CONFLICTS OF JURISDICTION: ANTITRUST AND INDUSTRIAL POLICY

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I

INTRODUCTION

An economist is likely to view the major U.S. antitrust statutes, such as the Sherman Act or the Clayton Act, as laws concerned with the effects of particular business conduct and practices on competition and consumer welfare. These statutes were adopted by the United States Congress in 1890 and 1914, respectively, when the intensity and the dimensions of competition in the United States, and hence consumer welfare, were being defined primarily, if not exclusively, by the activities of American firms. Essential international trade data fully support this view of competition.[1] At the end of the nineteenth century the value of U.S. imports amounted to $850 million in current dollars. Viewed from another vantage point, U.S. imports then amounted to 4.5% of the Gross National Product (GNP). These imports consisted primarily of crude materials, such as raw silk, coffee, and sugar, and semi and finished manufactured goods, such as wood pulp, copper bars, wool products, and newsprint. Finally, but equally important, the United States was running a comfortable balance of trade surplus.[2] By 1950, when the Celler-Kefauver Act[3] amended section 7 of the original Clayton Act, the United States was the paramount industrial power in the free world. Its international trade activity, however, was still quite limited. In 1950 imports amounted to $8.9 billion in current dollars, and constituted a mere 3% of the Gross National Product. Again, as in the late nineteenth century, business rivalry and competition in the United States were predominantly a "domestic affair."[4]

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1. *See infra* text and accompanying notes 2-7.

2. In 1900, domestic exports exceeded general imports by $521 million in current dollars. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, BICENTENNIAL EDITION: HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 890 (1975).

3. Celler-Kefauver Act of 1950, 15 U.S.C. § 18 (1982).

4. *Id.* Data presented in R. RAPP., TRADE WARFARE AND THE NEW PROTECTIONISM (1986), shows that in 1929, foreign trade, which equals exports plus imports, amounted to about eight percent of the GNP. By 1941, this ratio declined to five percent and stayed at or below ten percent from 1949 through 1969. By 1984, this ratio approached twenty percent.

Business rivalry is no longer simply a domestic American affair. In the past decade, international trade has come to play an increasingly significant role in the U.S. economy. The staggering balance of trade deficits have now reached $160 billion annually. Repeated calls have emerged for protectionist policies designed to insulate American firms from "unfair and excessive" foreign competition and to wring trade concessions and better access to foreign markets for U.S. exporters. Both have become daily front-page news items. In 1985 exports of goods and services were $362.3 billion (1982 dollars), imports had reached $470.5 billion (1982 dollars), and together these comprised 23% of the U.S. GNP.[5] In key sectors of the economy, imports have captured a substantial share of the U.S. market. For example, in 1972, the import penetration ratios[6] were 13.6% for motor vehicles and car bodies, 9.8% for steel supply, 7% for apparels and other textile products, and 7.6% for electrical and electronic equipment. By 1982, the import penetration ratios for these products had risen to 26.7%, 17.2%, 20%, and 16%, respectively. At the end of 1985, the import penetration ratios for capital goods and consumer goods in general were 30.1% and 11.3%, respectively.[7]

In this new environment, the activity of American firms no longer solely or even predominantly defines the intensity and dimensions of competition. Rather, it is the strategic interactions of both domestic and foreign firms, including potential foreign entrants, which determine market rivalry. Consequently antitrust policy—or to use a more descriptive term, "competition policy"—must now take into account the realities of international trade and rivalry. However, accomplishing this shift in policy considerations will not be a simple matter.

The drafters of the 1982 and 1984 Department of Justice (DOJ) Merger Guidelines have undertaken perhaps the most valiant effort in this direction. These DOJ guidelines attempt to design market definition procedures in merger cases that would best reflect the constraining role of foreign firms, products, and technology in maintaining competition in the U.S. economy.[8] Still, many major areas of policy remain unexplored and unresolved. The use of U.S. antitrust laws (competition policy) to regulate the conduct of foreign

5. Imports alone accounted for 13% of GNP in 1985. BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE Survey of Current Business (Aug. 1986).

6. Import penetration refers to the ratio of imports to new supply (domestic product shipments plus imports) as defined by the BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1986 U.S. INDUSTRIAL OUTLOOK 19 (table 6) [hereinafter 1986 INDUSTRIAL OUTLOOK].

7. The capital goods import penetration ratio is constructed by dividing merchandise imports of capital goods, excluding autos and trucks, by producers' durable equipment expenditures. The import penetration ratio for consumer goods is constructed by dividing imports of consumer goods, excluding food and autos, by personal consumption expenditures less food and motor vehicle expenditures. Johnson, *U.S. International Transactions in 1985*, 72 FED. RESERVE BULL., May 1986, at 291. For a review of current industry trends in international trade, see 1986 INDUSTRIAL OUTLOOK, *supra* note 6, at 14-21; Johnson, *supra*, at 287-97.

8. For a discussion of the provisions of the Dep't of Justice Merger Guidelines which pertain to international trade and market definition, see Ordover & Willig, *Perspectives on Mergers and World Competition*, in ANTITRUST AND REGULATION 201-18 (R. Grieson ed. 1986); Ordover, *Transnational Antitrust and Economics*, in ANTITRUST AND TRADE POLICY IN INTERNATIONAL TRADE 233-48 (B. Hawk ed. 1985).

firms when that conduct directly affects the competitiveness of U.S. markets and the economic well-being of U.S. consumers has not been tested. This essay demonstrates that economic analysis can contribute to policymaking in this area but that, for a variety of reasons, this contribution is likely to be much more limited than in other areas of antitrust policy and practice.

The following major conclusions emerge from the analysis in this essay. First, in terms of affecting the conduct of foreign firms, U.S. antitrust policy is most effective where it is least needed and least effective where it is most needed. In particular, U.S. antitrust policy can in some circumstances reach allegedly predatory conduct engaged in by a single foreign firm, or by a group of foreign firms, although it is quite unlikely that successful predation in international markets will occur. At the same time, U.S. antitrust laws are almost totally ineffective against cartels formed by foreign firms, or sovereign governments (for example, OPEC), even though such cartels as a rule harm U.S. consumers. Finally, these laws are totally ineffective against mergers of foreign competitors, when such mergers may have substantial adverse effects on competition in U.S. markets.

Second, given single firm conduct that may violate section 2 of the Sherman Act,[9] foreign sovereign compulsion should constitute an almost infallible defense against the application of U.S. antitrust laws.

A third conclusion is that when testing the conduct of foreign firms for potential violations of section 2 of the Sherman Act, it is most plausible to assume that these firms behave as profit-maximizing entities. This conclusion also applies to enterprises which are directly under the control of foreign governments, for example, Polish golfcart producers. Therefore, such firms, in selecting their business conduct, should be allowed to avail themselves of whatever explicit and implicit advantages that have been or are being conferred on them by their governments.

Fourth, only a most limited foreign sovereign compulsion defense should be available to foreign cartels comprising non-governmental entities which may foreseeably and significantly elevate prices in the United States. Furthermore, both "foreseeability" and "significance" should be explicitly defined in terms of U.S. market shares, the likely impact on prices, and other quantitative and qualitative indices. The definitions should be arrived at through the use of analytic procedures such as those embodied in the United States Department of Justice Merger Guidelines.[10] In addition, as a legal matter, no substantive weight should be given to the question of whether the effect on competition and consumer welfare in the United States was intentional.

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9. In pertinent part, section 1 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

15 U.S.C. § 2 (1982).

10. Department of Justice Merger Guidelines, 49 Fed. Reg. 26,024, paras. 2.3-2.4 (1984).

The fifth conclusion is that unadorned economic theory would favor the abolition of the soveriegn compulsion defense for cartels constituting government-controlled enterprises or agencies (such as OPEC), but it must be conceded that foreign sovereigns cannot be sued in their sovereign capacity. On the other hand, in the area of restrictive practices that would fall within the purview of section 1 of the Sherman Act,[11] sovereign capacity ought to be understood rather narrowly and the actions of the sovereign should be regarded as primarily commercial in nature. This conclusion follows because, as will be explained below, conduct that may run afoul of section 1 when it has substantial effects on international commerce cannot be justified as being part of a legitimate industrial policy.

Finally, the balancing test for claiming jurisdiction in antitrust cases is likely to remain largely unworkable until some common ground among trading nations is reached. This common ground must delineate the scope of legitimate industrial policies. The balancing test must also encompass a common understanding of the role competition policies are to have in allocating global economic resources and in affecting competitive dynamics.

In sum, this article takes the view that because U.S. antitrust statutes are concerned with business conduct and its effects on competition and consumer welfare in the United States, there must be compelling reasons why these significant effects should not justify jurisdiction. The reasons are most compelling for not exercising jurisdiction for effects resulting from single firm conduct and from impacts on world trade and competition that can be attributed to the pursuit of legitimate macroeconomic and microeconomic policy objectives by foreign governments. Reasons not to exercise jurisdiction are least compelling in relation to non-governmental cartels and, in fact, strong reasons exist in favor of exercising antitrust jurisdiction against cartel members.

II

MODES OF INDUSTRIAL POLICY AND IMPACTS ON COMPETITION

Macroeconomic policies which influence such key economic aggregates as the inflation rate, interest rates, the unemployment rate, and rates of exchange unquestionably have a significant impact on world trade and the relative competitiveness of firms in world markets. These policies provide an advantage to some firms and a disadvantage to others, and their impact on competition is a background against which industrial policies and international rivalry must be assessed.

Industrial policies are designed to influence directly key microeconomic variables such as the level of employment in a particular sector of the

11. In relevant part, section 2 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of travel or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. § 1 (1982).

economy, industry prices and investment, or expenditures on research and development.[12] In general, industrial policies affect resource allocation among various sectors of the economy. As such, these policies selectively provide an advantage or disadvantage to various industries and sectors of the economy, and may have a substantial impact on international trade and on the state of rivalry in world markets. For the sake of discussion, in the rest of this essay it will be convenient to divide industrial policies into three categories. These categories, however, cannot be neatly demarcated. Nevertheless, policies which fall into distinct categories should potentially be given differing weight in the "balancing test" for jurisdiction.

The first category of industrial policies is comprised of those policies aimed at correcting recognized market failures. Market failure arises when competitive markets do not perform in a manner consistent with the maximization of socioeconomic welfare.[13] An example of one perceived failure of a market economy is the sluggish disbursement of resources towards research and development (R&D) activities. Private incentives to invest in R&D activities are guided by the profit motive. But the profit motive is an inadequate guide when private investment in R&D yields social benefits which cannot be appropriated by those who undertake the investment.[14] To correct this type of market failure, direct subsidies by the government might be necessary. These subsidies provide advantages to firms that receive them, but they hardly create antitrust concerns.

Another example of market failure occurs when financial markets fail to provide adequate amounts of risk capital with which to finance new productive ventures. This type of failure may again require direct involvement by the government. In Japan, venture capital markets barely exist, and at times the Ministry of International Trade and Industry (MITI) has served the function that financial markets perform in the United States.[15] Market failure can also result from the underlying technology that necessarily concentrates a particular industry, and causes it to fail to behave competitively. In this instance, appropriate public policy may be difficult to fashion; while breaking up firms imposes losses in productive efficiency, imperfect competition causes prices to deviate from the competitive ideal.[16] Industrial policies may encourage concentration, hence imperfect competition, in the belief that more concentrated markets ultimately stimulate dynamic efficiency. The

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12. For a careful definition and discussion of industrial policy, see R. LAWRENCE, CAN AMERICA COMPETE? (1984).

13. *See* Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351-79 (1958) (excellent discussion of various causes of market failure).

14. *See* Ordover, *Economic Foundations and Considerations in Protecting Industrial and Intellectual Property*, 53 ANTITRUST L.J. 503-18 (1985) (discusses the antitrust implications of R&D economics).

15. *See* R. LAWRENCE, *supra* note 12.

16. Many economists now question whether perfect competition is the appropriate benchmark against which actual market structures should be compared. They regard it as more illuminating to inquire whether or not a particular industry is behaving optimally from the social standpoint, given the nature of its production technology and the structure of demand. *See, e.g.*, W. BAUMOL, J. PANZAR & R. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982).

theory may be that concentration leads to greater R&D investments and faster technological progress, and thereby contributes to overcoming the type of market failure described below.

These examples show that markets, in their structure, behavior, and performance, frequently deviate from the theoretical ideal. When such deviations arise governmental intervention is justified, at least theoretically. Correction of such deviations will affect the flow of goods and services in international trade. Thus, even legitimate industrial policies pursued by one country and designed to correct market failures could be detrimental to firms and workers in other countries. Nevertheless, such policies should be encouraged rather than stymied by expansive antitrust policies.[17]

The second category of industrial policies includes those which respond directly to various socioeconomic pressures. These pressures are only in part causally related to some form of market failure. To understand the rationale for this type of intervention, it is necessary to introduce a public choice model of the functioning of public policy-making.[18] In this model, the government, or rather its elected and unelected officials, is in the position to secure and maintain supracompetitive profits (monopoly rents) for firms and workers, or to preserve sectors that could not otherwise return a profit and survive in a competitive international marketplace.[19] In some instances these types of interventionist policies come in response to genuine social concerns that are indirectly rooted in market failure considerations. For example, when a decline in a particular industry creates large scale unemployment among workers with specialized skills (human capital), the socioeconomic costs of such dislocations may be immense and may warrant some form of industrial policy intervention. Similarly, some form of intervention may be warranted to assist the orderly removal of excess capital from the declining sector of the economy. Unfortunately, more often than not, the particular public policies chosen are hardly desirable from the standpoint of social efficiency. For example, distress cartels, which are sometimes embraced in Europe and Japan, only prolong the difficulties associated with needed adjustments to a new equilibrium without offering much to society as a whole.[20] It is unreasonable to expect other countries to share in the costs of inefficient adjustment policies by condoning distress cartels which have significant competitive effects abroad. In particular, there is no reason why, as a matter

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17. For a discussion of microeconomic politics in the free trade environment, see R. HARRIS, TRADE, INDUSTRIAL POLICY AND INTERNATIONAL COMPETITION (1985).

18. For an extensive discussion of public choice theory of policy-making, see Mueller, *Public Choice: A Survey*, 14 J. ECON. LIT. 395-433 (1976).

19. For an excellent discussion of protectionist policies from the vantage point of public choice theory, see R. BALDWIN, THE POLITICAL ECONOMY OF U.S. IMPORT POLICY (1985).

20. For a discussion of the economic inefficiencies associated with distress cartels and the undesirability of relaxing antitrust standards for declining industries, see M. FRANKENA & P. PAULTER, ANTITRUST POLICY FOR DECLINING INDUSTRIES (Federal Trade Commission, Bureau of Economics Working Paper, 1985). Distress cartels are cooperative pricings and production agreements among independent manufacturers in industries experiencing declining demand and substantial excess capacity.

of economic theory, section 1 of the Sherman Act should not apply to such arrangements, even if the arrangements are fully sanctioned and encouraged by the respective governments involved. By aggressively using section 1 in these instances, the United States might encourage foreign governments to rebate the overcharge and benefit U.S. consumers.[21]

Finally, a third broad category of industrial policies consists of those designed to transfer the profits from foreign firms and foreign consumer surplus to domestic firms.[22] These types of policies form the center of the ongoing debate among policymakers and economists on the economic costs and benefits of strategic trade and industrial policies.[23] The policies in this category are also the most difficult to analyze for several reasons. The theoretical rationale for their implementation is shaky and, at times, they may appear indistinguishable from the more legitimate industrial policies which fall into the first two categories listed above. Finally, the net effect of these policies may be to improve consumer welfare in the importing country and reduce profits and wages in the import-competing industry.

Three plausible examples will illustrate the policies at issue here. First, consider the semiconductor industry in which learning-by-doing and scale economies are significant determinants of the cost of production.[24] In such a scenario, one country can gain an advantage in international trade by denying foreign competitors access to its market. This strategy reduces the level of total sales of foreign firms, raises their unit costs, and makes it more difficult for them to compete even in their own markets. Note that the domestic firms of a country that pursues this policy benefit only indirectly from it. Nevertheless, they gain an international advantage because their relative costs are lowered. If the advantage is significant, import-competing firms may be driven out. These firms may find it difficult to return if re-entry barriers are high, and the surviving firms may be able to elevate prices. No predatory act by a private party has occurred, but the outcome nevertheless resembles that which would arise if the exporting firms were engaged in predatory conduct.[25]

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21. Of course such rebates may prompt the import-competing U.S. industry to clamour for protection against "dumped" foreign products. However, if dumping were to be defined as pricing below long-run marginal cost, such protectionist maneuvers are likely to fail more often than not. *See e.g.*, Ordover, Sykes & Willig, *Unfair International Trade Practices*, 15 J. INT'L L. & POL. 323-38 (1983).

22. Consumers' surplus is defined as the difference between the maximum amount that a consumer is willing to pay for a given quantity of the product and the amount that he or she actually pays.

23. The literature on this subject is by now voluminous. A nontechnical collection of papers can be found in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (P. Krugman ed. 1986), and R. HARRIS, *supra* note 17. For a more technical presentation, see P. KRUGMAN, INDUSTRIAL ORGANIZATION AND INTERNATIONAL TRADE (National Bureau of Economic Research Working Paper No. 1957, 1986); Dixit, Strategic Aspects of Trade Policy (1985) (unpublished manuscript available from the *Law & Contemporary Problems'* office).

24. R. Baldwin & P. Krugman, Market Access and International Competition: A Simulation Study of 16K Random Access Memories (1986) (unpublished manuscript) (analyzes strategic and industrial policy for the semiconductor industry).

25. Professor Fox, whose grasp of intricate economic arguments often exceeds that of trained economists, suggests that this strategy also could cause high concentration in excluded countries because the available market might not be big enough to support more than a few efficient firms and

In a second example, consider the case of a government which facilitates a cartel in the domestic market for video cassette recorders (VCRs). Creating a cartel in the home market makes exports more desirable and also guarantees a satisfactory overall rate of return on the sales of VCRs, even if export prices are significantly lower than home prices. These low export prices are sufficiently competitive to reduce significantly the market share of import-competing firms. Again, the effect of the industrial policy may be similar to that which would occur if private firms had engaged in predation. Provided that the exporters had not sold below their marginal cost, however, the actual price would not be predatory.

The final example alludes to governmental policies which facilitate, encourage, and sanction export cartels. These cartels transfer consumer surplus from abroad (that is, they lower the foreign consumer surplus) and transform it into higher profits and wages in exporting domestic industries. In some limited instances these cartels may be justified on efficiency grounds. For example, exporting firms might set up joint marketing operations in order to avoid costly duplication of distribution facilities. In many other instances, however, such a justification is unavailable. In these instances the rationale for the cartels becomes transparent: It is good to extract profits from abroad at the expense of foreign consumers because our "nationalistic" evaluation of economic well-being does not place value on the well-being of consumers abroad.[26]

This section has outlined various categories of industrial policy. Governmental policies significantly influence business activity in advanced economies, as well as in newly developed countries (NDCs) and less developed countries (LDCs). These policies are governed by a variety of objectives, including the commercial, the more broadly socioeconomic, or the blatantly geopolitical. It is a recognized principle of international law that each country should have a sovereign right to influence and regulate economic activity in its own territory.[27] However, in the open world economy, such policies have effects beyond national borders: They impose costs and confer benefits upon, and at times clash with the policies of, other countries. This essay seeks to establish guidelines for the resolution of these potential conflicts.

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could lead to cartel-type behavior. This outcome could be facilitated by the excluded country's protectionist policies.

26. Thus, I strongly disagree with the views of James Atwood expressed at the Conference which seem to suggest that there should be a mutual forbearance among trading nations with respect to their home-grown export cartels. In light of the finding that generally there is no efficiency rationale for such cartels, the opposite stance is more justified. I would, of course, permit an efficiency defense. Douglas Rosenthal, Esq., pointed out to me that governmental policies that merely sanction cartels might be more effectively attacked using the provisions of section 301 of the 1974 Trade Act, 19 U.S.C. § 2411 (1980 & Supp. 1987). *See also* Atwood, *Antitrust and Export Cartels*, LAW & CONTEMP. PROBS., Autumn 1987, at 153.

27. For a convenient summary, see 1 W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 43-164 (1982); 1 P. AREEDA & D. TURNER, ANTITRUST LAW 254-78 (1978).

III

INDUSTRIAL POLICIES AND PRIVATE ACTIONS

For simplicity, business conduct will be divided into two categories: (1) conduct aimed at garnering an additional market share from firms in the importing country and maintaining this higher market share over time, potentially to the detriment of the importing country's consumers; and (2) conduct designed to reduce competition through implicit or explicit collusion. Stated another way, conduct in the first category would be scrutinized under section 2 of the Sherman Act to determine whether it constitutes either monopolization or an attempt to monopolize.[28] The second category includes conduct that may run afoul of section 1 of the Sherman Act.[29] Note that mergers and acquisitions involving foreign firms, which might violate section 7 of the Clayton Act, are plainly beyond the reach of U.S. law.[30]

Regardless of which category the specific conduct fits, the first and major question is whether the activities of firms is in accordance with a government policy.[31] This question does not have a simple, precise answer. It is quite plausible that the government has not rigorously defined its policy, or some parameters may have been intentionally left vague, and thus open to misinterpretation. Furthermore, in the desire to shield their firms from prosecution, governments may provide ex post facto rationalizations for why they believe the activities to be within the contemplated scope of governmental policies. The firms themselves, however, may strive strategically to use the shield of government compulsion. These examples demonstrate the importance of defining how much weight should be given to the defense of foreign sovereign compulsion. Determining the weight of the defense should also not be divorced from the following two considerations. First, is the allegedly illegal conduct predatory or is it collusive (leaving aside collusive conduct designed to facilitate predatory activities)? Second, which of the three broad categories of industrial policies is being invoked as a defense?

The need to determine which of the three industrial policies is at issue has been developed in Section II. Industrial policies designed to rectify a well-recognized market failure are generally desirable not only from the chauvinistic vantage point of the country pursuing those policies, but also from the vantage point of global efficiency and resource allocation. Consequently, these policies should be encouraged. Industrial policies aimed

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28. *See supra* note 8.

29. *See supra* note 10.

30. Some believe that the more dependent the United States becomes on imports of foreign products, the more likely it is that such mergers, if they were to occur, would be harmful to U.S. consumers. In other words, the finding of a "world market" for the purposes of merger assessment may make it easier for two U.S. firms to satisfy the Merger Guidelines but it also brings out the constraining role of foreign firms on the conduct of firms selling to U.S. consumers.

31. Assume that it already has been demonstrated that there is a sufficient nexus between the foreign government's policy, conduct of firms, and the impact on U.S. competition and consumers.

at relieving some socioeconomic burdens, such as excess sectoral unemployment or superfluous capital, are likely to be even more protected under the sovereign immunity doctrine than are policies designed to correct market failure.

The analysis developed here suggests, however, that greatest protection should be extended to industrial policies which correct explicit market failures. Lesser protection should be accorded to direct interventions that attempt to cure socioeconomic ills. These policies are generally poorly designed and frequently transfer costs from the country which pursues them to innocent third parties. These interventions also redistribute burdens within the country. Yet, it must be recognized that it would be a transgression to prohibit any government from (implicitly) taxing its citizenry to finance its agricultural policy, for example. When the effects of a country's domestic economic policies spill abroad, a legitimate extraterritorial interest emerges: There should be no taxation without representation. Nevertheless, "representation" through the claims of antitrust jurisdiction appears to be an inappropriate and ineffective venue.

Finally, policies which seem merely to redistribute consumer surplus rather than correct market failure should be accorded the least protection. The United States should be most restrictive in extending the compulsion defense to firm conduct which is allegedly in accordance with nationalistic policies designed primarily to redistribute world profits and consumers' surplus. This is especially the case if the United States is a primary or important target of these policies and the impact on it is substantial.

Within each category of industrial policies, the most expansive protection under the foreign compulsion defense ought to be accorded to those actions which have the alleged effect of monopolizing or attempting to monopolize the relevant U.S. market. Several reasons support this position. The likelihood of successful predation is considered by many economists to be rather low in most realistic market scenarios,[32] and the author believes that the likelihood of successful predation is probably even lower when the alleged predator is an exporting firm domiciled abroad. Moreover, the United States can protect its import-competing industries against low prices by means of diverse measures pertaining directly to international trade. Such measures as tariffs and countervailing duties are an accepted part of the world trading order and are guided by the principles of free trade embodied in the rules of GATT.[33] As of now, there is less international agreement on the proper

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32. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981) (expounds the view that successful predation is almost never likely and hence prohibitions against it are unnecessary and tend to be counterproductive). A more balanced view is presented in J. Ordover & G. Saloner, Predation, Monopolization and Antitrust (1987) (unpublished manuscript) (forthcoming in R. SCHMALENSEE & R. WILLIG, HANDBOOK OF INDUSTRIAL ORGANIZATION (1987)).

33. The General Agreement on Trade and Tariffs (GATT) is an international organization devoted to the promotion of trade in general and reducing barriers to trade in particular. For a good non-technical discussion of GATT and other international and regional trade organizations, see M. KREININ, INTERNATIONAL ECONOMICS, 331-49 (5th ed. 1987).

scope and role of antitrust policies, even though in this regard the divergence between the United States and some of our trading partners is less than it used to be. Finally, the difficulties in applying such standard tests of predatory behavior as the Areeda-Turner test[34] are most likely to be compounded when applied to foreign firms whose costs are frequently impossible to ascertain.

The above considerations justifying expansive protection for predatory practices under the foreign compulsion rule do not apply to price fixing and other cartels. Whether the price or other terms and conditions of sale have been fixed is a factual inquiry whose success does not turn on such intricate questions as whether or not the sale price exceeds reasonably anticipated marginal costs. Cartels are more pernicious than are predatory strategies because at no time do they confer benefits on consumers. Unlike predatory conduct which is difficult to distinguish from normal strategic interactions, collusion is the opposite of competition and cannot be mistaken for it. Depression cartels are an inefficient method of dealing with an industry's transition to a lower level of equilibrium output. There is no reason why other countries should bear the costs of such inefficient policies when other policy instruments are available to handle the task.[35] Standard remedies in international trade, such as tariffs and countervailing duties, cannot address the problem of elevated prices; instead, they only exacerbate the inefficiencies caused by above-competitive prices.

Despite the arguments against cartels, a very limited sovereign compulsion defense should be available to private firms comprising a cartel. It is of course possible to argue that such a defense should not be available because, in the absence of the defense, firms may be quite reluctant to participate in such cartels. If, however, firms are hesitant to participate in this type of collusion, then foreign governments may become less willing to form such cartels. If cartels are made undesirable, the cure may be worse than the disease. It may, for instance, lead to inefficient reallocation of assets, nationalization of productive assets, or export tariffs. These practices may prove more difficult to counter than a cartel agreement.

Government cartels present the most formidable dilemma. There is no question that such cartels are detrimental to the global allocation of resources. Yet these cartels, typically used to fix and stabilize the prices of raw materials and agricultural products, are in essence immune to attack by U.S. antitrust laws. Here "simpleminded" prescriptions of economics inevitably run up against the accepted principles of international law, and ultimately must recognize politics as an overriding principle. Consequently, attempts to reach a diplomatic solution to the problems posed by government

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34. Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1976).

35. More effective policies may include direct payments to owners of excess capacity, retaining programs for affected employees, or tolling agreements.

cartels are more likely in the long run to bring about global efficiency than noncooperative, adversarial antitrust litigation.

Economic analysis therefore suggests that the sovereign compulsion defense should be interpreted broadly in monopolization cases, especially when the allegedly anticompetitive conduct is broadly construed; such interpretation would encourage the pursuit of microeconomic policies designed to cure market failure or to facilitate some socioeconomic objectives. In price fixing cases, the defense should be interpreted narrowly in order to discourage firms from entering into such collusive agreements and hiding behind the shield of sovereign compulsion. This view is reinforced by the fact that collusive agreements of this kind are not consistent with legitimate industrial policies but are, most likely, designed to usurp consumer surplus.[36]

IV

THE BALANCING TEST

When sovereign interests clash, it is reasonable to resort to a balancing of equities. Balancing is a rather empty prescription for ascertaining jurisdiction, however, unless there exists some idea of the appropriate weights to be assigned to conflicting interests. Assigning a very low weight to the genuine interests of the foreign sovereign is a very crude position. In fact, it may provoke retaliation by the country whose interests have been undervalued. Retaliation will consist of the slighted state assigning zero weight to the interests of the first country. As a result, both countries in the long run are damaged more than they would be if the first sovereign had initially used a more appropriate balancing test. Hence, after assessing potential strategic interactions among nations in the international arena, it is clear that purely chauvinistic weights are never optimal.

How much positive weight should be assigned to foreign interests in the balancing test? Such weights should not be specified *ex ante*, primarily because inflexible weights might only hamper conflict resolution. Some guidelines are desirable, however. This essay has already offered some preliminary guidelines by positing that foreign sovereigns should not be penalized for policies which remedy market failures and efficiently pursue vital socioeconomic objectives. These objectives do not, however, include strategic industrial policies designed to transfer profits and consumer surplus from abroad.

Balancing enters, albeit through a back door, at the stage when "the relative significance and foreseeability of the effects of the conduct on the United States. . ."[37] is compared with effects abroad. Why such a comparison should be important is unclear. Surely, if the effect in the United States is

36. One caveat may be mentioned here: Competitive industry may extract the natural resource too fast for the good of the national welfare. Sovereign compulsion in this instance may be necessary. *See* P. DASGUPTA, THE CONTROL OF RESOURCES (1982).

37. The Reagan Administration's Package to Congress for Revision of Federal Antitrust Laws, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1253, at S-14 (Feb. 20, 1986).

substantial in absolute terms, irrespective of the effect abroad, this ought to be enough to claim jurisdiction. To see why the relative distribution of effects is largely irrelevant, consider the case where the foreign country is perfectly willing to accept the burdens of constructing a cartel in a vital industry on the belief that additional profits from abroad justify the policy.[38] It is preferable to adopt some objective threshold criteria for determining the economic impact of the allegedly illegal conduct on competition in the United States. From this perspective, the more substantial the potential harm is to the United States, the lower is the weight to be assigned the conflicting interest of the foreign sovereign.

V

CONCLUSION

Economists have been reluctant to venture into the unchartered waters of international antitrust jurisdiction issues. This essay may convince the reader that such reluctance is justified. Some positive insights, however, do emerge from this tentative first step. Most significantly, this analysis demonstrates that very few advantages will result from aggressive exercise of jurisdiction in cases alleging violations of section 2 of the Sherman Act. At the same time, claiming jurisdiction in section 1 cases promises clear economic benefits. Accordingly, the defense of sovereign compulsion should be construed as narrowly as possible in a section 1 case. In fact, there is a strong argument for denying such defenses to private firms in order to discourage participation in such pernicious arrangements as cartels and price-fixing. Unfortunately, such an unyielding position may violate established principles of international law and may potentially lead to strategic responses more destructive than the cartel problem itself.[39] Nevertheless, the possibility of potential strategic responses is not likely enough to preclude an expansive jurisdiction policy in applying U.S. antitrust laws.

38. For an example of such calculations albeit in a somewhat different context, see Ordover & Willig, *supra* note 8.

39. This is especially the case if one is of the opinion that cartels have the tendency to quickly collapse because individual profit incentives lead cartel members to chisel on the agreement.