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NOTE

A PRESCRIPTION FOR EXCESS: USING PRESCRIPTIVE COMITY TO LIMIT THE EXTRATERRITORIAL REACH OF THE SHERMAN ACT

I. INTRODUCTION

The United States aggressively pursues antitrust violations perpetrated by foreign defendants.¹ Of the fines collected by the Department of Justice (“DOJ”) for Sherman Act violations, eighteen of the twenty largest fines have been levied against foreign corporations.² Private plaintiffs, too, are able to bring private rights of action against foreign corporations under the Sherman Act.³ Courts adjudicate these matters involving wholly foreign conduct and parties by applying the Sherman Act extraterritorially.⁴

The extraterritorial application of the Sherman Act has vexed courts for decades.⁵ There has been sharp disagreement among jurists as to how U.S. courts ought to apply U.S. antitrust laws abroad.⁶ As a general

1. See *2010 Year-End Criminal Antitrust Update*, GIBSON DUNN 1, 3 (Jan. 5, 2011), <http://www.gibsondunn.com/publications/Documents/2010Year-EndCriminal/AntitrustUpdate.pdf> (indicating that in 2010, for example, the United States assessed a large number of international antitrust fines).

2. ANTITRUST DIV., DEP’T OF JUSTICE, SHERMAN ACT VIOLATIONS YIELDING A CORPORATE FINE OF \$10 MILLION OR MORE 1-2 (2012) [hereinafter SHERMAN ACT VIOLATIONS], available at <http://www.justice.gov/atr/public/criminal/sherman10.html>.

3. See *infra* text accompanying note 22.

4. See *infra* Part II.C.

5. See, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355 (1909) (finding it “startling” that a plaintiff would seek relief for something occurring internationally); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 609 (9th Cir. 1976) (describing how international law does not provide strict guidance on the application of the Sherman Act extraterritorially and absence of such guidance from the Sherman Act itself); James S. McNeill, Comment, *Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction*, 28 CAL. W. INT’L L.J. 425, 431 (1998) (“Since the [Sherman] Act’s enactment, courts have struggled with determining just where jurisdiction begins and ends when foreign commerce is involved. The result is a hodgepodge of judicially constructed tests and factors.”).

6. Compare *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (finding that international comity concerns are not always implicated by an extraterritorial application of law),

matter, the Sherman Act can apply extraterritorially to foreign conduct if that conduct produces substantial effects inside the United States.⁷ The Supreme Court has established judicial rules about the extraterritorial application of the Sherman Act that do not provide predictive guidance or protection for foreign defendants.⁸ The result is that foreign defendants cannot know with sufficient certainty whether their wholly foreign actions will lead either to a civil lawsuit or criminal prosecution in U.S. courts.⁹ Further, the extraterritorial application of the Sherman Act has negatively impacted foreign relations between the United States and its closest trading partners.¹⁰

The purpose of this Note is to analyze the problems caused by the expansive extraterritorial application of the Sherman Act and to propose that courts must apply the principles of prescriptive comity when analyzing the Sherman Act's application to foreign conduct. Courts would employ two different comity analyses depending on whether conduct is illegal in only the United States or illegal in both the United States and the country where the conduct occurred.¹¹ If conduct is legal in the foreign jurisdiction where it occurred, courts would employ a comity analysis that looks to the degree of regulation that the foreign nation imposes on the industry in which the allegedly anticompetitive conduct occurs.¹² When conduct is illegal in both nations, the court would use prescriptive comity by looking for consent or implied consent from the other nation and by ensuring that an exercise of jurisdiction will not impede upon diplomatic relations.¹³

with *id.* at 817-18 (Scalia, J., dissenting) (advocating the use of prescriptive comity to limit the extraterritorial application of U.S. antitrust laws).

7. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (concluding that both agreements at issue were unlawful, even though made abroad, because they affected the imports in the United States).

8. See, e.g., *Hartford Fire*, 509 U.S. at 799 (providing that no conflict of law exists when a defendant can comply with two sovereigns' laws even if those laws are different).

9. MAHER M. DABBAH, *THE INTERNATIONALISATION OF ANTITRUST POLICY* 194 (2003); see Brief for the Gov't of Japan as Amicus Curiae Supporting Appellees at 13, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001) (discussing the difficulty in anticipating whether conduct in one nation will lead to the application of another nation's laws); see also Jonathan M. Rich & Greta L. Burkholder, *Third Circuit Eases Burden on Foreign Injury Antitrust Plaintiffs*, MORGAN LEWIS (Aug. 29, 2011), <http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/2a5d8a27-5a84-4b08-866e-e03199550b11> (describing how the burden is becoming lower on plaintiffs in antitrust cases involving foreign conduct).

10. See *infra* Part III.D.

11. See *infra* Part IV.B.

12. See *infra* Part IV.B.1.

13. See *infra* Part IV.B.2.

Part II of this Note discusses how the Sherman Act came to apply extraterritorially. Part III shows the problems caused by the extraterritorial application of the Sherman Act, especially the negative impact on international relations. Part IV discusses how to use comity, defined in the context of Justice Antonin Scalia's dissent in *Hartford Fire Insurance Co. v. California*,¹⁴ when courts decide whether to apply the Sherman Act extraterritorially.

II. THE SHERMAN ACT'S SHIFT FROM STRICTLY TERRITORIAL APPLICATION TO EXTRATERRITORIAL APPLICATION

The extraterritorial application of U.S. laws varies among the courts and depends on the type of substantive law at issue.¹⁵ Circuits have different standards about what conduct will trigger the extraterritorial application of U.S. laws.¹⁶ While the Supreme Court has continued to recognize a presumption against extraterritoriality, the strength of that presumption and how litigants can overcome it has not been clarified by recent Supreme Court holdings.¹⁷ The extraterritorial application of the Sherman Act, in particular, has greatly expanded since its inception.¹⁸ While it is now established that the Sherman Act applies extraterritorially, courts have used various standards to judge its application to foreign conduct.¹⁹

14. 509 U.S. 764 (1993).

15. See John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 376 (2010) (describing the evolution of presumption against extraterritoriality and analyzing the reasons for its varying construction by the courts).

16. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 101 (1998). For example, Chief Judge Abner Mikva of the D.C. Circuit ignored the presumption in applying the National Environmental Policy Act when there were effects felt in the United States and conduct occurred in the United States. *Id.* However, the Ninth Circuit takes a more restrictive view on extraterritoriality with copyright law and limits the application of U.S. law to conduct abroad, even when there are effects in the United States. *Id.* The Fifth Circuit in the context of securities law cases uses the presumption by focusing on the effects, instead of where the conduct occurs. *Id.*

17. See Knox, *supra* note 15, at 376-77.

18. See *infra* Part II.B.

19. See, e.g., *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-15 (9th Cir. 1976) (acknowledging the effects test, but introducing a comity balancing analysis); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (applying the Sherman Act extraterritorially when the effects are felt in the United States).

A. *The Sherman Act*

The Sherman Act²⁰ is the United States' antitrust statute that prohibits anticompetitive business activity, such as monopolies and price-fixing.²¹ The DOJ can bring criminal penalties, including imprisonment and fines, against individuals and corporations for violating the Sherman Act, and private plaintiffs allegedly injured by Sherman Act violations have a private right of action in federal court.²² Central to a Sherman Act violation is an agreement among parties to act in an anticompetitive manner.²³ Price-fixing, bid-rigging, and market allocation are *per se* criminal violations of the Sherman Act.²⁴ The DOJ finds that "[s]uch agreements have been shown to defraud consumers and unquestionably raise prices or restrict output without creating any plausible offsetting benefit to consumers."²⁵

B. *The Development of an Expansive Extraterritorial Antitrust Regime*

The Sherman Act was originally construed as a strictly territorial statute.²⁶ The Supreme Court officially proclaimed this in 1909.²⁷ It was followed until 1945.²⁸ By the close of the twentieth century, though, the Sherman Act was construed to not only apply extraterritorially, but to apply so broadly that courts today are not required to consider international comity in certain cases.²⁹ Foreign criminal conduct by foreign entities can now trigger liability for Sherman Act violations as well.³⁰

20. 15 U.S.C. §§ 1–7 (2006).

21. *Id.* § 1.

22. *Id.* § 15 (giving plaintiffs injured by Sherman Act violations a private right of action in federal district court).

23. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 2 (2005), available at <http://www.justice.gov/atr/public/guidelines/209114.pdf>.

24. *Id.* at 4. The DOJ defines price-fixing as "an agreement among competitors at any level of the economy (manufacturers, distributors, or retailers) to raise, fix, or otherwise maintain the price at which their products or services are sold." *Id.* at 5. Bid-rigging is defined as "the way that conspiring businesses effectively raise prices where purchasers—often federal, state, or local governments—acquire products or services by soliciting bids." *Id.* at 8. Market allocation occurs when competitors agree "to divide the market among themselves." *Id.* at 11.

25. *Id.* at 4.

26. See 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, 224–25 (1994).

27. *Id.* at 225.

28. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945).

29. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–98 (1993).

30. See *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

1. Territoriality in *American Banana*

The plaintiff in *American Banana Co. v. United Fruit Co.*,³¹ a U.S. corporation, tried to recover damages under the Sherman Act from another U.S. company for activity that took place in Latin America.³² The Supreme Court held that U.S. antitrust laws did not apply to conduct outside of the United States.³³ *American Banana* established that the Sherman Act did not apply extraterritorially because “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”³⁴

The Court distinguished exercising jurisdiction over acts in a region governed by a sovereign from situations “in regions subject to no sovereign.”³⁵ In sovereign-less regions, a country’s court could exercise jurisdiction extraterritorially to adjudicate disputes between its own citizens.³⁶ However, in a region with a sovereign, such as the Latin American nations where the disputed activity in *American Banana* occurred, it “would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent,” to apply one nation’s laws in the territory of another.³⁷

In *American Banana*, the Supreme Court strictly adhered to the territorial principal of jurisdiction.³⁸ This helped to prevent international tensions and was a predictable and efficient way of exercising jurisdiction.³⁹ However, territoriality was soon expanded to embrace extraterritorial effects as a basis for jurisdiction.⁴⁰

31. 213 U.S. 347 (1909).

32. *Id.* at 354-55.

33. *See id.* at 357.

34. *Id.* at 356 (citing *Slater v. Mexican Nat’l R.R. Co.*, 194 U.S. 120, 126 (1904)).

35. *See id.* at 355-56.

36. *Id.* at 356.

37. *See id.*

38. *See* Austen L. Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455, 1466 (2008).

39. *Id.* at 1466-67.

40. *See id.* at 1467-68, 1471 (describing the paradigm shift in legal theory that signaled the end for strictly territorial application of U.S. law).

2. A Significant Expansion

In *United States v. Aluminum Co. of America* (“Alcoa”),⁴¹ the Second Circuit, designated by the Supreme Court as a court of last resort for this action,⁴² decided that the Sherman Act does have extraterritorial application when violations taking place abroad have intended effects in the United States.⁴³ Alcoa was accused of creating a monopoly for virgin aluminum ingot and conspiring to restrain trade through an agreement with Aluminum Limited.⁴⁴

However, the anticompetitive activity did not occur in the United States.⁴⁵ Rather than simply applying the general principle from *American Banana*—that courts were precluded from applying the Sherman Act extraterritorially⁴⁶—the court created a two-part test to determine that the court did in fact have jurisdiction.⁴⁷

In his opinion, Justice Learned Hand found that the anti-competitive agreements at issue would have been a violation of the Sherman Act had they occurred within the borders of the United States.⁴⁸ Justice Hand extrapolated that even though the agreements took place abroad, they were still unlawful because they had intended substantial effects in the United States and did in fact affect the United States.⁴⁹ Therefore, the two-part test to determine extraterritorial jurisdiction of the Sherman Act is that the defendants intended substantial effects in the United States and that the alleged anticompetitive action in fact had an effect on the economy.⁵⁰ However, Justice Hand also acknowledged that U.S. courts needed to exercise discretion in applying the Sherman Act extraterritorially.⁵¹ That discretion, he found, should be “the limitations customarily observed by nations upon the exercise of their powers.”⁵² Justice Hand did not believe that Congress envisioned the Sherman Act’s reach to extend as far as a court’s personal jurisdiction.⁵³ For example,

41. 148 F.2d 416 (2d Cir. 1945).

42. *Id.* at 421 (“On June 12, 1944, the Supreme Court, declaring that a quorum of six justices qualified to hear the case was wanting, referred the appeal to this court under § 29 of Title 15 . . .”).

43. *See id.* at 444.

44. *Id.* at 421.

45. *See id.* at 443.

46. *See Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

47. *See Aluminum Co. of Am.*, 148 F.2d at 444 (describing how the defendants’ conduct was unlawful if there were intended effects in the United States and the conduct did in fact affect the United States).

48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.* at 443.

52. *Id.*

53. *Id.*

conduct that was not intended to affect U.S. trade, but does so anyway, should not be included under the Sherman Act because of the “international complications likely to arise.”⁵⁴

The *Alcoa* effects test became the standard for extraterritorial application of the Sherman Act.⁵⁵ In *Hartford Fire Insurance Co. v. California*,⁵⁶ both the majority⁵⁷ and the dissent recognized that *Alcoa* firmly established the extraterritorial nature of the Sherman Act.⁵⁸ It is so firmly established, that it has found its way into statute: the Foreign Trade Antitrust Improvement Act (the “FTAIA”)⁵⁹ is essentially a codification of the *Alcoa* effects test.⁶⁰ However, the *Alcoa* effects test has led to substantial global criticism, especially from nations such as the United Kingdom.⁶¹

3. Attempts to Limit the Extraterritorial Application of the Sherman Act

In the decades after *Alcoa*, some courts began to limit the extraterritorial reach of the Sherman Act.⁶² These courts realized the negative international implications that arose from the effects test and sought to limit *Alcoa*’s application.⁶³ In order to curb *Alcoa*, courts used the principles of international comity in their analysis of the extraterritorial application of the Sherman Act.⁶⁴ *Timberlane Lumber Co. v. Bank of America*⁶⁵ was one of the most influential of these cases.⁶⁶ The *Timberlane* court and other courts that followed its reasoning wanted not only a showing of substantial effects, but also a balancing of

54. *Id.*

55. Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265, 268 (2005).

56. 509 U.S. 764 (1993).

57. *Id.* at 796 (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”).

58. *Id.* at 814 (Scalia, J., dissenting) (“[I]t is now well established that the Sherman Act applies extraterritorially.”).

59. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2006).

60. See Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 313-14 (2007).

61. See, e.g., Nicholas Davidson, *U.S. Secondary Sanctions: The U.K. and E.U. Response*, 27 STETSON L. REV. 1425, 1426 (1998) (describing how the United Kingdom negatively views the expansive application of U.S. antitrust law to foreign conduct).

62. See Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 674-75 (2001).

63. See DABBAH, *supra* note 9, at 167-68.

64. *Id.* at 168.

65. 549 F.2d 597 (9th Cir. 1976).

66. See Swaine, *supra* note 62, at 674-76 (describing the influence of the decision and how the American Law Institute included a list of factors similar to those in *Timberlane* in its revisions of the *Restatement of Foreign Relations Law*).

interests in favor of U.S. jurisdiction before applying the Sherman Act beyond the territorial confines of the United States.⁶⁷

In *Timberlane*, Timberlane Lumber brought an action against Bank of America for a Sherman Act violation, specifically using the elements from *Alcoa*.⁶⁸ The District Court initially dismissed the action because there were no direct effects felt in the United States.⁶⁹ In his decision on appeal, Judge Herbert Choy addressed the problems of the extraterritorial application of the Sherman Act, especially from an international relations perspective.⁷⁰

In particular, the opinion discussed how foreign nations have viewed the extraterritorial application of U.S. antitrust law “as excessive intrusions into their own spheres.”⁷¹ However, Judge Choy recognized that, despite the foreign criticism surrounding its application, the *Alcoa* test was typically used by courts to justify extraterritorial application of the Sherman Act.⁷² The District Court in *Timberlane* did just that and simply looked to the effects without discussing other factors, such as comity.⁷³

Judge Choy found the *Alcoa* test “incomplete because it fail[ed] to consider other nations’ interests.”⁷⁴ In an attempt to modify the test from *Alcoa*, Judge Choy articulated a three-part balancing test to determine the extraterritorial application of the Sherman Act.⁷⁵ The purpose of the test was to ensure that a court was exercising jurisdiction in a manner consistent with prescriptive comity.⁷⁶ Among the factors for courts to consider were:

Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter

67. DABBAH, *supra* note 9, at 168.

68. See *Timberlane*, 549 F.2d at 600-01, 605 (“Plaintiffs also allege that there has been a direct and substantial effect on United States foreign commerce, and that defendants intended the results of the conspiracy, including the impact on United States commerce.”). The plaintiffs properly alleged both elements, the intended conspiracy with substantial effects, from the *Alcoa* test. See *id.*; see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945).

69. *Timberlane*, 549 F.2d at 601. Judge Choy noted that the court below was not specific about what grounds it was using to dismiss the action. *Id.* at 601. Two of the possible rationales for dismissal were failure to state a claim and lack of subject matter jurisdiction. *Id.* at 602. Judge Choy chose to review the district court’s decision using failure to state a claim. *Id.* at 603.

70. See *id.* at 609.

71. *Id.*

72. See *id.* at 610.

73. *Id.* For the district court, a showing of effects on U.S. commerce was the threshold upon which to base jurisdiction. *Id.*

74. *Id.* at 611-12. Following from that, Judge Choy also recognized that applying U.S. law to foreign citizens can be controversial and problematic. See *id.* at 612.

75. See *id.* at 615.

76. McNeill, *supra* note 5, at 436.

of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?⁷⁷

The case was ultimately remanded to decide these questions.⁷⁸

Other circuits adopted the *Timberlane* approach and used comity as an important factor in their analysis about jurisdiction.⁷⁹ Some courts, though, found it difficult to apply Judge Choy's balancing test.⁸⁰ His test was criticized for giving the judicial branch too much political discretion.⁸¹ As such, courts continued to inconsistently apply the effects test when determining jurisdiction.⁸²

4. Towards Expansion

The Supreme Court in *Hartford Fire* chose not to adopt Judge Choy's comity-based analysis.⁸³ Instead, the Court focused on a defendant's ability to comply with American and foreign laws simultaneously.⁸⁴ After *Hartford Fire*, international comity clearly does not have a prominent place in a court's analysis whether to apply the Sherman Act extraterritorially.⁸⁵

The plaintiffs in *Hartford Fire* were nineteen states and private individuals who brought an action under the Sherman Act against members of the insurance industry, including foreign companies.⁸⁶ The defendants allegedly conspired to alter standard form commercial general liability insurance policies in order to limit their obligations under the policies.⁸⁷ Insurance Services Office, Inc. ("ISO") created the

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

78. *Id.*

79. See Sprigman, *supra* note 55, at 269. This trend, started after *Timberlane*, came to a halt subsequent to the Supreme Court's *Hartford Fire* decision. *Id.*

80. McNeill, *supra* note 5, at 437-38.

81. S. Lynn Diamond, Note, Empagran, *The FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 813-14 (2006).

82. See McNeill, *supra* note 5, at 438-39 (describing inconsistent case results after *Timberlane* that led to a circuit split).

83. See Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 235 (2001).

84. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993); Jordan A. Dresnick et al., *The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad*, 40 U. MIAMI INTER-AM. L. REV. 453, 474 (2009).

85. See Robert C. Reuland, *Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of the United States Antitrust Laws*, 29 TEX. INT'L L.J. 159, 204 (1994); Susan E. Burnett, Comment, *U.S. Judicial Imperialism Post Empagran v. F. Hoffman-LaRoche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT'L L. REV. 555, 592 (2004).

86. *Hartford Fire*, 509 U.S. at 770, 775.

87. *Id.* at 770-71.

standard policies.⁸⁸ ISO's members, which included over 1000 insurers, almost always used these forms.⁸⁹ When the defendant insurance companies were unsuccessful in getting ISO to change the forms, the plaintiffs alleged that defendants acted in contravention of the Sherman Act.⁹⁰ The alleged activity included persuading British reinsurers to not provide reinsurance for policies written on the ISO forms.⁹¹

In their complaint, the plaintiffs also claimed that the British reinsurers conspired to force American primary insurers to only offer claims-made policies.⁹² If the American primary insurers did not comply, the reinsurers would not provide reinsurance contracts.⁹³ The British reinsurers also allegedly conspired to not reinsure pollution coverage insurance contracts for the North American market.⁹⁴

The British reinsurers sought to dismiss the action because the extraterritorial application of the Sherman Act in this case would violate "the principle of international comity."⁹⁵ They were not arguing that there was no basis for jurisdiction, and in fact conceded that there was subject matter jurisdiction.⁹⁶ Instead, they argued that this was a situation where the interests of the British government were strong enough to counsel against the extraterritorial application of the Sherman Act.⁹⁷ Justice David Souter, writing for the majority, did not accept the British reinsurers' argument and instead found that the Court had "no need in this litigation to address . . . considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity."⁹⁸

88. *Id.* at 772.

89. *Id.* The defendant insurers wanted policies that only paid or defended claims made during the policy period to limit their liability. *Id.* at 771. They wanted these policies, known as "claim-made" policies, to be retroactive to further limit their liability. *Id.* (internal quotation marks omitted). Further, the insurance companies wanted to no longer cover "sudden and accidental" pollution, which was typically covered under commercial general liability insurance. *Id.* Lastly, the defendant insurance companies wanted to limit the legal fees associated with defending claims. *Id.* at 771-72 (internal quotation marks omitted).

90. *Id.* at 773-74.

91. *Id.* at 775.

92. *Id.* at 776.

93. *Id.*

94. *Id.*

95. *Id.* at 797.

96. *Id.* at 795.

97. Transcript of Oral Argument at 37, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1128).

98. *Hartford Fire*, 509 U.S. at 799.

Justice Souter cited *Alcoa* as evidence that “it is well established . . . that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”⁹⁹ Because the British reinsurers intended the effects of their actions to be felt in the United States and their conduct had substantial effects in the United States, they met both elements of the *Alcoa* test.¹⁰⁰ The Court of Appeals placed great emphasis on the reinsurers’ intent to affect the United States, and deemphasized comity.¹⁰¹ Justice Souter, too, seemed especially reticent to apply comity at all.¹⁰² He referenced the FTAIA for the proposition that Congress was ambivalent about a court’s decision to decline to exercise their subject matter jurisdiction over a Sherman Act claim because of international comity concerns.¹⁰³

Instead of creating a judicial standard for international comity when extraterritorial applications of the Sherman Act are at issue, Justice Souter passed on the question.¹⁰⁴ He decided that even if a court could decline to exercise their Sherman Act subject matter jurisdiction on the grounds of comity, “international comity would not counsel against exercising jurisdiction in the circumstances alleged.”¹⁰⁵ Justice Souter then focused his emphasis on the degree of conflict between British and American law.¹⁰⁶ The British reinsurers argued that their conduct was legal under applicable British law and applying the Sherman Act extraterritorially to their conduct would undermine the British regulatory scheme for reinsurance.¹⁰⁷ Justice Souter did not find this relevant. Because the reinsurers could have complied with laws of both countries, the fact that their conduct was legal under British law did not preclude the extraterritorial application of the Sherman Act.¹⁰⁸

99. *Id.* at 796.

100. *See id.* at 798.

101. *Id.*

102. *See id.*

103. *Id.* (citing H.R. REP. NO. 97-686 at 13 (1982), *reprinted* in 1982 U.S.C.C.A.N. 2487, 2487).

104. *Id.*

105. *Id.*

106. *See id.*

107. *Id.* at 798-99.

108. *Id.* at 799.

C. *The Current State of the Extraterritorial Application of the Sherman Act*

The Sherman Act has evolved from *American Banana*, where it was a strictly territorial statute.¹⁰⁹ It is well-settled law that courts may apply the Sherman Act extraterritorially to foreign conduct causing effects within the United States.¹¹⁰ Recent case law demonstrates the expansive jurisdiction that courts have to adjudicate Sherman Act violations resulting from purely foreign conduct.¹¹¹ However, the expansive use of the effects doctrine has serious consequences, including possible criminal penalties for foreign corporations engaged in foreign conduct.¹¹²

After *Hartford Fire*, U.S. courts now only need to look to two factors to determine if they can apply the Sherman Act extraterritorially.¹¹³ First, they examine the effects on the U.S. economy.¹¹⁴ Second, they determine if there is a true conflict between U.S. antitrust law and foreign law.¹¹⁵ They do not need to apply a comity analysis.¹¹⁶ A jurisdiction-based comity test has been replaced by a simple question of whether a party can obey two—albeit different—laws at the same time.¹¹⁷

Hartford Fire solidified the importance of the *Alcoa* effects test to determine the extraterritorial application of the Sherman Act and deemphasized Judge Choy's comity-based concerns in *Timberlane*.¹¹⁸ Comity in the wake of *Hartford Fire* is now an incredibly difficult defense for a foreign defendant to raise when challenging the extraterritorial application of the Sherman Act.¹¹⁹ Foreign entities are now even less certain if their conduct will give rise to a Sherman Act violation.¹²⁰

109. *Compare* *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (citing *Slater v. Mexican Nat'l R.R. Co.*, 194 U.S. 120, 126 (1904)), *with* *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (1945).

110. *See, e.g., Hartford Fire*, 509 U.S. at 796.

111. *See, e.g., In re Vitamin C Antitrust Lit.*, 584 F. Supp. 2d 546, 548 (E.D.N.Y. 2008) (exercising jurisdiction over price-fixing conduct in China that had effects in the United States).

112. *See, e.g., United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

113. *See* Andrew C. Udin, Comment, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U. L. REV. 1321, 1340 (2001).

114. *See id.*

115. *Id.* at 1345.

116. *See id.* at 1346 (describing how the conflict test replaced a comity analysis).

117. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993).

118. *See* Udin, *supra* note 113, at 1346.

119. 1 SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 6.21 (3d ed. 2011).

120. DABBAH, *supra* note 9, at 194-95.

III. EXPANSIVE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT IS PROBLEMATIC

Justice Scalia dissented in *Hartford Fire* about the extraterritorial application of the Sherman Act to the British defendants' foreign conduct.¹²¹ His opinion addressed what he saw as serious problems with expansive extraterritorial application of the Sherman Act.¹²² Much of his dissent focused on the majority's lack of respect for international law.¹²³ Foreign nations, too, joined Justice Scalia in their disapproval of expansive international antitrust enforcement.¹²⁴ However, despite Justice Scalia's concerns, subsequent courts have felt bound by *Hartford Fire*, even in the criminal context.¹²⁵ In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*,¹²⁶ the Supreme Court had an opportunity to provide a new standard that addressed Justice Scalia's concerns about international comity, but instead limited its holding to antitrust suits causing wholly foreign injury.¹²⁷ The current state of the extraterritorial application of the Sherman Act continues to reflect Justice Scalia's concerns because it continues to complicate international relations and ignores customary international law.¹²⁸

A. Justice Scalia's Dissent in *Hartford Fire*

Justice Scalia framed his dissent by addressing two questions raised in the British reinsurers' argument against extraterritorial application of the Sherman Act.¹²⁹ The first question was whether the District Court had subject matter jurisdiction over the Sherman Act claim.¹³⁰ It was obvious to Justice Scalia that there was in fact subject matter jurisdiction

121. *Hartford Fire*, 509 U.S. at 812 (Scalia, J., dissenting).

122. See *infra* Part III.A.

123. See *infra* Part III.A.

124. Brief for the Gov't of Japan as Amicus Curiae Supporting Appellees at 1-2, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001); Brief for the Gov't of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioners at 3, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1128).

125. See, e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) ("Under settled principles of statutory construction, we also are bound to apply [the rule from *Hartford Fire*] by interpreting Section One [of the Sherman Act] the same way in a criminal case.").

126. 542 U.S. 155 (2004).

127. See Burnett, *supra* note 85, at 607 (describing how the Supreme Court discussed comity in *Empagran*, but "oversimplifie[d] the issues" by limiting its holding to foreign injury).

128. See *supra* text accompanying notes 269-78; see also McNeill, *supra* note 5, at 452-53 (discussing the global community's resentment toward the U.S. antitrust regime).

129. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812 (1993) (Scalia, J., dissenting).

130. *Id.*

because a Sherman Act violation arises under a federal statute.¹³¹ In fact, Justices Souter and Scalia agreed about subject matter jurisdiction.¹³² Therefore, the more substantive question was whether the Sherman Act could be applied extraterritorially to the British reinsurers' conduct.¹³³ This was not a question of subject matter jurisdiction.¹³⁴ Instead, the issue was whether Congress, when it enacted the Sherman Act, intended the statute to reach the wholly foreign conduct of the British reinsurers.¹³⁵

To determine if the District Court could apply the Sherman Act to the foreign conduct, Justice Scalia began with an analysis of prescriptive jurisdiction.¹³⁶ Prescriptive jurisdiction is the ability of a nation to "make its laws applicable to persons or activities."¹³⁷ Under the Constitution, Congress certainly has the explicit power to make laws relating to commerce.¹³⁸ Those laws are not strictly territorial and can extend outside of the United States.¹³⁹ However, the issue for Justice Scalia was how Congress intended the Sherman Act to apply extraterritorially.¹⁴⁰

In determining the extent of prescriptive jurisdiction, Justice Scalia relied on two canons of construction: that statutes are presumed to not apply extraterritorially and that statutes should never violate customary international law.¹⁴¹ The first canon, the presumption against extraterritoriality, was overcome because case precedent firmly established that the Sherman Act applies extraterritorially.¹⁴² Justice Scalia found that the second canon, that statutes are presumed not to violate customary international law, was not met in *Hartford Fire*.¹⁴³ This canon is implicated only after the presumption against extraterritoriality is met or is not applicable.¹⁴⁴ Because the first canon was satisfied, Justice Scalia looked at the extent to which the application of the Sherman Act in this case would offend customary international law.¹⁴⁵

131. *Id.*

132. *See id.*; *accord id.* at 795 (majority opinion).

133. *Id.* at 813 (Scalia, J. dissenting).

134. *Id.*

135. *Id.*

136. *Id.* at 813-14.

137. *Id.* (internal quotation marks omitted).

138. *Id.* at 813.

139. *Id.* at 813-14.

140. *Id.* at 814.

141. *Id.* at 814-15 (quoting *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804)).

142. *Id.* at 814.

143. *Id.* at 819.

144. *Id.* at 814.

145. *Id.* at 815.

Justice Scalia would have dismissed the case for failure to state a claim because the second canon of construction was not met.¹⁴⁶ Applying the Sherman Act extraterritorially in *Hartford Fire* offended customary international law because it ignored prescriptive comity.¹⁴⁷ Prescriptive comity is “the respect sovereign nations afford each other by limiting the reach of their laws.”¹⁴⁸ This is a distinct concept from the comity of courts, which is when “judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.”¹⁴⁹ Comity played an important role in the dissent because “using international law to limit the extraterritorial reach of statutes is firmly established in [U.S.] jurisprudence.”¹⁵⁰

If the District Court allowed the plaintiffs’ claim to proceed, the United States was ignoring the United Kingdom’s ability to regulate its reinsurance industry.¹⁵¹ The presence of that comprehensive regulatory scheme made it evident to Justice Scalia that it was unreasonable for the United States to apply the Sherman Act extraterritorially to the British reinsurers’ conduct.¹⁵² Therefore, Justice Scalia thought it “unimaginable” that Congress intended its prescriptive jurisdiction to govern this conduct, given how unreasonable it would be.¹⁵³

The majority opinion, then, sharply differed from Justice Scalia’s approach to comity.¹⁵⁴ For Justice Scalia, the comity analysis is not about exercising jurisdiction, but instead about whether the Sherman Act, as contemplated by Congress, actually covered the British reinsurers’ conduct.¹⁵⁵ Even though the parties themselves blurred the lines of the role of comity in adjudicative jurisdiction and prescriptive jurisdiction, Justice Scalia rejected the way the majority ignored the prescriptive jurisdiction question.¹⁵⁶

146. *See id.* at 822. Justice Scalia would not have dismissed the claim based on lack of subject matter jurisdiction because he found that there was subject matter jurisdiction. *See id.* at 813. Instead, he found that the plaintiffs failed to state a claim because the extraterritorial reach of the statute did not extend to the conduct of which they complain. *See id.*

147. *See id.* at 817-19.

148. *Id.* at 817.

149. *Id.*

150. *Id.* at 818.

151. *See id.* at 819.

152. *Id.* Justice Scalia used the *Restatement (Third) of Foreign Relations Law* to show the unreasonableness of applying the Sherman Act extraterritorially over the British reinsurers. *Id.* (citing the 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987)). Under the *Restatement (Third)*, prescriptive jurisdiction is unreasonable when, *inter alia*, there is a limited nexus to the state seeking to enforce its law and when two nations’ laws are conflicting. *See id.*

153. *See id.* at 819.

154. *See id.* at 820.

155. *See id.* at 813-14, 819.

156. *See id.* at 820 (noting that the majority improperly characterized the issue as whether a

Had Justice Scalia also chosen—albeit erroneously—to do a comity analysis through an adjudicative jurisdiction framework, as the majority did, he still would have come up with the different result than the majority.¹⁵⁷ Justice Scalia recognized that the adjudicative jurisdiction analysis done by the majority created a serious problem because it ignored comity unless compliance with both U.S. and foreign law was impossible.¹⁵⁸ This would lead to an even broader application of the Sherman Act, which would have negative consequences on international relations, especially regarding nations with which the United States shares a trade relationship.¹⁵⁹ In following the majority's rationale at looking at "true conflict," Justice Scalia would have seen that the real conflict was between the legitimate interests of the United States and the United Kingdom.¹⁶⁰ Therefore, even if assuming, *arguendo*, the majority properly characterized the issue as one of conflict of laws instead of prescriptive jurisdiction, the *Hartford Fire* majority still needed to recognize and respect the United Kingdom's interest in regulating the reinsurance industry.¹⁶¹

Justice Scalia's dissent in *Hartford Fire* sought to use comity to ensure reasonable application of the Sherman Act to foreign conduct.¹⁶² He recognized the purpose of the reasonableness factors in the *Restatement (Third) of Foreign Relations Law*.¹⁶³ His decision was consistent with the importance of comity used by courts pre-*Hartford Fire*.¹⁶⁴ The majority, on the contrary, severely limited comity by relegating it to the infrequent situations when foreign law requires a party to act in contravention of U.S. laws.¹⁶⁵

Courts have taken the majority decision in *Hartford Fire* so literally that the role of comity in the extraterritorial application of the Sherman Act is now severely limited.¹⁶⁶ Comity, which was once an important

court could adjudicate the dispute, rather than if the Sherman Act actually covered the alleged conduct). The District Court unquestionably had adjudicative jurisdiction because the Sherman Act was the claim at issue. *Id.* at 812.

157. *Id.* at 820.

158. *See id.*

159. *Id.*

160. *See id.* at 820-21.

161. *See id.* at 819-21.

162. *See id.* at 817.

163. *See* Andreas F. Lowenfeld, Commentary, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflection on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 49 (1995).

164. *See* Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 569 (2000).

165. *Id.*

166. *See id.*

restraint on the extraterritorial application of the Sherman Act, was virtually eliminated by the majority in *Hartford Fire*.¹⁶⁷ Instead of providing courts useful guidance about when and when not to apply the Sherman Act extraterritorially, the majority in *Hartford Fire* allowed for “a triumph for governmental regulation of anticompetitive behavior.”¹⁶⁸ Justice Scalia sought to prevent unreasonable application of a powerful statute abroad,¹⁶⁹ whereas the majority legitimized broad application of the Sherman Act extraterritorially.¹⁷⁰ As seen in recent cases,¹⁷¹ courts are now predisposed in favor of extraterritorial application of the Sherman Act.¹⁷²

B. *Hartford Fire’s Impact on Criminal Sherman Act Prosecutions*

The impact of *Hartford Fire* was not limited to civil actions.¹⁷³ Rather, the First Circuit’s decision in *United States v. Nippon Paper Industries*¹⁷⁴ brought the holding from *Hartford Fire* into the criminal context.¹⁷⁵ The First Circuit expanded *Hartford Fire*, despite the detrimental impact that the extraterritorial application of the Sherman Act has had on relations between the United States and Japan.

In *Nippon Paper*, a grand jury indicted Nippon Paper Industries Co., Ltd. (“NPI”), a Japanese company, for conspiring to fix the price of thermal fax paper in North America.¹⁷⁶ NPI moved to dismiss the indictment because all of the activity occurred in Japan.¹⁷⁷ The DOJ opposed the motion because the effects of the price-fixing were felt in the United States and co-conspirators were in the United States.¹⁷⁸ The First Circuit denied NPI’s motion because it felt bound by *Hartford Fire*, even though *Hartford Fire* was a civil action and this was a criminal case.¹⁷⁹

167. *Id.*

168. Phillip R. Trimble, Commentary, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT’L L. 53, 57 (1995).

169. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 819 (1993) (Scalia, J., dissenting).

170. Trimble, *supra* note 168, at 57.

171. See, e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

172. John A. Trenor, Comment, *Jurisdiction and the Extraterritorial Application of Antitrust Laws After Hartford Fire*, 62 U. CHI. L. REV. 1583, 1608 (1995).

173. See *Nippon Paper*, 109 F.3d at 9.

174. 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

175. *Id.* at 9.

176. *Id.* at 2.

177. *Id.* Because the alleged activity took place in Japan, NPI argued that the indictment failed to state a violation of Section 1 of the Sherman Act. *Id.*

178. *Id.*

179. *Id.* at 9 (“Under settled principles of statutory construction, we also are bound to apply

The First Circuit did discuss comity in its decision.¹⁸⁰ It saw international comity as “a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction.”¹⁸¹ This conception of comity fit into Justice Scalia’s definition of comity of courts and not prescriptive comity, which is the type of comity he found applicable to the extraterritorial application of U.S. laws.¹⁸² While the First Circuit did recognize comity’s diminished stature after *Hartford Fire*, it did not seek to revitalize comity or distinguish this situation from that of the British reinsurers in *Hartford Fire*.¹⁸³ Instead, it used *Hartford Fire*’s holding to show that the Japanese defendant’s comity claim was “even more attenuated” than that of the British reinsurers because its conduct was illegal “under both Japanese and American laws.”¹⁸⁴ Therefore, the court found no reason to accept NPI’s comity argument.¹⁸⁵ Instead, it found that extending considerations of comity to NPI would “create perverse incentives” for foreign defendants.¹⁸⁶

Nippon Paper was an opportunity for the First Circuit to limit the decision in *Hartford Fire* to only civil cases.¹⁸⁷ This decision not to do so shows the magnitude of the Supreme Court’s holding in *Hartford Fire* because that holding has expanded jurisdiction not just for the Sherman Act civilly but also criminally.¹⁸⁸ The *Nippon Paper* decision is also significant because the *Restatement (Third) of Foreign Relations Law* sees the extraterritorial application of criminal law to be “particularly intrusive.”¹⁸⁹ However, the *Nippon Paper* court did not consider the *Restatement*, which is rooted in comity.¹⁹⁰ This was consistent with *Hartford Fire* because “the Supreme Court rejected the notion of comity-style analysis as binding U.S. law.”¹⁹¹

[the rule from *Hartford Fire*] by interpreting Section One [of the Sherman Act] the same way in a criminal case.”)

180. *Id.* at 8-9.

181. *Id.* at 8.

182. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

183. *See Nippon Paper*, 109 F.3d at 8.

184. *Id.*

185. *See id.*

186. *Id.*

187. Chad Stockel, Note, *Sherman’s March on Japan: U.S. v. Nippon Paper and the Extraterritorial Reach of Criminal Antitrust Law*, 9 TRANSNAT’L L. & CONTEMP. PROBS. 399, 420 (1999).

188. *See Nippon Paper*, 109 F.3d at 9.

189. Stockel, *supra* note 187, at 412 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 reporter’s note 8 (1987)) (internal quotation marks omitted).

190. *Id.* at 412-13.

191. *See id.*

By expanding the holding of *Hartford Fire*, the First Circuit set a precedent that gives the United States overreaching authority to control foreign conduct.¹⁹² One of the dangers of *Nippon Paper* is that the United States can influence another nation's economic policy by applying criminal antitrust statutes to that nation's corporations and citizens.¹⁹³ Another danger is that foreign defendants would have the burden of defending their wholly foreign conduct in U.S. criminal courts.¹⁹⁴

International relations can easily be harmed by a criminal antitrust regulatory scheme that closely mirrors *Nippon Paper* because it does not foster cooperation among states.¹⁹⁵ Further, nations can retaliate against the application of the Sherman Act extraterritorially by doing the same with their laws in connection with U.S. corporations or individuals.¹⁹⁶ Given that there are vastly different economic policies functioning in an antitrust statute, this can have a negative impact on the U.S. economy.¹⁹⁷

C. A Missed Opportunity

In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,¹⁹⁸ comity had a small reprise.¹⁹⁹ The Supreme Court took into consideration the concerns about extraterritorial application of the Sherman Act raised in amicus briefs by Belgium, Canada, Germany, Ireland, Japan, and the United Kingdom.²⁰⁰ Justice Stephen Breyer, who wrote for the majority, used these briefs in his decision to decline to extend the Sherman Act to foreign conduct causing independent foreign injury.²⁰¹ The Court recognized that "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs"; however, it did not see that as a *per se* violation of prescriptive comity when that conduct has causes.²⁰²

192. See Elliott Sulcove, Comment, *The Extraterritorial Reach of the Criminal Provisions of U.S. Antitrust Laws: The Impact of United States v. Nippon Paper Industries*, 19 U. PA. J. INT'L ECON. L. 1067, 1093 (1998).

193. *Id.* at 1093-94.

194. *Id.*

195. Michael Bishop, Note, *United States v. Nippon Paper Industries Co.: Criminal Application of the Sherman Act Abroad*, 32 GEO. WASH. J. INT'L L. & ECON. 271, 290 (1999).

196. See *id.* at 290-91.

197. See *id.* at 289.

198. 542 U.S. 155 (2004).

199. Ralf Michaels, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, DUKE U. SCH. L., <http://web.law.duke.edu/publiclaw/supremecourt/online/commentary/fhovemp> (last visited Nov. 5, 2012).

200. *Id.*

201. See *Empagran*, 542 U.S. at 167-68, 175.

202. See *id.* at 165.

Instead, it found that prescriptive comity did allow the United States to exercise its antitrust laws extraterritorially for injuries felt within the United States.²⁰³

The defendant, Empagran S.A., sought to dismiss the plaintiffs' class action lawsuit against foreign and domestic vitamin manufacturers.²⁰⁴ The class consisted of both foreign and domestic purchasers of vitamins who alleged that manufacturers engaged in price-fixing, which violated the Sherman Act.²⁰⁵ The plaintiffs alleged that the vitamin manufacturers engaged in foreign anticompetitive activity, which had adverse effects not only in the United States, but also negative foreign effects.²⁰⁶ The Supreme Court declined to exercise the Sherman Act extraterritorially for the foreign conduct causing foreign harm, but it did hold that the domestic purchasers had a cognizable Sherman Act claim.²⁰⁷

The Supreme Court's opinion in *Empagran* was based in part on the FTAIA.²⁰⁸ The FTAIA limits the application of the Sherman Act when anticompetitive conduct causes only foreign injury.²⁰⁹ It also mentioned comity in its decision to limit the Sherman Act's application when a plaintiff alleges a purely foreign injury.²¹⁰ The Court held that declining to apply the Sherman Act extraterritorially in this situation "properly reflects considerations of comity."²¹¹ However, the Supreme Court did not use *Empagran* as an opportunity to reinstate comity considerations when considering the extraterritorial application of the Sherman Act for any type of foreign conduct.²¹²

Justice Scalia concurred with the majority for two reasons.²¹³ First, he agreed with the majority's construction of the FTAIA.²¹⁴ Second, he found the majority's holding to be consistent "with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories."²¹⁵

203. *Id.*

204. *Id.* at 159-60.

205. *Id.* at 159.

206. *See id.*

207. *Id.*

208. *Id.* at 158 (citing Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2006)).

209. *See id.* (citing 15 U.S.C. § 6a).

210. *Id.* at 175.

211. *Id.*

212. *See* Huffman, *supra* note 60, at 324 (noting how the *Empagran* decision "did not explicitly cast doubt on *Hartford Fire*").

213. *See Empagran*, 542 U.S. at 176 (Scalia, J., concurring).

214. *Id.*

215. *Id.*

This echoed the second principle of statutory construction upon which he relied in his dissenting opinion in *Hartford Fire*.²¹⁶

Empagran failed to adequately remedy the international relations conflicts and customary international law violations caused by *Hartford Fire* and expanded by *Nippon Paper*.²¹⁷ While it did introduce a prescriptive comity analysis for conduct that had foreign injury, courts are still bound by *Hartford Fire* when conduct has effects within the United States.²¹⁸ The problem, therefore, caused by the extraterritorial application of the Sherman Act needs to be addressed through a new judicial standard.²¹⁹ That standard must be rooted in prescriptive comity because that would afford the greatest opportunity to improve international relations, especially among some of the United States' closest trading partners who are frequent targets of antitrust actions.²²⁰

D. The Global Community Disapproves of the Expansive Reach of the Sherman Act

The expansive reach of the Sherman Act has been met with resistance from other nations,²²¹ especially from countries with which the United States is a trading partner.²²² Some nations oppose the United States' antitrust regime because it infringes on their sovereignty and thus violates international law.²²³ Other nations are concerned about the detrimental effects on their economies caused by the extraterritorial application of U.S. antitrust law.²²⁴ The United Kingdom is one of the most vociferous objectors to the globalized reach of U.S. antitrust laws.²²⁵ Japan, too, strongly disapproves of the extraterritorial application of U.S. antitrust laws into its sovereign territory.²²⁶ Both

216. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting). Justice Scalia used the canon of construction in his dissenting opinion that statutes should not be read to conflict with customary international law, including prescriptive comity. *Id.* at 814-15, 817. Scalia also recognized in *Empagran* that the majority acknowledged prescriptive comity. See *Empagran*, 542 U.S. at 176 (Scalia, J., concurring).

217. See Huffman, *supra* note 60, at 323-24 (describing that despite the contrast between *Empagran* and *Hartford* in terms of comity, the *Empagran* Court did not undo *Hartford*'s rule).

218. See Michaels, *supra* note 199 (noting that the result of *Empagran* could have been different had the conduct caused domestic injury).

219. See *infra* Part IV.B.

220. See *infra* Part IV.B.

221. Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 384 (1997) [hereinafter Waller, *Internationalization*].

222. Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations,"* 72 S. CAL. L. REV. 1601, 1608 (1999).

223. See McNeill, *supra* note 5, at 452-53.

224. Waller, *supra* note 221, at 384.

225. *Id.*

226. *Id.*

Japanese and British nationals and businesses have frequently been targets of U.S. antitrust prosecution, despite their nations' much weaker antitrust enforcement schemes.²²⁷ Even U.S. courts that have allowed U.S. antitrust law to apply extraterritorially recognized the validity of this concern.²²⁸

While the United States and the United Kingdom have formed a strong and mutually beneficial military alliance,²²⁹ the extraterritorial application of U.S. antitrust laws has been a source of tension between the two nations.²³⁰ The United States and United Kingdom have fundamentally different perspectives about the extraterritorial application of their own laws, especially with antitrust laws.²³¹ The United Kingdom adopts a more restrictive view, compared to the liberal effects test used in the United States.²³² With few exceptions, the United Kingdom will only exercise jurisdiction over actions occurring in its territories or the actions in foreign territories perpetrated by its own nationals or domestic corporations.²³³ Antitrust matters do not seem to fall under the exceptions, as the view of the British government is that "substantive jurisdiction in antitrust matters should only be taken on the basis of the territorial principle or the nationality principle."²³⁴

The United Kingdom has criticized the much more expansive effects test employed by the United States because it infringes on other nations' sovereign rights.²³⁵ In 1978, the British government expressed its disapproval in a diplomatic note.²³⁶ The note, prepared on behalf of the British Embassy by Department of State Deputy Assistant Secretary for International Finance and Development Charles F. Meissner²³⁷

227. *Id.*

228. *See, e.g.,* *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984) ("It is often argued before United States courts that the application of United States antitrust laws to foreign nations violates principles of comity. Those pleas are legitimately considered.").

229. Cheryl Pellerin, *U.S., U.K. Military Relationship Essential*, *Mullen Says*, U.S. DEP'T OF DEFENSE (June 10, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=64282>.

230. Davidson, *supra* note 61, at 1425. At the time Mr. Davidson wrote this article, he was the First Secretary (Trade Policy) at the British Embassy in Washington, D.C. *Id.* at 1425 n.*.

231. *See id.* at 1426.

232. *See id.*

233. *Id.*

234. *See* D.M. Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INT'L LAW. 645, 647 (1979). The British position would allow for an exercise of jurisdiction over a foreign person or company as long as the anticompetitive activity occurred in the United Kingdom. *Id.* The nationality principle permits states to exert jurisdiction over its own nationals abroad, as long as it does not infringe on another nation's sovereignty. *Id.*

235. Davidson, *supra* note 61, at 1426-27.

236. Jacobs, *supra* note 234, at 648.

237. *Id.* at 648 n.7.

stated: “HM Government considers that in the present state of international law there is no basis for the extension of one country’s antitrust jurisdiction to activities outside of that country”²³⁸

Even more, the United Kingdom passed the Protection of Trading Interests Act (the “PTIA”)²³⁹ in 1980 as a result of the nation’s strong disapproval of the extraterritorial application of U.S. antitrust law and in order to protect its domestic industries.²⁴⁰ The PTIA “provide[s] protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom.”²⁴¹ Not only does the PTIA provide protections against the extraterritorial application of foreign laws in the United Kingdom, but it also deters parties from bringing private actions.²⁴² Through protective discovery measures and the unenforceability of certain judgments,²⁴³ it becomes more expensive and less certain to bring a private antitrust lawsuit against a British company.²⁴⁴

The United Kingdom referenced the PTIA in its amicus brief supporting the British reinsurers in *Hartford Fire*.²⁴⁵ Its major argument in the brief was that international law prohibits the type of extraterritorial application sought by the plaintiffs in *Hartford Fire*.²⁴⁶ While the United Kingdom acknowledged that it worked with the United States on adjudicating disputes surrounding conduct that was illegal in both countries, it recognized the friction that extraterritorial application of the Sherman Act has caused between the two nations.²⁴⁷ The British government did not take the position that all instances of the extraterritorial application of U.S. antitrust law were prohibited by international law.²⁴⁸ Instead, its disapproval in this particular case was based on how exercising jurisdiction over the British reinsurers would

238. *Id.* at 648 (internal quotation marks omitted).

239. 1980, c. 11 (Eng.).

240. See Davidson, *supra* note 61, at 1427. A British minerals company was facing treble damages as the result of a U.S. antitrust lawsuit, which prompted the passage of the PTIA. *Id.*

241. Protection of Trading Interests Act, c. 11.

242. See Davidson, *supra* note 61, at 1428.

243. See Protection of Trading Interests Act §§ 2, 4–6.

244. Davidson, *supra* note 61, at 1428.

245. Brief for the Gov’t of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioners at 3–4, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1128). The United Kingdom used the PTIA as evidence of its substantial interest in the *Hartford Fire* litigation. See *id.* at 4.

246. See *id.* at 14.

247. *Id.* at 2–3.

248. *Id.* at 3.

interfere with Britain's ability to regulate its own industries.²⁴⁹ The United Kingdom argued that international law required the U.S. courts to decline to adjudicate the matter because it would be unreasonable to exercise jurisdiction over the British defendants.²⁵⁰ Further, the British government mirrored Justice Scalia's dissent in *Hartford Fire* by recognizing the canon of construction that U.S. laws should not be construed to violate international law.²⁵¹ Following from this canon, the amicus brief argued that the Sherman Act has not been previously construed by the Supreme Court so as to ignore its impact on U.S. allies.²⁵²

The government of Canada also submitted an amicus brief supporting the foreign petitioners in *Hartford Fire* because of its concerns about U.S. extraterritorial jurisdiction.²⁵³ Canada did not want the conduct of the British reinsurers to be included under the Sherman Act because it would violate international law.²⁵⁴ The conduct of the British reinsurers was legal in the United Kingdom, and Canada did not want U.S. antitrust laws to apply to conduct that was legal in the country where it occurred.²⁵⁵ In its brief, Canada also raised an important question: Would the United States want another nation to apply its laws extraterritorially to conduct that was legal in the United States, but illegal in that foreign country?²⁵⁶ Like the United Kingdom, though, Canada recognized its relationship with the United States and because of that close economic relationship, Canada did not want applications of U.S. law to conflict with international law.²⁵⁷

Canada recognized the same canon of construction that the British government and Justice Scalia used: that U.S. laws should not be construed to violate international law.²⁵⁸ International law would not permit a nation to apply its economic regulatory laws to foreign conduct when that application is inconsistent with the foreign nation's economic policy.²⁵⁹ Canadian courts do not apply Canadian law in situations where

249. *Id.* at 5.

250. *See id.* at 22-23.

251. *See id.* at 16-17.

252. *Id.* at 19.

253. Brief for the Gov't of Canada as Amicus Curiae Supporting Certain Petitioners at 1, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1128).

254. *See id.* at 5-6 (noting that the United States follows customary international law and customary international law prohibits one state from using its economic law to regulate conduct in another state).

255. *See id.* at 4-5.

256. *Id.* at 17-18.

257. *Id.* at 2.

258. *Id.* at 9.

259. *See id.* at 6-7.

the application “would displace or undermine the laws or established policies of another state.”²⁶⁰ Other nations, including Australia, Switzerland, Germany, and France follow the same judicial restraint as Canada “as a matter of obligation.”²⁶¹

Similar to the United Kingdom and Canada, Japan and the United States have a close relationship.²⁶² However, Japan is a frequent target of the extraterritorial application of the Sherman Act.²⁶³ In September 2011, a Japanese company faced \$200 million in fines and three Japanese nationals entered into plea bargains to each serve more than a year of jail time as a result of price-fixing and bid-rigging in the automotive industry.²⁶⁴ Twenty-five Japanese companies have been held liable for Sherman Act violations that each resulted in a fine of more than \$10 million.²⁶⁵ As of December 2011, the DOJ had only collected eighty-nine fines that were more than \$10 million.²⁶⁶ On that same list compiled by the DOJ, only fifteen U.S. companies faced fines of more than \$10 million.²⁶⁷ Japan, not the United States, was the most represented nation on the DOJ’s list.²⁶⁸

Japan, in *Nippon Paper*, filed an amicus brief in favor of defendant NPI, which strongly opposed the extraterritorial application of the Sherman Act.²⁶⁹ The amicus brief acknowledged the close relationships between the two nations.²⁷⁰ However, it reasoned that the relationship was based on “mutual respect for each Nation’s sovereignty.”²⁷¹ Japan saw extraterritorial applications of law as “infring[ing] the sovereign rights of other countries.”²⁷² Because *Nippon Paper* was a criminal matter, the government of Japan found the extraterritorial application to be “particularly problematic.”²⁷³ One of the problems Japan articulated

260. *Id.* at 7.

261. *Id.* at 7-8.

262. *Partnership for Security and Prosperity*, PRIME MINISTER OF JAPAN AND HIS CABINET (June 30, 2001), http://www.kantei.go.jp/foreign/koizumispeech/2001/0630anzen_e.html.

263. *See, e.g.*, SHERMAN ACT VIOLATIONS, *supra* note 2, at 1-7.

264. Press Release, Dep’t of Justice, Furukawa Elec. Co. Ltd. and Three Executives Agree to Plead Guilty to Auto. Parts Price-Fixing and Bid-Rigging Conspiracy (Sept. 29, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/275503.pdf.

265. SHERMAN ACT VIOLATIONS, *supra* note 2, at 1-7.

266. *Id.*

267. *Id.*

268. *Id.*

269. Brief for the Gov’t of Japan as Amicus Curiae Supporting Appellees at 1-2, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001).

270. *Id.* at 2.

271. *Id.*

272. *Id.* at 7.

273. *Id.* at 7-8.

was the inability of foreign defendants to “foresee or predict that their conduct could expose them to criminal punishment abroad.”²⁷⁴

The government of Japan illustrated that if a Japanese court tried to use Japanese law to regulate domestic conduct in the United States, the United States would find it unreasonable.²⁷⁵ There would be a conflict between U.S. law and policy and Japanese law and policy.²⁷⁶ Therefore, Japan viewed the extraterritorial application of the Sherman Act in *Nippon Paper* to be “an offensive interference with Japanese jurisdiction.”²⁷⁷ Japan instead advocated for coordination on antitrust laws between nations without any unilateral assertions of jurisdiction.²⁷⁸

While foreign governments have submitted amici curiae briefs to express their concerns, their lack of effectiveness has led nations to question the impartiality of the U.S. judiciary when deciding extraterritorial applications of law.²⁷⁹ The Seventh Circuit boldly rejected the amicus briefs of foreign governments in a case involving uranium cartels.²⁸⁰ In *In re Uranium Antitrust Litigation*,²⁸¹ Australia, Canada, South Africa, and the United Kingdom submitted amicus briefs opposing jurisdiction.²⁸² However, the Seventh Circuit flatly rejected the briefs because “shockingly to [them], the governments of the defaulters ha[d] subserviently presented for them their case against the exercise of jurisdiction.”²⁸³ Roberts B. Owen, legal adviser of the Department of State at the time, expressed the concerns of the U.S. government about this line in the opinion to Associate Attorney General John H. Shenefield.²⁸⁴

Owen wanted Shenefield to explain to the Seventh Circuit the problems it caused in the *Uranium Antitrust* opinion.²⁸⁵ These problems included “serious embarrassment to the United States in its relations with some of [its] closest allies.”²⁸⁶ The Department of State had been

274. *Id.* at 13.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 27-28.

279. Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 520-21 (1998).

280. *Id.* at 521.

281. 617 F.2d 1248 (7th Cir. 1980).

282. *Id.* at 1253.

283. *Id.* at 1255-56.

284. Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 657, 665 (1980).

285. *See id.*

286. Nash, *supra* note 284, at 665-67 (quoting Letter from Legal Adviser Roberts Owen to

engaged in diplomatic contact with other nations about this matter and had encouraged the nations to submit their amicus briefs.²⁸⁷ It wanted nations to submit these briefs because it acknowledged other nations' concerns about the extraterritorial application of antitrust laws.²⁸⁸ The Department of State wanted these concerns brought to the attention of the Seventh Circuit in the interest of foreign relations.²⁸⁹

In 1982, Congress passed the FTAIA.²⁹⁰ The FTAIA limits the scope of the Sherman Act by making it only applicable to trade or commerce with foreign nations if there are substantial and foreseeable effects on U.S. commerce and if the effects create a cognizable Sherman Act violation.²⁹¹ The first stated purpose of the Act was to ameliorate the concern that antitrust laws were harming American exporters.²⁹² The second purpose, which is relevant to this Note, was to address the differing approaches in the courts about the extraterritorial application of U.S. antitrust statutes.²⁹³ Congress felt a "single, objective test" would be a "simple and straightforward clarification of existing American law."²⁹⁴ Congress recognized the problems that different interpretations of the effects test caused.²⁹⁵ However, it did not question the test itself.²⁹⁶

Another purpose of the Act was to reduce the tensions between the United States and its trading partners caused by the extraterritorial application of the Sherman Act.²⁹⁷ Congressman Peter Rodino of New Jersey was aware of these tensions, as were experts who testified in front of Congress, such as Professor Eleanor Fox of New York University.²⁹⁸ The FTAIA, however, has been criticized as a "poorly drafted, needlessly complicated and woefully inadequate statute" because it does

Asst. Att'y Gen. John H. Shenefield (Mar. 17, 1980) [hereinafter Roberts Owen Letter]).

287. *Id.* at 665-66.

288. *Id.*

289. *Id.* at 665-67.

290. Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. REV. 2151, 2156 (2003).

291. *Id.* at 2157.

292. H.R. REP. NO. 97-686 at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2487.

293. *Id.*

294. *Id.* at 2-3, 1982 U.S.C.C.A.N. at 2487-88. By clarifying the state of American law for the extraterritorial application of the Sherman Act, Congress envisioned "a clear benchmark . . . for business [people], attorneys and judges as well as our trading partners." *Id.*

295. *See id.* at 5-6, 1982 U.S.C.C.A.N. at 2490-91.

296. *See id.* at 5, 1982 U.S.C.C.A.N. at 2490. Congress accepted that the place of the effect, not the place of the action, as determinative in the extraterritorial application of the Sherman Act. *See id.*

297. Huffman, *supra* note 60, at 305.

298. *See also id.* at 308-09.

not provide courts with a practical standard.²⁹⁹ It has been criticized because of its ineffectiveness in limiting the extraterritorial application of the Sherman Act in a meaningful way, so as to solve the serious international relations issues that arise from the liberal use of the effects test.³⁰⁰ Further, the FTAIA did not address the comity-based concerns that Judge Choy had in *Timberlane*.³⁰¹

When a court decides whether to apply the Sherman Act extraterritorially, there is concern that judges are not qualified to evaluate “the diplomatic, national security, and international economic issues” that inevitably will arise.³⁰² Because of the impact extraterritoriality has on foreign relations, courts should realize that their function is different than that of the Department of State³⁰³ and should not prescribe to the strongly extraterritorial trend started by *Hartford Fire*.³⁰⁴ The British PTAIA³⁰⁵ and the strongly-worded amicus brief filed by the Japanese government in *Nippon Paper*³⁰⁶ should be lessons to courts about the negative impact that broad extraterritoriality can have on foreign relations.³⁰⁷ However, the trend is that the DOJ is taking advantage of the broad extraterritorial rules and aggressively prosecuting foreign defendants, using creative tactics such as plea bargains with favorable immigration terms.³⁰⁸ Because of the failure of the FTAIA to adequately address the international community’s concerns,³⁰⁹ a new judicial standard needs to be formulated that recognizes the competing interests of effective antitrust enforcement and compliance with international law.³¹⁰

299. Cavanagh, *supra* note 290, at 2188.

300. See Huffman, *supra* note 60, at 311. Huffman believes that Congress misunderstood the confusion about the effects test. See *id.*

301. See DABBAH, *supra* note 9, at 169.

302. Griffin, *supra* note 279, at 519-20.

303. See *id.*

304. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993); see, e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

305. Protection of Trading Interests Act, 1980, c. 11 (Eng.).

306. See generally Brief for the Gov’t of Japan as Amicus Curiae Supporting Appellees, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001).

307. See, e.g., Nash, *supra* note 284, at 665-67 (quoting Roberts Owen Letter).

308. Kara Scannell, *U.S. Accused of Unfair Antitrust Tactic*, FIN. TIMES (Sept. 20, 2011, 11:04 PM), <http://www.ft.com/intl/cms/s/0/1d923292-e0b9-11e0-947a-00144feabdc0.html>. U.S. officials are obtaining plea bargains from foreign defendants whereby they plead guilty, but in exchange receive an exemption from travel restrictions. *Id.* Foreign executives found guilty of an antitrust violation without the exemption would face travel restrictions to the United States. *Id.* Executives are willing to take the plea so they can continue their business relationships in the United States after serving jail time. *Id.*

309. See Huffman, *supra* note 60, at 311, 314-15.

310. See *infra* Part IV.B.

IV. HOW TO USE COMITY TO LIMIT THE SHERMAN ACT'S EXTRATERRITORIAL REACH

Simply telling courts to reinstate a comity analysis will not solve the problems caused by the extraterritorial application of the Sherman Act.³¹¹ While the concept of comity is often cited by courts, it lacks a clear definition.³¹² Even less clear is how courts ought to apply comity.³¹³ Adding to the confusion of comity is that there are two distinct types of comity: comity of courts and prescriptive comity.³¹⁴

A. Comity: An Ambiguous Term

For the extraterritorial application of the Sherman Act, Justice Scalia found that prescriptive comity—"the respect sovereign nations afford each other by limiting the reach of their law"—ought to guide a court's application of the Sherman Act to foreign conduct.³¹⁵ Justice Scalia's definition of prescriptive comity was rooted in the "comity of nations," as opposed to the "comity of courts."³¹⁶ The Supreme Court in *Hilton v. Guyot*³¹⁷ defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience."³¹⁸ *Hilton* is often cited by courts for its definition of comity.³¹⁹

For the Supreme Court in *Hilton*, applying laws extraterritorially depended upon the comity of nations.³²⁰ However, just as modern courts have come to inconsistent conclusions about the extraterritorial

311. See *Hartford Fire Ins. Co. v. California*, 508 U.S. 764, 818 n.9 (1993) (Scalia, J. dissenting) (explaining the confusion courts have had in distinguishing the comity of courts and prescriptive comity); see also Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1322 (1985) (describing the difficulty in applying the principle of comity).

312. Michael D. Ramsey, *Escaping "International Comity"*, 83 IOWA L. REV. 893, 893 (1998).

313. See *id.* at 902-05 (explaining the difficulties courts have using comity).

314. *Hartford Fire*, 508 U.S. at 817.

315. *Id.* For purposes of this Section, all references to "prescriptive comity" will follow that definition.

316. *Id.* (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (1834)). Justice Story defined "comity of nations" as "the true foundation and extent of the obligation of the laws of one nation within the territories of another." STORY, *supra*.

317. 159 U.S. 113 (1895).

318. *Id.* at 163-64.

319. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 8-9 (1991).

320. See *Hilton*, 159 U.S. at 163 (internal quotation marks omitted). While not using the same terms as modern courts, the Supreme Court in *Hilton* recognized that one nation's laws "operat[ing] within the dominion of another nation, depends upon . . . 'the comity of nations.'" *Id.*

application of the Sherman Act³²¹ because of various understanding of what comity requires, the Supreme Court in *Hilton* recognized that comity is a difficult term.³²² It could not, though, find an appropriate substitute to the amorphous concept of comity.³²³ The Court also could not define the role of comity, placing it somewhere between “mere courtesy and good will” and “a matter of absolute obligation.”³²⁴ However, modern courts have recognized its important role in the “international system like the mortar which cements together a brick house.”³²⁵

The purpose of this Note is not to resolve the conflict about what exactly comity is. Instead, its purpose is to provide a new standard for the extraterritorial application of the Sherman Act rooted in how Justice Scalia used comity in his dissent in *Hartford Fire*.³²⁶ Using his definition can ameliorate one of the paramount problems in the extraterritorial application of the Sherman Act: that nations see it as an infringement on their sovereign rights.³²⁷ Because Justice Scalia’s definition of prescriptive comity would function to limit the extraterritorial reach of the Sherman Act, it is “firmly established in [American] jurisprudence.”³²⁸ Thus, it avoids the myriad problems courts have had in deciding the extent to which they need to recognize comity.³²⁹

B. Using Justice Scalia’s Definition of Prescriptive Comity to Limit the Extraterritorial Application of the Sherman Act

In order to solve the problem created by *Hartford Fire*’s majority, courts must first recognize the importance of prescriptive comity in deciding whether the Sherman Act reaches foreign conduct. When foreign conduct causes effects in the United States, the court must then perform an analysis based on prescriptive comity.³³⁰ As seen in *Empagran*, foreign conduct with foreign effects will not allow for an extraterritorial application of the Sherman Act.³³¹ Therefore, the

321. See *supra* Part II.C.

322. See *Hilton*, 159 U.S. at 163.

323. See *id.*

324. *Id.* at 163-64.

325. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

326. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

327. See Brief for the Gov’t of Japan as Amicus Curiae Supporting Appellees at 7, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001).

328. *Hartford Fire*, 509 U.S. at 818.

329. See *Hilton*, 159 U.S. at 164-65.

330. See *supra* text accompanying notes 147-49.

331. See *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159 (2004).

Supreme Court has used prescriptive comity in the past when it declined to allow U.S. law to intrude on the sovereignty of another nation.³³² There is no need for any type of analysis in these situations because case law firmly establishes that these types of cases involve no justiciable claim.³³³ There are two situations where courts would have to perform a comity analysis. The first situation is when conduct is legal—but not required—in the country where it occurred, but proscribed under the Sherman Act.³³⁴ The second situation is when conduct is illegal under both the Sherman Act and the laws of the country where it occurred.³³⁵

1. The *Hartford Fire*-Type Situation

To properly use prescriptive comity, courts must look beyond whether conduct is simply legal in another country. They must look to how the industry in which the alleged anticompetitive conduct is regulated by the foreign country where it occurred. If the conduct is regulated under a comprehensive regulatory scheme, such as the reinsurance industry in *Hartford Fire*, a court should decline to exercise the Sherman Act extraterritorially in order to respect that nation's right to regulate its own industries.³³⁶

In *Hartford Fire*, the foreign defendants who challenged jurisdiction based on principles of comity were reinsurers based in London.³³⁷ The London reinsurance market alone has a thirty percent market share.³³⁸ As a result, the United Kingdom has developed a comprehensive regulatory structure for the reinsurance market.³³⁹ Therefore, the United Kingdom wanted the United States to respect its own ability to regulate an industry of national importance.³⁴⁰ It did not

332. See *id.* at 176 (Scalia, J., concurring).

333. See, e.g., *id.* at 159 (majority opinion).

334. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993).

335. See, e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

336. See *Hartford Fire*, 509 U.S. at 819 (Scalia, J., dissenting).

337. *Id.* at 775 (majority opinion).

338. Thomas Holzheu & Roman Lecher, *The Global Reinsurance Market*, in *HANDBOOK OF INTERNATIONAL INSURANCE: BETWEEN GLOBAL DYNAMICS AND LOCAL CONTINGENCIES* 889 fig.18.6 (J. David Cummins & Betrand Venard eds., 2007).

339. See Brief for the Gov't of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioners at 10-11, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1128). For example, the British legislation requires registered insurers to make certain filings and to meet minimum capitalization thresholds. *Id.* at 11.

340. See *id.* at 13-14 (arguing that "the assertion of jurisdiction by the U.S. courts here . . . [is] an offensive interference with [the United Kingdom's] sovereign rights and significant interests").

want U.S. antitrust laws to dictate changes to its historic policy, especially when the extraterritorial application of the Sherman Act in *Hartford Fire* would have done so without any input from the United Kingdom.³⁴¹

Using prescriptive comity to decline jurisdiction over foreign conduct in this way is consistent with the principles of the Member States of the Organization of Economic Cooperation and Development (“OECD”) in that member states “respect[] . . . the interests of other Member Countries.”³⁴² If a court finds that a country has a comprehensive regulatory scheme in place for a certain industry, the court must decline to apply the Sherman Act extraterritorially to that conduct. This approach is grounded in prescriptive comity because the United States would be limiting the reach of its laws so as to respect the sovereignty of another nation.³⁴³ That respect comes from acknowledging that the United States cannot regulate the economic activity in every country solely based on effects felt within the United States.³⁴⁴

The analysis into a country’s regulation of an industry would be objective because it would be “based on externally verifiable phenomena, as opposed to individual’s perceptions.”³⁴⁵ History of regulation and a country’s market share in an industry are objective factors.³⁴⁶ Market share is data-based, which is clearly an objective factor.³⁴⁷ A history of regulation is also an objective factor because it is based on fact, instead of a judge’s opinion about national interests.³⁴⁸

U.S. courts can make active inquiries into foreign law.³⁴⁹ Federal Rule of Civil Procedure 44.1 grants courts broad authority to decide issues of foreign law.³⁵⁰ Once a party has raised an issue about foreign law, “the court may consider any relevant material or source, including

341. *See id.*

342. *Id.* at 15 (internal quotation marks omitted). The list of OECD member nations includes Australia, Belgium, France, Germany, Israel, Japan, Korea, Netherlands, Switzerland, the United Kingdom, and the United States. *List of OECD Member Countries—Ratification of the Convention on the OECD*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/general/listofoecdmembercountries-ratificationoftheconventionontheoecd.htm> (last visited Nov. 5, 2012). All of these states have had one or more of their domestic corporations face fines under the Sherman Act of over \$10,000,000. *Id.*; *see* SHERMAN ACT VIOLATIONS, *supra* note 2, at 102.

343. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

344. *See* KY P. EWING, JR., *COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA’S EXPERIENCE* 238 (2d ed. 2006).

345. *See* BLACK’S LAW DICTIONARY 1178 (9th ed. 2009) (defining “objective”).

346. *See id.*

347. *See id.*

348. *See id.*

349. *See* FED. R. CIV. P. 44.1; *see also* FED. R. CRIM. P. 26.1.

350. *See* FED. R. CIV. P. 44.1.

testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”³⁵¹ The court’s decision on foreign law is treated as a matter of law, instead of as a matter of fact.³⁵² The Federal Rules of Criminal Procedure provides a nearly identical rule for using foreign law in criminal proceedings.³⁵³

An objective analysis avoids the problems inherent in balancing tests.³⁵⁴ Balancing tests are ill-suited to determine the extraterritorial application of the Sherman Act.³⁵⁵ These types of tests do not operate well in practice and become problematic for judges.³⁵⁶ Courts cannot properly judge and balance the political factors inherent in balancing tests.³⁵⁷ Further, these balancing tests—which do not represent rules of international law—have not adequately addressed the comity concerns raised by foreign nations.³⁵⁸ Given the open-ended nature of balancing tests, there can either be multiple answers or no answer.³⁵⁹ Judges who cannot properly balance national interests will inevitably assert jurisdiction, which does nothing to further international relations.³⁶⁰ However, an objective analysis grounded in prescriptive comity would solve many of the international relations issues because a nation’s sovereignty is adequately protected.

One proposed solution to the extraterritorial application of the Sherman Act is modifying the *Restatement (Third) of Foreign Relations Law*.³⁶¹ In its current form, the *Restatement* provides a list of factors for courts to balance when deciding if they ought to apply laws

351. *Id.*

352. *Id.*

353. *See* FED. R. CRIM. P. 26.1.

354. *See* *Laker Airways Ltd. v. Sabena, Belgian World Airways*, 731 F.2d 909, 948 (D.C. Cir. 1984).

355. *Id.* (describing the impracticality of a balancing test when deciding prescriptive jurisdiction).

356. *See* WALLER, *supra* note 119, at § 6.13.

357. *Laker Airways*, 731 F.2d at 949-50.

358. *See id.* at 950.

359. *Cf.* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 158-59 (2010) (describing how the *Restatement (Third) of Foreign Relations*’ balancing test is problematic because there is no guidance about how to weigh the factors).

360. *See* Eleanor M. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is “Reasonableness” the Answer?*, 19 N.Y.U. J. INT’L L. & POL. 565, 577 (1987).

361. *See* Eleanor M. Fox, *Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked*, 42 N.Y.U. J. INT’L L. & POL. 159, 168 (2009) [hereinafter Fox, *Modernization*].

extraterritorially.³⁶² This new *Restatement* would use the locus of principle effects and principle contacts as an important factor.³⁶³ Courts would also look at the “combined overall welfare of the communities affected.”³⁶⁴ Instead of including the list of factors to be weighed from the current form in the new *Restatement*, the revised *Restatement* would include factors in a comment that could possibly be used when deciding whether to apply a law extraterritorially.³⁶⁵ This approach recognizes that the current *Restatement* factors are not applicable in all circumstances and are outdated.³⁶⁶ Even though this new approach would include a comity-type analysis by acknowledging the effects of enforcement in a foreign country, it still leads to a balancing test of interests.³⁶⁷ Further, this new approach continues to reinforce the effects as the most important factor for application of a law extraterritorially and not the place of the conduct.³⁶⁸ This would not be consistent with prescriptive comity because it ignores the sovereignty of the nation where the conduct occurred.

Foreign nations who sharply oppose the extraterritorial application of the Sherman Act should continue to submit amicus briefs explaining their industries to U.S. courts. Amicus briefs can give the court valuable insight into an industry.³⁶⁹ The use of amicus briefs in appellate litigation is well-established under the Federal Rules of Appellate Procedure.³⁷⁰ The Supreme Court also has established rules for amicus briefs.³⁷¹ At the trial level, the foreign governments would be litigating amici.³⁷² Even though these amici are not common in typical litigation, foreign

362. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

363. See Fox, *Modernization*, *supra* note 361, at 168.

364. *Id.* at 169.

365. *Id.* at 170.

366. See *id.* (noting that certain factors have less weight depending on the circumstances).

367. See *id.* at 168-70.

368. *Id.* at 168.

369. See Daniel Schimmel, *The Influence of Amicus Briefs and Morrison*, CONFLICTOFLAWS.NET (July 5, 2010), <http://www.conflictflaws.net/2010/the-influence-of-amicus-briefs-and-morrison/>.

370. See FED. R. APP. P. 29. Parties that are not the United States, its officer, its agency, or a state, do need leave of court to file an amicus brief. *Id.* However, a party with a strong interest, such as a foreign country whose citizen or domestic corporation is a party, will be able to show a strong interest and reasons why their brief will help the determination of the case. *Id.*

371. SUP. CT. R. 37.

372. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 679-80 & n.51 (2008).

governments participating as litigating amici can help guide courts about the regulatory structure of a particular industry.³⁷³

2. *Nippon Paper*-Type Situations

A prescriptive comity analysis when conduct is illegal in the both the United States and the foreign nation where it occurred requires courts to look for consent on the part of the foreign nation.³⁷⁴ When the DOJ is bringing a claim, whether civilly or criminally, a court would look to see if there was foreign cooperation and assistance.³⁷⁵ The cooperation would be evidence that the nation consented to the United States adjudicating the matter, and, therefore, comity is satisfied because it preserves mutual respect among nations. Absent that consent or implied consent, however, a court would not apply the Sherman Act extraterritorially.

Plaintiffs in civil matter—other than the DOJ—would have an affirmative duty at the pleading stage to show that the principles of comity are not offended by applying the Sherman Act extraterritorially.³⁷⁶ They can do this through evidence of prior cooperation or consent of a foreign nation for antitrust enforcement. However, that foreign nation's cooperation must be in the same or relatively similar industry.³⁷⁷ If plaintiffs cannot overcome this pleading standard, the action would be dismissed for failure to state a claim.³⁷⁸

373. See *id.*; Schimmel, *supra* note 369.

374. Cf. Charles A. James, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the OECD Global Forum on Competition 8 (Oct. 17, 2001) (transcript available at <http://www.justice.gov/atr/public/speeches/9330.pdf>) (discussing the importance of cooperative relationships). Assistant Attorney General James, though, recognizes that this is "not a panacea for every issue that arises out of the globalization of antitrust." *Id.*

375. For a discussion of how the DOJ coordinates international cooperation, see generally ANTITRUST DIV., U.S. DEP'T OF JUSTICE, THE ANTITRUST DIVISION'S INTERNATIONAL PROGRAM (2011), available at <http://www.justice.gov/atr/public/international/program.pdf>.

376. For an example of a pleading standard that requires more than bare assertions, see generally *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* involved the pleading requirements for stating a cognizable claim for a Sherman Act violation. *Id.* at 548-49. The Court found that a plaintiff needed enough specifics in its complaint to make the cause of action "plausible." *Id.* at 570. Like in *Twombly*, this standard would not require copious detail but enough fact to support the proposition that this action does not offend comity.

377. Cf. Brief for the Gov't of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioners at 5, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1128) (describing that while the United Kingdom has cooperated with the United States in the past, there have also been significant conflicts between the two nations).

378. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 822 (1993) (Scalia, J., dissenting).

3. The Importance of a New Standard

A new standard for the extraterritorial application of the Sherman Act rooted in prescriptive comity avoids the complications of balancing tests.³⁷⁹ It also can best placate the concerns of foreign nations.³⁸⁰ Their biggest concern is that U.S. antitrust laws unduly interfere with their own ability to regulate their own markets.³⁸¹ The United States, though, cannot simply bow to foreign concerns as the sole motivating factor for action.³⁸² Instead, the United States, by using prescriptive comity, is following established American jurisprudence and operating under traditional canons of construction.³⁸³

C. *An International Antitrust Regime Is Impractical*

An international antitrust regime is, in theory, a noble goal.³⁸⁴ However, as a practical matter, it is unrealistic given the different antitrust goals nations have.³⁸⁵ Those differences cannot be solved through good-faith cooperation among nations.³⁸⁶ For example, the United States and European Union strongly differ not only on substantive antitrust law, but also on procedural antitrust law.³⁸⁷ Nations also have different judicial processes and different views on fundamental rights, such as due process.³⁸⁸ If nations individually enforce

379. See *supra* text accompanying notes 354-60.

380. See *supra* Part III.D.

381. See, e.g., Brief for the Gov't of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioners at 13-14, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (No. 91-1128) (expressing concern that applying the Sherman Act extraterritorially would impede the United Kingdom's ability to regulate its own industries).

382. See *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (disagreeing with the contention that foreign laws should shape U.S. law).

383. See *supra* text accompanying notes 141-44.

384. See James, *supra* note 374, at 9 (supporting the Global Competition Network as a model for global antitrust cooperation).

385. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1539 (1998). Canada, for example, does not just use antitrust laws to foster competition but also to protect small business. *Id.*

386. See James, *supra* note 374, at 5-6. The United States and European Union reached opposite decisions on the approval of the General Electric-Honeywell merger, despite cooperating with each other. *Id.* at 5.

387. Waller, *Internationalization*, *supra* note 221, at 392. The U.S. approach is litigation-based, whereas the European Union's is administrative. *Id.* Most nations follow an administrative antitrust regime and not a litigation-based regime. *Id.*

388. See SECTION OF ANTITRUST LAW, AM. BAR ASS'N, INTERNATIONAL ANTITRUST COOPERATION HANDBOOK 2 (2004).

international standards, there can be vastly different interpretations, and that would defeat the purpose of an international antitrust regime.³⁸⁹ This is likely, given how domestic courts can sharply differ on the same antitrust laws.³⁹⁰

D. From Uncertainty to (More) Certainty

The new standard for the extraterritorial application of the Sherman Act that operates through prescriptive comity can help to give foreign corporations more certainty because it eliminates complicated and imprecise balancing tests.³⁹¹ When corporations are deciding whether to pursue a transaction, they can be guided by objective factors to make a well-informed decision to avoid their conduct giving rise to a cognizable Sherman Act violation. Entering into foreign agreements and changing the *Restatement* do not help to provide this certainty. Of course, no standard can provide defendants with perfect certainty—short of exactly complying with the Sherman Act for all foreign transactions.

V. CONCLUSION

It is unimaginable that the *American Banana* Court could have foreseen the dramatic expansion of the Sherman Act.³⁹² Through the effects test and the majority opinion in *Hartford Fire*, more and more international conduct comes under the ambit of the Sherman Act.³⁹³ While the Supreme Court did recognize the importance of prescriptive comity in *Emagran*, it failed to extend its usefulness to a common area of antitrust enforcement: foreign conduct causing effects in the United States.³⁹⁴ A once strictly territorial statute has, through the years, led to international tensions, even between the United States and its closest allies and trading partners.³⁹⁵ The current state of the extraterritorial application of the Sherman Act, if not changed through a new judicial standard, will only cause further international tensions.³⁹⁶ Requiring courts to always recognize prescriptive comity is a practical solution that can help to relieve some international tensions.³⁹⁷ It will not dilute

389. John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 562 (2003).

390. *Id.* at 562.

391. See *supra* text accompanying notes 354-60.

392. See *supra* text accompanying notes 38-39.

393. See *supra* Part II.B.

394. See *supra* Part III.C.

395. See *supra* Part III.D.

396. See *supra* text accompanying notes 302-10.

397. See *supra* Part IV.B.

antitrust enforcement, but will instead ensure that it is done in a manner consistent with accepted international principles.³⁹⁸ As seen in Justice Scalia's dissenting opinion in *Hartford Fire*, a comity-based antitrust system is consistent with accepted norms of international law that date back to Justice Story.³⁹⁹ This system would appropriately recognize the limits of U.S. laws.⁴⁰⁰

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398. See *supra* Part IV.D.

399. See *supra* note 316 and accompanying text.

400. See *supra* text accompanying notes 147-49.

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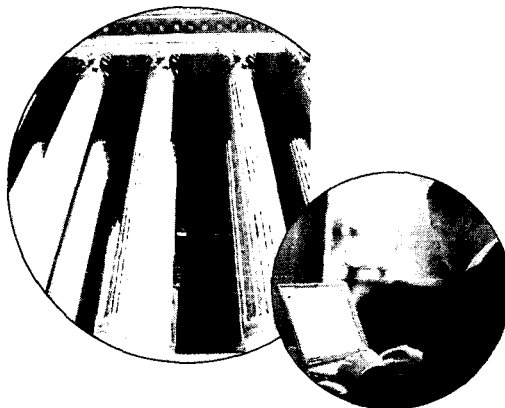
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