra* note 8, at S-6. Activities that the courts typically analyze under the rule of reason analysis include joint ventures, vertical distribution arrangements (ex: from parts to manufacturer to the market), and intellectual property licensing arrangements (ex: patents, licenses, etc.). *Id.*

45. *Id.* at S-7.

46. *Id.*; *Antitrust Primer*, *supra* note 16, at *7-8.

47. *Aluminum Co. of Am.*, 148 F.2d at 432. Judge Learned Hand stated that "no monopolist monopolizes unconscious of what he is doing." *Id.*

48. *See id.* at 428 (explaining that the offensive nature of the violations of Section 1 and 2 of the Sherman Act is the restriction of free competition to United States' commerce).

commerce among the several States, or with foreign nations."[49] Section 2 of the Sherman Act prohibits monopolies, attempted monopolies, or conspiracies to monopolize "any part of trade or commerce among the several States, or with foreign nations."[50] This "potentially far-reaching language" raises the loaded question of exactly how far the legislature intended the Sherman Act's jurisdictional reach to extend.[51] By not expressly confining the Sherman Act's reach, Congress implicitly left it up to the courts to decide its scope.[52] The Supreme Court first addressed the issue of the Sherman Act's jurisdiction over actions taken abroad in *American Banana Co. v. United Fruit Co.*[53]

In *American Banana*, the defendant conspired with the Costa Rican Government to drive the plaintiff out of business.[54] The Court stated that the laws of the nation in which the violator committed the act must determine the lawfulness of the act.[55] The Court went on to hold that the Costa Rican government took possession of the plaintiff's land and supplies through the use of its sovereign power and that any interference with that action would be contrary to the notion of the "comity of nations."[56] The Court held that the plaintiffs could not bring civil actions under

49. Sherman Act § 1.

50. Sherman Act § 2.

51. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291 (3d Cir. 1979) (debating whether the Sherman Act applied to activities committed in a foreign country by an American corporation). *See generally* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (explaining the relevance of "legislative jurisdiction" in determining the extraterritorial reach of a statute stemming from Congress' broad power to "regulate Commerce with foreign Nations"). The United States Constitution grants Congress the very broad power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

52. *See Mannington Mills*, 595 F.2d at 1291 (determining that neither the act nor its legislative history gave the courts any guidance as to the jurisdictional reach of the Sherman Act); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 609 (9th Cir. 1976) (noting that the Sherman Act's only limit is the Commerce Clause, which governs all legislation enacted by Congress).

53. 213 U.S. 347 (1909).

54. *Id.* at 355. The Costa Rican army seized the plaintiff's plantation and supplies and forced the stoppage of construction on the plaintiff's railway being built to get his harvest to the American market. *Id.* The defendant, who had a monopoly on the banana market, insisted that this restrictive activity take place. *Id.* at 354-55.

55. *Id.* at 356.

56. *American Banana*, 213 U.S. at 356-57. *See generally* Hilton v. Guyot, 159 U.S. 113, 164 (1895) (defining comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws").

the Sherman Act based on wholly extraterritorial conduct.[57]

Following a slow erosion of the Court's holding in *American Banana*,[58] the Second Circuit in *United States v. Aluminum Co. of America*[59] attacked this historically narrow interpretation.[60] The court afforded extraterritorial reach to the Sherman Act if a violator intended to effect commerce in the United States, provided that the alleged conduct actually had an effect[61] upon commerce.[62] Courts refer to this analysis as the "effects test."[63]

Although the effects test remained the integral factor in the analysis of whether the Sherman Act has extraterritorial reach, the court in *Timberlane Lumber Co. v. Bank of America*[64] expanded the analysis by requiring an inquiry into comity[65] considerations.[66]

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57. *American Banana*, 213 U.S. at 355-56.

58. *See* United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927) (concluding that in the circumstances where courts have found that the Sherman Act has jurisdiction over conspiratorial conduct it is not affected even though the actors were facilitated by legislation of a foreign nation).

59. 148 F.2d 416 (2d Cir. 1945).

60. *See id.* at 443 (holding that the Sherman Act has extraterritorial jurisdiction over conduct that has consequences within the United States).

61. *Cf.* Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (1994) (establishing that with regard to United States' "export" trade, the effect on commerce must be "direct, substantial, and reasonably foreseeable" in order for the Sherman Act to apply to activities involving trade with foreign nations).

62. *Aluminum Co. of Am.*, 148 F.2d at 444. Drawing from the decision of *American Banana*, the court noted that it interpreted Congress' mandate to enforce the antitrust laws as only applying to conduct which effects United States' commerce. *Id.* at 443. *See also American Banana*, 213 U.S. at 357 (determining that statutory language having "universal scope" will be understood to apply only to those subject to the statute's jurisdiction, not to just anyone who authorities have detained and brought before the court). After the court achieves jurisdiction and once the prosecutor/plaintiff proves the intent to affect United States commerce, the burden shifts to the defendant to establish that there was no actual effect on the commerce. *Aluminum Co. of Am.*, 148 F.2d at 445. The basis for this shift in the burden of proof from the plaintiff to the defendant is that the courts assume that any restriction of the factors that determine prices will inevitably have some effect on the price. *Id.*

63. *See Mannington Mills*, 595 F.2d at 1291 (noting that the "effects test" had gained support from the Supreme Court); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 611-12 (9th Cir. 1976) (discussing the "effects test" in respect to comity considerations).

64. 549 F.2d 597 (9th Cir. 1976).

65. It is important to distinguish between the "comity of courts" and "prescriptive comity." *Hartford*, 509 U.S. at 817 (Scalia, J., dissenting). The "comity of courts" refers to a judge's power to deny jurisdiction where there may be a more appropriate court in which to hear the suit; "prescriptive comity" refers to the respect nations afford each other with regard to limiting the extraterritorial reach of their laws where appropriate. *Id.*

66. *Timberlane*, 549 F.2d at 615. The court determined that in order to be complete, the "effects test" must be coupled with a determination of the relevant foreign interests. *Id.* at 611. The court reasoned that anytime there

The court formulated a "tripartite analysis" which a court was to apply when assessing whether it had subject matter jurisdiction[67] to enforce extraterritorial violations of the Sherman Act.[68] This analysis required that a court take into account comity considerations prior to determining whether the court has subject matter jurisdiction.[69]

The court in *Mannington Mills, Inc. v. Congoleum Corp.*,[70] like the court in *Timberlane*,[71] chose to include comity considerations in its analysis of whether a court should exercise extraterritorial jurisdiction.[72] However, unlike the court in *Timberlane*,[73] the court in *Mannington* kept the comity analysis[74] separate from the issue

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is a need to utilize the extraterritorial reach of the Sherman Act, the conduct the parties are litigating will have also affected the trade and commerce of a foreign nation. *Id.* The court went on to explain that there will be times when the domestic interests will not be strong enough to overcome the interests of the foreign nation and in such a case the court should not grant jurisdiction. *Id.* at 609.

67. Subject matter jurisdiction is the "court's power to hear and determine cases of the general class or category to which proceedings in question belong; the power to deal with the general subject involved in the action." BLACK'S LAW DICTIONARY 1425 (6th ed. 1990).

68. *Timberlane*, 549 F.2d at 613. The first factor a court must consider when determining whether it has subject matter jurisdiction over a Sherman Act claim is whether the activity had an intended or actual effect on the commerce of the United States. *Id.* The second factor a court must consider is whether the effect actually harmed the plaintiff in a way in which the courts would recognize a compensable injury. *Id.* Finally, the third factor is whether comity considerations counsel against the application of subject matter jurisdiction. *Id.* Some elements a court must weigh when determining the effect of comity include:

> [t]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principle places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged on conduct within the United States as compared with conduct abroad.

Id. at 614.

69. *Timberlane*, 549 F.2d at 613.

70. 595 F.2d 1287 (3d Cir. 1979).

71. *See supra* notes 66, 68 and accompanying text.

72. *Mannington Mills*, 595 F.2d at 1294.

73. *See supra* note 68 and accompanying text.

74. The factors the court in *Mannington Mills* proposed that courts should consider when determining the effect of comity factors include:

> 1. Degree of conflict with foreign law or policy;
> 2. Nationality of the parties;
> 3. Relative importance of the alleged violation of conduct here compared to that abroad;
> 4. Availability of a remedy and the pendency of litigation there;
> 5. Existence of intent to harm or affect American commerce and its

of whether the court had subject matter jurisdiction.[75] Once the court found that subject matter jurisdiction existed, it then analyzed comity considerations to see if the court should exercise its jurisdiction.[76]

These two divergent views[77] remained in effect until the Supreme Court, in *Hartford Fire Insurance Co. v. California*, addressed the issue of how comity considerations should affect the exercise of jurisdiction.[78] In *Hartford*, the Court found that the foreign defendants[79] conspired to effect, and actually did affect, commerce in the United States.[80] The Court held that the Sherman Act therefore applied and that it was proper to consider comity factors only after determining whether the court had subject matter jurisdiction.[81] Although the *Hartford* court found that the only relevant comity factor was whether "there is in fact a true conflict between domestic and foreign law . . .,"[82] the court failed to discuss whether other comity factors[83] would ever be sufficient enough for any court to decline the exercise of its jurisdiction.[84]

Thus, a court may consider comity in its analysis of whether

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foreseeability;

6. Possible effect upon foreign relations if the court exercised jurisdiction and grants relief;

7. If relief is granted, whether a party will be placed in the position of being forced to perform and act illegal in either country or be under conflicting requirements by both countries;

8. Whether the court can make its order effective;

9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10. Whether a treaty with the affected nations has addressed the issue.

Mannington Mills, 595 F.2d at 1297-98.

75. *Id.* at 1294.

76. *Id.*

77. *See supra* notes 66, 68, 69, 74-76 and accompanying text.

78. 509 U.S. 764 (1993).

79. The defendants the court in *Hartford* spoke of were London based reinsurance companies. *Id.* at 796.

80. *See id.* (discussing that the defendants had effected the United States insurance market).

81. *Id.* at 798 n.24. This decision effectively overruled the analysis of the court in *Timberlane* that required the consideration of comity factors in determining whether the court had subject matter jurisdiction in the first place. *See id.* (adopting the *Mannington* approach of considering comity factors after jurisdiction is established and distinguishing its analysis from that in *Timberlane*).

82. *Hartford*, 509 U.S. at 798.

83. *See supra* notes 68, 74.

84. *See Hartford*, 509 U.S. at 798 (explaining that it is not necessary to discuss the issue of whether comity factors could ever counsel against the exercise of jurisdiction because the factors would not counsel against it under the current circumstances).

it should exercise its jurisdiction.[85] However, comity does not require the abstention from the exercise of extraterritorial jurisdiction merely because a foreign nation could also regulate the actor's conduct.[86] When courts exercise extraterritorial jurisdiction, two defenses frequently arise: the "act of state" doctrine[87] and the doctrine of "sovereign compulsion."[88]

The Supreme Court in *Underhill v. Hernandez*[89] originally articulated the act of state doctrine as the principle that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment of the acts of the government of another, done within its own territory."[90] Before a court will accept the defense of the act of state doctrine, the court must consider the particular characteristics of the anticompetitive activity itself; its effect on the parties involved in the litigation; and the magnitude of the role the foreign nation played.[91] The Supreme Court in *Hartford Fire Insurance Co. v. California*,[92] however, limited the scope of the act of state doctrine when it held that "even where the foreign state has a strong policy to permit or encourage . . . conduct . . . [n]o conflict exists . . . 'where a person subject to regulations by two states can comply with the laws of both.'"[93]

The defense of sovereign compulsion protects actors from

85. *Id.* at 798 n.24; *Mannington Mills*, 595 F.2d at 1296.

86. *Hartford*, 509 U.S. at 799; *Mannington*, 595 F.2d at 1302 (Adams, J., concurring).

87. *See Mannington Mills*, 595 F.2d at 1292 (concluding that the defendant relied heavily on the act of state doctrine as a defense to the claims against him); *Timberlane*, 549 F.2d at 607 (explaining why the court rejected the defendant's assertion of an act of state defense); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 107 (C.D. Cal. 1971) (discussing the defendants motion to dismiss brought on the grounds of the act of state doctrine).

88. *See Mannington Mills*, 595 F.2d at 1293 (discussing the similarity in the defenses of sovereign compulsion and the act of state doctrine); *Timberlane*, 549 F.2d at 606 (determining that the assertion of sovereign compulsion is another recognized defense to the extraterritorial reach of the Sherman Act).

89. 168 U.S. 250 (1897).

90. *Id.* at 252.

91. *Mannington Mills*, 595 F.2d at 1293. *See also Timberlane*, 549 F.2d at 606 (concluding that neither government approval or government involvement alone can sustain the defense of the act of state doctrine). The court also concluded that even if ordinarily the defendant could claim the act of state doctrine as a defense under particular circumstances, the weaker the foreign relation issues are, the less likely a court will be to deny extraterritorial jurisdiction. *Id.* at 607. In addition, the court determined that courts do not consider a court judgment an act of state because it represents private interests that the parties merely litigated before the court and not the public interests of the foreign nation. *Id.* at 607-08.

92. 509 U.S. 764 (1993).

93. *Id.* at 799.

liability where a sovereign compelled their anticompetitive activities.[94] The actor claiming the defense must show that the sovereign "mandated"[95] conduct that was an "integral"[96] part of the anticompetitive activity.[97] This means that the actor cannot assert the defense of sovereign compulsion if he or she could have refused to obey the demands of the sovereign.[98]

II. CIVIL VERSUS CRIMINAL: IS THERE REALLY A DISTINCTION?

Because the Sherman Act does not expressly state the jurisdictional scope Congress intended it to have,[99] courts have determined that Congress relied on its broad power "[t]o regulate Commerce with foreign Nations . . ."[100] when enacting the general language of this Act.[101] Courts are not to give effect to general words, such as those in the Sherman Act;[102] however, without giving regard to the limitations the "Conflict of Laws" theory[103] imposes.[104] In *Aluminum Co. of America*,[105] after considering the

94. *Mannington Mills*, 595 F.2d at 1293; *Timberlane*, 549 F.2d at 606. The sovereign compulsion defense treats the actor's conduct as though the state committed the act itself. *Timberlane*, 549 F.2d at 606.

95. *See Mannington Mills*, 595 F.2d at 1293-94 (holding that the defense requires more than the "mere approval" of the foreign sovereign).

96. *See id.* at 1293 (deciding that the "foreign decree" must have been a "basic and fundamental" aspect of the challenged activity).

97. *Id.*

98. *Id.*

99. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291 (3d Cir. 1979).

100. U.S. CONST. art. I, § 8, cl. 3.

101. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 609 (9th Cir. 1976). *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) (upholding Congress' power to regulate trade with foreign nations by applying the Sherman Act to conduct occurring primarily in Canada); Lauritzen v. Larsen, 345 U.S. 571, 579 n.7 (1953) (determining that courts must give effect to legislation that Congress intended to regulate commerce with foreign nations).

102. The general words referred to include those in section one of the Sherman Act, stating that "[e]very contract . . . is declared to be illegal," and those in section two stating that "[e]very person who shall monopolize . . . shall be deemed guilty of a felony . . . ." Sherman Act §§ 1, 2.

103. When there is an "[i]nconsistency or difference between the laws of different states or countries, arising in the case of persons who have acquired rights, incurred obligations, injuries or damages, or made contracts, within the territory of two or more jurisdictions . . .," the courts must either reconcile the laws, or select between the two, and then the court must decide "the degree of force to be accorded the law of another jurisdiction . . . ." BLACK'S LAW DICTIONARY 299-300 (6th ed. 1990).

104. Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 (5th Cir. 1982); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).

105. 148 F.2d 416 (2d Cir. 1945).

limitations the "Conflict of Laws" placed on Congress, the court found that the Sherman Act's broad language did give extraterritorial jurisdiction to the courts where a violator intended to effect, and did effect, United States' commerce.[106]

Once the courts decide that Congress has addressed the "Conflict of Laws" problem, courts are bound to carry out the legislation.[107] Therefore, in order to protect United States' commerce, courts must give the extraterritorial reach Congress mandated to the United States' antitrust laws.[108] In order to accomplish this, the Sherman Act must be able to reach foreign defendants and wholly extraterritorial anticompetitive conduct.[109]

Until the First Circuit afforded extraterritorial reach to the Sherman Act's jurisdiction in a criminal suit in March of 1997, the courts had only utilized the Sherman Act's extraterritorial reach in civil settings.[110] This Part addresses whether the Sherman Act's extraterritorial jurisdiction should apply in criminal antitrust prosecutions. Section A explains the parallelism between criminal and civil enforcement of the Sherman Act. Section B explains the varying legal protections afforded a defendant in an antitrust suit. Section C explains why criminal suits dealing with foreign defendants and extraterritorial conduct have been lacking in the past.

A. Congressional Plan to Provide and Promote Parallel Remedies

Many statutes that regulate a large area of activity, such as antitrust laws, have incorporated a private cause of action in the legislation creating "private attorneys general"[111] to help deter illegal conduct whenever government assets are ineffectual.[112] United States' antitrust laws utilize both criminal and civil remedies to achieve their objectives.[113] Civil remedies supplement

106. *Id.* at 443.

107. *Lauritzen*, 345 U.S. at 579 n.7.

108. Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680, 687 (S.D.N.Y. 1979); *Antitrust Enforcement*, *supra* note 8, at S-3.

109. *Antitrust Enforcement*, *supra* note 8, at S-3.

110. *See* United States v. Nippon Paper Indus., 109 F.3d 1, 4 (1st Cir. 1997) (determining that whether the Sherman Act had extraterritorial reach in a criminal antitrust prosecution was an unanswered question prior to this case).

111. *See* Chrysler Corp. v. General Motors Corp., 596 F. Supp. 416, 419 (D.D.C. 1984) (discussing how private parties acting as "private attorneys general" can enforce public policy by bringing actions under the United States' antitrust laws).

112. *See* Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 151 (1987) (allowing private parties to act as "private attorneys general" to help enforce the United States' antitrust laws is necessary because the government lacks the resources necessary for effective enforcement).

113. New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 350 (3d Cir. 1964). Sections 1 and 2 of the Sherman Act do not create civil obligations, they articulate activities that, if committed, render the

criminal remedies by providing the government with additional means to combat actions taken in violation of antitrust laws. Specifically, the public, acting as "private attorneys general," may go after anticompetitive behavior, increasing the likelihood of punishment, which then intensifies the deterrent effect of antitrust laws.

1. Congressional Intent to Utilize Private and Public Actions in Antitrust Enforcement

The use of "private attorneys general" to enforce antitrust laws was an essential element in Congress' strategy to eliminate anticompetitive behavior.[114] Congress aspired to provide a framework allowing private suits to enforce antitrust laws so effectively that the majority of public actions would not be imperative.[115] Additionally, Congress hoped that the cumulative effect of both private and public suits would help deter anticompetitive behavior.[116]

2. Promotion of the Use of Civil Actions to Punish Anticompetitive Behavior

Both Congress and the courts have promoted the use of civil suits to punish activity that violates antitrust laws. Congress accomplished its goal of civil suits as a punishment through statutory enactments. The courts have further encouraged the use of civil suits as a punishment by often holding that a defendants' rights to certain common law defenses are waived in such suits.

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actor criminally culpable. *Indusustrial Inv.*, 671 F.2d at 891. *See also* Sherman Act §§ 1, 2 (providing felony punishments for the violation thereof). However, sections 4 and 16 of the Clayton Act provide for civil remedies where a party has violated an antitrust law. *See* Clayton Act §§ 4, 16 (providing treble damages and injunctive relief in civil actions); *see also* California v. American Stores Co., 495 U.S. 271, 284 (1990) (concluding that section 16 of the Clayton Act was partly enacted to help execute the antitrust laws); *New Jersey Wood*, 332 F.2d at 350 (explaining that section 4 of the Clayton Act enables businesses to work with the government in enforcing the antitrust laws and increases the government's arsenal of weapons for its attack on violators by providing more private remedies, thus, saving the government the burden of litigating these suits itself).

114. *See American Stores*, 495 U.S. at 284 (discussing Congress' intent to utilize private actions to protect competition); *Chrysler*, 596 F. Supp. at 418-19 (explaining that private actions are a necessary tool to guarantee the effectiveness of the United States' antitrust laws).

115. *See New Jersey Wood*, 332 F.2d at 350 (expressing Congress' desire for private civil suits to make public actions unnecessary). Congress hoped to save the government time and money by placing part of the weight of enforcement on the general public. *Id.* at 350 n.4.

116. *See id.* at 352 (discussing Congress' desire for a "cumulative remedy" for anticompetitive behavior).

a. Congressional Promotion of Private Civil Actions

Congress included several benefits in its antitrust legislation to encourage private citizens to sue violators of antitrust laws.[117] In its desire to make private suits an essential element in enforcing antitrust laws, the possibility of receiving treble damages is the primary stimulus.[118] The lure of treble damages serves the purpose of enforcing antitrust laws by encouraging private citizens to bring suit.[119]

Treble damage awards, however, have a much broader purpose than just promoting private civil suits. That purpose is to punish those who commit acts declared illegal under the antitrust laws.[120] The treble damage remedy enables the government to use private citizens to "prosecute, sue, and shun criminals."[121]

Treble damages serve a dual purpose.[122] First, they

117. *See American Stores*, 495 U.S. at 284 (holding that if a private citizen brought suit at the same time a government action was pending, the court would toll the statute of limitations so that the plaintiff could wait and use a successful judgment in a government action as prima facie evidence in the private civil suit); Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 266 (1972) (determining that Congress granted actions to private citizens under the antitrust laws regardless of the amount in controversy). The court in *Standard Oil* went on to explain that Congress also made provisions for the receipt of attorneys fees in a successful antitrust action brought by "private attorneys general." *Standard Oil*, 405 U.S. at 266. *See also* Clayton Act § 4 (providing for the recoupment of attorneys fees in successful private civil actions).

118. *See Standard Oil*, 405 U.S. at 262, 275 (Brennan, J., dissenting) (concluding that Congress hoped treble damage awards would encourage private individuals to bring suits on behalf of the general public as "private attorneys general" in order to save the government time and money); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 945 (D.C. Cir. 1984) (concluding that treble damages are the "centerpiece" of Congress' plan to encourage private actions).

119. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969) (determining that the purpose of giving private parties treble damages is in part to encourage the enforcement of antitrust laws). The court then concluded that treble actions serve the public interest by "pry[ing] open to competition a market that has been closed by defendants' illegal restraints." *Id.* (quoting N.Y., N.H. & H.R. Co. v. ICC, 200 U.S. 361, 401 (1906)).

120. *See Industrial Inv.*, 671 F.2d at 891 (concluding that treble damages are meant in part to penalize offenders of the antitrust laws); County of Orange v. Sullivan Highway Prod., Inc., 752 F. Supp. 643, 645 (S.D.N.Y. 1990) (determining that treble damage actions play a penal role in the statutory scheme set up for the enforcement of Antitrust laws).

121. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1347 (1991). The author further explained that statutes creating "private attorneys general" essentially convert the plaintiffs "into bounty hunters . . . paid handsomely, out of the offenders' pockets, to sue those who have . . ." committed the illegal acts. *Id.*

122. Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977); Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573, 583 (3d Cir. 1979).

compensate the victims of anticompetitive conduct.[123] Second, they deter violators by increasing the likelihood of a suit, which may deprive them threefold of "the fruits of their illegality."[124]

b. Judicial Promotion of Private Civil Actions

Congress has not been alone in promoting the use of civil actions to deter anticompetitive activity. The courts, too, have seen the need for private civil actions; and have in certain instances even held that a defendant does not have a right to several common law defenses otherwise available.

First, the court in *Industrial Investment Development Corp. v. Mitsui & Co.*[125] found that the common law doctrine of *forum non conveniens*[126] is not applicable in United States' antitrust suits.[127] The court reasoned that because of the penal nature of the treble action,[128] foreign courts are not an appropriate forum.[129] The defendants in *Mitsui*[130] moved to have the suit dismissed on the ground of *forum non conveniens*.[131] The defendants believed that because all of the activities alleged had taken place in Indonesia, Indonesia would be a more suitable forum.[132] The court stated that a dismissal on the grounds of *forum non conveniens* would inhibit the Sherman Act's extraterritorial reach; therefore, the court found that "antitrust cases cannot be dismissed on the ground that a foreign country is a more convenient forum."[133]

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123. *Illinois Brick*, 431 U.S. at 746; *Mid-West*, 596 F.2d at 583.

124. *Id.*

125. 671 F.2d 876 (5th Cir. 1982).

126. *Forum non conveniens* is a "[t]erm refer[ring] to [the] discretionary power of the court[s] to decline jurisdiction when convenience of parties and ends of justice would be better served if action[s] were brought and tried in another forum." BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

127. *Industrial Inv.*, 671 F.2d at 890.

128. See *supra* notes 120-21 and accompanying text for a discussion of the penal nature of treble actions.

129. *Industrial Inv.*, 671 F.2d at 891. The court explained that it is a "well-established principle of international law that the courts of no country execute the penal laws of another." *Id.* *See also* Clayton Act § 12 (providing that antitrust actions against corporations may be brought in any district in which the corporation conducts business). The court in *Industrial Investment*, further explained that to allow the defendants to claim the defense of *forum non conveniens* would unnecessarily protract the litigation because antitrust actions usually involve corporations that do business nationwide or have offices and subsidiaries all over the world. *Industrial Inv.*, 671 F.2d at 890.

130. The defendants were Mitsui & Co., a Japanese company, its American subsidiary, Mitsui & Co. (USA), and P.T. Telaga Mas Kalimantan Co., an Indonesian company. *Industrial Inv.*, 671 F.2d at 881.

131. *Id.*

132. *Id.* at 891.

133. *Id.* The court explained that the defendants would have been using the doctrine to usurp the constitutionally granted extraterritorial jurisdiction of United States antitrust laws. *Id.*

Second, courts have found that the common law defense of *in pari delicto*[134] is not a recognized defense in antitrust actions.[135] The courts reasoned that the public policy behind the enforcement of the antitrust laws and the "ever present threat" of private actions, acting as a deterrent to anticompetitive behavior, are more important than a defendant's claim that the plaintiff himself has broken the antitrust laws.[136] This takes into account the theory that the plaintiff is not suing simply for his own injuries, but also as a public representative through his capacity as a "private attorney general."[137]

Third, courts have rejected the "pass-on" defense that the defendant's acts did not actually injure the plaintiff because the plaintiff passed on his economic injury to his customers.[138] Courts

134. *In pari delicto* means "equal fault; equally culpable or criminal; in a case of equal fault or guilt." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

135. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968) (finding that *in pari delicto* is not a defense to antitrust claims); Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 278 (9th Cir. 1976) (holding that the courts do not recognize the common law defense of *in pari delicto* as a defense in antitrust actions); Chrysler Corp. v. General Motors Corp., 596 F. Supp. 416, 418 (D.D.C. 1984) (holding that because private antitrust suits "serve important public purposes the courts do not recognize the common law defense of *in pari delicto* in antitrust cases").

136. *See Perma Life*, 392 U.S. at 139 (determining that "the antitrust laws are best served by insuring that the private action will be an ever-present threat" even if the plaintiff is somewhat guilty himself because of the "overriding public policy in favor of competition"); *Chrysler*, 596 F. Supp. at 419 (finding that a defendant's "claim that the plaintiff has himself violated the law himself cannot be allowed to "overshadow plaintiff's cause of action and the potential vindication of the public interest"). Limited circumstances exist where the defense of *in pari delicto* may bar a plaintiff from recovering. *Javelin*, 546 F.2d at 279. Those limited circumstances are when the plaintiff himself helped form the conspiracy and the plaintiff is of at least equal fault with the defendant. *Id.* In these circumstances, the burden of proof to show that the defense of *in pari delicto* is applicable shifts to the defendant. *Id.*

137. *Javelin*, 546 F.2d at 280.

138. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977) (accepting that defendants may not use the "pass-on theory" as a defense in an antitrust action); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (denying the defendant the opportunity to introduce evidence that the plaintiff passed-on his injury to indirect purchasers). One reason for the rejection of the pass-on defense is that the defense would unnecessarily complicate the treble action. *Hanover*, 392 U.S. at 492. The acceptance of the pass-on defense would require the courts to trace the effects of the overcharge to the indirect purchasers. *Id.* at 493. The defendant may still assert the pass-on defense, however, when there is a fixed quantity, cost plus contract, between a direct purchaser and his clients because the contract itself would show who absorbed the cost of the artificially inflated price without forcing the court to trace the transaction from beginning to end. Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573, 577 (3d Cir. 1979). This type of contract guarantees that the indirect purchaser actually absorbs the whole overcharge. *Id.* A second reason for not allowing the pass-on defense is to insure that the courts punish antitrust violators for their conduct. *Hanover*,

have rejected the pass-on defense because by allowing a direct purchaser, who may or may not pass-on an overcharge to his customers, to sue the antitrust violators ensures the full recovery of the overcharge instead of only allowing recovery in smaller increments by the customers.[139] The derivative effect of not allowing the pass-on defense is that this policy also bars the indirect purchaser from recovering damages from the original antitrust violator.[140] However, because the private civil suit is such an important element in the enforcement of the antitrust laws, courts continue to allow indirect purchasers to bring actions requesting injunctive relief under section 16 of the Clayton Act.[141]

B. Protections Provided by Public Actions Versus Private Actions

By granting extraterritorial jurisdiction to the Sherman Act, courts have gained a wide range of powers over those individuals who violate antitrust laws. However, numerous limits exist on the courts' powers in these areas.

1. Comity Factors

Before a court exercises jurisdiction over a foreign defendant or foreign conduct, the court must consider the impact such a decision will have on foreign nations.[142] One reason a court

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394 U.S. at 494. The direct purchaser has the highest incentive to sue because he carries the full burden of the original overcharge. *Id.* If the direct purchaser does pass-on the overcharge to the indirect purchasers, it only affects the indirect purchasers by a small percentage of the full overcharge, therefore, they have less incentive to sue. *Id.*

139. *Illinois Brick*, 431 U.S. at 735.

140. *Id.* at 747. The same reasoning applies here as it does to the use of the pass-on defense. The courts want to ensure effective enforcement of the antitrust laws, so they concentrate on recovery through the direct purchasers. *Id.* at 735. Direct purchasers initially absorb the complete impact of the artificial prices while indirect purchasers absorb only a portion of the overcharge. *Id.* at 736. Therefore, direct purchasers are more likely to sue than indirect purchasers are because they have a greater incentive to sue; they will receive a higher damage reward if the suit is successful. *Id.* The courts cannot allow both indirect and direct purchasers to sue because it would result in "duplicative recoveries." *Id.* at 730.

141. *Mid-West*, 596 F.2d at 594. The private individual's right to bring an action for injunctive relief does not affect the courts main concern in *Hanover* that the pass-on defense would cripple the enforcement of the antitrust laws. *Id.* at 592. The use of injunctive relief does not deny the direct purchaser of his right to sue for treble damages, nor does it subject the violator to multiple liability. *Id.*

142. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993) (finding that the only comity factor that would keep the court from exercising its jurisdiction in this case was a "true conflict between the applicable domestic and foreign laws"); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979) (holding that the court's analysis of whether to exercise jurisdiction should include comity factors); Timberlane Lumber Co. v.

considers comity factors when deciding whether to exercise jurisdiction is the danger of violating our Nation's system of separation of powers by imposing upon the executive branch's authority to manage foreign affairs.[143] Whenever a public antitrust action is filed, the executive branch first determines whether United States' interests with regard to anticompetitive conduct outweighs those of foreign nations.[144] As to private antitrust suits, however, the executive branch does not have this same opportunity to determine whether the impact on foreign relations outweighs the benefits sought by a private party.[145] Therefore, the risk that a judicial decision may disturb United States' foreign policy is greater when litigating a private antitrust suit than when litigating a public one.[146]

2. *Constitutional Protections*

Defendants violating antitrust laws may face either civil or criminal prosecutions.[147] It is only criminal antitrust prosecutions,

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Bank of Am., 549 F.2d 597, 606 (9th Cir. 1976) (considering the interference an exercise of jurisdiction may have on the foreign affairs of the relevant nations); *see also supra* notes 68, 74 and accompanying text.

143. *Mannington Mills*, 595 F.2d at 1292.

144. *Antitrust Enforcement*, *supra* note 8, at S-22 n.167. The DOJ's view is that the Judicial branch should not dismiss any government action on the basis of comity because the DOJ, and therefore the executive branch, will have already considered those factors before any suit is filed. *Id.* When balancing the United States' interests with those of a foreign nation, the DOJ considers many factors, including:

> (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
> (2) the nationality of the persons involved in or affected by the conduct;
> (3) the presence or absence of a purpose to affect United States consumers or competitors;
> (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
> (5) the existence of reasonable expectations that would be furthered or defeated by the action; and
> (6) the degree of conflict with foreign law or articulated foreign economic policies.

Id. at S-22 to S-23 n.170.

145. *Timberlane*, 549 F.2d at 613.

146. *See Antitrust Enforcement*, *supra* note 8, at S-22 n.167 (describing private antitrust actions as risky in that a finding of liability may disturb a foreign nation's political objectives and impinge upon the executive department's role in foreign affairs). The courts have even suggested that courts should bar private antitrust suits with extraterritorial affect due to the risk they pose to foreign affairs. *Timberlane*, 549 F.2d at 613 n.28.

147. Sections 1 and 2 of the Sherman Act make it a felony to "make any contract or engage in any combination or conspiracy hereby declared illegal . . . [or to] monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . ." respectively. Sherman Act §§ 1, 2. Section 4 of the Sherman Act and sections 4, 4c, and 15 of the Clayton Act provide for civil remedies based on violations of the Sherman Act. Sherman

however, that entitle a defendant to several important constitutional protections.[148] The most important of these protections are: the right to a trial by jury; the right to counsel; and Due Process requirements of the presumption of innocence and proof beyond a reasonable doubt.[149] Importantly, antitrust laws enable citizens to bring civil suits that ultimately punish the defendant for the same conduct the government can pursue criminally, without providing the defendant with key constitutional protections the defendant would otherwise be entitled to.[150]

C. The Absence of Extraterritorial Criminal Antitrust Actions

Given that courts have held that United States' antitrust laws have extraterritorial jurisdictional reach,[151] a natural

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Act § 4; Clayton Act §§ 4, 4c, 15.

148. The following are Constitutional Amendments granting certain protections to United States citizens:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

149. *See* U.S. CONST. amend. V (demanding due process of law in "any criminal case"); U.S. CONST. amend. VI (granting the right to trial by jury and counsel in "all criminal prosecutions"). Courts have determined that the due process requirement that the prosecutor must prove guilt beyond a reasonable doubt applies only to criminal cases. United States v. Regan, 232 U.S. 37, 47-48 (1914).

150. *See supra* notes 120-21, 148 and accompanying text.

151. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 610 (9th Cir. 1976); United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945).

question is why the United States has waited until the mid-1990's to bring a criminal antitrust prosecution based on wholly extraterritorial conduct.[152] Several factors have impeded the DOJ's ability to effectively enforce its role in bringing criminal suits involving extraterritorial conduct. Part one will discuss those factors while part two will discuss what is being done to overcome those barriers.

1. Barriers to Criminal Enforcement of Conduct with Extraterritorial Repercussions

At the end of 1994, the DOJ had thirty percent fewer attorneys than in 1980; approximating the number of attorneys the DOJ had in 1972.[153] The DOJ reduced the number of attorneys it employed at the same time the economy was booming.[154] Today, with fewer attorneys, the DOJ has fewer resources to pursue criminal prosecutions; and with an increasingly global economy, the DOJ faces a tremendous amount of pressure.[155]

In addition to lacking resources to effectively pursue extraterritorial criminal conduct, foreign governments have hindered the DOJ by enacting blocking[156] and clawback[157] statutes.[158] These statutes delay, if not prevent, much of the discovery necessary to bring successful criminal prosecutions.[159] Even in those nations without such statutes in effect, the DOJ has encountered negative reactions to requests for information

152. *See* United States v. Nippon Paper Indus., 109 F.3d 1, 4 (1st Cir. 1997) (noting that this case represents the first criminal prosecution based on wholly extraterritorial conduct).

153. 1994 ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE ANN. REP. i, *available in* 1995 WL 33161 (D.O.J.) [hereinafter ANNUAL REPORT].

154. *Id.* The DOJ has released figures putting the economy at two and a half times the size it was about 20 years before. Anne K. Bingaman, *The Clinton Administration: Trends in Criminal Antitrust Enforcement*, Address Before the Corporate Counsel Institute (Nov. 30, 1995), *available in* 1995 WL 710992 (D.O.J.), at *1.

155. Bingaman, *supra* note 154, at *1.

156. Legislatures enact blocking statutes to prevent the citizens of a foreign nation from providing information helpful to antitrust investigations. Roscoe B. Starek, III, *International Aspects of Antitrust Enforcement*, Remarks Before the Seminar on Antitrust for the 90s the Second Century of Change (July 15, 1994), *available in* 1994 WL 642420 (F.T.C.), at *2.

157. Clawback statutes provide a defendant found liable in a treble damage action to recover from the successful plaintiff any uncompensable amounts awarded. *Id.*

158. Canada, the Netherlands, Great Britain, France, and Switzerland have all enacted this type of legislation. *Id.* at *11 n.4.

159. H.R. REP. NO. 103-772, at 11 (1994), *reprinted in* LEGISLATIVE HISTORY OF THE INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994, Pub. L. No. 103-438, 1994 U.S.C.C.A.N. (108 Stat. 4597) 3647, at 3651 [hereinafter LEGISLATIVE HISTORY].

regarding criminal investigations.[160] This may be because these nations view such criminal prosecutions as an insult to their sovereignty.[161]

2. Antitrust Enforcement Assistance Act

In order to assist in the government's efforts to collect information from abroad for antitrust investigations, Congress enacted the International Antitrust Enforcement Assistance Act of 1994.[162] This Act authorizes the government to provide information to foreign officials conducting their own antitrust investigations, and further authorizes the government to investigate American firms for foreign officials; provided these foreign governments reciprocate when the United States needs information from them.[163] This Act also mandates that foreign officials use the information our government provides only for law enforcement purposes.[164] The Act thus gives the government of the United States an opportunity to establish working relationships with foreign officials in the antitrust field.[165]

III. ENFORCEMENT OF THE ANTITRUST LAWS TO THEIR FULLEST EXTENT

Congress charged the executive branch with the duty to enforce United States' antitrust laws to their "fullest extent," without concern for where the conduct occurs, whenever that conduct unreasonably restrains United States' commerce.[166] To help

160. Starek, *supra* note 156, at *3.

161. *Id.* at *5.

162. 15 U.S.C. §§ 6201-6212 (1994).

163. LEGISLATIVE HISTORY, *supra* note 159, at 3647-48.

164. *Id.* at 3648. Much of the information in the United States Government's possession is confidential, as is most information necessary for effective antitrust enforcement in the possession of foreign governments. *Id.* at 3653. By reaching agreements with foreign nations under the Act, antitrust officials can share this information between nations as long as the foreign nations meet certain confidentiality requirements. *Id.* at 3654.

165. The Government has cultivated such agreements with the European Union, Australia, and Germany. *Id.* at 3652; ANNUAL REPORT, *supra* note 153, at 2; Starek, *supra* note 156, at *11 n.6. The agreement with Australia, for instance, cancels out their blocking statute when the United States notifies the Australian Government of it needs in the manner the agreement provides. Starek, *supra* note 156, at *11 n.23. The United States has also joined with Canada in the Mutual Legal Assistance Treaty, which the DOJ used to help penetrate the fax paper price fixing scheme at the heart of *Nippon Paper*. LEGISLATIVE HISTORY, *supra* note 159, at 3652; ANNUAL REPORT, *supra* note 153, at 1.

166. Bingaman, *supra* note 154, at *2. Congress established the Sherman Act's extraterritorial reach in the Act itself which Congress reinforced through the enactment of the Foreign Trade Antitrust Improvement Act of 1982. *Id.* *See* Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (1994) (reinforcing the Sherman Act's extraterritorial reach by providing conditions

enforce the antitrust laws, Congress provided prosecutors with the alternative of bringing either criminal prosecutions or civil suits.[167] Congress intended the civil and criminal actions to function in a parallel manner.[168] To insure the parallelism of the two types of actions, Congress provided plaintiffs in civil actions with the right to recover treble damages.[169] In addition, the courts have made prosecutions easier by removing the obstacle of several common law defenses.[170] This possibility of treble damages and the absence of several common law defenses gives civil actions a penal nature. Whether a successful action will result in treble damages, fines, or imprisonment, all function as both a deterrent and a punishment.

Courts have consistently upheld the enforcement of Congress' mandate to enforce the antitrust laws to their fullest extent with regard to civil antitrust actions based on extraterritorial conduct.[171] However, the DOJ has not enforced the antitrust laws to their fullest extent in regard to criminal prosecutions. In 1997, the First Circuit decided a previously unanswered question: whether the government can predicate a criminal antitrust action on wholly extraterritorial anticompetitive conduct.[172] Until this time, the DOJ neglected to enforce antitrust laws with regard to criminal conduct committed abroad. This Comment proposes that the government can base criminal antitrust actions on wholly extraterritorial conduct and argues that the government needs to provide the DOJ with more resources and implement enforcement agreements with foreign nations in order to make effective enforcement possible.

Prosecutors have utilized civil actions to enforce antitrust laws, enabling the government to expand its resources and to rid itself of the constitutional burdens to which defendants are

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for when the courts can exercise its jurisdiction). See *supra* notes 100 and 101 and accompanying text for a discussion on Congress' power to regulate trade with foreign nations. The Supreme Court confirmed the Act's extraterritorial jurisdiction in *Hartford Fire* by holding that the Act regulates even extraterritorial conduct when it is meant to produce, and does produce, an effect on United States' commerce. Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 796 (1993).

167. See *supra* Part I.A. for a discussion on which parties may bring civil and criminal actions under the antitrust laws.

168. See *supra* Part II.A. and II.A.1. for a discussion of the parallelism between civil and criminal antitrust actions.

169. See *supra* Part II.A.2.a. for a discussion on the use of treble damages as a stimulus for individuals to bring suits, and as a punishment for those who violate the antitrust laws.

170. See *supra* Part II.A.2.b. for a discussion on the common law doctrines the courts have waived as defenses for antitrust defendants.

171. See *supra* Part I.B. for a discussion on how it became settled law that the Sherman Act's jurisdiction extends to reach conduct committed abroad.

172. United States v. Nippon Paper Indus., 109 F.3d 1, 2 (1st Cir. 1997).

entitled in criminal trials.[173] The government has been prosecuting defendants through the parallel civil action provided by Congress in the same statutory language in which Congress provided for criminal prosecutions. At the same time, individuals acting as private attorneys general have brought suits under the Clayton Act, which authorizes suits for treble damages against Sherman Act violators. Allowing the government to bring criminal suits against foreign defendants for anticompetitive conduct committed abroad would actually provide defendants with greater protections than those they receive under the current policy.

Foreign trade makes up approximately twenty-five percent of the United States' gross domestic product, more than double what it was thirty years ago.[174] In 1994, the DOJ had roughly the same number of attorneys as it had thirty years ago.[175] Thus, the activity the DOJ is responsible for policing has multiplied as the DOJ has been diminishing in power and strength.

Congress intended for the antitrust laws to be enforced to their fullest extent. To accomplish this, the government must utilize all the weapons that these antitrust laws provide. This means that violators who have committed criminal acts should face criminal penalties. The first step toward effectively enforcing the antitrust laws to their fullest extent is to increase the DOJ's staff. The increase in the number of fines the DOJ will be able to secure through successful prosecutions of anticompetitive conduct committed abroad will help offset the cost of the increased manpower.

The second step toward effectively enforcing our Nation's antitrust laws to their fullest extent is to utilize agreements with foreign nations consistent with the provisions of the International Antitrust Enforcement Assistance Act.[176] The United States has entered into antitrust cooperation agreements with Australia, Canada, Germany and the European Union.[177] However, as of November, 1995, the agreement with Canada was the only one that the DOJ had utilized in an antitrust investigation regarding extraterritorial conduct.[178] Our government must actively pursue nations interested in entering these agreements and exercise its rights under the agreements once made.

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173. The treble damage award in civil actions has enabled the government to use private citizens as private attorneys general to prosecute defendants.

174. LEGISLATIVE HISTORY, *supra* note 159, at 3651.

175. ANNUAL REPORT, *supra* note 153, at i.

176. See *supra* Part II.C.2. for a discussion of the International Antitrust Enforcement Assistance Act of 1994.

177. Bingaman, *supra* note 154, at *10.

178. *Id.*

CONCLUSION

With the increasing significance of import and export trade on United States commerce, the DOJ cannot limit its criminal enforcement of the United States antitrust laws to domestic issues. The DOJ has restricted criminal prosecutions to conduct that is inherently illegal such as price fixing, market allocation, and bid rigging. These activities deny Americans their right to a free market economy by artificially raising prices and reducing the quality and quantity of goods.[179] Our Nation's courts should not allow businesses to get away with this type of activity merely because they committed their acts in a foreign country.

Congress has made clear that it wants antitrust laws enforced to their fullest extent. It has been over fifty years since the courts first stated that it was settled law that antitrust laws have extraterritorial jurisdiction.[180] The courts have consistently held that plaintiffs can base civil actions on conduct committed wholly abroad. It is time to effectuate Congress' intent and to promote the parallelism between the two types of actions by granting extraterritorial jurisdiction over conduct committed wholly abroad in criminal prosecutions.

179. Bingaman, *supra* note 154, at *3.

180. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945) (holding that it is settled law that states can restrict conduct that has an effect within its territory).