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The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust

Thomas J. Schoenbaum

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The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust

Thomas J. Schoenbaum†

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† Thomas J. Schoenbaum is Dean and Virginia Rusk Professor of International Law, and Executive Director at the Dean Rusk Center for International and Comparative Law, University of Georgia School of Law.

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I. Introduction

On December 15, 1993, the Uruguay Round of Multilateral Trade Negotiations was concluded successfully after seven years of difficult negotiations. The Final Act¹ creates a World Trade Organization (WTO) and comprehensively addresses a wide variety of policy issues affecting international trade. One topic left unaddressed, however, is the increasingly important relationship between international trade and antitrust goals and policies. In a bygone age when the United States economy was largely autonomous, government-enforced competition policy followed the dictates of the antitrust laws, chiefly the Sherman Act,² the Clayton Act,³ the Federal Trade Commission Act,⁴ and the Robinson-Patman Act,⁵ all enacted during populist periods of American history in which there was widespread abuse of monopoly power and distrust of "big" business. These antitrust laws are enforced by two federal agencies: the Federal Trade Commission and the U.S. Department of Justice. The result of their enforcement, consistent with their underlying jurisprudence, is an important national policy: the promotion of competition in order to ensure consumer welfare and allocative efficiency.⁶

During the past two decades, however, these traditional antitrust goals have been overshadowed by other concerns. First, the antitrust

¹ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1.

² 15 U.S.C. §§ 1-7 (1988). Section 1 of the Sherman Act, 15 U.S.C. § 1, broadly prohibits contracts, combinations, and conspiracies in restraint of trade. A non-exclusive list includes price fixing, concerted refusals to deal, and tying arrangements. Section 2 of the Sherman Act, 15 U.S.C. § 2, proscribes monopolization and the attempt to monopolize trade.

³ 15 U.S.C. §§ 12-25 (1988). Section 7 of the Clayton Act, 15 U.S.C. § 18, provides enforcement against incipient monopolization.

⁴ 15 U.S.C. §§ 41-57c (1988). Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, prohibits "unfair methods of competition," including conduct that threatens to ripen into an antitrust violation.

⁵ 15 U.S.C. §§ 13, 13a-c, 21 (1988). The Robinson-Patman Act prohibits price discrimination in certain circumstances. *Id.*

⁶ See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 98-133 (1978). In his extensive analysis, Bork concludes that the antitrust laws protect consumer welfare through concern with allocative efficiency by ensuring that resources are put to their best use; he finds no place for considering distributive issues in antitrust. Robert H. Lande has argued, however, that the original concern of the antitrust laws was with distributive issues—the transfer of wealth from consumers to large firms exercising monopoly power. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 67 (1982). See also Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979).

theories of the "Chicago School"⁷ dominate both the courts and enforcement authorities.⁸ These theories focus on encouraging business firms to achieve increased output and efficiency by providing a greater tolerance than that allowed by traditional theories for vertical restraints and horizontal combinations.⁹ Second, the international trade laws—in marked contrast to the antitrust laws—have been enforced with increasing zeal. The international trade laws introduce a new competition policy that emphasizes the ability of United States business to compete with foreign-based firms. Thus, U.S. industries are not only protected at home against unfair or even merely onerous foreign competition; they also are assisted in opening new export markets, particularly in countries with "unfair" trade policies and closed markets.

In recent years, this protectionist competition policy has steadily gained ground. The popular press has taken up the cause by attributing layoffs and recession to low-wage (and some high-wage) foreign competition and closed foreign markets. Devotees of the "new competitiveness" call for governmental remedies: stricter trade laws, relaxation of traditional antitrust standards, and "managed trade."

However laudable the goal of increasing the international competitiveness of U.S. industry, it is apparent that pursuit of this goal sometimes engenders conflicts with traditional antitrust policies. Analytically, there are four problem areas with respect to the interrelationship between the international trade laws and antitrust: (1) Are there inherent conflicts between the policies of the international trade laws and antitrust? If so, how can these conflicts be resolved? (2) Are the antitrust laws an impediment to the international competitiveness of U.S. industries and companies? Should they be weakened? (3) Is there reason to harmonize national antitrust laws and enforcement? (4) Should the antitrust laws be enlisted as a tool to open foreign markets and increase the international competitiveness of U.S. industry?

These four issues will be addressed in turn. The concluding section will propose a framework for reconciling trade and antitrust policy and offer support for an international competition code within the General Agreement on Tariffs and Trade (GATT).¹⁰

⁷ For a discussion of the conservative-oriented Chicago School and its principal rivals, see Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917 (1987), and Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987).

⁸ See, e.g., *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988); *Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 433 U.S. 36 (1977).

⁹ See generally Fox, *supra* note 7.

¹⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

II. Policy Conflicts Between Antitrust and International Trade Laws

A. *The Different Policy Goals*

Competition laws, e.g., the antitrust laws, and international trade laws have different policy goals. The purpose of competition policy is to ensure the functioning of the free market and to protect consumers against market-distorting restraints and practices. Industries and firms are thus compelled to compete for the consumer's favor, which ensures the availability of the best choice of goods and services at optimum prices.¹¹

In contrast, the international trade laws are aimed at securing the competitive position of U.S. industries, firms, and workers in both domestic and international commerce. Some of the international trade laws protect against not only unfair import competition, but also fairly traded imports that may cause serious injury. Other international trade laws seek to foster an open world trading system, i.e., a world open to U.S. exports and investment.¹² It is not surprising that the widely different purposes of the international trade laws and the antitrust laws sometimes come into conflict.

B. *The Trade Relief Laws*

1. *The Antidumping Laws*

Dumping occurs when a firm is found to sell its product at a lower price in an export market than in its home market. Under current law such price discrimination is virtually illegal *per se*. There are two antidumping statutes under U.S. law. The Antidumping Act of 1916¹³ creates a private right of action against dumping that occurs with the intent of destroying or injuring American industry or restraining or monopolizing trade or commerce in the United States. Because of the difficulty of proving this requirement, this Act is moribund.¹⁴

¹¹ See, for example, the classic statement of the United States Supreme Court in *Northwestern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958):

[T]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive prices will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress

¹² See generally Symposium, *The Interface of Trade/Competition Law & Policy*, 56 ANTITRUST L.J. 397 (1987).

¹³ 15 U.S.C. § 72 (1988).

¹⁴ For discussion on this point, see Kermit W. Almstedt, *International Price Discrimination in the 1916 Dumping Act—Are Amendments in Order?*, 13 LAW & POL'Y INT'L BUS. 747 (1981). Representative Richard Gephardt and others in Congress have proposed to amend the 1916 Act to create a rebuttable presumption that foreign firms which are subject to antidumping findings have acted with the intent of destroying or injuring a U.S. industry. These proposals have failed to pass. See Gilbert B. Kaplan & Susan H. Kuhbach, *The Causes of Unfair Trade: Trade Law Enforcers' Perspective*, 56 ANTITRUST L.J. 445 (1987).

The second antidumping law, first passed in 1921 and reenacted in the Trade Agreements Act of 1979,¹⁵ is very much alive. This law, which is administered jointly by the Department of Commerce and the International Trade Commission (ITC), permits a finding of dumping to be based upon sales of foreign merchandise in the United States at "less than fair value" if these sales are causing or threatening to cause "material injury" to the U.S. industry producing a "like product."¹⁶

The first prong of this test—sales at less than fair value (LTFV)—is essentially a price discrimination determination: An LTFV sale exists if the home market price exceeds the U.S. price.¹⁷ The second re-

¹⁵ 19 U.S.C. § 1673 (1988). The Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193 (codified at 19 U.S.C. § 1671-1677k (1988)), essentially replaced the Antidumping Act of 1921, amending Title VII of the Tariff Act of 1930. The Trade Agreement Act was passed to bring the U.S. antidumping law into conformity with the GATT requirements of the Tokyo Round; however, the changes in the law were primarily procedural.

¹⁶ 19 U.S.C. § 1673 (1988). As an alternative to showing material injury or the threat of material injury, the injury requirement of dumping can be satisfied by showing that the establishment of an industry in the United States is materially retarded by reason of imports. 19 U.S.C. § 1673(2)(B) (1988).

¹⁷ 19 U.S.C. § 1677b(a)(1)(A) (1988). The test for dumping focuses upon price differences or discrimination between different markets. In effect, it is unfair to charge different prices for the same goods. However, unlike the domestic U.S. price discrimination statute, the Robinson-Patman Act, which compares differences in actual selling prices to different customers in the United States, 15 U.S.C. § 13(a), the dumping price discrimination focuses on comparing the ex factory netback prices in the two markets. Therefore, the prices in each market must be adjusted by accounting for container, packaging, and transport costs, import duties, taxes, and a variety of other costs that may be different in each market. 19 U.S.C. § 1677a(d)-(e) (1988); International Trade Administration Antidumping Duties, 19 C.F.R. § 353.41-42 (1992). In a dumping case, the U.S. Department of Commerce will investigate whether there have been sales at "less than fair value" by comparing the "U.S. price" with "fair value." Fair value or "foreign market value" is calculated based on a weighted average of home market prices, while the U.S. price is determined on a transaction-by-transaction basis. 19 U.S.C. § 1677a(a) (1988). Under current law, however, the methodology of calculating fair value is skewed so as to enhance the possibility of a finding of dumping. These methodological defects in the process are as follows:

First, when there is an absence of adequate verifiable sales in the home market or where home market sales are below cost for an extended period of time, the Commerce Department bases foreign market value (fair value) on either the price at which the merchandise is sold or offered for sale to third countries or on the "constructed value" of the merchandise. 19 U.S.C. § 1677b(a)(1)(B), (a)(2) (1988). Both result in highly arbitrary measures. Picking a third country as a surrogate obviously presents difficulty. The criteria used are similarity of product to that exported to the United States, value of sales, and similarity of market in terms of organization and development of that with the United States. 19 C.F.R. § 353.49(b) (1993). "Constructed value" also is highly artificial. Constructed value consists of direct expenses plus general expenses (overhead), which must be at least ten percent direct expenses; and a profit equal to not less than eight percent of the sum of direct and general expenses as well as the cost of packing. 19 U.S.C. § 1677b(a)(2) (1988). There is a presumptive rule of eighteen percent for general expenses and profit, which tends to raise the fair value price to increase the likelihood of a finding of dumping as well as increase the resulting dumping margin.

Second, where more than ten percent of total sales in the home market are below cost sales (based on fully allocated costs), the Commerce Department will disregard the below cost sales in calculating fair value. 19 U.S.C. § 1677b(c) (1988); see 19 C.F.R. § 353.51 (1993). The effect of excluding low cost sales is to increase fair value, thus enhancing the possibility of a finding of dumping as well as the dumping margin.

quirement, "material injury," is defined as "harm which is not inconsequential, immaterial, or unimportant."¹⁸ For the purpose of making this finding, the ITC, which is given this task, can consider a wide range of factors such as "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity," "factors affecting domestic prices," "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to reuse capital, and investment," and "actual and potential negative effects on the existing development and production efforts of the domestic industry."¹⁹ The causation requirement is not a rigorous one; the injury can be caused "by reason of" the imports if they "contribut[e] to the [the] overall injury to [a domestic] industry."²⁰

Viewed from the perspective of economics and antitrust analysis, the antidumping laws have numerous shortcomings. While the antitrust laws focus on injury to competition, the antidumping acts focus on injury to U.S. producers. It is not often the case that injuring U.S. producers injures competition.

First, if the antidumping laws were aimed at predatory price discrimination, i.e., selling below a reasonable measure of cost to drive out competitors and to achieve market control, then the antitrust laws would join in condemnation. Both the Robinson-Patman Act and section 2 of the Sherman Act outlaw predatory pricing;²¹ however, except for the virtually irrelevant 1916 Antidumping Act,²² a finding of dump-

Third, Department of Commerce regulations limit circumstances of sale adjustments in calculating fair value to that amount claimed on U.S. sales. 19 C.F.R. § 353.56(b) (1993). This arbitrary cap tends to increase the home market ex factory price thereby increasing the likelihood of dumping and the dumping margin.

Fourth, in determining the existence of dumping or the dumping margin, the Department of Commerce compares a weighted average of home market or third country prices with the U.S. price on a transaction-by-transaction basis. In making this comparison, the department ignores "negative margins," i.e., instances in which the U.S. price *exceeds* foreign market value. 19 U.S.C. § 1677 b(c) (1988).

¹⁸ 19 U.S.C. § 1677(7)(A) (1988).

¹⁹ 19 U.S.C. § 1677(7)(A)-(C) (1988).

²⁰ The legislative history makes clear that the causation requirement is not defining a principal, substantial, or even significant cause, but only a contributory cause. S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 443.

²¹ Section 2 of the Sherman Act penalizes "every person who shall monopolize or attempt to monopolize." 15 U.S.C. § 2 (1988). In attempted monopolization cases, a creditor's below cost pricing is illegal. *Swift and Co. v. United States*, 196 U.S. 375, 396 (1905); *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369 (9th Cir. 1989). In monopolization cases, below cost pricing is generally conclusive of predatory pricing. *United States v. Prinnell Corp.*, 384 U.S. 563, 570-71 (1966). The Clayton Act, as amended by the Robinson-Patman Act, also reaches predatory pricing: A plaintiff may challenge predatory pricing under the Robinson-Patman Act by showing that one of the two prices charged in a price discrimination case was below cost. 15 U.S.C. § 13 (1988). Most predatory pricing cases have been brought under the Sherman Act. *See, e.g., Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, (2d Cir. 1981); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981); *William Inglis and Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981); *Chillicothe Sand and Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980).

²² *See supra* notes 13-14 and accompanying text.

ing is independent of any showing of predatory intent.²³ It may be further objected that the showing of a specific predatory intent is too high a standard of proof (witness the moribund nature of the 1916 Act), and the current antidumping regime is necessary to nip such potential conduct in the bud. However, if this is the purpose of the antidumping statute, it is terribly over-inclusive. Dumping can be found solely on the basis of price discrimination, even if both prices are above average total cost.²⁴ In contrast, under the competition laws, prices above average total cost are legal per se, and a manufacturer's prices are not suspect of being predatory unless they are below the company's average variable or marginal costs.²⁵ Furthermore, the antidumping laws are devoid of the standard Robinson-Patman Act defenses to price discrimination: "acting in good faith to meet an equally lower price of a competitor"²⁶ and selling under "changing conditions affecting the market or marketability of the goods concerned."²⁷

Second, the key concept of "material injury" to U.S. producers is vague and imprecise. The definition of injury as "harm which is not

²³ For example, compare the statutory language of the Antidumping Act of 1916, 15 U.S.C. § 72 (1988), with the Trade Agreements Act of 1979, 19 U.S.C. § 1673 (1988).

²⁴ In a dumping case the inquiry is whether a foreign producer is selling at less than fair value. Sales at "less than fair value" exist when a price differential can be found between the foreign producer's home market and the U.S. market; when a price differential exists between the foreign producer's prices and third country markets and the U.S. market; or when sales in the United States occur below a constructed cost of production. 19 U.S.C. § 1677b(a)(1)-(2) (1988). Even in the third case where the foreign producer's costs are an issue in a dumping case, the inquiry is whether the sales are below fully allocated costs, i.e., total cost or average total cost calculated as the sum of fixed and variable costs divided by the number of units produced.

²⁵ See *Henry v. Chloride Inc.*, 809 F.2d 1334, 1346 (8th Cir. 1987) ("Prices above average total cost are legal per se . . . average variable cost is a marker of rebuttable presumptions, with the plaintiff holding the burden above and the defendant below."); see generally Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Daniel J. Gifford, *Rethinking the Relationship Between Antidumping and Antitrust Laws*, 6 AM. U. J. INT'L L. & POL'Y 277 (1991).

²⁶ 15 U.S.C. § 13(b) (1988). Therefore, a foreign company accused of dumping in the United States market cannot defend on the basis that its low prices were necessary to meet the competition. See 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 1862, at 1718, Inv. No. 731-TA-270 (Apr. 1986) (final admin. review) (finding material injury in a dumping case although the price cutting was initiated by the U.S. producer).

²⁷ 15 U.S.C. § 13(a). This defense permits sales at bargain prices to remove obsolete inventory and to respond to changing market conditions. See, e.g., *Valley Plymouth v. Studebaker-Packard Corp.*, 219 F. Supp. 608 (S.D. Cal. 1953). The foreign producer in a dumping case, therefore, cannot defend its price cutting on the basis of response to changing conditions. This highlights the most significant difference between the Robinson-Patman Act and the antidumping provisions: In a Robinson-Patman Act case the fundamental inquiry is whether the producer charged the same price to customers *at the same time*. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407 (7th Cir. 1989) ("No one supposes that a seller must charge the same price on contracts signed at different times, or on long-term contracts and spot sales."). A dumping case is fundamentally different: Ex factory prices on individual U.S. transactions are typically compared to a six-month weighted average of the ex factory prices in home market or third-country sales. This contravenes the Robinson-Patman Act rule that a seller may charge different prices even to the same customer at different times.

inconsequential, immaterial, or unimportant" and the fact that imports need be only a contributory cause of the harm mean that the necessary proof is not rigorous. In practice, material injury determinations are made on the basis of declining production figures, employment, and profits, while causation is shown by evidence of under selling and lost sales.²⁸ Antitrust analysis would be much more rigorous than an antidumping analysis in defining the affected domestic industry and products;²⁹ the key question would be whether the lost profits to "materially injured" U.S. firms are monopoly rents because of the oligopolistic or monopolistic structure of the affected industry. If so, the dumping will actually improve competition by diminishing or eliminating monopoly rents, and no antidumping duties should be imposed. Antidumping duties are warranted, therefore, only to the extent the injury corresponds with the losses to a *competitive* industry.³⁰

²⁸ See, e.g., High Capacity Pagers from Japan, USITC Pub. 1410, Inv. No. 731-TA-102 (Oct. 1983) (final admin. review), 5 I.T.R.D. (BNA) 1721 (1983). In an antidumping case, the International Trade Commission does not require a fine-tuned showing of a cause and effect relationship. Factors other than dumping may, in fact, cause injury to the domestic industry, such as quality problems, labor difficulties, and supply problems. Nevertheless, the ITC must not weigh these various causes against each other, and even though other factors have contributed to injuring the domestic industry, a finding may be made that the dumping is nevertheless a cause of material injury. See, e.g., Oil Country Tubular Goods from Israel, USITC Pub. 1840, Inv. Nos. 701-TA-217 and 731-TA-318 (Apr. 1986) (prelim. review).

²⁹ In an antidumping case, the investigation of injury requires the identification of a domestic U.S. industry that may have suffered material injury. Industry is defined as the domestic producer of a like product. 19 U.S.C. § 1677(4)(A) (1993). In antidumping cases there are no strict tests for determining "like products." In some cases, like products, may include substantially similar articles such as components or sub-assemblies. See, e.g., Cellular Mobile Telephones and Sub-assemblies from Japan, U.S. ITA, final determination, 50 Fed. Reg. 45447 (1985); High Capacity Pagers from Japan, USITC Pub. 1410, Inv. No. 731-TA-102 (Oct. 1983) (final admin. review), 5 I.T.R.D. (BNA) 1721 (1983). In other cases the term like product is very narrowly defined. See, e.g., Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (final admin. review), 7 I.T.R.D. (BNA) 1969, 1970 (June 1985) (defining like product as red raspberries packed in bulk containers for sale to remanufacturers, excluding all other types of fresh market and retail packed red raspberries). Because the U.S. domestic industry is defined in terms of like products, there is very little precision in defining such an industry. See Diane P. Wood, "Unfair" Trade Injury: A Competition Based Approach, 41 STAN. L. REV. 1153, 1175-79 (1989); N. David Palmeter, *Injury Determinations in Antidumping and Countervailing Duty Cases—A Commentary on U.S. Practice*, 21 J. WORLD TRADE L., Feb. 1987, at 7. The imprecision of the definition of "like product" and "domestic industry" in a dumping case contrast sharply with the precision of an inquiry under an antitrust case where such considerations as cross elasticity of demand will be carefully analyzed in determining like products and in defining the industry producing the competitive products. Antitrust cases carefully consider the market power collective as well as independent of the firms involved. See Wood, *supra*, at 1178-79.

³⁰ The economic rationale for imposing antidumping duties is controversial. See Presley L. Warner, *Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust*, 23 LAW AND POL'Y INT'L BUS. 791 (1992); Phedon Nicolaidis, *The Competition Effects of Dumping*, 24 J. WORLD TRADE L., Oct. 1990, at 115; Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEX. INT'L L. J. 265 (1987); John J. Barcelo, *The Antidumping Law: Repeal It or Revise It*, 1 MICH. Y.B. INT'L LEGAL STUD. 53 (1979). There must be a causal link between sales at less than fair value (LTFV) and the injury, but LTFV sales need not be the sole or even the most important cause of injury. *Fundacao Tupy S.A. v. United States*, 859 F.2d 915 (Fed. Cir. 1988).

There appear to be two economic reasons for condemning the practice of dumping.

Even here, strict economic analysis would provide a qualification, since dumping into a competitive industry would provide purchasers of the dumped products with an increase in wealth. In a dumping situation, the second-line injury would occur in the dumper's *home market* where barriers to arbitrage prevent the re-import of the lower-priced goods so that prices are high. Thus, the deadweight loss of dumping is in the

First, dumping may be, in fact, predatory pricing, which is the practice of selling goods below an economically reasonable measure of cost in order to drive out a rival and ultimately control the market. However, there are two problems in using antidumping duties to control predatory pricing. First, most antitrust commentators agree that predatory pricing in the U.S. market is quite rare and difficult to carry out. Predatory pricing requires not only a campaign of below-cost sales, to eliminate target competitors, but also the particular industry in question must have barriers to entry high enough that new firms will not come in to replace the target firms being eliminated. Even the Supreme Court of the United States has expressed skepticism that predatory pricing can be carried out, and demanded a high degree of concrete evidence to overcome a motion for summary judgment for the defense. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Moreover, if the antidumping laws are intended to remedy predatory pricing, they overlap with both § 2 of the Sherman Act and the Robinson-Patman Act. When compared with those two antitrust statutes, the antidumping laws are extremely vague and imprecise. The Sherman Act and Robinson-Patman Act have quite precise standards for recovery for predatory pricing. First, a plaintiff seeking to establish competitive injury from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. See, e.g., *Brook Group v. Brown & Williamson Tobacco*, 113 S. Ct. 2578 (1993). In most cases, this will be not total cost but average variable cost. The second prerequisite is a demonstration that the competitor had a reasonable prospect or a dangerous probability of recouping its investment in below-cost prices. *Id.* These standards conflict with the antidumping clauses which provide relief in the form of imposition of antidumping duties for below cost pricing alone. Yet, under the antitrust statutes, "evidence of below cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition." *Id.* at 2589. A vivid illustration of the difference between the antidumping statutes and antitrust laws is the fact that U.S. color television manufacturers sued the Japanese color television industry for predatory pricing and lost in the *Matsushita Electric* case; however, when the same industry filed a petition against the Japanese industry under the U.S. antidumping law, they won. *Color Picture Tubes from Japan*, USITC Pub. 367, Inv. No. 731-TA-367-370 (July 1971) (final admin. review). Thus, the antidumping laws are a blunt instrument for combatting predatory pricing.

There is, however, a second practice that in economic terms merits the application of the antidumping laws. The motivation for persistent dumping may not be predatory pricing but instead, strategic dumping to gain market share. Indeed, many companies emphasize market share as a long-term objective rather than short-term profitability. Dumping to gain market share is particularly a probable motive where a foreign producer enjoys monopoly rents in its home market and can take advantage of these monopoly rents as well as cost savings for increased production to finance its dumping practices abroad. This form of persistent dumping will be possible, however, only where the home and foreign markets are economically segregated. There also must be low elasticity of demand for the firm's product in the home market or at least sufficient market power and little possibility of competition. In the foreign market, there must be high elasticity of demand so that the firm will set lower prices for foreign sales. It is evident that dumping to increase market share distorts trade. Although consumers may be better off, producers who lose market share are worse off. See Steven F. Benz, *Low Cost Sales and the Buying of Market Share*, 42 STAN. L. REV. 695 (1990). Nevertheless, there are two problems with respect to applying the antidumping laws as a remedy to correct below cost sales for the purpose of buying market share. First, the antidumping law is over-inclusive because it remedies price discrimination that does not, in fact, diminish competition. Second, even as a remedy for buying market share, antidumping duties are only a second-best solution. The best solution would be to open the foreign producers home market to eliminate the monopoly profits and the economic segregation of the two markets.

home market, borne by the disfavored customers. This would indicate that even dumping that distorts competition in the export market should not be impeded as long as the benefits from the cheaper goods are greater than the adjustment costs for injured industries and workers.

This analysis would appear to lead to the conclusion that the antidumping laws should be revised to conform to competition law principles. This solution has been proposed by several scholars,³¹ but it is politically unrealistic. In fact, the antidumping laws function as a safeguard mechanism, frequently protecting non-competitive domestic firms from international competition.³² Because this is now the main purpose of the antidumping laws, the process of imposing antidumping duties should be reformed in two principal ways: (1) the imposition of relief should be discretionary and should be determined by the President, who can act on a political basis; and (2) the ITC should be required to make a competition analysis of the dumping in addition to the material injury determination in order to facilitate the President's decision.

2. *The Countervailing Duty Laws*

As with the antidumping laws, there are two countervailing duty laws designed to nullify foreign subsidies. The older law, recodified in the Tariff Act of 1930, authorized a countervailing duty if another country had paid a "bounty or a grant upon the manufacture or production or export" of any product.³³ This extremely broad formulation gained even more force because there was no necessity to find injury to a competing U.S. industry.

In 1979, however, the United States significantly amended its countervailing duty laws to conform to the GATT Subsidies Code.³⁴ For countries accepting the Subsidies Code there is now a material injury requirement: no countervailing duty may be imposed on goods from these countries unless the Department of Commerce concludes that the product is benefitting from a bounty or grant and the ITC determines that an industry in the United States is materially injured, threatened with material injury, or the establishment of an industry has been materially retarded by imports or sales for importation of the

³¹ See, e.g., Wood, *supra* note 29; Ronald A. Cass, *Price Discrimination and Predation Analysis in Antitrust and International Trade: A Comment*, 61 CINCINNATI L. REV. 877 (1993).

³² See JAGDISH N. BHAGWATI, PROTECTIONISM 48-52 (1988).

³³ Tariff Act of 1930 § 303, 19 U.S.C. § 1303 (1988).

³⁴ Trade Agreements Act of 1979, Title I, Pub. L. No. 96-39, 93 Stat. 144, 151 (codified at 19 U.S.C. § 1671(a) (1988)), Implementing the GATT Subsidies Code, Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, GATT BISD Supp. (No. 26), at 56 (1980).

subsidized goods.³⁵ Two kinds of subsidies³⁶ are countervailable: export subsidies and production subsidies that are not generally available, but are provided to a specific enterprise or industry.³⁷

The economic effect of a subsidy is to shift the total supply curve. Depending on the relative elasticities of demand, this results in a fall in price in benefitted markets and a corresponding increase in consumption.³⁸ The effect on competition is similar to dumping; the subsidy may have a beneficial or a negative effect depending on the structure of the market. However, the "material injury" standard³⁹ applied in subsidy cases does not distinguish between an injury that restores competition and an injury that diminishes it. Furthermore, in countervailing a subsidy, the surcharge duty is based upon the *ad valorem* cash flow benefit received by producers.⁴⁰ Although this is equivalent to the economic effect of a targeted export subsidy, it is greater than necessary to counter a domestic production subsidy, upstream or input subsidies, or even a general export subsidy because the effect of these subsidies is spread over the entire supply curve of the subsidized product.⁴¹

Thus, a countervailing duty will almost always increase the price of a product above what is optimal for competitive purposes; such duties are frequently at odds with competition policies.

3. Section 337 of the Tariff Act of 1930

a. Background of Section 337

Section 337 of the Tariff Act of 1930⁴² is another trade law that restricts imports on the ground of unfairness. This statute prohibits:

[u]nfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale . . . the effect . . . of which is to destroy or substantially injure an industry . . . in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.⁴³

In addition, section 337 prohibits the importation (or sale for importation) into the United States of goods that infringe upon valid U.S. intellectual property rights. There is no need to show injury be-

³⁵ 19 U.S.C. § 1671(a)(2) (1988).

³⁶ 19 U.S.C. § 1677(5) (1988). The term subsidy is statutorily equivalent to bounty or grant.

³⁷ 19 U.S.C. § 1677(5)(B) (1988).

³⁸ Joseph F. Francois, *Countervailing the Effects of Subsidies: An Economic Analysis*, 26 J. WORLD TRADE L., Feb. 1992, at 5; Erna van Duren, *An Economic Analysis of Alternative Countervailing Duties*, 25 J. WORLD TRADE L., Feb. 1991, at 91.

³⁹ The material injury standard applicable to subsidies cases is identical to the statutory language regarding material injury in dumping cases. See Tariff Act of 1930 §§ 701(a)(2), 731(2), 771(7), 19 U.S.C. §§ 1671(a)(2), 1673(2), 1677(7) (1988).

⁴⁰ 19 U.S.C. § 1671(a)(2) (1988).

⁴¹ See van Duren, *supra* note 38, at 96-97.

⁴² 19 U.S.C. § 1337(a) (1988).

⁴³ *Id.*

cause it is conclusively presumed. A section 337 action may be filed by a private complainant or on the ITC's own initiative.⁴⁴ The investigation undertaken by the ITC culminates in a trial-type hearing before an Administrative Law Judge. Relief can be speedy and effective: an order excluding the offending articles from the U.S. market.⁴⁵ The President has the option to disapprove an order for section 337 relief within sixty days,⁴⁶ but this power is sparingly used.⁴⁷

In evaluating section 337, it appears that substantively this statute simply duplicates prohibitions already contained in other laws. The antitrust prohibitions would be available under the Sherman Act sections 1 and 2 and the Federal Trade Commission Act. Indeed, the language of section 337 mirrors section 5 of the FTC Act.⁴⁸ The intellectual property protection provisions of section 337 also do not establish any new substantive rights. Violations of statutory intellectual property rights are simply made an unfair trade practice. Apart from section 337, such violations could be the subject of an infringement action in U.S. district court.⁴⁹

Procedurally, however, section 337 has enormous advantages over district court cases. First, the jurisdiction of the ITC under section 337 is not based upon in personam principles, but upon in rem jurisdiction over the imported product.⁵⁰ This eliminates the difficulties of extraterritorial jurisdiction over foreign defendants that might arise in U.S. district court cases. Second, the ITC proceeding is also a public investigation with the full power of the U.S. government behind it. A foreign defendant faced with exclusion of its products from the U.S. market cannot easily avoid prompt disclosure of information and discovery of documents as it may in a district court proceeding.⁵¹ Third, the short statutory time limits for a section 337 proceeding, twelve months which can be extended to eighteen months in complex cases,⁵² is much more expeditious than district court cases. Fourth, the remedy in a section 337 case—an exclusion order, excluding the goods from entry into the United States, as well as a cease and desist order⁵³—is often more ef-

⁴⁴ 19 U.S.C. § 1337(b) (1988).

⁴⁵ 19 U.S.C. § 1337(d) (1988).

⁴⁶ 19 U.S.C. § 1337(g) (1988).

⁴⁷ For an account of section 337 procedure, see Martin Nettesheim, *Sec. 337 of the Trade Act of 1930: Unfair Methods of Competition*, in U.S. TRADE BARRIERS: A LEGAL ANALYSIS 325 (Eberhard Grabitz & Armin von Bogdandy eds., 1991).

⁴⁸ 15 U.S.C. § 45(a) (1988).

⁴⁹ See generally Grant E. Finlayson, *Rethinking the Overlapping Jurisdictions of Section 337 and the U.S. Courts*, 21 J. WORLD TRADE L., Apr. 1987, at 41.

⁵⁰ See 19 U.S.C. § 1337(a)(1)(B) (1988).

⁵¹ See generally William L. Lafuze & Patricia F. Stanford, *An Overview of Section 337 of the Tariff Act of 1930: A Primer for Practice Before the International Trade Commission*, 25 J. MARSHALL L. REV. 459 (1992).

⁵² 19 U.S.C. § 1337(b)(1) (1988).

⁵³ 19 U.S.C. § 1337(d)-(f) (1988).

fective than the injunctive relief available in district court.⁵⁴ Thus, the procedural and remedial characteristics of section 337 burdens import competition.

In 1989, a GATT Panel confirmed that section 337 burdened import competition; it found that section 337 violated the national treatment obligation of the GATT, Article III:4.⁵⁵ The Panel concluded that section 337 affords less favorable treatment to imported goods because (1) they must contend with two forums, the ITC and district court, to adjudicate violations whereas domestic firms can be sued only in district court;⁵⁶ (2) the time limits unique to section 337 discriminate against importers;⁵⁷ and (3) the available remedies in section 337 are less favorable to imported products.⁵⁸ The United States has accepted this Panel Decision, but section 337 has not yet been reformed.

b. Should Section 337 Be Changed? Is It Needed?

The antitrust cause of action provided under section 337 is superfluous and probably can be eliminated. Antitrust practitioners and private litigants do not find section 337 very useful because there is no provision for damages, and the President can make an essentially unreviewable political decision to deny section 337 relief even where it is granted by the ITC.⁵⁹ As far as the U.S. government is concerned, section 337 is not needed because it duplicates the power to sanction foreign unfair acts under section 301 of the Trade Act of 1974.⁶⁰

On the other hand, the intellectual property aspects of section 337 merit retention. Although certain aspects of the U.S. intellectual property laws, for example, the first-to-invent system of patent registra-

⁵⁴ An exclusion order is automatically enforceable by the U.S. Customs Service.

⁵⁵ *United States-Section 337 of the Tariff Act of 1930: Report by the Panel*, GATT Doc. L/6439, at 47 (Nov. 1989).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ An example of this is the *Pipe and Tube* case in 1978, which involved a complaint that steel pipe and tube products were being imported from Japan and sold at below cost with the intent to restrain or monopolize trade and commerce in the United States. The ITC recommended relief, but President Carter disapproved this determination on the ground that the proposed order would simply result in shifting the current level of imports among existing foreign suppliers and would have no benefit either to promote competition for the U.S. pipe and tube industry. See *Certain Welded Stainless Steel Pipe and Tube*, USITC Pub. 863, Inv. No. 337-TA-29 (Dec. 1978); 43 Fed. Reg. 70,789 (1978).

⁶⁰ See *infra* notes 81-85 and accompanying text.

tion⁶¹ and the restrictions on "gray market" goods,⁶² are arguably anticompetitive, the United States has an important stake in combating the unique problems of piracy of intellectual property rights and disregard of recognized intellectual property rights by many foreign companies and governments. The GATT, Article XX(d), recognizes a limited exception to the national treatment requirements of Article III:2 if the measures are necessary to secure compliance with substantive intellectual property laws. Thus, section 337 should be retained to allow action against imports infringing upon U.S. intellectual property rights, but should be reformed to comply with GATT norms.⁶³ U.S. intellectual property laws should be reformed to eliminate anticompetitive aspects by allowing parallel imports of gray market goods, and a first-to-file system of registration should be instituted for patent rights to conform to international practice.

4. *The Escape Clause*

Section 201 of the Trade Act of 1974⁶⁴ is a safeguard measure or "escape clause" authorized by Article XIX of the GATT that provides a temporary remedy for a domestic industry that is suffering actual or threatened serious injury due to import competition. The purpose of this law is to give the industry (and the workers involved) a grace period during which it can adjust to freer international competition.⁶⁵

⁶¹ Although the United States has justifiable objections with respect to the inadequacy of intellectual property protection in many countries, the U.S. "first-to-invent" filing system for patents is substantially different from the "first-to-file" procedure that is virtually universal outside of the United States. The World Intellectual Property Organization (WIPO) has recommended a number of changes in the U.S. patent law in order to harmonize it with international practice. See, e.g., Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993); Vito J. DeBari, *International Harmonization of Patent Law: A Proposed Solution to the United States' First-to-File Debate*, 16 FORDHAM INT'L L.J. 687 (1993).

⁶² Gray market goods are trademarked goods purchased abroad and sold in competition with goods distributed by the domestic registered trademark holder. A more polite term is "parallel importing." See generally Andrew Ruff, *Releasing the Grays: In Support of Legalizing Parallel Imports*, 11 UCLA PAC. BASIN L.J. 119 (1992). The United States Supreme Court in *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), defined three parallel import scenarios: first, where the distributor is totally independent of the foreign manufacturer and may be fully vested of the right to the local trademark; second, where the foreign manufacturer and the distributor may be affiliated either through common ownership of a local trademark or because of a corporate relationship; and third, where the domestic mark holder may authorize the foreign manufacturer to use the trademark. In the *K-Mart* case, the Supreme Court held that imports of gray market goods should be restrained in the first and third scenarios but should be allowed under the second scenario. *K-Mart*, 486 U.S. at 294. The United States thus restrains parallel imports to a greater extent than its principal trading partners, Canada, the EU, and Japan. See Ruff, *supra*, at 123-29.

⁶³ See generally Daniel J. Plaine et al., *Protection of Competitors or Protection of Competition: Section 337 and the Antitrust Laws*, 56 ANTITRUST L.J. 519 (1987).

⁶⁴ 19 U.S.C. § 2251 (1988).

⁶⁵ See S. Rep. No. 1298, 93d Cong., 2d Sess. 123 (1974), reprinted in 1974 U.S.C.C.A.N. 7263. Although § 201 is the U.S. version of the safeguard clause authorized by Article XIX of the GATT, there are several differences between § 201 and Article XIX. First, GATT Article XIX contains the requirement that the increase in imports results from "unforeseen develop-

Section 201 is usually triggered by the filing of a petition by a representative of the affected domestic industry,⁶⁶ but an investigation can be initiated also by the U.S. government.⁶⁷ Section 201 investigations are carried out by the ITC.⁶⁸ The ITC must first identify the domestic industry that is potentially affected, i.e., one that is "producing an article like or directly competitive" with an imported article.⁶⁹ Second, the ITC determines whether an article is being imported in "increased quantities";⁷⁰ this can be either absolutely or relatively compared to domestic production.⁷¹ Third, as a prerequisite for recommending relief, the ITC must find that the industry is experiencing "serious injury or the threat thereof."⁷² Fourth, the ITC must determine that the increased imports are a "substantial cause"⁷³ of the serious injury, which is defined as "a cause which is important and not less than any other cause."⁷⁴

Upon finding that the statutory requirements of section 201 are satisfied, the ITC will recommend to the President appropriate relief for the involved domestic industry. This recommendation may take the form of increased tariff duties, quotas, tariff-rate quotas, or adjustment assistance.⁷⁵ The President also may initiate international negotiations with concerned states, negotiate an orderly marketing agreement with foreign governments, proclaim an auction of import licenses, or propose new legislation.⁷⁶

In determining the appropriate relief, the President may consider a variety of factors, including the efforts being made by the industry to adjust to international competition, the economic and social costs in-

ments." This is not required by U.S. law. Second, the GATT provision requires that the increase in imports results from tariff concessions, and § 201 does not impose this requirement. Third, the causation standard in the GATT escape clause differs from § 201 in that it requires only that the injurious imports "cause" serious injury or the threat thereof; the U.S. standard in § 201 is "substantial cause."

⁶⁶ 19 U.S.C. § 2251(a)(1) (1988).

⁶⁷ 19 U.S.C. § 2251(b)(1)(A) (1988).

⁶⁸ *Id.*

⁶⁹ 19 U.S.C. § 2252(b)(1)(A) (1988).

⁷⁰ *Id.*

⁷¹ Birch Plywood Doorskins, USITC Pub. 743, at 12-13, Inv. No. TA-201-1 (Oct. 1975).

⁷² 19 U.S.C. § 2252(b)(1)(A) (1988).

⁷³ 19 U.S.C. § 2252(b)(1)(B) (1988).

⁷⁴ H.R. REP. No. 571, 93d Cong., 1st Sess. 44, 46-47 (1973). This causation requirement is a higher hurdle to overcome than causation under the antidumping or countervailing duty laws. A case in point is Certain Motor Vehicles, USITC Pub. 1110, Inv. No. TA-201-44 (Dec. 1980), which involved an application for § 201 relief by the U.S. automobile industry. The ITC denied relief finding that the depressed condition of the U.S. auto industry was due to recession and the industry's inability to respond to changing consumer tastes. According to the ITC, imports were only a subordinate cause. In 1988, § 201 was amended to require that the ITC, in considering the condition of the domestic industry, may not aggregate the causes of declining demand associated with a recession or economic downturn into a single cause of serious injury. 19 U.S.C. § 2252(c)(2)(A) (1988). This makes a finding of substantial cause more likely in cases where declining demand for domestic goods coincides with recession.

⁷⁵ 19 U.S.C. § 2253(a) (1988).

⁷⁶ *Id.*

volved, and the effect on consumers and competition in domestic markets.⁷⁷ The range of factors involved provides the President with a wide latitude of discretion in granting or denying relief as well as in deciding what relief is appropriate.⁷⁸

Section 201 relief is usually inconsistent with the procompetition policies of the antitrust laws. Section 201 relief in whatever form (except adjustment assistance, which is rarely granted) will diminish competition and probably raise prices. Section 201 relief can be justified, however, if its intended purpose, i.e., the preservation of American industries and employment, outweighs the costs to competition and consumers in any given case. The question then becomes whether there is an adequate statutory mechanism for identifying and weighing the costs and benefits involved.⁷⁹ The answer regrettably is no; although the President can consider the costs to consumers and competition, there is complete freedom to disregard them.⁸⁰ Because the section 201 process is very political, it may be desirable to maintain the President's flexibility. At a minimum, the statute should be amended to require the ITC to assess the competitive consequences of its recommendation and transmit this information to the President.

5. Section 301

Section 301 of the Trade Act of 1974⁸¹ is the most open-ended of all the trade remedy laws. This section permits the United States Trade Representative (USTR) to retaliate against unfair trade practices by any foreign country. A section 301 action may be initiated by a private "interested person,"⁸² with the investigation being handled by the USTR.⁸³ An unfair trade practice under section 301 can be (1) a denial of rights under a trade agreement; (2) a foreign act or practice that denies benefits or is inconsistent with any trade agreement; or (3) a foreign act or practice that is "unjustifiable and burdens or restricts United States commerce."⁸⁴

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ In *Nonrubber Footwear*, USITC Pub. 1717, Inv. No. TA-201-55 (July 1985), the ITC made the point that the escape clause relief should "assist industries to adjust out of a situation where there has been a fundamental shift in comparative advantage to low-cost producers." *Id.* at n.17. In some cases, the U.S. industry achieves these goals. In the *Harley Davidson Motorcycle* case, Harley sought § 201 relief in 1982 when it was on the verge of bankruptcy. Imports from Japan in terms of high quality cheaper heavy motorcycles were eating into Harley's market share. The ITC granted Harley's petition and the president granted relief. During the period when it was shielded from imports, Harley made a comeback in the marketplace by cutting its costs and developing new products. See *Heavyweight Motorcycles*, USITC Pub. 1342, Inv. No. TA-201-47 (Feb. 1983).

⁸⁰ Judicial review in an escape clause case is very limited. See *Maple Leaf Fish Co. v. United States*, 762 F.2d 86 (Fed. Cir. 1985).

⁸¹ 19 U.S.C. § 2411 (1988).

⁸² 19 U.S.C. § 2412(a)(1) (1988).

⁸³ 19 U.S.C. § 2412(a)(2)-(4) (1988).

⁸⁴ 19 U.S.C. § 2411(e)(1) (1988).

Relief under section 301 is equally broad. The USTR may raise tariffs, impose quotas, withdraw previously negotiated trade concessions, or enter into a trade-restrictive agreement with the offending country. Retaliation measures can include trade restrictions on products other than the products that are the subject of dispute.⁸⁵

Section 301 is a highly political remedy that is used to combat unfair practices that close export markets to American products either in the country employing the practice or in third-country markets. As such, it complements antitrust policy by increasing global competition. Occasionally, however, retaliation can lessen competition by sanctioning international settlements that raise prices, divide markets, or place numerical limits on imports. The U.S.-Japan semiconductor agreement,⁸⁶ which authorized a de facto horizontal price-fixing arrangement for semiconductor chips in the United States, serves as an example. A study of the effect of section 301 relief on competition should be a statutory prerequisite to the imposition of any remedy under this section.

6. *Voluntary Restraint Agreements*

One of the most egregious conflicts between the antitrust law and trade concerns voluntary restraint agreements (VRAs). The VRA is a government-to-government agreement or understanding whereby numeric limits are placed on exports of a particular class of products.⁸⁷ VRAs are essentially safeguard devices that protect domestic industries

⁸⁵ 19 U.S.C. § 2411(c) (1988).

⁸⁶ Arrangement Concerning Trade in Semiconductor Products, Sept. 2, 1986, U.S.-Japan, 25 I.L.M. 1409. This arrangement resolved disputes between the United States and Japan concerning the alleged dumping of semiconductor chips as well as a § 301 petition asking for relief because of closed markets for American semiconductor chips in Japan. The arrangement requires Japan to monitor costs and prices of specific semiconductor products, and Japan agreed to establish an organization to assist foreign semiconductor sales within Japan. *Id.* at 1410-12. While the aspect of the agreement that requires Japan to facilitate foreign semiconductor sales in Japan through the promotion of long-term relationships between Japanese and foreign firms and even joint ventures promotes competition in Japan, with respect to the United States market, the agreement impedes competition by authorizing private firms to enter into a horizontal agreement on the price of semiconductors being sold in the United States. See Letter from Charles F. Rule, Assistant Attorney General, U.S. Department of Justice to Makota Kuroda, Vice Minister for International Affairs, Ministry of International Trade and Industry (July 30, 1986) (on file with author). The Justice Department essentially agreed to immunize Japanese implementation of the agreement from enforcement under the antitrust laws. In June 1991, the United States and Japan extended the semiconductor arrangement for an additional five years. See *U.S. and Japan Sign Semiconductor Pact Targeting 20 Percent Share*, 8 Int'l Trade Rep. (BNA) No. 23, at 845 (1991). On this occasion the Justice Department again issued a letter confirming that the modified arrangement would not give rise to a violation of the U.S. antitrust laws. Correspondence from William P. Barr, Deputy Attorney General, U.S. Department of Justice, to Ambassador Ryohei Murata (June 11, 1991) (on file with author); Correspondence from James F. Rill, Assistant Attorney General Antitrust Division, U.S. Department of Justice, to Noboru Hatakeyama, Vice Minister for International Affairs, Ministry of International Trade and Industry (Aug. 1, 1991) (on file with author).

⁸⁷ E.g., Michael M. Kostecki, *Export-Restraint Arrangements and Trade Liberalization*, 10

from import competition. Their popularity stems from the fact that they provide a "quick fix" that is politically clean since the onus of enforcement is typically placed on the exporting country. In addition, there is a tacit understanding that no compensation will be demanded by the exporting country, which would otherwise have this right under the principal safeguard provision of the GATT, Article XIX. The process of negotiating and carrying out a VRA is typically conducted behind closed doors. Legislative approval is not required, and there are not any public hearings on the implications or consequences. The VRA is simply announced as a *fait accompli* and politically trumpeted as a triumph, particularly for the importing country.⁸⁸

What makes the VRAs so pernicious is that they are the remedy of choice for the "big" cases. Such cases involve hugely important economic sectors, such as steel, autos, machine tools, or semiconductors, and are too hot to handle as ordinary antidumping or section 201 cases; thus, they are "settled" by VRAs.

The first major use of VRAs was in connection with the crisis over steel imports in the late 1960s. After extensive negotiations with the U.S. government, Japanese and European producer associations signed letters stating their intention to limit steel exports to the United States to certain specified tonnage.⁸⁹

This VRA was challenged in court by Consumers Union of the United States which charged: (1) that the officials of the executive branch in negotiating and accepting these representations and in monitoring compliance were acting beyond the scope of their delegated authority; (2) that the steel import restraints violated section 1 of the Sherman Act; and (3) that existing trade legislation preempted the field and constituted the sole source of executive power to grant relief against imports.⁹⁰

In *Consumers Union of U.S., Inc. v. Kissinger*,⁹¹ the validity of the VRA was upheld. After analyzing the existing trade legislation, the majority concluded that, although Congress had comprehensively dealt with *enforceable* import restrictions, foreign assurances of voluntary restraint did not purport to be enforceable and could not conflict with

WORLD ECON. 425 (1987); Kent Jones, *The Decline of Liberal Trade*, 16 WORLD COMPETITION 17 (1993).

⁸⁸ On May 1, 1981, the United States and Japan signed a VRA on automobiles, restricting the import of Japanese passenger cars into the United States to 1.68 million units. For an evaluation and discussion of the VRA, see Jeannette Schuler, *Voluntary Export Restraints*, in U.S. TRADE BARRIERS: A LEGAL ANALYSIS 463 (Eberhard Grabitz & Armin von Bogdandy eds., 1991).

⁸⁹ See Malcolm D. H. Smith, *Voluntary Export Quotas and U.S. Trade Policy—A New Non-Tariff Barrier*, 5 LAW & POL'Y INT'L BUS. 10 (1973).

⁹⁰ *Consumers Union of U.S., Inc. v. Rogers*, 352 F. Supp. 1319 (1974), *vacated in part, sub nom.*, *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974).

⁹¹ 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

legislative actions mandates.⁹² The court did not reach the antitrust issue because the plaintiff had stipulated that the Sherman Act count should be dismissed with prejudice.⁹³ Although the district court had found that the steel arrangements were not exempt from the antitrust laws, and that the executive had no power to exempt them, the court of appeals vacated this aspect of the district court's order. Judge Leventhal filed a powerful dissenting opinion. He argued that the steel arrangements were not really "voluntary"; instead, they were part of a bilateral undertaking concluded after extensive negotiations. Thus, the executive negotiation and acceptance of the VRA undertakings were preempted by Congress.⁹⁴

Consumers Union has come to be regarded as a seminal case. Congress has allowed VRAs to flourish and has approved the related technique of orderly marketing arrangements as a policy option in the Trade Agreements Act of 1974.⁹⁵ Thus, the U.S. government has continued to use VRAs, but negotiations now are invariably with governments. In the 1980s, many extremely important VRAs were employed. For example, on May 1, 1981, after negotiations with American officials, Japan announced that it was limiting exports of autos to the United States to 1.68 million units per year.⁹⁶ This was accompanied by a letter from the U.S. Justice Department asserting that because the export limitations involved were to be compelled by the Japanese government, no antitrust violation was involved.⁹⁷ Additional VRAs in the 1980s have involved steel, machine tools, and semiconductors.⁹⁸

a. VRA Costs

VRAs may have utility as a safeguard device, but the costs they impose on consumers of the products involved are typically very high. By shifting the supply curve for the good toward scarcity, the result is higher prices, not only for the imported product now in short supply, but also for competing domestic products that can be priced higher

⁹² *Id.* at 140-43.

⁹³ *Id.* at 139.

⁹⁴ *Id.* at 146-49 (Leventhal, J., dissenting).

⁹⁵ 19 U.S.C. § 2253(a)(3)(E) (1988). Orderly marketing arrangements (OMAs) are quantitative restrictions that are negotiated with the exporting nation. Unlike VRAs, OMAs are administered by the importing nation and are the subject of formal agreement.

⁹⁶ This VRA followed an ITC determination in a § 201 case that imports of automobiles were not a substantial cause of serious injury to the U.S. industry. See U.S. INTERNATIONAL TRADE COMMISSION, 1110 CERTAIN MOTOR VEHICLES AND CERTAIN CHASSIS AND BODIES THEREOF (Dec. 1980). For the Japanese announcement of the VRA, see U.S. Import Weekly (BNA) No. 76, at A-1, N-1 (May 6, 1981). The U.S. Justice Department cleared this VRA on antitrust grounds. See Donald E. DeKieffer, *Antitrust and the Japanese Auto Quotas*, 8 BROOK. J. INT'L L. 59 (1982). See also Michael W. Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of the United States Antitrust Laws*, 27 HARV. INT'L L.J. 99 (1986).

⁹⁷ Letter from Attorney General Smith to Japanese Investor Okawara (May 7, 1981), reprinted in A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 406 (2d ed. 1983).

⁹⁸ SPENCER W. WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW ch. 14 (1992).

without losing ground to their import competition. For example, the ITC has estimated the cost of the auto VRA to be \$15.7 billion from 1981 to 1984.⁹⁹ In most cases, the profits of foreign exporters do not suffer from a VRA because the scarcity rent resulting from higher prices is collected by the exporting companies.

b. VRAs and the GATT

VRAs exist outside the GATT structure because no nation will challenge them. The nations directly involved will tacitly agree not to invoke GATT norms, and third countries will remain silent also; they are usually doing the same thing in other areas. Thus, there has never been a definitive GATT ruling on VRAs. Their defenders argue that VRAs do not have to comply with GATT requirements because of their "voluntary" nature, but this is the same disingenuous reasoning as that of the majority opinion in *Consumers Union*.¹⁰⁰

The GATT allows a contracting party to impose import restraints only in specified situations and after following strict procedures. Article XIX, the GATT safeguard clause, conditions this remedy on "unforeseen developments" which, along with trade concessions, cause increased imports of a product, which in turn cause or threaten serious injury to domestic producers of like or directly competitive products.¹⁰¹ The GATT article XIX remedy is limited to a temporary suspension of trade concessions previously granted, and even then the exporting state may demand compensation.¹⁰²

VRAs would appear to violate Article XIX of the GATT because they rarely fulfill these requirements. VRAs also typically violate GATT Article I, the most favored nation (MFN) clause, since they are selective, granting trade relief only to the nation with which they are negotiated. Finally, VRAs also violate Article XI of the GATT, which forbids quantitative restrictions.¹⁰³ VRAs are essentially illegal export quotas. This was confirmed by a GATT panel decision¹⁰⁴ in 1988 on a chal-

⁹⁹ U.S. INTERNATIONAL TRADE COMMISSION, A REVIEW OF RECENT DEVELOPMENTS IN THE U.S. AUTOMOBILE INDUSTRY, INCLUDING AN ASSESSMENT OF THE JAPANESE VOLUNTARY RESTRAINT AGREEMENTS IX (Feb. 1985).

¹⁰⁰ *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), cert. denied, 421 U.S. 1004 (1975). The Agreement of Safeguards of the GATT Uruguay Round adopts major new restrictions on VRAs. The agreement stipulates that a member, in the future, shall not seek or maintain any voluntary export restraint or orderly marketing agreement, and all such measures are to be phased out within four years. An exception is permitted for one specific measure for each importing nation, but even this must be phased out by December 31, 1999. Agreement on Safeguards, Section VI, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Version of December 15, 1993, MTN/FA (Dec. 15, 1993).

¹⁰¹ General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XIX, 61 Stat. A3, 55 U.N.T.S. 187.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Japan-Trade in Semiconductors, Report of the Panel Adopted on May 4, 1988, the GATT, BISD 35S/116, 117.

lenge brought by the EU¹⁰⁵ to the Agreement on Semiconductor Trade between the United States and Japan. The panel stated that the Japanese government was using a coherent system to restrict imports in violation of Article XI:1; the government requested that companies not export semiconductors at prices below costs, and it systematically monitored costs and prices to pressure manufacturers to align their production to meet demand forecasts.¹⁰⁶ Although the panel limited its ruling to the aspect of the Semiconductor Agreement that restrained exports to the EU, the same reasoning would carry over to VRA restrictions themselves. There is no exemption in Article XI for export restraints imposed with the consent of the importing nation.¹⁰⁷

c. VRAs and Antitrust

VRAs are typically enforced by the exporting country. This usually involves the formation of an export cartel among producers in the exporting country. At a minimum, the export cartel will agree to divide market share, usually on the basis of historic factors. The cartel also may fix prices. In addition, the terms and conditions of export sales may be assigned.¹⁰⁸

There is little question that such an export cartel would be per se illegal under section 1 of the Sherman Act because it restrains competition in the United States. Despite this, VRAs have not been challenged on antitrust grounds since the ill-fated *Consumers Union*¹⁰⁹ decision. There are two reasons for this. First, those most affected by the VRA, consumers, would not have standing to raise a claim under the Sherman Act;¹¹⁰ importers and competitors would have standing, but they lack an economic incentive to bring suit. Second, the defense of "foreign sovereign compulsion" would apply to most VRAs:¹¹¹ the exporting nation, at the behest of the U.S. Department of Justice, makes sure that the export arrangement is compelled by law and invol-

¹⁰⁵ The Maastricht Treaty, which became effective on November 1, 1993, provides that the European Community be renamed the European Union (EU). See Maastricht Treaty on Political Union, Feb. 7, 1992, 31 I.L.M. 247, 255 (entered into force Nov. 1, 1993).

¹⁰⁶ Japan-Trade in Semiconductors, *supra* note 104, at 121.

¹⁰⁷ *Id.* at 125.

¹⁰⁸ See, e.g., Mitsuo Matsushita & Robert Repeta, *Restricting the Supply of Japanese Automobiles, Sovereign Compulsion or Sovereign Collusion*, 14 W. RES. J. INT'L L. 47 (1982).

¹⁰⁹ In the district court opinion in *Consumers Union*, Judge Gesell stated in dicta that a "flat agreement among private foreign producers mutually to limit a substantial amount of goods to be sold in the United States is a violation of the Sherman Act." *Consumers Union of the U.S., Inc. v. Kissinger*, 352 F. Supp. 1319, 1323 (D.D.C. 1973), *vacated in part*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

¹¹⁰ Consumers generally do not have standing to sue under the Sherman Act. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

¹¹¹ The defense of foreign sovereign compulsion is similar on policy grounds to the act of state doctrine. The defense applies when a foreign national establishes that it violated U.S. law as a result of obeying directives of its own government. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 441(1) (1986) [hereinafter RESTATEMENT].

untary so as to leave little doubt that the requirements of the defense of foreign sovereign compulsion would be fulfilled.

d. Managed Trade

"Managed trade" is a political slogan that seeks to provide a quick solution to trade deficit problems by artificial government manipulation of trade flows. Managed trade takes the VRA technique one step further since the export-surplus nation must not only agree to restrain exports, it also must agree to import a certain market share of the same or related products from the other nation involved. Managed trade thus requires an intricate interrelationship of government-compelled cartels. Export cartels in both nations would be needed as well as an import cartel in the export-surplus nation. Although these arrangements might be protected from antitrust challenge by the foreign sovereign, there is little question that they massively restrain competition in the traditional sense.

Regretfully, many governments, including the United States, are increasingly ambivalent about managed trade. Despite free trade rhetoric, they weave a fabric of quotas, restraints, and other arrangements around trade flows, and even trade "targets" are justified as remedies of last resort.¹¹²

¹¹² See generally FRED BERGSTEN, RECONCILABLE DIFFERENCES (1993).

"Managed trade" usually involves numerical "targets" for trade flows. A numerical target-based trade policy violates several GATT articles including Article I:1 (the most-favored nation obligation), Article XI:1 (prohibiting quotas), and Article III:4 (the national treatment obligation). Article I:1 is violated if a government uses numerical targets to discriminate in favor of imports of certain countries. Article XI:1 is violated if the target number is administered as a quota.

Even if the target is a minimum figure and not a quota, Article III:4 is a principle which is violated if a government makes discriminatory distinctions between imports and domestic products even if the differential treatment is designed to favor imports.

Although Article III:4 of the GATT is worded in terms of requiring imports to be "accorded treatment no less favorable" than that accorded to like products of national origin, the purpose of this article is clearly to impose an obligation of non-discrimination between imported and domestic products that would be violated by government requirements to favor imported products.

This is clear from the history and interpretation of Article III:

(1) In the REPORT OF THE PANEL ON ITALIAN DISCRIMINATION AGAINST IMPORTED AGRICULTURAL MACHINERY, BISD 75/60 (1959), the Panel commented on this language as follows: the intention of the drafters of the [GATT] Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs (emphasis supplied).

Id., para 11.

(2) The principle of non-discrimination is clearer in the official French text of the GATT, which states that imported products

"ne seront pas soumis à un traitement moins favorable."

A correct English translation of the French text is that imported products "must not be treated less favorably" than domestic products.

Thus, it is clear from the French text that Article III:4 is a principle of neutrality or non-discrimination between imported and domestic products. The French text avoids the "no less favorable" language that implies that discrimination in favor of imports is permissible. This is wrong.

(3) This also is recognized by all academic commentaries on Article III:4. For example,

7. *Misuse of the Trade Laws*

Most of the U.S. trade laws restraining imports provide standing for domestic companies to criticize their foreign competitors. While the normal use of such procedures should not raise antitrust questions, there may be cause for concern about the overzealous use of trade laws to lessen foreign competition. Such misuse of the trade laws may occur as follows: (1) a baseless trade law petition may be filed to harass a foreign competitor or to cause great expense; or (2) a collusive settlement may be concluded with a foreign competitor outside the framework of the trade laws.¹¹³

These two instances, if factually proved, would seem to trigger liability and damages under the antitrust laws. Although the *Noerr-Pennington*¹¹⁴ doctrine would provide antitrust immunity for private parties initiating and participating in trade relief actions, the "sham exception"¹¹⁵ to this doctrine would outlaw the intentional filing of a baseless trade petition and the knowing submission of false information. Private party participation in settlements of trade disputes would be protected conduct within the context of the trade laws;¹¹⁶ however, a settlement agreement directly with foreign competitors or on an industry-to-industry basis risks being illegal under section 1 of the Sher-

Professors Jackson and Davies, in their book *INTERNATIONAL ECONOMIC RELATIONS* 483 (2d ed. 1988), state that:

The national treatment obligation, like the MFN obligation, is a rule of "non-discrimination." They further state that: The national treatment clause . . . attempts to impose the principle of non-discrimination as between goods which are domestically produced, and goods which are imported . . . National treatment obligations are designed to reinforce the *basic policy of trade liberalization—minimizing government interference and distortion of transactions which cross borders.*

Id.

¹¹³ See Spencer W. Waller, *Abusing the Trade Laws: An Antitrust Perspective*, 17 *LAW & POL'Y INT'L BUS.* 487 (1985); Pierre F. De Revel d'Esclapon, *Non-Price Predation and the Improper Use of U.S. Unfair Trade Laws*, 56 *ANTITRUST L.J.* 543 (1987); Joe Sims & Edith E. Scott, *Antitrust Consequences to Private Parties of Participation in and Settlement of Selected Trade Actions*, 56 *ANTITRUST L.J.* 561 (1987).

¹¹⁴ This doctrine holds that the antitrust laws do not prohibit competitors from associating with each other in order to convince the legislative or executive branch of the government to take some action, even anticompetitive action. See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

¹¹⁵ The sham exception holds that the Noerr-Pennington Doctrine will not protect a firm or group of firms that use governmental petitioning as a sham. See, e.g., *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920 (1993); *California Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *In re Burlington N.*, 822 F.2d 518 (5th Cir. 1987).

¹¹⁶ The trade laws do not exempt anticompetitive activity that would be illegal under the antitrust laws; however, the trade laws provide for specific settlement procedures. See, e.g., 19 U.S.C. § 1673(c) (1988), which provides for termination or suspension of countervailing duty cases, and 19 U.S.C. § 1671(c) (1988), which provides for termination or suspension of antidumping cases. There would be implied immunity under the antitrust laws as long as private parties follow these statutory procedures. See *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1974).

man Act.¹¹⁷

C. The Trade Laws and International Competitiveness

The international trade laws as presently administered are inefficient and counterproductive. There is no evidence that they have contributed in any important way to American international competitiveness. In fact, generally the opposite is true: they keep inefficiently operated businesses going by penalizing consumers. Also, the trade laws have been ineffective in lowering the American trade deficit. The decade of the 1980s saw progressive tightening of the trade laws while, at the same time, the trade deficit ballooned out of control. Managed trade is a siren song that appears to offer a quick fix: that numerical trade targets will automatically restore American competitiveness. In fact, managed trade will backfire: government-approved antitrust violations will proliferate and the numerical export targets the United States now regards as floors will be eventually interpreted as ceilings by other nations. In addition, efficiently operated U.S. industries will suffer as other nations use managed trade against them. Finally, the United States will forfeit the political and economic leadership position that it has occupied in the world since the end of World War II.

The United States continues to have an important stake in a free and open world economy. U.S. officials still profess this ideal, but this is increasingly mixed with protectionist actions and rhetoric.

The United States should seek to maintain a consistent position on how the world economy works or ought to work. There is no real alternative to free trade—admittedly an ideal—which rests on the twin pillars of open world markets and the idea of comparative advantage. The answer to the American trade deficit, then, is to promote the attainment of these two ideals. There is much work to do to open world markets including: (1) the implementation of the NAFTA and the GATT Uruguay Round; (2) the definition of America's relationship to Asia under the auspices of APEC (the Asia-Pacific Cooperation forum); (3) the integration of the formerly Communist countries into the world economy; (4) the economic development of the developing world; and (5) the resolution of ongoing trade disputes with the European Union and Japan. We also can work to enhance our comparative advantage by economic and political reforms to encourage savings and investment, both public and private, and most importantly, the development of our human resources.

The trade laws have their place. However, their administration should be integrated with antitrust principles. Domestic industries

¹¹⁷ Trade settlement agreements would be tested under the rule of reason test. See *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979). See also *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

should not be protected from international competition except upon careful consideration of the costs and benefits involved. Safeguard relief should be available, but should only be granted for the purpose of enhancing long-term competition after the reform of the industry involved. Also, the United States should maintain the ability to retaliate against unfair practices of other nations, but this power should be exercised in conformity with international norms.

III. The Antitrust Laws And International Competitiveness

The second aspect of the relationship between international trade and the antitrust laws is the growing influence of those who argue that the antitrust laws should be weakened to improve American international competitiveness.¹¹⁸ There is a complementary trend in the courts to adopt less restrictive interpretations of the antitrust laws. In its seminal decision in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, the Supreme Court held that non-price vertical restraints are not illegal unless they actually threaten competition in the particular circumstances.¹¹⁹ Since *Sylvania*, the courts have applied a rule of reason analysis to all vertical territorial and customer restrictions,¹²⁰ and even horizontal mergers are now challenged by the FTC and the Justice Department only in very unusual circumstances.¹²¹ These developments are, at least in part, attributable to the idea that domestic antitrust enforcement is less important due to international competition.

Is this correct policy? Is there any evidence that relaxation of the antitrust laws improves American competitiveness?¹²² The following discussion will address two areas where the antitrust laws already have

¹¹⁸ E.g., Henry G. Manne, *Economic Commentary: U.S. Must Update Its Merger Laws in this Time of Foreign Competition*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 10, 1985, at K4.

¹¹⁹ 433 U.S. 36 (1977). See also *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988), in which the Supreme Court held that a complaint by one dealer about another's price cutting and the supplier's termination of the second dealer did not involve a price agreement and was not illegal per se.

¹²⁰ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Sprayright Serv. Corp.*, 465 U.S. 752 (1984); *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202 (9th Cir. 1988).

¹²¹ Under the 1992 Horizontal Merger Guidelines, the most important factor in determining whether a merger should be challenged is high market concentration. Under the 1984 merger guidelines, a challenge was "likely" if there was high market concentration. Under the 1991 Horizontal Merger Guidelines, high market concentration is the beginning of the analysis, and the merger can be justified by the presence of other factors, such as the ease of market entry, presence of efficiencies and the failing firm defense. *U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13, 104 (Apr. 2, 1992).

¹²² Some critics of the antitrust laws hold that the United States should ease antitrust restraints to help American corporations compete more effectively in international markets. See, e.g., Henry G. Manne, *Economic Commentary: U.S. Must Update Its Merger Laws in This Time of Foreign Competition*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 10, 1985, at K4. For a discussion of this issue, see *Commentary: Antitrust and International Competitiveness in the 1990s*, 58 ANTITRUST L.J. 591 (1989).

been substantially relaxed by statute to enhance U.S. competitiveness: export cartels and joint ventures.

A. *Export Cartels*

The United States, along with most other industrialized countries, continues to sanction export cartels, usually referred to as export associations, which are encouraged to facilitate exporting by American companies. Under the Webb-Pomerene Act of 1918,¹²³ export associations composed of members engaging solely in "export trade" of goods may register with the FTC and obtain an exemption from the Sherman Act.¹²⁴ However, the shelter provided by the Webb-Pomerene Act is strictly limited. Conduct which restrains trade in the United States or hurts a domestic competitor will not be immune.¹²⁵

Because the Webb-Pomerene Act fell into disuse,¹²⁶ Congress in 1982 passed two additional acts. First, the Foreign Trade Antitrust Improvements Act¹²⁷ limits the jurisdictional reach of the Sherman Act over export matters. Second, the Export Trading Company Act¹²⁸ (ETC Act) provides a procedure whereby an export association can obtain a Certificate of Review from the Secretary of Commerce (in consultation with the Department of Justice) which insulates the association from criminal or civil liability under the antitrust laws for conduct specified in the certificate. The ETC Act exemption is broader than the Webb-Pomerene Act. First, under the ETC Act, an export association can export services as well as goods. Second, the ETC Act permits banks to own and finance export trading companies.¹²⁹

There is a consensus that the various antitrust exemptions for export companies have had very little impact and have not contributed in any important way to decrease the U.S. trade deficit or to increase the competitiveness of U.S. firms. Although the Webb-Pomerene Act was passed to benefit small companies, the Act is used by large firms in concentrated industries; in 1982, there were thirty-nine registered associations (primarily large forms) accounting for between two and

¹²³ 15 U.S.C. §§ 61-66 (1988).

¹²⁴ 15 U.S.C. § 62 (1988).

¹²⁵ 15 U.S.C. § 65 (1988).

¹²⁶ The Webb-Pomerene Act was restrictively interpreted by the courts. *E.g.*, *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950) (holding illegal the export activities of a Webb-Pomerene association formed by producers of coated abrasives).

¹²⁷ The jurisdictional provisions of the 1982 Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6A (1988), provide that the Sherman and Clayton Acts shall not apply to conduct involving export trade or commerce unless such conduct has a direct, substantial, and reasonably foreseeable effect on (1) domestic U.S. commerce, (2) import commerce, or (3) the export opportunities of a person engaged in exporting from the United States.

¹²⁸ 15 U.S.C. §§ 4001-4021 (1988).

¹²⁹ 15 C.F.R. § 325.2 (1992). The ETC Act created an office in the Department of Commerce to promote export trading companies. 15 U.S.C. § 4003 (1988).

three percent of American exports.¹³⁰ With only about 100 registrations presently in effect, the ETC Act also has failed to live up to expectations.¹³¹

Not only have the export association exemptions had little effect in encouraging U.S. exports, they have produced frictions with U.S. trading partners and encouraged cartelization abroad. *Daishowa International v. North Coast Export Co.*¹³² provides an example of the anticompetitive conduct encouraged by U.S. export associations. The *Daishowa* case involved Japanese wood chip importers and paper manufacturers who formed a conspiracy to lower the price of wood chips to counter the market power of a U.S. Webb-Pomerene association. The district court rejected the argument of the Japanese importers that they should have the reciprocal immunity of the U.S. Webb-Pomerene Association.

Thus, U.S. law demands that foreign purchasers from U.S. export associations must act competitively. Foreign antitrust authorities, however, may tolerate import cartels dealing with U.S. export associations on the theory that they were necessary to counter the market power of the export associations. Also, foreign antitrust authorities may proceed against export associations that might be immune under U.S. law. In the *Wood Pulp* case,¹³³ the European Court of Justice held that a Webb-Pomerene export association of wood pulp exporters violated EU competition law. The Court also held the conduct of foreign producers that had no manufacturing or marketing facilities located in the EU nevertheless subject to the EU competition laws.¹³⁴ Another effect of U.S. utilization of export cartels is to encourage their use by our trading partners. Japan, Germany, the Netherlands and many other states allow export cartels based on the U.S. model.¹³⁵ It is difficult to lecture our trading partners on the evils of cartels in international trade when we encourage their use domestically.

¹³⁰ See A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571 (1992).

¹³¹ See Spencer W. Waller, *The Failure of the Export Trading Company Program*, 17 N.C. J. INT'L L. & COM. REG. 239 (1992).

¹³² 1982-2 Trade Cas. (CCH) ¶ 64, 774 (1982).

¹³³ *A. Ahlstrom Osakeyhtio v. Commission*, 4 Common Mkt. Rep. (CCH) ¶ 14, 491 (Sept. 27, 1988). Although the Court of Justice in this case did not adopt the U.S. effects doctrine by name, it did hold that foreign producers with no facilities in the EC were within the EC's jurisdiction. See also the *Dyestuffs* case, *Imperial Chemical Indus., Inc. v. Commission*, 1972 Case No. 48/69, 1972 E.C.R. 619, [1971-73 Transfer Binder] Common Mkt. Rep. (CCH) § 8161 (July 14, 1972) (holding that members of a cartel located outside of the EU violated EU competition law where their conduct produced anticompetitive effects within the Community). The EU merger regulation also carries hidden dangers for U.S. companies. See Marsha Cope Huie & Stephen D. Hogan, *The New European Merger Control Regulation and the Short-Term Horizon of United States Firms*, 6 AM. U. J. INT'L L. & POL'Y 325 (1991).

¹³⁴ *A. Ahlstrom Osakeyhtio v. Commission*, 4 Common Mkt. Rep. (CCH) ¶ 14, 491 (Sept. 27, 1988).

¹³⁵ Special Committee, *International Antitrust Report*, Sept. 1, 1991, A.B.A. SEC. ANTITRUST L. 61-73. [hereinafter ABA Special Committee Report].

As has been recommended by the Special Committee on International Antitrust of the American Bar Association,¹³⁶ the U.S. Congress should immediately repeal export association immunity and launch a campaign to convince our trading partners to do the same. Export associations are counterproductive. U.S. exporters find them of little value, and any benefits to the United States are outweighed by the restrictive trade practices they cause or justify in response by our trading partners. Eliminating export association immunity would remove a source of trade friction and would justify tough U.S. action against foreign import cartels and restrictive practices that impede U.S. exports.

B. Joint Ventures

A second case where the antitrust laws have been relaxed to enhance American competitiveness is joint venture formation and operation. Joint ventures are judged under the U.S. antitrust laws on a full "rule of reason" analysis. In *United States v. Penn Olin Chemical Co.*,¹³⁷ which involved a joint venture for the manufacture of sodium chlorate in the southeastern United States, the Supreme Court called for analysis of a range of relevant factors:

the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to non-competitive practices; the potential power of the joint venture in the relevant market; and appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through Penn-Olin; the effect, in the event of that occurrence, of the other joint venturer's potential competition; and such other factors as might indicate potential risks to competition in the relevant market.¹³⁸

Since *Penn Olin*, the courts and enforcement authorities have judged joint ventures with increasing leniency, viewing them as often enhancing efficiency, reducing costs, and as necessary in view of increasing international competition.¹³⁹ Thus the Supreme Court has rejected per se condemnation of joint ventures,¹⁴⁰ and the FTC has approved joint ventures like the General Motors/Toyota production joint venture with the justification that it was "a limited . . . joint venture not a merger of GM and Toyota."¹⁴¹

¹³⁶ *Id.* at 83-85.

¹³⁷ 378 U.S. 158 (1964).

¹³⁸ *Id.* at 177.

¹³⁹ See generally Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605 (1986).

¹⁴⁰ *Penn Olin*, 378 U.S. at 163.

¹⁴¹ *In re General Motors Corp.*, 103 F.T.C. 374, 386 (1984) (3-2 decision).

The 1988 Antitrust Enforcement Guidelines for International Operations¹⁴² also state that the Justice Department will follow a rule of reason approach on joint ventures. The scrutinization of joint ventures will focus upon three factors:

1. whether the joint venture would likely have anticompetitive effects in the market or markets in which it proposes to operate,
2. whether the joint venture or any of its restraints would likely have any anticompetitive effect in any other market in which the joint venture partners are actual or potential competitors, and
3. whether there are likely anticompetitive effects associated with any non-price vertical restraints imposed in connection with the joint venture.¹⁴³

If the Justice Department is satisfied that there are no significant anticompetitive risks under these three tests, then the joint venture will not be challenged. However, if significant anticompetitive risks are revealed by these first three inquiries, then the Department will consider a fourth factor: whether procompetitive efficiencies outweigh the risk of anticompetitive harm.¹⁴⁴

The International Guidelines also recognize that joint ventures must be judged from the viewpoint of international commerce and the global economy:

Joint ventures may be created for a variety of good business reasons. For example, joint ventures may be created to take advantage of complementary skills or economies of scale in production, marketing, or R&D, or to spread risk. In foreign markets in particular, joint ventures may be politically and commercially more practical than either merger or independent operation.¹⁴⁵

Despite the clear signals that economically efficient joint ventures will not be challenged and that the principal concerns of regulators will be joint ventures that are shams for cartelization, the business community has continued to lobby Congress for legislation weakening the antitrust laws to approve joint ventures. The result has been two fairly meaningless acts whose main purpose has been to require the registration of joint ventures with attendant bureaucratic bells and whistles. The National Cooperative Research Act¹⁴⁶ (NCRA) was passed in 1984 to restate the obvious, i.e., that research and development joint ven-

¹⁴² U.S. Department of Justice, *Antitrust Enforcement Guidelines for International Operations* (1988), 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Supp. Nov. 17, 1988) [hereinafter *1988 Antitrust Enforcement Guidelines*].

¹⁴³ *Id.* at 11.

¹⁴⁴ *Id.* at 11-12.

¹⁴⁵ *Id.* at 11. The future competitiveness of many U.S. industries will depend on their ability successfully to develop and deploy new technologies in areas such as superconductivity, high-definition television, robotics, and computer-aided design and manufacturing. The costs of developing these technologies and bringing them to the market as quickly and efficiently as possible may require joint efforts among actually or potentially competing firms, foreign and domestic. *Thornburgh Endorses Legislation to Alter Law on Joint Production*, 56 Antitrust & Trade Reg. Rep. (BNA) No. 1404, at 301 (Feb. 23, 1989).

¹⁴⁶ 15 U.S.C. §§ 4301-4305 (1988).

tures are subject to a rule of reason analysis. In 1993 Congress amended this law to reaffirm the rule of reason approach for production joint ventures as well.¹⁴⁷

It is difficult to see what these two laws add to the already permissive attitude toward joint ventures except the requirement of filling out forms to notify the antitrust bureaucracy. The 1993 amendments add an additional irrelevance to the already admittedly irrelevant NCRA.¹⁴⁸ If the Congress really wanted to reassure U.S. business that joint ventures would not be challenged, it could enact a *per se* approval process like that in the EU.¹⁴⁹ Under EU regulations, a joint venture can receive immunity upon the fulfillment of the following conditions:

1. that it "contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress";
2. that consumers receive an "equitable" share of the resulting benefit;
3. that it does not impose greater restrictions on the venturers than are necessary to accomplish the venture's objectives; and
4. that it does not increase the power of the venturers to "eliminat[e] competition in respect of a substantial portion" of the products in question.¹⁵⁰

EU competition law, in contrast to U.S. antitrust law, is based upon notification and approval of restrictive agreements that serve the interests of the European Union. The EU exemption process is more certain, but it is subject to bureaucratic control.

The EU model would reduce uncertainty over antitrust immunity, but it would introduce a regulatory approval process so that the cure would be worse than the disease. American business would undoubtedly resist additional governmental control of joint venture formation. Thus, the present law offers adequate protection for joint ventures to compete in the global marketplace.

IV. Promoting Harmonization of the Antitrust Laws

A. *Reasons for Harmonization*

There are two principal arguments in favor of promoting greater antitrust law harmonization. First, lax antitrust enforcement against entrenched domestic cartels and anticompetitive practices blocks U.S. companies from access to foreign markets. For example, the United

¹⁴⁷ Pub. L. No. 103-42, 107 Stat. 117 (1993) (codified in scattered sections of 15 U.S.C.).

¹⁴⁸ See the analysis of Timothy K. Armstrong, *Transnational Production, Joint Ventures, and United States Antitrust Law: Evaluating the Proposed National Cooperative Production Amendments*, 28 TEX. INT'L L.J. 119 (1993).

¹⁴⁹ For analysis of European Joint Venture Regulation, see Frank L. Fine, *EEC Antitrust Aspects of Production Joint Ventures*, 26 INT'L LAW. 89 (1992); Dana W. Hayter, Note, *Scapegoat for the Trade Deficit: Does EEC Antitrust Treatment of Joint Ventures Place the United States at a Competitive Disadvantage*, 16 HASTINGS INT'L & COMP. L. REV. 391 (1993).

¹⁵⁰ Treaty of Rome, Mar. 25, 1957, art. 85, para. 3, 198 U.N.T.S. 3. For the approach of the EEC to joint ventures, see Frank L. Fine, *supra* note 149.

States contends that nonaggressive enforcement of competition laws in Japan impedes access to the Japanese market.¹⁵¹ The Structural Impediment Initiative (SII) talks between Japan and the United States have led Japan's Fair Trade Commission to increase the number of enforcement actions and raise the penalties for noncompliance.¹⁵² The United States has also obtained the agreement of the EU to prosecute anticompetitive restraints that may affect U.S. interests.¹⁵³

A second reason to harmonize national antitrust laws is to eliminate conflicting, needless, and often discriminatory obstacles to cross-border business transactions and arrangements. An important example of this is the national competition policies governing patent and know-how licensing contracts. The United States, the European Union, and Japan have adopted detailed policies on the validity of restrictive clauses in such agreements. The three sets of rules exhibit marked differences, however, in both procedure and substance. The EU relies upon a "block exemption" or safe harbor approach¹⁵⁴ that permits licensing agreements that are notified in advance and conform to the regulation. Japan has a much more extensive set of rules that are designed to require a balanced agreement between the parties.¹⁵⁵ The United States has permissive rules that permit virtually any freely bargained arrangement without the necessity of prior notification.¹⁵⁶

While certain differences of approach are justified, compliance with different regimes is often an unnecessary burden. National antitrust authorities could engage in a dialogue designed to reduce unnecessary national differences that inhibit international transactions. Trade and investment would benefit from a policy of international cooperation among national antitrust authorities, particularly in the areas of technology licensing, joint ventures, mergers, and distribution arrangements.

Harmonization of the various national antitrust laws is a point that has been considered by the ABA Special Committee on International Antitrust.¹⁵⁷ Their wise recommendations include four points: (1)

¹⁵¹ See James F. Rill, *Statement on Japanese Competition Policies and the U.S. Response before the U.S. Senate Committee on Judiciary, 29 July 1992*, WORLD COMPETITION, Sept. 1992, at 143.

¹⁵² *Id.* at 145.

¹⁵³ See Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, reprinted in 30 I.L.M. 1487 (1991). The U.S.-EC agreement provides for: (1) notification of enforcement action; (2) cooperation and consultation on matters of mutual concern; (3) recognition of a right to petition each other for enforcement against conduct that might have an anticompetitive effect in the petitioner's area; and (4) specification of factors that might cause abatement of an otherwise valid enforcement proceeding. *Id.*

¹⁵⁴ Commission Regulation 2349/84, 1985 O.J. (L 219) 16.

¹⁵⁵ For a detailed exposition of Japanese law and policies in this area, see MITSUO MATSUHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 258-64 (1993).

¹⁵⁶ See U.S. Department of Justice, *Antitrust Enforcement Guidelines for International Operations* (1988), 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988).

¹⁵⁷ ABA Special Committee Report, *supra* note 135, 1-29. See Mark R. Joelson, *Harmonization: A Doctrine for the Next Decade*, 10 Nw. J. INT'L L. & Bus. 133 (1989).

Nations should agree to prohibit cartels and cartel conduct; special immunity provisions for export cartels should be repealed. (2) Nations should strive to harmonize the timing and content of their various premerger reporting requirements, should freely consult and exchange information, and should coordinate their merger review procedures. (3) Nations should harmonize their laws relating to intellectual property and antitrust, particularly with respect to licensing agreements, mergers, and joint ventures and should take care not to undermine foreign intellectual property rights in enforcing competition laws. (4) Nations should align their antitrust doctrines relating to antitrust immunity (nonjusticiability) because of governmental involvement, such as the foreign sovereign compulsion doctrine, the act of state doctrine, the Noerr-Pennington doctrine and its sham exception, and the commercial activity exception to foreign sovereign immunity.¹⁵⁸

The ABA Special Committee saw no need for the adoption of a World Antitrust Code.¹⁵⁹ Citing past efforts by the United Nations Conference on Trade and Development (UNCTAD) resulting in the adoption of a Restrictive Business Practices Code, a Transfer of Technology Code, and the OECD Guidelines for Multinational Enterprises, the ABA Special Committee concluded that a World Antitrust Code would not contain meaningful or enforceable standards because of the wide differences among nations.¹⁶⁰

Although the ABA Special Committee may be correct about the feasibility of a World Antitrust Code, perhaps the time is right for a more modest proposal: The negotiation of a set of competition principles at the GATT and a "side agreement" open to all GATT members that would set out a common understanding with regard to conflicts in competition policy that might cause trade friction or hinder free trade. As Sir Leon Brittan has advocated, antitrust violations that distort international trade should be subject to a GATT panel review.¹⁶¹

B. The Draft International Antitrust Code

On July 10, 1993, a group of experts known as the International Antitrust Code Working Group unveiled an ambitious proposal for an International Antitrust Code¹⁶² to be adopted as a plurilateral trade agreement under the auspices of the GATT. This proposal is a serious

¹⁵⁸ ABA Special Committee Report, *supra* note 135, at 2-14.

¹⁵⁹ *Id.* at 28-29.

¹⁶⁰ *Id.* at 278-94.

¹⁶¹ Right Honorable Sir Leon Brittan, Q.C., A Framework for International Competition, Address before the World Economic Forum (Feb. 3, 1992).

¹⁶² Draft International Antitrust Code as a GATT-MTO Plurilateral Trade Agreement, July 10, 1993, *reprinted in* 64 *Antitrust & Trade Reg. Rep. (BNA) (Special Supplement)* (Aug. 19, 1993). The scope of application of the code is limited to restraints of competition affecting at least two parties accepting the code. *Id.* art. 3, § 1.

and comprehensive attempt to deal with the inconsistencies between trade and antitrust rules and to establish a set of enforceable antitrust standards to supplement the GATT. The Draft Code, however, does not purport to modify the laws of unfair trade practices or to secure the passage of a harmonized competition law in all countries. Rather, it seeks to establish minimum substantive standards for national anti-trust laws based upon principles of non-discrimination and national treatment.¹⁶³

The Draft Code contains the following principles:

(1) Certain horizontal restraints such as cartels and other agreements to fix prices, divide markets, or assign quotas are illegal *per se*;¹⁶⁴ other horizontal restraints are presumptively illegal, but may be justified under a rule of reason analysis.¹⁶⁵

(2) Certain vertical restraints (distribution strategies) such as resale price fixing and distribution cartels are illegal *per se*;¹⁶⁶ other distribution restraints are presumptively illegal, but may be justified under a rule of reason analysis.¹⁶⁷ Vertical restraints should not be used to hinder cross-border transactions.

(3) Intellectual property rights should be exercised within the legal limits of the legal context of such rights.¹⁶⁸ It is permissible for the holder of an intellectual property right to grant licenses which may be exclusive, territorially restricted, and which impose justified obligations and restrictions.¹⁶⁹ It is illegal to use intellectual property rights

¹⁶³ Each party to the Draft Code would agree to adopt whatever measures are necessary to implement its obligations. *Id.* art. 1.

¹⁶⁴ *Id.* art. 4, § 1.

¹⁶⁵ *Id.* art. 4, § 2.

¹⁶⁶ *Id.* art. 5, § 1.

¹⁶⁷ *Id.* art. 5, § 2.

¹⁶⁸ *Id.* art. 6, § 1.

¹⁶⁹ *Id.* art. 6, § 2. The Comments to this section enumerates the following non-exhaustive list of permissible restrictions:

- an obligation to the licensee to procure goods and services from a given source, insofar as obtaining such products or services from that source is necessary for a technically satisfactory exploitation of a licensed invention;
- an obligation on the licensee to pay a minimum royalty or to produce a minimum quantity of the licensed product or to carry out a minimum number of operations exploiting the licensed invention;
- an obligation on the licensee to restrict his exploitation of the licensed invention to one or more technical fields of application covered by the licensed patent;
- an obligation on the licensee not to grant sub-licenses or assign the license;
- an obligation to mark the licensed product or, if applicable, the service with an indication of the patentee's name, the licensed patent or the patent licensing agreement;
- an obligation on the licensee not to divulge know-how communicated by the licensor; the licensee may be held to this obligation even after the agreement has expired and as long as the know-how remains secret;
- an obligation to inform the licensor of infringements of the patent, to take legal action against an infringer, and to assist the licensor in any legal action against an infringer;
- an obligation on the licensee to observe specifications concerning the minimum quality of the licensed product which are necessary for a technically

to abuse a dominant position or to pool such rights to suppress rival technologies.¹⁷⁰

(4) Concentration, mergers, and restructuring of business enterprises which have an international dimension should be judged by national antitrust authorities using similar criteria and with full notification to authorities in affected nations.¹⁷¹ In appraising business concentrations, national authorities should consider all competitive factors, especially the competitive structure of the affected markets and the market position of the undertakings and their financial and economic power.¹⁷²

(5) Abuse of a dominant position that adversely affects competition in any market is illegal. Such abuse may consist of

- a) limiting production, markets, or technical development;
- b) applying different conditions to equivalent transactions; and
- c) tying agreements.¹⁷³

(6) Remedies under national laws may include fines, damages, disgorgement of profits, injunctive relief and publication of judgment.¹⁷⁴

(7) Public undertakings that engage in economic activities that could be carried on by private undertakings may involve restraints of competition that are appropriate, indispensable, and proportional to meet the public purpose.¹⁷⁵

The Draft International Antitrust Code proposes significant new international institutions to ensure its observance by contracting parties. An International Antitrust Authority (IAA), a new GATT agency, would consist of a President and an International Antitrust Council.¹⁷⁶ The IAA would have the power to ask national antitrust authorities to initiate enforcement, to bring actions against national antitrust authorities in national courts, to sue private persons and undertakings in national courts, and to sue a contracting party before an International Antitrust Panel (IAP) for alleged violations of the Code.¹⁷⁷ The IAP, a

satisfactory exploitation of the licensed invention, and to allow the licensor to carry out related checks;

- an obligation on the parties to communicate to one another any experience gained in exploiting the licensed invention and to grant one another a non-exclusive license in respect of inventions relating to improvements and new applications;
- an obligation on the licensor to grant the licensee any more favorable terms that the licensor may grant to another undertaking after the agreement is entered into.

Id. art. 6, § 2 cmt. 3.

¹⁷⁰ *Id.* art. 6, § 1(b).

¹⁷¹ *Id.* arts. 8-11.

¹⁷² *Id.* art. 11, § 1(b).

¹⁷³ *Id.* art. 14.

¹⁷⁴ *Id.* art. 15 § 1(a).

¹⁷⁵ *Id.* art. 16, § 1 and cmts.

¹⁷⁶ *Id.* art. 19, § 1.

¹⁷⁷ *Id.* art. 19, § 2.

permanent dispute resolution body, would have the power to interpret the Code and to resolve disputes (1) between parties and (2) between the IAA and parties to the Code.¹⁷⁸

The Draft International Antitrust Code is an important proposal. For the first time, it would make competition policy an integral part of the GATT system of trade agreements. While the Code does not directly tackle the problem of the protectionist nature of certain international trade laws, it would establish a competition policy as an overriding concern in trade matters, and the dispute resolution process would create a forum for the resolution of conflicts between protectionist trade rules and competition policy.

Nevertheless, the broad harmonization advanced by the Code is neither economically necessary nor politically feasible. Unless its substantive principles are made as non-binding suggestions, the Code would subject national antitrust enforcement to unacceptable standardization. Furthermore, the creation of international antitrust institutions with binding authority over both national courts and national antitrust authorities will be rejected out of hand by key nations such as the United States.

Rather than an international antitrust enforcement bureaucracy, the IAA should serve as a forum for consultation, discussion, and exchange of information. The IAA also could foster antitrust harmonization and the syntheses of trade and antitrust by (1) identifying areas of agreement and common principles; (2) promoting antitrust enforcement that may be necessary to eliminate trade distortions; (3) recommending common standards and rules where a consensus approach is desirable and feasible; and (4) providing a forum for the resolution of international antitrust disputes over jurisdiction, discovery, and enforcement.

V. "Extraterritorial" Antitrust Enforcement

A. *The "Extraterritoriality" Controversy*

Controversy still surrounds the application of the U.S. antitrust laws to conduct in other countries that may affect the United States.¹⁷⁹ Several nations have enacted "blocking statutes"¹⁸⁰ designed to blunt U.S. enforcement efforts, and Japan has highlighted "excessive extraterritorial application of competition law" as an unfair U.S. trade prac-

¹⁷⁸ *Id.* art. 20.

¹⁷⁹ Although the U.S. antitrust laws were passed to deal with domestic anticompetitive conduct, they have increasingly been applied extraterritorially. See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 *LAW & POL'Y INT'L BUS.* 1 (1992). The Supreme Court has approved this policy as "well established." *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 n.22 (1993).

¹⁸⁰ See generally Sidney S. Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 *N.Y.U. J. INT'L L. & POL.* 1061 (1984).

tice.¹⁸¹ The nations object that U.S. antitrust enforcement often seeks to impose American policies that run counter to their interests and traditions.¹⁸²

A celebrated example is the case involving a Laker Airlines' suit for damages against British Caledonian, Pan American, and several other airlines alleging predatory pricing and a conspiracy in violation of the Sherman Act and Clayton Act.¹⁸³ Laker alleged that these airlines reduced their fares to match Laker's and sought actual and treble damages.¹⁸⁴ Because much of the necessary discovery in the case would take place in the United Kingdom, the United States District Court issued an injunction prohibiting the airline defendants from taking any action in a foreign forum that could impair or interfere with the jurisdiction of the court.¹⁸⁵

On June 27, 1983, the Secretary of State for Trade and Industry of the United Kingdom, citing his powers under the British Protection of Trading Interest Act (PTIA),¹⁸⁶ issued an order and general directions prohibiting persons who carry on business in the United Kingdom from complying with United States antitrust measures in the district court arising out of any agreement or arrangement to which a U.K. designated airline is a party or any act done by a U.S. designated airline that relates to air carriage under relevant international treaties.¹⁸⁷ The PTIA, a so-called "blocking" statute, works as follows. First, the act empowers the British Secretary of State to direct any person in the United Kingdom not to comply with a prohibition or requirement from another country which the Secretary believes would endanger the trading interest of the United Kingdom.¹⁸⁸ Second, the Secretary can forbid the production of documents located in Britain when this would be prejudicial to British sovereignty.¹⁸⁹ Third, there is no enforcement in British courts of awards for multiple damages that are designated competition judgments.¹⁹⁰ Fourth, the British Act provides for recovery of multiple damage awards by qualifying defendants that had to pay such damages in another country.¹⁹¹ This is known as a "clawback"

¹⁸¹ JAPAN EXTERNAL TRADE ORGANIZATION, 1992 REPORT ON UNFAIR TRADE POLICIES 97 (1992).

¹⁸² *Id.*

¹⁸³ *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 917 (D.C. Cir. 1984).

¹⁸⁴ *Id.*

¹⁸⁵ *Laker Airways, Ltd. v. Pan Am. Airways*, 559 F. Supp. 1124 (D.D.C. 1983).

¹⁸⁶ Protection of Trading Interests Act, 1980, ch. 11 (Eng.). For a discussion of the PTIA, see A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981).

¹⁸⁷ Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 (SI 1983 No. 900).

¹⁸⁸ Protection of Trading Interests Act, 1980, ch. 11 (Eng.).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

provision.¹⁹²

On July 26, 1983, the U.K. Court of Appeal announced its judgment that the order and directions were within the power of the Secretary of State and were valid.¹⁹³ The order and directions of the British executive prevented the British airlines from complying with any requirements imposed by the United States District Court and prohibited the airlines from relying on their own commercial documents located within the United Kingdom to defend themselves against Laker's lawsuit. As a result, the U.K. Court of Appeal concluded that the United States District Court action was wholly untriable and permanently enjoined Laker from proceeding in the United States with its antitrust claims against British Airways and British Caledonian.¹⁹⁴

The jurisdictional conflicts between the United States and the British courts were further heightened in March 1984 when the United States Court of Appeals for the District of Columbia affirmed the district court's protective injunction prohibiting the *Laker* defendants from taking part in foreign actions designed to prevent the district court from hearing Laker's antitrust claims.¹⁹⁵ The two opposing court decisions meant that the two countries were on a collision course regarding the issue of whether *Laker* would be allowed to go forward. The problem was alleviated, however, in July 1984 when the House of Lords in a unanimous decision¹⁹⁶ overturned the decision of the U.K. Court of Appeal and allowed Laker's liquidator to continue his case against British Airways and British Caledonian in the U.S. courts.

The House of Lords reasoned that if Laker's allegations could be proved at trial, then they disclosed a cause of action under American law but not English law, and consequently, that the American court was the only forum of competent jurisdiction.¹⁹⁷ In light of this decision, the court refused to apply English rules concerning *forum non conveniens*. The court considered it inappropriate and an obstruction of justice to prevent access to the only court competent to resolve the merits of the case.¹⁹⁸ The court rejected the claim of the British airlines that it was unconscionable for Laker to sue them in the United States. The court explained that the British airlines, as well as Laker, had voluntarily entered the U.S. market and obtained licenses to operate scheduled services under U.S. domestic laws and relevant international treaties. In doing so, they had submitted voluntarily to U.S.

¹⁹² *Id.*

¹⁹³ [1983] 3 W.L.R. 544.

¹⁹⁴ *Id.*

¹⁹⁵ *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

¹⁹⁶ *British Airways Bd. v. Laker Airways, Ltd.*, [1984] 3 W.L.R. 413 (H.L.), reprinted in 23 I.L.M. 727 (1984). Also see Note, *The Laker Antitrust Litigation: The Jurisdictional "Rule of Reason" Applied to Transnational Injunctive Relief*, 71 CORNELL L. REV. 645 (1986).

¹⁹⁷ *British Airways*, [1984] 3 W.L.R. at 416.

¹⁹⁸ *Id.*

domestic law with respect to operations within the United States.¹⁹⁹

The *Laker* case was thus resolved when the English court deferred to the United States jurisdiction. Certainly, however, this will not always be the case. The potential for conflict because of the extraterritorial applicability of U.S. antitrust laws still remains.

Nevertheless, the international community has come to realize and international law to recognize that legislative and enforcement competence cannot always be circumscribed by the "territorial" theory of jurisdiction. In *United States v. Aluminum Company of America (Alcoa)*,²⁰⁰ Judge Learned Hand formulated the so-called "effects" test for antitrust jurisdiction: "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the state reprehends; and these liabilities other states will ordinarily recognize."²⁰¹

In the wake of the *Alcoa* decision, U.S. enforcement authorities applied the antitrust laws to a wide variety of foreign practices that had an allegedly anticompetitive effect in the United States.²⁰² This assertion of power elicited protests that the United States was ignoring international comity and respect for the sovereignty of its trading partners.²⁰³

B. International Comity and Judicial Restraint

In order to place some practical limits on the extraterritorial exercise of jurisdiction, the federal courts fashioned principles of judicial restraint. In *Timberlane Lumber Co. v. Bank of America*,²⁰⁴ which involved an illegal conspiracy in Honduras to prevent Timberlane from shipping Honduran timber to the United States, the Ninth Circuit Court of Appeals set out a three-part test as follows:

A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil *violation* of the antitrust laws. . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those

¹⁹⁹ *Id.* at 419-20.

²⁰⁰ 148 F.2d 416 (2d Cir. 1945).

²⁰¹ *Id.* at 443.

²⁰² For a summary, see Joseph P. Griffin, *United States Antitrust Laws and Transnational Business Transactions: An Introduction*, 21 INT'L LAW. 307 (1987).

²⁰³ See, e.g., United Kingdom Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill, 21 I.L.M. 847 (1982).

²⁰⁴ 549 F.2d 597 (9th Cir. 1976).

other nations, to justify an assertion of extraterritorial authority.²⁰⁵

The third part of this test is the heart of the *Timberlane* analysis. The court called for a balancing of the following factors in determining whether to exercise jurisdiction:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.²⁰⁶

The *Timberlane* "rule of reason" analysis thus rests on international comity and conflicts-of-laws principles.²⁰⁷ The *Timberlane* analysis was followed by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*,²⁰⁸ which utilized these balancing factors and added the "possible effect on foreign relations" to the *Timberlane* list.

The *Timberlane* balancing test was accepted by the American Law Institute (ALI) in its *Restatement (Third) of Foreign Relations Law*, sections 402 and 403.²⁰⁹ Under section 402, a state may exercise jurisdiction to prescribe law with respect to (a) conduct that takes place within its territory; (b) conduct outside its territory "that has or is intended to have substantial effect within its territory;" (c) activities and interests of its nationals; and (d) activities against the state's security or similar interests.²¹⁰ In addition, Restatement section 403 requires the *exercise* of jurisdiction to be reasonable, judged according to the location of the

²⁰⁵ *Id.* at 613 (citations omitted).

²⁰⁶ *Id.* at 614.

²⁰⁷ On remand of the case, the court applied these doctrines to dismiss the plaintiff's complaint. *Timberlane Lumber Co. v. Bank of Am.*, 749 F.2d 1378, 1386 (9th Cir. 1984).

²⁰⁸ 595 F.2d 1287 (3d Cir. 1979). This case summarizes the factors to be considered in applying the principle of comity as follows:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations, if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and
10. Whether a treaty with the affected nations had addressed the issue.

Id. at 1297-98.

²⁰⁹ RESTATEMENT, *supra* note 111, §§ 402-403.

²¹⁰ RESTATEMENT, *supra* note 111, § 402.

alleged conduct, the effects within the regulating state, the nationalities of the parties, the importance of the regulation to the regulating state, the likelihood of conflict with another state's laws, and the extent to which the regulation is consistent with the international system. In the case of concurrent jurisdiction, each state has an obligation to evaluate its own as well as the other state's interest and should defer to another state whose interest is "clearly greater."²¹¹

In its 1993 decision in *Hartford Fire Insurance Co. v. California*,²¹² the Supreme Court reaffirmed both the "effects" test for extraterritorial antitrust jurisdiction and the principle of international comity. The *Hartford* case made no change in the *substance* of the comity doctrine but clarified *when* and *how* comity should be applied. Justice Souter, writing for the Court's majority, employed a two-step analysis. First, the question of jurisdiction is to be determined by whether there are allegations of wrongful conduct producing "some substantial effect in the United States."²¹³ Only after jurisdictional concerns have been satisfied do comity concerns come into play. Second, an overriding threshold question is whether there is a "true conflict" between U.S. and foreign law.²¹⁴ According to the Court, which cited the Restatement for the proposition that no conflict exists "where a person subject to regulation by two states can comply with the laws of both,"²¹⁵ if there is no alleged conflict, there is no need for the application of comity. Thus, in the Supreme Court's view, the existence of a conflict of laws is an essential precondition for the application of comity principles. This holding undercuts the comity doctrine and clears the way for broader extraterritorial application of U.S. antitrust laws.²¹⁶

²¹¹ The Restatement specifically applies these principles to regulation by the United States of anticompetitive conduct, so that if the "effects" test is satisfied it is presumptively reasonable for the United States to exercise extraterritorial jurisdiction. However, any exercise of jurisdiction is subject to the requirement of reasonableness. RESTATEMENT, *supra* note 111, §§ 415 cmt. a.

²¹² 113 S. Ct. 2891 (1993).

²¹³ *Id.* at 2909.

²¹⁴ *Id.*

²¹⁵ *Id.* at 2910 (citing and quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e) (1986).

²¹⁶ This aspect of Justice Souter's opinion was criticized by Justice Scalia, who wrote a dissenting opinion on this point which was joined by Justices O'Connor, Kennedy, and Thomas. Justice Scalia called the majority's analysis "breathtakingly broad," predicting "sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners." *Id.* at 2922 (Scalia, J., dissenting).

The nub of the differences between Justice Souter and Justice Scalia concerns the issue of "prescriptive" international jurisdiction. According to the Restatement, "jurisdiction to prescribe"—essentially legislative jurisdiction—is to be distinguished from "jurisdiction to adjudicate"—the authority to subject persons or things to the judicial process. (The Restatement also has a third category: jurisdiction to enforce, the authority to compel compliance with law.) RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986).

Justice Souter's opinion assumes that the Sherman Act's grant of subject matter jurisdiction is identical to jurisdiction to prescribe, and thus prescriptive jurisdiction requires no

The U.S. Department of Justice has incorporated a more restrictive concept of comity in its 1988 Antitrust Guidelines for International Operations.²¹⁷ In determining whether to exercise jurisdiction, the Department will consider:

- (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
- (2) the nationality of the persons involved in or affected by the conduct;
- (3) the presence or absence of a purpose to affect United States consumers or competitors;
- (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
- (5) the existence of reasonable expectations that would be furthered or defeated by the action; and
- (6) the degree of conflict with foreign law or articulated foreign economic policies.²¹⁸

By tempering the reach of U.S. antitrust jurisdiction through the recognition of international comity, the "effects" test has become more acceptable. Other states have adopted similar jurisdictional concepts, and bilateral antitrust agreements signed with Australia,²¹⁹ Canada,²²⁰ Germany,²²¹ and the European Union²²² have established a degree of international cooperation in the field of antitrust.

further analysis. Thus comity for Justice Souter and the Court's majority is *not* a matter of jurisdiction, but rather of *conflicts-of-laws*. *Hartford Fire Ins.*, 113 S. Ct. 2910-11.

Justice Scalia and the four-person dissent, on the other hand, make international comity an integral part of *prescriptive* jurisdiction. In their view, international comity comes into play whenever a statute is determined to apply extraterritorially according to congressional intent. *Id.* at 2917-20. Citing extensive precedent, *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); and *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), Justice Scalia forcefully argues that an act of Congress "ought never to be construed to violate the law of nations if any other possible construction remains." *Hartford Fire Ins.*, 113 S. Ct. at 2919 (Scalia, J. dissenting) (quoting *The Charming Betsy*, 6 U.S. (2 Cranch) at 118). Thus, for Justice Scalia, the comity analysis is part of the international law doctrine of jurisdiction to prescribe, which is a limitation on the *legislative* (not the *judicial*) power of the United States. *Id.* at 2921 (Scalia, J. dissenting).

Justice Scalia's view coincides with prior lower court cases such as *Timberlane*, 549 F.2d at 608-15; *Mannington Mills*, 595 F.2d at 1294-98; and *Laker Airways v. Sabena*, 731 F.2d 909, 938 n.109 (1984), as well as with the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986), which makes the reasonableness analysis and comity "limitations on jurisdiction to prescribe."

²¹⁷ U.S. DEPARTMENT OF JUSTICE ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 32 (1988).

²¹⁸ *Id.*

²¹⁹ Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., T.I.A.S. No. 10,365, 21 I.L.M. 702.

²²⁰ Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, U.S.-Can., 23 I.L.M. 275.

²²¹ Agreement Between the Government of the United States of America and the Federal Republic of Germany Relating to Unilateral Cooperation on Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956, T.I.A.S. No. 91.

²²² Agreement Between the Government of the United States of America and the Com-

C. *Redressing Foreign Anticompetitive Practices*

In 1992, a new jurisdictional controversy arose over a change in the antitrust enforcement policy announced by the Department of Justice.²²³ The new policy extends extraterritorial enforcement of U.S. antitrust laws to foreign business conduct that hampers U.S. exports where such activity would have violated U.S. law had it occurred domestically. The Department of Justice will assert enforcement jurisdiction upon finding the following:

- (1) the conduct has a direct, substantial and reasonably foreseeable effect on exports of goods or services from the United States;
- (2) the conduct involves anticompetitive activities that violate the U.S. antitrust laws—in most cases, group boycotts, collusive pricing, and other exclusionary activities; and
- (3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.²²⁴

This policy implements the 1982 Foreign Trade Antitrust Improvements Act²²⁵ which extended the Sherman Act to cover conduct that has a direct, substantial, and reasonably foreseeable effect "on export trade or export commerce with foreign nations . . ."²²⁶ The new policy supersedes a note²²⁷ to the 1988 Antitrust Enforcement Guidelines for International Operations that precluded Department of Justice enforcement against foreign business activity unless the anticompetitive conduct causes direct harm to consumers in the United States.²²⁸

This is an important development because it authorizes use of the U.S. antitrust laws to combat illegal barriers to export competition in world markets. The new policy may be used against import cartels and restrictive practices in other countries that exclude U.S. products and thereby curb competition.²²⁹

The new policy is in accord with the traditional aims of antitrust law to protect competition in domestic as well as international markets. It builds upon existing antitrust jurisprudence that establish as clear

mission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487, 1491 [hereinafter U.S.-EC Cooperation Agreement].

²²³ U.S. DEPARTMENT OF JUSTICE, Pub. No. 92-117, JUSTICE DEPARTMENT WILL CHALLENGE FOREIGN RESTRAINTS ON U.S. EXPORTS UNDER ANTITRUST LAWS (1992).

²²⁴ *Id.* at 2-3. For an analysis, see John S. Magney, *U.S. Extends Reach of Antitrust Enforcement*, 1992 INT'L FIN. L. REV. 18; Note, *U.S. Department of Justice Antitrust Enforcement Policy*, 34 HARV. INT'L L.J. 192 (1993).

²²⁵ 15 U.S.C. § 6a (1988).

²²⁶ *Id.*

²²⁷ 1988 *Antitrust Enforcement Guidelines*, *supra* note 142, n.159, stated that the Justice Department was concerned only about adverse effects on competition that would harm U.S. consumers.

²²⁸ 1988 *Antitrust Enforcement Guidelines*, *supra* note 142.

²²⁹ An example of this is *United States v. C. Itoh & Co., Ltd.*, 1982-83 Trade Cas. (CCH) 65,010 (W.D. Wash.) (consent decree) (involving Japanese purchasers of Alaskan tanner crabs charged with colluding on prices they would pay for U.S. exports of processed seafood).

authority to condemn anticompetitive conduct that limits U.S. exports, deprives U.S. firms of export opportunities, or has a spillover effect that restrains competition among U.S. exporters.

This policy should be implemented by understandings with our trading partners that U.S. enforcement action may be held in abeyance to give the other concerned nation a reasonable opportunity to take action against the conduct. Accordingly, the United States should negotiate or update bilateral antitrust agreements with its major trading partners. The new accords, modeled on the U.S.-EC antitrust agreement, should provide for (1) consultation and notification; (2) agreement on factors which may justify an extraterritorial enforcement action; and (3) a right to request antitrust enforcement action by the other nation against conduct within its borders that is impeding market access or causing extraterritorial anticompetitive effects. If this is done, competition and market access will be encouraged. This would be a valuable supplement to trade retaliation under section 301 and an alternative to protectionist actions under the trade laws.

Thus, traditional "negative" international comity may be supplemented by a new "positive comity."²³⁰ A foreign government would be induced to enforce antitrust principles to open markets closed to U.S. exports. Nonetheless, positive comity has distinct limits: No nation will enforce antitrust laws against its own interests or merely to please an important trading partner. Thus, positive comity is not a panacea that will replace extraterritorial antitrust enforcement. In the long run, the best hope for smoothing the rough edges of extraterritorial enforcement is to promote further convergence of substantive antitrust laws among trading nations and to establish an International Antitrust Authority as a forum for discussion of antitrust standards, enforcement, and relief.²³¹ The IAA also could provide a forum for the resolution of disputes over extraterritorial antitrust jurisdiction and foster convergence of action among national antitrust authorities.

VI. Conclusion

There are many correspondences between the antitrust laws and the laws regulating international trade. Yet, the trade and antitrust laws often come into conflict. While the trade laws are necessary for both political and economic reasons, they should not be applied without consideration of their impact on competition and consumer welfare. These traditional antitrust goals retain their validity, and they serve the cause of American competitiveness better than the protectionism of the trade laws.

²³⁰ See James R. Atwood, *Positive Comity—Is It A Positive Step?*, in INTERNATIONAL ANTI-TRUST LAW & POLICY: ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 79 (Barry Hawk ed. 1993).

²³¹ See *supra* notes 176-78 and accompanying text.

There is little evidence that the antitrust laws have contributed to the American trade deficit or have reduced the international competitiveness of American industries. On the contrary, more competition, not less, would serve the cause of American competitiveness by opening new export markets and eliminating trade restraints that disadvantage American firms. Accordingly, U.S. policy should be to promote better antitrust enforcement by other nations as well as harmonization and consultation so that differing conceptions of the antitrust laws are not a barrier to trade. In order to minimize such conflicts, the GATT should adopt a Side Agreement on Competition and Trade.

The extraterritorial application of national antitrust laws is sanctioned by the "effects" jurisdictional test tempered by principles of international comity. In order to prevent conflicts of jurisdiction and law, nations should agree to consult and cooperate to maintain international competition and free and open national markets. An International Antitrust Authority should be created under the auspices of the GATT to foster harmonization of national antitrust laws that affect trade, to resolve disputes, and to promote cooperation on issues relating to antitrust process and enforcement.

Those who would dilute or weaken the antitrust laws are wrong; we need more antitrust enforcement, not less, as long as enforcement takes into account the globalization of markets. Antitrust properly applied is an alternative to the protectionism of the trade laws.