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The Return of Timberlane?: The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust

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ABSTRACT

Over the past 100 years, the United States has remained ambivalent regarding the potential extraterritorial application of its antitrust laws. The executive, legislative, and judicial branches began with a doctrine of strict territoriality but promptly shifted toward an examination of the effects of the antitrust activity on U.S. commerce. Since the 1970s, the branches of government have reframed the question as one of statutory interpretation, embraced considerations of international comity, modified those considerations, and eventually rejected many of those same considerations.

Throughout this chaos, however, the results reached by the various branches of government have typically been consistent with the economic theory of international antitrust. This theory suggests that a country will use its domestic antitrust laws to regulate foreign conduct when that country is both a net importer and maintains the political power to compel international compliance. Thus, with one major deviation in the 1970s, the United States, since becoming a net importer, has extended jurisdiction over foreign parties for antitrust activity organized and occurring abroad whenever it has maintained sufficient international political power.

The Fifth Circuit has now entered the debate on extraterritorial application of U.S. antitrust law. In Den Norske Stats Oljeselskap As v. HeereMac v.o.f., *the court, in an opinion rooted solely in statutory interpretation, declined to exercise jurisdiction over the claims of a foreign plaintiff injured by cartel activity occurring exclusively outside of the United States. While this result may seem consistent with traditional notions of the role of U.S. courts, it is inconsistent with both the economic theory of international antitrust and the antitrust laws' goal of protecting the U.S. consuming public. This Note argues that the Fifth Circuit should have exercised jurisdiction over the foreign plaintiff's claims, thereby protecting U.S. consumers from rising prices and avoiding further uncertainty regarding the extraterritorial application of U.S. antitrust law.*

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I. INTRODUCTION

Despite the stated goal of protecting the U.S. consuming public, the United States has remained ambivalent regarding the potential extraterritorial application of its antitrust laws. In domestic cases, the courts and legislature have oscillated between the per se and rule of reason tests to determine antitrust violations. The debate regarding extraterritorial application, meanwhile, has been far more complex. The various branches of government began with a doctrine of strict territoriality that required that the antitrust activity occur in U.S. territory but promptly shifted toward an examination of the effects of the antitrust activity on U.S. commerce to determine violations. Since the 1970s, the branches of government have reframed the question as one of statutory interpretation, embraced considerations of international comity, modified those considerations, and eventually rejected many of those same considerations.

Throughout this chaos, however, the results of extraterritorial antitrust enforcement have been remarkably consistent with the economic theory of international antitrust. This theory suggests that a country will use its domestic antitrust laws to regulate foreign antitrust activity when that country is both a net importer and maintains the political power to compel international compliance. Thus, with one major deviation in the 1970s, the United States, since becoming a net importer, has extended jurisdiction over foreign defendants for antitrust activity organized and occurring abroad whenever it has maintained sufficient international political power.

The U.S. Court of Appeals for the Fifth Circuit has now entered the debate on extraterritorial application of U.S. antitrust law. In *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, the court declined to exercise jurisdiction over the claims of a foreign plaintiff injured by cartel activity organized and occurring exclusively outside of U.S. territory. While this result may seem consistent with traditional notions of the role of U.S. courts, it is inconsistent with both the economic theory of international antitrust and the antitrust laws' goal of protecting the U.S. consuming public. This Note examines *Den Norske* and attempts to place it within the context of the history and continuing debate regarding extraterritorial application of U.S. antitrust law.

Part II develops the economic theory of international antitrust that guides the analysis of later sections. Part III describes the origins of extraterritorial antitrust in the United States while Part IV traces the more recent history. Part V discusses the statutory and executive developments of the last 20 years, which attempt to clarify the government's position on the use of U.S. law to regulate foreign antitrust conduct. Part VI examines the Fifth Circuit's recent decision in *Den Norske* that exemplifies the confusion and discomfort

that U.S. courts feel in exercising subject matter jurisdiction in claims involving extraterritorial antitrust activity. Finally, Part VII recapitulates and shares some parting thoughts.

II. THE ECONOMIC THEORY OF INTERNATIONAL ANTITRUST

Scholars reason that there is a globally efficient level of antitrust activity.[1] This level, equilibrium, theoretically occurs when the marginal benefits of economies of scale from the creation of larger firms and cartels equal the marginal costs of those activities.[2] Countries, however, typically pursue independent, national antitrust policies, thereby maximizing national welfare rather than cooperating to maximize global welfare.[3] Therefore, despite greater overall economic cooperation through the North American Free Trade Agreement and the European Union, the level of global antitrust remains skewed from its optimal level.[4] Nevertheless, economics provides several predictions regarding how and when competing countries will manage their national antitrust policies.[5] Although they are only a small subset of antitrust activity, mergers are used in this Note as a framework for developing more general economic-based antitrust policy predictions.

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1. *See generally* Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998). Most areas of international law have not extensively adopted economic analysis because of seemingly inaccessible methodologies, conservative political prejudices, and positivism and its presumed denigration of international law. Jeffrey L. Danoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 6 (1999). With scholars such as Eleanor Fox, Andrew T. Guzman, and Diane Wood, international antitrust is an exception. Thus, economic reasoning aids the antitrust scholar because "there is broad consensus that antitrust law rightly depends on economic analysis to decide many issues. . . ." Ronald A. Cass, *International Trade and Unfair Imports: Price Discrimination and Predation Analysis in Antitrust and International Trade: A Comment*, 61 U. CIN. L. REV. 877, 878 (1993). Moreover, "both courts and the relevant enforcement agencies . . . have been influenced by the substantial body of positive economic writings on these subjects [antitrust constraints], often explicitly relying on recent academic literature." *Id.*

2. Guzman, *supra* note 1, at 1509.

3. *Id.* at 1504.

4. *Accord* William Sugden, Note, *Global Antitrust and the Evolution of an International Standard*, 35 VAND. J. TRANSNAT'L L. 989, 1017 (2002). Legal commentary has acknowledged this skewed effect and favors efforts aimed at further harmonization and internationalization of competition law. *See, e.g.*, Eleanor M. Fox, *Toward World Antitrust and Market Access*, 90 AM. J. INT'L L. 1 (1996); *But see* Diane Wood, *A Cooperative Framework for National Regulators*, 72 CHI.-KENT L. REV. 521, 524 (1996) (arguing national regulation is the best approach).

5. *See generally* Guzman, *supra* note 1; Sugden, *supra* note 4.

A. *The Conceptual Framework*

The basic economic model of international antitrust (Model 1) assumes a world consisting of two countries.[6] Country A is home to all of the producers of the traded good while Country B is home to all of the consumers.[7] Country A attempts to maximize profits for its producers while Country B seeks to maintain low prices for its consumers.[8] Tension between these competing interests can arise when two firms in the producer country plan a merger.[9] Although this merger may be desirable from a global perspective, antitrust policy is pursued at the national level.[10] Thus, the producer country will always approve the merger[11] while the consumer country will try to block the combination if higher prices could reduce consumer welfare.[12] Therefore, the ultimate disposition of the merger depends on the relative political power of the two countries.[13]

The isolation of producers and consumers in Model 1, however simple, fails to accurately portray the world marketplace.[14] Model 2 relaxes this assumption of isolation as Country A continues to produce the market good while Country B both produces and consumes the good.[15] Country A continues to act in the same manner as in Model 1; it will approve any merger proposal to maximize the country's welfare through an increase in domestic producer surplus.[16] Country B's policymakers, on the other hand, must make a more complex evaluation based on an analysis of the proposed merger's

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6. Guzman, *supra* note 1, at 1512.

7. *Id.* This one good represents a market basket of goods and services, thus allowing the economist to examine the market for only one good. *See* OLIVIER BLANCHARD, MACROECONOMICS 1-2 (1997).

8. Guzman, *supra* note 1, at 1515.

9. Sugden, *supra* note 4, at 994.

10. Guzman, *supra* note 1, at 1514. The result of this phenomenon is that if Country A gains ten utils via the merger and Country B loses five utils, Country B will try to block the activity even though the merger is globally efficient, creating five utils of wealth.

11. A rationally acting producer firm does not seek to merge unless its producer surplus increases. Thus, in a country that only produces, all mergers are approved because the increase in producer surplus is a proxy for the goals of the country.

12. Guzman, *supra* note 1, at 1515. Thus, the government promotes local interests and hopes to capture "the maximum possible benefits for locals while externalizing as many costs as possible onto foreigners." Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1152 (2001). Thus, countries frequently allow antitrust exemptions for export cartels because the harm occurs abroad while domestic firms profit from the same activities. *Id.*

13. Guzman, *supra* note 1, at 1516.

14. *Id.*

15. *Id.*

16. *Id.*

impact on both producers and consumers.[17] Country B will allow the merger if the net change to domestic producer and consumer surplus is positive; without domestic efficiency gains, Country B will not approve the combination.[18] The result is that "Country B will never allow an activity that reduces global welfare because its own consumers are the ones who would bear the loss."[19] However, some activities that increase global welfare will also be blocked because Country B's policymaking does not account for the welfare gains in Country A.[20]

Model 3 alters Model 2's assumptions, as Country A consumes rather than produces while Country B continues to both produce and consume.[21] Under this model, Country A does not approve any mergers that reduce global welfare because its consumers would suffer the negative effects.[22] Moreover, Country A will also block some mergers that increase global welfare because Country A fails to account for the increase in profits for Country B's producers.[23] Country B, on the other hand, approves all activities in which the net change to domestic producer and consumer surplus is positive.[24] The result is similar to that in Model 2 as some activities that increase global welfare will be blocked.[25] The difference, however, is that, in Model 2, Country A always approves the merger despite global inefficiency while under Model 3, Country A, as a nation of consumers, blocks some activity despite global efficiency.[26]

B. *Implications to a Trading Marketplace*

Without knowing the relative proportions of producers and consumers in each country, it "is impossible to predict how a country will respond to an activity with potentially anticompetitive effects."[27] Nevertheless, both countries seek to "approve activities for which the sum of the changes in producer and consumer surplus is positive."[28] Therefore, if each country both produces and consumes the same

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17. *Id.*
18. *Id.*
19. *Id.* at 1517.
20. *Id.*
21. *Id.* For ease of comparison to Model 2, the Author has transposed the variable names from Professor Guzman's model of a two consumer, one producer world.
22. *Id.* at 1517-18.
23. *Id.* at 1518.
24. *Id.*
25. *Id.*
26. *Compare id.* at 1516 (concluding that Country A approves all proposed antitrust activity), *with id.* at 1517-18 (concluding that Country A refuses approval of some proposed antitrust activity).
27. *Id.* at 1518-19.
28. *Id.* at 1518.

percentage of world output, the global market achieves optimal levels of antitrust.[29]

A country that does not maintain a share of global consumption equal to its global production, however, likely will not adopt the optimal global policy.[30] This principle suggests that

> [a] country whose firms are responsible for x% of global production will take into account x% of the change in global producer surplus generated by a particular activity. A country whose consumers account for y% of global consumption will take into account y% of the total change in global consumer surplus generated by the activity.[31]

This logic results in a situation where "a country that can apply its laws extraterritorially will underregulate anticompetitive behavior if it is a net exporter and overregulate such behavior if it is a net importer."[32]

The preceding analysis, however, assumes that each country is able to enforce its laws globally.[33] The power to enforce laws in the international system is derived from a variety of factors, such as the size of the country, the size of its market, and the prestige and attractiveness of that market.[34] Moreover, even if a country possesses sufficient power to enforce its antitrust policy abroad, it will decline to do so when the cost of regulating extraterritorial antitrust exceeds the benefits received.[35] Nevertheless, a large country with a broad market can be expected to export its antitrust laws, especially if other countries rely on it as a major international trading partner.[36]

Without transaction costs or political considerations, the efficient level of global antitrust occurs regardless of the adopted legal rule.[37] Countries should pay or trade with each other to costlessly redistribute income and maximize global surplus.[38] Transaction costs and political considerations, however, are a reality of the economic world.[39] Thus, the efficient outcome may not occur under every legal

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29. *Id.* at 1519.
30. *Id.* at 1519-20.
31. *Id.*
32. *Id.* at 1520.
33. Sugden, *supra* note 4, at 995-96.
34. Guzman, *supra* note 1, at 1525.
35. *Id.*
36. *Accord id.* at 1524-29.
37. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11-12 (2d ed. 1989). Ronald H. Coase developed this principle regarding economic analysis of law in 1960, which is popularly referred to as the Coase Theorem. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
38. POLINSKY, *supra* note 37, at 12.
39. *Id.*

rule.[40] In antitrust, where the political clout of countries determines the level of regulation, some efficient activity will be blocked if one powerful country suffers a net loss, regardless of global benefits.[41]

With transaction costs, a country that cannot enforce its laws globally will have relatively weaker antitrust policies.[42] The country can obviously prevent domestic firms from engaging in suboptimal levels of antitrust, but domestic consumers can still be hurt by foreign antitrust activity.[43] This country has a modified incentive structure and will allow domestic firms to engage in anticompetitive activity "if the change in domestic surplus plus the change in domestic profits is greater when the activity is allowed than when it is prevented domestically."[44] Thus, such a country prevents domestic firms from engaging in profit decreasing antitrust activity but cannot prevent foreign firms from decreasing domestic consumer surplus.[45] This antitrust policy is weaker than the optimal global policy because foreign countries cannot be compelled to follow the country's strong domestic antitrust policy.[46] The result is an overabundance of antitrust activity in that country's marketplace.[47]

A country with extraterritoriality, on the other hand, will block the anticompetitive activities of foreign firms, and even some of their procompetitive activities, if either impedes the country's trade or production.[48] The result is that in a world with extraterritoriality, "the toughest law is the binding law because an inefficient activity imposes a net loss on at least one country, and that country can prevent the activity through extraterritorial application of its laws."[49] Thus, all globally inefficient antitrust activities are prevented, but some efficient activities are also blocked.[50] The prevailing law will produce less antitrust activity than is optimal.[51]

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40. *Id.* at 13.
41. Guzman, *supra* note 1, at 1524.
42. *Id.* at 1521.
43. *Id.* at 1522.
44. *Id.*
45. *Id.* at 1523.
46. *Id.* at 1524.
47. *Id.* As international trade increases, the divergence in policy becomes more acute, and the country becomes more vulnerable to politically powerful countries. *Id.*
48. *Id.* at 1523. Professor Fox, however, argues that, in some instances, a country with extraterritoriality will refrain from such exercise in hopes of attracting business and investment or, because of the Theory of the Commons, saving on the expense of enforcement. Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1794 (2000).
49. Guzman, *supra* note 1, at 1524.
50. *Id.*
51. *Id.* Professor Guzman's attempts to explore these types of choice of law issues through economics is "by far the most comprehensive and rigorous" attempt to do so. Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957, 969 (2002). Moreover, a primary implication of this theory is that "[i]nternational

III. THE ORIGINS OF EXTRATERRITORIAL ANTITRUST IN THE UNITED STATES

A. *Congress Legislates*

The U.S. Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."[52] In 1890, Congress used this authorization to enact the Sherman Antitrust Act (Sherman Act).[53] The United States was the first country to enact formal antitrust laws, but Senator Sherman and other proponents believed that the Sherman Act merely codified existing common law doctrines.[54] Section 1 provides 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. . . ."[55] Additionally § 2 makes it a crime to "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. . . ."[56]

The U.S. Attorney's office may prosecute violations of the Sherman Act in either a civil or criminal proceeding.[57] If the government directly purchased goods from the party accused of antitrust violations, it may obtain injunctive relief, damages, or both through a civil proceeding.[58] Alternatively, the government may prosecute all antitrust violations and seek imprisonment and fines of up to ten million dollars.[59]

The Sherman Act serves as the fundamental legislation regarding antitrust, but it does not incorporate a provision for private parties to sue third parties for alleged antitrust violations.[60] The Clayton Act, enacted in 1914, grants these powers, as "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

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organizations can promote negotiations over substantive issues by facilitating transfer payments," thereby reducing transaction costs and creating the most efficient outcome regardless of the legal rule. *Id.* at 960.

52. U.S. CONST. art. I, § 8.
53. Sherman Antitrust Act §§ 1-7, 15 U.S.C. §§ 1-7 (1997).
54. 21 CONG. REC. 2456, 2457 (1890).
55. 15 U.S.C. § 1 (1997).
56. *Id.* § 2.
57. *Id.* §§ 1, 2, 4.
58. *Id.* § 4; Clayton Act § 4, 15 U.S.C. § 15 (1997).
59. 15 U.S.C. §§ 1-2 (1997).
60. *See generally id.* §§ 1-7.

of the United States."[61] Successful parties may be awarded injunctive relief or treble damages plus costs and attorney's fees.[62]

B. *The Courts Interpret*

Initially, the U.S. Supreme Court interpreted the Sherman Act literally, holding that the Sherman Act "renders illegal *all* agreements which are in restraint of trade or commerce. . . ."[63] The severity of the violation or the reasonableness of judicial intervention did not affect this strict holding.[64] In 1911, however, the Court adopted the "rule of reason" test, which required a finding of an unreasonable or undue restraint of trade before antitrust activity could be halted under the Sherman Act.[65] The Court, relying on Congress' intent to codify common law, overruled prior precedent because only "unreasonable restraint[s]" on trade were justiciable prior to enactment of the Sherman Act.[66]

1. The Courts Consider Extraterritorial Jurisdiction

Despite the plethora of litigation concerning domestic antitrust, the Court did not consider the potential extraterritorial application of the Sherman Act until 1909 when it heard oral arguments in *American Banana Co. v. United Fruit Co.*[67] The Court, led by Justice Oliver Wendell Holmes, initially expressed surprise that U.S. antitrust law might apply extraterritorially.[68] United Fruit, a U.S. corporation, maintained a longstanding monopoly of the banana trade through its plantations in Panama, which was then part of the

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61. *Id.* § 15(a).

62. *Id.*

63. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 341 (1897) (emphasis added). The Court believed that Congress should address any policy considerations that negated the literal interpretation. *Id.* at 340. Many scholars argue that, in the *Trans-Missouri* opinion, Justice Peckham intended to outlaw "all naked horizontal restraints" in part because of a concern "about the fate of 'small dealers and worthy men' at the hands of large trusts." Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 44-45 (1999).

64. *Trans-Mo.*, 166 U.S. at 341.

65. Standard Oil Co. v. United States, 221 U.S. 1, 54, 60 (1911).

66. *Id.* at 54. The Court, however, would continue to waiver on the rule of reason and per se approaches to antitrust analysis. Milton Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1289-90 (1982). Moreover, although the judiciary and legislature have modified pertinent antitrust doctrines, they have hesitated to correct a series of aberrations from accepted norms. *Id.* at 1289.

67. Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

68. *Id.* at 355.

United States of Colombia.[69] In 1903, American Banana, also a U.S. corporation, harvested a banana crop from a new Panamanian plantation in a territory administered by Costa Rica.[70] United Fruit, which was subsidized by the Costa Rican military, promptly confronted American Banana and demanded that either business cease or the American Banana operation merge into United Fruit.[71] American Banana declined both options.[72] United Fruit, which would lose substantial profits should its monopoly cease, induced the Costa Rican government[73] to seize a part of American Banana's plantation and a cargo of its supplies.[74] Costa Rica then awarded the property to one of its citizens.[75] Rather than contest these actions in a Costa Rican court, where Costa Rica would presumably prevail, American Banana challenged United Fruit's monopoly in U.S. court, alleging violations of the Sherman Act.[76]

Justice Holmes, who felt the Sherman Act was foolish, affirmed the circuit court[77] and Circuit Court of Appeals, dismissing American Banana's complaint for failure to state a cause of action.[78] Using conflict of laws cases to support the prevailing notions of strict territoriality, Justice Holmes foreclosed extraterritorial application of the Sherman Act.[79] The Court reasoned that "the general and almost

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69. *Id.* at 354. For an in-depth discussion of the impact of United Fruit in Central America, see generally STACY MAY & GALO PLAZA, THE UNITED FRUIT COMPANY IN LATIN AMERICA (1958).

70. *Am. Banana*, 213 U.S. at 354. McConnell actually owned the plantation at its inception in 1903 but sold the property to American Banana in June 1904. *Id.* American Banana retained control of the plantation throughout the litigation process. *Id.*

71. *Id.*

72. *Id.*

73. American Banana also alleged that these actions were outside of the jurisdiction of Costa Rica because Panama had become an independent sovereign in November 1903. *Id.* at 354-55.

74. *Id.*

75. *Id.* at 355.

76. *Id.* at 353.

77. *Id.* at 359. In 1909 the circuit court served as the federal trial court. *See* Thomas E. Baker, *A Primer on the Jurisdiction of the U.S. Courts of Appeals*, FED. JUD. CENTER EDUC. & TRAINING SERIES, at § 1.03, *available at* 1989 WL 270242 (1989).

78. *Am. Banana*, 213 U.S. at 353, 357; Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 641 (2001).

79. *Am. Banana*, 213 U.S. at 359; William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 114 (1998). Holmes relied heavily on the principles of *Slater v. Mexican National Railroad*, where he had advised the plaintiffs to sue "in Mexico, on the other side of the river," where the fatal injury occurred. Slater v. Mexican Nat'l R.R., 194 U.S. 120, 129 (1904). The rationale for this result is the "vested rights" theory of conflict of laws, which bases the source of legal obligations on the law of the place of the act. Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1807-08 (1992). Justice Holmes preferred the term "*obligatio*" to "vested rights," although both refer to the idea

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," except where the statute specifically stated otherwise.[80] The Court believed that to act otherwise would be unjust and constitute an undue interference with the authority of another country.[81] Therefore, because United Fruit's alleged antitrust activities had occurred outside U.S. borders, the Sherman Act and other U.S. laws could not regulate the conduct.[82]

American Banana, at its narrowest, has been read to suggest that the United States cannot impose liability on companies whose conduct takes place both domestically and internationally.[83] At its broadest, Justice Holmes presented an interpretation of the Sherman Act that precluded application of U.S. antitrust laws to conduct that occurs outside of the United States, regardless of the nature and degree of domestic effects.[84] Nevertheless, Holmes' notion of international comity is one in which the home country and its laws serve as the primary and perhaps exclusive forum for regulation of antitrust violations.[85] This result was consistent with the liberalist view of international conflicts that powered the U.S. political system before World War I.[86] Cooperation, rather than conflict, was believed to create stability in the international system, and therefore, no country should impose order on another.[87] Moreover, although a major economic player and importer, the United States lacked clout

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that foreign law is given effect as a matter of law. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 111-12 (1998).

80. *Am. Banana*, 213 U.S. at 356. This language is authority for both the general presumption against extraterritoriality and the specific presumption against the extraterritoriality of the Sherman Act. William Dwight Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L.J. 655, 657 (1954). The general presumption, however, was not invented by Justice Holmes, but rather by Justices Marshall and Story nearly 100 years earlier in *The Schooner Charming Betsy* and *The Appollon*. *Id.* at 658. *See also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); The Appollon, 22 U.S. (9 Wheat.) 361 (1824).

81. *Am. Banana*, 213 U.S. at 356. Justice Holmes' manner of analysis suggests that the Court's concern "was less congressional intent than congressional authority to regulate activities abroad." Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 604 (1990).

82. *Am. Banana*, 213 U.S. at 357.

83. Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 751 (1995).

84. *Am. Banana*, 213 U.S. at 356.

85. *Cf. id.*

86. For a more detailed discussion of the liberal conception of world order, see generally JOSEPH S. NYE, JR., UNDERSTANDING INTERNATIONAL CONFLICTS 2-6 (1993).

87. The highlight of this cooperation ideology would come after World War I as President Woodrow Wilson proposed the League of Nations. *Id.* at 75.

within the international scene and, therefore, lacked ability to enforce its laws abroad.[88] Thus, the economic theory of international antitrust successfully accounts for the Court's result; the U.S.'s weak extraterritorial antitrust policy allowed a welfare-destroying cartel to continue operation.

2. The Court Reconsiders

As global tension heightened, the Court became more aggressive, and the government prevailed in a series of enforcement actions that concentrated on the effects of foreign antitrust activity on the domestic economy.[89] Four years after *American Banana*, the Court narrowed Justice Holmes' presumption against extraterritoriality and exercised jurisdiction over activities that occurred on the open seas where there was presumably no sovereign government.[90] Then, the Court asserted that U.S. courts may control *all* domestic activity regardless of whether the acting party was American or foreign.[91] Finally, as the United States became active in World War I, the Court shifted from the cooperation-based sentiments of liberalism and began using U.S. law to regulate antitrust activity organized from abroad but coordinated in the United States.[92]

As the United States became more aggressive in the world marketplace, the Court further narrowed the *American Banana*

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88. The United States became the world's largest economy in the 1880s, but Great Britain continued to dominate the international system. *Id.* at 53-54.

89. Swaine, *supra* note 78, at 641.

90. United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87, 106 (1913). The Canadian corporation's conduct occurred from both inside and outside U.S. borders. *Id.* The Court, in sustaining the plaintiff's claims, treated this application as an exception, thereby preserving the general rule that U.S. law has no extraterritorial effect. *Id.* Nevertheless, the Court signaled a willingness to hear cases involving foreign parties in actions occurring outside the territory of the United States. Turley, *supra* note 81, at 609.

91. *Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. at 106.

92. Thomsen v. Cayser, 243 U.S. 66, 88 (1916). The plaintiff alleged that the defendants interfered with trade by offering lower prices to U.S. companies shipping goods exclusively on their shiplines. *Id.* at 68, 71-72. The U.S. Supreme Court determined that, although the conspiracy was formed abroad, it was operated in the United States and therefore affected U.S. foreign commerce within the meaning of the Sherman Act. *Id.* at 88. More importantly, the Court made a preliminary attempt at phrasing extraterritorial application of the Sherman Act in terms of effects: "[T]he combination affected the foreign commerce of this country and was put into operation here." Dodge, *supra* note 79, at 123 (quoting *Thomsen*, 243 U.S. at 88). Scholars commended this relaxation of the rule against extraterritorial application of the Sherman Act because "anticompetitive activities are necessarily going to occur outside the United States in many cases and the statutory purpose would be needlessly sacrificed by a strict limit to U.S. activities." William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1253-54 (2001).

doctrine in *United States v. Sisal Sales Corp.*[93] The U.S. government charged Sisal, a U.S. corporation, with conspiring to monopolize U.S. sales of materials used in making rope. From its U.S. offices, Sisal officials had allegedly induced Mexican government officials to create favorable laws that recognized Sisal as the exclusive trader in such materials.[94] The Court rejected traditional notions of foreign government protection and immunity, holding that antitrust activity occurring outside the United States, even if sanctioned by a foreign government, faced possible regulation under the Sherman Act.[95] As a result, Sisal was liable for Sherman Act violations.[96] With this determination of liability, the Court completed its nearly systematic rejection of liberalism and strict territoriality, both of which had guided Justice Holmes in *American Banana*.[97]

In contrast to the propensity for world cooperation in the early 1900s, the post-World War I international system was influenced by collective security.[98] Collective security was a liberal solution to the perceived failures of the international system leading up to World War I.[99] The approach embraced the creation of liberal international institutions such as the League of Nations and an international court system.[100] Thus, the focus became worldwide cooperation through democratic decisions made at the international level.[101] Despite sentiments rooted in cooperation, the United States had emerged as a world power and was expected to influence these new international institutions. With this power, the economic theory of international antitrust suggests that the United States would begin to regulate

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93. United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

94. *Id.* at 271.

95. *Id.* at 276. Under the facts of *Sisal*, *Thomsen v. Cayser* did not serve as relevant precedent because Sisal's agreement was negotiated from the United States, and then the conduct occurred abroad, causing direct effects on the U.S. market. Therefore, the Court required a new, broader doctrine to regulate Sisal's conduct.

96. *Id.*

97. *See generally id.* The Court distinguished *American Banana* from *Sisal* because, in the latter, "part of the conduct occurred in the United States and had intentionally affected American trade." Dean Brockbank, *The 1995 International Antitrust Guidelines: The Reach of U.S. Antitrust Law Continues to Expand*, 2 J. INT'L LEGAL STUD. 1, 7 (1996). The Court, however, never expressly overruled *American Banana*, although "its authority has been so eroded by subsequent case law as to have been effectively limited to its specific factual pattern." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 491 F. Supp. 1161, 1181 (E.D. Pa. 1980).

98. NYE, *supra* note 86, at 74-76. Leading into World War I, the world had embraced the balance of power approach, which represents a multipolar world. *Id.* at 56-57. This approach was widely blamed for the war, and thus collective security, advocated by President Woodrow Wilson, became the systemic goal. *Id.* at 74.

99. *Id.*

100. *Id.*

101. *Id.*

more closely a wider variety of foreign antitrust activity.[102] Thus, economics predicted the courts' rejection of strict territoriality in the years following *American Banana*.[103]

3. The Court Adopts a New Approach

Following World War II, U.S. courts drastically extended their exercise of jurisdiction over foreign corporations through *United States v. Aluminum Co. of America (Alcoa)*.[104] The U.S. Court of Appeals for the Second Circuit, sitting as a court of last resort via certificate from the Supreme Court,[105] implicitly rejected the *American Banana* approach of strict territorial application of the Sherman Act.[106] Alcoa, a U.S. corporation, maintained a Canadian subsidiary, Aluminum Limited (Limited).[107] Limited entered into a cartel agreement with a French corporation, two German corporations, one Swiss corporation, and one British corporation to limit the supply of aluminum in the United States.[108] The U.S. government challenged the cartel, which was protected by Swiss law, in U.S. courts, alleging violations of the Sherman Act.[109]

The court, led by Judge Learned Hand, established the "intended effects" test to determine whether a U.S. court should hear complaints of extraterritorial antitrust activity.[110] Noting that Congress did not intend for the Sherman Act to punish antitrust activity without consequences on U.S. commerce, the court ruled that U.S. courts may impose liability on foreign citizens and corporations "for conduct outside [U.S.] borders that has consequences within [U.S.] borders which the state reprehends. . . ."[111] The court, however, limited this seemingly boundless doctrine by requiring a

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102. Heavy importers with power among other nations are expected to overregulate antitrust activities. *See supra* notes 1-51 and accompanying text.

103. *Id.*

104. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416 (2d Cir. 1945).

105. The U.S. Supreme Court was unable to meet quorum and thus referred the case to the Second Circuit under 15 U.S.C. § 29 as amended in 1944. This provision was partially repealed in 1974. *See* 15 U.S.C. § 29 (1944) (partially repealed by 1974 amendments). Thus, for all intents and purposes, the Second Circuit's rationale was binding on the other circuits.

106. *Alcoa*, 148 F.2d at 443.

107. *Id.* at 421. Limited was formed on May 31, 1928 to take over the majority of Alcoa's foreign operations. *Id.* at 439.

108. *Id.* at 442.

109. *Accord id.* at 443 (noting that the action arises under § 1 of the Sherman Act).

110. *Id.* at 421, 443-44. Professor Gunther argues that Judge Hand's opinion is "flawed on several points and perhaps wrongly decided." Michael Boudin, *The Master Craftsman Learned Hand: The Man and the Judge*, 47 STAN. L. REV. 363, 375-77 (1995).

111. *Alcoa*, 148 F.2d at 443.

direct and intended effect on U.S. domestic commerce.[112] The court further held that the Sherman Act does not apply to antitrust activities with only an indirect effect on U.S. commerce, such as a limit on European supply that leads to an increase in U.S. prices.[113] Moreover, if domestic antitrust effects are lacking, regardless of intent, the Sherman Act does not apply.[114] Limited's cartel intended to suppress and restrain the exportation of aluminum to the United States, thereby satisfying the intent requirement.[115] Furthermore, limited supply raised domestic prices for aluminum, creating a direct effect on U.S. commerce.[116] Therefore, the court held that the cartel agreement violated the Sherman Act.[117]

The effects test gained rapid acceptance in the United States but was met with resistance abroad.[118] The United States received harsh criticism for neglecting to consider the interests of foreign governments in regulating the commercial activity of their domestic corporations under their own national laws.[119] The *Alcoa* decision, however, is consistent with the economic theory of international antitrust as well as the dominant political ideology of the mid-20th century.[120] Globalization led to more multinationals, and as it became the world's police force, the United States assumed a prominent role in the international system.[121] Thus, the United States maintained the political power necessary for extraterritorial

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112. *Id.* at 443-44.

113. *Id.*

114. *Id.* at 444.

115. *Id.*

116. *Id.* Effects could be inferred by evidence showing a sharp increase in aluminum imports to the United States following dissolution of the cartel.

117. *Id.* at 445. The monopolist, however, would argue that the plaintiffs "suffered no antitrust injury since Alcoa had done no more than substitute its output for that of the [plaintiffs]," which did not result in inefficiencies or restricted output. William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1480 (1985).

118. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 9 (1992). A Canadian critique regarding the effects doctrine focuses on the ability of the United States to reduce the foreign sovereign's control of activity under their control. *See generally* J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978).

119. Alford, *supra* note 118, at 9.

120. NYE, *supra* note 86, at 111. *See also supra* notes 1-51 and accompanying text.

121. *See generally* NYE, *supra* note 86, at 63, 98-131. A bipolar system is one in which the international system is driven by two competing hegemons. *Id.* at 30. This system simplifies communication and calculations, but marginal conflicts are magnified in degree because the system lacks flexibility. *Id.* at 122. The Cold War has become a classic example of a bipolar system, with the United States and the former Soviet Union clashing because of differing goals. *Id.* at 100. The original example, however, is Athens and Sparta during the Peloponnesian War. *See id.* at 8-24.

enforcement of its antitrust laws.[122] With these powers and status as a net importer, U.S. courts, in creating and applying the effects test, successfully followed the predictions of the economic theory of international antitrust.[123] This success continued as the Court subjected a foreign corporation to liability under the Sherman Act for exercising powers directly conferred to it by its national sovereign.[124]

IV. THE *TIMBERLANE* PROGENY

A. *Considerations of International Comity*

In the 1970s, the U.S. Court of Appeals for the Ninth Circuit developed a tripartite analysis to guide the determination of whether the Sherman Act should regulate extraterritorial antitrust activities.[125] The Timberlane plaintiffs alleged that Bank of America, N.A. officials and other unrelated persons located in the United States and Honduras conspired to prevent Timberlane, a U.S. corporation, from milling lumber in Honduras for export to the United States.[126] As a result, a few individuals, financed by Bank of America, maintained complete control over the Honduran lumber export business.[127] In 1974, Timberlane challenged these actions in the U.S. District Court for the Northern District of California.[128] In granting the defendants' motion for summary judgment, the court failed to make specific findings of fact or extensive conclusions of law but nevertheless concluded that the defendants' activities did not

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122. *Accord id.* at 63, 98-131.

123. *See supra* notes 1-51 and accompanying text.

124. Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-08 (1962). Continental Ore produced and sold vanadium, a metal obtained from ores mined in Colorado, while the defendants mined the ore. *Id.* at 691-92. Continental Ore alleged that the defendants monopolized trade in the ore deposits by refusing to sell it to outsiders. *Id.* at 693. The defendants had been appointed as an agent of the Canadian government and had been delegated the power to act as the government acts, but the Court still exercised jurisdiction over Continental Ore's claims. *Id.* at 702 n.11, 703, 707-08. This holding reflected the Supreme Court's implicit adoption of the Second Circuit's *Alcoa* holding and the effects test. Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 205 (1999).

125. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597 (9th Cir. 1976).

126. *Id.* at 601. Because the case originally rose under a Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(6), the court assumed the facts presented in Timberlane's complaint as true.

127. *Id.*

128. *Id.*

have a direct and substantial effect on U.S. commerce.[129] On appeal, the Ninth Circuit reversed.[130]

While U.S. law can regulate some conduct beyond domestic borders, the court concluded that it could not do so in all situations.[131] The court noted that other governments often resent extraterritorial application of U.S. law, particularly when the United States maintains only a weak interest in the conflict.[132] The court's task became more difficult because, even though U.S. courts frequently required substantial effects on domestic commerce before exercising jurisdiction over extraterritorial activity, there was no consensus among them regarding how far U.S. jurisdiction should extend.[133] Moreover, in the context of the Sherman Act, few cases examined the *Alcoa* effects requirement because most filed cases involved obvious violations.[134] Thus, with numerous disputes regarding distinctions of direct and indirect effect and intent, the threshold for *Alcoa* effects had not been adequately defined.[135]

To define more rigidly the extraterritorial application of U.S. antitrust law, the court developed a tripartite analysis.[136] First, the antitrust laws require that there be some effect, either actual or intended, on U.S. commerce.[137] 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."[138] Third, to quell international criticism, the interests of the United States must be sufficiently strong "vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[139]

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129. *Id.* The District Court also believed that the injuries were the result of acts of the Honduran government and therefore, under the act of state doctrine, the court could not review the defendants' actions. *Id.* at 601 n.3.

130. *Id.* at 600.

131. *Id.* at 609.

132. *Id.*

133. *Id.* at 610. Several courts used the direct and substantial effect formulation as a prerequisite to extending jurisdiction. *See* United States v. Watchmakers of Switz. Info. Ctr., Inc., 1963 Trade Cas. (CCH) P70,600 (S.D.N.Y. 1962); United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957); United States v. Gen. Elec. Co., 82 F. Supp. 753, 891 n.17 (D.N.J. 1949). Other courts have used different formulations. *See* United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 592 (S.D.N.Y. 1951) ("a conspiracy . . . which affects American commerce"); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949), *modified and aff'd*, 341 U.S. 593 (1951) ("a direct and influencing effect on trade").

134. *Timberlane*, 549 F.2d at 611.

135. *Id.*

136. *Id.* at 613.

137. *Id.*

138. *Id.* (emphasis in original).

139. *Id.*

This analysis shifts the question of extraterritorial application of the antitrust laws from one of congressional intent to one of subject matter jurisdiction.[140] Later courts have continued this mode of analysis but additionally consider congressional intent as part of the subject matter jurisdiction evaluation.[141] More importantly, however, the court's tripartite analysis rejected the *Alcoa* effects test and allowed for greater consideration of international comity: in the Ninth Circuit, a mere effect on U.S. commerce would no longer be a sufficient basis "on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness."[142] Thus, under the jurisdictional rule of reason, the ultimate determination of jurisdiction hinges on international conflict of laws principles.[143] This fact intensive inquiry relies heavily on the balancing of foreign interests under the third part of the analysis.[144] Therefore, before asserting jurisdiction, the District Court would need to find that the United States had "a sufficiently strong interest" in the matter through consideration of

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business 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 of conduct within the United States as compared with conduct abroad.[145]

Only after evaluation of these elements, which are in part derived from the Restatement (Second) of the Foreign Relations Law of the United States, can a court hold that "the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction."[146]

Although Timberlane's claims were predominantly against foreign defendants and most of the activity occurred in Honduras, nothing in the record suggested a conflict with Honduran law.[147]

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140. John A. Trenor, Comment, *Jurisdiction and the Extraterritorial Application of Antitrust Laws After* Hartford Fire, 62 U. CHI. L. REV. 1583, 1594-95 (1995).

141. *Id.*

142. *Timberlane*, 549 F.2d at 613 (emphasis in original).

143. *Id.* at 613-14.

144. *Id.*

145. *Id.*

146. *Id.* at 614-15. *See infra* Part IV.C. for a discussion of the Restatement (Second) of the Foreign Relations Law of the United States. Although the *Timberlane* doctrine attempts to "restrain the application of seemingly strict law," it does not purport to refine the general rule of intended effects. Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 785 (1984).

147. *Timberlane*, 549 F.2d at 615.

Therefore, dismissal by the District Court on jurisdictional grounds was inappropriate without evaluation of the claims under the tripartite analysis.[148] The case was remanded, and on reconsideration the District Court found extraterritorial application of the Sherman Act to be inappropriate.[149] The court found that the interests of the United States were only derivative to the claims of its citizens and that Honduran courts could provide Timberlane with adequate relief.[150] Thus, as the original *Timberlane* court had speculated, some antitrust claims brought in U.S. courts present interests "of the United States [that] are too weak and the foreign harmony incentive for restraint too strong to justify extraterritorial assertion of jurisdiction."[151]

As the Ninth Circuit accepted international comity as a consideration in determining extraterritorial application of U.S. law, the U.S. Department of Justice (DOJ) grappled with the same ideas. The resulting debate was in direct response to the business community's belief that it was the victim of overzealous and perhaps inconsistent antitrust enforcement.[152] As a result, on January 26, 1977, the DOJ issued its first Antitrust Guide for International Operations (1977 Guide).[153] The 1977 Guide sought to "provide a working statement of government enforcement policy," while maintaining protection for the U.S. consuming public through assurance of the benefits of competitive products.[154] The 1977 Guide also reinforced the DOJ's goal of protecting U.S. export opportunities from privately imposed restrictions.[155] Finally, the 1977 Guide recognized that, although U.S. antitrust laws are not limited to solely domestic application, enforcement activity regarding foreign transactions can occur only when the activity has a substantial and foreseeable effect on U.S. commerce.[156] The DOJ, however, retracted from this expansive notion of the United States as the world's antitrust police and required evaluation of international comity considerations before the exercise of jurisdiction, thereby adopting the essence of the *Timberlane* analysis.[157] Thus, if the United States

148. *Id.*

149. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 574 F. Supp. 1453, 1465 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984).

150. *Id.*

151. *Timberlane*, 549 F.2d at 609.

152. United States Department of Justice Antitrust Guide for International Operations, *reprinted in* 55 ANTITRUST & TRADE REG. REP. (BNA) NO. 799 (Feb. 1, 1977) [hereinafter 1977 Guide].

153. *Id.*

154. *Id.* at E-1.

155. *Id.* at E-2.

156. *Id.* at E-2, -3.

157. *Id.*

had a less significant interest than a foreign government, such as when there is neither a direct nor intended effect, then U.S. enforcement authorities should not encroach.[158] The express language of the 1977 Guide, however, maintained the possibility for more intrusive enforcement.[159]

In academia and the other Courts of Appeals, the *Timberlane* doctrine received heavy criticism for being conceptually flawed, overly discretionary, and outcome determinative.[160] Professor Grippando argues that the exercise of restraint under *Timberlane* is "an abuse of judicial equity power."[161] Moreover, a choice of law analysis provides a better means for analyzing a court's interest in an extraterritorial antitrust dispute.[162] Professor Maier describes the use of interest balancing under *Timberlane* as "unfortunate."[163] He further criticizes the doctrine as focusing too heavily on national interests, failing to assess the utility of assertion of jurisdiction, and weakening the international system by focusing on short term goals.[164] The courts of appeals have also considered many of the *Timberlane* implications, with the Third, Fifth, and Tenth Circuits adopting the general doctrine and the Seventh and District of Columbia Circuits criticizing it.[165]

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158. *Id.*

159. *Id.* The 1977 Guide has been criticized for its failure to make a precise statement of the law. Joseph P. Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INT'L L.J. 215, 254 (1978). Its goal, however, was not to completely state the law, but rather to elucidate "an intelligent enforcement program" that is generally consistent with existing law. Donald I. Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORNELL INT'L L.J. 255, 257 (1978).

160. Trenor, *supra* note 140, at 1601. *See also* Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); James M. Grippando, *Declining to Exercise Extraterritorial Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 395 (1983).

161. Grippando, *supra* note 160, at 428.

162. *Id.* at 402-03.

163. Maier, *supra* note 160, at 590.

164. *Id.* at 591, 593-94. Professor Maier would later criticize the then-proposed Restatement (Third) for its continued reliance on a reasonableness inquiry rather than elements that can create better certainty, predictability, and uniformity. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 319-20 (1982). The U.S. Court of Appeals for the District of Columbia Circuit apparently found Professor Maier's argument persuasive, citing it in the *Laker Airways* decision. Laker Airways Ltd. v. Sabena, Belg. World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

165. Accepting the *Timberlane* doctrine are: Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982), *cert. granted and vacated*, 460 U.S. 1007, *cert. denied*, 464 U.S. 961 (1983); Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 868-69 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979). Rejecting *Timberlane* are:

B. *Rejecting the* Timberlane *Rationale*

The most prominent of the *Timberlane* doctrine rejections was from the U.S. Court of Appeals for the District of Columbia Circuit in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*.[166] Laker Airways Limited (Laker), a British corporation, offered no-thrill transatlantic airline service between London and New York at a cost of approximately one-third of that established by the International Air Transport Association (IATA), a cartel that met annually to fix prices for air travel.[167] The members of IATA viewed Laker as a threat and in 1977 allegedly agreed to a predatory pricing scheme aimed at driving Laker out of business.[168] In 1981, when the value of the British pound deteriorated relative to the U.S. dollar, Laker encountered financial difficulties because of inadequate hedging between revenues received in British pounds and debts paid in U.S. dollars.[169] Several airlines further lowered their prices and paid extra commissions to travel agents for diverting passengers from Laker.[170] IATA achieved its goal, and Laker liquidated in 1982.[171] Laker's liquidator filed suit against IATA and its individual members, alleging violation of U.S. antitrust law.[172]

Midland Bank, a British corporation, feared it would be joined as a defendant in Laker's U.S. action and as a result, filed a preemptive action in the United Kingdom designed to prevent the District Court from hearing Laker's claims.[173] The already named foreign defendants in the *Laker* action initiated similar actions in the United Kingdom.[174] The U.K. High Court on Justice responded, issuing an interim injunction against Laker, preventing it from pursuing its U.S. claims.[175] In response, Laker joined two new defendants, KLM Royal Dutch Airlines (KLM) and Sabena World Air S.A./N.V. (Sabena), who

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Laker Airways, 731 F.2d at 939-41; *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980).

166. *Laker Airways*, 731 F.2d at 909. Professor Waller argues that courts "mangle[d]" the *Timberlane* doctrine in part because the infrequency and difficulty of foreign antitrust cases lead to an inability to determine the appropriate degree of sensitivity to foreign concerns. Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 572 (2000).

167. *Laker Airways*, 731 F.2d at 916-17. Because the case originally rose under a Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(6), the court assumed the facts presented in Laker's complaint as true.

168. *Id.*

169. *Id.* at 917.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 917-18.

174. *Id.* at 918.

175. *Id.*

had not filed for U.K. protection, and the District Court granted an injunction against the two from joining the preemptive foreign action.[176] KLM and Sabena appealed, arguing that the injunction violated principles of international comity.[177]

The D.C. Circuit determined that the United States and the United Kingdom shared concurrent jurisdiction over Laker's claims.[178] The *Timberlane* factors, however, were not useful in addressing which forum should maintain jurisdiction.[179] Moreover, the Court noted that other courts and scholars had dismissed interest balancing as a failed approach because U.S. courts rarely declined to exercise jurisdiction.[180] Without stronger legislative guidance, U.S. courts were "ill-equipped to determine whether the vital national interests of the United States or those of other nations should predominate."[181] Absent executive branch interference, U.S. antitrust law would be applied to Laker's claims.[182] Therefore, the District Court's decision to grant the injunction was affirmed.[183]

C. *The Restatements Address* Timberlane *and* Laker Airways

The Restatement (Second) of the Foreign Relations Law of the United States (Restatement (Second)), released in 1965, 11 years before *Timberlane*, acknowledged the *Alcoa* effects test.[184] Section 18 noted that a sovereign could apply its domestic law to persons acting outside of the territory if the conduct caused an effect within the territory.[185] This extension, however, was subject to four requirements:

> (i) the conduct and its effect are constituent elements of the activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[186]

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176. *Id.* at 918-19.
177. *Id.* at 919.
178. *Id.* at 915.
179. *Id.* at 948-49.
180. *Id.* at 950.
181. *Id.*
182. *Id.*
183. *Id.* at 955-56.
184. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 17, 30 (1965) [hereinafter RESTATEMENT (SECOND)].
185. *Id.* § 18.
186. *Id.* § 18(b).

Thus, the Restatement (Second) limited the reach of the *Alcoa* effects test, thereby acknowledging many of *Alcoa's* critics.[187] Moreover, in § 40, the Restatement (Second) embraced the principles of international comity, which would later guide the court in *Timberlane*.[188] The combination of §§ 18 and 40 reflect the American Law Institute's increased interest in international cooperation.[189]

The Third Restatement of the Foreign Relations Law of the United States (Restatement (Third)), issued in 1987, replaced the Restatement (Second) and § 18, in particular.[190] Section 402 of the Restatement (Third) allows for the exercise of jurisdiction when there is territoriality, nationality, or effects.[191] The effects basis for jurisdiction closely resembles the "effects" test from *Alcoa* but differs in that the conduct need not actually have the intended effect on U.S. commerce.[192] Even when jurisdiction can be established, however, a court should decline to exercise it if such exercise would be unreasonable under principles of international comity.[193] Moreover, this evaluation is guided by an interest-balancing test, which instructs courts to consider the same factors as in *Timberlane*.[194] These factors, listed in § 403, include:

> (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;
>
> (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;

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187. *Id.* § 18.

188. *Id.* § 40. When two states share jurisdiction, each state should moderate its enforcement in light of:

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

Id.

189. *Id.*

190. *Id.*; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT (THIRD)].

191. RESTATEMENT (THIRD), *supra* note 190, § 402.

192. *Id.*

193. *Id.* § 403.

194. *Id.*

> (c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.[195]

These factors represent explicit consideration of international comity principles.[196] Moreover, to address the *Laker Airways* situation, the Restatement (Third) suggests that when two countries have a concurrent interest in regulating a particular activity, the country with a weaker interest should defer to the stronger interest.[197] Thus, even when a country may reasonably exercise jurisdiction over an antitrust defendant, some circumstances will require deference to another country's more significant interests.[198] The explicit discussion of antitrust activities in §§ 402 and 403, however, retains the possibility of the more expansive *Alcoa* effects test for jurisdiction.[199]

D. *Implications on the Economic Theory of International Antitrust*

Timberlane was the first major case in the history of U.S. extraterritorial antitrust that did not follow the economic theory of international antitrust. In its wake, *Timberlane* and the 1977 Guide were heavily debated, were followed with decreasing frequency, and were eventually rejected.[200] In the international system, intervention became more important, and the United States maintained the clout to influence strongly the policies and practices of other nations.[201] Moreover, the United States became a larger net importer than at any other point in its history. The combination of international power and net importer status suggests that, under the economic

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195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* § 415 (examining the purpose of the anticompetitive conduct).
200. *See supra* notes 125-99 and accompanying text; *see infra* notes 242-71 and accompanying text.
201. NYE, *supra* note 86, at 114-19, 132.

theory of international antitrust, the Ninth Circuit should have exercised jurisdiction over Timberlane's claims.

Laker Airways, on the other hand, attempted to embrace implicitly the principles of the economic theory of international antitrust.[202] Despite extensive academic and judicial debate on the role of international comity in determining the extraterritorial application of U.S. antitrust law, the Supreme Court remained ambivalent, denying certiorari in *Timberlane* and several of the other pertinent cases.[203] This implicit acceptance and rejection of international comity, however confusing, may best be described as tacit approval of the courts of appeals determining extraterritorial effect on a case-by-case basis. This is precisely what the *Timberlane* court envisioned, and on occasion, the circuits reached the conclusions suggested by the economic theory of international antitrust, and other times the circuits did not.[204] This debate would continue until the Court was presented with a case with facts where, although *Timberlane* balancing suggested a denial of subject matter jurisdiction, the Court could not reasonably allow foreign law to govern the antitrust activity.[205] This case would involve large sums of money and a major industry, whereas the majority of the cases from the late 1970s involved smaller antitrust activities with smaller dollar amounts of alleged harm.[206]

V. THE FTAIA AND NEW DOJ GUIDELINES

A. *Congress Attempts to Eliminate Ambiguity*

In 1982, Congress sought to clarify the ambiguities surrounding the various interpretations of application of U.S. antitrust laws to foreign conduct.[207] The result was the Foreign Trade Antitrust Improvement Act (FTAIA).[208] The FTAIA exempts U.S. export

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202. *Id.* at 139-41. *See supra* notes 1-51 and accompanying text.

203. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 472 U.S. 1032 (1985); Mitsui & Co. v. Indus. Inv. Dev. Corp., 464 U.S. 961 (1983); Montreal Trading Ltd. v. Amax, Inc., 455 U.S. 1001 (1982).

204. *See supra* note 165.

205. *See infra* notes 242-71 and accompanying text.

206. *See id.*

207. Jeffrey N. Neuman, *Through a Glass Darkly: The Case Against Pilkington plc. Under the New U.S. Department of Justice International Enforcement Policy*, 16 N.W. J. INT'L L. BUS. 284, 299 (1995).

208. Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (1982) [hereinafter FTAIA]. The FTAIA was born from Public Law No. 97-290. Section 402 amends the Sherman Act and is codified in § 6a while § 403 amends § 45 of the Federal Trade Commission Act (which is not discussed in this Note). The FTAIA states:

commerce from antitrust laws unless there is a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.[209] The FTAIA aims to limit the scope of U.S. antitrust law when U.S. consumers are not affected.[210] Congress initially hoped that the FTAIA would make explicit the Sherman Act's application to overseas conduct, but the result was poorly worded, thereby creating substantial ambiguity regarding its application.[211]

The overarching goal of the FTAIA is to prevent overzealous courts from using U.S. antitrust law to protect foreign companies from antitrust activity when the effects on U.S. commerce are secondary.[212] There was, however, little description of what constitutes a "direct, substantial, and foreseeable" effect.[213] By designating "reasonably foreseeable" as an objective standard, Congress explicitly removed the intent element from the *Alcoa* effects formulation.[214] Nevertheless, the FTAIA retains the requirement that the antitrust activity create an actual effect on U.S. commerce.[215] Despite these strides toward streamlining the test for extraterritorial application of the Sherman Act, the ambiguity of the FTAIA's statutory language prevents the establishment of a clear test

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> Conduct involving trade or commerce with foreign nations.
>
> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Id.

209. *Id.*

210. *See generally id.*

211. H.R. REP. NO. 97-686, 97th Cong., 2d Sess., at 2, *reprinted in* 1989 U.S.C.C.A.N. 2487.

212. *Cf.* Neuman, *supra* note 207, at 304-05.

213. FTAIA, 15 U.S.C. § 6a.

214. *See id.*

215. This effect is part of the *Alcoa* formulation.

for determining "what degree of effects on U.S. exporters is sufficient to trigger U.S. jurisdiction. . . ."[216]

The FTAIA does not deny U.S. courts subject matter jurisdiction over antitrust claims brought by foreign parties.[217] Because conduct rather than citizenship gives rise to the antitrust claim, even efforts directed abroad can be halted by U.S. courts if there is an effect on the U.S. domestic market.[218] Most importantly, however, the lack of language precluding claims by foreigners, combined with the FTAIA's goal of protecting U.S. markets, indicates that Congress intended for foreigners to have access to U.S. courts for alleged violations of U.S. antitrust law regardless of where that conduct occurred.[219] The only requirement is the requisite effects on U.S. domestic commerce; effect violates the Sherman Act.[220]

The FTAIA does not apply to conduct involving import trade or commerce.[221] Therefore, the "direct, substantial, and reasonably foreseeable" language should not apply to foreign cartels that ship goods to the United States.[222] Lower courts, however, frequently use the formulation to evaluate whether subject matter jurisdiction should be granted in cases where only U.S. import markets are implicated.[223] The Supreme Court has also applied the FTAIA to import commerce cases.[224] Consequently, Congress' ambiguous wording has led to abandonment of the FTAIA's original goal of excluding some U.S. exporters from the restrictions of the Sherman Act.[225] This deviation has led the FTAIA to be used as support for

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216. Neuman, *supra* note 207, at 305. Moreover, the FTAIA has been described as "somewhat inscrutable," "inelegantly phrased," and not "destined for inclusion in a manual of style." Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 287-88 (2002) (citing United States v. Nippon Paper Indus., 109 F.3d 1, 4 (1st Cir. 1997)).

217. FTAIA, 15 U.S.C. § 6a. *See also* Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122, 2137 (2001).

218. Note, *supra* note 217, at 2137.

219. *Accord id.* at 2138.

220. *Id.* at 2139.

221. Alford, *supra* note 118, at 17. Traditionally restraints were described as either import trade or commerce, export trade or commerce, or totally foreign commerce. Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 786 (1986). The FTAIA collapses these last two categories and subjects them both to its language. *Id.* at 787.

222. Alford, *supra* note 118, at 17 (citing Eleanor M. Fox, *Extraterritoriality and Antitrust—Is "Reasonableness" the Answer?, in* 1986 FORDHAM CORP. L. INST. 49, 54 (Barry E. Hawk ed., 1987)).

223. *Cf. id.* at 17-19; *See also* Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001).

224. *See generally* Hartford Fire Ins. v. California, 509 U.S. 764 (1993).

225. *See generally id.*; *see also* FTAIA, 15 U.S.C. § 6a.

the *Timberlane* progeny and its considerations of international comity.[226]

B. *The 1988 Guidelines*

President Ronald Reagan, guided by economists from the University of Chicago, instituted a new era of economic policy, during which laissez faire and the attitude of "law is economics" prevailed.[227] These sentiments pervaded the DOJ, which became less intrusive in prosecuting foreign antitrust activity unless that activity affected the U.S. economy; "the only antitrust offense is creation or use of market power to cut back output and thus to raise prices. . . ."[228] In 1988, this philosophy was formally adopted in the 1988 Antitrust Enforcement Guidelines for International Operations (1988 Guidelines).[229]

The goal of the 1988 Guidelines was to "yield the best allocation of resources, lowest prices, and the highest quality products and services for consumers."[230] To serve these goals, the discussion of the FTAIA included Footnote 159, which created an effects test reminiscent of *Alcoa*:

> Although the FTAIA extends jurisdiction under the Sherman Act to conduct that has a direct, substantial and reasonably foreseeable effect on the export trade or export commerce of a power engaged in such commerce in the U.S., the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.[231]

This footnote did not explicitly ignore the implications of international comity suggested in *Timberlane*, but rather suggested a more narrow approach to comity than the 1977 Guide.[232] The DOJ had determined that comity concerns generally only arise "if anticompetitive conduct within the jurisdiction of the U.S. antitrust

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226. FTAIA, 15 U.S.C. § 6a. The courts continued their extensive bickering over how to apply the *Timberlane* doctrine, but *National Bank of Canada v. Interbank Card Ass'n* appears to have guided Congress and represents a less deferential approach to the interests of foreign sovereigns. Nat'l Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981) (rejecting the first two parts of the *Timberlane* tripartite analysis); H.R. REP. NO. 97-686, *supra* note 211.

227. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 958 (1987).

228. *Id.*

229. United States Department of Justice 1988 Antitrust Enforcement Guidelines for International Operations, *reprinted in* 55 ANTITRUST & TRADE REG. REP. (BNA) NO. 1391 (Nov. 17, 1988) [hereinafter 1988 Guidelines].

230. *Id.* at S-5.

231. *Id.*

232. *See id.*

laws is encouraged or promoted by the law or policy of a foreign sovereign."[233] This language represented a stark change from the 1977 Guide, which recommended a limited scope for extraterritorial enforcement.[234] The DOJ, however, exercised restraint by scrutinizing foreign markets only if the antitrust activity decreased the ability of a U.S. exporter to compete domestically.[235] Nevertheless, because of its broad language, Footnote 159 received heavy international criticism, especially from Japan.[236]

President George Bush's administration replaced pragmatism with ideological rigidity and began more extensive antitrust enforcement than had been extended under President Reagan.[237] As part of this more ambitious enforcement strategy, then-Attorney General William P. Barr announced in April 1992 that the Department of Justice was removing Footnote 159 from the 1988 Guidelines.[238] This change once again permitted the DOJ to bring lawsuits against foreign corporations who acted exclusively outside of the United States if their operations were to the detriment of U.S. exporters.[239] With this modification, the DOJ hoped to enforce more zealously U.S. antitrust law as a means of keeping the increasing trade deficit in check.[240] Nevertheless, the DOJ continued to express a willingness to work with other countries in antitrust enforcement.[241]

C. Hartford Fire *and Firm Rejection of Broad Interpretations of International Comity*

Following the DOJ's doctrinal rejection of the principles of international comity, the Supreme Court followed suit in *Hartford Fire Insurance v. California*.[242] Hartford Fire and the other

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233. *Id.* at S-22.

234. *Compare* 1977 Guide, *supra* note 152, at E-2, -3 (suggesting limited scope for extraterritorial enforcement), *with* 1988 Guidelines, *supra* note 229, at S-21 (proposing more rigorous review of extraterritorial activity).

235. 1988 Guidelines, *supra* note 229, at S-22.

236. John R. Wilke, *Hunting Cartels, U.S. Trust-Busters Increasingly Target International Business*, WALL ST. J., Feb. 5, 1997, at A3.

237. Robert Pitofsky, *Antitrust Policy in a Clinton Administration*, 62 ANTITRUST L.J. 217, 218 (1993).

238. *U.S. Broadens Enforcement Posture on Foreign Application of Sherman* Act, 62 ANTITRUST & TRADE REG. REP. (BNA) NO. 1560, at 479 (April 9, 1992).

239. Neuman, *supra* note 207, at 296.

240. *Id.* at 297.

241. *U.S. Broadens Enforcement Posture on Foreign Application of Sherman Act*, *supra* note 238, at 479.

242. Hartford Fire Ins. v. California, 509 U.S. 764 (1993). The case originally rose under a Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(6), and the Court therefore assumed the facts presented in Hartford Fire's complaint as true.

petitioners alleged that several other insurance companies conspired to restrict the terms and availability of commercial general liability insurance in the United States, thereby violating § 1 of the Sherman Act.[243] The defendants included: the Insurance Services Office, an association of insurers who prepared the policies; four firms engaged in direct sales of commercial general liability insurance who hedged themselves with reinsurance policies; and a series of London-based reinsurers who operated as syndicates and underwriters for Lloyd's of London.[244] The London-based reinsurers moved to dismiss the claims against them, arguing that principles of international comity barred the application of U.S. antitrust laws to their activities, which had occurred in the United Kingdom.[245] Central to this argument was the fact that the British Parliament had expressly permitted the antitrust activities.[246]

On June 28, 1993, the Supreme Court ruled, in a five-to-four decision, that U.S. antitrust law applied to the London resinsurers' conduct.[247] The Court, led by Justice David Souter, noted that the Sherman Act applies to foreign conduct that is intended to produce and does produce substantial effects on U.S. commerce, and those requirements were met in Hartford Fire's complaint.[248] The Court believed that in enacting the FTAIA, "Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity."[249] The Court then determined that the only question was "whether 'there is in fact a true conflict between domestic and foreign law.'"[250] For the London reinsurers to assert that Parliament permitted their conduct was "not to state a conflict."[251] Merely because antitrust activity is lawful in one country does not bar application of U.S. antitrust law, regardless of the foreign government's interest in regulating the conduct.[252] "Where a person who is subject to regulation by two states can comply with the laws of both," there is no conflict.[253] Because the U.K. reinsurers could

243. *Id.* at 769. Commercial general liability insurance is insurance purchased by businesses, non-profits, and government agencies for protection against the risk of liability to third parties for personal or property injury. *Id.* at 770 n.1.

244. *Id.* at 764.

245. *Id.* at 769.

246. *Id.* at 798.

247. *Id.*

248. *See generally id.* at 794-99.

249. *Id.* at 798.

250. *Id.* (quoting Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

251. *Id.* at 799.

252. *Id.* (quoting RESTATEMENT (THIRD), *supra* note 190, § 415, cmt. j).

253. *Id.* (quoting RESTATEMENT (THIRD), *supra* note 190, § 403, cmt. e).

comply with U.S. law without violating English law, there was no conflict of laws.[254] Therefore, there was no reason for the lower courts to refrain from the exercise of jurisdiction for reasons of international comity.[255]

In an opinion that signaled a willingness to return to many of the principles of *American Banana*, Justice Antonin Scalia dissented.[256] He treated the question not as one of the jurisdiction of the courts, but rather as the pre-*Timberlane* interpretation question of congressional intent.[257] He then used two canons of statutory construction to guide his inquiry into the legislative jurisdiction of the Sherman Act.[258] First, without an intent explicit to the contrary, congressional legislation "is meant to apply only within the territorial jurisdiction of the United States."[259] Boiler-plate language such as that in the Sherman Act will not overcome this presumption.[260] Second, a law "ought never to be construed to violate the law of nations if any other possible construction remains."[261] Statutes should not be interpreted to "regulate foreign persons or conduct if that regulation would conflict with principles of international law."[262] Applying these canons, Justice Scalia then used *Timberlane* and the Restatement (Third) to derive the relevant principles of international law, including the reasonableness inquiry.[263] With these observations, Justice Scalia noted that the activity took place primarily in the United Kingdom and that the defendants were U.K. corporations. Under such circumstances, he thought it "unimaginable that an assertion of legislative jurisdiction would be considered reasonable, and therefore, it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion."[264]

The Court, however, retracted from the *Timberlane* stance of interest balancing by nearly abolishing international comity considerations.[265] Instead, the Court adopted a philosophy whereby a

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254. *Id.*
255. *Id.* at 798.
256. *See generally id.* at 812-22 (Scalia, J., dissenting).
257. Justice Scalia treated subject matter jurisdiction and the extraterritorial reach of the Sherman Act as "two distinct questions. . . ." *Id.* at 812-13.
258. *Id.* at 814.
259. *Id.* (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).
260. *Id.*
261. *Id.* at 814-15.
262. *Id.* at 815.
263. *Id.* at 817-19.
264. *Id.* at 819.
265. Swaine, *supra* note 78, at 678. Some commentators have argued that this near abolishment is not enough and that the comity inquiry should be entirely rejected. *See, e.g.*, Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191 (1999).

conflict of laws arises only if the law of one country compels a violation of the U.S. antitrust laws.[266] This reflects a very narrow understanding of the conflicts that can trigger considerations of international comity and therefore, allows for an expansive notion of extraterritorial jurisdiction without regard for the possibility of "sharp and unnecessary conflict with the legitimate interests of other countries."[267] Foreign nations immediately balked at the ideas of *Hartford Fire* because it expanded the potential scope for U.S. antitrust law.[268] Moreover, they criticized the United States for retaining the ability to prosecute foreign nationals for violations of U.S. antitrust law, "even when the foreign nations that companies are located in do not even recognize those violations as crimes."[269] Compared to *Timberlane*, the Court's stance represented a riptide in the "rising tide of cooperation in international antitrust enforcement."[270] In the process, the Court had granted "a triumph for governmental regulation of anti-competitive behavior."[271]

D. *The Ineffective IAEAA and Clinton's Guidelines*

To further complicate matters, the 1994 International Antitrust Enforcement Assistance Act (IAEAA) generated a new approach toward regulating international antitrust.[272] The IAEAA grants the U.S. Attorney General and the Federal Trade Commission (FTC) the authority to disclose to foreign authorities information helpful to enforcing foreign antitrust laws or "determining whether a person has violated or is about to violate any of the foreign antitrust laws. . . ."[273] Moreover, the Attorney General's office is granted power

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266. Swaine, *supra* note 78, at 678.

267. *Hartford Fire Ins.*, 509 U.S. at 820 (Scalia, J., dissenting). *See also* Alford, *supra* note 118, at 225; Swaine, *supra* note 78, at 679.

268. William P. Connolly, Note, *Lessons to be Learned: The Conflict in International Antitrust Law Contrasted with Progress in International Financial Law*, 6 FORDHAM J. CORP. & FIN. L. 207, 214 (2001).

269. *Id.*

270. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on* Hartford Fire Insurance Co. v. California, 34 VA. J. INT'L L. 213, 230 (1993). Under the Court's reasoning, a court must ignore all conflicts that fall short of an actual conflict between the laws of sovereigns. Robert C. Reuland, Hartford Fire Insurance Co., *Comity and the Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT'L L.J. 159, 207 (1994). This allows for "inconsiderate extraterritorial application of our laws." *Id.* at 208. Moreover, this construction has no basis in modern conflict of laws theory. Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has* Hartford Fire *Extinguished Considerations of Comity?*, 15 U. PA. J. INT'L BUS. L. 221, 244 (1994).

271. Swaine, *supra* note 78, at 682.

272. International Antitrust Enforcement Assistance Act, 15 U.S.C. §§ 6201-12 (1998) [hereinafter IAEAA].

273. *Id.* § 6201.

to aid a foreign antitrust authority in obtaining evidence of antitrust activity.[274] These powers apply to violations of both U.S. and foreign antitrust laws.[275] Provisions are made to establish appropriate safeguards for the protection of confidential information.[276]

Although these powers may initially appear quite broad, they may not be exercised unless there is an antitrust mutual assistance agreement in force with the foreign government.[277] An antitrust mutual assistance agreement is a written agreement between the United States and a foreign antitrust authority ensuring that the foreign authority will provide assistance to the United States comparable to that provided by the Attorney General and the FTC by the foreign antitrust authority.[278] An exception to the written agreement component is available if the Attorney General or the FTC believes that the foreign antitrust authority will provide comparable assistance and is capable of complying with the confidentiality requirements.[279]

Upon its enactment in 1994, the IAEAA was described as groundbreaking legislation.[280] As late as 1998, however, no antitrust mutual assistance agreement was in force.[281] The first antitrust mutual assistance agreement was signed with Australia in 1999, but it provides less assistance than originally envisioned in the IAEAA.[282] Moreover, the European Union and Japan have questioned their abilities and interests in forming antitrust mutual assistance agreements with the United States.[283] Thus, the IAEAA remains essentially moot as a means of regulating international antitrust activity.[284]

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274. *Id.* § 6202(a).
275. *Id.* § 6202(b).
276. *Id.* § 6204.
277. *See id.* § 6207.
278. *Id.* § 6211(2)(A).
279. *Id.* § 6207(a)(1).
280. Connolly, *supra* note 268, at 224.
281. *Id.*
282. *Id.* at 225. Some of the reluctance to use the IAEAA may be a U.S. policy judgment to pursue broader cooperation schemes through the Organization for Economic Cooperation and Development. Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 378 (1997).
283. Connolly, *supra* note 268, at 228-30.
284. *Id.* The ineffectiveness of the IAEAA is further demonstrated in the informal accord reached between the United States and the European Union. The agreement allows for simultaneous review by both governments of merger proposals but, because the governments have differing standards toward reducing competition, does not provide for cooperation in the evaluation of the proposals. Matthew J. Turosz, *EU-U.S. Antitrust Deal to Ease Merger Review*, KIPLINGER BUS. FORECASTS, Oct. 3, 2000, *available at* 2002 WL 20611962. This agreement, however, represents a small step toward resolving the policy differences over mergers between the United States and the European Union. Thus, the IAEAA may become more relevant if and when the

In 1995, the Clinton administration formally joined the extraterritorial antitrust debate, as the DOJ and FTC issued a revised version of the Antitrust Enforcement Guidelines for International Operations (1995 Guidelines).[285] The official goals of the 1995 Guidelines are to "ensure open and free markets, protect consumers, and prevent conduct that impedes competition. . . ."[286] Moreover, the 1995 Guidelines reflect the Clinton administration's willingness to pursue a policy for tough international antitrust enforcement as a means of reducing the U.S. trade deficit.[287] In accordance, the 1995 Guidelines adopted both the *Hartford Fire* rationale for import cases and the FTAIA test requiring the antitrust activity to have a "direct, substantial, and reasonably foreseeable effect on U.S. commerce."[288] This potent combination allows the agencies to regulate a substantial amount of antitrust activity occurring abroad, even when it merely has an "effect" on, rather than involves, import commerce.[289] The agencies, however, agreed to consider fully comity factors in situations where there was not a true conflict with foreign law.[290] There was no indication, however, that these added considerations would lead to different results than under the *Hartford Fire* formulation, particularly with the 1995 Guidelines' language cautioning that it is not "the role of the courts to 'second-guess the executive branch's judgment as to the proper role of comity concerns. . . .'"[291]

E. *Implications on the Economic Theory of International Antitrust*

By the mid 1970s, the United States was firmly established in the world marketplace as a net importer.[292] Within the international system, the United States became a stronger world power after the collapse of the Soviet Union in 1991.[293] Under this power structure,

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governments converge on consistent policies, which would allow for mutual enforcement. *Id.*

285. United States Department of Justice 1995 Antitrust Enforcement Guidelines for International Operations, *reprinted in* 67 ANTITRUST & TRADE REG. REP. (BNA) NO. 1707 (Apr. 6, 1995) [hereinafter 1995 Guidelines].

286. *Id.* at S-3.

287. Neuman, *supra* note 207, at 297.

288. 1995 Guidelines, *supra* note 285, at S-8.

289. *Id.*

290. *Id.* at S-12.

291. *Id.* (citing United States v. Baker Hughes, Inc., 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), *aff'd*, 908 F.2d 281 (D.C. Cir. 1990)).

292. International Trade Administration, *U.S. Total Exports Imports and Balances: Table 26*, *available at* http://www.ita.doc.gov/td/industry/otea/usfth/aggregate/H01T26.html (last visited Nov. 5, 2002) [hereinafter *U.S. Aggregate Foreign Trade Data*].

293. *See* NYE, *supra* note 86, at 180.

the United States maintained substantial power, especially as nuclear deterrence led to a further build-up of nuclear weapons.[294] Thus, the economic theory of international antitrust suggests that the United States would maintain jurisdiction over the *Hartford Fire* claims.[295] With this result, the courts and economics officially converged on a uniform result regarding the extraterritorial application of U.S. antitrust law, thereby ending the discrepancy between the two created by the *Timberlane* progeny.[296]

VI. THE FIFTH CIRCUIT REJECTS EXPANSIVE NOTIONS OF EXTRATERRITORIALITY

A. *The Alleged Cartel and the District Court's Holding*

Den Norske Stats Oljeselskap As (Statoil), the plaintiff, is a Norwegian corporation that owns and operates oil and gas platforms in the North Sea.[297] The relevant defendants provide heavy-lift barge services in the Gulf of Mexico, the North Sea and the Far East and are: HeereMac, v.o.f., a corporation of the Netherlands; McDermott, Inc., a U.S. corporation; and Saipem S.p.A., a U.K. corporation.[298] These companies maintained a worldwide monopoly on heavy-lift barges from 1993 to 1997.[299] During this period, Statoil purchased services from HeereMac and Saipem.[300]

In its complaint, Statoil alleged that the defendants created a cartel, thereby conspiring to "fix bids and allocate customers, territories, and projects between 1993 and 1997."[301] Under this alleged agreement, HeereMac and McDermott gained exclusive access to heavy-lift projects in the Gulf of Mexico, while Saipem received a greater proportion of projects in the North Sea.[302] Because of this agreement, Statoil contended that it and other purchasers of heavy-lift barge services in the Gulf of Mexico paid inflated prices for heavy-

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294. *Id.*

295. *See supra* notes 1-51 and accompanying text.

296. *Id.*

297. Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420, 421 (5th Cir. 2001). Until June 2001, Statoil was owned by the Norweigan government. Greg Stohr, *Top U.S. Court May Rule on Antitrust Suits over Foreign Cartels*, BLOOMBERG NEWS, October 1, 2001, LEXIS, News Library, Allbbn File.

298. *Den Norske*, 241 F.3d at 422 n.2. A heavy-lift barge can carry more than 4,000 tons, and the barge's services are used in the hoisting and transporting required in the construction of offshore drilling platforms. *High Court Seeks U.S. Input on Review of FTAIA Case*, 9 ANTITRUST LITIG. REP., Oct. 2001, at 4.

299. *Den Norske*, 241 F.3d at 422.

300. *Id.*

301. *Id.*

302. *Id.*

lift barge services in the North Sea.[303] These price increases compelled Statoil to increase the price of crude oil it exported to the United States in order to maintain satisfactory profit margins.[304]

In December 1998, Statoil filed suit against the alleged cartel members in the U.S. District Court for the Southern District of Texas alleging violations of U.S. antitrust law.[305] The case was assigned to Judge Melinda Harmon of the Houston division, and on July 12, 1999, she dismissed Statoil's complaint on a motion to dismiss for lack of subject matter jurisdiction.[306] The court held that jurisdiction was inappropriate because "Statoil's damages arise from its projects in the Norwegian sector of the North Sea," rather than projects in U.S. territory.[307] Moreover, the court held that the cartel's activities "did not have a direct, substantial, and reasonably foreseeable anticompetitive effect" on U.S. trade or commerce. [308] Therefore, Statoil's complaint failed to satisfy the FTAIA's jurisdictional requirements, and as a result, the alleged injuries were not of the type that U.S. antitrust laws could redress.[309]

Statoil appealed to the U.S. Court of Appeals for the Fifth Circuit.[310] Statoil argued that the FTAIA did not limit the access of foreign plaintiffs to U.S. courts based on the site of the alleged antitrust injury.[311] Moreover, the FTAIA should not preclude the exercise of subject matter jurisdiction when the domestic effect on U.S. commerce is different than the injury of which the plaintiff complains.[312] Thus, Statoil urged the court to find that the cartel caused Statoil to overpay for heavy-lift barge services, thereby causing antitrust injury to Statoil and a secondary effect of increased crude oil prices in the United States.[313] Under Statoil's reasoning, the increase in domestic oil prices satisfied the domestic effect

303. *Id.*
304. *Id.*
305. *Id.* at 423. Statoil's complaint was filed after the U.S. DOJ, in December 1997, filed a criminal complaint against HeereMac and one of its directors alleging that the defendants conspired to eliminate competition in the heavy-lift barge industry. *Id.* at 422. The defendants consented to U.S. jurisdiction, pled guilty to the charges, and agreed to pay a $49 million fine. *Id.* at 422-23; Stohr, *supra* note 297. As a result, numerous companies filed suit in the U.S. federal courts alleging injuries from HeereMac's conduct. *Den Norske*, 241 F.3d at 423. The first suit was filed by Phillips Petroleum Company and its foreign subsidiaries. *Id.* On January 22, 1999, the U.S. District Court for the Southern District of Texas dismissed the claims because they did not arise from a direct and substantial effect on U.S. commerce. *Id.* at 423.
306. *Den Norske*, 241 F.3d at 423.
307. *Id.* (citing the district court opinion).
308. *Id.* (citing the district court opinion).
309. *Id.*
310. *Id.*
311. *Id.* at 424.
312. *Id.* at 425.
313. *Id.*

requirement, and therefore, Statoil satisfied subject matter jurisdiction requirements.[314] The majority, however, rejected these arguments.[315]

B. *The Fifth Circuit Affirms*

In a two-to-one decision, the Fifth Circuit panel of Judge E. Grady Jolly, Judge Emilio Garza, and Judge Patrick Higginbotham affirmed the District Court's dismissal of Statoil's antitrust claims for lack of subject matter jurisdiction.[316] The majority court, in an opinion written by Judge Jolly and joined by Judge Garza, framed the issue as one of statutory interpretation and sought to determine whether the FTAIA was intended to grant foreign companies like Statoil subject matter jurisdiction.[317] The court initially recognized the static nature of judicial interpretations regarding the extraterritorial reach of U.S. antitrust law throughout history. The court became the first federal appellate body to interpret the FTAIA's requirement that a domestic effect on commerce give rise to the antitrust claim.[318] The resulting interpretation required the court to reject Statoil's contentions that it had satisfied the FTAIA's jurisdictional requirements.[319]

The court expressed doubt that "foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act."[320] It then interpreted the FTAIA to prohibit regulation of non-import foreign commerce unless "(1) such conduct has a direct, substantial, and reasonably foreseeable effect on United States domestic commerce, and (2) such effect gives rise to the antitrust claim."[321] The court determined that the cartel's conduct of dividing territories and fixing prices had a direct, substantial, and reasonably foreseeable effect on the U.S. market in the form of increased crude oil prices.[322] Thus, Statoil satisfied the first prong of the FTAIA.[323]

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314. *Cf. id.* Statoil's injury was the "quid pro quo" leading to injury to the U.S. market. David G. Keyko & Jessica Caplan, *Federal Courts Explain Borders for Antitrust Claims Involving Foreign Injuries*, METROPOLITAN CORP. COUNS., May 2001, Northeast Ed., at 12.

315. *Den Norske*, 241 F.3d at 425.

316. *Id.* at 421.

317. *Id.* at 423-24.

318. *Id.*

319. *Id.* at 425.

320. *Id.* at 426. This argument is based in the Commerce Clause, which allows Congress the authority to regulate interstate commerce and commerce with foreign nations. U.S. CONST. art. I, § 8.

321. *Id.* (emphasis added).

322. *Id.*

323. *Id.* at 426-27.

The court, however, found the second prong of the FTAIA more problematic and determined that Statoil failed to show how increased crude oil prices in the United States had given rise to its antitrust claim.[324] The court interpreted the FTAIA as requiring that Statoil's injury for an antitrust claim stem from the effect of higher crude oil prices.[325] Statoil's injury, however, stemmed from the effect of the higher prices it paid for heavy-lift barge services.[326] Although the court recognized a possible

> connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea, the FTAIA requires more than a "close relationship" between the domestic injury and the plaintiff's claim; it demands that the domestic effect "gives rise" to the claim.[327]

Higher oil prices in the United States had not harmed Statoil, and therefore, the court determined that Statoil had failed the FTAIA's jurisdictional requirements.[328] This finding required affirmation of the District Court's dismissal of Statoil's complaint for lack of subject matter jurisdiction.[329]

The majority further reinforced its conclusion by examining the FTAIA's legislative history.[330] While on the floor of the House of Representatives, the purpose of the FTAIA was described as "more clearly establish[ing] when antitrust liability attaches to international business activities."[331] Moreover, the record reflected that "Congress intended to exclude purely foreign transactions . . . from the reach of U.S. antitrust laws."[332] Although not controlling, the court used the reasoning of the legislative history to further preclude exercising jurisdiction over Statoil's claims.[333]

Finally, the court justified its result as being consistent with prior case law.[334] The court asserted that no U.S. court had exercised jurisdiction "where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market."[335] Therefore, Statoil lacked relevant precedent for its contentions, and "when considered with the plain language of the

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324. *Id.* at 427.
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at 431.
330. *Id.* at 428-29.
331. *Id.* at 428 (quoting H.R. REP. NO. 97-686, *supra* note 211, at 5, 8).
332. *Id.*; *But see* H.R. REP. NO. 97-686, *supra* note 211, at 10 (stating that wholly-foreign transactions are covered by the FTAIA).
333. *Den Norske*, 241 F.3d at 428-29.
334. *Id.* at 429.
335. *Id.*

statute and evidence of congressional intent," the record obligated the Fifth Circuit to affirm the dismissal of Statoil's complaint for lack of subject matter jurisdiction.[336]

C. *A Poignant Dissent*

Judge Higginbotham had "no hesitation" in concluding that the FTAIA does not divest federal courts of jurisdiction over Statoil's claims.[337] Although Statoil is a foreign company, its injury was the same as that of Americans who maintained a statutory right to seek recovery.[338] With this observation, Higginbotham examined the plain language of the FTAIA.[339] He noted that § 6a(2) clearly states that the effect on U.S. commerce "give rise to a claim" rather than the majority's reading of "'give rise to' *the plaintiff's* claim."[340]

He interpreted this language to mean literally that the effect on U.S. commerce must be sufficient to support *a* claim.[341] He continued, "'a' has a simple and universally understood meaning. It is the indefinite article . . . If the drafters of the FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have."[342] The FTAIA obviously exempted antitrust activities where the effects on U.S. commerce are benign; there must be harm to U.S. competition as a result of the activity.[343] Beyond that initial harm, however, the literal text of the FTAIA "does not require that the effect on U.S. commerce give rise to the plaintiff's claim."[344]

Judge Higginbotham next examined the legislative purpose and history surrounding the FTAIA.[345] Congress designed the FTAIA to exempt from antitrust scrutiny U.S. exporting that does not harm domestic commerce.[346] Congress did not enact the legislation to limit the liability of participants in international cartels that affect U.S. commerce.[347] Statoil's claims involve an international cartel, and thus, the original Sherman Act language controls.[348] The majority's view, on the other hand, attempted to limit the protection for Americans affected by foreign antitrust violations in a manner

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336. *Id.* at 431.
337. *Id.* at 431 (Higginbotham, J., dissenting) (emphasis in original).
338. *Id.*
339. *Id.* at 431-32.
340. *Id.* at 432 (emphasis in original).
341. *Id.*
342. *Id.*
343. *Id.* at 432-33.
344. *Id.* at 433.
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.* at 434.

contrary to explicit congressional intent.[349] This would transform the FTAIA from "a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States."[350]

To exclude foreign plaintiffs would lessen the ability of U.S. law to deter antitrust activity because "conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States.[351] Moreover,

> [i]f foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home.[352]

Such possibilities would undercut the ability of the Sherman Act to deter antitrust activity, and arbitrage principles indicated that U.S. consumers would pay higher prices.[353]

Furthermore, the legislative history undermines the majority's restrictive interpretation of the FTAIA.[354] The legislative history states that the FTAIA

> does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States . . . would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects in the United States, even if some purchasers take title abroad or suffer economic injury abroad.[355]

With this language, Congress contemplated that foreign plaintiffs such as Statoil could recover under U.S. antitrust laws.[356] Although the majority correctly noted that "American ownership should not create jurisdiction over a wholly foreign conspiracy," the fact was neither "controverted, controversial, or relevant to this case" because the heavy-lift barges were not U.S.-owned.[357] Moreover, the more important, relevant language was omitted from the majority's

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349. *See id.* Moreover, such a concern "about increased access by foreign parties to U.S. courts is misplaced; given the increasing ability of a course of conduct to affect multiple nations, such access is a foreseeable consequence of the FTAIA's design." Mehra, *supra* note 216, at 310.

350. *Den Norske*, 241 F.3d at 434.

351. *Id.* at 435.

352. *Id.* (quoting Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 315 (1978)).

353. *Id.* at 435.

354. *Id.* at 436.

355. *Id.* (quoting H.R. REP. NO. 97-686, *supra* note 211 (emphasis in original), citing *Pfizer*, 434 U.S. at 308).

356. *Id.* at 436.

357. *Id.*

discussion and states that "if a conspiracy between two foreign firms, regardless of American ownership, does have an effect on domestic commerce, there is jurisdiction."[358] This language coupled with express legislative intent supported a reversal of the District Court's holding.[359]

Finally, Judge Higginbotham noted that all other court of appeals cases arising under the FTAIA granted jurisdiction to plaintiffs like Statoil.[360] Because he would have found subject matter jurisdiction, he reached the standing inquiry.[361] Statoil met standing requirements because there was an injury in fact, an antitrust injury, and proper plaintiff status.[362] Therefore, Judge Higginbotham believed that the District Court should not have dismissed Statoil's claims.[363]

D. *Subsequent Developments*

A discontented Statoil promptly appealed the Fifth Circuit's decision to the Supreme Court. On October 1, 2001, the Supreme Court invited the Solicitor General to file briefs on the matter.[364] The government responded, arguing that the Fifth Circuit's decision was correct and "will not impair the United States' ability to enforce the Sherman Act against international cartels."[365] The Supreme Court agreed and, on February, 19, 2002, denied Statoil's petition for a writ of certiorari.[366]

E. Den Norske's *Outlook*

Economic principles suggest that the Fifth Circuit should have maintained jurisdiction over Statoil's claims. Throughout the 1993 to 1997 time period during which Statoil allegedly paid artificially inflated prices for heavy-lift barge services, the United States remained a net importer.[367] The international trade deficit ranged

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358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.* at 437.
362. *Id.* at 437-38.
363. *Id.* at 439.
364. Statoil ASA v. HeereMac v.o.f., 122 S.Ct. 28 (2001).
365. *Review of FTAIA Case Is Premature, U.S. Tells Supreme Court*, ANTITRUST LITIG. REP., Jan. 2002, at 6.
366. Statoil ASA v. HeereMac v.o.f., 122 S.Ct. 1059 (2002). Statoil's subsequent petition for rehearing was denied on April 15, 2002. Statoil ASA v. HeereMac v.o.f., 122 S.Ct. 1597 (2002).
367. *U.S. Aggregate Foreign Trade Data*, *supra* note 292.

from a low of $116 billion in 1993 to a high of $183 billion in 1997.[368] The economic theory of international antitrust suggests that, because the United States is a net importer, it will tend to overregulate international antitrust activity when politically feasible.[369]

Several political scientists have hypothesized that the international system has become unipolar since the fall of the Soviet Union in 1991.[370] Typically, unipolar systems are inherently unstable, and thus, most political scientists study the imminent demise of the dominant country[371] For the moment, however, the United States enjoys "a much larger margin of superiority over the next most powerful state or, indeed, all other great powers combined than any leading state in the last two centuries."[372] Moreover, the United States has become the first modern international state that dominates the economic, military, technological, and geopolitical components of international power.[373] This international political power structure suggests that the United States can strongly influence the nature and quantity of international antitrust activity.[374] The combination of this power and status as a net importer suggests that the Fifth Circuit should have maintained jurisdiction over Statoil's claims.[375]

The question is why the Fifth Circuit declined jurisdiction. The facts of this case do not present a compelling justification for the use of limited U.S. judicial resources. Statoil, a foreign corporation, attempted to use U.S. courts as a venue to assert antitrust claims involving conduct occurring 3,000 miles from the United States.[376] Nevertheless, the antitrust activity allegedly resulted in higher oil

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368. *Id.*

369. *See supra* notes 1-51 and accompanying text. The choice-of-law model developed by Professor Guzman, however, would establish a "presumption against extraterritoriality, national treatment of foreign plaintiffs, and private rights of action," which would each reduce the number of inefficient choice-of-law rules. Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 939 (2002). Moreover, when individual states lack incentives for efficient choice-of-law rules, strong international organizations may prove useful. *Id.* This argument should not underpin the conclusions of the economic theory of international antitrust because the interests of individual nations are not aligned with global interests. *See generally id.*

370. William C. Wohlforth, *The Stability of a Unipolar World*, INT'L SEC., Summer 1999, at 5. *But see* Christopher Layne, *From Preponderance to Offshore Balancing: America's Future Grand Strategy*, INT'L SEC., Summer 1997, at 86; Christopher Layne, *The Unipolar Illusion: Why New Great Powers Will Arise*, INT'L SEC., Spring 1993, at 5.

371. Wohlforth, *supra* note 370, at 5-6.

372. *Id.* at 7.

373. *Id.*

374. *Id.*

375. *See supra* notes 1-51 and accompanying text.

376. *See supra* notes 297-315 and accompanying text.

prices in the U.S. market.[377] By failing to exercise subject matter jurisdiction over Statoil's claims, the Fifth Circuit defeated one of the primary goals of U.S. antitrust law, protecting the consuming public.[378] These are not facts of a frivolous claim; U.S. commerce was directly harmed, and the U.S. antitrust laws should remedy the injury.[379]

The Fifth Circuit, however, failed to make the connection between the goals of antitrust and the facts of Statoil's complaint.[380] In reaching this result, the court, similar to those in most other extraterritorial antitrust cases, failed to consider the implications of the economic theory of international antitrust.[381] Nevertheless, most of those other courts have reached the result anticipated by economics. *Den Norske* is somehow different.

The Fifth Circuit panel in *Den Norske* based its decision predominantly on its statutory interpretation of the FTAIA. The court, however, should not have applied the FTAIA to Statoil's complaint because the FTAIA applies only to a small subset of export cases.[382] It does not apply to import commerce cases.[383] Statoil alleged that the price of crude oil *imported* into the United States was inflated, not the price of crude oil exported.[384] Nevertheless, the Supreme Court and several other lower courts have interpreted and applied the FTAIA to import cases where the original language of the Sherman Act should control.[385] Moreover, those other courts have still reached results consistent with the economic theory of international antitrust.

Further, the majority's interpretation conflicts with the goals of U.S. antitrust law. The Fifth Circuit's narrow interpretation limits the number and types of claims that foreign plaintiffs may assert in U.S. courts. The FTAIA, however, was not designed to grant foreign plaintiffs relief, but rather determines subject matter jurisdiction in *every* qualifying case.[386] Therefore, the majority's interpretation, at its logical extension, requires that every plaintiff's pleadings must demonstrate that the effect experienced personally is the same effect as that of the overall U.S. marketplace (a microcosm, so to speak).[387]

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377. Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420, 425 (5th Cir. 2001).
378. 1977 Guide, *supra* note 152, at E-2.
379. *Den Norske*, 241 F.3d at 425.
380. *See generally id.* at 420.
381. *See generally id.*
382. *See* FTAIA, 15 U.S.C. § 6a.
383. *Id.*
384. *Den Norske*, 241 F.3d at 422.
385. *See, e.g.*, Hartford Fire Ins. v. California, 509 U.S. 764 (1993).
386. FTAIA, 15 U.S.C. § 6a.
387. *Cf. Den Norske*, 241 F.3d at 426.

This heightened pleading requirement removes court access from many plaintiffs with legitimate claims, thereby further constraining the ability of U.S. antitrust law to protect the consuming public.[388] Judge Higginbotham, on the other hand, appears to realize that the Sherman Act, which includes the FTAIA, deals primarily with defendants, not plaintiffs, and therefore, should not create a heightened pleading requirement.[389]

Through its dismissal of Statoil's claims for lack of subject matter jurisdiction, the Fifth Circuit's decision conflicted with the 1995 Guidelines, which remain in effect. The 1995 Guidelines attempt to ensure free and open markets through aggressive extraterritorial antitrust enforcement.[390] *Den Norske*, however, restricts the ability of foreign parties to seek such markets.[391] Thus, theoretically, only the government can remove impediments to open markets unless a party can establish a direct causal connection between its purported injury and the alleged effect on U.S. commerce. The U.S. District Court for the District of Arizona has gone even further than the Fifth Circuit's holding.[392] In *United States v. LSL Biotechnologies, Inc.*, the court required the type and scope of the domestic effect to be the same.[393] Because the government was unable to show a direct effect, the court dismissed the complaint for lack of subject matter jurisdiction.[394] *LSL* thus removes much of the discrepancy between the 1995 Guidelines and *Den Norske* by disregarding existing regulations. This result is particularly troublesome because the court assumed a role whereby it second-guessed the executive branch's judgment.[395] This result further deviates from the predictions of the economic theory of international antitrust.[396]

Moreover, *Den Norske* tacitly and implicitly reinstates the considerations of international comity rejected by the Supreme Court in *Hartford Fire*. The Fifth Circuit, by requiring that Statoil and the U.S. market experience the same antitrust effect, proclaimed that the United States did not have a substantially significant interest in the matter.[397] Unlike *Hartford Fire*, however, the Fifth Circuit did not

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388. *See* 1977 Guide, *supra* note 152, at E-2.
389. *See Den Norske*, 241 F.3d at 432.
390. 1995 Guidelines, *supra* note 285, at S-3.
391. *See Den Norske*, 241 F.3d at 431.
392. United States v. LSL Biotechnologies, Inc., 2002 U.S. Dist. LEXIS 6499 (Ariz. 2002).
393. *Id.* at *17-18.
394. *Id.* at *18-19.
395. *See generally id.*
396. *See supra* notes 1-51 and accompanying text.
397. *See generally* Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001).

attempt to superficially balance the interests of U.S. courts against those of Norwegian or Russian courts and then deny comity considerations because there was not a direct conflict of laws.[398] Instead, the Fifth Circuit inherently deferred to the interests of any other court, asserting only that U.S. subject matter jurisdiction was improper.

Despite the fact that all indicators suggest that the Fifth Circuit should have maintained subject matter jurisdiction over Statoil's claims, the Supreme Court denied certiorari on the appeal.[399] Likely, the facts of Statoil's case did not sufficiently compel space on the Court's limited docket. The result is that *Den Norske* remains binding precedent within the Fifth Circuit and is persuasive precedent elsewhere. Thus, *Den Norske* maintains the same procedural posture that *Timberlane* occupied for many years.

The similarities to *Timberlane* do not end there. Through October 1, 2002, *Den Norske* has been cited by ten courts in six different circuits for the proposition that the FTAIA requires that the U.S. domestic antitrust effect give rise to the plaintiff's claim.[400] The Third Circuit, the District of Arizona, and the District Court for the District of Columbia have affirmed the Fifth Circuit's reasoning.[401] The Fourth Circuit has followed a slightly modified interpretation of *Den Norske*.[402] The Second Circuit has rejected the Fifth Circuit's rationale.[403] Finally, the Western District of Kentucky and the

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398. *See generally id.*

399. Statoil ASA v. HeereMac v.o.f., 122 S.Ct. 1059 (2002). Statoil's subsequent petition for rehearing was denied on April 15, 2002. Statoil ASA v. HeereMac v.o.f., 122 S.Ct. 1597 (2002).

400. Dee-K Enters., Inc. v. Heveafil Sdn. Bhd., 299 F.3d 281 (4th Cir. 2002); Kruman v. Christie's Int'l, 284 F.3d 384 (2d Cir. 2002); Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293 (3d Cir. 2002); Sniado v. Bank Aus. AG, 174 F. Supp. 2d 159 (S.D.N.Y. 2001); Turicentro, S.A. v. Am. Airlines, Inc., 152 F. Supp. 2d 829 (2001); Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc., 153 F. Supp. 2d 700 (E.D. Pa. 2001); Crompton Corp. v. Clariant Corp., 220 F. Supp. 2d 569 (M.D. La. 2002); United States v. LSL Biotechnologies, Inc., 2002 U.S. Dist. LEXIS 6499 (Ariz. 2002); Empagran S.A. v. F. Hoffman-La Roche, Ltd., 2001 U.S. Dist. LEXIS 20910 (D.D.C. 2001); Gen. Elec. Co. v. Latin Am. Imports, S.A., 187 F. Supp. 2d 749 (W.D. Ky. 2001).

401. *Turicentro*, 303 F.3d at 307 (plaintiffs lacked standing because the injury did not "flow from that which makes the defendants' acts unlawful"); *LSL*, 2002 U.S. Dist. LEXIS 6499 at *18 (holding that effects on seed prices did not have a direct effect on the subsequent sale price of a tomato and, therefore, the United States did not meet the FTAIA's jurisdictional requirements); *Empagran*, 2001 U.S. Dist. LEXIS 20910 at *5-13 (rejecting the foreign plaintiffs argument that, by paying higher prices for Class Vitamins abroad, U.S. domestic prices rose, thereby satisfying the FTAIA's jurisdictional requirements).

402. *Dee-K Enterprises*, 299 F.3d at 296 (holding that the plaintiffs must show that "the harm of which they complain had a substantial effect on our commerce").

403. *Kruman*, 284 F.3d at 400 (holding that "the 'effect' on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act").

Middle District of Louisiana have held that the plaintiffs have satisfied the FTAIA's direct, substantial, and reasonably foreseeable effect requirement.[404] Thus, the courts of appeal debate regarding extraterritorial application of U.S. antitrust law sparked by *Timberlane* in the 1970s has reemerged in the 2000s. The true question then is not why the Fifth Circuit denied subject matter jurisdiction over Statoil's claims. Rather, it is when the Supreme Court will find a set of plaintiffs with claims of a similar and compelling magnitude to those presented in *Hartford Fire* and use those plaintiffs to finally settle the current doctrinal debate.

VII. CONCLUSION

Beginning with Justice Holmes and *American Banana* nearly 100 years ago, the United States has remained ambivalent regarding the potential extraterritorial application its antitrust laws. The various branches of government began the 20th century with a doctrine of strict territoriality but soon after shifted toward an examination of the effects of the antitrust activity on U.S. commerce. Since the 1970s, the branches of government have reframed the question as one of statutory interpretation, embraced considerations of international comity in *Timberlane*, modified those considerations in *Laker Airways*, and eventually rejected many of those same considerations in *Hartford Fire*.

Throughout this chaos, however, the results reached by the various branches of government have been remarkably consistent with the economic theory of international antitrust. This theory suggests that a country will use its domestic antitrust laws to regulate foreign conduct when that country is both a net importer and maintains the political power to compel international compliance. Thus, with the *Timberlane* deviation, the United States has extended jurisdiction over foreign parties for antitrust activity organized and occurring abroad whenever it has been a net importer and maintained sufficient international political power.

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404. *Crompton*, 220 F. Supp. 2d at 569 (granting subject matter jurisdiction under the FTAIA because the plaintiff alleged both domestic and foreign injury); *Gen. Elec.*, 187 F. Supp. 2d at 752-53 (holding that "LATAM has alleged a direct, substantial, and reasonably foreseeable effect on a U.S. market—that is, the export market for U.S.-branded appliances to Peru—which, due to the fact that LATAM was GE's only potential competitor in that market, gave rise to LATAM's antitrust claims"). By categorizing LATAM's market as the U.S. export market rather than the Peruvian import market, the *General Electric* court appears to sidestep the *Den Norske* requirement that the plaintiff and U.S. domestic commerce experience the same effect from the alleged antitrust activity. *See Gen. Elec.*, 187 F. Supp. 2d at 752-53.

The Fifth Circuit has now entered the debate on extraterritorial application of the U.S. antitrust laws. In *Den Norske*, the court declined to exercise jurisdiction over the claims of a foreign plaintiff injured by cartel activity occurring exclusively outside of the United States. This result seems consistent with traditional notions of the role of U.S. courts, but it is inconsistent with both the economic theory of international antitrust and the antitrust laws' goal of protecting the U.S. consuming public. Thus, the Fifth Circuit should have exercised jurisdiction over Statoil's claims, thereby protecting U.S. consumers from rising oil prices. The Fifth Circuit's result, however, has already been embraced, modified, and rejected by a variety of other U.S. courts. These discrepancies suggest that, at some point when it finds a plaintiff with a claim of compelling magnitude, the U.S. Supreme Court will reenter and settle the current doctrinal debate on extraterritorial antitrust.

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