THE EXTRATERRITORIAL REACH OF THE CRIMINAL PROVISIONS OF U.S. ANTITRUST LAWS: THE IMPACT OF *UNITED STATES V. NIPPON PAPER INDUSTRIES*

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1. INTRODUCTION

The extraterritorial application of U.S. antitrust laws has always presented a complicated set of issues for a court considering whether to exercise jurisdiction over a foreign defendant. When the foreign defendant's alleged conduct occurred in the United States, a court's exercise of jurisdiction is relatively noncontroversial. However, when the alleged conduct of a foreign defendant occurred wholly outside of the United States, courts have been more reluctant to subject foreign entities to U.S. antitrust laws.

The doctrines regarding the extraterritorial application of the civil provisions of U.S. antitrust laws are well-developed. Although early opinions held that the Sherman Act and other antitrust provisions could not reach the conduct of foreign entities, the courts eventually discarded this position. Instead, courts adopted a more flexible test which allowed the exercise of jurisdiction if the defendant's conduct had a substantial effect, actual or intended, on the commerce of the United States.[1] A recent Supreme Court case further clarified the law as it applies to civil violations.[2]

Although there has been tremendous development regarding the civil provisions of the antitrust laws, there have been few attempts to apply the criminal provisions of the antitrust laws to

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[1] *See generally* Sandra C. Hymowitz, Note, *Extraterritorial Application of the Sherman Act to Foreign Corporations*, 11 DEL. J. CORP. L. 513 (1986).

[2] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

foreign defendants.[3] In early 1997, however, the First Circuit Court of Appeals held that the criminal provisions of U.S. antitrust laws applied to a foreign defendant whose conduct occurred entirely in a foreign state.[4] In reversing the district court, the First Circuit essentially applied the same doctrines applicable to civil violations of antitrust laws to the criminal provisions and did not hesitate to exercise jurisdiction over the defendants.

This comment explores the road leading to the First Circuit's extension of extraterritorial criminal jurisdiction over foreign defendants whose conduct occurred entirely in a foreign state. Section 1 discusses the growing importance of international commerce to the world economy and gives an overview of the relevant U.S. antitrust statutes. Section 2 traces the development of the extraterritorial application of U.S. antitrust laws through judicial interpretation of the statutes. Section 3 explores the opinions of the District Court and the First Circuit in *United States v. Nippon Paper Industry Co.* Section 4 discusses the problems raised by the exercise of extraterritorial jurisdiction by U.S. courts and presents a criticism of the First Circuit's opinion. This section also includes a discussion of foreign legislative responses to the extension of U.S. antitrust jurisdiction. In Section 5, I argue that criminal antitrust jurisdiction should not be extended to the foreign conduct of foreign defendants because that path will certainly lead to greater international conflict over the extraterritorial reach of U.S. laws. Finally, this comment advocates a return to a reasonableness approach to the extraterritorial exercise of criminal antitrust jurisdiction.

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[3] In fact, in 1987, when the Restatement (Third) of Foreign Relations Law was published, the Reporters could find no case of criminal prosecution for an economic offense against the United States carried out by a foreign entity entirely outside of the United States which did not involve fraud. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 reporters' note 8 (1987).

[4] *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

1.1. *The Growing Importance of International Commerce and the Consequences of the Extraterritorial Application of the Criminal Provisions of U.S. Antitrust Law*

International commerce and the rapid growth of transnational economic connections have always hampered the ability of an individual state to enforce its competition laws.[5] Advances in technology and transportation, exacerbate these problems. The formation of regional trading blocs, while easing enforcement issues within the bloc, may also exacerbate the difficulties between countries in different blocs. Adding to these problems are different attitudes toward the enforcement of competition law. Some states may view certain practices as offensive to economic law and policy while others may view the identical practices as desirable.[6] Five international attempts to harmonize the law of competition into a unified body of international law have been attempted, but all of these attempts failed.[7]

1.2. *United States Antitrust Statutes*

The Sherman Act[8] and the Clayton Act[9] provide the primary antitrust regulation prohibiting anticompetitive behavior. The Sherman Act proscriptions are divided into two sections. Section 1 of the Sherman Act provides that "[e]very contract,

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[5] *See* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 344 (1997). The U.S. antitrust laws responded to the problems of enforcement in the face of interstate and international commerce by moving enforcement from the states to the federal government. *See id.*

[6] One example of this conflict can be found in the British and American attitudes toward regulation of the shipping industry. In the United Kingdom, conferences, which are cartels of ship owners, "have been accepted for more than a century as a necessary evil if stable, regular, and efficient scheduled shipping services are to be maintained." A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 258 (1981).

It remains a policy of the British government to exempt such conferences from its competition law and the competition law of other states. The United States, however, considers conferences subject to and in violation of its competition law This difference in philosophy has led to significant conflict between the two nations. *See id.*

[7] *See* Waller, *supra* note 5, at 349.

[8] 15 U.S.C. §§ 1-7 (1994).

[9] 15 U.S.C. §§ 12-27, 44 (1994).

combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[10] Section 2 prohibits monopolization, attempts at monopolization, and combinations or conspiracies to monopolize any part of interstate or foreign commerce.[11] Under each of these sections, violations are considered criminal and are prosecuted as felonies that may result in a fine, imprisonment or both.[12]

Parties injured by violations of the Sherman Act or Clayton Act may bring private rights of action. Under Section 4 of the Clayton Act, a plaintiff may recover treble damages including reasonable attorneys' fees and the cost of suit if the plaintiff can prove that she was "injured in his business or property by reason of anything forbidden in the antitrust laws."[13]

Each mode of enforcement (civil and criminal) has certain advantages and disadvantages. In the civil context, treble damages plus attorneys' fees and costs are extremely strong incentives against violating the antitrust provisions. Either an unlawful purpose or an anticompetitive effect constitutes a civil violation.[14] Furthermore, a civil plaintiff may obtain flexible relief in the form of an injunction to prevent a defendant from engaging in anticompetitive behavior.[15]

The criminal context requires the prosecution to meet a higher standard of proof before a court will find a violation: the prosecution must prove both intent to violate the antitrust laws and an anticompetitive effect on commerce.[16] However, the criminal provisions provide some powerful advantages for the prosecution of antitrust violations as well. Criminal suits allow the prosecuting party, which is the Department of Justice, to employ a grand jury as a result of Justice's ability to compel

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[10] 15 U.S.C. § 1.

[11] 15 U.S.C. § 2.

[12] *See* 15 U.S.C. §§ 1-2. The maximum fine for a corporation is $10,000,000. The maximum fine for an individual is $350,000. Individuals found guilty may also be imprisoned for up to three years. *See id.*

[13] 15 U.S.C. § 15. Treble damages, attorneys' fees, and legal costs may be recovered for violations of either the Sherman Act or the Clayton Act.

[14] *See* United States v. Container Corp. of America, 393 U.S. 333 (1969).

[15] *See* 15 U.S.C. §§ 4, 15-16.

[16] *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978).

witnesses to testify and to compel the production of documents.[17] A criminal suit also allows the prosecution to offer immunity to witnesses in exchange for testimony or other evidence that might otherwise be impossible to discover.[18]

2. THE EVOLUTION OF THE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT

At first, courts interpreting the Sherman Act refused to apply it to conduct of foreign corporations operating outside of the United States. Slowly, however, jurisdiction over foreign defendants was extended by the courts in the civil context. It was this transition that set the stage for the extension of jurisdiction over foreign defendant acting outside of the United States in criminal antitrust proceedings.

2.1. From American Banana *to* Alcoa: *The Evolution of Extraterritorial Jurisdiction over Foreign Defendants in U.S. Antitrust Civil Suits*

Initially, the Sherman Act and other United States antitrust laws could not reach the activities of foreign corporations if such activities were carried out beyond the territorial limits of the United States.[19] This position was adopted by the U.S. Supreme Court in *American Banana Co. v. United Fruit Co.*,[20] the first major case dealing with the Sherman Act in an international context. *American Banana* involved two American corporations with operations in South America. The plaintiff alleged that the government of Costa Rica, under the influence of the defendant, seized part of the plaintiff's plantation and supplies, thus preventing the plaintiff from engaging in its business. A citizen of Costa Rica then obtained a judgment from a Costa Rican court declaring that the plantation belonged to him and not the plaintiff. The defendant then bought the plantation from the plaintiff.[21]

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[17] *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 325 (3d ed. 1990).

[18] *See id.*

[19] *See* Hymowitz, *supra* note 1, at 516.

[20] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[21] *See id.* at 354-55.

In an opinion delivered by Justice Holmes, the Supreme Court held that a defendant did not violate the Sherman Act, stating that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[22] The Supreme Court interpreted the language of the Sherman Act as covering "only every one subject to such legislation, not all that the legislator subsequently may be able to catch."[23] Thus, under the doctrine of *American Banana*, the possibility of the extraterritorial extension of U.S. antitrust laws was entirely foreclosed.

The rule in *American Banana* stood unmodified for only four years. In *United States v. Pacific & Arctic Railway & Navigation Co.*[24], the plaintiff alleged that the defendants conspired to monopolize trade between various U.S. ports and several ports in Canada. The Supreme Court held that the plaintiff could proceed in its antitrust action against the defendants to the extent that the acts occurred within the United States.[25] In *Thomsen v. Cayser*,[26] the defendants were owners of foreign steamship lines operating between the United States and South Africa, who allegedly formed "conferences" to prevent competition between themselves and to stop new lines from entering the market. Once again, the Supreme Court held that although the combination was formed abroad by foreign corporations, it fell within the reach of U.S. antitrust laws because it "affected the foreign commerce of this country and was put into operation here."[27]

In *United States v. Sisal Sales Corp.*,[28] the plaintiffs alleged that the defendants, three American banks, two American corporations, and a Mexican corporation, conspired to

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[22] *Id.* at 356.

[23] *Id.* at 357.

[24] United States v. Pacific & Arctic Ry. & Navigation Co., 228 U.S. 87 (1913).

[25] *See id.* at 106. The Court did not cite *American Banana* in the opinion. The cases are, however, distinguishable. In *American Banana*, two domestic corporations were engaged in conduct wholly outside of the United States. In *Pacific & Arctic Ry.*, the conduct did include activities which occurred in the United States." *See* Hymowitz, *supra* note 1, at 517 n.39.

[26] Thomsen v. Cayser, 243 U.S. 66 (1917).

[27] *Id.* at 88.

[28] United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

monopolize the importation and sale of sisal in the United States. The defendants were able to persuade the governments of Mexico and Yucatan to pass laws that restricted the sale of sisal and discriminated in favor of the Mexican corporation.[29] The Supreme Court once again allowed the exercise of jurisdiction over the defendants, reasoning that the primary defendants and the acts which gave effect to the combination occurred in the United States.[30]

Although the scope of foreign activities over which United States courts were willing to exercise jurisdiction was expanding, the rule in *American Banana*, which refused to extend jurisdiction to activities that occurred entirely outside of the United States, stood until 1945. In that year, the Second Circuit, sitting as the court of last resort, extended antitrust jurisdiction in civil cases far beyond the limits set by *American Banana* in the landmark case *United States v. Aluminum Corp. of America*.[31] In *Alcoa*, a Canadian corporation, a wholly-owned subsidiary of an American corporation, entered into two agreements, one in 1931 and the second in 1936 outside of the United States with foreign producers of aluminum. These agreements sought to restrict the amount of aluminum imported into various countries including the United States through the implementation of a quota system.[32] In a dramatic break from the doctrine of *American Banana*, Judge Learned Hand held that antitrust jurisdiction over the conduct of foreign corporations which occurs outside of the United States may be exercised if the acts were intended to affect and actually did affect the foreign commerce of the United

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[29] *See id.* at 273.

[30] *See id.* at 276 (asserting that although the defendants were "aided by discriminatory legislation," it was "their own deliberate acts, here and elsewhere" that gave rise to the plaintiffs' complaint). The Court noted that the factual situation of *Sisal Sales* was "radically different" from the one in *American Banana* and thus refused to apply an *American Banana* analysis. *Id.* at 275.

[31] United States v. Aluminum Corp. of Am., 148 F.2d 416 (2d Cir. 1945) [hereinafter Alcoa]. The case was heard on appeal by the Second Circuit rather than the Supreme Court because the Supreme Court could not find a quorum of six justices qualified to hear the case. *See id.* at 421.

[32] *See id.* at 442-43. Neither agreement expressly mentioned the United States. However, during the negotiations leading to the agreement, all of the participants agreed that imports into the United States should be included. *See id.* at 443.

States.[33] Under *Alcoa*, once the plaintiff has proven intent, the burden of proof shifts to the defendants to demonstrate that their conduct did not actually affect American commerce.[34] Thus, *Alcoa* was the final step in the erosion of the strict limitations placed on extraterritorial jurisdiction of antitrust cases created by *American Banana.*

2.2. *The Rise of the Jurisdictional Rule of Reason*

The *Alcoa* "intended effects" test firmly established the possibility of antitrust jurisdiction over foreign defendants' conduct under certain circumstances. That decision, however, left many questions unanswered. The most pressing issues left unanswered by *Alcoa* were the role of comity in the analysis, the magnitude of the effect that must be present in the U.S. before jurisdiction may be exercised, and the issue of conflicts between U.S. and foreign law. These questions were at least partially answered by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*[35]

In *Timberlane*, the plaintiffs, an American corporation and two Honduran corporations owned by the partners in the American corporation, sought sources of lumber for its operations in the United States. The American corporation opened a new mill and reactivated an old mill in Honduras. The plaintiffs alleged that the defendants sought to disrupt their operations by seeking an "embargo" against Timberlane's Honduran operations and using the embargo to shut down Timberlane's Honduran mills.[36]

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[33] *See id.* at 443-44. Judge Learned Hand cited *American Banana* in his opinion, but did not distinguish it from the case before the court. Judge Hand did, however, note that "[w]e should not impute to Congress an attempt to punish all whom its courts can catch, for conduct which has no consequences within the United States. *Id.* at 444 (citing *American Banana*, 213 U.S. at 347).

[34] *See* Hymowitz, *supra* note 1, at 519. Although *Alcoa* defined a new test for extraterritorial jurisdiction, it failed to state how great the effects on American commerce must be before antitrust jurisdiction may attach. *See* Varun Gupta, Note, *After* Hartford Fire: *Antitrust and Comity,* 84 GEO. L.J. 2287, 2290-91 (1996). For an early application of the *Alcoa* test, see generally United States v. General Elec. Co., 82 F.Supp. 753 (D.N.J. 1949).

[35] Timberlane Lumber Co. v. Bank of America N.T. & S.A., 549 F.2d 597 (9th Cir. 1976).

[36] An "embargo" under Honduran law is a court-ordered attachment of property that is registered with the government of Honduras and prevents the

In reversing the district court's dismissal of Timberlane's complaint, the Ninth Circuit further elaborated on the requirements for the exercise of extraterritorial jurisdiction in antitrust cases. The *Timberlane* court recognized that while previous cases had established that U.S. antitrust laws could reach certain extraterritorial acts, it certainly could not and should not reach all such acts because at some point U.S. interests in enforcing the law become too attenuated and the potential for injury to foreign relations becomes too great.[37] To define this limit, the *Timberlane* court declined to apply an *Alcoa* effects test, choosing instead to consider the interests of foreign countries and observe "the limitations customarily observed by nations upon the exercise of their powers."[38]

In considering more than just the actual or intended effects of foreign conduct in the United States, the Ninth Circuit added an additional prong to the *Alcoa* effects test.[39] The new test would consider the following factors:

> the antitrust laws require in the first instance that there be some effect— actual or intended— on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws . . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links

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sale of the property without a court order. The court appoints a judicial officer to prevent the reduction of the property's value. *See id.* at 604.

[37] *See id.* at 609.

[38] *Id.*

[39] The Ninth Circuit criticized the effects test as being "incomplete because it fails to consider the other nation's interests . . . [n]or does it expressly take into account the full nature of the relationship between the actors and this country." *Id.* at 612-13. The court also noted that comity concerns were probably already present in the effects test as applied by American courts. *See id.* (stating that "the requirement for a 'substantial' effect may silently incorporate [considerations of comity and the interests of other nations], with 'substantial' as a flexible standard that varies with other factors.").

> to, the United States— including the magnitude of the effect on American foreign commerce— are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.[40]

Under this analysis, the third prong, the degree of conflict between American and foreign law, results in what the *Timberlane* court named a "jurisdictional rule of reason" requiring a balancing of American and foreign interests.[41] This "rule of reason" requires the consideration of the following factors:

> (1) the degree of conflict with foreign law or policy;
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> (2) the nationality or allegiance of the parties and the locations or principal places of business or corporations;
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> (3) the extent to which enforcement by either state can be expected to achieve compliance;
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> (4) the relative significance of effects on the United States compared with those elsewhere;
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> (5) the extent to which there is explicit purpose to harm or affect American commerce;
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> (6) the foreseeability of such effect; and,
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> (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[42]

The *Timberlane* "rule of reason" thus represented a substantial modification of the *Alcoa* effects test and represented an attempt by the courts to identify and avoid potential conflicts with U.S.

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[40] *Id.* at 613 (citations omitted).

[41] *Id.* at 613-14.

[42] *Id.* at 614.

foreign policy.[43]

The Third Circuit modified the *Timberlane* test in *Mannington Mills, Inc. v. Congoleum Corp.*[44] In *Mannington Mills*, the plaintiff sought treble damages and injunctive relief under U.S. law, alleging that the defendant had secured foreign patents by fraud.[45] Reversing the district court's dismissal of the plaintiff's complaint, the Third Circuit explicitly included the "possible effect upon foreign relations if the court exercises jurisdiction and grants relief" as a factor to be considered when applying a *Timberlane* balance of interests test.[46] The *Mannington Mills* court also interpreted the *Timberlane* opinion as first finding jurisdiction and then deciding whether its exercise was proper.[47] If this is indeed the case, then the *Timberlane* and *Mannington Mills* tests may be better seen as adding a second step to the jurisdictional analysis by considering the possibility of judicial

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[43] *See* Hymowitz, *supra* note 1, at 522-23.

[44] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d. Cir. 1979).

[45] *See id.* at 1290.

[46] *See id.* at 1297. The factors cited by the *Mannington Mills* court were: (1) the degree of conflict with foreign law or policy; (2) the nationality of the parties; (3) the relative importance of the alleged violations of conduct here compared to that abroad; (4) the availability of a remedy abroad and the pendency of litigation there; (5) the existence of intent to harm or affect American commerce and its foreseeability; (6) the possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and, (10) whether a treaty with the affected nations has addressed the issue. *Id.* at 1297-98.

Although in theory a court applying a *Timberlane* or *Mannington Mills* balance of interests test must consider foreign interests and potential conflicts with foreign policy goals, in practice, courts have been very reluctant to relinquish jurisdiction. *See* Michael G. McKinnon, Comment, *Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of U.S. Antitrust laws and Viable Solutions Beyond the* Timberlane/Restatement *Comity Approach*, 21 PEPP. L. REV. 1219, 1277-78 (1994) (stating that the courts may merely be paying "lip service" to the comity consideration, discounting the foreign interests involved and allowing jurisdiction as long as the domestic interest is "more than a de minimis United States regulatory interest").

[47] *See* Steven A. Kadish, *Comity and the International Application of the Sherman Act: Encouraging the Courts to Enter the Political Arena*, 4 NW. J. INT'L L. & BUS. 130, 147 (1982).

abstention after determining that jurisdiction is proper.[48]

2.3. *A Move Away From International Comity*: Hartford Fire Ins. Co. v. California

The Supreme Court's 1993 decision in *Hartford Fire Ins. Co. v California*[49] marked a sharp break from the two-part *Timberlane/Mannington Mills* jurisdictional analysis. The Court moved away from an international comity analysis and required a strong showing of conflict between American and foreign law before refusing to exercise jurisdiction.[50]

In *Hartford Fire*, nineteen states and numerous private plaintiffs brought suit against domestic primary insurers, domestic dealers of reinsurance, two domestic trade associations, a domestic reinsurance broker, and reinsurers based in London.[51] The plaintiffs' complaints alleged that the defendants violated the Sherman Act by conspiring to alter the terms of their domestic general liability insurance policies.[52] In particular, the California complaint alleged that the London reinsurers violated the Sherman Act by forcing primary insurers to use insurance forms with clauses limiting the liability of the insurer, "thereby rendering 'pollution liability coverage . . . almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California.'"[53] The London reinsurance defendants did not argue that the district court lacked jurisdiction over the Sherman Act claims, rather, they argued that the interests of a foreign state were sufficiently strong to overcome any U.S. interest in the enforcement of its antitrust laws.[54]

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[48] *See id.*

[49] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

[50] *See id.* at 798-99.

[51] *See id.* at 778-80.

[52] *See id.* at 770-71. More specifically, the defendants allegedly forced insurers who sell insurance directly to consumers to make four changes to their policies that would substantially reduce the risk and the cost to insurers of issuing policies. *See id.* at 771-72. The defendants allegedly obtained these concessions by several methods such as refusing to issue or renew reinsurance to any insurer using standard insurance forms without the changes. *See id.* at 774-76.

[53] *Id.* at 795.

[54] *See id.* (stating that the position of the London reinsurance defendants, is not that the Sherman Act does not apply in the sense that a minimal basis for

The Supreme Court rejected this position, noting that the London reinsurance defendants were engaged in conspiracies which substantially affected the American market for insurance and stating that "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."[55] The *Hartford Fire* Court declined to apply a *Timberlane* comity analysis. Rather, it stated that the question that must be considered was whether "there is in fact a *true conflict* between domestic and foreign law."[56] A "true conflict" does not exist "where a person subject to regulation by two states can comply with the laws of both."[57] In this case, since British law did not require the defendants to act in some way prohibited by American law and because compliance with both American and British law was not impossible, there was no conflict and thus no reason for U.S. courts to decline the exercise of jurisdiction.[58]

Thus, the decision in *Hartford Fire* substantially alters the analysis set forth in *Timberlane* and *Mannington Mills*. Under the *Hartford Fire* approach, a court considering the extraterritorial application of U.S. antitrust laws first must find a substantial effect on the commerce of the United States.[59] If there is such an effect, then the court will apply American antitrust laws unless doing so would force the defendant to violate the laws of a

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the exercise of jurisdiction doesn't exist here.... [The London reinsurance defendants'] position is that there are certain circumstances... in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained).

[55] *Id.* at 796.

[56] *Id.* at 798 (quoting Société Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 555 (1987) (Blackmun, J. concurring in part and dissenting in part)) (emphasis added).

[57] *See id.* at 799 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. e.). The Court noted that the London reinsurance defendants and the Government of the United Kingdom both submitted briefs stating that Parliament had created a regulatory regime and that the conduct of the defendants was legal under British law. The Supreme Court rejected this position, stating "'[t]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws even where the foreign state has a strong policy to permit or encourage such conduct." *See id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 cmt. j.).

[58] *See id.*

[59] *See* Gupta, *supra* note 34, at 2296.

foreign jurisdiction.[60] Only in this uncommon situation is a *Timberlane* comity analysis possibly appropriate.[61]

3. AN APPLICATION OF *HARTFORD FIRE*: THE FIRST CIRCUIT'S EXTENSION OF THE *HARTFORD FIRE* OPINION TO CRIMINAL VIOLATIONS OF THE SHERMAN ACT

Hartford Fire represents a significant departure from the *Timberlane/Mannington Mills* approach in the civil context. The Supreme Court, however, did not specifically address the application of its decision to cases arising under the criminal provisions of the antitrust laws. In *United States v. Nippon Paper Indus. Co.*,[62] the First Circuit Court of Appeals applied the *Hartford Fire* opinion to a case in the criminal context. This section will explore both the District Court and the Court of Appeals decisions.

3.1. United States v. Nippon Paper Indus. Co.: *The District Court Opinion*

In 1995, a federal grand jury indicted Nippon Paper Industries Co., Ltd., a manufacturer of facsimile paper based in Japan, alleging that in 1990 Nippon Paper Industries and other unnamed conspirators met in Japan and agreed to fix the price of thermal facsimile paper in the United States.[63] The scheme was accomplished by selling the paper to unaffiliated trading houses with the condition that they sell the paper in North America at

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[60] *See id.*

[61] *See id.* One commentator suggests that *Hartford Fire* abandoned *Timberlane* in two ways. First, the opinion notes that Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a, does not require a court to refuse jurisdiction on the basis of international comity. Second, by requiring the finding of a "true conflict" before invoking a *Timberlane* comity analysis, the Court severely restricted scope of *Timberlane's* applicability in future cases. *See id.* at 2296-97.

[62] *Nippon Paper*, 109 F.3d at 1.

[63] *Id.* at 2. Nippon Paper Industries Co., Ltd. is the successor corporation which resulted from a merger between two Japanese corporations, Jujo Paper Co., Inc. and Sanyo Kokusaku Co., Ltd. The government brought its complaint against Nippon Paper for the conduct of its predecessor, Jujo Paper Co., Inc. *See* United States v. Nippon Paper Indus. Co., Ltd. 944 F.Supp. 55, 58 (D. Mass 1996).

inflated prices.[64] The trading houses in turn shipped the paper to North America and sold it through their American subsidiaries. The indictment further alleged that Nippon Paper observed the activities of the trading houses and ensured that the prices charged to consumers were indeed the prices which it had secured through the alleged conspiracy.[65] The indictment asserted that since these activities had a "substantial adverse effect on commerce in the United States and unreasonably restrained trade," Nippon Paper had violated section one of the Sherman Act.[66]

Nippon Paper moved to dismiss, claiming that if the conduct had actually occurred, it had occurred entirely in Japan and thus Nippon Paper was not subject to prosecution under the Sherman Act.[67]

After concluding that Nippon Paper had adequate contacts with the United States to warrant the court's exercise of general personal jurisdiction over it, the court turned to the question of the extraterritorial application of the Sherman Act in criminal actions. The district court noted that this case presented an issue of first impression concerning the extraterritorial reach of the Sherman Act's criminal provisions.[68] The government argued that the same substantive language of the Sherman Act applies to both civil and criminal violations, and therefore under the line of cases dealing with civil applications of antitrust laws ending with *Hartford Fire,* the Sherman Act clearly could reach extraterritorial conduct in a criminal prosecution.[69]

The district court rejected this contention, stating flatly that "the line of cases permitting the extraterritorial reach in civil

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[64] *See Nippon Paper*, 109 F.3d at 2.

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *See Nippon Paper Indus. Co.*, 944 F. Supp. at 64. The district court based its conclusion on the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW which states in the reporters' notes that "[n]o case is known of criminal prosecution in the United States for an economic offense (not involving fraud) carried out by an alien wholly outside the United States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 note 8 (1986).

[69] *See Nippon Paper Indus. Co.*, 944 F. Supp. at 64. The government cited *Hartford Fire* which held that the civil sanctions of the Sherman Act apply "to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.*, 509 U.S. at 795.

actions is not controlling."[70] Instead, the court applied the presumption against the extraterritorial application of federal statutes coupled with the Restatement's reluctance to apply the criminal provisions of the antitrust statutes to foreign conduct.[71] Reasoning that the extraterritorial provisions of the antitrust laws would result in unfairness and unpredictability, the district court dismissed the indictment against Nippon Paper and its predecessor Jujo.[72]

3.2. Nippon Paper *On Appeal: The First Circuit's Opinion*

The First Circuit disagreed with the district court's conclusions and reversed the decision.[73] After presenting the historical development of the extraterritorial application of antitrust laws in the civil context, the First Circuit held that the criminal provision of the Sherman Act could reach wholly extraterritorial conduct.[74] It came to this conclusion by engaging

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[70] *Nippon Paper Indus. Co.*, 944 F. Supp. at 65.

[71] The district court cited *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) for the presumption against the extraterritorial application of federal statutes. *Nippon Paper Indus. Co.*, 944 F. Supp. at 65. In *Arabian American Oil Co.*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 does not apply extraterritorially to U.S. firms employing U.S. citizens abroad. *See* Arabian American Oil Co., 499 U.S. at 258-59. The Court stated that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Id.* at 248 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

The Restatement's position on the extraterritorial application of statutes with both civil and criminal provisions is summarized in the comments to section 403 which state:

> The principles governing jurisdiction to prescribe set forth in § 402 and in this section apply to criminal as well as to civil regulation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. f (1986).

[72] *See Nippon Paper Indus. Co.*, 944 F. Supp. at 66.

[73] *Nippon Paper*, 109 F.3d 1.

[74] *See id.* at 9.

in statutory construction of the Sherman Act itself and by reliance upon the holding in *Hartford Fire.* Each of these steps will be considered in turn.

3.2.1. The Statutory Construction Argument and the Application of the Hartford Fire *Test*

The court first noted that the language governing both civil and criminal cases is exactly the same; therefore, "common sense" would seem to dictate the extraterritorial application in both situations.[75] The First Circuit did not solely rely on "common sense" however, citing "accepted canons of statutory construction" to support its position.[76] The court noted that identical words or terms used in different places in the same statute must be interpreted in the same way, "not only when particular phrases appear in different sections of the same act, but also when they appear in different paragraphs or sentences of a single section."[77] In this case, however, the argument is even more powerful because the words used to impose both civil and criminal liability are exactly the same words found in exactly the same section of the same statute. Therefore, "the case for reading the language in a manner consonant with a prior Supreme Court interpretation is irresistible."[78]

If the Sherman Act is construed using these canons of interpretation, the court would (and did) conclude that the same line of cases applying the Sherman Act extraterritorially in the civil context must apply in the criminal context as well. Thus, instead of formulating a new test, the court believed it was obligated to apply the test in *Hartford Fire.*[79]

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[75] *Id.* at 4 (observing that "[w]ords may sometimes be chameleons, possessing different shades of meanings in different contexts . . . but common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil") (citations omitted).

[76] *Id.* (citing Commissioner of Internal Revenue v. Lundy, 516 U.S. 235, 250-53 (1996)).

[77] *Id.* at 5 (citing Russo v. Texaco, Inc., 808 F.2d 221, 227 (2d Cir. 1986)).

[78] *Id.*

[79] *See id.* at 9 ("We need go no further. *Hartford Fire* definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States. We are bound to accept that holding.").

3.2.2. The First Circuit's Rejection of the Restatement and International Comity

The court's opinion attacked the reliance of the defendants, as well as the district court, on the Restatement (Third) of Foreign Relations Law and on notions of international comity. First, the court dismissed comment *f* of section 403 of the Restatement as "merely reaffirm[ing] the classic presumption against extraterritoriality— no more, no less."[80] Instead of reading section 403 of the Restatement as creating a strong presumption against the extraterritorial application of antitrust laws, the court interpreted the section as merely suggesting that "a country's decision to prosecute wholly foreign conduct is discretionary."[81]

The First Circuit flatly rejected the defendants' assertion that they must consider international comity in deciding whether to exercise jurisdiction over the defendants.[82] Under *Hartford Fire's* "true conflict" test, comity only becomes a concern if the Japanese laws forced the defendant to act in a way incompatible with U.S. antitrust laws, or if compliance with both U.S. and Japanese laws was impossible. The court reasoned that the conduct alleged in the complaint was illegal under both U.S. and Japanese laws, "thereby alleviating any founded concern about [*Nippon Paper*] being whipsawed between separate sovereigns."[83] Finally, the court's opinion engaged in a limited discussion of reasonableness under section 403 of the Restatement (Third) of Foreign Relations Law.[84] The court concluded that jurisdiction over the defendants was reasonable because of the international character of commerce and the negative incentives that would be created if jurisdiction were not exercised.[85]

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[80] *Id.* at 7.

[81] *Id.*

[82] *See id.* at 8. (stating that "we see no tenable reason why principles of comity should shield [Nippon Paper Industries] from prosecution").

[83] *Id.*

[84] *See id.*

[85] We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in [Nippon Paper's] favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible

4.1. The First Circuit's Wrong Turn

The First Circuit was concerned that allowing a single section governing both civil and criminal applications of antitrust laws to have two different meanings "would open Pandora's jar."[86] Unfortunately, the court failed to realize that their extension of the criminal provisions of the antitrust laws would exacerbate what is already a serious problem in international economic law.

4.1.1. Before Nippon Paper: *Problems in the Extraterritorial Application of the Civil Sherman Act Provisions*

In extending the reach of the criminal provisions of the Sherman Act, the First Circuit ignored the long-standing and growing criticism of the eagerness of U.S. courts to extend their jurisdiction abroad. Long before *Hartford Fire* and *Nippon Paper* were decided, many nations held the opinion that U.S. courts had gone too far, and they expressed their displeasure through many channels. In light of the recent developments in *Nippon Paper*, the criticism of U.S. antitrust laws surely will increase.

One of the earliest examples of conflict between the United States and another nation regarding the application of U.S. antitrust laws occurred in the early 1950s. The conflict between states has been particularly acrimonious between the United States and the United Kingdom. In *United States v. Imperial Chemical Indus., Ltd.*,[87] the U.S. government alleged that the defendants, several foreign and domestic corporations, conspired to eliminate competition and divide world markets for several chemical products, in particular, nylon, neoprene, and polythene. The Imperial Chemical Industries, a British corporation, objected to the exercise of jurisdiction over it. The court rejected this defense and found minimum contacts on which to base jurisdiction, holding that the existence of an American subsidiary whose entire purpose was to carry out the business of Imperial Chemical Industries was sufficient to establish the defendant's

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between cause and effect.

See id.

[86] *Id.* at 5 (citing United States v. Aversa, 984 F.2d 493, 498 (1st Cir. 1993) (en banc)).

[87] United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952).

presence in the jurisdiction.[88] The court subsequently found that a worldwide cartel had been formed to control the production and distribution of nylon.[89]

The conflict between the judiciary of two states occurred when the court attempted to fashion a remedy. The court noted that there were several significant differences in the rights of patent holders in the United States and the United Kingdom.[90] After finding that the patents were used to restrain trade in both countries in violation of the laws and policies of both countries, the court concluded the following:

> [i]t does not seem presumptuous for this court to make a direction to a foreign defendant corporation over which it has jurisdiction to take steps to remedy and correct a situation, which is unlawful both here and in the foreign jurisdiction in which it is domiciled [and, i]t is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States.[91]

A British court disagreed with this conclusion and refused to honor the judgment, stating that the patent rights in controversy were "a species of property . . . which is English in character and is subject to the jurisdiction of the English courts; and . . . it is not competent for the courts of the United States, or of any other country, to interfere with those rights."[92]

Another example of foreign outrage over the extension of

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[88] *See id.* at 229.

[89] *See id.* at 231-32. The patent issue arose because each of the defendants, duPont and ICI, held certain patents which they had used to defeat competition from other producers. *See id.* at 220-21. The court defined the problem in finding a suitable remedy by stating,"[w]hile the maintenance of a competitive economy is of prime importance, we may not seek to achieve that end by unwarranted judicial whittling down of patent rights." *Id.* at 221.

[90] *See id.* at 228-29 (discussing the differences between the patent laws of the United States and the United Kingdom).

[91] *Id.* at 229.

[92] British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., 2 AllE.R. 780, 783 (C.A. 1952) (interlocutory proceedings); 3 All E.R. 88 (Ch. 1984) (plenary proceedings).

U.S. antitrust laws beyond American borders can be found in the case *In re Uranium Antitrust Litigation.*[93] In that case, Westinghouse Electric Corporation brought a civil antitrust suit against twenty-nine foreign and domestic producers of uranium alleging violations of U.S. antitrust law. Of these twenty-nine defendants, nine of the foreign defendants refused to appear and the court entered default judgments against each of them.[94] On appeal from an order entered against the defendants, the governments of Australia, Canada, South Africa and the United Kingdom filed briefs as amici curiae, each questioning the jurisdiction of a U.S. court over the case.[95] The court noted that there was no opportunity for fact-finding because the defaulting foreign corporations had, with the support of their respective governments, steadfastly refused to appear and contest the allegations in the complaint, making it nearly impossible for the case to proceed.[96]

Conflict with the government of other states has occasionally persuaded courts to modify their decisions. In *United States v. General Electric Co.*,[97] the district court determined that General Electric had attempted to monopolize the United States market for incandescent electric lamps by organizing an international cartel. The cartel consisted of licensing agreements between foreign and domestic companies.[98] One of the members of the cartel was Philips, a Netherlands corporation. The court confronted difficulties similar to those in *Imperial Chemical* when it attempted to fashion a remedy in regard to Philips.[99] The Department of Justice advocated the elimination of all of the

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[93] *In re* Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980).

[94] *See id.* at 1250.

[95] *See id.* at 1253.

[96] *See id.* at 1254.

[97] *General Elec.*, 82 F. Supp. 753 (D.N.J. 1949).

[98] *See id.* at 827-28, 847 (discussing the claims and also the Court's distinct view).

[99] The court specifically exempted Philips from part of the judgment. The court ordered that General Electric open its books and records to representatives of the Department of Justice for inspection. The court did not subject Philip's books and records held outside of the United States to the measure, noting that it was "persuaded that international complications" made the provision for observation of books and records "impracticable." *See* United States v. General Electric Co., 115 F.Supp. 835, 877-78 (D.N.J. 1953).

licensing agreements. The government of the Netherlands, however, complained to the United States Department of State and demanded that the Department of Justice ask for a much more limited decree in recognition of the laws and policy of the Netherlands.[100] Although the court ordered Philips to make its patents available to competitors, it conditioned the order by stating that Philips would not be held in contempt of court "for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the . . . state in which Philips . . . may be incorporated . . . [or] may be doing business."[101]

4.1.2. Foreign Legislative Responses to the Extension of U.S. Antitrust Jurisdiction

Several foreign states have passed statutes attempting to block the exercise of extraterritorial jurisdiction by the United States. These statutes attempt to disrupt a foreign state's exercise of jurisdiction by refusing to cooperate with the foreign tribunal, by denying foreign litigants access to information, or in some cases by allowing a defendant to escape a foreign judgment or by reducing the judgment in the case of multiple damage awards.

One example of such a blocking statute is the British Protection of Trading Interests Act of 1980 (the "Interests Act").[102] The purpose of this legislation was to prevent British individuals and firms from being subject to foreign economic and commercial policies.[103] The Interests Act provides three protections. First, the Interests Act allows the British government to forbid compliance with certain foreign court orders and requests, if the orders "are damaging or threaten to damage the trading interest of the United Kingdom."[104] The government can also prohibit the production of documents or

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[100] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 note 5 (1987).

[101] *General Elec.*, 115 F. Supp. at 878.

[102] Protection of Trading Interests Act, 1980, ch. 11, §§ 1-8 (United Kingdom).

[103] *See* Lowe, *supra* note 6, at 257 (quoting the words of the United Kingdom's Secretary of State for Trade).

[104] Protection of Trading Interests Act § 1(1)(b).

other information in foreign courts,[105] and courts may not allow a foreign request for evidence if such request "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom."[106] Second, the Interests Act prohibits the enforcement of foreign judgments which award multiple damages or which stem from the regulation or prohibition of restrictive or anticompetitive practices.[107] Third, the Interests Act provides for the recovery of the noncompensatory element of awards of multiple damages by a British defendant from the party in whose favor the judgment was entered.[108] The Interests Act's language generally applies to all foreign states, but the Interests Act is primarily aimed at the United States because the United Kingdom often considers U.S. conduct highly intrusive.[109]

Other countries have adopted similar acts. For example, Canada has adopted blocking statutes at both the federal and provincial level. At the federal level, the Foreign Extraterritorial Measures Act (the "Act") provides that the government of Canada may prohibit the production of documents or other information by a Canadian citizen or corporation.[110] The Act also allows the government to block actions taken by a foreign state or tribunal if the act affects international trade or commerce and "has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty."[111] Similar laws were enacted in both Ontario and Quebec.[112] Once again, although these laws apply to

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[105] *See id.* § 2(1)(a)-(b).

[106] *Id.* § 4.

[107] *See id.* § 5(1)-(6).

[108] *See id.* § 6(1)-(2).

[109] *See* Lowe, *supra* note 6, at 257 ("Although the Act is directed against foreign authorities generally, it is well known that it is primarily intended to deal with what are seen as incursions upon British jurisdiction and trading interests by the authorities of the United States.").

[110] *See* Foreign Extraterritorial Measures Act, R.S.C. ch. F-29, § 3(1)(a)-(c) (1985) (Can.).

[111] *Id.* § 5(1).

[112] The Business Concerns Records Act (the "Quebec Act") and the

any foreign state, the Act is primarily intended to discourage the extraterritorial application of U.S. laws.[113]

5. A PROPOSAL FOR A NEW TEST FOR THE EXTRATERRITORIAL APPLICATION OF THE CRIMINAL ANTITRUST PROVISIONS

The extent to which the criminal provisions of U.S. antitrust laws should be applied extraterritorially presents an unusually difficult problem. On one hand, a return to the *American Banana* doctrine could potentially result in damage to American interests and would effectively render U.S. economic policy impotent. On the other hand, *Nippon Paper*, as well as *Hartford Fire*, will certainly lead to even greater international conflict. The extension of criminal jurisdiction in *Nippon Paper* may result in foreign retaliation against American corporations and individuals.

There is no simple solution to the problem of the extraterritorial application of antitrust laws. Nonetheless, American courts should not follow the path of *Nippon Paper* and *Hartford Fire*. This section proposes a return to a modified *Timberlane/Mannington Mills*/Restatement analysis.

5.1. A Criticism of the First Circuit's Nippon Paper *Opinion*

In extending criminal antitrust jurisdiction extraterritorially, the First Circuit merely applied the holding in *Hartford Fire* after engaging in a brief investigation of the meaning behind the Sherman Act. Unfortunately, this approach stretches the *Hartford Fire* opinion much too far.

The First Circuit cites a number of cases for the proposition that identical words which cover both civil and criminal violations should be interpreted in the same way. However, the Court cited no cases that mandated parallel interpretations that

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Business Records Protections Act (the "Ontario Act") are similar to the Foreign Extraterritorial Measures Act in that they too prohibit Canadian entities from complying with foreign orders or requests in some circumstances. *See* Business Records Protections Act, R.S.O. ch. B-19 (1990) (Can.) (Ontario's blocking statute); Business Concerns Records Act, R.S.Q. ch. D-12 (1977) (Can.) (Quebec's blocking statute).

[113] *See* Mark A. A. Warner, *Hunt v. Lac D'Amiante du Québec*, 88 AM. J. INT'L L. 532, 533 (1994) ("Successive Canadian Governments have long been troubled by the extraterritorial application of a range of U.S. laws dealing with matters such as the effect in the United States of violations of U.S. antitrust laws by actors located outside the United States.").

implicated international issues. For example, the Court cites *United States v. Thompson/Center Arms Co.*[114] for the proposition that where a statute has both criminal and civil sanctions, the court must apply uniform interpretations to both contexts. *Thompson/Center Arms Co.*, however, concerned a statute that levied a tax on certain firearms.[115] In a footnote, the plurality noted that the rule of lenity[116] could be applied to this statute and the interpretation should be the same for suits arising under both the tax and the criminal provisions.[117] The Court also cites *Ratzlaf v. United States* for a similar proposition.[118]

The case for a single construction of a statute with both civil and criminal penalties loses its force when considered in the international context. First, when the criminal penalties affect other states and their subjects, the extension of jurisdiction may be particularly offensive.[119] Second, even the agencies that enforce the statutes with both civil and criminal provisions generally agree that "criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification."[120] Enforcement agencies no doubt realize that zealous criminal prosecutions of foreign entities may have serious repercussions for American corporations and individuals abroad and may damage foreign relations with other states. Most

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[114] United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992).

[115] The statute also has criminal applications. *See id.* at 518 n.10.

[116] The rule of lenity is a doctrine "by which courts decline to interpret criminal statutes so as to increase penalty imposed, absent clear evidence of legislative intent to do otherwise; in other words, where there is ambiguity in a criminal statute, doubts are resolved in favor of defendant." BLACK'S LAW DICTIONARY 1332 (6th ed. 1990).

[117] *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10.

[118] Ratzlaf v. United States, 510 U.S. 135 (1994). In *Ratzlaf*, federal law required banks to report cash transactions in excess of $10,000 to the Department of the Treasury. The statute at issue forbids transactions to be broken up in order to avoid the reporting requirement. The Court held that the phrase "willfully violating" must be applied uniformly throughout the statute. *See id.* at 143.

[119] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 reporters' note 8 (1986) ("In applying the principle of reasonableness, the exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive.").

[120] *Id.*

extensions of criminal statutes to extraterritorial conduct involve "serious and universally condemned offenses, such as treason or traffic in narcotics, and to offenses by or against military forces."[121] Comment f of section 403 of the Restatement (Third) of Foreign Relations Law states:

> The principles governing jurisdiction to prescribe set forth in § 402 and in this section apply to criminal as well as to civil regulation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.[122]

The First Circuit dismissed the Restatement as "merely reaffirm[ing] the classic presumption against extraterritoriality—no more, no less."[123] This Restatement comment, however, must be read in the context of both section 402 and section 403. The bases of jurisdiction in section 402 include extraterritorial conduct which has a substantial effect, actual or intended, within the United States.[124] However, the analysis does not end with section 402. Under section 403, jurisdiction over extraterritorial conduct is not allowable where it is "unreasonable."[125] Even if jurisdiction would be reasonable, a state may have to defer the exercise of jurisdiction when the interests of another state are greater than its

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[121] *Id.* For a discussion of extraterritorial bases of criminal jurisdiction, see generally, Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982).

[122] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. f (1987).

[123] *Nippon Paper*, 109 F.3d at 7.

[124] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3) (1987).

[125] *Id.* § 403(1). In deciding whether jurisdiction is reasonable, a court should consider "all relevant factors." *See id.* § 403(2) (suggesting factors which should be considered).

own.[126] Thus, while Comment f, read out of context, may restate the presumption against extraterritoriality, it is part of a larger analysis which requires a court to balance competing interests and expectations.

The First Circuit noted that "nothing in the text of the Restatement proper contradicts the government's interpretation of Section One" and cited section 402(1)(c) and section 415(2) to support its contention that the only requirement for extraterritorial jurisdiction is a substantial, actual or intended, effect in the United States.[127] However, both of these sections must be read in light of the criteria for reasonableness set forth in section 403.[128]

One of the main problems created by the *Nippon Paper* opinion is that it fails to limit itself effectively. The First Circuit observed that "[w]e live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale."[129] Thus, declining to exercise extraterritorial criminal jurisdiction would create perverse incentives to foreign entities by allowing them to escape criminal prosecution by simply being absent from the United States. However, the Court only identified half of the problem. While the extension of criminal jurisdiction over foreign defendants may catch more violators of U.S. antitrust laws, it will certainly result in U.S. overreaching and may potentially be abused by enforcement agencies. For example, it is possible that forms of industrial organization which are perfectly legal in other countries could violate U.S. antitrust laws and result in prosecution within the United States, even if the conduct occurs entirely in the foreign jurisdiction.[130] Thus,

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[126] *See id.* § 403(3).

[127] *Nippon Paper*, 109 F.3d at 7.

[128] Section 402 explicitly states that it is "[s]ubject to § 403." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). Comment e of section 415 also incorporates the factors in section 403. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 cmt. a (1987) ("This section applies the general principles of sections 402 and 403 to regulation by the United States of anticompetitive conduct.").

[129] *Nippon Paper*, 109 F.3d at 8.

[130] For example, many industries in Japan are organized in structures called *keiretsu*. A vertical *keiretsu* is made up of suppliers, distributors, and financial institutions which service a specific manufacturing concern within an

the United States could attempt to alter the economic policy of other nations through the application of its criminal law to foreign corporations and citizens.[131] The proper forum for the discussion and negotiation of economic policy among sovereign states is not in the criminal courts of the United States. Furthermore, a test that relies on the substantial effects doctrine without the requirement of reasonableness would result in many prosecutions in the United States which would better be heard in other jurisdictions. As the First Circuit noted, the volume of international commerce and the connections between states are rapidly increasing. As nations become increasingly interdependent in their economic relations, there would be little conduct that would not potentially have a substantial effect in the United States. Parties acting in world markets could find themselves with the heavy burden of defending against criminal liability in the United States.

5.2. A Proposal for a New Test

Under this proposed test, criminal antitrust jurisdiction over

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industry. A horizontal *keiretsu* is comprised of manufacturers from different industries, a trading company, a bank, and insurance companies. *See* Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871, 883 n.48 (1993). This organization is typical of many industries that have a large export presence in the United States. Although these organizations are legal and encouraged under Japanese economic policy, they may be offensive to U.S. economic law and policy. Under a "substantial effects" test not moderated with a reasonableness requirement, the United States could attempt to prosecute many of the *keiretsu* in the United States, thus imposing U.S. economic policy on other sovereign states.

[131] In particular, U.S.-Japanese relations could suffer. One of the principle problems between the two countries involves the enforcement of the Japanese Antimonopoly Law. The United States believes that the Japanese government has been too reluctant to enforce the law. The Japanese government, however, believes that its enforcement has been reasonable. *See* Alex Y. Seita & Jiro Tamura, *The Historical Background of Japan's Antimonopoly Law*, 1994 U. ILL. L. REV. 115, 118 (1994). Given the opportunity, the United States government may employ its own antitrust enforcement agencies to rectify this problem by using U.S. criminal law instead of engaging in the much more difficult diplomatic negotiation.

On an ironic note, it was the United States that forced the Japanese to enact the Antimonopoly Law following the Allies victory in World War II. Indeed, the entire concept of American competition law was foreign to them. *See id.* at 122.

foreign defendants acting entirely outside of the United States may only be exercised when the conduct of the defendants passes a three-part test.

First, the defendant's conduct must have either a substantial effect or must have been intended to have a substantial effect on the commerce or trade of the United States.[132] Both the Restatement and this test rely on a territorial approach to jurisdiction.[133] Thus, the first part of this test adopts traditional principles of jurisdiction accepted by U.S. courts for many years.[134] Requiring substantial actual or intended effects in the United States before exercising jurisdiction prevents the use of U.S. antitrust laws as a weapon in a battle between foreign entities without any connection to the United States.[135]

Jurisdiction may not be exercised just because the conduct of the defendants had a substantial effect, actual or intended, in the United States. Rather, jurisdiction may only be exercised where it would be "reasonable" to do so. The courts in *Timberlane* and *Mannington Mills* and the drafters of the Restatement each proposed a multiple factor test for reasonableness. The main thrust of all of these tests is the identification of a conflict of

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[132] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). Section 402 lists three bases for jurisdiction recognized by international law: territoriality, nationality, and passive personality. Other commentators have recognized five bases for the exercise of extraterritorial criminal jurisdiction: territoriality, nationality, the protective principle, the passive personality theory, and the universal theory. *See* Christopher L. Blakesley, *supra* note 120, at 1110-11.

[133] *See id.* at 1126-27 ("Thus, the basis for the expansion of jurisdiction over actions in violation of United States antitrust laws has usually been the objective territoriality principle, in so much as the effect of such violations occurs within United States territory.").

[134] *See id.* at 1123 ("American law has traditionally allowed the assertion of jurisdiction over offenses when the conduct giving rise to the offense has occurred extraterritorially, as long as the harmful effect(s) or result(s) take place within the jurisdiction's territorial boundaries (objective territoriality).").

[135] For an example of a foreign plaintiff bringing suit in the United States under U.S. antitrust laws in connection with conduct occurring almost entirely in France and without any substantial impact on American trade or commerce, see *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 363 (S.D.N.Y. 1997). The plaintiff brought suit after the defendant refused to provide a French telephone directory with certain names removed. The plaintiff's only connection to the United States was the formation of a U.S. subsidiary which would sell this list to direct marketers in the United States who wished to market products in France. *See id.* at 466.

interests between states, and the state with the lesser interest deferring to the state with the greater interest in the dispute.[136] Under this proposed test, the exercise of jurisdiction is reasonable only after evaluating a set of relevant factors. Probably the most comprehensive and useful set of factors is set forth in section 403 of the Restatement, which lists the following factors:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
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> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulations is consistent with the traditions of the international system;

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[136] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (concluding that "in light of all the relevant factors . . . a state should defer to the other state if that state's interest is clearly greater."); *see also Timberlane*, 549 F.2d at 614-15 ("Having assessed the conflict, the court should determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction."); *see also Mannington Mills*, 595 F.2d at 1297 (stating that one factor in determining reasonableness is the "relative importance of the alleged violation of conduct here compared to that abroad").

> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.[137]

Under this proposed test, several additional factors would be considered. First, where the United States and another nation may have jurisdiction over the defendant, the U.S. court would consider the incentive the other interested state has in prosecuting the conduct if U.S. courts did not exercise jurisdiction. For example, in *Nippon Paper*, Judge Lynch noted in his concurrence that the conduct stated in the complaint only affected American consumers, so the Japanese government had little incentive to prosecute improper conduct.[138] The incentive problem is most severe when dealing with export cartels. States have little incentive to prosecute export cartels because their behavior only affects consumers in other countries. For example, the Foreign Trade Antitrust Improvements Act of 1982 exempts anticompetitive behavior in export trade or commerce from prosecution under the Sherman Act. However, activities abroad which have a substantial effect in the United States or on the import trade of the United States are not exempted.[139] Thus, where a foreign state's exports to the United States indicate anticompetitive behavior, this criterion would justify U.S. courts who exercise jurisdiction.

Second, U.S. courts should consider the degree of conflict with other countries' economic policies, including their industrial structure. One of the primary problems with the "true conflicts" test of *Hartford Fire* is that it only considers conflicts between U.S. and foreign laws in which it is impossible to comply with both sets of laws or regulations.[140] The proposed test recognizes

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[137] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987). For the *Timberlane* factors, see 549 F.2d at 614. For the *Mannington Mills* factors, see 595 F.2d at 1297-98.

[138] *See Nippon Paper*, 109 F.3d at 12.

[139] *See* 15 U.S.C. §§ 6a, 45(a)(3).

[140] *See Société Nationale Industrielle Aerospatiale*, 482 U.S. 522 at 555 (1987), *cited in Hartford Fire*, 509 U.S. at 799.

that other states have economic policies which may differ from those of the United States and that U.S. courts should not allow U.S. enforcement agencies to attack those policies using U.S. antitrust law. Courts, though, could consider the regulatory and policy regimes of other countries in determining whether to allow the extraterritorial exercise of antitrust jurisdiction. However, courts should not refuse to extend antitrust jurisdiction solely because another state has a strong policy of encouraging certain conduct.[141] Rather, courts should consider industrial organization only as part of a larger analysis which also examines all of the named factors.

Third, a court contemplating extension of criminal jurisdiction over a foreign defendant should consider the availability and adequacy of alternate remedies for the aggrieved party. As previously noted,[142] many countries regard the imposition of criminal jurisdiction as particularly intrusive. A civil suit rather than a criminal prosecution would avoid many of the problems created by the *Nippon Paper* opinion and may even provide better remedies for the plaintiff, namely treble damages or injunctive relief. For conduct that occurred entirely outside of the United States and affected parties with operations in the country in which the conduct occurred, the court should consider the availability of remedies in the judicial system of the foreign state. Seeking a remedy in the state in which the conduct occurred solves several problems. First, the local court would have easier and more convenient access to evidence. Second, it avoids the application of blocking statutes and other devices aimed at restricting foreign access to records. Third, it prevents parties from using U.S. antitrust laws as weapons against competitors in conflicts involving the parties' conduct in other countries.

The third step in this proposed test may require that U.S. courts relinquish jurisdiction over a foreign defendant even if the exercise of jurisdiction would be reasonable. If the regulations of two states conflict such that compliance with both sets of

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[141] The Restatement takes a similar position. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 cmt. j (1987) ("Ordinarily, the fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws.").

[142] *See supra* note 118.

regulations is impossible, U.S. courts should carefully analyze the interests of the United States and of the foreign state. If the interests of the foreign state are greater, U.S. courts should defer the exercise of jurisdiction to the other state.[143] This prong of the test is similar to the "true conflicts" test set forth in *Hartford Fire.* Deference to the other state only occurs under this prong if it is actually impossible to comply with both sets of regulations.

6. CONCLUSION

The First Circuit's extension of criminal antitrust jurisdiction to foreign defendants acting in foreign states will certainly lead to greater conflict between the United States and its trading partners. Foreign states, already uncomfortable with the reach of U.S. laws, are certain to react negatively to this development.

A better approach to the problem of criminal conduct of foreign entities in foreign states is to return to a Restatement-style "reasonableness" analysis. By allowing jurisdiction in cases where the foreign conduct has a substantial effect on U.S. trade or commerce, where the exercise of jurisdiction is reasonable, and where there would be no conflict with foreign law if there was compliance with U.S. law, U.S. courts could address potential antitrust violations that may reduce efficiency and unfairly damage U.S. business interests while avoiding as many conflicts as possible with other states who may view the exercise of criminal jurisdiction over their subjects as unreasonably intrusive and unwelcome.

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[143] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (1987). This prong may require one state modifying or eliminating a regulation or interpreting a statute in such a way as to avoid conflict. *See id.* § 403 cmt. e.

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