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Bringing Down Private Trade Barriers- An Assessment of the United States' Unilateral Options: Section 301 of the 1974 Trade Act and Extraterritorial Applications of U.S. Antitrust Law

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STUDENT NOTE

BRINGING DOWN PRIVATE TRADE BARRIERS — AN ASSESSMENT OF THE UNITED STATES' UNILATERAL OPTIONS: SECTION 301 OF THE 1974 TRADE ACT AND EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAW

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INTRODUCTION

At a time when much progress has been made to eliminate governmental obstacles to free trade,[1] policy makers have begun to focus on the private trade barriers that may result from restrictive business practices. Quite naturally, they have turned to antitrust law in search of a remedy. Indeed, well before completion of the Uruguay Round of trade negotiations, the Right Honorable Sir Leon Brittan, then Commissioner in charge of the European Commission's Directorate General for competition policy, made an influential appeal to introduce antitrust law as an

1. The completion of the Uruguay Round of the GATT has left a strengthened institutional structure for the elimination of trade barriers, the WTO, and a number of treaties dealing with specific areas, including industrial and agricultural goods, services, and intellectual property protection. However, these treaties deal mainly with trade barriers imposed by governments, not restrictive business practices. *See* Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, GATT Doc. No. MTN/FA, 33 I.L.M. 1130 (1994) [hereinafter Uruguay Round Final Act].

element of the GATT system.[2] However, a subsequently drafted code appears to have scant prospects of adoption any time soon.[3] The task of agreeing on substantive rules is daunting, and many doubt whether it is desirable.[4] In the wake of this apparently overambitious project, two lines of attack seem to be emerging, neither of which involve changes in substantive law. One involves "positive comity" between national or regional enforcement agencies. Such arrangements tend to facilitate the ability of one enforcement agency to coax another into enforcing its own laws.[5] The other line of attack, purely unilateral, is to apply antitrust law extraterritorially. The U.S. enforcement agencies have embraced this line of action. This probably reflects both a determination to pursue an independent policy and, with regard to certain trading partners, a tactical gesture designed to coax these countries' authorities to adopt the presumably more attractive alternative of enforcing their own laws. Thus, this second line of attack, which is the principal focus of this note, in some instances "supplements" positive comity arrangements.

The current U.S. policy is to apply the U.S. antitrust laws, not only to conduct abroad that affects the U.S. domestic market, but also to exclusionary conduct that impedes access of U.S. companies to foreign markets. The Antitrust Division of the Department of Justice (DOJ)

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2. Rt. Hon. Sir Leon Brittan, A Framework for International Competition, Address at the World Economic Forum (Feb. 3, 1992), *cited in* Edwin A. Vermulst, *A European Practitioner's View of the GATT System: Should Competition Law Violations Distorting International Trade Be Subject to GATT Panels?*, WORLD COMPETITION, March 1993, at 5, 5.

3. A draft International Antitrust Code, designed to be adopted as a plurilateral agreement under the auspices of the GATT (now WTO), was drawn up by a group of 12 experts known as the International Antitrust Code Working Group. As the head of the Antitrust Division of the DOJ has put it, "the problems of getting agreement world-wide on an international antitrust code . . . are just so overwhelming that it is hard to imagine this occurring in the near term." Interview with Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, in Washington, D.C. (fall 1993), *available in* WESTLAW, AMBAR-TP Database. The draft Code was greeted with skepticism at a December 1993 committee meeting of the Organization for Economic Cooperation and Development (OECD) in Paris. *Antitrust Division Official Predicts Scant Prospects of International Code*, [11 Current Reports] INT'L TRADE REP. (BNA) 220 (Feb. 9, 1994).

4. *See, e.g.*, Eleanor Fox, *Harmonization of Law and Procedures in a Globalized World: Why and How?*, 60 ANTITRUST L.J. 593 (1991) (offering an account of the pros and cons of harmonization and leaning towards the cons).

5. *See, e.g.*, Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, *reprinted in* 30 I.L.M. 1491 (1991), 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 382 (Sept. 26, 1991) [hereinafter EC-US Antitrust Cooperation Agreement]. For references on the operation of this agreement, see Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353, 374 n.117 and 376 n.123. This type of procedural arrangement may find worldwide, multilateral application within the WTO. This is the subject of current work by S.J.D. candidate Werner Zdouc at the University of Michigan Law School.

announced in 1992 that it would take action "against conduct occurring overseas that restrains United States exports."[6] The Draft Antitrust Enforcement Guidelines for International Operations (Draft Guidelines for International Operations), jointly issued in October, 1994, by the DOJ and the Federal Trade Commission (FTC), confirm this position.[7] This emerging unilateral U.S. policy has been advocated mainly in the context of discussions concerning the trade imbalance with Japan.[8]

Another unilateral option to which the United States might turn is the so-called "anticompetitive practices clause" of Section 301 of the 1974 Trade Act. This alternative differs greatly from the extraterritorial application of antitrust law. A comparison of the two alternatives serves to highlight a number of traits in the antitrust option that call into question its validity.

One can scarcely overemphasize the differences between the alternatives provided by trade law and antitrust law. The relevant trade statute, Section 301, institutes a process that requires the U.S. Trade Representative (USTR) to identify trade barriers and, in some instances, subject the foreign power in question to the choice of either removing the barrier or facing trade sanctions. The policy underlying Section 301 has been referred to in the literature as "aggressive unilateralism."[9] It is said to be "aggressive" because, unlike most other trade statutes, Section 301 is primarily concerned with opening foreign markets rather than protecting the U.S. domestic market.[10] It is "unilateral" because the targeted country has not agreed to be subject to the process. Despite this label, the Section 301 process is not wholly unilateral. Countries subjected to it ultimately chose whether to settle with the United States or face retalia-

6. U.S. Dep't of Justice, Pub. No. 92-117, Justice Department Will Challenge Foreign Restraints on U.S. Under Antitrust Laws 1 (Apr. 3, 1992) (unpublished press release available from the DOJ and on file with author) [hereinafter DOJ Policy]. At the time of writing, the Antitrust Division had brought one case of this sort since the 1992 announcement, which was settled by consent decree. *See* United States v. Pilkington plc, Civil No. 94-345 (D. Ariz. filed June 25, 1994); Proposed Final Judgment and Competitive Impact Statement (CIS), 59 Fed. Reg. 30,604, 30,609 (June 14, 1994) [hereinafter Consent Decree]. For a discussion of *Pilkington*, see *infra* part I.B.3.

7. Draft for Public Comment (October 13, 1994), *reprinted in* 59 Fed. Reg. 52,810 (Oct. 19, 1994) [hereinafter Draft Guidelines for International Operations].

8. As early as 1990, "the DOJ announced [that it would pursue claims against overseas conduct so as to promote exports] at a press briefing concerning, significantly, the progress of talks on the Structural Impediments Initiative with the Japanese." Lori B. Morgan & Helaine S. Rosenbaum, *U.S. Department of Justice Antitrust Enforcement Policy*, 34 HARV. INT'L L.J. 192, 195 (1993).

9. *See, e.g.*, AGGRESSIVE UNILATERALISM (Jagdish Bhagwati & Hugh Patrick eds., 1990).

10. Another aggressive trade statute is the Telecommunications Trade Act of 1988, 19 U.S.C.S. § 3104 (Law. Co-op. 1993). This statute is in essence a sector-specific version of Section 301 and is thus known as "Telecom 301."

tion. If they choose to settle, they may bargain for acceptable terms of settlement, they may implement those terms, and they may later chose to breach them. By contrast, the extraterritorial application of antitrust law does not allow for this type of foreign government input. Instead of coercing other countries to regulate their businesses in a manner conducive to foreign trade, the antitrust option skips over the intermediary of the foreign government and operates to regulate directly those businesses. Needless to say, when unilateral regulation of foreign conduct replaces government-to-government coercion, this presents a novel situation in trade relations which takes aggressive unilateralism to new heights. The analogy with the aggressive unilateralism of Section 301 is perhaps somewhat strained, since the extraterritorial application of antitrust law is ostensibly part of antitrust policy, not trade policy. However, when antitrust statutes are deployed to promote export opportunities, the line between aggressive trade policy and the goal of preserving a healthy, competitive environment for the sake of U.S. firms and consumers begins to blur.

Aside from the distinction between government coercion and direct regulation, the Section 301 and antitrust options also differ in their propensity to reflect the foreign policy interests of the United States. While action under Section 301 is at heart a political process, guided largely by the discretion of the USTR, the antitrust remedy is a judicial one, open to private litigants who may pursue their interests without regard to the broader concerns of the United States. This feature, like unilateral regulation, is not disturbing when the extraterritorial application of antitrust law is seen as part of our national antitrust policy because this policy is by design one in which private litigants act as the primary enforcers. Yet, is such a design appropriate when the purpose of the suit is to gain access to foreign markets? Is this not more properly the subject of a foreign trade policy?

This note examines how the antitrust and trade law options operate, with the two-fold purpose of providing some idea of their potential effectiveness and also suggesting what limitations, if any, should be placed on their use. Parts I and II analyze the mechanics of applying the antitrust and Section 301 remedies to eliminate foreign trade-restrictive business practices. In light of this discussion of how the two processes work, Part III considers whether they are likely to get out of control and suggests how they ought to be restrained. Part III finds that Section 301 is subject to a number of constraints that generally will keep its use within reasonable bounds. The antitrust remedy, however, emerges as more problematic. While it may fruitfully and reasonably be used to promote U.S. exports in some instances, it is unclear whether the courts will keep private litigants from taking the remedy to lengths that would be damaging to U.S. interests and to the development of international law. Existing domestic law fails to offer sufficient guidance, and the relevant international norms (should the courts even deem them within the province of judicial cognizance) are far too open-ended. The danger is not only that the United States will encounter diplomatic friction but, worse, that some foreign powers will begin to exercise jurisdiction in a similarly aggressive manner. Accordingly, Part III proposes a policy of self-restraint. Such a policy could be explicitly adopted by U.S. enforcement agencies, in hopes that this would influence private litigants and the courts. A statement of policy adhered to in practice would send a clear message to foreign powers. The word and deed of the United States could in turn influence and evolve with the practices of other states, and a reasonable customary norm might emerge.

I. UNILATERAL REGULATION: EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAW

A. The Constraints of the Judicial Process

This section will first deal with the jurisdictional constraints on the extraterritorial application of antitrust law, focusing on the rules of prescriptive jurisdiction and the related doctrine of international comity. These two gate-keeping devices are specifically designed to address concerns about the appropriateness of the extraterritorial application of laws. The next subsection will briefly examine a different type of constraint, namely, that foreign trade-restrictive business practices may often be permissible under U.S. antitrust law. The last subsection will note some conceptual difficulties that arise in substantive analysis when our antitrust laws are applied extraterritorially to conduct that restricts U.S. export commerce without directly affecting U.S. consumer welfare. It should be noted in passing that the requirement of personal jurisdiction[11] and the obstacles

11. The commercial contacts of a foreign company with the United States may be sufficient to meet the *in personam* jurisdiction standard of minimum contacts set out in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). If the offending business has a U.S. subsidiary, it may often be sued under an "alter ego" or agency theory. The first case to announce the applicability of the alter ego theory to foreign antitrust defendants was United States v. Scophony Corp., 333 U.S. 795 (1948). The DOJ reportedly favors the tactic of naming as defendants the U.S. subsidiaries of offending businesses, suing on alter ego or agency theories. Joseph P. Griffin, *The Impact of Reconsideration of U.S. Antitrust Policy Intended to Protect U.S. Exporters*, WORLD COMPETITION, June 1992, at 5, 10; *see also* New York State Bar Association, *The Proposed Application of the U.S. Antitrust Laws to Foreign Markets (Report of the Commercial and Federal Litigation Section)*, WORLD COMPETITION, Sept. 1991, at 143, 150.

inherent in foreign discovery[12] and enforcement[13] may also present

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12. According to Anne Bingaman, Assistant Attorney General and head of the Antitrust Division of the DOJ, the "most formidable restrictions on the United States' ability to prosecute offenses that occur outside U.S. borders arise not under our jurisdiction or substantive law, but in connection with legal limitations on our ability to obtain foreign-located evidence. . . ." Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Address Before the World Trade Center Chicago Seminar on GATT After Uruguay (May 16, 1994), *in* Department of Justice, U.S. Antitrust Policies in World Trade 10 (May 16, 1994) (unpublished transcription available from the DOJ and on file with author). Discovery is of course crucial in antitrust where so much turns on detailed factual determinations involving information that is often difficult to locate even in the United States. U.S. law and the relevant international law applied in domestic courts pose few obstacles to foreign discovery. Though federal discovery rules do not specifically authorize courts to compel disclosure of documents or other materials located abroad, the federal courts have eschewed any categorical territorial limitations on discovery, preferring a rule-of-reason approach similar to that used in the area of prescriptive jurisdiction. Spencer W. Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101, 109 (1993); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 48 (1992). Orders for foreign discovery are consequently often issued. *Id.* at 48.

The obstacles to foreign discovery are naturally to be found in the reticence or inability of foreign courts or other foreign officials to cooperate. Mutual Legal Assistance Treaties (MLATs), according to Anne Bingaman, provide "an effective means of cooperation for most types of criminal investigation." Bingaman, *supra*, at 11. These treaties entail mutual commitments for the domestic authority to obtain information requested by the foreign authority, allowing disclosure of certain information otherwise confidential under domestic law. MLATs, however, do not cover all antitrust suits (the United States Mutual Legal Assistance Treaty with Switzerland expressly excludes antitrust matters), and they are all limited to investigations in criminal cases. *See* Bingaman, *supra*, at 12. The existence of statutory provisions safeguarding the confidentiality of information obtained by the U.S. antitrust agencies is considered to be a principal obstacle to the expansion of the scope of existing MLATs. *Report on the Proposed International Antitrust Enforcement Assistance Act*, 1994 A.B.A. SEC. ANTITRUST L. & INT'L L. 6. These provisions preclude the Department of Justice and the Federal Trade Commission from providing information to other nonfederal antitrust enforcers, such as foreign antitrust authorities. *Id.* In an attempt to address this obstacle, Congress recently passed the International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, 108 Stat. 4597 (1994). This law allows U.S. federal antitrust authorities to enter into mutual assistance agreements with foreign antitrust authorities. It permits the Attorney General and the FTC to exchange antitrust evidence with foreign authorities in the context of both criminal and civil investigations. Antitrust information is to be provided to foreign antitrust authorities "to determine whether a person has violated *any* of the foreign antitrust laws . . . ." *Id.* § 2(1) (emphasis added). A number of types of antitrust evidence is, however, excluded: evidence obtained in Hart-Scott-Rodino filings, evidence relating to matters before a grand jury, and certain classified information. *Id.* § 5. Ironically, the original impetus for the International Antitrust Enforcement Assistance Act came in great part from the need to exchange information contained in Hart-Scott-Rodino filings. Remarks of Prof. Thomas Kauper, January 1995. Nevertheless, the Act purports to open the way to bilateral agreements that would greatly facilitate the international discovery process. However, some foreign agencies may be reluctant, or lack authority, to enter into agreements providing for assistance as far-reaching as that envisaged in the Act. For example, the Court of Justice of the European Communities recently declared void the EC-US Antitrust Cooperation Agreement, *supra* note 5, in a case decided on August 9, 1994. Case C-327/91, French Republic v. Commission, 1994-8 E.C.R. I-3641. The European Commission reports that, since the European Union Member States have in essence not questioned the substance of the agreement, the Commission expects a similar agreement will be approved by the Council, thus allowing the maintenance of cooperation between the European Commission and the U.S. antitrust authorities. *Court of Justice Cancels Act Whereby the Commission Concludes an Antitrust Agreement with the United States, Without Disputing the Content of the Agreement — Commission Expects Council Approval of the Agreement*, EUROPE, No. 6291 (n.s.) Aug. 10, 1994, 42d year, at 2, 3. Other knowledgeable observers are, however, not as sanguine about the prospects for approval by the Council. They suspect that Member States will raise heretofore latent substantive concerns about the agreement.

13. Foreign courts do not customarily enforce U.S. decrees concerning behavior in their countries. *See* PHILLIP AREEDA & DONALD F. TURNER, 1 ANTITRUST LAW: AN ANALYSIS OF

significant practical constraints.[14] These constraints are tributary to policies distinct from prescriptive jurisdiction and comity and thus cannot be expected accurately to reflect concerns about whether U.S. laws should be applied extraterritorially. The same may be said for the jurisdictional matter of foreign sovereign immunity, as well as the substantive obstacles that may be raised by the act of state doctrine and the government compulsion defense. Therefore these matters, though of considerable practical relevance, will not be discussed here.

1. Jurisdictional Constraints

To address effectively private barriers in foreign markets, it would have to be feasible to bring a case against the conduct of foreign nationals acting abroad. Prescriptive jurisdiction in such cases would be justified under the theory that the restrictive effect on U.S. exporters constitutes an effect within U.S. territory. Judge Learned Hand, in the 1945 *Alcoa* case, noted in *dictum* that the U.S. antitrust laws reach cases involving effects on exporters.[15] In 1982, Congress confirmed this view with respect to all of the provisions of the Sherman Act and most provisions of the Clayton Act.[16] The 1982 Foreign Trade Antitrust Improvements Act (FTAIA) states that these two laws apply to violations causing "injury to export business in the United States."[17] Moreover, the fact that the offending parties are foreign nationals is not in itself a bar to

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ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 238 (1978). Moreover, some countries have enacted legislation prohibiting such enforcement. Griffin, *supra* note 11, at 10. Therefore, enforcement abroad will largely depend on the presence of persons in the United States that can be coerced. This is easy when defendant has a U.S. subsidiary. Otherwise, the judge might look for assets that can be taken "hostage." AREEDA & TURNER, *supra*, ¶ 270. Judges may be reluctant to do so because such practices would discourage investment in the United States. The fact is, however, that the importance of the U.S. market offers great leverage in enforcement. Even when businesses are not present in the U.S. market through subsidiaries, they are often willing to comply with court orders so as to avoid having restrictions placed on their access to the U.S. market.

14. The doctrine of *forum non conveniens*, on the other hand, has no application in antitrust law. United States v. Nat'l City Lines, Inc., 334 U.S. 573 (1948).

15. United States v. Aluminum Company of America, 148 F.2d 416, 443 (2d Cir. 1945) (the purpose of the antitrust laws is to protect domestic, import, and export commerce).

16. Some substantive provisions of the Clayton Act do not apply to practices restricting U.S. export opportunities. In this regard, Areeda and Turner note that "Clayton Act § 2(a) applies only to sales 'for use, consumption or resale within the United States.' Clayton Act § 3 is similarly limited, and § 7 concerns only those mergers with anticompetitive implication in a 'section of the country.' " AREEDA & TURNER, *supra* note 13, ¶ 234a.

17. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(A) (1982). In light of the 1982 Act and previous case law, the general presumption that Congress did not intend its laws to be applied extraterritorially has no currency in the area of antitrust law. *See* Hartford Fire Insurance Co. v. California, ___ U.S. ___, 113 S. Ct. 2891, 2918 (1993) (Scalia, J., dissenting). For an argument that the general presumption is in any case out of date, see Born, *supra* note 12.

the prescriptive reach of the antitrust laws, though it may affect relief and have some bearing on substantive analysis.[18]

The constitutionality of the reach of the antitrust laws as prescribed by Congress is not controverted among the courts and thus need not be discussed here.[19] As to international law, U.S. law allows that acts of Congress may generally be applied by the courts in violation of international norms,[20] unless those norms emanate from treaties that are directly applicable ("self-executing") and later in time.[21] As there is no treaty governing the prescriptive jurisdiction of antitrust laws,[22] international law now presents no barrier, enforceable in U.S. courts, to the general directive of the 1982 Act that antitrust laws apply to protect export opportunities. (Nonetheless, international law may still be relevant inasmuch as U.S. courts subscribe to the canon of interpretation that U.S. laws should be construed where possible so as not to conflict with international norms.)[23]

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18. *See* KINGMAN BREWSTER & JAMES R. ATWOOD, ANTITRUST AND AMERICAN BUSINESS ABROAD ¶¶ 232–33 (2d ed. 1981) (court may be influenced by defendant's foreign status).

19. Under the angle of federal-state relations, the Commerce Clause covers foreign commerce, and the federal system has always been largely inclined toward federal rather than state power in the context of foreign relations. As to civil liberties, it has been suggested that Fifth Amendment due process considerations be used to limit the reach of U.S. regulatory authority, but this has not occurred. For more recent analysis, see Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

20. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1986); *see also* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2287 n.54 (1991) (citing relevant cases).

21. RESTATEMENT (THIRD), *supra* note 20, § 115(1)(a); *see* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 320 (1992); John H. Jackson, *United States*, *in* 7 UNITED KINGDOM NATIONAL COMMITTEE OF COMPARATIVE LAW, THE EFFECT OF TREATIES IN DOMESTIC LAW 141, 161 (Francis G. Jacobs & Shelley Roberts eds., 1987).

22. Efforts to treat the problem of extraterritorial jurisdiction by convention have been limited. Sreenivasa, in his outline presented to the 1994 International Law Commission (ILC), notes: "States have . . . entered into formal or informal agreements to coordinate their policies, promote their cooperation[,] and institutionalize responses governing exercise of extraterritorial jurisdiction. But most of these efforts had been limited in focus and others remained largely persuasive." *Extraterritorial Application of National Legislation Outline by Mr. Pemmaraju Sreenivasa Rao* 71, 73, U.N. Doc. A/CN.4/454 (1994) [hereinafter Sreenivasa Outline] (citing F. A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, 186 R.C.A.D.I. 9, 56–66 (1984-III); ALAN V. LOWE, EXTRATERRITORIAL JURISDICTION (1983)). Mr. Sreenivasa mentions as international conventions touching on issues of extraterritoriality those relating to terrorism, extradition, drug-trafficking, and avoidance of double taxation. He suggests that the ILC "need not commit itself for the development of a Convention on the subject," stating that "[e]ven a model law or a compilation of guiding principles could contribute towards codification . . . ." Sreenivasa Outline, *supra*, at 85. His remarks would seem to indicate just how far the international community is from adopting any sort of general convention governing extraterritorial application of laws.

23. The theory is that Congress should be presumed to have acted in accordance with

In summary, except for a few provisions of the Clayton Act which probably do not apply extraterritorially,[24] there is no doubt that the Clayton and Sherman Acts will reach conduct abroad affecting U.S. export opportunities. Debate arises rather as to how to apply a general limitation provided by Congress, namely that the offending conduct must meet the "effects test" prescribed in the 1982 Foreign Trade Antitrust Improvements Act; and whether, and how, limitations beyond the effects test should be applied by the courts in the name of international comity or law. These two issues are not in practice entirely separate, but they are often treated by the courts as analytically distinct and will thus be examined separately.

a. The Effects Test ("Direct, Substantial, and Reasonably Roreseeable")

The 1982 Act limits coverage of foreign restrictive business practices to cases where the effect of the offending conduct is "direct, substantial, and reasonably foreseeable . . . ."[25] As this language is similar to formulations used previously by the courts,[26] it is clear that the language confirms the courts' assumption that the Sherman and Clayton Acts are not intended to cover all conduct that has some traceable effect in the United States; the source of the effect must not be too remote.[27] It is less clear whether the statutory language provides operative criteria to determine what is too remote.[28]

As was the case under the previous formulations, the statutory test has resulted in very few dismissals.[29] If anything, the words "reasonably

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international law, unless it clearly indicates otherwise. Restatement (Third), *supra* note 20, § 114. This rule is also known as the *Charming Betsy* principle, in reference to Chief Justice Marshall's opinion in Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804) ("[A]n act of law ought never to be construed to violate the law of nations if any other possible construction remains").

24. *See supra* note 16 and accompanying text.

25. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6(A)(1) (1988).

26. *See, e.g.*, United States v. Hamburg-Ameritanishche Packet-Fahrtactien-Gesellschaft, 200 F. 806 (C.C.S.D.N.Y. 1911) ("direct and material effect"); Sumeyer v. Seven-Up Co., 411 F. Supp. 635 (S.D.N.Y. 1976) ("substantial impact"); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 ("any effect that is not both insubstantial and indirect").

27. Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 222 (1982).

28. *Id.* at 222. Since it was known that the previous judicial formulations failed to supply operative criteria, the likeness of the statutory language to these formulations might be taken as indication that Congress did not intend to clarify where the line ought to be drawn between direct effects and effects that are too remote.

29. *See* Russel J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992).

foreseeable" make the statutory notion broader than the previous formulations by eliminating any possible requirement of actual knowledge of substantial effects on U.S. commerce, or intention to create such effects.[30]

b. International Law/Comity: the Reasonableness Test ("Balancing" or the "Jurisdictional Rule of Reason")

In response to the perception of many observers abroad and at home that the effects theory had led U.S. antitrust laws to be applied a bit too far "offshore," certain courts began to embrace what is sometimes referred to in antitrust circles as a "jurisdictional rule of reason."[31] With this approach the courts sought to limit jurisdiction, not by refining the effects test, but rather by adding a separate inquiry as to whether exercising jurisdiction would be unreasonable under the circumstances.[32]

There is no formula for deriving what is "reasonable" under the reasonableness test. In a manner similar to the interest-balancing approach often used in U.S. domestic conflicts law, the judge must make a reasonableness decision in light of a number of factors. Although the factors vary,[33] the constant is that they embrace the interests of the plaintiffs and/or government in the suit, as well as the interests of others affected by the relief contemplated, including the interests of defendants in legal certainty[34] and the interests of foreign powers in regulating the

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30. "The legislative history of the Act indicates that Congress intended 'reasonably foreseeable' to be an objective standard: 'The test is whether the effects would have been evident to a reasonable person making practical business judgements, not whether actual knowledge or intent can be shown.' " Griffin, *supra* note 11, at 6.

31. *See, e.g.*, BREWSTER & ATWOOD, *supra* note 18, at 306.

32. This "reasonableness test" is presented in the Restatement (Third) as an affirmative element of jurisdiction, dictated by principles of international law. RESTATEMENT (THIRD), *supra* note 20, § 402; SPENCER W. WALLER, ANTITRUST LAWS AND INTERNATIONAL COMMERCE §5.06 (1993) (commenting that the Restatement (Third) adopts the approach of Industrial Investment Development Corp. v. Mitsui & Co., 671 F.2d 876, 883–84 (5th Cir. 1982)). *Industrial Investment* stated that:

> [w]e . . . disagree with the suggestion in *In re Uranium Antitrust Litigation*, 617 F.2d at 1255, that the question whether to entertain the suit is discretionary with the trial judge. A decision not to apply the antitrust laws must be based on solid legal ground; the question is one of interpreting the scope that Congress intended to give the antitrust laws."

Industrial Investment, 671 F.2d at 884 n.7.

33. The most commonly cited sets of factors, all slightly different, are found in the RESTATEMENT (THIRD), *supra* note 20, § 403; Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

34. *See, e.g.*, RESTATEMENT (THIRD), *supra* note 20, § 403(2)(d) ("The existence of justified expectations that might be protected or hurt by the regulation").

offending conduct free of interference by the United States.[35] Taking such factors into consideration requires the judge to decide whether to dismiss in light of U.S. interests connected with the *effect that gave rise to jurisdiction* as well as the U.S. interests implicated by the undesirable *effect of exercising jurisdiction.* The balancing process involved in the reasonableness test essentially asks which effect is worse.[36]

The reasonableness test is criticized both for offering too little guidance to the courts and for giving an improper role to the judiciary in foreign policy.[37] More relevant for the purposes of this discussion, however, is the fact that the test has led to few dismissals,[38] and where it has done so, the U.S. interests were often *de minimis* and would not have passed the effects test anyway.[39] Moreover, certain circuits have rejected outright the notion that U.S. courts should be cognizant of the reasonableness test and have applied only the effects test.[40] Since minimum contacts may be aggregated on a nationwide basis for the purposes of establishing personal jurisdiction over foreign defendants,[41] plaintiffs

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35. *See, e.g.*, RESTATEMENT (THIRD), *supra* note 20, § 403(2)(h) ("The likelihood of conflict with regulation by another state").

36. One court has said as much, describing the "balancing [reasonableness] test" as a process that "weighs the impact of the foreign conduct on U.S. commerce against the potential international repercussions of asserting jurisdiction." Dominicus Americana Bohio v. Gulf & Western Ind., 473 F. Supp. 680, 687 (S.D.N.Y. 1979); *cited in* Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 484 (1992).

37. Garvey, *supra* note 36, at 484–86.

38. Weintraub, *supra* note 29, at 1812. Weintraub cites Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (stating "balancing tests [applied as a jurisdictional matter in antitrust and securities cases] tend to deemphasize foreign sovereign interests and almost never lead a court to decline jurisdiction"). *Id.* at 1812 n.74.

39. *See* Garvey, *supra* note 36, at 485. Nevertheless, there have been cases dismissed under the reasonableness test in which U.S. interests were arguably more than *de minimus*. *See, e.g.*, Rivendell Forest Products Ltd. v. Canadian Forest Products Ltd., 810 F.Supp. 1116 (D. Colo. 1993).

40. Most notably the D.C. Circuit in Laker Airways, Ltd. v. Sabena Belgium World Airlines, 731 F.2d 909 (D.C. Cir. 1984). WALLER, *supra* note 32, § 5.08, notes that the Second and Seventh circuits have also rejected balancing. He cites National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981), and In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980). Karl Meessen notes, however, that refusal to apply the reasonableness test is *not* necessarily a commentary about the existence of a norm of reasonableness in international law. Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM J. INT'L L. 783, 801 (1984).

41. BREWSTER & ATWOOD, *supra* note 18, at 117.

> The Supreme Court has noted, but had no occasion to consider, the constitutional issues raised by the theory that a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the United States as a whole, rather than on its contacts with the state in which the federal court sits.

Id. at 130 (1993 Cumulative Supplement) (citing Omni Capital International, Ltd. v. Rudolf can select venue in a circuit that rejects the reasonableness test, other considerations concerning choice of venue permitting.

The Supreme Court recently had an opportunity to consider the reasonableness test in *Hartford Insurance*.[42] As is explained below, however, a majority of the Court chose to avoid the matter. Consequently, whether, and how, to apply the test remains a matter of dispute among the circuits. The *Hartford Insurance* case is nonetheless of interest because it reveals some general tendencies on the Court.

c. The Status of the Jurisdictional Rule of Reason in the Supreme Court — an Implicit "Thumbs-Down:" The *Hartford Insurance* case

The following account of the *Hartford Insurance* case refers to points made in the DOJ's amicus brief that help to demystify somewhat the reasoning of the majority on the Court.[43]

Twenty state attorneys general launched what was publicized as a "nuclear attack" on the insurance industry in California.[44] A number of insurers were charged with colluding to exclude from coverage the risk of polluter liability. Among the defendants were three London-based reinsurers which had allegedly coerced recalcitrant California insurers into abandoning their pollution liability coverage by refusing to reinsure them. The effect in the United States was the elimination of an important type of insurance in the state of California through means of a refusal to deal. This conduct was permissible both domestically and internationally under United Kingdom law, which includes a comprehensive regulatory scheme for reinsurance. The policy interest at stake for the United Kingdom was the viability of its reinsurance market, which, it was argued, would be in jeopardy if its reinsurers exposed themselves to the considerable amounts involved in polluter liability. The Ninth Circuit, applying a reasonableness test under Section One of the Sherman Act, found that "application of [U.S.] antitrust laws to the London reinsurance market 'would lead to significant conflict with

Wolff & Co., 484 U.S. 97, 102 n.5 (1987), and Asahi Metal Industries Co. v. Superior Court, 480 U.S. 102, 113 (1987)).

42. *Hartford Insurance*, 113 S.Ct. at 2891.

43. For an otherwise more detailed analysis of the case, see, e.g., David G. Gill, *International Decisions: Antitrust — Extraterritorial Reach of Sherman Act — "Reasonableness" — International Comity*, 88 AM. J. INT'L L. 109 (1994).

44. Stacy Adler, *Drawing the Battle Lines: Activists Declare War on Insurers*, BUS. INS., Aug. 8, 1988, at 1 (quoting former West Virginia Attorney General Charles G. Brown); *see also*, Michael L. Weiner, *Comity, Cooperation, and Keiretsu: Comments on Papers by Davidow and Griffin*, 24 LAW & POL'Y INT'L BUS. 1067, 1068 n.7 (1993).

English law and policy' "[45] but concluded that the "express purpose [of defendants] to affect United States commerce and the substantial nature of the effect produced" weighed more heavily in the balance.[46]

The Supreme Court granted certiorari to decide, among other things, whether the appellate court had properly allowed the Sherman Act to reach the London reinsurers. Plaintiff-respondents not only argued to affirm jurisdiction but also argued that the Court should seize the opportunity to put an end to the reasonableness test, which plaintiff-respondents characterized as a vague doctrine of abstention that ran counter to jurisdiction as prescribed under the FTAIA.[47]

Justice Scalia, writing for a four member dissent vigorously attacked this position.[48] However, the majority managed to avoid the matter almost entirely by working on the assumption that the "only substantial question was whether there is 'a true conflict between domestic and foreign law.' "[49] This assumption rendered irrelevant "other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity,"[50] thus obviating the question of what factors should be included in the reasonableness test. More importantly, the majority skirted the issue as to whether such a test should be applied at all.

The majority's reasoning appears to rest on two dubious conclusions in the arguments in the amicus brief filed by the DOJ supporting the

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45. In re Insurance Antitrust Litigation, 938 F.2d 919, 933 (9th Cir. 1991), *rev'd*, *Hartford Insurance*, 113 S.Ct. at 2891.

46. *In re Insurance Antitrust Litigation*, 938 F.2d at 934.

47. Brief for Respondent States at 11, *Hartford Insurance*, 113 S. Ct. 2891, *cited in* Weiner, *supra* note 44, at 1069 n.10.

48. Justice Souter, for the majority, noted that the FTAIA takes no position on the issue of international comity. *Hartford Insurance*, 113 S.Ct. at 2910; *see also* Hawk, *supra* note 27, at 222–23; Griffin, *supra* note 11, at 7 n.14. Justice Scalia, however, took the position that scrutiny for reasonableness is not a matter of judicial abstention to be exercised after jurisdiction is established but rather a prior matter of congressional intent: "[T]he extraterritorial reach of the Sherman Act . . . has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct." *Hartford Insurance*, 113 S.Ct. at 2918. Thus, this was a matter of "legislative jurisdiction" — jurisdiction to prescribe, not jurisdiction to adjudicate. *Id.* Scrutiny for reasonableness of jurisdiction is read into our statutes under the *Charming Betsy* principle: "[A]n act of law ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804) (Marshall, C.J.). Justice Souter, for the majority, rejected this argument that "comity concerns figure into the prior analysis whether jurisdiction exists under the Sherman Act," stating that "[t]his contention is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction." *Hartford Insurance*, 113 S.Ct. at 2909 n.24.

49. *Id.* at 2910.

50. *Id.* at 2911.

plaintiff-respondents. First, the DOJ noted that "[n]either [defendant-] petitioners nor their amici argue that in the absence of conflict the district court should refrain from exercising jurisdiction."[51] This led the DOJ to conclude that, since the existence of a "conflict" was the only sticking point according to petitioners, "other comity factors" need not be considered — though it is far from clear that the Court should not have considered such factors *sua sponte*.[52] Second, the DOJ posited that a "conflict for purposes of comity analysis must be 'a true conflict between domestic and foreign law,' "[53] — even though the previous step in the reasoning made it sensible to define conflict in the way the defendant-petitioners had meant to. The majority opinion of the Court adopted this definition in its analysis by implicitly defining a "true conflict" as one "where a person subject to regulation by two states can[not] comply with the laws of both."[54] Since U.K. regulation allowed (i.e., did not explicitly prohibit) the reinsurance of companies insuring against polluter liability, there was no conflict.

The majority opinion's reasoning was faulty in several other respects,[55] but the relevant point here is that the opinion's analysis regarding jurisdiction appears to have turned on a technicality; its insistence on the need for a "true conflict" was based on the defendant-petitioners' failure to invoke other balancing factors while contesting jurisdiction. If so, the Supreme Court has neither rejected the reasonableness test nor

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51. Brief for the United States as Amicus Curiae Supporting Respondents at point III-d, *Hartford Insurance*, 113 S.Ct. at 2891, *available in* LEXIS, Genfed Library, Briefs File [hereinafter DOJ Amicus].

52. Like the question of subject matter jurisdiction in federal-state relations, prescriptive jurisdiction does not involve individual rights but rather systemic questions. In the case of subject-matter jurisdiction these are questions related to the nature of the federal system. In the case of prescriptive jurisdiction, these are analogous questions about the boundaries of power between nations. Thus, the issues raised are not a question of rights that can be waived by the parties to a suit, but rather questions that should be addressed *sua sponte* by the court.

53. DOJ Amicus, *supra* note 51; *see also* Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 555 (1987) (Blackmun J., concurring in part and dissenting in part).

54. *Hartford Insurance*, 113 S.Ct. at 2910.

55. First, though it purports to be based on Justice Blackmun's *dictum* in *Société Nationale*, which referred to the need to consider only "true conflicts," the majority opinion's definition of a true conflict is different from what was probably meant by Justice Blackmun. Justice Blackmun used the phrase in reference to U.S. domestic conflicts analysis. A true conflict in this context means only that "each state involved has a policy that would be advanced by the application of its laws." WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, UNDERSTANDING CONFLICTS OF LAWS 216 (2d ed. 1993). It does not mean that the laws have to contain mutually exclusive rules as the majority in *Hartford Insurance* chose to define it.

Second, the majority opinion seems to draw its definition of true conflict from § 403(3) of the Restatement (Third). However, as Justice Scalia notes in his dissent, the Restatement's conflicts test is designed to apply only *after* the reasonableness test of § 403(1) has been satisfied. *Hartford Insurance*, 113 S.Ct. at 2922 n.11 (Scalia, J., dissenting).

replaced it with the narrower test of "true conflict" as defined in the opinion.

Hartford Insurance is nonetheless significant to those interested in assessing the practical reach of U.S. antitrust laws. The broader message of the case is suggested by the fact that five of nine Supreme Court justices were inclined not to engage in interest-balancing. Otherwise, the majority could have easily considered the "other factors" of the reasonableness test *sua sponte*, not limiting its judgment to the so-called "true conflicts" analysis. However, with new justices on the Court, it is probably premature to draw any conclusions about the fate of interest-balancing as a means of controlling the extraterritorial reach of the antitrust laws.

d. Summing up the Status of Prescriptive Jurisdiction and International Comity in U.S. Courts

It is undisputed that Congress intends the antitrust laws to apply extraterritorially, including to protect exports. It is also clear under U.S. law that the courts must accept this prescription as a matter of principle, regardless of its compatibility with international law. The potential limitations on jurisdiction are the statutory effects test and the judicially developed reasonableness test. The latter has been adhered to by some of the circuit courts and a four member minority on the Supreme Court, but a majority on the Court appears to have avoided the issue. All doctrinal subtleties aside, the fact is that most cases are not dismissed for either lack of prescriptive jurisdiction or reasons of comity among nations.[56]

2. Substantive Constraints

The efficacy of U.S. antitrust laws against foreign trade-restrictive business practices does not depend solely on whether those practices come within the reach of the antitrust laws; they must also violate them. Though there may be some overlap in the goals of antitrust and the policy of free trade, it should not be assumed that trade-restrictive business practices will tend to give rise to violations. U.S. antitrust law has developed primarily as a remedy for conduct, at home or abroad, that harms the U.S. domestic market, not U.S. export commerce. Not surprisingly, the rules crafted over the years by the courts under the general mandates of the Sherman and Clayton Acts do not appear partic-

56. Weintraub, *supra* note 29, at 1811–12.

ularly designed to help businesses enter new geographical markets.[57] As one commentator has observed: "Since the 1970s, the U.S. Supreme Court has made clear that the U.S. antitrust laws protect "*competition*, not *competitors*."[58] "For that reason, in domestic commerce cases, the exclusion of one or even several competitors from a market is cause for antitrust concern only if the probable effect of that exclusion would be to reduce output below, and raise prices above, competitive levels in a relevant market."[59] Though probable effect may have little significance in foreign commerce cases involving clearly per se offenses, it may well influence the outcome in rule-of-reason cases. Also, it may influence courts' characterization of practices as falling within the *per se* or rule-of-reason categories.

To be sure, a number of potentially trade-restrictive business practices may violate antitrust laws. These might, for example, include group boycotts (refusals to deal), buyers' cartels,[60] predatory pricing,[61] cross-licensing (patent pooling),[62] or fraudulent procurement of patents when this confers *de facto* monopoly power.[63] Finally, as evidenced in the *Pilkington* Consent Decree discussed *infra*, territorial restrictions imposed under intellectual property licensing agreements can be both illegal and extremely stifling to international trade. However, it remains

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57. This is in contrast to the EC's competition policy, which is designed partly to further market integration by ensuring that the work of dismantling governmental barriers to free trade is not undermined by private restrictions. On the difference between treatment of vertical restrictions under U.S. and EC antitrust law due to this difference in policy concerns, see Stavros Petropoulos, *Parallel Imports, "Free Riders" and the Distribution of Motor Vehicles in the EEC: The Eco System/Peugeot Case*, 2 CONSUM. L.J. 9 (1994).

58. Deborah Garza, *DOJ's New Export-Promotion Policy: Using the Sherman Act to Remedy the Exclusion of U.S. Firms from Foreign Markets*, 9 ANTITRUST 28, 31 (1994) (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977), *quoting* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

59. Garza, *supra* note 58, at 31 (citing Tampa Elec. Co. v. Nashville Co., 365 U.S. 320 (1961); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 280 (7th Cir. 1984)).

60. Buyers' cartels occur when buyers collude to force low prices or other terms of purchase and have been the subject of successful "export opportunities" suits. *See* United States v. C. Itoh & Co., 1982–83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. 1982) (terminating by consent decree Japanese buyers' cartel formed to purchase Alaska tanner crab); Daishowa Int'l v. North Coast Export Co., 1982-83 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982) (granting preliminary injunction prohibiting a buyers' cartel, formed to respond to a Webb-Pomerene export cartel, from boycotting the plaintiff-U.S. exporter as part of its cartel strategy); *see also* Griffin, *supra* note 11, at 8.

61. Predatory pricing might be used to keep out selected foreign competition at crucial moments. It is, however, difficult to imagine a case where this would be effective because most exporters, when faced with predatory pricing, would retreat to their home market or other foreign markets until competitive prices are restored.

62. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (defendant was a U.S. company).

63. *Proposed Application of U.S. Antitrust Laws to Foreign Markets*, *supra* note 11, at 149.

true that U.S. antitrust laws are not particularly geared to promoting exports and that, consequently, numerous trade-restrictive business practices will have to be dealt with by other means, if at all. This is likely the case with the Japanese Keiretsu, which, ironically, are the very type of business practice that has motivated calls to use the antitrust laws to promote exports.[64]

a. The Keiretsu and U.S. Antitrust Law

At least in political fora, allegations that anticompetitive practices in Japan are partially to blame for the U.S.-Japan trade deficit have centered on Keiretsu relationships[65] and led to calls for the extraterritorial application of U.S. antitrust law to remedy the problem.[66] Two uncertain assumptions are at work. One is that Keiretsu practices are responsible in part for the trade imbalance.[67] The other assumption, examined here, is that Keiretsu relationships may be successfully pursued under U.S. antitrust law.

In terms of basic structure, the Keiretsu generally seems to escape U.S. antitrust law, at least when located abroad. The Keiretsu is structured through cross-ownership and interlocking directorates.[68] The relevant antitrust provision, Section 8 of the Clayton Act, applies to

64. *See supra* note 8 and accompanying text.

65. "Keiretsu is a relationship or a combination of relationships among corporations independently incorporated." Jiro Tamura, *U.S. Extraterritorial Application of Antitrust Law to Japanese Keiretsu*, 25 J. INT'L L. & POL. 385, 385 n.3 (1993).

66. HOUSE COMM. ON WAYS AND MEANS, PHASE I: JAPAN'S DISTRIBUTION SYSTEM AND OPTIONS FOR IMPROVING U.S. ACCESS, H.R. DOC. NO. 332–283 vii (1990). *See also* Gary R. Saxonhouse, *Japan, SII and the International Harmonization of Domestic Economic Practices*, 12 MICH. J. INT'L L. 450, 462–63 (1990).

67. Alan O. Sykes has concluded:

> The proposition that unique impediments exist to penetrating the Japanese market may or may not be correct. A combination of language barriers, quality problems, and marketing ineptitude on the U.S. side may explain much of the apparent difficulty in selling to Japan. Likewise, the perception that selling in Japan is unduly difficult may be an artifact of its persistent trade surplus, attributable in part to the need for foreign capital in the United States driven by U.S. fiscal policy, and the ability of the Japanese to supply it.

Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: the Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263, 303 (1991–92); *see also*, Saxonhouse, *supra* note 66, at 462–69.

68. Saxonhouse notes that cross-ownership would tend to influence policy only to the extent that the holdings of companies outside of Keiretsu are dispersed. In fact, however, they tend to be concentrated in the hands of one or two outside companies, indicating that they should effectively counter the influence of Keiretsu holdings. Saxonhouse, *supra* note 66, at 463.

cross-ownership and interlocking directorates among competitors.[69] But the "horizontal" Keiretsu is not a grouping of competitors but rather a conglomeration of noncompeting entities from different sectors.[70] Moreover, Section 8 applies to "commerce," which arguably does not include foreign trade in the context of that statute.[71] Thus, horizontal Keiretsu may entirely escape exposure to U.S. antitrust law. As to possible limitations on vertical Keiretsu, which are characterized by integrated distribution or production, the Clayton Act rules on vertical ownership do not apply where the restrictive effects only concern export opportunities.[72]

Therefore, the structure of Keiretsu does not appear to be subject to legal attack under the Clayton Act. But certain practices involved in Keiretsu relationships may be actionable under U.S. antitrust laws. Territorial restrictions (e.g., through exclusive dealerships under licensing) are perhaps actionable but not likely to be of concern to exporters because they affect predominately intrabrand competition.[73] On the other hand, vertical boycotts, reciprocal dealing, and exclusive dealing are examples of actionable arrangements that might be practiced by Keiretsu and which might impede exports.[74] Exclusive dealing will be briefly examined here, as this practice appears to be most susceptible to a successful suit.[75]

b. Keiretsu and Exclusive Dealing

Keiretsu exclusive dealing, whereby a distributor is only allowed to deal in one brand, acts to block avenues of entry.[76] Even this cause of action against the Keiretsu appears to be a weak one. To be actionable under Section Three of the Clayton Act, exclusive dealing must be mandatory — possibly not often the case with vertical Keiretsu.[77] Fur-

69. 15 U.S.C. § 19 (1988 & Supp. II 1990).

70. *See, e.g.*, Joel Davidow, *Antitrust and Keiretsu*, 24 LAW & POL'Y INT'L BUS. 1039, 1044 (1993); Alex Y. Seita, *Discussing Japan Rationally*, 25 LAW & POL'Y INT'L BUS. 193, 217–23 (1993).

71. Davidow, *supra* note 70, at 1044–45.

72. *Id.* at 1042; Hawk, *supra* note 27, at 219.

73. Julie A. Shepard, *Using United States Antitrust Law Against the Keiretsu as a Wedge into the Japanese Market*, 6 TRANS'L LAW 345, 354 n.78 (1993). This is not true when the particular technology under license is crucial to competition. *See infra* part I.B.3 (discussing the practices eliminated under the Consent Decree).

74. Davidow, *supra* note 70, at 1039.

75. *Id.* at 1049.

76. Shepard, *supra* note 73, at 368.

77. Another possible basis, not examined here, would be § 5 of the FTC Act. Davidow, *supra* note 70, at 1040.

thermore, the effect of the exclusive dealing must be to lessen substantially competition in the relevant geographic market. While one author has concluded that the relevant market would be Japan,[78] another has noted that this is far from clear, since the relevant geographic market includes all possible profitable outlets for the foreclosed competitor's goods.[79] In any event, even if the relevant market in distribution is substantially foreclosed, courts will consider the availability of alternative means of entry, including the possibility of setting up one's own dealerships.[80]

Another basis for attacking exclusive dealing could be Section One of the Sherman Act, which prohibits agreements, combinations, and conspiracies in restraint of trade.[81] As a nonprice vertical restraint, exclusive dealing is not a *per se* violation. The analysis, as under Section Three of the Clayton Act, would involve considering alternative means of entry, including entering through independent distributors or by vertically integrating.[82] The costs of these alternatives, to the extent that they could be deemed prohibitive and thus restrictive, would then be weighed in a rule-of-reason analysis against the positive effects for consumers of the exclusive dealing arrangement.[83] These positive effects might include improvements in services rendered to the consumer resulting from the dealers' specialization in one brand, and savings from the simplification of distribution channels that could be passed on to the consumer.[84]

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The Japanese Kereitsu appears to hold up well when subjected to the scrutiny that we apply to our own firms at home. But should those standards apply to conduct abroad? Eminent antitrust scholars have allowed that they should not be rigorously applied to foreign conduct.[85]

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78. Shepard, *supra* note 73, at 357.

79. Davidow, *supra* note 70, at 1040.

80. *Id.* One cautiously optimistic author has pointed to studies suggesting that removal of distributors from the market through exclusive dealing arrangements concentrates the remaining market, "increasing the probability that nonaffiliated suppliers can collude." Weiner, *supra* note 44, at 1071. Though such a claim might work in the domestic context, it would involve considerably stretching the directness element of the effects test required for establishing prescriptive jurisdiction in suits brought against foreign conduct.

81. 15 U.S.C. § 1 (1988 & Supp. II 1990).

82. *See* Shepard, *supra* note 73, at 361 n.163.

83. *Id.* at 359.

84. *Id.* at 362–63.

85. AREEDA & TURNER, *supra* note 13, ¶ 237.

The following subsection raises the more particular question whether, and what, different standards should apply to foreign conduct that harms U.S. export, as opposed to domestic, commerce.

3. Quandaries Concerning the Relationship Between Prescriptive Jurisdiction and Substantive Antitrust Analysis

There is a paradoxical relationship between the goals underlying the prescriptive jurisdiction ascribed to U.S. antitrust laws by Congress and the goals embodied in the substantive law developed by the courts. On the one hand, as noted in Part I.A.1, the FTAIA reflects Congress' desire to see the Sherman and Clayton Acts applied to protect exporters. On the other hand, as noted in Part I.A.2, the courts have come to interpret the latter laws so as to protect competition, not competitors.[86] This incongruence poses a quandary. How should the judge rule on the merits in cases where domestic competition is unaffected and competitors — U.S. exporters — are the only casualties? One answer would be to presume that Congress, when enacting the FTAIA, was simply asserting the jurisdictional reach of the antitrust laws, without implications for substantive analysis. It would then make sense to presume also that domestic competition was still the concern, not competition in the world at large. If so, then suits filed against practices restricting U.S. exports should be successful on the merits only when the targeted practices also happen to affect negatively the U.S. domestic market.[87]

An alternative, and more plausible, reading of the FTAIA would be to suppose that its provisions on the jurisdictional reach of the Sherman and Clayton Acts imply a mandate for the courts to interpret the goals of these laws differently when they are applied to foreign conduct impeding exports. But, if so, the question of how the substantive analysis should be adjusted presents yet another quandary. The balancing of competitive gains against competitive losses which inheres in antitrust analysis will tend to find the losses in the U.S. and the gains abroad.[88] Should the judge consider gains abroad? If so, with what degree of deference to the judgment of foreign regulators?

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86. *See* Garza, *supra* note 58 and accompanying text.

87. Indeed, example E of the Draft Guidelines for International Operations envisages that these enforcement agencies would bring suit against practices "resulting [in] sales into the United States [that] affect output and price in the U.S." as well as impairing U.S. exports. Draft Guidelines for International Operations, *supra* note 7, at 52,817. Yet other examples involve practices having no effect on the U.S. domestic market. *See, e.g., id.* (example F).

88. Balancing is most often associated with rule-of-reason analysis because this involves balancing of "pro" and "anti" competitive factors in the particulars of the case. However, the "per se rule is merely a special case of the rule of reason," VII AREEDA & TURNER, *supra* note 13, ¶ 1509, whereby balancing occurs ex ante with regard to a category of practices rather than on the particulars of each case.

The problem is posed most starkly in the hypothetical Keiretsu exclusive dealing arrangement discussed in Part I.A.2.b. The scale that measures the pros and cons of this business practice sits, so to speak, astride the jurisdictional frontier of the United States and Japan, with the pros weighing on one side and the cons on the other. Efficiency gains will go to the Japanese domestic market, and the losses will be on the U.S. export market. The dilemma is thus whether the court should factor in the gains to the Japanese domestic market, in this case the possibly improved services provided to the consumer resulting from exclusive distribution arrangments. Not to take these gains into account would be to apply a double standard, subjecting foreign business to a more rigid rule. But, if the court is to evaluate gains to the Japanese consumer, this seems a distinctly uncomfortable exercise. The effects doctrine allows extraterritorial regulation in reaction to harmful effects within the home territory. While this basis for jurisdiction easily warrants deciding whether there is domestic harm, it does not seem to warrant deciding what is best for the foreign country in which harmful conduct takes place, in this case, deciding whether the exclusive dealing arrangement offers gains to the Japanese consumer that offset any competitive costs of the arrangement. As was the case regarding the quandary concerning the interpretation of the FTAIA, one response could be to divorce substantive analysis from jurisdictional considerations, once jurisdiction has been established. However, jurisdictional and substantive inquiries are not wholly independent.[89] Thus, rather than second guessing other country's policies, the courts may be inclined to assume pro-competitive effects and assign these effects a weight equivalent to whatever deference they deem appropriate to accord to the interests of the foreign sovereign. In this sense comity considerations similar to those applied in a "jurisdictional rule-of-reason" analysis would be introduced into the substantive rule-of-reason analysis on one side of the balancing equation.[90] This solution would, of course, have the unhappy effect of injecting at the level of substantive analysis the same degree of uncertainty that already exists at the level of jurisdictional inquiry in most cases of extraterritorial application of laws. This hypothetical appears, furthermore, to present *terra incognita* for the courts, since the cases generally

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89. I AREEDA & TURNER, *supra* note 13, ¶ 237.

90. As Professor Areeda has stated, "[i]n examining a foreign restraint, the conclusion that Congress did not mean to cover it might be expressed either in terms of the statute's jurisdictional reach or in terms of a substantive conclusion about the 'reasonableness' of the restraint." *Id.* ¶ 237. In *per se* cases, such a scheme would not be possible at the level of determining a violation, but comity considerations might well come into play in determining the remedy. For an alternative solution, see BREWSTER & ATWOOD, *supra* note 18, at 205–06.

cited in connection with export restraints tend to involve either practices that are theoretically *per se* illegal, such as group boycotts,[91] or practices involving U.S. defendants that collude with foreign businesses, so that the pro-competitive aspects of the litigious restraint can be evaluated as affecting the U.S. market.[92]

Thus, antitrust suits brought against practices abroad solely because they harm U.S. export commerce introduce significant analytical problems not present in suits attacking foreign practices that harm the U.S. domestic market. This is so even though both types of suit involve the extraterritorial application of the antitrust laws. Discussion in the next section will turn to the U.S. Government's antitrust enforcement agencies' policy of bringing suits to promote exports, focusing on why this came about and what kinds of jurisdictional limitations the government is likely to set for itself within the broader parameters of the statutory test outlined *supra*. However, it should be noted in concluding this discussion of substantive analysis that, while the new Draft Guidelines for International Operations give ample space to the matters of prescriptive jurisdiction and comity, they pass over the attendant substantive dilemmas raised by suits to protect export commerce. The Draft Guidelines tersely allow that "[a]nticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved."[93] This statement, which focuses on the *nationality* and *locus of offenders*, misses the issue discussed above, which arises from the fact that the *"locus" of effects* is foreign rather than domestic U.S. commerce.

B. *Government Policy*

This section will indicate the significance of enforcement policy espoused by government and discuss the genesis of the current policy of bringing suits to protect export opportunities as it was announced by the DOJ in 1992. Then it will examine a recent case of enforcement of this type. Finally, in the light of this case and the Draft Guidelines for International Operations, some effort will be made to surmise what enforcement policy is likely to be in practice.

91. *See* cases cited *supra* note 60.

92. *See, e.g.*, Zenith Radio, 395 U.S. at 100 (regarding a defendant U.S. company which had entered into a joint venture involving patent pooling with a Canadian company).

93. Draft Guidelines for International Operations, *supra* note 7, at 52,815.

1. The Importance of Government Enforcement Policy

The Restatement (Third) on the Foreign Relations Law of the United States, in a passage referring specifically to the extraterritorial application of antitrust law, observes that, "[i]n general, the exercise of regulatory jurisdiction by the United States is evaluated in the same way whether the law is invoked in litigation by a private party or by an agency of the United States Government."[94] This may be an accurate description of the courts' overt evaluation of jurisdiction, but they are nonetheless likely to be swayed by the judgment of a government agency in a matter so charged with foreign policy implications as antitrust law. This may in turn influence trends in private litigation.[95] In particular, government enforcement policy — not only its own filings, but also amicus briefs and even general policy statements — may affect judicial receptiveness to assertions of extraterritorial antitrust jurisdiction by litigants seeking treble damages. Consequently, such policy has repercussions well beyond the limited number of cases that the DOJ or the FTC themseves may bring.

2. Enforcement Policy as Announced in 1992

The DOJ announced in footnote 159 of its 1988 Antitrust Enforcement Guidelines for International Operations (1988 International Guidelines) that it would limit its enforcement activities to conduct that could

94. RESTATEMENT (THIRD), *supra* note 20, § 415, cmt. G.

95. Griffin, *supra* note 11, at 13. There are several possibilities for synergetic effects. First, a successful suit by the DOJ will encourage exporters to sue. *Id.* Second, exporters might invest considerable resources in getting the DOJ to sue in order to reap later the benefits of such an investment through res judicata arguments in treble damages suits. Morgan & Rosenbaum, *supra* note 8, at 204. This might be particularly attractive as an alternative to bringing suits in the first instance because courts might accept the DOJ's general claim that they should not engage in the reasonableness test when the DOJ brings suits. *See, e.g.*, DOJ Amicus, *supra* note 51, point III.c ("We believe that courts should not engage in any comity analysis in antitrust actions brought by the United States"). Finally, though the threshold issue of jurisdiction should not in principle be determined by expressions of executive interest, the possibility for influence is there. Intervention in the form of an amicus brief on the issue of sovereign immunity is thought often to carry weight beyond the actual merits of the legal arguments presented because of the fact of foreign state involvement. Garvey, *supra* note 36, at 491–92. Similar weight might be given to the DOJ arguments presented in the context of a private antitrust suit given the foreign public policy considerations involved. Perhaps more far-fetched, but not entirely remote, is the possible influence of the DOJ's general endorsement of export-opportunity suits reflected in the 1992 rescission of footnote 159 of the 1988 Antitrust Enforcement Guidelines for International Operations. *See* ANTITRUST DIVISION, DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1988) [hereinafter 1988 INTERNATIONAL GUIDELINES]. Even if the DOJ's general policy statement does not turn out to influence judges, exporters may initially bring suits in hopes that it will.

"harm U.S. consumers by reducing output or raising prices."[96] This was purely a matter of prosecutorial discretion, since the antitrust statutes themselves contain no such limitation.[97] In April 1992, the DOJ rescinded its policy of abstention, stating that it "will, in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to U.S. consumers."[98] Thus, after a brief hiatus, the DOJ reopened the possibility that it bring cases motivated purely by the concern of market access, in essence deleting footnote 159 of the 1988 International Guidelines. The Draft Guidelines for International Operations issued jointly by the DOJ and the FTC in the fall of 1994 maintain this stance.[99]

While the policy of abstention seems to have been part of the general hands-off approach to regulation of the Reagan and Bush Administrations, the 1992 return to former policy appears in part to have been a tactical move. It took place in an election year amidst accusations in Congress of lax enforcement of antitrust law regarding Japanese Keiretsu, and in particular criticism of the policy announced in 1988 of not bringing cases against conduct abroad unless it harmed U.S. consumers.[100] At the same time, the Bush Administration had been meeting with resistance from Japan in talks under the Strategic Impediments Initiative (SII) on the issue of restrictive business practices. Notwithstanding official statements to the contrary,[101] the change of policy was perceived in the United States and Japan as a thinly veiled threat addressed to Japan.

Subsequently, the SII talks yielded commitments on the part of Japanese authorities to step up enforcement of their antitrust law. The results included increases in the budget and staffing of the Japanese Fair Trade Commission, a quadrupling of the administrative fines in civil cases, and significant increases in criminal penalties.[102] For its part, the

96. 1988 INTERNATIONAL GUIDELINES, *supra* note 95, at 30 n.159.

97. *See* discussion *supra* part I.A.1 (on the jurisdictional reach of the U.S. antitrust statutes).

98. DOJ Policy, *supra* note 6.

99. "[T]he Agencies may in appropriate cases take enforcement action against anticompetitive conduct, wherever occurring, that restrains U.S. exports . . . ." Draft Guidelines for International Operations, *supra* note 7, at 52,817.

100. Davidow, *supra* note 70, at 1048.

101. James F. Rill, then Assistant Attorney General in Charge of the Antitrust Division of the DOJ, reportedly "emphasized that policy change is one of general application and is not aimed at particular foreign markets." DOJ Policy, *supra* note 6, at 3.

102. Assistant Attorney General Anne K. Bingaman, Address Before the World Trade Center Chicago Seminar on GATT After Uruguay (May 16, 1994), *in* U.S. DEP'T OF JUSTICE, U.S. ANTITRUST POLICIES IN WORLD TRADE 7 (1994) [hereinafter Bingaman Address].

DOJ stated in 1992 that it was "prepared to work with antitrust authorities in the importing country if they are better situated to remedy the conduct and are prepared to act."[103] A more recent statement makes it clear that this option is to be preferred and that extraterritorial action by the DOJ is to occur only after failed attempts to obtain enforcement by foreign authorities.[104]

With the DOJ preference for foreign enforcement and the apparent success of SII talks, it appeared as if the rescinding of footnote 159 might be better represented as a successful tactic rather than an actual change in enforcement policy. However, Anne Bingaman, who heads the Antitrust Division of the DOJ, recently announced that the DOJ's hopes that enforcement by Japanese authorities would be adequate have begun to diminish and that U.S. extraterritorial enforcement will thus be pursued.[105] Yet, no suits have been brought against Japanese companies operating out of Japan since the 1992 policy change, and indeed since 1982.[106] As will be seen below, there is perhaps a distinction to be made between the general policy announced with the rescinding of footnote 159 and the particular issue of Japanese restrictive business practices.

3. Policy in Practice: the *Pilkington* Consent Decree

It is probably too early to draw firm conclusions about the DOJ's post-1992 enforcement policy. However, the *Pilkington* case, which resulted in a consent decree (Consent Decree), is an exemplary case and the first to implement post-1992 DOJ policy.[107] Pilkington, a U.K. firm, dominates the world's flat-glass industry, which includes glass used in windows and automobile windshields.[108] Almost all flat glass is produced using a "float" process and is referred to as "float glass." Worldwide shipments of float glass in 1991 were worth approximately $15 billion.[109]

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103. DOJ Policy, *supra* note 6, addendum at 2 (Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports: Statement of Antitrust Enforcement Policy).

104. Bingaman Address, *supra* note 102, at 7.

105. *Id.* at 8.

106. Two cases were brought in 1982. *See Itoh*, 1982–83 Trade Cas. (CCH) ¶ 65,010; *Daishowa*, 1982–83 Trade Cas. (CCH) ¶ 64,774.

107. United States v. Pilkington plc, Civil No. 94–345 (D. Ariz. filed June 25, 1994).

108. U.S. Dep't of Justice, Pub. No. 94-283, Justice Department Files First Antitrust Suit Against Foreign Company Since 1992 Policy Change 1 (May 26, 1994) (press release available from the DOJ and on file with author).

109. Complaint for the United States at 6, United States v. Pilkington plc, Civil No. 94-345 (D. Ariz. filed June 25, 1994) [hereinafter *Pilkington* Complaint] (on file with author).

In 1962, Pilkington developed improvements to the float-glass process, patented these improvements, and transferred the patented technology along with certain know-how to its principal competitors through restrictive licensing agreements.[110] Two aspects of the licensing agreements were stifling to trade. First, many agreements contained restrictions on the export of float glass from allocated territories.[111] Second, and more crucially, all of the agreements restricted each licensee's right to construct and operate float-glass factories to a specified territory or group of countries, generally corresponding to the territory in which the licensee previously manufactured glass.[112] Given that thirty to fifty new plants are expected to be built world-wide within the next six years, the DOJ estimated that exclusion from the market for building those plants would result in a loss of somewhere between $150 million and $1.25 billion in U.S. export revenues over that six-year period.[113] The DOJ claimed that "Pilkington's maintenance and continued enforcement of the license restraints . . . was not justified by any intellectual property rights of substantial value."[114] Under the Consent Decree, Pilkington agreed to end restraints against U.S. companies anywhere in the world,[115] to end restraints on foreign companies selling in the U.S.,[116] and not to engage in unlawful monopolies.[117]

4. Distinguishing Rhetoric from Policy

If the *Pilkington* Consent Decree is any indication of future DOJ practice, it seems that the DOJ pronouncements of early 1992 should be read on at least three levels. First, at the superficial level, there was the official statement that "the policy change has general application and is not aimed at particular foreign markets."[118] At a second level was the

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110. *Id.* at 8–9.

111. *Id.* at 10.

112. *Id.* at 8–9.

113. Justice Department Files First Antitrust Suit Against Foreign Company Since 1992 Policy Change, *supra* note 108, at 3. The agreements also contained limitation-on-use provisions that kept licensees from improving the technology and thereby deprived consumers of the benefits of more efficient production techniques. *Pilkington* Complaint, *supra* note 109, at 9. Thus while the stated DOJ policy is that cases will be brought regardless of whether U.S. consumers are harmed, the DOJ alleged that U.S. consumers were harmed in this case. *Id.* at 8–9. This harm, however, appears secondary to the losses in export opportunities, and it would appear that the DOJ threw in the allegation of consumer harm for good measure.

114. *Pilkington* Complaint, *supra* note 109, at 8–9.

115. Consent Decree, *supra* note 6, at 30,605.

116. *Id.* at 30,606.

117. Justice Department Files First Antitrust Suit Against Foreign Company Since 1992 Policy Change, *supra* note 108, at 3.

118. DOJ Policy, *supra* note 6.

political innuendo singling out Japan as the target of the new policy. Finally, actual practice as evidenced in the *Pilkington* Consent Decree would suggest a refined version of the official statement. *Pilkington* suggests a preference for cases involving practices that impede U.S. commerce not only with the home country of the offending party but also with other territories.

Though it would be comforting to see such a preference reflected in the Draft Guidelines for International Operations, they do not appear to contemplate any such limitation. Indeed, discussion following one example states: "The mere fact that only the market of [one country] appears to be foreclosed is not enough to defeat" jurisdiction under the FTAIA.[119] However, this quote follows a hypothetical case in which "companies agree at a trade association meeting (1) to refuse to adopt any U.S. company technology as an industry standard and (2) to boycott any distributor . . . that stocks competing U.S. products." This suggests an exception to the preference for cases involving restrictions of exports to more than one country in instances where the anticompetitive practices have no other purpose than to thwart trade with the U.S. It is no doubt wishful thinking to ascribe this scheme of rules and exceptions to conscious policy on the part of the U.S. enforcement agencies. Suffice it here to point out that practice and stated policy are at least not in conflict with this scheme, which will be central to the formula proposed in Part III of this note.

II. COERCION: SECTION 301

The first part of this note considered the option of applying antitrust law extraterritorially to eliminate trade-restrictive business practices. When viewed as an attempt to solve a trade problem, the antitrust option is novel, if not unorthodox. The elimination of trade barriers is usually seen to be a matter of intergovernmental relations: each government holds the key to its domestic market, and any country wishing to exploit that market must somehow convince the gatekeeper to open the door. The antitrust remedy ignores this convention of trade relations by passing over the gatekeeper's head, so to speak, to regulate directly and unilaterally the businesses that are obstructing trade.

This part of the note will focus on an option that is no more friendly than unilateral regulation but which is a bit more conventional in trade relations: coercion. In particular, this part will examine the statutory basis for coercive trade policy provided in Sections 301–310 of the

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119. Draft Guidelines for International Operations, *supra* note 7, at 52,817.

1974 Trade Act (Section 301).[120] These provisions require the USTR to *investigate* practices that burden or restrict United States commerce; *determine* whether they are actionable; *negotiate* to reach settlement with the offending government following a positive determination; and, if negotiations fail, *retaliate*, usually by restricting access to the U.S. market.[121] Note that the steps in the Section 301 process — investigation, determination, negotiation, and settlement or retaliation — do not all involve unilateral action on the part of the United States. Negotiation and settlement are intergovernmental processes, and of course any settlement is implemented by the foreign government. In this sense, Section 301 fits with the more conventional government-to-government scheme of trade relations, and it is significantly less unilateral than the antitrust remedy, which is directly administered by the U.S. courts. The term "unilateralism" is employed in connection with Section 301 to highlight the fact that it involves the use of unilateral threat tactics rather than the reciprocal processes of offer and request which presumably lead to a mutually satisfactory trade deal.

The following sections are designed to offer the reader an idea of whether, and to what extent, Section 301 may be used against private trade barriers. The first section points out some general characteristics of Section 301 which are essential to understanding how its provisions are likely to function. The second section looks at whether trade-restrictive business practices are actionable under Section 301. The next section warns that the use of Section 301 is substantially constrained by political considerations and by international commitments undertaken within the context of the World Trade Organization. The final section considers what experience suggests about the use of Section 301 to remedy private trade barriers.

A. *The Political Nature of Section 301*

As a provision of trade law, Section 301 is unique in that it is primarily an instrument of conquest. Though it offers some potential for protecting the home market, its main purpose is to facilitate aggressive action on the part of the U.S. Government to open foreign markets. Conquest is not a matter of right to be adamantly defended. It is rather a matter of seizing opportunities, in the proper time and place. Thus, the drafters of the 1974 Trade Act wisely ensured that the provisions of

120. 19 U.S.C. §§ 2411–2420 (1988 & Supp. II 1990).

121. Retaliation is limited to the withdrawal of trade concessions. Trade embargoes and the like are naturally reserved for a different scale of retaliation not provided for under Section 301.

Section 301 allow it to be implemented with a great deal of flexibility. At the same time, Section 301, particularly as amended in 1988, reflects the desire of Congress that the Executive branch not be left entirely to its own devices in carrying out aggressive trade policy. For this reason, a number of provisions require accountability before Congress and a fair degree of transparency vis-à-vis the public at large. This lends to the process a level of domestic political involvement that is uncharacteristic of most trade diplomacy. The process is thus its own brand of politics — neither quite as secretive and flexible as diplomacy, nor as predictable and rigid as most legal process. The following subsections describe the basic traits that give Section 301 its peculiarly political nature and point out their consequences.

1. The General Characteristics of Section 301

a. Congressional Review

Implementation of Section 301 has thus far escaped judicial review and will probably continue to do so. Consequently, as one experienced commentator has put it, Section 301 "is the sort of statute that only Congress can enforce."[122] There are a number of provisions that facilitate "congressional review" and political scrutiny in general. Lists of priority countries must be drawn up by the USTR and presented to Congress; a determination not to pursue a case must be published in the Federal Register;[123] and progress on implementation of settlements must be reported to Congress.[124]

b. Porous Provisions

The drafting of Section 301 has been described as "an intricate maze of mandatory commands in one place and extremely wide loopholes in the other."[125] For example, the provisions requiring mandatory action under Section 301(a) are followed by a series of escape devices, including "extraordinary cases where [mandatory] action . . . would have an adverse impact on the United States economy substantially out of proportion to the benefits of [such] action."[126] These loopholes may at times

122. Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, *in* AGGRESSIVE UNILATERALISM, *supra* note 9, at 113, 122; *see also id.* at 122 n.13.

123. 19 U.S.C.A. § 2414 (West 1980).

124. 19 U.S.C.A. § 2420 (West 1980).

125. *See* Hudec, *supra* note 122, at 122.

126. Some experts have also noted that even the mandatory language itself appears to

be impractical for political reasons, but as a matter of legal interpretation, the USTR has great latitude to maneuver within whatever limits politics may impose.

c. Initiative and Control by the USTR

The key player in a Section 301 proceeding is the Office of the U.S. Trade Representative, which is in control from start to finish. It decides whether to undertake investigations; determines on the basis of its investigations which, if any, terms of Section 301 apply to the case; and decides whether and how to retaliate. This concentration of governmental authority in a single agency may be contrasted to the wide dispersion of power under the most important protective U.S. trade laws, the antidumping and countervailing duty statutes. These statutes provide that certain determinations are to be made by a government agency and that others are to be made by an independent commission.[127]

A corollary of the key role given to the USTR is the relatively insignificant role of private petitioners. The investigative stage of a Section 301 proceeding can be initiated by the USTR itself or upon private petition. But the role of the private petitioner is little more than to call attention to the existence of a problem. The USTR determines whether the case brought by a petitioner fulfills the criteria of a Section 301 action. If the USTR makes a negative determination, the petitioner has no recourse to judicial review.

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offer a way out: "the Trade Representative shall take action authorized in subsection (c), *subject to the specific direction*, if any, *of the President*." Trade Act of 1974, § 301(a), 19 U.S.C. § 2411(a) (emphasis added). One may read "specific direction" as referring to *how* action may be taken, but it could also be read as referring to *whether* action may be taken. The President is not subject to the mandatory provisions and so would be free to extricate the USTR from the requirement of mandatory action without having specific reference to the escape devices provided in § 301(a). Whether the President would be willing, as a political matter, to intervene on the basis of such an interpretation is a separate question.

127. Under the antidumping statute, less-than-fair-value determinations are made by the Commerce Department, and material injury determinations are made by the International Trade Commission. 19 U.S.C. § 1673 (1988 & Supp. II 1990). A similar division of tasks operates when countervailing duties are applied to offset foreign subsidies. The Commerce Department determines the existence of a subsidy, and the International Trade Commission determines the existence of material injury. Tariff Act of 1930, § 701, 19 U.S.C. § 1671 (1988 & Supp. II 1990). The U.S. escape clause procedure uses a different model to divide power. The initial authority for the entire determination is placed in the hands of an independent commission, the International Trade Commission. However, the President may reject the Commission determination. Trade Act of 1974, §§ 201–203, 19 U.S.C.A. §§ 2251–53 (West 1980). On the relation between the Commission and the President in escape clause proceedings, see JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 547–49 (2d ed. 1986).

d. Negotiated Settlement

Relief under Section 301 takes the form of a negotiated settlement. Foreign governments may choose not to negotiate, or to break off negotiations, if they believe the costs of settling are greater than those of suffering retaliation. Furthermore, even when there is a settlement, foreign governments influence the shape of the remedy in a way that they do not in the course of antitrust judicial proceedings. They influence the terms of the settlement by negotiating it, and they control implementation. They may also later decide not to honor the settlement.

2. Consequences

The characteristics outlined above combine to affect the operation of Section 301 in a number of ways.

a. An Instrument Serving Government, Not Individuals

Section 301 works to promote U.S. interests, not to defend individual interests. This results most directly from the central role of the USTR in Section 301 proceedings and the absence of judicial review. By concentrating governmental authority in the hands of one agency, the possibility for petitioner influence is diminished. (This is in contrast to antidumping and countervailing duty proceedings, where the dispersion of governmental power provides petitioners with more control over the overall flow of events than the government.) Because the whole procedure escapes judicial review, this increases the margin for governmental discretion and further reduces the influence of private petitioners. Otherwise, the intervention of courts would bestow power on the individual by ensuring to some degree that determinations conform to abstract criteria objectively applied, thus divorcing the outcome of proceedings from the political context and majority rule.

b. A Relatively Precise Instrument Among Trade Statutes

The requirements of transparency and the resulting domestic political scrutiny under Section 301 make it appear an unwieldy instrument. Yet when compared to the protective trade statutes, Section 301 appears much more effective. This is yet another consequence of the fact that the USTR may act free of the courts and with little fear that individuals will take control of events. Under the protective trade statutes, judicial review and the central role of petitioners minimize the possibility that discretionary concerns of government will be reflected. The result under Section 301 is just the opposite. This is perfectly in keeping with the notion that Section 301 is a tool of conquest, not defense, where the ability to advance and retreat at will is crucial. If the process were driven by precise legal criteria that mechanically trigger remedies, strategic behavior would be impossible. On the other hand, the political pressure exerted on the USTR through Section 301 procedure provides some impetus for the USTR to achieve the statute's objective without Congressional micromanagement or judicial interference.[128]

c. A Generally Cautious, Trade-Friendly Policy

Because the USTR is the only agency that implements Section 301 and because implementation is largely discretionary, the USTR is central to how Section 301 will be applied. The Office of the U.S. Trade Representative is mainly in the business of negotiating trade deals and considers itself successful when markets are opened, not closed.[129] Section 301 is thus unlikely to be used when the threat of retaliation appears either insufficient to coerce, or harmful to negotiating prospects. Moreover, even when it deems retaliation otherwise appropriate, the USTR will feel constrained not to retaliate in a way that breaches U.S. commitments or would tend to undermine the value of trade agreements.

The trade-friendly bias of the office of the USTR can, however, be overcome by domestic political concerns.[130] This is particularly true where Section 301 is concerned because the USTR must report to Congress on progress in negotiations and implementation. The volatile moods of Congress and of public opinion at large must therefore be considered when trying to assess the general temperament of policy under Section 301.

d. Textual Analysis Difficult and Unreliable, yet Relevant

Section 301 is inherently imprecise and its implementation is similarly unpredictable. In the absence of judicial review, judicial interpreta-

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128. This is most likely the explanation for Sykes' empirical observation that implementation of Section 301 has not been "captured" by private interests, leading to its use for protectionist, rather than aggressive purposes. *See* Sykes, *supra* note 67, at 317.

129. The relatively few cases of retaliation under Section 301 tend to support this position. *See id.* (noting that Section 301 process has not been subject to "regulatory capture," i.e., turned to use in favor of those interested in closing off the U.S. market rather than opening foreign markets).

130. The USTR, after all, works for the President. Though the 1988 Trade Act formally delegated authority from the President to the USTR in Section 301 proceedings, the USTR soon after the adoption of the Act advised that "real authority" had not been transferred. Then USTR Clayton Yeutter reportedly remarked that the USTR "reports to the President and won't go against him." Fred M. Greguras, *Representing the Growing Technology Company: The Omnibus Trade & Competitiveness Act of 1988*, *in* ALI-ABA COURSE OF STUDY, Nov. 3, 1988, *available in* WESTLAW, JLR Database.

tion cannot elucidate the section's vaguer provisions. Also, because "Congressional review" substitutes for judicial review, one can expect apparently precise requirements to be interpreted with some flexibility. For example, the word of the statute will at times require that recourse must be had to retaliation within a fixed period after negotiations or after GATT panel proceedings are opened. However, it is generally expected that members of Congress will not be heard to complain if the deadline is exceeded and progress is being made.[131]

Although Section 301 provisions are subject to political considerations and to that extent are full of uncertainty, they still bear close analysis. The intricacies of a particular clause may be irrelevant when a particular course of action is ruled out as a political matter, but they could conceivably be pivotal when the USTR deems it feasible to take a stand.

e. Jurisdiction Not an Issue

Section 301 would appear immune to criticism concerning the limits of prescriptive jurisdiction. Neither the source of the rules nor the relief sought supports the proposition that Section 301 proceedings involve the extraterritorial application of U.S. law.[132] Foreign officials may be indignant because the transparency requirements of Section 301 procedure give them the impression that their country is on trial. But it is important to insist that the trial is a political one, driven by public opinion, not private rights, and controlled by the political branches, not the judiciary. This, combined with the fact that the relief sought is a negotiated settlement, means that the Section 301 remedy does not impose any set of rules upon a foreign country. Pressure is applied on the subject country to do something, and that country decides whether or not to oblige. What is imposed, if anything, is the spontaneous political will of the U.S. Government.

As to jurisdiction to enforce, with respect to retaliation, the United States is simply restricting access to its market, risking international

131. *See, e.g.*, Hudec, *supra* note 122, at 122. The flexibility shown by Congress is now relevant to the question of whether the USTR would be required under Section 301 to retaliate before authorization has been obtained pursuant to proceedings within GATT dispute settlement.

132. *But see* Chris Shore, *The Thai Copyright Case and Possible Limitations of Extraterritorial Jurisdiction in Action Taken under Section 301 of the Trade Act of 1974*, 23 LAW & POL'Y INT'L BUS. 725, 736 n.68 (1992) (arguing that in the Thai Copyright case the USTR was attempting to "prescribe a specific interpretation of Thai law, which . . . is tantamount to prescription under the Restatement" (Third) §§ 401–403). Note that § 402 of the Restatement refers to application of the law by administrative agencies as well as courts.

liability, but remaining well within the bounds of its jurisdiction to enforce within its territory.

As will be discussed *infra*, international law places substantial limits on the scope of retaliation under Section 301. However, the range of activities actionable under Section 301 is not directly affected by this limitation because the USTR may choose to "cross-retaliate" (i.e., withdraw trade concessions in an area unrelated to the subject of a Section 301 proceeding).[133] Given the possibility of cross-retaliation and the fact that Section 301 cannot be seen as an exercise in extraterritorial jurisdiction, the legal constraints on the range of issues that can be addressed under Section 301 are purely a function of what issues are actionable as a matter of domestic law; the international law constraints thus have no direct bearing on the scope of action.

B. *The Scope of Action under the Anticompetitive Practices Clause of Section 301*

Action under Section 301 can be *mandatory*, triggered by denial of U.S. rights or "benefits" under a trade agreement (Section 301(a)), or *discretionary*, based on acts, policies or practices that are "unreasonable" or "discriminatory" (Section 301(b)). The following analysis will be limited to discretionary action under Section 301(b) because this note by hypothesis supposes the absence of international agreements addressing trade-restrictive business practices.[134] Action under Section 301(b) would most plausibly arise under the heading of "toleration by a foreign government of systematic anticompetitive activities by private firms . . . ."[135] This "anticompetitive practices clause" was inserted with the

133. *See* Trade Act of 1974, § 301(c)(3), 19 U.S.C. § 2411 (1988 & Supp. II 1990) ("The actions the Trade Representative is authorized to take . . . may be taken against any goods or economic sector . . . (B) without regard to whether or not such goods or economic sector were involved in the act, policy, or practice that is the subject of such action").

134. Cases requiring mandatory action could nonetheless arise. First, certain existing agreements do arguably contain obligations to eliminate restrictive business practices, though these obligations are limited in scope. *See, e.g.*, General Agreement on Trade in Services, *in* Uruguay Round Final Act, *supra* note 1, Annex 1B, art. VIII (requiring signatories to see to it that the activities of legal or *de facto* monopolies or oligopolies are consistent with their MFN or specific commitments under GATS). Mandatory action under § 301(a) might also be triggered by denial of "benefits to the United States" under a trade agreement that does not cover business practices but which gives rise to the expectation of benefits that would be denied when restrictive business practices are tolerated. Finally, settlements pursuant to discretionary action under § 301(b) may lead to commitments on the part of the subject country to control restrictive business practices. The failure to honor such commitments would, according to legislative history within the Senate, be regarded as an "unjustifiable" practice, also a cause of action under § 301(a)(ii). S. REP. NO. 167, 100th Cong., 1st Sess. 77 (1987).

135. Trade Act of 1974, § 301(3)(B)(i)(III), 19 U.S.C. § 2411 (amended 1988).

1988 amendments to Section 301 as part of an indicative list of practices to be considered "unreasonable" under Section 301(b).

To be actionable under the anticompetitive practices clause, a case must involve government "toleration" of business practices. These practices must be "anticompetitive." A general provision of Section 301 would further require that the business practices in question burden U.S. commerce.

1. Government Tolerance

The general terms of Section 301(b) designate as actionable the acts, policies, or practices of a "foreign country." How then to address the activities of private business? One of the bills tabled during the 1988 amendments would have simply broadened the scope of Section 301 to include private anticompetitive behavior. This was, however, rejected as too great a departure from the general spirit of Section 301, which is designed to address intergovernmental problems. In particular, it was difficult to countenance retaliating against a country for the behavior of individuals within its borders, irrespective of whether the behavior was government sanctioned.[136] The solution was to implicate the responsibility of foreign governments for restrictive business practices through their "toleration" of them. The Report of the Senate Finance Committee (Senate Report) offers the rationale, stating that the amendment reflected "the growing conviction . . . that anti-competitive, market-restrictive behavior on the part of private firms, when coupled with the failure of a foreign government to intervene to eliminate such behavior, can act as a barrier to market access which is as great as any formal government act, policy, or practice alone."[137]

If government involvement could be inferred from the toleration of just any anticompetitive behavior, the requirement of government toleration would be meaningless. The Senate Report, however, makes it clear that there is some content to the requirement. The anticompetitive practices clause is not intended to apply broadly to any and all purchasing decisions by private firms.[138] Toleration, according to the Senate Report, must be of "*pervasive* or *egregious* activities . . . which result in a *persistent pattern* of restricted market access by U.S. firms *in a partic-*

136. Judith Hippler Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendment to Section 301*, *in* AGGRESSIVE UNILATERALISM, *supra* note 9, at 49, 73–74.

137. S. REP. No. 167, 100th Cong., 1st Sess. 85 (1987).

138. *Id.*

ular industry."[139] Under such circumstances, it would be difficult to imagine that the government was unaware of the activity, and its failure to intervene would seem to create a reasonable inference of complicity.

The principal consequence of the government toleration requirement is to provide the USTR with a basis for refusing cases that acutely affect petitioners but that are of little importance to the United States. This effect of the government toleration requirement would, however, seem to add little to the general requirement of burden on U.S. commerce discussed *infra*.

Perhaps the reference to a "particular industry" would work to rule out a general claim by the USTR of lax antitrust enforcement. However, it is this author's view that, since Section 301 is not subject to judicial review,[140] the quoted language and any but the most clear and broad restraints on the scope of action under Section 301 should generally be read as offering an excuse for inaction when the USTR decides that this is prudent, rather than as a limitation on the USTR's range of discretionary action.

2. The Standard of Anticompetitive Behavior

Section 301(b) refers to "systematic anticompetitive activities."[141] What is the standard upon which the USTR must determine that activities are anticompetitive?

In the statute itself, there is no reference either to the antitrust rules of the United States or to the rules of the locus of the offending activities. The statute seems, rather, to set its own standard, referring to activities that are restrictive "on a basis that is inconsistent with commercial considerations . . . ."[142] This standard, however, only tells us the obvious, namely that restrictive business practices should not be construed as anticompetitive when foreign companies are refusing to buy U.S. products due to high prices or inferior quality.

Thus, a question remains as to which of the multitude of business practices that subordinate immediate commercial interests to strategic concerns are to be considered anticompetitive. The Senate Report offers the extremely general example of "cartel-type behavior . . . and closed purchasing behavior . . . that precludes or limits U.S. access in a con-

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139. *Id.* (emphasis added).

140. *See supra* part II.A.1.a.

141. Trade Act of 1974, § 301(3)(B)(i)(III), 19 U.S.C. § 2411 (1988 & Supp. II 1990).

142. *Id.*

certed and systematic way . . . ."[143] Ultimately, both the legislative history and the text of the statute fail to offer substantive criteria — *sui generis* or by reference to other bodies of law, domestic or foreign. Thus, the standard of anticompetitive behavior does not appear susceptible of rule-based construction.

The legislative history does, nevertheless, offer guidance of a general nature. On the one hand, the Senate Report insists that the purpose of the clause is not to force U.S. concepts of antitrust law on foreign governments.[144] Rather, a "flexible approach" should be used, taking into "account, among other things, whether the anti-competitive . . . activities are inconsistent with local (not U.S.) law; the flagrancy of the activities; and the degree of the effect on U.S. commerce."[145] On the other hand, the Report of the House Ways and Means Committee (House Report) mentions the need to give consideration to whether opportunities in the foreign country generally reciprocate those available in the United States.[146] Consistency with local law is only one of several non-exclusive factors mentioned in the Senate Report. In context, the mention of local law seems to be made only in order to emphasize that, *if* the USTR is to take into account existing antitrust rules, it should look rather to rules of the country in which the conduct takes place and not those of the United States.

In sum, the standard is not based on rules of conduct. Rather, it is result-based, and results are gauged relatively. The test asks whether the practices impede market access; and, if so, whether they impede market access more than practices permitted in the United States impede access to its market. The standard is one of rough reciprocity of competitive conditions as they affect market access, not one of identity of rules ("mirror reciprocity").[147]

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143. S. REP. NO. 167, 100th Cong., 1st Sess. 85 (1987).

144. *Id.* at 86.

145. *Id.*

146. *See* H.R. REP. NO. 100-40, 100th Cong., 1st Sess. 16 (1987) ("consideration should be given to the denial by the foreign government of access to the market in that country and opportunities within that market generally reciprocating those available in the United States").

147. In this respect, the standard is similar to one of the standards of Telecom 301, a sector-specific version of Section 301. Section 1377(a)(2)(B) of that Act refers to acts, policies, or practices of a country that deny "to telecommunications products and services of United States firms mutually advantageous market opportunities" in the foreign country subject to action. Note, however, that, unlike the anticompetitive practices clause of Section 301, this clause contemplates denial of opportunities "within the context of the terms" of an existing agreement. 19 U.S.C. § 3106 (1988 & Supp. II 1990). Also, certain parts of the so-called reciprocity clause of the European Union's Second Banking Directive use a similar standard. *See* Council Directive 89/646, 1989 O.J. (L 386) 1. In particular, the notion of "comparable treatment" of art. 9(3) of the Second Banking Directive bears considerable

This loose requirement of reciprocity is unworkable and unsatisfactory as a legal standard. However, it serves well the needs of strategic trade relations by foregoing the benefits of legal certainty in favor of flexibility.[148] One might object to such an imprecise standard because it allows for arbitrary determinations. Yet arbitrariness only deserves a bad name in the realm of relations between states and individuals. Section 301 is outside of that realm, for it does not directly concern private rights. It seeks to vindicate the state's interests, not those of individuals, and the "defendants" are governments, not individuals. The lack of a clear, objective standard is thus acceptable for the same reason that it is permissible not to subject implementation of the standard to judicial review: the standard is one for the political question, designed to guide the judgment of the USTR through a political process, governed by power relations among coequal branches of government and concerned with similarly coequal relations between the United States and foreign powers.[149]

3. Burden on United States Commerce

Section 301(b) allows discretionary action only when a practice "burdens or restricts United States commerce."[150] Consequently, this requirement rules out any possibility of private petitioners embroiling the United States in matters in which it has no real interest. This consequence comports with the notion that, while individual petitioners may

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resemblence to the reciprocity standard of the anticompetitive practices clause of Section 301. *Id.* art. 9(3).

148. In seeming contradiction to this assertion, the Senate Report on the 1988 amendments claims that they are motivated by the "perception that the Section 301 process needs to be invested with a much greater degree of predictability and certainty. . . ." S. REP. NO. 167, 100th Cong., 1st Sess. 86 (1987). However, certainty in this context actually refers more to the desire to convey to foreign countries the impression that, when they do not comply with requests, retaliation would be more certain under the new Section 301. The same paragraph of the Report reveals this concern, lamenting the fact that "[o]ur trading partners do not know when the United States will act to enforce its international rights and when it will choose to remain passive." *Id.* The actual result of the 1988 amendments was perhaps to convey the impression of certain reprisal but not in fact to increase the certainty of reprisal. What the 1988 amendments actually did was to increase the *likelihood* of reprisal through various mechanisms by placing political pressure on the USTR, while still leaving open to the USTR the option to back down when reprisal would be, all things considered, not in the best interest of the United States.

149. It would be another matter if the "defendant" were a foreign individual. On this, and the analogy between the domestic political question and foreign policy matters, see Brilmayer, *supra* note 20, at 2277 (framing the debate on whether U.S. courts should be cognizant of international law in terms of a paradigm distinguishing traditional, horizontal state-to-state international law issues and emerging, vertical state-individual transnational law issues).

150. Trade Act of 1974, § 301(b), 19 U.S.C. 2411 (1988 & Supp. II 1990).

be helpful in calling attention to trade restrictions, the purpose of Section 301 is not to redress harm to them, but to further the general interests of the United States.[151]

4. Conclusion

The anticompetitive practices clause, like Section 301 in general, can best be understood as a simultaneous effort to prod the USTR to act, partly by enlisting the help of private petitioners while at the same time not allowing the latter to hijack the process.[152]

The language concerning restrictive business practices, as with most of the 1988 amendments,[153] was designed to elicit action on the part of the USTR, not restrict it. The addition of the anticompetitive clause should be viewed in the overall context of the 1988 amendments, which reflected the attitude in Congress that the Presidency was not being aggressive enough in its use of Section 301.[154] If the anticompetitive practices clause were designed to limit the latitude for action by the USTR, it would have made little sense to insert it as part of a list indicative of "unreasonable" practices. Any meticulous analysis of what the clause does not cover would seem superfluous in light of the fact that matters not covered by it could still be construed as otherwise "unreasonable."[155] The purpose of the new language inserted with the 1988 amendments was to put the spotlight on the issue of restrictive business practices, thus applying some pressure on the USTR not to "overlook" the matter.[156]

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151. Such a reading of the statute is also supported by the fact that its standing requirement is far more lenient than that of other trade statutes, requiring only that the petitioner be an "interested person" and not necessarily directly harmed. And in practice, the USTR has not required a showing of substantial injury before initiating negotiation. Konrad Blake Thatcher, Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW. J. INT'L L. & BUS. 492, 502 (1987).

152. One commentator characterizes the role that Congress had in mind for the USTR more cynically: "Statutes of this kind are a form of political bluster in which the Congress overacts for domestic consumption, counting on the Executive to dilute the reality." Hudec, *supra* note 122, at 122 n.13.

153. For instance, the requirements that the USTR draw up a list of priority countries (§ 310(a)) and present a yearly report to Congress about the progress in negotiations with these countries (§ 310(d)).

154. *See* S. REP. No. 167, 100th Cong., 1st Sess. 72 (1987) ("Along with [the] discretion in determining what action to take has come the discretion to take no action. Too often U.S. Presidents have opted to do nothing . . .").

155. Indeed, the USTR had already brought a case that dealt in part with restrictive business practices before the 1988 amendments. *See infra* part II.A.2.d.

156. *See* S. REP. No. 167, 100th Cong., 1st Sess. 74 (1987) ("The statute's enumeration of actionable foreign acts, policies and practices, while intentionally broadly stated, may be so broad as to permit an Administration to overlook situations that are within the scope of the statute and ought to be investigated and remedied").

Thus, the restrictive elements of the anticompetitive practices clause should be read as a substantive check on the private petitioner's case. This would complement the procedural safeguards inherent in the whole Section 301 process discussed in Part II.A.

C. *Retaliation Under Section 301*

1. The Political and Legal Constraints of the World Trading System

It has been asserted above that the question of what is actionable under Section 301 largely escapes legal scrutiny and is really a question of political judgment for the USTR subject to "Congressional review." This assertion is only partially true. As a matter of domestic law, the Section 301 process is not subject to judicial review. Also, any international law limitations on prescriptive jurisdiction are probably of no concern because Section 301 is not, it has been argued here, an exercise of prescriptive jurisdiction.[157] However, international law and politics do ultimately constrain the use of Section 301 by limiting the latitude for retaliation.

The international political constraints are simple yet considerable. Coercion, as opposed to unilateral regulation, certainly has its advantages from the standpoint of those countries subjected to the Section 301 process (flexibility and the possibility, ultimately, to say no). Yet deploying Section 301 involves directly blaming a country and threatening to punish it, if not actually retaliating. Except in special cases, this is usually more offensive to a foreign government than blaming or punishing one of its nationals would be. Thus, one writer has noted that, "[i]ronically, detractors remark that Super 301 is 'too powerful' for effective use among most U.S. allies or trade partners . . . ."[158]

International legal constraints exist because retaliation involves restricting access to the U.S. market, and much of that access is now granted to other countries under commitment. The terms of Section 301 do not require the USTR to respect international obligations.[159] How-

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157. *See supra* part II.A.2.e.

158. William A. Lovett, *Rethinking U.S. Trade Policy*, 1 TULANE J. OF INT'L & COMP. L. 135, 163 (1993). To the extent that countries have significant home markets, the risk of counterretaliation is a strategic disadvantage. *See* Sykes, *supra* note 67, at 294 ("[a] bully is more likely to sway the behavior of a weakling").

159. Nor does it require the USTR to violate them, given the possibility for cross-retaliation. Cross-retaliation presumably allows the USTR to find some area where the United States has no commitments. This way out might become increasingly theoretical given the increasing breadth of coverage of the GATT MFN principle. *See infra* note 160. Compare this with

ever, the USTR can be expected to avoid violation of trade agreements for the reasons examined in the discussion of general traits *supra* Part II.A.1. It is thus safe to say that the existence of U.S. trade commitments will generally prevent retaliation in the committed area. To the extent that such commitments prevent retaliation, they undermine the credibility of the threat of retaliation and so limit the use of Section 301.

Thus, the increasing breadth of trade commitments undertaken by the United States precludes retaliation in most areas. For instance, the U.S. adherence to the most favored nation principle (MFN) in areas covered by agreements undertaken within the framework of the World Trade Organization substantially reduces the capacity for U.S. retaliation.[160] Congress specifically allows the USTR to take measures in retaliation that breach the MFN principle.[161] However, this permission should not be read as a general approval by Congress of MFN violation, and there would most likely be little political pressure to take advantage of it. The allowance for MFN violation has to be read in the context of Section 301's connection to dispute settlement in the GATT and the international law theory of "self-help" or the notion of "justified disobedience."[162] The USTR is required to request the opening of a GATT panel when the practice under investigation involves a GATT agree-

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§ 1382 of Telecom 301, which states that "[n]othing in this part may be construed to require actions inconsistent with the international obligations of the United States, including the General Agreement on Tariffs and Trade." 19 U.S.C. § 3111 (1988 & Supp. II 1990).

160. On the MFN principle and Section 301, see, e.g., OFFICE OF INT'L SECTOR POLICY, DEP'T OF COMMERCE, AN EXAMINATION OF THE ADEQUACY OF U.S. TRADE LAWS AS THEY AFFECT THE COMPETITIVENESS OF HIGH TECHNOLOGY INDUSTRIES 33 (1983), *cited in* Thatcher, *supra* note 151, at 517. A particularly striking example of the impact of the MFN principle on the U.S.'s margin for retaliation is the effect of the MFN commitment under GATS. This agreement establishes an ambitious framework for trade liberalization but is modest in terms of immediate commitments to liberalize. Yet one of the few substantive commitments is to grant MFN treatment with regard to all services. Art. II of the GATS provides: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." General Agreement on Trade in Services, *in* Uruguay Round Final Act, *supra* note 1, Annex 1B, art. II. Thus, however modest progress in trade liberalization turns out to be in the service sector in years to come, the United States has already made a commitment that in effect precludes retaliation in the entire sector. In this sense, the United States has abandoned one potentially forceful means of liberalizing without at the same time securing any degree of liberalization.

161. "The actions the Trade Representative is authorized to take . . . may be taken against any goods or economic sector— . . . (A) on a nondiscriminatory basis *or solely against the foreign country [subject to proceedings]*." Trade Act of 1974, § 301(c)(3), 19 U.S.C. § 2411 (1994) (emphasis added).

162. The latter notion has been suggested by Hudec, *supra* note 122, at 125–131. For an explanation of the "self-help" theory, see ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 4, 37–40, 67–68 (1984).

ment.[163] If the panel does not find for the United States, further pursuit of the matter is not mandatory.[164] The provision allowing violation of MFN echoes the provision of GATT dispute settlement allowing retaliation when it is authorized pursuant to a favorable ruling. The only difference is that Section 301 allows — and ostensibly requires — retaliation where there is a favorable panel ruling but authorization is blocked, i.e., it allows self-help when the GATT system acknowledges a violation or denial of benefits but offers no relief. The self-help theory probably no longer has any applicability in the case where there are panel proceedings because it is based on the existence of a deficiency in the GATT dispute settlement system, the possibility for the defendant to block authorization of retaliation, that has since been remedied.[165] If the

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163. When an investigation "involves a trade agreement," the USTR is required to "request proceedings on the matter under the formal dispute settlement procedures provided under such agreement." 19 U.S.C. § 2413(a)(2) (1994). At what point in an investigation will practices that do not violate an agreement, but only "involve" it in the sense that there is some colorable argument for nullification or impairment, require resort to GATT dispute settlement? It is the author's view that, because the purpose of resorting to GATT panels is to allow vindication of rights or benefits provided for by GATT without, in the process, actually violating GATT, resorting to a GATT panel would only be necessary if the USTR plans to retaliate in a manner that would violate GATT, absent authorization pursuant to the Understanding on Dispute Settlement. Note, however, that this reasoning addresses the question whether U.S. law requires resort to GATT dispute settlement. Another matter altogether is whether GATT law requires it. This would seem to be the case under the new Understanding on Dispute Settlement. Understanding on Rules and Procedures Governing the Settlement of Disputes, *in* Uruguay Round Final Act, *supra* note 1, Annex 2. As Andreas Lowenfeld notes, "Article 23 of the Understanding . . . states that when members seek redress of a violation of the GATT or a related agreement, 'they shall have recourse to, and abide by, the rules and procedures of this Understanding,' and shall not make a determination that a violation has occurred or that benefits have been nullified or unpaid, 'except through recourse to dispute settlement in accordance with the . . . Understanding.' " Andreas Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 481 (1994). However, this does not clearly ban unilateral determinations and GATT-legal retaliation in cases that do not involve alleged violations or nullification and impairment of the GATT or related agreements. This might notably be the case of Section 301 proceedings dealing with restrictive business practices.

164. This requirement of recourse to GATT probably serves, *inter alia*, to make sure that any possibility of legal retaliation within the sphere of GATT commitments will be known. At first blush, another purpose seems to be to ensure that violation of GATT is not mandatory. Actually, it is not mandatory in any case because of the possibility for cross-retaliation provided under § 301(c)(3). Nonetheless, the legally redundant loophole does serve two political functions. First, it gives an overall impression of intending to comply with GATT, thus mollifying foreign governments that might not be so finely attuned to the degree of discretion that the USTR in fact has in terms of retaliation (indeed, part of the credibility of the threat under Section 301 relies on their not being too aware of this discretion). Second, the legally redundant loophole takes political pressure off the USTR to retaliate within the sphere of GATT in the event of a negative ruling.

165. The new Understanding on Dispute Settlement does not allow one country to block authorization to retaliate (withdraw concessions). Article 22(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that, failing compliance or satisfactory compensation, "any party having invoked the dispute settlement procedures may request authorization from the DSB [Dispute Settlement Body] to suspend the application to

self-help theory has no more applicability in the case of infringements acknowledged by the GATT system through dispute settlement, it probably never had any applicability in the scenario discussed in this note (i.e., where recourse is not made to dispute settlement and thus infringement or other nullification of an agreement has not been found by the GATT system to be present).[166] The conclusion is thus that Congress in all likelihood did not intend the USTR to violate the MFN principle in the type of case contemplated in this note. This will lend some strength to the USTR's own GATT-compatible stance in the event of transitory domestic political pressure to violate the MFN principle.

Therefore, when a successful case cannot be made before a GATT panel, the effective use of Section 301 is limited because the margin for retaliation is limited. This margin will only decrease as the scope of GATT and related agreements increases. This state of affairs is part of what is, generally speaking, a good bargain: the latitude for unilateral pursuit of gains has been restricted in return for a system that ensures their effective pursuit within a multilateral framework. When private trade barriers are considered, however, the compromise involved in this bargain appears greater. Even though GATT coverage is broad and expanding in terms of sectors (industrial goods, agricultural goods, services, intellectual property protection), this coverage still applies mainly to public barriers. Hence, the scope for retaliation not authorized within the GATT is greatly reduced, but the private barriers potentially attacked with Section 301 are not correspondingly reduced; the reduction in unilateral means of securing market liberalization has not been matched with an increase in multilateral means to achieve the same ends. The following section examines a failed attempt to correct this discrepancy by tinkering with Section 301. Though the bill discussed below will in all probability *not* become law, it warrants examination because its inherent failings reveal just how difficult it is to circumvent the constraints of the world trading system.

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the Member concerned of concessions or other obligations under the covered agreements." Understanding on Rules and Procedures Governing the Settlement of Disputes, *in* Uruguay Round Final Act, *supra* note 1, Annex 2, art. 22(2). Art. 22(6) then provides, in relevant part, that "[w]hen the situation described in [Art. 22(2)] occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides *by consensus* to reject the request." *Id.* art. 22(6) (emphasis added). The previous situation whereby authorization was blocked absent consensus has thus been reversed.

166. Furthermore, even if one considers a unilateral determination of nullification of sufficient authority to justify disobedience, the cause of action considered in this paper — toleration of restrictive business practices — makes it difficult to base retaliation on a colorable claim of nullification.

2. H.R. 4206: A Failed Attempt to Evade the Constraints of the World Trading System

The observations in the preceding section reveal that Section 301 will be increasingly unable to deal with private barriers to market access because Section 301 ultimately relies on the threat of raising barriers to market access, a practice of which the world trading system is increasingly intolerant. One solution to this problem is retaliation which does not impede market access. H.R. 4206, a bill submitted to the House Ways and Means Committee on April 13, 1994, inserted an additional remedy whereby civil penalties would be imposed on "foreign or domestic persons that engage in restrictive business practices . . . when such practices foreclose United States exports or otherwise burden or restrict United States foreign commerce."[167] The President would have been empowered to levy civil penalties against the U.S. business operations of the offending company.[168]

By shifting retaliation from governments to businesses, the bill would seem to generally have escaped the purview of the GATT or the analogous agreement on services. Neither forced compliance nor imposition of fines would constitute a barrier to trade in goods or services with the United States.[169] Nor would the bill have restricted the activities of service providers within the U.S. market. Rather, it would have prescribed conduct of businesses operating outside of the United States. However egregious this remedy might have been, it would have escaped the constraints of GATT just as surely as does the extraterritorial application of U.S. antitrust laws.

H.R. 4206 was in essence a clever hybrid of the antitrust and Section 301 remedies. On the one hand, it was free of the constraints posed by trade commitments because retaliation was to be against businesses instead of governments. On the other hand, it might also have gotten around the substantive deficiencies of U.S. antitrust law, because the standards applied by the President under Section 301 would not neces-

167. The insertion would have been entitled "Section 311. Action by the President to Open Foreign Markets." Presumably, it would have been inserted into the 1974 Trade Act after §§ 301–310, which comprise the so-called Section 301, and it would have been part of the amendments under the "Gatt Fair Trade Enforcement Act of 1994," to implement the results of the Uruguay Round. The bill was presented at the 103d Congress, 2d session of the House of Representatives by Congressman Regula (for himself and Congressman Mineta) on April 13, 1994. *See* H.R. 4206, 103d Cong., 2d Sess. (1994).

168. *Id.* § 311(e).

169. It would probably stretch the limits of the prohibition in art. III of the GATT to argue that the fines imposed under an amended Section 301 would "afford protection to domestic production."

sarily have to follow those developed by the U.S. courts in the antitrust context.[170] Also, by retaining the procedural aspects of Section 301, use of the remedy would have been kept well within the control of government, precluding the possibility of imprudent private suits.

Though H.R. 4206 appeared to solve many problems, it did not appear in the House Ways and Means Committee bill for implementation of the Uruguay Round of GATT. The author is not aware of the reasons for its rejection. One explanation is that lawmakers realized the hybrid involved in the H.R. 4206 proposal imported some defective traits from the antitrust remedy along with the good ones. By providing for retaliation against individuals, the bill would have fundamentally transformed the Section 301 process in two respects.

First, directly sanctioning the businesses engaged in restrictive business practices as opposed to sanctioning their host government would probably introduce the international law issue of prescriptive jurisdiction. The President would be penalizing certain behavior in another country. As the home country of the offending business would no longer act as an intermediary to implement the will of the United States, the argument that this was simply a modification of behavior pursuant to the normal political relations between two states would no longer be valid.[171] As will be seen in part III of this note, extraterritorial jurisdiction would be difficult to justify in cases dealing purely with problems of access to one country's market.

Second, because "defendants" would be individuals, it seems likely that determinations would be subject to judicial review.[172] Introduction of judicial review would detract from the flexibility that is so essential to use of the Section 301 process as an instrument of foreign relations. Also, judicial review might render less probable the potential disjunction between the substantive standards used under Section 301 and those developed by the courts under U.S. antitrust law mentioned above; the U.S. courts might be reluctant to apply a double standard.

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170. On the substantive deficiencies of U.S. antitrust law as a remedy to private trade barriers, see *supra* I.A.2.

171. *See supra* part II.A.2.e (arguing that the rules on prescription jurisdiction do not apply to Section 301).

172. Indeed, the statute itself might come under fire for failing to meet due process requirements. In particular, procedural aspects linked to the absence of a real possibility to defend except through diplomatic representations could be held unconstitutional. Constitutional limitations might even apply to the matter of prescriptive jurisdiction. On the issue of whether the Constitution does/should control prescriptive jurisdiction, see Brilmayer & Norchi, *supra* note 19 (arguing that there may be constitutional limitations imposed by the due process clause); Friedrich K. Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 LAW & CONTEMP. PROBS. 39 (1987) (offering reasons why the courts have not and should not bring the Constitution to bear on the issue of prescriptive jurisdiction).

D. *The Limited Experience with the Anticompetitive Practices Clause of Section 301*

The political nature of the Section 301 process suggests that experience, rather than meticulous legal analysis, is likely to be the best indicator of the efficacy of its anticompetitive practices clause. Disappointingly for the empiricist, though, the experience with the use of Section 301 against private barriers to market access is extremely limited.

The only case brought exclusively against private barriers was withdrawn by the petitioners.[173] The case involved a Japanese car manufacturer which charged higher prices on spare parts sold to suppliers that were not its designated car dealers.[174] Thus, oddly for a Section 301 petition, the complaint was in essence aimed against restraints on imports *into* the United States. Petitioner, the Auto International Association, first took the case to the DOJ, which did not hesitate to decide that the vertical restriction involved did not violate antitrust law. The Association then filed a petition with the USTR, which it withdrew soon thereafter.

In another case, grievances concerning business practices were filed together with complaints concerning state activity.[175] The petition sought mainly to eliminate strategic trade barriers[176] in the Japanese semiconductor sector, but it also complained of lax enforcement of Japanese antitrust law regarding cartels. This lack of enforcement combined with publicly maintained strategic trade barriers apparently allowed the Japanese industry to fix prices on the domestic market impervious to foreign competition, permitting producers to finance exports at "unfairly" low prices. The USTR took up the private as well as public aspects of the complaint and the settlement partially addressed the private aspects.[177] The private aspects of the complaint thus were "piggy-

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173. Japan Auto Parts (P-21), Office of the United States Trade Representative Section 301 Table of Cases 3 (Apr. 1, 1994) (filed May 9, 1988; withdrawn June 30, 1988) (on file with author).

174. The car manufacturer also allegedly flatly refused to sell to suppliers in some instances. *Id.*

175. Japan Semiconductors, 52 Fed. Reg. 43,146 (1987).

176. That is, "various forms of national industrial policies designed to direct resources toward certain sectors in order to achieve national objectives." CONGRESSIONAL RESEARCH SERVICE, MARKET ACCESS IN JAPAN: THE UNITED STATES EXPERIENCE 8–9 (No. 85-37, 1985), *cited in* Thatcher, *supra* note 151, at 528 n.258.

177. Japan was to monitor the cost and prices of chips exported to the United States, and Japanese manufacturers were to submit cost and price data to MITI. *U.S., Japan Reach Five-Year Deal on Chips, Administration Dropping Dumping, § 301 Cases*, [3 Current Reports]

backed" onto the public aspects, but the USTR decision to address the pricing issues indicates that it had not excluded private barriers from its agenda. Moreover, the proceedings took place in 1985–86. With the advent of the anticompetitive practices clause under the 1988 amendments to Section 301, the USTR should only be *more* receptive to complaints concerning government toleration of restrictive business practices — this said with the ever present general caveat that the prevailing political climate will be more determinate than most statutory language under the Section 301 regime.

While the USTR seems to be amenable to pursuing cases involving restrictive business practices, one cannot help but note that neither of the two cases discussed above raise issues of *private* conduct impeding access to a foreign market. The *Auto Parts* case involved activities which restricted exports *to* the U.S. market. The *Semiconductor* case, on the other hand, involved the combination of public trade barriers and private collusive behavior often associated with the problem of dumping.[178] Though the strategic trade barriers involved in that case may have impeded U.S. exports to Japan, if these public barriers were to be removed, the type of restrictive business practice at issue would actually be a boon to U.S. exporters, who would easily enter the market by underselling the cartel.

Thus, remarkably in the Section 301 experience, there have been no petitions alleging that restrictive business practices constitute barriers to a foreign market. This suggests that there is no substantial problem. Alternatively, it may suggest that firms are in fact encountering significant private trade barriers but see the Section 301 remedy as inadequate and not worth the costs of a petition. There could be a number of reasons for this, all linked with the political nature of Section 301. First, potential petitioners often contact the USTR before formally petitioning to find out whether their case will receive sympathetic attention and are often told that it will not. Second, a petition is an inherently risky investment. Though the costs of a Section 301 petition are probably far less than the costs of the discovery phase of an antitrust suit, it would rarely be possible to initiate a petition with any certainty that the politi-

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INT'L TRADE REP. (BNA) No. 32, at 994 (Aug. 6, 1986), *cited in* Thatcher, *supra* note 151, at 533 n.288.

178. *See, e.g.*, *Antitrust Solutions Urged for U.S. Steel Makers' Trade Woes*, 10 INT'L TRADE REP. (BNA) 1674 (June 1993) (describing allegations that cartel activity in Europe and the far-east and market allocation between those two regions were permitting businesses to finance dumping into the United States). On the link between dumping and restrictive business practices, *see* Bernard Hoekman & Petros Mavroidis, Antitrust-Based Remedies and Dumping in International Trade (Paper prepared for the Fifth Global Contributions Seminar, June 12–17, 1994, Tokyo).

cal winds will not shift after filing and investigation, causing the USTR to drop the case. Finally, petitioners cannot be sure what type of relief they will get from a settlement, and they have no great assurance that a settlement will be scrupulously honored by the country against which proceedings were brought.

It should be stressed, however, that it is no shortcoming that, because of the USTR's unresponsiveness, Section 301 does not fulfill the needs of private petitioners. The statute is designed to serve global United States interests, and as an instrument of trade law — a component of foreign policy — it should be. The observations made above simply suggest that the number of private petitions concerning private trade barriers is not necessarily an accurate barometer of American businesses' perception of their importance.

III. Controlling the Antitrust Option: A Proposal for Jurisdictional Self-Restraint

The previous parts of this note have been concerned with the feasibility of Section 301 and the extraterritorial application of U.S. antitrust law as remedies for private trade barriers. Having concluded that both remedies have their limitations but may offer some relief, it makes sense to turn to the broader implications of their use — where would these two remedies lead us if used with some frequency? Given past experiences with international trade regulation and with the extraterritorial application of antitrust law, it seems probable that one concern should be that the chickens will come home to roost.[179] Thus, the following two sections will be inspired by a version of the Golden Rule: Do unto others as you would have them do unto you, because they are bound to reciprocate, sooner or later. While Section 301 does not look troublesome in this perspective, the antitrust option does. Some explanation of

179. For instance, Prof. Jackson notes that, while "the United States, the EC, Canada, and Australia . . . account for the vast majority of antidumping cases brought in the world . . . there are some signs that other countries are 'learning the game.' " John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 228 (1989). In his course, The Law of International Trade and Economic Relations, he notes the tendency for other countries to follow the protectionist examples of the United States, suggesting that the latter should keep in mind when formulating foreign trade standards what it would be like to be subject to them. As to the extraterritorial application of antitrust law, the effects doctrine, first announced by Judge Learned Hand in the 1945 *Alcoa* case (*see supra* part I.A.1), is now in substance followed by some of the U.S.'s major trading partners, most notably the European Union. *See* Roger P. Alford, *The Extraterritorial Application of Antitrust Law: The United States and European Community Approaches*, 33 Va. J. Int'l L. 1 (1992). The reach of German antitrust law governing mergers is said to be arguably longer than that of the United States. David J. Gerber, *The Extraterritorial Application of German Antitrust Law*, 77 Am. J. Int'l L. 756, 757 (1984).

this is given below. The following section suggests how to address these concerns regarding the antitrust option.

A. *The Need for Self-Restraint*

Assuming *arguendo* that "aggressive unilateralism" is poor trade policy, Section 301 is still not likely to do much damage, given the internal and external constraints tempering its use. The discretionary control of the USTR, a generally prudent and trade-friendly administrator, offers an internal constraint.[180] The external constraints are the political costs of blaming and punishing, or threatening to punish, foreign powers, and the increasingly limited scope for GATT consistent retaliation under Section 301. These same external constraints also offer assurance that major trading partners inclined to surpass the United States in aggressive unilateralism of the Section 301 type would be at pains to do so. Therefore, the United States is not likely to set an example that we would fear to see followed or embellished on, and thus, there is no urgent need to define the scope of action under the anticompetitive practices clause of Section 301.[181]

The scope of the antitrust remedy, by contrast, needs to be defined more clearly. This is because it is less constrained than Section 301. The internal constraints on antitrust extraterritorial jurisdiction are, as of yet, not clearly defined, and international law offers virtually no external constraints. One might at first object that an internal constraint is offered by the limitations that the legislature and the courts place on the reach of the antitrust laws — the effects test and the inclination of some courts to factor in considerations of international comity. However, when one combines the tendency of courts not to dismiss cases, described *supra* I.A.1.b, with the fact that cases may be pursued through the court system by individuals independently of government agencies, the antitrust remedy begins to make Section 301 look tame by comparison. As to the external constraints of international law, there are no treaty obligations regarding jurisdiction to prescribe antitrust law, and customary international law is not delimiting.[182] Moreover, even if there

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180. *See supra* part II.A.

181. Moreover, the lack of judicial review makes it a somewhat futile task. Two authors, at least, have attempted definition. *See* David M. Pedley, *A Definition for "Unreasonable" in Section 301 of the Trade Act of 1974: A Consideration of the United States-Thailand Tobacco Dispute*, 5 EMORY INT'L L. REV. 285 (1991); Patricia I. Hanson, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122 (1987).

182. *See, e.g.*, Don Wallace, *Extraterritorial Jurisdiction*, 15 LAW & POL'Y INT'L BUS. 1099, 1100 (1983).

were clear and accepted rules, the framework and the incentive to enforce them are lacking.[183]

The antitrust remedy is therefore troubling in several respects. First, it is unclear just how outrageous U.S. suits will become because private treble damages suits are a wild card. Second, the confines of the example we would be setting appear so ill-defined that reactions would be even less predictable than our own actions. For instance, assuming that Keiretsu behavior abroad proved, after all, to be vulnerable to U.S. antitrust theories and courts admitted jurisdiction, it would be difficult to object on jurisdictional grounds if a politically confident Japan ten to twenty years down the road were to bring cases against companies operating in the United States on the theory that adherence to certain self-imposed technical standards constitutes an illicit exclusionary practice. The following is an approach to prescriptive jurisdiction designed to avoid such an unhappy development by better defining our own extraterritorial jurisdiction, not as a matter of conformity with international law, but as a matter of self-restraint.

B. *A Tentative Formula for Self-Restraint: Protective Jurisdiction*

After extensively surveying cases in which conflict arose over the extraterritorial application of antitrust laws, Karl Meessen in 1984 concluded that (a) "[a]ll attempts to identify simple criteria [i.e. connecting factors, such as locus of conduct or effect, and passive or active personality] for determining the situations in which antitrust conflicts arise have failed;" and (b), the "crux of the matter is adverse effect on foreign interests."[184] Implicit in these conclusions is the suggestion that the existence of a sufficient *basis* for the exercise of jurisdiction is not an issue and that concern must be directed to reasonableness in the *exercise* of jurisdiction, giving due consideration to the impact in any case on the specific interests of other states. The dilemma, as Meessen saw it, was thus mainly not one of the legitimacy of the basis of jurisdiction, but of reconciling cases of legitimate, concurrent jurisdiction. This led him to suggest a broad rule of "enlightened self-interest" regarding the basis of jurisdiction and a more "trenchant" rule on the

183. Unlike trade retaliation, extraterritorial application of U.S. law in the sense discussed in this note could not be subject to a GATT panel (i.e., there is no framework for enforcement). And the extraterritorial application of antitrust laws do not, unlike GATT-illegal trade retaliation, undermine a system in which the major trading partners have invested a great deal (i.e., there is no incentive to enforce).

184. Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 794 (1984). *See also id.* at 800 (arguing that no specific connecting factor, or set of such factors, appears to be regarded as binding).

exercise of jurisdiction that would emerge with practice, as states engaged in interest balancing to avoid undesired conflicts.[185] The emphasis of Meessen and others on interest balancing, rather than on the legitimacy of the jurisdictional basis, was sensible because they had observed that the flash points often involved cases where the basis of jurisdiction was not in doubt.[186] The suggestions that will follow, however, arise from the realization that the basis of extraterritorial jurisdiction might not always be legitimate, particularly where jurisdiction is over foreign conduct that restrains U.S. exports.

Without calling into question the effects doctrine as a basis of jurisdiction, the proposition asserted here is that the extraterritorial application of antitrust law based on that doctrine, when used to eliminate market access barriers, might often exceed the bounds of legitimate jurisdiction because it will tend to be *aggressive*, rather than *protective*.

To illustrate this point, consider an extreme case. Imagine a hypothetical suit against a company engaging in Keiretsu exclusive dealing. Once an antitrust violation is proven, the United States would then apply its laws essentially for the purpose of better exploiting another country's market. It is important to stress that, even though the United States might gain more by applying its laws to open Japanese markets than Japan might lose as a result of U.S. intervention, this case would offend our international sensibilities. This is because, regardless of the relative weights of U.S. and Japanese interests, the purpose of U.S. intervention does not strike us as a legitimate basis for jurisdiction. After all, what right does the United States have to regulate unilaterally another country's market on the sole justification that it would benefit by exploiting that market. Such a ground for jurisdiction would seem to offend even the most relative notions of sovereign equality and noninterference.

It is argued here that jurisdiction used for aggressive purposes departs from the effects doctrine as we know it. Attorney General

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185. *Id.* at 801. Meessen's view of balancing interests as a matter of customary international law differs from the Restatement (Third) in that it would include only factors that reflect the concerns of states, leaving private conflicts analysis to domestic law. Meessen's view differs from the position of the *Timberlane* and *Mannington Mills* courts in that it does not necessarily require that the judiciary engage in balancing, as long as the conduct of the state conforms. For the proposition that the political branches are capable of ensuring this, see Garvey, *supra* note 36.

186. Lloyd Cutler in 1984 noted in this regard that "[t]he problem is that world economic activity is now so interdependent that the effects principle, and the same can be said for the territoriality principle and for the nationality principle, can confer regulatory jurisdiction, very plausible regulatory jurisdiction, on two or more sovereigns . . . ." Lloyd Cutler, *Restrictive Business Practices or Anti-trust: 'Effects' Doctrine and Territorial Approach. US Concepts*, *in* EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 70, 71 (Cecil J. Olmstead ed., 1984).

Griffin Bell, in an address to Australians in 1978, speaks implicitly to the notion that the effects doctrine is based on a protective notion of jurisdiction:

> [R]ight from the beginning, our government concluded that if you never applied the antitrust laws to persons or actions located outside your territory, the result will be that the values of others . . . will be forced upon us *in our* territory. We . . . assert [jurisdiction] to promote the significant United States interest in maintaining competition in *United States markets.*[187]

Given the current level of global economic interdependence, it is unrealistic to speak of foreign values being forced on U.S. businesses *in U.S.* territory. Even the notion of *U.S. markets* would quickly become elusive in any concrete set of circumstances involving business conduct abroad. Nevertheless, it is worthwhile to maintain the notion of protection in the rationale underpinning effects based jurisdiction. Indications of how to do this effectively are offered in United States practice, particularly the *Pilkington* Consent Decree.[188]

It is probably no coincidence that the DOJ, when it rescinded footnote 159 of their 1988 International Guidelines, chose to state that its aim was to "protect" export opportunities, rather than, for instance, to "enhance" them.[189] The problem is that the DOJ formula offers no means to distinguish between protective and aggressive purposes. DOJ practice, on the other hand, suggests a sharper definition. The *Pilkington* Consent Decree involved licensing restrictions that precluded U.S. exports, not to a specific country, but to *any* country.[190] In this case, then, it is possible to construe DOJ action as protecting the general ability to export. This can be distinguished from action to secure exports to a particular country when the anticompetitive conduct is within that country. In this latter case, the "effects" outside of its territory are no greater than the effects of directly regulating entry to the market through government measures. Thus, unilateral regulation seems inappropriate.[191] For when a government is tolerating practices that bar access to its own market, this is certainly an integral part of its trade policy.

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187. United States Attorney General Griffin Bell, Address to the Law Council of Australia (July 17, 1978), *in* ALAN V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF MATERIALS 1, 4–5 (1983).

188. *See* Consent Decree, *supra* note 6, at 30,604.

189. DOJ Policy, *supra* note 6, at 1.

190. *Pilkington* Complaint, *supra* note 109, at 8–9.

191. *See* introductory remarks *supra* part II.

The rule. Thus, the rule would be that foreign conduct that generally blocks exports, or that blocks access to only one market, is fair game for U.S. antitrust laws, *provided that the offending conduct takes place outside of the country whose market is targeted for trade.*

The rationale. As with general application of the effects doctrine for protection against harm from imports, this version would naturally require a significant *effect* on U.S. commerce. However, an additional requirement, centering on the *purpose* of asserting U.S. jurisdiction, is necessary in cases concerning export opportunities because there are numerous cases in which the magnitude of the estimated effect of being kept out of some potential market is great. Yet, the magnitude of the potential gain is inadequate to provide a legitimate basis for extraterritorial jurisdiction. Thus, it is necessary to insist that the purpose of the jurisdiction be legitimate. It is asserted that (a) extraterritorial jurisdiction in the economic context must be protective in nature to be legitimate; and (b) in the normal course of trade relations, it can hardly be maintained that acting to secure entry to a particular market against the will of a country having territorial jurisdiction over that market is an act of protection. Thus, the operative rule is that the legitimacy of the extraterritorial application of U.S. antitrust law to protect export opportunities depends on whether or not the anticompetitive practices limited to one market must be seen as part of the sovereign's prerogative to deny access to its market; or whether the practices deny access to other markets as well, in which case they may more readily be seen to provide a legitimate basis for protective action. This would mean, for instance, that jurisdiction could be legitimate in a case such as *Pilkington* (involving territorial restrictions enforced through the exclusive licensing agreements of a U.K. company), where access to markets other than that of the United Kingdom was being impeded by the restrictive practices.[192]

The exception. The rule stated above comports thus far with post-1992 DOJ and court practice, but it does not, unfortunately, accommodate certain previous practices, namely suits aimed at Japanese buyers' cartels and boycotts.[193] Nor does it comport with certain illustrative

192. The rule would seem generally to have the practical effect of allowing extraterritorial antitrust jurisdiction to protect export opportunities when exporters are being restrained by contract. It is difficult to imagine that the restrictive effects of a business arrangement could affect exports by third parties outside of the national market in which the restrictive arrangements are in effect.

193. The DOJ has cited boycotts and buyers' cartels as targets twice since 1982. *See Itoh*, 1982–83 Trade Cas. (CCH) ¶ 65,010; *Daishowa*, 1982–2 Trade Cas. (CCH) ¶ 64,774. Note that *Zenith Radio*, 395 U.S. at 100, a case often cited by the DOJ, involves no such aggressive behavior on the part of the defendant. However, the defendant was, significantly, a

examples of the 1994 Draft Guidelines for International Operations.[194] Nevertheless, it should be possible to carve out an accommodating exception to the rule stated in the preceding paragraphs. Such an exception might say that restrictive business practices that can only be construed as aggressive and lacking any internal justification — i.e., practices that would make no sense if they were not intended to exploit or harm the plaintiff — offer a basis for extraterritorial jurisdiction even if carried out in the country targeted for exports. This exception to the operative rule is still reasonably consistent with the general premise of protective action because it is a reaction to aggressive behavior. Furthermore, the reaction itself would be aggressive only with respect to the defendants and not to any implicit structural policy of the host government. To the extent that the government is involved, for example through some type of strategic use of a boycott or buyers' cartel, the government compulsion defense is likely to preclude relief anyway. This exception to the rule appears safe because it would mean that extraterritorial application of law would still be impermissible when it seeks essentially to cure perceived structural impediments, as opposed to discreet incidents of targeted behavior. This is important from the perspective of trying to provide an example that, if followed by other countries, avoids the possibility that the United States market would be regulated in a way fundamentally at odds with the American idea of what is good for the domestic market.

PROPOSALS

The following is a thumb-nail sketch of how the conclusions reached in this note would suggest that U.S. unilateral policy might unfold and interact with relevant multilateral and bilateral processes.

A. *The Antitrust Remedy: Clarify the Outer Limits of Government Enforcement Policy*

Part III suggested a principled formula allowing the U.S. enforcement agencies to eschew cases against private barriers to foreign markets when such cases would involve an aggressive assertion of jurisdiction. Implementing the formula should not be too difficult because both

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U.S. company. Meessen's survey revealed that, in all but one case, there have been objections to the extraterritorial application of antitrust law only when claims are directed against foreign firms. Meessen, *supra* note 184, at 793.

194. Draft Guidelines for International Operations, supra note 7, at 52,816–17 (illustrative examples C and F); *see also supra* note 113 and accompanying text. Moreover, 1992 DOJ policy statements specifically allude to group boycotts. *See* DOJ Policy, *supra* note 6.

current and past practice appear well within the bounds it prescribes. To borrow from trade-law terminology, the theories call for "standstill," not "rollback." Even if the courts do not explicitly embrace such a formula, sufficiently explicit manifestations of enforcement agency policy could be adequate in their impact on private litigation.[195] If the self-imposed norm is sufficiently clear, it would not only help to ensure that the United States sets the right example by its actions; it would also serve to avoid misconstruction by foreign powers of the limits of the example set.

B. *Section 301 and Other Government-to-Government Remedies*

Section 301 has the potential to pick up where the antitrust remedy leaves off, dealing with those trade-restrictive business practices that are ruled out as subjects of antitrust suits under the theory set out in Part III. Section 301 could also operate when the government compulsion defense precludes a successful antitrust suit. As Part II demonstrated, Section 301 cannot be used at will and so cannot perfectly complement the antitrust remedy. However, use of Section 301 should be conceived of as part of a broader range of government-to-government means of eliminating private trade barriers. The proposal here is to use and improve the government-to-government channels currently available.

Use the available coercive remedies. In addition to the unilateral approach of Section 301, there may be a multilateral coercive remedy. The authors who have most closely examined the option of taking private barriers to a GATT panel conclude that some active forms of government support for such barriers are already inconsistent with GATT and as such can be attacked as *prima facie* cases of nullification or impairment.[196] They also conclude that *non*violation cases involving private trade barriers may, under some circumstances, be successful under current GATT law. They remark, however, that this "potentially powerful tool . . . has not yet been put to the test."[197] Use of this option, they suggest, would, if nothing else, help to identify where the problems lie.

Negotiate to eliminate identified barriers. Synergy is possible between the process of identification that may occur through use of the coercive remedy of Section 301 and the use of solutions based on

195. *See supra* part I.B.1 (discussing the importance of government enforcement policy).

196. Bernard M. Hoekman & Petros C. Mavroidis, *Competition, Competition Policy and the GATT*, 17 WORLD ECON. 121, 148 (1994).

197. *Id.*

mutual benefit, i.e., trade agreements. Even where the coercive remedy is unsuccessful (negotiations are unsuccessful and the case is lost in GATT or there is no means of GATT consistent retaliation under Section 301), recourse to the remedy will still serve to identify the barriers. This could lead to renewed efforts to negotiate a solution, not as a matter of vindicating what is already owed to the United States, but rather through the enticement of reciprocal concessions. For example, it may turn out upon closer inspection that vertical restrictions in the Japanese car market could be circumvented without too much cost by setting up our own dealerships.[198] However, it may be prohibitively expensive to establish a distributorship in Japan because of the need for a compulsory deposit. While such a barrier is not prohibited by the General Agreement on Trade in Services, the United States, having identified it as a major barrier to Japan's car market, would certainly push hard to have Japan include removal of the requirement as a specific commitment under the market access provision of that Agreement. In future negotiations, whatever Japan's reasons for a compulsory deposit, these arguments would have to have sufficient political weight to justify keeping the U.S. auto industry out of its market.

The above example illustrates the forceful effect of identifying obstacles.[199] It also suggests that we should look twice to be sure whether many problems can be boiled down to traditional regulatory issues for which the multilateral system is already equipped, rather than contemplating the possibility of harmonizing competition law or attacking private barriers coercively.[200] Furthermore, identifying obstacles may lead to the conclusion that certain perceived barriers related to restrictive business practices can be alleviated, not by harmonizing but through an agreement that assures mutual, but not necessarily identical, adjustment in competition policy to improve market access.[201] In particular, the issue of enforcement lends itself to negotiated solutions without under-

198. This was the suggestion of Aaditya Mattoo, member of the Economic Research and Analysis Unit of the GATT. Interview with Aaditya Mattoo, Member, Economic Research and Analysis Unit of GATT, in Geneva, Switzerland.

199. This process is institutionalized by the Trade Policy Review Mechanism. Professor Jackson suggests this as one of the avenues offered by GATT to confront the new problems posed by restrictive business practices. John H. Jackson, Alternative Approaches for Implementing Competition Rules in International Economic Relations 17 (draft of November 10, 1993) (on file with author).

200. For a discussion of Japan's Large Retail Store law, see Saxonhouse, *supra* note 66, at 467.

201. For a different view on this matter, see Phedon Nicolaides, *Towards Multilateral Rules on Competition. The Problems in Mutual Recognition of National Rules*, WORLD COMPETITION, March 1994, at 5.

taking harmonization. An agreement to enforce could also contain reference to the use of arbitration under the GATT Understanding on Dispute Settlement.

Improve the coercive remedies. There will always be private barriers that are so fluid that they cannot be identified early and negotiated away. Furthermore, the United States may ultimately confront the problem that its market contains so few restrictions that it has nothing to offer at the negotiating table in order to gain concessions. Where the avenue of reciprocal concessions leads to naught, this failure may push lawmakers to improve the coercive remedies. Congress may modify Section 301 to put even more pressure on the USTR to act, for instance by citing specific types of anticompetitive practices or heightening political exposure through yet more procedural modifications. If Section 301 turns out to be a dead end because of decreasing margins for GATT consistent retaliation, the United States could then push to move with other countries to change the terms of reference of dispute settlement within the GATT, or perhaps even change some of the substantive ground rules.

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This scheme — which is not so much a plan as a description of what should naturally occur — will filter out insignificant problems and identify significant ones. The process of identification will in turn channel political awareness, both domestic and foreign, to the right places, thus marshaling the political capital needed to achieve the compromises necessary to solve the most pernicious problems. It is probably a safe bet that there will not be much left in the way of unaddressed obstructions at the end of this process — certainly none that merit the long-term costs of aggressive extraterritorial application of U.S. antitrust law.