

# DIAMONDS ARE A CARTEL'S BEST FRIEND: THE RISE AND FALL OF ANTICOMPETITIVE BUSINESS PRACTICES WITHIN DE BEERS'S INTERNATIONAL DIAMOND CARTEL

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## I. INTRODUCTION

Antitrust law exists to protect consumers from unfair business practices,<sup>1</sup> such as price-fixing and the elimination of competition.<sup>2</sup> It exists to preclude businesses from exercising excessive control over the markets in which they operate and traditionally targets such anticompetitive behavior as collusion, excessive market concentration, and predatory pricing.<sup>3</sup> The United States has traditionally maintained exceedingly stringent standards in the area of antitrust activity when compared with those of other nations around the world.<sup>4</sup>

In the 1958 landmark antitrust case *Northern Pacific Railway Company v. United States*, the U.S. Supreme Court found that the objective of antitrust laws “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress. . . .”<sup>5</sup> Antitrust law in the United States exists to provide a healthy balance between the interests of American industry, competing in both domestic and foreign markets, and that of consumers, seeking protection of their economic welfare.<sup>6</sup>

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1. See 1-1 Antitrust L. and Trade Reg., 2d ed. § 1.02 (noting that U.S. antitrust law was passed by Congress as a response to the growing power and economic control of corporate giants like the Standard Oil Trust).

2. See 1-1 Antitrust L. and Trade Reg., 2d ed. § 1.04 [hereinafter Antitrust L. and Trade Reg. § 1.04] (emphasizing the U.S. Justice Department’s continued devotion to criminal prosecution under antitrust policies against price fixing and market allocation).

3. See DEBORA L. SPAR, THE OXFORD HANDBOOK OF INTERNATIONAL BUSINESS: ANTITRUST AND COMPETITION POLICY 219 (Alan M. Rugman & Thomas L. Brewer eds., 2001) [hereinafter ANTITRUST AND COMPETITION POLICY].

4. *Id.*

5. *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, 4 (1958).

6. John L. Cooper, *Programs from the 1992 Annual Meeting: The Boundaries of Horizontal Restraints: Communication and Cooperation Among Competitors: Balancing Competitor Cooperation and Competition Against Consumer Welfare and Viable International Competition*, 61 ANTITRUST L.J. 621 (1993).

While businesses in the United States are subject to high standards, enforcement of laws restricting unfair business practices against international businesses is an obstacle not yet completely overcome.<sup>7</sup> International cartels, such as the Organization of the Petroleum Exporting Countries ("OPEC"), which have enjoyed decades of control over the worldwide oil market, continue to circumvent U.S. antitrust law.<sup>8</sup> Several factors contribute to this problem, including the inability of the U.S. Department of Justice to exercise personal jurisdiction over, and effect service of process on, international businesses.<sup>9</sup> Few international cartels, however, have managed to maintain the continued success, both within the United States and on the international scene, found in the international diamond cartel.<sup>10</sup> The continued success of the diamond cartel, though, is in jeopardy since its mastermind and longtime puppeteer, De Beers Consolidated Mines ("De Beers"), recently pled guilty to a ten-year-old antitrust indictment in the United States.<sup>11</sup>

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7. See ANTITRUST AND COMPETITION POLICY, *supra* note 3, at 220 (noting that the U.S. Justice Department's failure to prosecute De Beers, the South African company that directs the highly successful international diamond cartel, is a result of the company's continued devotion to educating itself as to U.S. antitrust policies in order to outwit the Justice Department and circumvent U.S. antitrust laws). See also Damjan Kukovec, *International Antitrust – What Law in Action?*, IND. INT'L & COMP. L. REV., vol. 15.1 (2004); Symposium, *The Role of Foreign Competition in U.S. Merger Enforcement: Information from Abroad: Who Bears the Burden in an Antitrust Investigation?*, 65 ANTITRUST L.J. 227 (1996) [hereinafter *Role of Foreign Competition*] (noting that international antitrust enforcement and fact gathering poses significant jurisdictional and comity problems, thus restricting access even to information located abroad dealing with primarily domestic issues); 1-1 Antitrust L. and Trade Reg., 2d ed. § 1.03 (noting that there still exists today an uncertainty in antitrust enforcement policy among the courts).

8. See Appendix B: Jurisdictional Conflicts Arising from Antitrust Enforcement, *Jurisdictional Conflicts Arising from Extraterritorial Enforcement: Part I: Antitrust and Competition Laws: Jurisdictional Conflicts Arising from Antitrust Enforcement: Panel Discussion*, 54 ANTITRUST L.J. 729 (1985) (noting that the Act of State and sovereign immunity defenses still hinder successful enforcement of antitrust policies against such international cartels as OPEC). See also Margaret Levenstein and Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801 n.2 (2004). A "cartel" is generally defined as "[a] combination of producers and sellers that join together to control a product's production or price." BLACK'S LAW DICTIONARY 206 (7th ed. 1999).

9. Assistant U.S. Att'y Gen. Joel I. Klein, A Note of Caution with Respect to WTO Agenda on Competition Policy, Address Before The Royal Institute of International Affairs, <http://www.usdoj.gov/atr/public/speeches/0998.htm> (Nov. 18, 1996).

10. DEBORA L. SPAR, *THE COOPERATIVE EDGE: THE INTERNAL POLITICS OF INTERNATIONAL CARTELS* 73 (1994) [hereinafter *INTERNATIONAL CARTELS*]. "[T]he international diamond cartel is a rare, almost unique, phenomenon. It has maintained a level of cooperation that has not even been achieved in most commodity markets, and it has succeeded in keeping the supply of diamonds limited and their price high." *Id.*

11. On July 12, 2004, De Beers pled guilty to a 1994 indictment alleging price-fixing schemes between it and General Electric. Margaret Webb Pressler, *De Beers Pleads to Price-Fixing*, WASH. POST, July 14, 2004, at E1, <http://www.washingtonpost.com/wp-dyn/articles/A48041-2004Jul13.html>; Arik Johnson, *De Beers Diamond Monopoly Poised to Re-Enter U.S. Market, Faces New Scrutiny in Europe*, COMPETITIVE INTELLIGENCE, at <http://www.aurorawdc.com/ci/000133.html> (Mar. 2, 2004).

De Beers has effectively maintained a stranglehold on the international diamond market since the company's inception well over a century ago.<sup>12</sup> Since that time, De Beers has managed to control the supply of diamonds in the international market and keep diamond prices far above would-be market levels.<sup>13</sup> Unlike other industries, the international diamond cartel has effectively incorporated all major diamond producers into an efficient, cooperative unit, impressing upon producers the necessity of unified actions.<sup>14</sup> "It has enforced a complex system of stockpiles, production quotas, and standards that are designed to keep prices and demand high even while overall diamond supplies are growing."<sup>15</sup>

Headquartered in South Africa since its inception, De Beers has achieved staggering worldwide success in avoiding prosecution under antitrust laws.<sup>16</sup> While prosecution in the United States is not surprising given the stringent U.S. antitrust standards, its home jurisdiction, South Africa, also maintains laws against antitrust activity.<sup>17</sup> Ironically, De Beers has managed to escape prosecution in South Africa due to its strong influence on the South African economy, in particular, its dominant presence in the country's stock market.<sup>18</sup> Given the diverse economic market in the United States, U.S. officials have aggressively pursued prosecution against De Beers and others in the international diamond cartel under federal antitrust laws.<sup>19</sup> However, due to the

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12. De Beers Mining Company was formed in 1880 in response to the booming diamond mining business in South Africa. INTERNATIONAL CARTELS, *supra* note 10, at 47.

13. *Are Diamonds Really Forever?*, LUDWIG VON MISES INST. 320, at <http://www.mises.org/econsense/ch91.asp> (Sept. 8, 2004) [hereinafter *Are Diamonds Really Forever?*].

14. See INTERNATIONAL CARTELS, *supra* note 10, at 41.

15. *Id.*

16. See *id.* at 41-42, 47, 73-74.

17. Center to Bridge the Digital Divide, NetTel@Africa Off-Line Content, *The Basic Principle of Competition Policy*, at <http://cbdd.wsu.edu/kewlcontent/cdoutput/TR501/page32.htm> (n.d.) (last visited Nov. 6, 2005) [hereinafter *The Basic Principle of Competition Policy*].

18. *Id.* at 77.

19. Where De Beers enjoys a dominant presence in the South African economy, the company has had minimal impact on the broadly diverse United States economy. See Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 637 (2004) (noting that De Beers constitutes over one-half of the South African stock market); see also Alan Cowell, *De Beers, With Net Off 15%, Will Curb Its Diamond Buying*, N.Y. TIMES, August 24, 2001, at W1 (noting that although the United States constitutes one-half of the annual \$60 billion diamond gem market, De Beers's annual diamond gem profits in 2001 were only \$744 million). As a result, pursuing prosecution of De Beers in the United States would likely not have nearly the detrimental effect on consumers and investors that it would in South Africa, which is likely why the U.S. Justice Department has been so eager to pursue De Beers under the law. See Anne K. Bingaman, *Report from Officialdom: 60 Minutes With Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, 63 ANTITRUST L.J. 323 (1994) (noting that the U.S. Justice Department considered its 1994 indictment against De Beers for antitrust violations relating to price-fixing its most notable indictment of the current Attorney General's term in office).

inability to reach international businesses and obtain evidence located outside U.S. borders, the government's success to date has been only minimal.<sup>20</sup>

The changing diamond market has brought with it a change in the operating philosophy within the international diamond cartel. Where diamond producers, led by De Beers, have traditionally focused on elimination of competition and setting uniform market standards, the insurgence of antitrust regulation worldwide has brought much scrutiny upon what were once overlooked, or, more commonly, ignored business practices within the diamond industry.<sup>21</sup> Public discovery of the presence of conflict diamonds<sup>22</sup> in the market,<sup>23</sup> coupled with reports of money laundering, damaged the diamond industry's reputation in the late 1990s.<sup>24</sup> The growing number of diamond producers around the world also left De Beers with an increasingly looser grip on the market.<sup>25</sup> The recent development of the synthetic gem diamond,<sup>26</sup> a stone which can be naturally cultured and grown in a laboratory to exactly replicate those traditionally mined by companies like De Beers, further cracked the cartel's foundation, the traditional image of scarcity and distinctiveness, which De Beers's has struggled for so long to maintain.<sup>27</sup>

20. Klein, *supra* note 9.

21. *See id.* *See also* *Role of Foreign Competition*, *supra* note 7. "[A]ntitrust enforcement cooperation agreements are becoming both more common and more substantively meaningful." *Id.*

22. "Conflict diamonds are diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in contravention of the decisions of the Security Council." United Nations Department of Public Information, *Conflict Diamonds: Sanctions and War*, at <http://www.un.org/peace/africa/Diamond.html> (last updated Mar. 21, 2001). *See also* *De Beers reshapes to market*, MINING J., June 2, 2000, at 437 [hereinafter *De Beers reshapes to market*].

23. De Beers's introduction of the "Kimberley Certificate," a document providing consumers with the history of each diamond, has helped to alleviate much consumer distrust. TurkishPress.com, *Diamond Industry Battles to Regain Sparkle*, at <http://www.turkishpress.com/news.asp?ID=33704> (Nov. 14, 2004) [hereinafter *Diamond Industry Battles*].

24. *Id.*

25. As late as the mid-1950s, De Beers retained a dominant control over the production of diamonds worldwide. However, "[b]y 1960, South African diamonds accounted for only 19 percent of total world gemstone production and by 1990, 9 percent." INTERNATIONAL CARTELS, *supra* note 10, at 52-53.

26. Synthetic industrial diamonds, used mainly for industrial cutting, have been on the market for nearly half a century. American Museum of Natural History, *The Nature of Diamonds: Growing Diamonds*, <http://www.amnh.org/exhibitions/diamonds/growing.html> (n.d.) (last visited Nov. 6, 2005). De Beers is a major producer of synthetic industrial diamonds. *Id.*

27. Only recently has the technology for growing synthetic gem diamonds, those commonly found in jewelry, been developed. *See* *Diamond Industry Battles*, *supra* note 23. The synthetic diamond market has taken the international diamond cartel off-guard within the last decade. *Id.* High-ranking officials continue to discuss ways to eradicate the potential harm of synthetic diamonds, which are virtually indistinguishable from mined diamonds. *Id.* Maintaining the image that diamonds are rare and unique is essential to the continued success of

With legitimate concerns looming over De Beers and the international diamond cartel, the future of the diamond industry is uncertain. Restraints on competition in the mining industry and the diamond market, both of which De Beers once enjoyed near-exclusive control over,<sup>28</sup> are generally discouraged and becoming more obsolete in today's world.<sup>29</sup> Further, where De Beers dominated the pre-twentieth century diamond market, producing over ninety percent of the world's diamonds, its power since 1900 has continually diminished due to the increasing number of competitors.<sup>30</sup> The future of a company that has operated essentially free from antitrust restraints for over a century is today facing serious threats from both competitors and governments worldwide.<sup>31</sup> Now resuming a direct presence in the United States after settling a ten-year-old antitrust indictment,<sup>32</sup> De Beers will likely be under close watch for some time as its actions will certainly have direct consequences on both the U.S. diamond market and, more importantly, on U.S. consumers.<sup>33</sup> Similarly, a tightening grip on antitrust activity throughout the world,<sup>34</sup> including South Africa,<sup>35</sup> and a push for increased cooperation between governments in the area of antitrust enforcement against international cartels,<sup>36</sup> will inevitably force De Beers to, at the very least, modify its traditional business practices.<sup>37</sup>

This Note examines the history of De Beers and the international diamond cartel, its unsurpassed success despite legitimate antitrust regulation in both the United States and South Africa, and the potential consequences of a continued diamond cartel, especially in the U.S. market. Part II of this inquiry focuses on the history and tradition of anticompetitive practices within the international diamond cartel. It also looks at the inner workings of De Beers and how its actions and policies have affected the diamond industry. Part III examines the efforts made to combat antitrust activity, focusing on antitrust legislation in both South Africa and the United States, as well as attempts to prosecute De Beers and others. While South Africa has yet to pursue

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the diamond industry. *Id.* The emergence of synthetic diamond technology threatened to damage the image that De Beers and others have sought to maintain for over a century. *Id.* In an effort to battle the emerging synthetic diamond industry and as part of its Gem Defensive Program, the international diamond cartel, led by De Beers, has recently developed and distributed testing machines to distinguish between natural and synthetic diamonds, as well as implementation of negative propaganda and clever marketing schemes to discount the validity and legitimacy of synthetic diamonds. See Joshua Davis, *The New Diamond Age*, WIRED NEWS, at [http://www.wired.com/wired/archive/11.09/diamond\\_pr.html](http://www.wired.com/wired/archive/11.09/diamond_pr.html) (Sept. 2003).

28. See INTERNATIONAL CARTELS, *supra* note 10, at 53.

29. See Klein, *supra* note 9. See also *Role of Foreign Competition*, *supra* note 7.

30. De Beers: A Diamond is Forever, *De Beers History*, at <http://www.debeersgroup.com/debeersweb/About+De+Beers/De+Beers+History/> (n.d.) (last visited Nov. 6, 2005) [hereinafter *De Beers History*].

31. See *Role of Foreign Competition*, *supra* note 7. See generally Klein, *supra* note 9.

32. See Pressler, *supra* note 11, at E1.

33. See *id.*

34. See *Role of Foreign Competition*, *supra* note 7.

35. *The Basic Principle of Competition Policy*, *supra* note 17.

36. Klein, *supra* note 9.

37. See *id.*

prosecution of its largest economic superpower, despite applicable antitrust legislation that would make that possible, the United States has made attempts to curtail De Beers's antitrust activity and has, in fact, recently achieved arguable success.<sup>38</sup> Part IV will examine the efforts toward international cooperation and enforcement in the area of antitrust law, and Part V will conclude by addressing the consequences of recent obstacles for the international diamond cartel and the future of the cartel both in the United States and on the international scene.

## II. HISTORY OF DE BEERS AND THE INTERNATIONAL DIAMOND CARTEL

In order to understand how a company like De Beers is able to control an international market, coordinate major players in its industry, and maintain a public illusion that its product is scarce and valuable,<sup>39</sup> it is necessary to examine its history. For De Beers, this includes an examination of how it formed, grew, and rose to control perhaps the most successful cartel in history. From humble beginnings, De Beers has evolved into the largest diamond producer in the world and the largest company in the South African economy.<sup>40</sup>

There is little doubt that this growth and power have played a significant role in De Beers's business practices and continuing efforts to maintain its control over the diamond industry.<sup>41</sup>

Cooperation in the diamond industry began when diamonds were discovered in the late 1860s in South Africa.<sup>42</sup> While diggers were limited to holding only single plots of land at one time, they quickly realized the financial benefit of plot conglomeration<sup>43</sup> because they were unable to predict which

38. See *infra* Part III(b); Pressler, *supra* note 11, at E1.

39. INTERNATIONAL CARTELS, *supra* note 10, at 43 (footnote omitted).

To be considered valuable, diamonds must be perceived as rare; and if this scarcity is to be credible, all excess diamonds must be kept off the market. Understandably, then, a common interest in restricting the entry of diamonds onto the market has persistently forced the members of the diamond trade to bind together to prevent diamonds from becoming as common as flint. The advantages of restricting supply, of course, are not unique to diamonds. Where diamonds are concerned, however, they appear to have been particularly irresistible, powerful enough to have compelled a history of cooperative behavior that culminated in the creation of the present-day diamond cartel.

*Id.*

40. See *id.* at 77. See also Leslie, *supra* note 19, at 637.

41. See INTERNATIONAL CARTELS, *supra* note 10, at 53. In order to maintain control of the industry as new diamond producers continue to enter the market, De Beers has been forced to incorporate others into the cartel. *Id.* "Most diamond-producing states have signed long-term contracts with De Beers, agreeing to sell a fixed proportion of their rough stones solely to De Beers and its agents." *Id.* As a result, the modern-day diamond cartel is largely a cooperative effort between De Beers and other leading diamond producers worldwide. *Id.* "Together, these ventures form a seamless web of collaboration, each strand linked to De Beers at the center and then turning outward to form the larger network." *Id.*

42. *Id.* at 43.

43. See generally *id.* at 45. Diggers began to combine their ownership in mine plots to

plots would be fruitful.<sup>44</sup> The restrictions on property holdings were quickly abolished and the cooperative efforts between diggers continued to grow, especially as the diamond mines grew in size and greater effort was required to extract the diamonds.<sup>45</sup> After the discovery of diamond mines on their property in 1871, "brothers Johannes Nicholas and Diederick Arnoldus de Beer<sup>46</sup> sold their farm 'Vooruitzigt,' which they had bought in 1860 for £50, to Dunell Ebdon & Co for £6,300."<sup>47</sup> This farm would be the eventual site of the extremely prosperous De Beers and Kimberley Mines.<sup>48</sup>

Cecil Rhodes, an entrepreneur, began renting steam-powered pumps to diggers at the Kimberley Mine in 1874 in order to help alleviate the water seepage problems in the mine.<sup>49</sup> Rhodes's business continued to grow with the booming diamond mining industry in the area.<sup>50</sup> As his business grew, he began to amass ownership in plots at the De Beers Mine.<sup>51</sup> He formed the De Beers Mining Company in 1880 to control his stake in the De Beers Mine, and by 1887, Rhodes had purchased all remaining plots in the mine.<sup>52</sup> While Rhodes controlled the diamond mining industry at the De Beers Mine, he set his sights even higher.<sup>53</sup>

Rhodes recognized that the value of diamonds rested in maintaining a perception of their scarcity.<sup>54</sup> In the late 1870s, Rhodes convinced the other South African diamond producers to sell him their mines in exchange for exclusive purchasing rights from him so that they could, in turn, resell the diamonds at set prices and in specific quantities.<sup>55</sup> At this point, the business practices within the South African diamond industry began to resemble those of

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promote efficiency and productiveness in the mining process. *Id.* By owning smaller shares in several plots rather than a full share in a single plot, diggers increased their chances of having ownership in a diamond-producing plot. *Id.*

44. *Id.*

45. *Id.*

46. Despite the common belief that the De Beers entity is controlled by the "De Beers family," the company, as was the famous De Beers Mine, is actually named after the original owners of the property upon which the De Beers enterprise was founded. De Beers History, *supra* note 30. Had Johannes Nicholas and Diederick Arnoldus de Beer known the financial potential their farm held when they sold it to Dunell Ebdon & Co in 1871, the sale likely would not have taken place and, as a result, De Beers as it is known today would not exist. *See generally id.*

47. *Id.*

48. *Id.*

49. INTERNATIONAL CARTELS, *supra* note 10, at 47.

50. *See id.*

51. *Id.*

52. *Id.*

53. *See id.* at 48-49.

54. *Id.* "Gem diamonds, after all, serve no real purpose. . . . Realizing the extent to which prosperity in the diamond market thus rested with the dual ability to manipulate demand and coordinate it with supply, Rhodes was determined to wrest control of both sides of the equation, regulating the entire industry so that the quantity of diamonds sold on the European market followed precisely the number of wedding engagements in any given year." *Id.*

55. *Id.* at 49.

the modern international diamond cartel.<sup>56</sup> By 1880, Rhodes owned all major diamond mines in South Africa and had, thus, successfully consolidated all of the region's diamond industry.<sup>57</sup> Rhodes had given birth to the international diamond cartel, which would continue its reign over the diamond industry into the twenty-first century.<sup>58</sup>

At the turn of the century, after Rhodes's death, De Beers began to change in an effort to preserve the company's control over the industry.<sup>59</sup> Ernest Oppenheimer took control of De Beers as Chairman in 1929.<sup>60</sup> Oppenheimer continued to adhere to the anticompetitive principles upon which Rhodes had built his empire.<sup>61</sup> Because only a small percentage of diamonds are suitable as gems due to their varying quality, Oppenheimer recognized that the remaining diamond supply would have to be capitalized in order to keep the diamond industry afloat.<sup>62</sup> Oppenheimer understood that, in order to maintain a successful cartel, uniform prices must be set industry-wide since the cost of diamond production bears no relationship to the value of the diamond.<sup>63</sup> Thus, maintaining control of the system as a whole, from production to marketing to distribution, was necessary to preserve a perception of the scarcity and value of diamonds.<sup>64</sup>

After Oppenheimer seized the reins of De Beers, the company began to move beyond the borders of South Africa.<sup>65</sup> In building its monopolistic control over the diamond industry, De Beers took advantage of the 1930s depression era in the United States by buying surplus diamonds.<sup>66</sup> The Central Selling Organization (CSO)<sup>67</sup> was formed in 1930 by De Beers in response to the growing number of diamond producers in the industry.<sup>68</sup> De Beers, as the

56. *See id.*

57. *Id.*

58. *Id.* at 47, 51-52.

59. *Id.* at 50.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 51-52.

66. *De Beers to Boycott War Zone Diamonds*, UNITED PRESS INT'L, July 12, 2000 [hereinafter *War Zone Diamonds*].

67. Kevin Bonsor, *How Diamonds Work*, at <http://money.howstuffworks.com/diamond7.htm> (n.d.) (last visited Nov. 6, 2005).

There are fewer than 200 people or companies authorized to buy rough diamonds from De Beers. These people are called sightholders, and they purchase the diamonds through the Central Selling Organization (CSO), a subsidiary of De Beers that markets about 70 percent to 80 percent of the world's diamonds. De Beers sells a parcel of rough diamonds to a sightholder, who in turn sends the diamonds to cutting facilities and then to distributors." *Id.* In short, customers of the CSO are strategically selected and are called "sightholders" because they are expected to buy whatever is offered to them.

*Id.*

68. *De Beers History*, *supra* note 30.



world's largest diamond producer, recruited the other major diamond producers in the industry to join the CSO. This provided a central marketplace for their product and an opportunity for De Beers to control prices and competition within the industry.<sup>69</sup> Having the major diamond producers united with the major diamond distributors under one organization, which De Beers itself controlled, proved to be the crowning accomplishment to De Beers's ongoing effort to monopolize and govern the international diamond industry.<sup>70</sup> Formation of the CSO placed De Beers firmly in control of the international diamond cartel, a position that De Beers has yet to fully relinquish.<sup>71</sup>

The CSO, however, lost prominence in the international diamond market in recent years.<sup>72</sup> As the number of international diamond producers increases, the number of companies buying and selling diamonds through the CSO continues to decrease.<sup>73</sup> With more diamond producers available, the need to be part of an exclusive central organization has declined.<sup>74</sup> New diamond producers and purchasers recognize the power of an expanding market over the traditional monopolistic control exercised by De Beers.<sup>75</sup> To combat this decrease in utilization of the CSO, De Beers has continued to reshape its policies regarding how CSO customers qualify as "sightholders," thus allowing more market participants to qualify to buy and sell through the CSO.<sup>76</sup>

Tightening competition requirements by the European Union have further encouraged De Beers's efforts to modify CSO membership standards.<sup>77</sup> In an effort to alleviate negative publicity and a potential stigma associated with the CSO, De Beers recently changed the organization's name to the Diamond Trading Company.<sup>78</sup> Due to longstanding history and tradition in the industry,

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69. *Are Diamonds Really Forever?*, *supra* note 13, at 320. "It is not simply that De Beers mines much of the world's diamonds; De Beers has persuaded the world's diamond miners to market virtually all their diamonds through [the CSO], which then grades, distributes, and sells all the rough diamonds to cutters and dealers further down the road toward the consumer." *Id.*

70. *Id.*

71. INTERNATIONAL CARTELS, *supra* note 10, at 74. "Because all the other members are linked to the cartel via De Beers, there is little opportunity for them to break with De Beers or to form third-party arrangements. Only De Beers can guarantee the producers' cooperation to the distributors and the distributors' to the producers." *Id.*

72. *See generally De Beers reshapes to market*, *supra* note 22, at 437 (stating that a significant decline in the number of diamond producers participating in the CSO leads to the conclusion that the CSO consequently has suffered a loss of prominence in the industry).

73. *Id.*

74. *See generally id.*

75. *See generally id.*

76. *Id.*

77. *Id.*

78. In 2000, De Beers publicly changed the name of the Central Selling Organization (CSO) to the Diamond Trading Company (DTC). De Beers History, *supra* note 30.

this effort, however, has likely had very little impact on participation or reputation, as the organization is still commonly referred to as the CSO.<sup>79</sup>

Naturally, as De Beers loses prominence in the international diamond market, so does the cartel.<sup>80</sup> "Even an unchallenged cartel, of course, does not totally control its price or its market; even it is at the mercy of consumer demand."<sup>81</sup> The presence of growing competition in the international diamond market has complicated the cartel's efforts to retain control over diamond prices and industry competition.<sup>82</sup> Further, the current world recession has played a major role in the decline of diamond prices.<sup>83</sup> "World demand, and particularly consumer demand in the U.S. for diamonds, has fallen sharply, with consumers buying fewer diamonds and downgrading their purchases to cheaper gems . . ."<sup>84</sup> De Beers itself has suffered substantial decreases in total profits in recent years.<sup>85</sup>

Today, even though the Oppenheimer family retains control of De Beers, the focus has changed. Where business during Rhodes's and Oppenheimer's reigns primarily focused on monopolistic control of the South African mines, in the 1950s the company was forced to shift its concentration to cooperation with other new diamond producers that had begun to spring up in other parts of the world.<sup>86</sup> In order to maintain control of the industry, De Beers has been forced to incorporate others into the cartel as new diamond producers continue to enter the market.<sup>87</sup> "Most diamond-producing states have signed long-term contracts with De Beers, agreeing to sell a fixed proportion of their rough stones solely to De Beers and its agents."<sup>88</sup> As a result, the modern-day diamond cartel is largely a cooperative effort, more so than in the past, between De Beers and

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79. While the name on the letterhead may have changed in 2000, those within both the diamond industry and the news media alike continue to refer to the organization as the CSO. See *Are Diamonds Really Forever?*, *supra* note 13.

80. See generally INTERNATIONAL CARTELS, *supra* note 10. Given De Beers's dominant position as leader of the international diamond cartel and due to its continued influence on and control over the industry, it follows that a loss in market prominence by De Beers would have a detrimental effect on the cartel itself. *Id.*

81. *Are Diamonds Really Forever?*, *supra* note 13.

82. The 1990s brought a rush of diamonds into the market as a result of the economic crash in East Asia and the fall of the former Soviet Union. *War Zone Diamonds*, *supra* note 66. This flood seriously damaged De Beers's efforts to control the flow of diamonds within the industry. *Id.* "Some new gem producers refused to join the De Beers cartel." *Id.* Similarly, large diamond deposits continue to be discovered through the world, most recently in Canada. Anthony DePalma, *International Business: Diamonds in the Cold; New Canadian Mine Seeks Its Place in a De Beers World*, N.Y. TIMES, Apr. 13, 1999, at C1.

83. *Are Diamonds Really Forever?*, *supra* note 13.

84. *Id.*

85. See De Beers History, *supra* note 30. De Beers's profits dropped forty percent in the late 1990s after the economic crash in East Asia. DePalma, *supra* note 82, at C1. In August 2001, De Beers announced that its profits had fallen fifteen percent since the first of the year. Cowell, *supra* note 19, at W1.

86. INTERNATIONAL CARTELS, *supra* note 10, at 52-53.

87. *Id.* at 53.

88. *Id.*

other leading diamond producers worldwide.<sup>89</sup> “Together, these ventures form a seamless web of collaboration, each strand linked to De Beers at the center and then turning outward to form the larger network.”<sup>90</sup>

In the twentieth century, De Beers began amassing legal challenges against its business practices, especially in the United States. Shortly after World War II, the U.S. Department of Justice charged De Beers with alleged price-fixing schemes within the industrial diamond trade.<sup>91</sup> De Beers pulled all operations within the United States, thereafter operating primarily from its headquarters in South Africa.<sup>92</sup> The U.S. Department of Justice continued to pursue De Beers, winning an indictment in 1994.<sup>93</sup> The indictment stood for ten years as De Beers remained outside the jurisdictional reach of U.S. officials.<sup>94</sup> De Beers's legal battles have been highly publicized and have undoubtedly damaged the company's image and reputation in both the diamond industry and with consumers worldwide.<sup>95</sup>

In an effort to curb slumping consumer confidence, De Beers announced its “strategic review” in 1998, under which it vowed to cease anticompetitive practices and devote itself to resolving its legal problems.<sup>96</sup> This review, however, has proven to be nothing more than empty words, contributing to the long history of masquerades by the company.<sup>97</sup>

The review that was said to herald a true desire to change its image from that of the most successful cartel in history, in fact never did anything to stop the company from working behind a cloak of opaqueness that allowed it to sell more than 60% of the world's rough diamonds to only 120 clients . . . .<sup>98</sup>

The review included a proposed “supplier of choice” program, designed to promote its practice of selling a majority of the diamonds available through its CSO to only a small number of select buyers.<sup>99</sup> The “supplier of choice” program is, in fact, still under review by European Union competition authorities.<sup>100</sup> Despite its continuing anticompetitive practices, De Beers has nevertheless maintained its vow of “total legal compliance around the world”

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89. *Id.*

90. *Id.*

91. Johnson, *supra* note 11.

92. David Teather, *De Beers Hopes to End its 50-year US Absence*, GUARDIAN, Feb. 25, 2004, at 19.

93. Johnson, *supra* note 11.

94. See Pressler, *supra* note 11, at E1.

95. See Teather, *supra* note 92, at 19.

96. Emma Muller, *De Beers to Open New York Retail Store*, BUS. DAY, Sept. 27, 2002, at 20.

97. *Id.*

98. *Id.*

99. *Id.*

100. Johnson, *supra* note 11.

and its "drive to create a new, modern De Beers," as a spokeswoman for the company stated after De Beers pled guilty to the antitrust indictment in the United States in July 2004.<sup>101</sup>

While maneuvering room on the legal front appears to be dwindling, De Beers's control within the international diamond cartel remains steadfast. Although De Beers now actually controls only around eight percent of the world's diamond supply, it is able to impose cooperation among the other members of the diamond cartel through its use of coercive tactics.<sup>102</sup> "In the end, all benefit: because the cartel can enforce compliance, it can stem excess supplies and maintain the critical perception of scarcity. And as long as this perception is maintained, diamonds will remain valuable."<sup>103</sup> While the cartel has suffered serious hits in recent years as a result of increasing competition and growing governmental opposition to its anticompetitive practices, especially in the United States, the practices traditionally employed by the international diamond cartel remain an effective means of achieving Rhodes's and Oppenheimer's foremost goal of cooperation, or anticompetitive practices, as it would more properly be termed today, within the industry.<sup>104</sup>

### III. COMBATING ANTITRUST ACTIVITY WITHIN THE DIAMOND INDUSTRY

#### A. *Legislation and the Lack of Prosecution Efforts in South Africa*

National policies against anticompetitive practices in South Africa date back nearly half a century.<sup>105</sup> De Beers's history of antitrust activity in South Africa spans over twice that of South African antitrust laws.<sup>106</sup> Since South Africa passed legislation against anticompetitive business practices, however, De Beers has yet to fall subject to such regulation.<sup>107</sup> In 1955, South Africa passed its first anticompetition regulation, the Monopolistic Conditions Act.<sup>108</sup> After this Act proved inadequate and unenforceable, it was reevaluated in the 1970s, and the Maintenance and Promotion of Competition Act was passed in

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101. Pressler, *supra* note 11, at E1.

102. INTERNATIONAL CARTELS, *supra* note 10, at 41.

103. *Id.* at 42.

104. *Id.* at 52. "Today, the cartel is much more than a geographical monopoly. It is an intricate network of production quotas, quality controls, and stockpiles. It is a formidable system of fixed prices and controlled distribution. *Id.* at 51-52. "[The diamond cartel's] tactics are varied and complex. Its strategy, though, is as simple now as it was in Rhodes's time: to restrict the number of diamonds released into the market in any given year and thus to perpetuate the illusion of diamonds as a scarce and valuable commodity." *Id.* at 41.

105. *The Basic Principle of Competition Policy*, *supra* note 17.

106. INTERNATIONAL CARTELS, *supra* note 10, at 48-50.

107. *See id.* at 77.

108. *The Basic Principle of Competition Policy*, *supra* note 17. This Act was superseded in 1979 by the Maintenance and Promotion of Competition Act. *See infra* notes 109-10.

1979.<sup>109</sup> This new Act provided for the formation of a Competition Board, an unprecedented step against antitrust activity in South Africa, to oversee and investigate anticompetitive activity.<sup>110</sup> "The 1979 Act was amended in 1986 to give the Competition Board further powers, including the ability to act not only against new concentrations of economic power but also existing monopolies and oligopolies."<sup>111</sup> Barely more than a decade later, South Africa's efforts to combat antitrust practices culminated with the passage of the new Competition Act in 1998.<sup>112</sup> While this 1998 Act could be seen to represent South Africa's

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109. *The Basic Principle of Competition Policy*, *supra* note 17; Maintenance and Promotion of Competition Act, No. 96 (1979) (BSRSA).

110. *Id.*

111. *Id.*

112. *Id.* The 1998 South African Competition Act provides in pertinent part as follows:

The people of South Africa recognise [sic]: That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy. That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans . . . .

Preamble of Competition Act, No. 89 (1998) (BSRSA).

4. Restrictive horizontal practices prohibited. – (1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if – (a) it has the effect of substantially preventing, or lessening, competition in a market, . . . (b) it involves any of the following restrictive horizontal practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) collusive tendering. . . . 5. Restrictive vertical practices prohibited. – (1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market . . . . 7. Dominant firms. – A firm is dominant in a market if – (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power. . . . 8. Abuse of dominance prohibited. – It is prohibited for a dominant firm to – (a) charge an excessive price to the detriment of consumers; . . . (d) engage in any of the following exclusionary acts . . . (v) buying – up scarce supply of intermediate goods or resources required by a competitor. . . .

Chapter 2, Prohibited Practices, Part A, Restrictive Practices, §§ 4-5, 7-8 of Competition Act, No. 89 (1998) (BSRSA). It is relevant to note that under Section 8(a) of the 1998 Competition Act, charging consumers an excessive price, to their detriment, for a product is prohibited. § 8(a) of Competition Act, No. 89 (1998) (BSRSA). De Beers announced in 2001 its plans to open "upmarket diamond jewellery [sic] outlets in Europe, the US [sic] and Japan . . . ."

Paul Armstrong, *Brussels Deals Blow to LVMH and De Beers*, TIMES, Apr. 19, 2001. In an effort to ward off a European Commission investigation concerning the strengthening of De Beers's "already-dominant position in the rough diamond

committed effort to eradicate anticompetitive business practices, it has proven to do very little against the nation's largest economic power, De Beers.<sup>113</sup>

South Africa maintained "flaccid competition legislation" prior to 1998.<sup>114</sup> The continued success of anticompetitive companies like De Beers instilled tolerance, or more appropriately, approval, for such practices in the South African economy.<sup>115</sup> However, the mounting push by reformists for the eradication of antitrust practices in South Africa in the late twentieth century created a stalemate between factions that are content with the business practices of the past and those advocating change.<sup>116</sup> As the largest business entity in the South African stock market, De Beers held a stake in this debate and likely played at least an indirect role in resisting the movement for reform.<sup>117</sup>

The lack of stringent laws against antitrust practices in South Africa prior to 1998 swung the pendulum of success seemingly in favor of De Beers and

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market," De Beers stated its intention of selling its jewelry "for up to 30 percent more than rival Bond Street outlets." *Id.* As a result, it appears that De Beers has made public statements indicating a blatant violation of the 1998 Competition Act. § 8(a) of Competition Act, No. 89 (1998) (BSRSA). However, in keeping with the long-standing tradition in South Africa, these self-admitted violations have yet to be punished under South African competition law. *Id.* The 1998 Competition Act further states in pertinent part, "9. Price discrimination by dominant firm prohibited. – (1) An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if – (a) it is likely to have the effect of substantially preventing or lessening competition; . . ." Chapter 2, Prohibited Practices, Part A, Restrictive Practices, § 9 of Competition Act, No. 89 (1998) (BSRSA). While this statute appears to have been arguably tailored to business practices traditionally relied on by anticompetitive companies, most notably De Beers, it has proven essentially ineffective in the efforts to eradicate such practices as De Beers continues to operate by its traditional internal business standards. *See infra* Part III(b). While De Beers's recent vow to devote itself to more legitimate operations, avoiding anticompetitive practices and resolving ongoing legal battles, *see* Pressler, *supra* note 11, at E1; *see also infra* Part III(b), such as those existing for half a century in the United States, *see* Johnson, *supra* note 11; *see also infra* Part III(b), actual enforcement of the 1998 Competition Act has yet to occur. It seemed that perhaps the mere passage of this Act would possibly spur reform with the company, bringing its conventional anticompetitive practices to a halt. *See id.* De Beers has since indicated that it had no plans to alter its traditional business practices. *See* Pressler, *supra* note 11, at E1.

113. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77 (noting that De Beers, its subsidiaries and sister companies, also owned by the Oppenheimer family, constituted at least one-half of the South African stock market). *See also* Leslie, *supra* note 19, at 637.

114. *See* Mungo Sogot, *Business; Anti-Trust Battle Rages in South Africa*, AFR. NEWS, Aug. 26, 1996.

115. *See generally id.* "South Africa is one of the most concentrated economies in the world – conglomerates control more than 70% of the Johannesburg Stock Exchange." *Id.* With an economy composed almost solely of conglomerates, it would be detrimental to the national economy to enforce antitrust policies against those engaging in anticompetitive practices. *See id.*

116. *Id.*

117. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77. *See also* Leslie, *supra* note 19, at 637.

other companies supporting higher profits and opposing competition.<sup>118</sup> A constant battle between “old-guard” and “new-guard” lawyers raged, the former content with lax competition legislation, and the latter pushing for stringent reform; a battle that prevented any real reform.<sup>119</sup> Stern opposition to new antitrust legislation brought internal conflict within the Department of Trade and Industry<sup>120</sup> in the late 1990s, as more rigid regulation seemed to be on the horizon.<sup>121</sup> The South African Department of Trade and Industry was, in large part, responsible for the development and drafting of the 1998 Competition Act.<sup>122</sup> Despite the inability to produce an acceptable complete draft of legislation, the department sent a discussion document dealing with potential competition reform policies to the National Economic Development and Labour Council (NEDLAC) in September 1996,<sup>123</sup> which would eventually culminate in a new Competition Act in 1998.<sup>124</sup>

The NEDLAC discussion examined and endorsed the U.S. approach to promote competition by legislatively threatening to break up conglomerates.<sup>125</sup> Despite actions within the government toward eradication of anticompetitive practices, forces from pro-anticompetitive factions continued to oppose any reform legislation. The passage of the new Competition Act in 1998, therefore, seemed to be a major victory for those favoring strong competition legislation.<sup>126</sup> However, despite this new legislation, just after the July 2004 antitrust guilty plea in the United States, a spokeswoman for De Beers was quoted as saying that De Beers has “no plans to change the way [it does] business.”<sup>127</sup> Further, the South African government has yet to pursue De Beers under the Competition Act for anticompetitive activity.<sup>128</sup>

The 1998 Act, at least in theory, prohibits collective and individual actions by businesses to restrict competition and abuse dominant status in the South African economic market.<sup>129</sup> The Act also specifically provides for a new Competition Commission, a reform of the existing inadequate Competition

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118. See generally Soggot, *supra* note 114.

119. *Id.*

120. *Id.*

121. See INTERNATIONAL CARTELS, *supra* note 10, at 77.

122. See Soggot, *supra* note 114.

123. *Id.*

124. *The Basic Principle of Competition Policy*, *supra* note 17; Competition Act, No. 89 (1998) (BSRSA).

125. Soggot, *supra* note 114. Actually breaking up conglomerates, however, has not been necessary as the legislation itself has proven effective in “send[ing] out the right signal.” *Id.*

126. The 1998 Act “outlaws restrictive horizontal practices (collusion between competing firms which prevent or lessen competition); restrictive vertical practices (agreements between firms and their suppliers and/or customers which prevent or lessen competition) and abuse of dominant market position.” Business Regulation and Commerce: Monopolies, Restraint of Trade and Competition, 2004 S. AFR. L. DIG. [hereinafter Restraint of Trade and Competition].

127. Pressler, *supra* note 11, at E1; see *infra* Part III(b).

128. See generally INTERNATIONAL CARTELS, *supra* note 10, at 77.

129. Restraint of Trade and Competition, *supra* note 126.

Board established by the 1979 Maintenance and Promotion of Competition Act,<sup>130</sup> and the formation of a competition-directed tribunal and appellate court to oversee the interpretation and enforcement of the new standards.<sup>131</sup> "Th[e] act specifically provides a legal background for the formation of the South African Competition Commission. A body that is responsible for the investigation, control and evaluation of prohibited practices, exception applications, mergers and acquisitions."<sup>132</sup> At its inception, the 1998 Act, along with its establishment of the new Competition Commission, was believed to signify South Africa's growing intolerance for anticompetitive practices.<sup>133</sup>

With legitimate competition policy in place, the question remains as to why businesses like De Beers are allowed to continue their anticompetitive practices. The answer rests firmly in economics: "South Africa is one of the most concentrated economies in the world. . . ."<sup>134</sup> Conglomerates, including De Beers, constitute over seventy percent of the South African stock market.<sup>135</sup>

De Beers itself constitutes one of the most powerful companies in that group given its historical domination of the South African market.<sup>136</sup> Considering how vital De Beers is to the economy and the stock market, "the South African government has rarely found any reason to interfere with the internal workings of the De Beers Corporation, or to impose any constraints on its overseas activities."<sup>137</sup>

Despite its lack of any official affiliation with the South African government, De Beers "operates as an officially sanctioned national monopoly, free from governmental restraints and bureaucratic interference."<sup>138</sup> Given this stranglehold on the South African economy, there is no question as to why the

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130. See *The Basic Principle of Competition Policy*, *supra* note 17; Maintenance and Promotion of Competition Act, No. 96 (1979) (BSRSA).

131. Restraint of Trade and Competition, *supra* note 126.

132. *The Basic Principle of Competition Policy*, *supra* note 17 (internal citation omitted).

133. *Id.*

134. Soggot, *supra* note 114.

135. *Id.*

136. See INTERNATIONAL CARTELS, *supra* note 10, at 77.

As of 1986, at least half of the South African stock market was composed of the stocks of De Beers, its sister company, Anglo American, or one of the many other firms in the Oppenheimer empire. Moreover, these firms are not just producing ordinary commodities; they control all South Africa's strategic minerals and thus constitute South Africa's economic power base.

*Id.* See also Leslie, *supra* note 19, at 637.

De Beers operates free from constraints of antitrust within its home country. The South African government had historically played a hands-off role with De Beers given the economic power of the company; in 1986, the stock of De Beers and its sister companies and affiliated firms constituted over half of the value of the South African stock market.

*Id.*

137. INTERNATIONAL CARTELS, *supra* note 10, at 77.

138. *Id.*



country refuses to act against De Beers.<sup>139</sup> To prosecute De Beers would be detrimental to its own national economy, which would directly contradict the very purpose of the Competition Act, which is to protect the national economy.<sup>140</sup>

*B. Legislation and Prosecution Efforts in the United States*

While De Beers has enjoyed a vice-like grip on the South African economy since its inception, allowing it to remain free from anticompetitive prosecution in its home country,<sup>141</sup> the company does not have nearly such a dominant position in the United States.<sup>142</sup> The United States constitutes one-half of the world's \$60 billion per year diamond gem market.<sup>143</sup> Although De Beers has traditionally been the leader in diamond gem production throughout the world, its share of that market continues to decline.<sup>144</sup> Unlike its control of more than one-half of the South African stock market, thus essentially dominating the South African economy,<sup>145</sup> De Beers has no presence in the U.S. stock market due to a lack of direct business operations and continuing legal problems in the United States.<sup>146</sup> As a result, where South Africa has been extremely hesitant to prosecute,<sup>147</sup> the United States has had very little to lose by pursuing prosecution of De Beers under U.S. antitrust law.<sup>148</sup>

Ironically, however, De Beers had managed to avoid prosecution in the United States until July 2004.<sup>149</sup> Despite the much more stringent antitrust laws in the United States,<sup>150</sup> De Beers enjoyed decades of unrestricted advertising and maintained diamond sales in the United States through the use of intermediaries.<sup>151</sup> The intermediaries purchased diamonds from De Beers and

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139. *See id.*

140. *See generally id.* The Competition Act was passed as an effort, as is all antitrust legislation, to protect consumers and the economy from anticompetitive practices within a given market. Prosecution of De Beers, given its stranglehold on the South African economy, would consequently bring harm to the national economy itself, which would contradict the intention of the Competition Act. *Id.*

141. *See id.*

142. *See generally* Cowell, *supra* note 19, at W1 (indicating that although the United States constitutes one-half of the annual \$60 billion diamond gem market, De Beers's diamond gem profit in the United States for the first half of 2001 was only \$744 million).

143. *Id.*

144. *See id.*

145. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77. *See also* Leslie, *supra* note 19, at 637.

146. *See* Johnson, *supra* note 11; *see generally* Pressler, *supra* note 11, at E1.

147. INTERNATIONAL CARTELS, *supra* note 10, at 77.

148. *See generally* Teather, *supra* note 92, at 19; Pressler, *supra* note 11, at E1; Johnson, *supra* note 11 (all noting the United States's continual battle, dating back to World War II, to prosecute De Beers under U.S. antitrust law).

149. *See* Pressler, *supra* note 11, at E1.

150. ANTITRUST AND COMPETITION POLICY, *supra* note 3, at 219.

151. Pressler, *supra* note 11, at E1; Teather, *supra* note 92, at 19.

sold them directly to U.S. consumers, thereby allowing De Beers to operate in the United States without having a direct presence to avoid giving the U.S. Justice Department jurisdiction over the company.<sup>152</sup> In July 2004, however, De Beers pled guilty to a ten-year-old indictment alleging price-fixing schemes with market competitors in violation of U.S. antitrust law.<sup>153</sup> This voluntary plea allowed De Beers to eliminate its use of intermediaries and deal directly with U.S. consumers once again,<sup>154</sup> thus it could be seen as more of a business decision by De Beers than a prosecution by the U.S. Justice Department. The economic motive for the plea is even more evident given the contemporaneous introduction of the competitive synthetic diamond into the U.S. market.<sup>155</sup>

Antitrust legislation has existed in the United States for more than twice as long as it has in South Africa.<sup>156</sup> U.S. antitrust policies date back to the emergence of the corporation and the rise of trusts that accompanied the growth of business and industry following the Civil War.<sup>157</sup> Congress enacted a series of antitrust laws in response to a growing public hostility toward and fear of monopolies and their anticompetitive business practices.<sup>158</sup> Collectively, these federal antitrust statutes work to provide U.S. consumers and businesses with a free competitive economy.<sup>159</sup> According to the statutes, the United States may obtain criminal sanctions, damages, and injunctive relief, and it may bring suit

152. See generally Teather, *supra* note 92, at 19. With an indictment looming, De Beers has effectively used intermediaries to operate in the United States without providing a way for the U.S. Justice Department to establish jurisdiction over the company. *Id.*

153. Pressler, *supra* note 11, at E1.

154. *Id.*

155. *Id.*

156. 1-9 Antitrust L. and Trade Reg., 2d ed. § 9.01.

157. *Id.*

158. *Id.*

The Sherman Act is the first and undoubtedly the single most important federal statute dealing with restraints of trade and monopolies, which that Act bans in broad and simple terms. The Clayton Act, amended by the Robinson-Patman Act, outlaws specific anticompetitive business dealings and is considered a vital supplement to the Sherman Act. It deals with price discrimination, mergers and acquisitions, exclusive dealing, "tying" arrangements, and corporate interlocks. The Clayton Act also contains the primary remedial provisions of the antitrust laws. The Federal Trade Commission Act established a regulatory commission with the power to define and prohibit "deceptive business practices" and "unfair competition."

*Id.*

Enacted in 1894, four years after passage of the Sherman Act, the Wilson Tariff Act was passed because the Democratic administration had pledged to replace trade protectionism with a policy of free trade. As originally introduced, the tariff act that ultimately included the Wilson Tariff Act ("the Act" or "the Wilson law") contained no antitrust provisions; these were added during the Senate floor debate because Congress was convinced trusts could abuse the act's other provisions.

1-5A Antitrust L. and Trade Reg., 2d ed. § 5A.01 [hereinafter Antitrust L. and Trade Reg. § 5A.01].

159. *Id.*

in any federal district that the corporation inhabits, transacts business, or is found.<sup>160</sup>

The Sherman Act, passed on July 2, 1890 after two years of debate, became the first and, to this day, the single-most important piece of antitrust legislation in the United States.<sup>161</sup> It was passed "to prevent practices creating monopolies or restraining trade by restricting competition and obstructing course of trade."<sup>162</sup> The elimination of competition using anticompetitive pricing to manipulate free market forces is a *per se* violation of the Sherman Act.<sup>163</sup> The Act prohibits any agreement by market participants to raise or lower prices or to charge rigid, uniform prices.<sup>164</sup> In other words, the Sherman Act strictly prohibits price-fixing in a given market, including the diamond market.<sup>165</sup>

Enacted four years after the passage of the Sherman Act, the Wilson Tariff Act was passed in an effort to protect free trade by eliminating the trade protectionism philosophy adopted by the Sherman Act.<sup>166</sup> Very similar to the Sherman Act,<sup>167</sup> the Wilson Tariff Act "prohibits [monopolies], conspiracies, trusts, agreements, and contracts intended to operate in restraint of free competition in trade or commerce in imported articles."<sup>168</sup>

The legislature and the judiciary long debated the extent to which these federal antitrust laws should be applied to international businesses and transactions.<sup>169</sup> In 1982, Congress passed the most significant amendment to the Sherman Act,<sup>170</sup> the Foreign Trade Antitrust Improvements Act [FTAIA],<sup>171</sup>

160. Business Regulation and Commerce, Monopolies, Restraint of Trade and Competition, U.S. FED. L. DIG. (2004) [hereinafter Business Regulation and Commerce].

161. 1-9 Antitrust L. and Trade Reg., 2d ed. § 9.02 [hereinafter Antitrust L. and Trade Reg. § 9.02]; 15 U.S.C.S. § 1 (2005).

162. Business Regulation and Commerce, *supra* note 160.

163. *Id.*

164. *Id.*

165. *See id.*

166. Antitrust L. and Trade Reg. § 5A.01, *supra* note 158; 15 U.S.C.S. § 1 (2005).

167. *Id.*

168. Business Regulation and Commerce, *supra* note 160; 15 U.S.C.S. §§ 8-11 (2005).

169. 1-6 Antitrust L. and Trade Reg., 2d ed. § 6.03 [hereinafter Antitrust L. and Trade Reg. § 6.03].

170. Antitrust L. and Trade Reg. § 9.02, *supra* note 161.

171. Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified in scattered sections of 12 and 15 U.S.C.). Section 402 of the Act added a new section (§ 6a) to the Sherman Act, which provides as follows:

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or  
(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

in an effort to clarify how U.S. antitrust law should be applied to cases involving international businesses and transactions.<sup>172</sup> The Act provided for a "direct, substantial, and reasonably foreseeable effect" test to be applied in all such cases.<sup>173</sup> As a result, any anticompetitive action taken by an international business or a domestic business in an international transaction that does not have a "direct, substantial, and reasonably foreseeable effect" on U.S. consumers or businesses cannot be prosecuted under federal antitrust laws.<sup>174</sup>

Despite this restriction on international prosecution, the U.S. Justice Department has persistently pursued international businesses, including De Beers and the international diamond cartel, under federal antitrust laws.<sup>175</sup> U.S. antitrust law typically has a greater effect on foreign businesses.<sup>176</sup>

Arguably, the greatest impact [of U.S. anticompetitive legislation] is felt by foreign firms that move into the US market. Because US antitrust rules are amongst the most stringent in the world and because they are applied with varying levels of intensity by successive administrations, they are a constant source of frustration for foreign firms that operate in the US market.<sup>177</sup>

De Beers, however, has proven to be an exception to the typical international anticompetitive firm, demonstrating its exceptional ability to avoid enforcement of U.S. anticompetitive rules.<sup>178</sup>

Despite decades of efforts to prosecute De Beers,<sup>179</sup> the U.S. Justice Department did not find success against the company under federal antitrust law until 2004.<sup>180</sup>

International litigation often raises questions of personal jurisdiction and service of process, and normally presents great difficulties in terms of an enforcement agency's ability to

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(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a (2005).

172. Antitrust L. and Trade Reg. § 6.03, *supra* note 169.

173. 15 U.S.C. § 6a.

174. *See id.*

175. *See generally* Teather, *supra* note 92, at 19; Johnson, *supra* note 11 (both noting the United States's continual battle, dating back to World War II, to prosecute De Beers under U.S. antitrust law).

176. ANTITRUST AND COMPETITION POLICY, *supra* note 3, at 219.

177. *Id.*

178. *Id.* at 220.

179. *Id.*

180. Pressler, *supra* note 11, at E1.

obtain documentary and testimonial evidence located abroad. Antitrust enforcement is a very fact-intensive exercise that almost invariably places a high evidentiary burden on enforcers. And when competition authorities cannot get access to the evidence needed to prosecute a violation, the world's consumers and businesses ultimately bear the cost.<sup>181</sup>

De Beers has become a master at avoiding antitrust prosecution in the United States.<sup>182</sup> "Well aware of the long arm of US [sic] law, . . . De Beers has become somewhat of an expert on US antitrust policy, and has carefully structured its entire organization to avoid any entanglement with the US rules."<sup>183</sup> This evasive structuring has included strategic advertising and the use of intermediaries to avoid direct sales to U.S. consumers.<sup>184</sup>

The U.S. Justice Department's efforts to prosecute De Beers under federal antitrust laws began in the mid-1940s. A federal suit seeking equitable relief was filed against De Beers in the Southern District of New York under the Sherman Act and the Wilson Tariff Act.<sup>185</sup> The federal government sought to restrain alleged antitrust violations,<sup>186</sup> initially obtaining a preliminary injunction to freeze De Beers's property in order to secure payment of any contempt fines that might flow from a future violation of a final order yet to be issued.<sup>187</sup> On May 21, 1945, however, the U.S. Supreme Court reversed the district court for lack of jurisdiction, thus invalidating the preliminary injunction.<sup>188</sup>

The U.S. Justice Department defended the injunction, arguing that the sequestration of property was "the only means of enforcing [the] Court's orders or decree" against a foreign corporate defendant.<sup>189</sup> While the Court recognized that section four of the Sherman Act gave the district court jurisdiction "to prevent and restrain violations of [the] Act,"<sup>190</sup> it ultimately found that the

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181. Klein, *supra* note 9. See also *Role of Foreign Competition*, *supra* note 7.

182. ANTITRUST AND COMPETITION POLICY, *supra* note 3, at 220.

183. *Id.*

184. Pressler, *supra* note 11, at E1; Teather, *supra* note 92, at 19.

185. *De Beers Consol. Mines, Ltd, et al. v. United States*, 325 U.S. 212, 214-15 (1945).

The complaint sought equitable relief based upon a charge that the defendants were engaged in a conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds, in violation of §§ 1 and 2 of the Sherman Act and § 73 of the Wilson Tariff Act.

*Id.* at 215 (internal citation omitted).

186. Specifically, the Justice Department alleged that De Beers had fixed the prices of industrial diamonds. See Teather, *supra* note 92, at 19. But cf. *De Beers Consol. Mines*, 325 U.S. at 214-15 (noting that the Justice Department's complaint alleged price fixing on both gem and industrial diamonds).

187. Philip W. Savrin, Survey Article, *Trial Practice and Procedure*, 46 MERCER L. REV. 1497, 1506 (1995).

188. *De Beers Consol. Mines*, 325 U.S. at 223.

189. *Id.* at 215.

190. *Id.* at 218 (quoting Sherman Act, 15 U.S.C. § 4).

injunction issued by the district court in this case was inappropriate under the circumstances.<sup>191</sup> The Court reasoned that the district court had jurisdiction only to "restrain the future continuance of actions or conduct intended to monopolize or restrain commerce."<sup>192</sup> Acknowledging that the arm of a preliminary injunction is limited to the relief that may be granted as a final result of the suit, the Court found that the injunction issued in the case dealt wholly with issues lying outside the suit and thus was inappropriate and void.<sup>193</sup>

The Court further recognized that the government's right to De Beers's assets that were frozen under the injunction was not the subject of the suit.<sup>194</sup> As a result, the district court had no jurisdiction over De Beers; the antitrust suit against the company was, therefore, dismissed.<sup>195</sup>

While De Beers managed to escape prosecution in 1945, the consequences of the suit had a lasting impact not only on the company itself, but on the diamond market and the international cartel as well.<sup>196</sup> The suit prompted De Beers to pull all operations out of the United States and retreat back to South Africa in order to avoid the Justice Department establishing jurisdiction over the company in future suits.<sup>197</sup> A second suit against De Beers arose in 1976 based on similar antitrust allegations.<sup>198</sup> This suit, however, merely resulted in a consent decree, under which De Beers simply promised to refrain from fixing the prices on industrial diamonds in the future.<sup>199</sup>

De Beers's legal troubles in the United States continued when Edward Russell, a former employee of General Electric Superabrasives,<sup>200</sup> filed suit against his employer's parent company, General Electric ("GE"), in 1993 alleging wrongful discharge of employment.<sup>201</sup> Russell claimed that his employment was terminated as a result of his knowledge of interactions and agreements between GE and De Beers.<sup>202</sup> During the course of the employment

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191. *Id.* at 220.

192. *Id.* at 219-20.

193. *Id.* at 220. "[The injunction in this case] deals with property which in no circumstances can be dealt with in any final injunction that may be entered." *Id.*

194. Savrin, *supra* note 187, at 1506.

195. *De Beers Consol. Mines*, 325 U.S. at 219-23.

196. *See generally* Teather, *supra* note 92, at 19; Pressler, *supra* note 11, at E1; Johnson, *supra* note 11.

197. *See* Teather, *supra* note 92, at 19. "The South African company pulled out of America shortly after the second world war, when the justice department filed a criminal lawsuit against it alleging that it fixed the price of industrial diamonds." *Id.*

198. *De Beers Charged Again in US*, BUS. L. BRIEF, Feb. 1, 1994.

199. *Id.*

200. General Electric Company Superabrasives [GES] is a division of the General Electric Company that is involved in the development and manufacturing of, among other superabrasive products, industrial diamonds. *See Russell v. Gen Elec. Co.*, 1994 WL 16006017, 2 (S.D. Ohio 1994).

201. *Id.* at 1.

202. *Id.* at 2-3.

suit, Russell made several allegations against both GE and De Beers involving potential violations of U.S. antitrust law.<sup>203</sup>

Russell alleges De Beers is a South African diamond cartel that operates a virtual worldwide monopoly of diamond gemstones and is the only significant competitor with [General Electric] in the industrial diamond market. He claims that De Beers and GE control approximately 90% of the worldwide industrial diamond market. He contends that the technology exchange between GE and De Beers was camouflage for potential antitrust violations.<sup>204</sup>

Russell contended during the suit that GE and De Beers had made agreements to simultaneously raise their industrial diamond prices in 1992.<sup>205</sup> The federal district court denied a motion for summary judgment by GE on January 4, 1994.<sup>206</sup> Barely one month after the district court's ruling, Russell withdrew his allegations against GE and the suit was settled outside of court on February 16, 1994.<sup>207</sup>

Ironically, the day after Russell settled his suit, the U.S. Justice Department obtained a grand jury indictment against both GE and De Beers<sup>208</sup> based, in large part, on the allegations concerning antitrust violations by both companies that were made by Russell during litigation.<sup>209</sup> Russell, not surprisingly, was a key witness for the Justice Department in obtaining the indictment against GE and De Beers.<sup>210</sup> "The indictment charges that

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203. *See id.*

204. *Id.* at 2.

205. *Id.* at 3.

206. *Id.* at 10.

207. *See* U.S. v. Gen. Elec. Co., et al., 869 F. Supp. 1285, 1289 (S.D. Ohio 1994).

208. The indictment was returned on February 17, 1994; suit was filed December 8, 1994. *See id.* at 1288-89.

209. *Id.* at 1288. The district court found, in part, the following facts:

On February 17, 1994, the grand jury returned an indictment charging defendants General Electric Company ("General Electric"), De Beers Centenary, AG ("De Beers"), Peter Frenz, and Philippe Liotier with one count of conspiracy to raise prices in violation of Section 1 of the Sherman Act. General Electric is a United States corporation. [It] manufactures industrial diamonds. . . . De Beers, through various affiliates, also manufactures industrial diamonds. Thus, De Beers is in direct competition with [General Electric]. General Electric and De Beers dominate the world industrial diamond manufacturing market.

*Id.* Peter Frenz is a manager for General Electric's industrial diamond division, and Philippe Liotier was a managing director for Diamant Boart, a company that buys industrial diamonds from both GE and De Beers. *Id.* Diamant Boart is owned by Sibeka, a company that is in a 50/50 joint industrial diamond manufacturing venture with De Beers. *Id.*

210. *Id.* at 1289. *But cf. GE Refutes Government Charges*, PR NEWswire, Feb. 17, 1994 [hereinafter *GE Refutes Government Charges*]. The day after Russell settled his employment suit with GE, GE made the following public statement:

defendants conspired to raise the list prices of industrial diamonds in 1991 and early 1992. [GE] and De Beers raised the prices of their industrial diamonds in early 1992. This was the first market-wide increase in the list prices of industrial diamonds in nearly five years."<sup>211</sup> The government claimed that representatives of both companies exchanged advance pricing information as part of an alleged conspiracy<sup>212</sup> to end a 20-year economic decline in the industrial diamond industry.<sup>213</sup>

Despite the victory in obtaining the indictment, the U.S. Justice Department's steepest obstacle still lay ahead.<sup>214</sup> Three of the defendants charged in the indictment, most notably De Beers, were beyond the jurisdictional reach of the court.<sup>215</sup> So long as De Beers remained outside the United States and did not directly transact business with U.S. consumers or distributors, the company would remain out of the Justice Department's reach.<sup>216</sup> Having the distinct advantage of being a foreign corporation with no business interests in the United States, De Beers simply failed to appear in court to answer for the antitrust allegations raised by the indictment, thus avoiding jurisdiction in the suit.<sup>217</sup>

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The government began its investigation two years ago after former GE vice president Ed Russell made sensational allegations of direct price-fixing between GE and De Beers. Yesterday Mr. Russell dismissed his lawsuit against GE and retracted his allegations, stating in a sworn affidavit in Federal Court that "during my entire employment at GE, I never had any personal knowledge of any anti-trust wrongdoing." In his affidavit, Mr. Russell also acknowledged he had been fired for performance reasons, not for whistleblowing.

*Id.*

211. *Gen. Elec. Co.*, 869 F.Supp. at 1289. "In late 1991 and early 1992, before the price increases were publicly announced or took effect, Liotier provided Frenz advance list pricing information about De Beers' planned price increase. Similarly, Frenz provided Liotier advance list pricing information about [GE's] planned price increase." *Id.*

212. *Id.* See also *GE Facing Charges of Fixing Price of Industrial Diamonds in Europe*, DEUTSCHE PRESSE-AGENTUR, Oct. 26, 1994 [hereinafter *GE Facing Charges of Fixing Price*]. GE defended the allegation by arguing that Liotier was acting as an employee of Diamant Boart, which is a GE customer, and thus the exchange of information between Frenz and Liotier was lawful. *Gen. Elec. Co.*, 869 F. Supp. at 1289.

213. *GE Facing Charges of Fixing Price*, *supra* note 212.

214. See *Gen. Elec. Co.*, 869 F. Supp. at 1289.

215. *Id.* "Three of the named defendants in this case – De Beers, Peter Frenz, and Philippe Liotier – were, and remain, beyond the territorial jurisdiction of the Court." *Id.*

216. See Teather, *supra* note 92, at 19.

217. See generally *id.*; Pressler, *supra* note 11, at E1; Johnson, *supra* note 11.

[I]t is often difficult to compel foreigners to participate in judicial proceedings in a country where the effects of their actions are being felt. One of the most notorious examples of this has been the persistent failure of the U.S. authorities to prosecute successfully the De Beers group for its alleged restraints on diamond trade.

Symposium, Symposium in Honor of Professor James A. Rahl: An International Antitrust Challenge: International Jurisdiction in National Legal Systems: The Case of Antitrust, 10 NW. J. INT'L L. & BUS. 56, 73 (1989) [hereinafter *International Jurisdiction in National Legal Systems*].



Left to defend the antitrust suit alone, GE released a public statement discounting the Justice Department's case against it.<sup>218</sup>

After investing two years and millions of taxpayer dollars in an investigation that did not yield proof of any direct price-fixing and after the person whose allegations prompted the investigation said he knew of no price-fixing the government is now trying to salvage its effort by bringing a wholly circumstantial case of indirect price-fixing that is without merit. . . . Government prosecutors have virtually unlimited power to bring an indictment. But, under our system of justice, they must prove the facts and satisfy the law to win the case in court.<sup>219</sup>

GE claimed that the information its employees received and used to set GE's industrial diamond list prices was received from a legitimate GE customer, not from De Beers.<sup>220</sup> The highly anticipated suit, though De Beers was not involved, was heralded as promising to be "one of the most far-ranging and hard-fought cases in antitrust annals."<sup>221</sup>

The suit against GE, however, turned into another failure for the U.S. Justice Department in the area of antitrust prosecution, once again due to jurisdictional problems.<sup>222</sup> While the allegations Russell made during his earlier employment suit against GE helped the U.S. Department of Justice win an indictment against both GE and De Beers,<sup>223</sup> the evidence needed to prosecute GE under the Sherman Act was unavailable, as much of it was held by GE's co-defendant, De Beers, in South Africa.<sup>224</sup> Prosecutors claimed that the evidence they needed was located overseas<sup>225</sup> and, thus, beyond their jurisdictional reach.<sup>226</sup> The court found that the Justice Department's circumstantial evidence, most notably Russell's allegations against GE and De Beers, was insufficient to allow the case to proceed.<sup>227</sup> GE was acquitted of the charges, and the suit against GE was dismissed.<sup>228</sup>

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218. See *GE Refutes Government Charges*, *supra* note 210.

219. *Id.*

220. *Id.*

221. *GE Facing Charges of Fixing Price*, *supra* note 212.

222. See Johnson, *supra* note 11.

223. *Gen. Elec. Co.*, 869 F.Supp. at 1289.

224. See Johnson, *supra* note 11.

225. *Id.*

226. See *id.*

227. *Gen. Elec. Co.*, 869 F. Supp. at 1290-92, 1300. In its motion for acquittal, GE asserted, among other arguments, that there was "insufficient evidence that Philippe Liotier acted on De Beers' behalf and that General Electric knew this," and the court agreed. *Id.* at 1290. In explaining its reasoning for granting GE's motion for acquittal, the court found the following:

While GE's involvement in the suit ended with its acquittal in 1994, De Beers would continue to feel the consequences of the indictment for the next decade.<sup>229</sup> To avoid jurisdiction in the United States, De Beers was forced to remain abroad and avoid any direct contact with the U.S. diamond market.<sup>230</sup> After the 1994 indictment, "[t]he company still advertise[d] heavily in the [United States] to maintain its brand name and [sold] through intermediaries, but it [did] not have its own retail presence and De Beers executives could be detained if they travel[ed] to the [United States]."<sup>231</sup> Despite the fact that the United States accounts for over one-half of retail jewelry diamond sales worldwide and the fact that the diamond market continued to grow after the 1994 indictment, due, in large part, to the emergence of many new sources of diamonds around the world, De Beers was forced to refrain from any direct communication or transactions in the United States due to the still-valid U.S. antitrust indictment.<sup>232</sup>

Following GE's acquittal in 1994, De Beers made efforts to get the indictment against it dropped.<sup>233</sup> However, the Clinton and the Bush

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General Electric cannot be held criminally liable for sharing advance pricing information with a customer. Stated otherwise, the government's conspiracy theory falls apart completely if Liotier was not acting on De Beers' behalf. . . . The government does not cogently dispute General Electric's contention that there is no direct evidence to establish that Liotier was acting on De Beers' behalf. The government maintains, however, that a rational trier of fact could infer this fact from circumstantial evidence it presented in its case. . . . The court finds that even if this evidence is viewed in the light most favorable to the government, it is insufficient to support an inference that Liotier acted on De Beers' behalf.

*Id.* at 1291-92.

It would have been difficult for the government to prove its case even in the best of circumstances. Here, however, the government's usual burden of investigating and proving its case was made more difficult because three of the four named defendants, and many potential witnesses, are foreign nationals beyond the jurisdiction of this Court.

*Id.* at 1300.

228. *Id.* at 1301.

229. See Teather, *supra* note 92, at 19; Pressler, *supra* note 11, at E1; Johnson, *supra* note 11.

230. See Johnson, *supra* note 11.

That hasn't stopped De Beers from becoming one of the world's best-known brands and one of the biggest advertisers in the U.S., relentlessly linking diamonds to engagements, weddings and anniversaries with its "A Diamond is Forever" campaign. But De Beers hasn't had a retail presence in America and its executives are subject to detention if they enter the country. De Beers only has its own retail stores in London and Tokyo.

*Id.*

231. Teather, *supra* note 92, at 19. See also Johnson, *supra* note 11.

232. Pressler, *supra* note 11, at E1. "[De Beers hasn't] been able to set foot in a market that represents half the world's diamond market . . . . De Beers could not call you in this country, they couldn't send you an e-mail, they couldn't mail you anything." *Id.* (quoting Kenneth M. Gassman, director of research for the Rapaport Diamond Report, an industry trade publication).

233. Johnson, *supra* note 11.

administrations persistently blocked any attempt by the company to rid itself of the charges.<sup>234</sup> U.S. officials did seek De Beers's help "in clamping down on illicit sales of smuggled Central African diamonds, used to finance regional wars – notably, the conflict in the Democratic Republic of the Congo."<sup>235</sup> De Beers offered to help in exchange for quashing the 1994 indictment that restricted its officials from entering or conducting business in the United States.<sup>236</sup> The exchange, however, did not take place, likely due to the Justice Department's unwillingness to allow De Beers back into the U.S. market.<sup>237</sup>

De Beers's legal troubles in the United States did not end with the indictment. Following the indictment, several buyers of industrial diamonds brought a civil antitrust class action suit against GE and De Beers, alleging a price-fixing conspiracy in violation of the Sherman Act and seeking to recover damages against the companies.<sup>238</sup> De Beers failed to either answer or appear for the litigation, and the court entered default judgment against the company.<sup>239</sup> GE, however, subject to the court's jurisdiction, did appear, settling the suit in 1999.<sup>240</sup>

Under the default judgment, De Beers had "no further standing to contest the factual allegations of plaintiff's claim for relief."<sup>241</sup> However, it remained to be determined by the court whether plaintiffs had a cause of action based on the unchallenged facts, as De Beers, while in default, had not admitted any conclusions of law.<sup>242</sup> The default judgment itself did not constitute a

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234. *Id.*

235. *De Beers Wants Improved US Relations*, UPI, Jan. 31, 2000, LEXIS, Nexis Library, UPI File.

236. *Id.*

237. *See generally* Pressler, *supra* note 11, at E1. The 1994 indictment remained in effect, despite De Beers's offer to help eradicate the diamond smuggling in Central Africa in 2000, until the charges were settled in 2004 as a result of De Beers's unrelated, voluntary plea. *Id.*

238. *In re Indus. Diamonds Antitrust Litig.*, 119 F.Supp.2d 418 (S.D.N.Y. 2000).

239. *Id.* at 419.

240. *Id.*

Following extensive discovery and negotiation, GE settled all claims asserted against it by the plaintiff class by agreeing to pay plaintiffs' attorneys fees and expenses (\$1,850,000 and \$500,000 respectively) and to give each class member an in-kind rebate of free diamonds of like grade and quality to their purchases of industrial diamonds from GE during a "claim period" of 20 months after the settlement became final, in an amount equal to 3% of the diamonds purchased by the member from GE during the claim period. If a class member purchased no diamonds from GE during the claim period, it was given the option of either transferring a share of its right to such in-kind rebate to another entity or of receiving from GE a cash payment of \$1,000. After notification of the class members and a fairness hearing, the settlement was approved by the Court on July 23, 1999.

*Id.* After the settlement with GE, the court reviewed the default judgment previously entered against De Beers at an evidentiary hearing on July 26, 2000. *Id.*

241. *Id.* at 420.

242. *Id.*

submission to damages, rather it merely established the facts of the case.<sup>243</sup> Any damages flowing from the suit were required to be determined at a subsequent evidentiary hearing.<sup>244</sup> The court found the evidence at the evidentiary hearing to be insufficient to support any award of damages against De Beers.<sup>245</sup> In its reasoning, the court cited the lack of any direct sales in the United States by De Beers; De Beers instead used independent middlemen to transact business with consumers.<sup>246</sup> As a result, De Beers's shrewd business strategy again proved successful in thwarting an adverse judgment in the United States.<sup>247</sup>

The expanding diamond market and the introduction of the synthetic diamond, however, began to take its toll on De Beers.<sup>248</sup> The 1994 indictment still kept the company from operating, at least directly, in the United States, the largest diamond market in the world.<sup>249</sup> "U.S. officials over the years [were not] eager to help De Beers because of its history of harsh labor conditions and support for South Africa's apartheid regime."<sup>250</sup> Despite its extensive efforts to prosecute De Beers in the United States, the U.S. Justice Department knew that its case against the company stood little chance given the acquittal of GE in

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243. *Id.*

244. *Id.* at 419.

The court conducted an inquest to fix damages against the defaulting defendant De Beers on July 26, 2000. The only witness was Dr. Michael C. Keeley, plaintiff's economics expert. De Beers was not represented at the hearing. An attorney for its Irish subsidiary, De Beers Industrial Diamonds (Ireland), attended the hearing, but declined the Court's invitation to cross-examine the witness or otherwise actively participate.

*Id.* at 419.

245. *Id.* at 424.

246. *Id.* at 421. The court found that plaintiffs' expert, Dr. Keeley, inaccurately computed the damages being sought. *Id.*

Dr. Keeley based his computation of damages on estimates of total U.S. sales of industrial diamonds by both GE and De Beers. This was a clear error of considerable magnitude. De Beers did not sell directly to any members of the plaintiff class or any other U.S. purchaser similarly situated. De Beers industrial diamonds are marketed in the U.S. by distributors . . . . To award damages against De Beers based on plaintiffs' purchases of industrial diamonds not directly from De Beers but from an independent distributor would violate the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) that those who purchased the products of a price-fixing defendant indirectly through an independent middleman may not recover damages therefore from that defendant.

*Id.*

247. See generally *id.* De Beers's strategic use of independent intermediaries, thus avoiding any direct contact with U.S. consumers, avoided a judgment for civil damages. *Id.*

248. See Pressler, *supra* note 11, at E1.

249. Johnson, *supra* note 11. "[T]he charges have been hanging over De Beers for years, preventing its executives from traveling to the United States to do business even on precious gems without the risk of being arrested." Pressler, *supra* note 11, at E1.

250. Johnson, *supra* note 11.

1994.<sup>251</sup> If De Beers was willing to plead guilty to the indictment, the Justice Department knew that it was in little position to resist.<sup>252</sup>

A settlement to the decade-old charges would "give De Beers a bigger marketing presence and greater legitimacy with U.S. consumers."<sup>253</sup> A De Beers official was quoted as saying that the company "would really, really like to resolve these issues"<sup>254</sup> and that it was "hopeful of a resolution with the justice department."<sup>255</sup> On July 12, 2004, De Beers voluntarily pled guilty to the 10-year-old charges of price-fixing in the industrial diamond market.<sup>256</sup> The company agreed to pay a \$10 million fine to settle the indictment.<sup>257</sup> De Beers released a statement following the guilty plea claiming that although it was now free to resume business relationships and transactions in the United States, it had no intention of altering its traditional business strategies.<sup>258</sup> It is important to note that while De Beers effectively released the restraints on itself in the U.S. market, thereby giving the U.S. Justice Department no ammunition to pursue it, its business practices, specifically its "supplier of choice" sales tactic, is still under investigation by the European Union.<sup>259</sup>

De Beers's motive for the guilty plea after ten years of exile from the United States was likely due to several factors.<sup>260</sup> Its market presence had been in decline since the indictment due to the expanding market, new discoveries of diamonds around the world, and the advancements in synthetic diamond manufacturing.<sup>261</sup> "Industry experts say the company may have settled because

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251. *Id.* "[U.S.] Justice Department officials apparently have concluded that – having lost their case against De Beers's co-defendant GE in 1994 – they have little leverage to continue to exclude the company from the U.S. if it is willing to plead guilty, unconditionally, to the 10-year-old charge." *Id.*

252. *Id.*

253. Pressler, *supra* note 11, at E1.

254. Johnson, *supra* note 11 (quoting Lynette Hori, a spokeswoman for De Beers).

255. Teather, *supra* note 92, at 19.

256. Pressler, *supra* note 11, at E1.

257. *Id.*

258. *Id.* "Obviously, this means now that [De Beers] can resume normal business relationships. . . . Our sales directors can meet clients, and marketing teams can meet retailers. But we have no plans to change the way we do business." *Id.* (quoting Lynette Hori, a spokeswoman for De Beers).

259. Johnson, *supra* note 11. De Beers's "supplier of choice" program is aimed at enabling the company to single out only a select few buyers to which it will sell diamonds, creating competition among buyers for such status and maintaining tighter control over the cartel and the market. *Id.*

260. See Pressler, *supra* note 11, at E1.

261. *Id.* "[De Beers] dominance in the world's diamond market has been declining in recent years as new mines have opened in Russia, Canada and Australia, and as new varieties of synthetic diamonds – both industrial and gem quality – are being created." *Id.* But cf. DePalma, *supra* note 82, at C1 (explaining that De Beers has recently gained a foothold in the newly-discovered Canadian diamond mine region).

[T]he Canadians need De Beers . . . . Without it, they risk disrupting the cartel's tight grip on the market – a grip that keeps gem prices high for all. And [in March 1999], in fact, the mine's owners agreed to sell part of its production to

it was too risky to stay away from the U.S. market when so many new sources of diamonds were emerging."<sup>262</sup> De Beers, however, defended its motive as being linked to its strategy of "total legal compliance around the world" and its "drive to create a new, modern De Beers" rather than to the growing competition from mined and synthetic diamonds.<sup>263</sup> Given its past support for the apartheid regime in South Africa and its involvement in the conflict diamond struggle, De Beers has been working to improve its image around the world.<sup>264</sup> Settling its legal problems in the United States is one large step toward that goal.<sup>265</sup> However, the consequences of such a step have yet to be realized.<sup>266</sup>

#### IV. INTERNATIONAL ANTITRUST COOPERATION AND ENFORCEMENT

Antitrust cases involving international cartels have increasingly received more attention on the worldwide scene in recent years.<sup>267</sup> The problem with enforcement, however, is that the investigation and prosecution procedures for international cases do not correspond with the jurisdictional authority afforded by international law.<sup>268</sup> The United States has encountered this problem, specifically lacking the necessary jurisdiction and evidence, in trying to prosecute members of the international diamond cartel.<sup>269</sup> Following its unsuccessful attempt to prosecute De Beers and others in 1994, the United States stepped up its efforts in the area of international antitrust enforcement.<sup>270</sup>

To enhance the Justice Department's ability to prosecute international antitrust violations, Congress passed the International Antitrust Enforcement Assistance Act [IAEAA]<sup>271</sup> in 1994.<sup>272</sup> The IAEAA was the result of the "increasingly

De Beers. But that deal carries its own risks, for antitrust regulators in Washington take a dim view of De Beers, and if the owners get too cozy with the cartel, their American businesses could suffer.

*Id.* De Beers negotiated a deal to purchase thirty-five percent of the diamonds produced from the Canadian mines over the next three years. *Id.* "De Beers now has a foot in the door of what could in a few years be one of the world's top five diamond-producing regions." *Id.*

262. Pressler, *supra* note 11, at E1.

263. *Id.* (quoting Lynette Hori, a spokeswoman for De Beers).

264. Teather, *supra* note 92, at 19.

265. *Id.*

266. *See generally id.*

267. Klein, *supra* note 9. "[I]nternational cartel cases, where competitors in various countries get together privately to fix prices or allocate territories on a worldwide basis, have assumed increasing prominence." *Id.*

268. *Id.*

269. *Id.* The U.S. Justice Department lacked the necessary jurisdiction to pursue De Beers and the necessary evidence to prosecute GE after the 1994 antitrust indictment. Johnson, *supra* note 11.

270. *See* Antitrust L. and Trade Reg. § 1.04, *supra* note 2.

271. 15 U.S.C.A. § 6201 (2004). The IAEAA provides, in pertinent part, as follows:

[T]he Attorney General of the United States and the Federal Trade Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect under this chapter, antitrust evidence to assist the foreign antitrust authority –

global focus of antitrust enforcement in the 1990's"; it has enabled the Justice Department and the Federal Trade Commission to conduct international antitrust investigations in cooperation with antitrust enforcement authorities in foreign countries.<sup>273</sup>

After GE's acquittal in 1994 due to the inability to reach needed evidence overseas,<sup>274</sup> Congress realized that "American consumers and businesses were increasingly at risk from foreign cartels and monopolies that only could be prosecuted under U.S. antitrust laws if the enforcement agencies could obtain the evidence required to prove antitrust violations."<sup>275</sup> Congress passed the IAEAA "in order to permit the negotiation of reciprocal arrangements" to overcome the difficulty of obtaining evidence from foreign parties,<sup>276</sup> which was the problem in 1994 when GE was acquitted.<sup>277</sup> The IAEAA, however, has proven somewhat ineffective due to a lack of participation.<sup>278</sup> In fact, by 2001, seven years after the IAEAA was passed, Australia remained the only government to take advantage of the opportunity.<sup>279</sup>

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(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) in enforcing any of such foreign antitrust laws.

*Id.* 15 U.S.C.A. § 6204 (2004) provides limitations, outlining evidence which may not be offered to foreign antitrust authority under the IAEAA. *Id.*

272. 1-9 Antitrust L. and Trade Reg., 2d ed. § 9.07 [hereinafter Antitrust L. and Trade Reg. § 9.07].

The International Antitrust Enforcement Assistance Act ("the Act"), enacted in 1994, was designed to enhance the ability of the Antitrust Division of the [U.S.] Justice Department and the Federal Trade Commission ("FTC") to participate in international antitrust investigations. The Act authorizes the Attorney General and the FTC to conduct investigations on behalf of, and provide antitrust evidence to, foreign antitrust enforcement agencies. By limiting cooperation to foreign agencies with reciprocal arrangements, the Act also was intended to cause those foreign agencies to provide similar information to the American antitrust agencies. The Act also provides safeguards for sensitive business information.

*Id.*

273. *Id.*

274. Johnson, *supra* note 11.

275. Antitrust L. and Trade Reg. § 9.07, *supra* note 272.

276. Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 650 (2001). "A principal objective of bilateral agreements, accordingly, has been to promote the discovery and exchange of information between antitrust authorities." *Id.* at 649-50.

277. See Johnson, *supra* note 11.

278. Swaine, *supra* note 276, at 650-51.

279. *Id.* at 650. In 1996, the U.S. Assistant Attorney General acknowledged the IAEAA's participation problem and expressed optimism that such cooperation would be given in the future. Klein, *supra* note 9.

We recognize nevertheless that getting nations to enter into such bilateral agreements will not be easy, and that differences in the substantive and procedural rules in different countries will have to be carefully worked through. Most countries, for example, do not impose criminal penalties for violation of their competition laws. And there are always important cultural and sovereignty issues that must be resolved when such agreements are contemplated. Still, it is

The World Trade Organization [WTO] has also expressed an interest in playing an active role in international antitrust enforcement.<sup>280</sup> However, allowing the WTO to get involved should be approached very cautiously as it could lead to disruption of potentially successful enforcement factors that are already in place.<sup>281</sup> For example, "an increasingly globalized economy, spurred largely by technological advances, has meant that markets throughout the world are economically available even to previously domestic businesses."<sup>282</sup> Similarly, "successive reductions of government-imposed barriers to trade . . . [have] meant that entry into foreign markets is not just economically feasible but practically feasible as well."<sup>283</sup> Encouraging more previously domestic businesses to enter the global economy diminishes the potential for a successful cartel or anticompetitive agreements.<sup>284</sup> Allowing the WTO to get involved in international antitrust enforcement could disrupt the expanding global economy, which would in turn discourage domestic businesses from taking on a global role as legitimate world market participants.<sup>285</sup>

The idea of positive comity is a popular tool in the area of international antitrust enforcement.<sup>286</sup> Positive comity, as it relates to international antitrust enforcement, involves the recognition of and adherence to one nation's antitrust laws by another nation.<sup>287</sup> It recognizes that "anti-competitive activities

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my personal belief that such differences ultimately will not stand in the way of cooperation aimed at eliminating cartels.

*Id.*

280. Klein, *supra* note 9.

281. *Id.*

282. *Id.*

283. *Id.*

284. *See generally id.* As more businesses enter the global economy as legitimate competitors, the power of current cartel members over the markets in which they participate will diminish and it will become harder for companies like De Beers and GE to forge anticompetitive agreements, such as those to fix market prices. *Id.*

285. *See generally id.*

286. *See* Swaine, *supra* note 276; Donald C. Klawiter, *Criminal Antitrust Comes to the Global Market*, 13 ST. JOHN'S J. LEGAL COMMENT. 201 (1998); Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563 (2000); Kukovec, *supra* note 7, at 18.

287. *See* BLACK'S LAW DICTIONARY 261-62 (7<sup>th</sup> ed. 1999).

A great deal of misconception about the nature of conflict of laws is due to the loose use of the term 'comity.' The laws of another state or nation, it has been sometimes said, can have no operation in another sovereignty except by comity. In the dictionary definition, comity means 'courtesy between equals; friendly civility.' Such a conception of the matter supposes one sovereign, as a matter of courtesy, allowing the law of another to operate within the territory of the first. If this were true, the determination of when, by comity, recognition would be given to foreign law would not be a predictable matter. . . . Courts use it, often loosely, and in cases correctly decided despite looseness of terms. It is clear that reference to foreign law in appropriate cases is dependent not upon a mere courtesy which a court may grant or withhold at will, but upon the need to achieve justice among parties to a controversy having foreign contacts.

Herbert F. Goodrich & Eugene F. Scoles, *Handbook of the Conflict of Laws* § 7, at 7-8 (4<sup>th</sup> ed. 1964). "The comity principle is most accurately characterized as a golden rule among nations – that each must give the respect to the laws, policies and interests of others that it would have



occurring within the territory of one party to the agreement may adversely affect the interests of the other party."<sup>288</sup>

Traditional comity contemplates that an antitrust authority consider the other party's interests in deciding whether to initiate an investigation or proceeding, determining its scope, and electing which remedies to pursue. . . . U.S. agreements also contain "positive" comity provisions, whereby one authority may request the other to investigate anticompetitive activities occurring within its territory that affect the requesting authority's important interests.<sup>289</sup>

In the 1990s, the United States began working with the European Commission (EC) to establish such cooperation agreements.<sup>290</sup> In 1991, the "EC/U.S. Antitrust Cooperation Agreement" was formed, which was expanded in 1997 to a positive comity agreement.<sup>291</sup> Similarly, the 1994 IAEA serves as an important tool for the U.S. Justice Department in forging cooperation agreements outside the comity arena.<sup>292</sup>

The notion of using positive comity agreements in the area of international antitrust enforcement has encouraged antitrust authorities to take the idea further to include "cartel-specific agreements."<sup>293</sup> "[T]he current successes of the Antitrust Division has [sic] resulted from 'cartel-specific agreements' where the United States and other governments have shared information, coordinated enforcement actions, such as execution of searches for documents, assisted in locating and contacting witnesses and similar initiatives."<sup>294</sup> While these agreements do not carry the weight of a treaty or the stature of an official comity agreement, they do give an alternative for international antitrust enforcement, providing much-needed cooperation and discovery of critical evidence.<sup>295</sup>

While antitrust authorities have experienced some success through the use of positive comity and cartel-specific agreements,<sup>296</sup> there remains a

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others give to its own in the same or similar circumstances." Thomas Buergenthal & Harold G. Maier, *Public International Law in a Nutshell* 178 (2<sup>nd</sup> ed. 1990).

288. Kukovec, *supra* note 7, at 28.

289. Swaine, *supra* note 276, at 652.

290. See Klawiter, *supra* note 286.

291. *Id.* at 213-14.

292. *Id.* at 214. "In addition to positive comity agreements, the U.S. Government is also negotiating agreements with other Governments, pursuant to the 1994 International Antitrust Enforcement Assistance Act, to greatly expand the exchange of information among antitrust enforcement authorities around the world." *Id.* (citation omitted).

293. See *id.*

294. *Id.*

295. *Id.* at 214-15.

296. *Id.* at 216.

[O]ver thirty grand juries are investigating international cartel matters. Those investigations represent at least 30%, and probably over 50% of all the criminal investigative activities being conducted under the antitrust laws today. This is

problem, as with the IAEAA, in recruiting participation with other governments.<sup>297</sup> Prosecution of some of the U.S. Justice Department's biggest antitrust targets, such as De Beers, has proven extremely difficult without the cooperation of the countries in which those targets operate.<sup>298</sup> South Africa's unwillingness to prosecute De Beers or to forge any comity agreements in the area of antitrust law to allow foreign nations to pursue De Beers, due largely to the company's stranglehold on the nation's economy,<sup>299</sup> has served to place De Beers beyond the reach of prosecution in foreign countries, most notably in the United States.<sup>300</sup>

The idea of comity in the area of antitrust law, while hailed by academics, has traditionally not been favored by legislators, especially in the United States.<sup>301</sup> Further, the use of antitrust-related comity agreements continues to decline as more countries begin to play an active role in enforcement themselves.<sup>302</sup> While comity was a forefront issue for nearly half a century when U.S. antitrust law stood alone on the global scene, today it is an outdated concept because there is an increasing implementation of antitrust law worldwide.<sup>303</sup> As the number of countries that are passing and enforcing

truly monumental considering that there were virtually no such cartel investigations in 1991 or 1992. The trend is likely to continue.

*Id.* "Early in 2000, the Antitrust Division has over thirty grand juries investigating suspected international cartels, comprising one-third of the Antitrust Division's total criminal investigations." Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 276 (2003) (citation omitted).

297. See Klawiter, *supra* note 286, at 215.

Despite the fact that these cooperation agreements are beginning to solve some of the Antitrust Division's evidentiary problems, they are only limited successes to date. In many situations, the Antitrust Division is still thwarted in its attempt to obtain evidence found in other countries and to arrange for witnesses to testify in its proceedings.

*Id.*

298. See generally *id.*

299. See generally INTERNATIONAL CARTELS, *supra* note 10, at 77; Leslie, *supra* note 19, at 637.

300. See Teather, *supra* note 92, at 19.

301. Waller, *supra* note 286, at 564.

The United States Congress has never required the consideration of comity in the exercise of jurisdiction under any aspect of the antitrust laws despite numerous opportunities to do so. Moreover, the Congress has enacted numerous pieces of legislation operating on an extraterritorial basis without any incorporation of comity considerations. The most prominent example in recent years has been the Helms-Burton Act imposing sanctions on firms anywhere in the world which do business in Cuba or traffic in United States assets which were expropriated without compensation by the Castro regime.

*Id.* at 564 n.3.

302. *Id.* at 565-66.

303. *Id.*

Comity was the burning issue of the day for nearly fifty years while the United States was the world's antitrust policeman and U.S. national law sought to regulate nearly alone most anticompetitive conduct in foreign and global markets. Now we stand poised on the brink of a new world in which dozens of jurisdictions police their own markets for anticompetitive conduct and abusive

antitrust legislation increases, the need for agreements to enforce U.S. antitrust policies in those countries declines.<sup>304</sup> As an alternative to comity, one suggestion is "to allow the countries that feel the greatest economic effects from the cartel to regulate it, even if the host country has chosen not to do so or has 'regulated' the cartel by giving its approval."<sup>305</sup>

However, the problem remains of countries that pass antitrust laws but refuse to enforce them, such as the South African government's refusal to pursue De Beers for anticompetitive activity in violation of the country's Competition Act.<sup>306</sup> South Africa's refusal to enter into a comity agreement to allow antitrust officials to pursue De Beers under U.S. antitrust law has proven detrimental to other prosecution efforts as well.<sup>307</sup> For this reason, learning from incidents like the acquittal of GE in 1994 due to insufficient evidence, the U.S. Justice Department continues to pursue cooperation agreements with foreign nations, regardless of whether there is a comity agreement or not.<sup>308</sup>

In recent times, both the Antitrust Division and the FTC have spent far more time negotiating cooperation agreements with foreign enforcement agencies and working with those agencies to discover the necessary evidence to obtain convictions and effective relief and very little time worrying about unilateral assertions of extraterritorial jurisdiction, with or without comity.<sup>309</sup>

While a solution to the U.S. Justice Department's dilemma with companies like De Beers may not be solved without the use of comity or a willingness on the part of the host government, to prosecute the company itself, the growing use of cooperation agreements with foreign nations is an important step toward successful international antitrust enforcement.<sup>310</sup> "Cooperation is of extreme importance for effective prosecution of international cartels, as much of the alleged conduct takes place outside domestic territory and much of the evidence is located beyond the domestic regulator's reach."<sup>311</sup> In most

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market structures and the United States debates with its trading partners the creation of truly global rules to police global markets. Traditional comity concerns have little role to play in this debate.

*Id.*

304. *See id.*

305. *International Jurisdiction in National Legal Systems*, *supra* note 217, at 73.

306. *See generally* INTERNATIONAL CARTELS, *supra* note 10, at 77; Leslie, *supra* note 19, at 637.

307. *See generally* INTERNATIONAL CARTELS, *supra* note 10, at 77; Leslie, *supra* note 19, at 637.

308. Waller, *supra* note 286, at 573.

309. *Id.*

310. *See generally id.*

311. Kukovec, *supra* note 7, at 38.

international cartel cases, cooperation is sought as a precondition for enforcement.<sup>312</sup>

Another effort in the area of international antitrust enforcement is the International Competition Network [ICN], established in 2001 largely due to the efforts of the U.S. Justice Department's Antitrust Division and the FTC.<sup>313</sup>

Established largely in response to the new challenges in antitrust enforcement created by increased globalization, the ICN is a global network of competition authorities focused exclusively on competition. The twin goals of the ICN are to provide support for new competition agencies in enforcing their laws and building a strong competition culture in their countries, and to promote greater convergence among these authorities by working together and with interested parties in the private sector to develop guiding principles and best practices to be endorsed and implemented voluntarily.<sup>314</sup>

The ICN consists of several small groups, each focusing on different specific areas of competition law.<sup>315</sup> These groups present their findings to the ICN members, who in turn have the option to implement the group recommendations through their own separate legislation.<sup>316</sup> Currently, the ICN consists of sixty-five member jurisdictions on six continents and represents around seventy percent of the world's Gross Domestic Product.<sup>317</sup> While the ICN does not forge binding cooperation agreements between member nations, it does evidence willingness on the part of the United States and others to work together against international antitrust activity.<sup>318</sup>

## V. CONCLUSION

Anticompetitive practices in the diamond industry have existed for well over a century.<sup>319</sup> As leader of the international diamond cartel, De Beers has achieved staggering success in consolidating the diamond industry and

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312. *Id.* at 40. "Although disagreements on enforcement can arise in cartel investigations . . . , the drive to cooperate is stronger because often the very precondition for enforcement in international cartel cases is cooperation." *Id.*

313. Krauze, *supra* note 296, at 283.

314. *Id.* (citation omitted).

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 284.

319. INTERNATIONAL CARTELS, *supra* note 10, at 49.

imposing anticompetitive business practices on market participants.<sup>320</sup> However, as the number of diamond producers around the world continues to grow and economies worldwide are suffering from recession, the control that De Beers once enjoyed is slowly diminishing.<sup>321</sup> As the market grows, new producers and participants have been incorporated into the cartel, thus sacrificing some of De Beers's control over the cartel and the market.<sup>322</sup> Similarly, De Beers's continual legal troubles in the United States not only hurt the company's image in recent decades,<sup>323</sup> but undoubtedly weakened its grip on the diamond industry by prohibiting any direct contact or business transaction with U.S. consumers.<sup>324</sup>

While being forced to settle ongoing legal troubles in the United States, De Beers remains free from prosecution in its home country.<sup>325</sup> Despite nearly half a century of legislation restricting anticompetitive business practices,<sup>326</sup> South Africa has yet to pursue De Beers for such activity.<sup>327</sup> Given the company's dominant presence in the South African economy, constituting around one-half of the national stock market, it is no surprise that De Beers escaped decades of anticompetitive behavior without any interference from the South African government.<sup>328</sup> South Africa essentially left prosecution of De Beers's anticompetitive business practices to the rest of the world, most notably to the United States.<sup>329</sup> However, by operating out of South Africa and without any cooperation from the South African government, De Beers essentially has been allowed to operate free from restraint in the area of antitrust law due largely to jurisdictional problems.<sup>330</sup>

While international cooperation in antitrust enforcement gained prominence in recent years,<sup>331</sup> participation in such cooperation schemes has not met expectations.<sup>332</sup> The U.S. Justice Department continues to encounter difficulty in international antitrust prosecution due to jurisdictional problems,<sup>333</sup> and the unwillingness of countries like South Africa to provide needed

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320. *Id.* at 41.

321. *See supra* notes 82-85, 142, and accompanying text.

322. *See* INTERNATIONAL CARTELS, *supra* note 10, at 49. As new market participants come onto the scene, the cartel has been forced to incorporate them into its cooperative effort to maintain control of the market. *Id.* However, the more diamond producers and market participants there are in the cartel, the less control major cartel members like De Beers can exercise. *Id.*

323. *See* Teather, *supra* note 92, at 19 (noting that De Beers has been working in recent years to clean up its damaged image in the United States).

324. *See* Pressler, *supra* note 11, at E1; Johnson, *supra* note 11.

325. *See* INTERNATIONAL CARTELS, *supra* note 10, at 77.

326. *The Basic Principle of Competition Policy*, *supra* note 17.

327. INTERNATIONAL CARTELS, *supra* note 10, at 77.

328. *See id.*

329. *Id.*

330. *See supra* notes 269, 297-300 and accompanying text.

331. Klein, *supra* note 9.

332. Swaine, *supra* note 276, at 650.

333. Klein, *supra* note 9.

evidence and cooperation further adds to the frustration.<sup>334</sup> As a result, De Beers remained out of the reach of the U.S. Justice Department due both to its abroad operations and the stranglehold it has over the South African economy.<sup>335</sup> The growing implementation of comity and cooperation agreements between nations, however, is moving antitrust enforcement efforts closer to reaching De Beers.<sup>336</sup> The use of such agreements may prove to be the answer to decades of unsuccessful efforts to prosecute De Beers under U.S. antitrust law.<sup>337</sup>

Given De Beers's 2004 antitrust guilty plea in the United States, the tradition of anticompetitive practices and cartel activity within the diamond industry may be nearing a conclusion. Despite public statements that it has "no plans to change the way [it does] business,"<sup>338</sup> De Beers already has been forced to make public strides toward legitimacy.<sup>339</sup> The company declared its support for the Kimberly Process, which is "an attempt to remove diamonds from the market that are used to fund bloody conflicts in Africa," and is working to clean up its tarnished image with consumers worldwide.<sup>340</sup> Its recent guilty plea in the United States may prove to be its biggest stride yet toward legitimate business operations. However, allowing a corporation with a long history of anticompetitive practices and broken promises to reclaim a direct presence in the U.S. economy carries certain risk. The effects that a fully-functioning De Beers will have on U.S. consumers have yet to be seen. While the company professes to be turning over a new leaf, its efforts may merely be a smoke screen for a continued future of anticompetitive business practices in the diamond industry.

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334. See generally INTERNATIONAL CARTELS, *supra* note 10, at 77; Leslie, *supra* note 19, at 637.

335. See *supra* notes 306-07.

336. See *supra* notes 308-12.

337. See Kukovec, *supra* note 7, at 38.

338. Pressler, *supra* note 11, at E1.

339 See Teather, *supra* note 92, at 19.

340. *Id.*