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COMMERCIAL TREATIES AND FOREIGN COMPANIES: THE MUTUALLY REINFORCING PRINCIPLES OF REMEDIAL ANTITRUST AND NATIONAL TREATMENT

The fundamental goal of remedial antitrust is the creation and maintenance of the optimum competitive environment in markets disrupted by monopolistic control or illegal trade restraints.¹ Implementation of this goal may be through orders prescribing or prohibiting certain conduct,² or demanding the sale of some of the defendant's assets.³

1. 1 NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAW AND PROCEDURE, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 136 n.19 (1979) (testimony of Stephen M. Axinn, Miles W. Kilpatrick, and Malcolm M. Pfunder, Task Force Panel in Structural Relief Issues, Antitrust Section, American Bar Association) [hereinafter cited as NAT'L ANTITRUST COMM'N]; ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL IV-64 (1979) (adequate antitrust relief should "(1) stop the illegal practices alleged in the complaint, (2) prevent their renewal and (3) restore and monitor competitive conditions"). [hereinafter cited as ANTITRUST DIVISION MANUAL].

This goal differs from "perfect competition" in that it recognizes that the costs and difficulties of judicial relief will at some point outweigh any marginal improvement in competitive conditions. Considerations include the social cost — public and private — of litigating the issue, the "inevitable frictions of the restructuring process," and the possibility of erroneous judgment and inefficient relief. P. AREEDA, ANTITRUST ANALYSIS ¶¶ 131, 265 (3d ed. 1981). For this reason the concept also has been termed "workable competition." United States v. United Shoe Mach. Corp. 110 F. Supp. 295, 346-47 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); 1 NAT'L ANTITRUST COMM'N, *supra* at 121. Much has been written on workable competition. See, e.g., C. FERGUSON, A MACROECONOMIC THEORY OF WORKABLE COMPETITION (1964); Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940); Knox, *Workable Competition and Public Policy*, 1 ANTITRUST L. & ECON. REV., Spring 1968, at 41 (1968); Markham, *An Alternative Approach to the Concept of Workable Competition*, 40 AM. ECON. REV. 349 (1950); Sosnick, *A Critique of Concepts of Workable Competition*, 72 Q.J. ECON. 380 (1958).

2. These orders seek to gradually eliminate anticompetitive restraints by forbidding particular practices. Conduct or injunctive decrees, however, have "often proved to be ineffective and unwieldy," and therefore are disfavored. NAT'L ANTITRUST COMM'N, *supra* note 1, at 117-18. Nevertheless, this form of relief is found in a vast number of cases. See, e.g., *infra* text accompanying notes 37-40.

3. This is structural relief or "trust-busting." It is based on the economic theory that market structure influences competitive performance. See P. AREEDA *supra* note 1, at ¶ 134. The remedy for antitrust violations stemming from excessive market power is the reduction of such power through the forced sale of the violator's assets to appropriate firms. K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 43-54 (1976). The Supreme Court has approved and encouraged the use of structural relief. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 578, 580 (1966); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 329-31 (1961). Statutory authority for such relief is derived from the Sherman Act § 4, 15 U.S.C. § 4 (1976), and the Clayton Act § 15, 15 U.S.C. § 25 (1976). The Federal Trade Commission secures similar power from § 11 of the Clayton Act, and from the Federal Trade

The antitrust tribunal⁴ formulating relief must consider underlying market circumstances, including the competitive position of all significant suppliers.⁵

Foreign⁶ firms supply a growing portion of United States markets;⁷ consequently, their impact must be carefully weighed when formulating effective antitrust relief. Antitrust tribunals, however, have been slow to adopt remedial orders that recognize the new-found prominence of foreign firms. Indeed, many antitrust decrees have neglected to provide for foreign firms altogether; others have merely lumped these firms in over-inclusive groups based solely upon their foreign ownership.⁸

There are many strong economic arguments for ignoring the alienage of firms and keying only on their market status.⁹ Moreover, overlooking foreign suppliers in remedial orders is especially egregious in light of the nondiscrimination, or "national treatment," provisions found in a wide array of United States commercial treaties.¹⁰ This national treatment protection encompasses the complete range of economic and legal considerations necessary to place the foreign firm on the same competitive footing as its domestic rivals, including the right to full

Commission Act § 5, 15 U.S.C. § 45 (1976). The National Commission for the Review of Antitrust Law and Procedure found structural relief the most effective and certain remedy in Sherman Act § 2 and Clayton Act § 7 cases. It concluded that courts should order structural relief whenever a violation involving market power has been shown. 1 NAT'L ANTITRUST COMM'N, *supra* note 1, at 114-19. For examples of representative structural decrees see *infra* text accompanying notes 36, 41, 42.

4. The tribunal most often will be either a court or the Federal Trade Commission, although it may be a regulatory agency such as the Civil Aeronautics Board or the Interstate Commerce Commission. See *Pan Am. World Airways v. United States*, 371 U.S. 296, 305-06, 310, 312 (1962); see also P. AREEDA, *supra* note 1, at ¶ 179.

5. See *infra* text accompanying notes 33-45.

6. In this Note, "foreign" refers to ownership or control by non-United States persons or companies. This definition encompasses United States branches and domestically incorporated subsidiaries of foreign companies.

7. The United States has become increasingly dependent upon foreign imports. Between 1967 and 1977, manufacturing imports rose from 7.1% to 17% of gross domestic product. 2 NAT'L ANTITRUST COMM'N, *supra* note 1, at 310. In 1980, total imports were \$316.5 billion. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 422 (Table 702) (1981) [hereinafter cited as STATISTICAL ABSTRACT].

8. See *infra* notes 59-84 and accompanying text.

9. The foremost reason is consumer welfare. Allowing foreign firms to operate on the same basis as their domestic rivals will raise competitive pressures and reduce prices. This underlies the Supreme Court's famous statement that "[i]t is competition, not competitors, which the [Sherman] Act protects." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). Losses resulting from preferences for domestic industry are described *infra* at note 55.

10. These provisions prohibit governmental discrimination against foreign companies operating within the territory of the other nation. They are commonly included in the Friendship, Commerce and Navigation ("FCN") Treaties the United States has with several dozen foreign nations. *Avigliano [sic] v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 554 (2d Cir. 1981), *rev'd on other grounds*, 102 S. Ct. 2374 (1982); see *Sumitomo Shoji Am., Inc. v. Avagliano*, 102 S. Ct. 2374, 2380 & n.13 (1982). For a complete list of these treaties see OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, TREATIES IN FORCE (1982).

and fair recognition in antitrust remedial actions. Antitrust orders containing disparate provisions for domestic and foreign firms therefore violate national treatment guarantees unless based upon legitimate economic criteria applied uniformly to all suppliers.

This Note argues that greater appreciation for the nature and importance of national treatment obligations will compel tribunals fashioning antitrust relief to provide more suitably for foreign firms, and thus avoid straining international trade relations.¹¹ Moreover, because antitrust relief and national treatment objectives are mutually reinforcing, greater recognition of national treatment requirements should improve remedial orders from the standpoint of antitrust economics.¹² Meeting national treatment requirements should place little added burden on the antitrust tribunal; it must merely extend impartial economic analysis to all market suppliers, not just domestic firms.

This Note explores methods to ensure that antitrust relief orders satisfy both national treatment and remedial antitrust principles. Part I considers the history, purpose, and effects of national treatment obligations, focusing on their impact on foreign investment. Part II follows by inquiring into the essentials of effective antitrust relief. It emphasizes the need for remedial orders to be tailored on two levels; the first, corresponding to the market's overall characteristics, and the second, to the differences between individual market suppliers. Part III devises an analytical framework reconciling national treatment and remedial antitrust principles, and accordingly analyzes decisions attempting to accommodate these principles. The Note concludes by urging the adoption of requirements for the explicit use of economic reasoning to support discriminatory orders.

I. NATIONAL TREATMENT GUARANTEES

National treatment is one of many treaty regulations in the international trade arena.¹³ It guarantees "equal protection" both to domestic companies operating abroad and to foreign competitors active in the United States.¹⁴ A typical national treatment clause warrants that

11. Disregard of national treatment obligations may generate foreign hostility, in the form of simple bureaucratic obstruction or even open governmental retaliation, to United States companies operating abroad. The economic impact on the United States could be great; in 1980, American exports reached \$339.8 billion, constituting 12.9% of gross national product. STATISTICAL ABSTRACT, *supra* note 7, at 422 (Table 702); see also *infra* text accompanying note 104.

12. See *infra* text accompanying notes 54-57.

13. Numerous bilateral and multilateral agreements extend coverage to all aspects of international economic relations. For comprehensive treatment, see A. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* (1975).

14. Avigliano [sic] v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 554 (2d Cir. 1981), *rev'd on other grounds*, 102 S. Ct. 2374 (1982); see also Walker, *Modern Treaties of Friendship, Com-*

“[n]ationals and companies¹⁵ of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party.”¹⁶ Separate, more specific clauses commonly follow, dealing with subjects such as taxation, unemployment, access to the courts, patents, and the acquisition of property.¹⁷ A foreign company protected by national treatment thus can invest abroad confident of its competitive footing because its rights and privileges are defined by those accorded similarly situated domestic firms.¹⁸

Present United States commercial treaties commonly include national treatment obligations.¹⁹ This was not true prior to World War II; early

merce and Navigation, 42 MINN. L. REV. 805, 811 (1958) [hereinafter cited as Walker, *Modern Treaties*].

15. “Companies” is ambiguous; its meaning in this context was recently at issue before the United States Supreme Court. The Court’s decision appears to limit national treatment protection to domestic branches of foreign companies, and exclude from such protection foreign subsidiaries incorporated domestically.

The case *Sumitomo Shoji Am., Inc. v. Avagliano*, 102 S. Ct. 2374 (1982), involved alleged employment discrimination on the basis of Japanese citizenship. The defendant, a wholly-owned, domestically incorporated subsidiary of a Japanese firm, sought to shield itself behind a FCN treaty provision allowing “Japanese companies” to hire specialized employees “of their choice.” *Id.* at 2377. The Supreme Court ruled that unlike domestic branches of foreign firms, domestically incorporated subsidiaries of foreign firms are constituted under the laws of Delaware, California, or some other state, thereby becoming United States companies. The FCN treaty protection was thus unavailable, as they were “entitled to the rights, and subject to the responsibilities of other domestic corporations.” The Court focused on the treaty language and emphasized that this was the present interpretation of the State Department and the Japanese foreign ministry. *Id.* at 2379-82.

In a footnote the Court expressly reserved judgment as to the interpretation of other FCN treaties which, “although similarly worded, may have different negotiating histories.” *Id.* at 2380 n.12. The great majority of United States FCN treaties were negotiated around the same time and with much the same language, however, and it seems unlikely that the *Avagliano* decision will be so limited. Nevertheless, the Court’s great reliance on the treaty parties’ interpretations could lead to a contrary result if the parties to a different FCN treaty agreed on a construction inconsistent with the treaty in *Avagliano*.

16. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VII(1), 4 U.S.T. 2063, 2069, T.I.A.S. No. 2863 [hereinafter cited as Japanese FCN Treaty].

17. Other subjects dealt with in separate national treatment clauses include the sale, distribution, and use of products; workers’ compensation, insurance, and social security; the control, establishment, and acquisition of companies; unlawful searches, and the protection and security of persons; takings of property and nationalization; professional activities; trade names, trade labels, and industrial property; funds transfers; importation and exportation; shipping; and engagement in scientific, educational, religious, and philanthropic activities. *See, e.g., id.*; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797 [hereinafter cited as Danish FCN Treaty].

18. Defining the protection in relative or contingent terms has advantages for the host country as well. The built-in regulation and adjustment mechanism of a contingent standard adapts automatically to changing conditions. The alternative noncontingent standard leaves open the possibility of preferences for foreign companies. Walker, *Modern Treaties*, *supra* note 14, at 810-12.

19. *Sumitomo Shoji Am., Inc. v. Avagliano*, 102 S. Ct. 2374, 2380-81 (1982).

commercial treaties generally did not grant companies any rights, but dealt only with the rights and privileges of individuals.²⁰ Indeed, until the twentieth century, corporations had no legal status or access to the courts in foreign countries.²¹ The expansion of international corporate trade, however, necessitated new treaties granting corporations legal status and court access.²² United States postwar Friendship, Commerce and Navigation ("FCN") Treaties²³ enlarged the rights of corporations by approving the right to conduct business in foreign nations.²⁴ The inclusion of national treatment obligations in these FCN treaties assures foreign business entities of nondiscriminatory treatment in all aspects of their United States business activities.²⁵

The primary reason for bringing corporations within the scope of commercial treaties is to encourage international trade and investment.²⁶ Such trade and investment brings important benefits to every trading country through greater economic growth, increased income and investment, and expanded access to capital, resources, and technology.²⁷ Because foreign investors are influenced by the legal conditions existing in the potential host country, successful commercial treaties must ensure a policy of legal equity and hospitality. This includes assurances that the foreign entity and its property will be respected and that the enterprise will be accorded equal treatment vis-a-vis domestic companies.²⁸ In the United States, a key legal concern for foreign firms is antitrust treatment. Without assurances that they will not be competitively handicapped by discriminatory remedial orders, foreign firms will be deterred from extensive domestic activity.²⁹

20. Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 373-80 (1956) [hereinafter cited as Walker, *Provisions on Companies*].

21. *Avagliano*, 102 S. Ct. at 2380.

22. *Id.*

23. These treaties are self-executing — binding domestic law without the need for implementing legislation. *Spieß v. C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353, 356 (5th Cir. 1981), *vacated on other grounds*, 102 S. Ct. 2951 (1982). Under the Constitution such treaties are "the supreme law of the land." U.S. CONST. art. VI, § 2.

24. *Avagliano*, 102 S. Ct. at 2381 & n.17; *see also* Walker, *Provisions on Companies*, *supra* note 20, at 380.

25. Walker, *Treaties for the Encouragement and Protection of Foreign Investment*, 5 AM. J. COMP. L. 229, 232 (1956) [hereinafter cited as Walker, *Treaties for Foreign Investment*].

26. *Id.* at 231-34; *see also* *Hearing on Commercial Treaties Before the Subcomm. on Commercial Treaties and Consular Conventions of the Senate Comm. on Foreign Relations*, 82d Cong., 2d Sess. 4 (1952) [hereinafter cited as *1952 Hearing*]; *Hearing on the Commercial Treaties with Iran, Nicaragua, and the Netherlands Before the Senate Comm. on Foreign Relations*, 84th Cong., 2d Sess. 2 (1956).

27. *See generally* M. KREININ, *INTERNATIONAL ECONOMICS: A POLICY APPROACH* 214-40 (3d ed. 1979); *1952 Hearing*, *supra* note 26, at 4.

28. *See* Walker, *Treaties for Foreign Investment*, *supra* note 25, at 230; *see also* *1952 Hearing*, *supra* note 26, at 4.

29. Many commercial treaties in fact include a provision concerning antitrust enforcement. The clause is, however, basically hortatory. It commonly states that monopoly and collusive

II. THE ESSENTIALS OF EFFECTIVE ANTITRUST REMEDIES

Antitrust law focuses on market structure and economic performance and uses broad powers to restore and maintain effective competition in markets affected by anticompetitive restraints.³⁰ To accomplish this, antitrust tribunals have been given extensive discretion to mold equitable relief.³¹ Effective relief demands a far-reaching analysis of market structure and economic performance, including inquiry into a wide range of financial, economic, tax, and related matters.³² The exigencies of a particular market often demand complex relief orders incorporating a combination of remedies.³³

Because remedial measures must cure an array of market-specific competitive impairments,³⁴ a comparable array of remedial provisions has been required.³⁵ For example, orders have called for the offending firm or firms to create competitors,³⁶ to supply goods and services to all who wish to buy,³⁷ and to make patents, trademarks, trade secrets, or know-how available to competitors on a reasonable-royalty³⁸ or royalty-free basis.³⁹ Remedial measures also have altered the terms on

behavior is harmful to commerce, and that "each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects." *See, e.g.,* Japanese FCN Treaty, *supra* note 16, art. XVIII(1); Danish FCN Treaty, *supra* note 17, art. XVIII(1).

30. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 152-53 (1948); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 129-30 (1948); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947). *See also* 1 NAT'L ANTITRUST COMM'N, *supra* note 1, at 120-21, 132; ANTITRUST DIVISION MANUAL, *supra* note 1, at IV-64.

31. *See, e.g.,* FTC v. National Lead Co., 353 U.S. 419, 428 (1956) (explaining that the Commission is given wide discretion to determine "the type of order that is necessary to bring an end to the unfair practices found to exist It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947) (district courts have "large discretion to model their judgments to fit the exigencies of the particular case"); United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944); United States v. J.B. Williams Co., 498 F.2d 414, 428 (2d Cir. 1974); *see also* ANTITRUST DIVISION MANUAL, *supra* note 1, at IV-64.

32. *See* 1 NAT'L ANTITRUST COMM'N, *supra* note 1, at 116.

33. *Id.* at 132. *See also* ANTITRUST DIVISION MANUAL, *supra* note 1, at IV-64.

34. *See* 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 327 (1978); 1 NAT'L ANTITRUST COMM'N, *supra* note 1, at 132.

35. *See* 2 P. AREEDA & D. TURNER, *supra* note 34, at ¶ 327; 1 NAT'L ANTITRUST COMM'N, *supra* note 1, at 120, 131-32.

36. *See* Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969); *see also* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

37. *See, e.g.,* Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962); Airfix Corp. v. Aurora Plastics Corp., 222 F. Supp. 703 (E.D. Pa. 1963); Theatre Investment Co. v. R.K.O. Radio Pictures, 72 F. Supp. 650 (W.D. Wash. 1947).

38. *See, e.g.,* United States v. National Lead Co., 332 U.S. 319 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386, 417 (1945).

39. *See, e.g.,* *In re* Eli Lilly and Co., 95 F.T.C. 538 (1980); United States v. Coca-Cola

which a firm buys or sells,⁴⁰ prevented a firm from supplying itself,⁴¹ required a firm to disengage from several lines of integrated business,⁴² and compelled individuals to resign from management positions.⁴³

Moreover, not only must antitrust remedies be tailored to the specific market, they also must apply *within* the market on a class or single firm basis.⁴⁴ Appropriate relief therefore must analyze individual firm competence and resources in such areas as technological know-how, raw material reserves, marketing facilities and techniques, past sales, customer goodwill, and management ability.⁴⁵ Because capabilities among industry competitors inevitably vary, antitrust relief rarely provides identical treatment for each competitor. Indeed, relief orders have discriminated by excluding certain industry members as potential acquiring companies under a divestiture order on the basis of market share,⁴⁶ and prospective geographic operating area.⁴⁷ Mandatory patent licensing orders also have discriminated in favor of new market entrants⁴⁸ and against specific dominant firms.⁴⁹ Often, the firms subject to

Bottling Co., 1978-2 Trade Cas. (CCH) ¶ 62,277 (C.D. Cal. 1978); *United States v. General Elec. Co.*, 115 F. Supp. 835, 844-45 (D.N.J. 1953).

40. *See, e.g.*, *United States v. Loew's*, 371 U.S. 38 (1962).

41. *See, e.g.*, *United States v. Ford Motor Co.*, 315 F. Supp. 372 (E.D. Mich. 1970), *aff'd*, 405 U.S. 562 (1972).

42. *See, e.g.*, *United States v. Pullman Co.*, 1944-45 Trade Cas. (CCH) ¶ 57,242 (E.D. Pa. 1944) ("It is a purpose of this judgment to separate completely and perpetually the Sleeping Car Business from the Manufacturing Business and to separate completely and perpetually the ownership and control of each Business from the ownership and control of the other, irrespective of who owns or controls such Business.').

43. *See, e.g.*, *United States v. Crescent Amusement Co.*, 323 U.S. 173, 188 (1944).

44. It is very often administratively superior and economically sound simply to tailor relief to groups of firms on the basis of ranges of economic criteria. *See, e.g., infra* note 46.

45. For an example of the application of this principle to a specific market see W. Mueller, Comments on the Federal Trade Commission's Proposed Consent Agreement in the Matter of Eli Lilly and Company (1980) (unpublished manuscript on file with the *Journal of Law Reform*).

46. *See, e.g.*, *United States v. Stroh Brewery Co.*, 5 TRADE REG. REP. (CCH) ¶ 50,817, 47 Fed. Reg. 18,445 (D.D.C. Apr. 16, 1982) (proposed consent decree compelling divestiture of one of two breweries to any buyer other than Anheuser-Busch or Miller, the two dominant brewing companies in the pertinent market); *United States v. KDI Corp.*, 1972 Trade Cas. (CCH) ¶ 74,153 (C.D. Cal. 1972) (requiring defendant to divest itself of swimming pool franchises to entities that in the past had installed no more than five percent of the swimming pools in southern California); *United States v. Standard Oil Co.*, 1970 Trade Cas. (CCH) ¶ 72,988 (N.D. Ohio 1970) (ordering the divestiture of filling stations in Ohio and western Pennsylvania in part to persons not accounting for more than two percent of all motor fuel sales in the affected areas during preceding year).

47. *See, e.g.*, *United States v. American Ship Bldg. Co.*, 1973-1 Trade Cas. (CCH) ¶ 74,261, at 93,248 (N.D. Ohio 1973) (ordering defendant to sell three ships to buyers who will operate them on Great Lakes between United States ports).

48. *See, e.g., In re Illinois Cent. Indus., Inc.*, 82 F.T.C. 1097 (1973), *otherwise modified*, 86 F.T.C. 1194 (1975) (consent decree requiring defendant to license patents and know-how to a single "eligible firm" not then engaged in the relevant market).

49. *See, e.g.*, *United States v. Bristol-Myers Co.*, 1979-2 Trade Cas. (CCH) ¶ 62,738 (D.D.C. 1979) (approving a consent order in which defendant, Beecham, Ltd., agreed to grant licenses and sell pharmaceutical products in bulk to entities other than co-defendant Bristol-Myers and its subsidiaries).

discrimination have been neither parties to the proceedings nor wrongdoers.⁵⁰ In short, the only valid consideration in formulating antitrust relief is the impact on market competition; all other factors, including corporate nationality, are irrelevant.⁵¹

III. PROVIDING FOR NATIONAL TREATMENT IN ANTITRUST REMEDIES

Antitrust relief and national treatment provisions should be recognized as mutually reinforcing; each is founded on the belief that robust competition will greatly benefit consumers.⁵² Unfortunately, antitrust tribunals have not recognized the coherence of the two principles; some have even deemed the principles conflicting.⁵³ This is ironic because antitrust relief will comply with national treatment obligations if tribunals simply use objective economic analysis without regard to alienage considerations. Requiring tribunals to be more explicit in their economic analysis should result in closer adherence to national treatment obligations and improved antitrust relief orders.

A. The Complementary and Reinforcing Nature of National Treatment and Antitrust Principles

Understanding how national treatment and antitrust principles reinforce each other requires an appreciation of the role and purpose of international trade obligations.⁵⁴ These obligations complement the anti-

50. *E.g.*, *United States v. Stroh Brewery Co.*, 5 TRADE REG. REP. (CCH) ¶ 50,817, 47 Fed. Reg. 18,445 (D.D.C. Apr. 16, 1982) (excluding the two dominant brewers from acquisition of a divested brewery though they were unassociated with the case); *In re Gulf Oil Corp.*, 56 F.T.C. 688 (1960) (requiring defendant to divest three plants to any buyer except 23 large oil companies though there were no findings that those oil companies had engaged in illegal conduct and though they were not parties to the matter).

Antitrust tribunals are to disregard adverse effects on private individuals and companies in the framing of remedial orders. *See Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 471-72 (1969) ("We have emphasized that the pinch on private interests is not relevant to fashioning an antitrust decree, as the public interest is our sole concern."); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) ("[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.').

51. *See infra* note 80; *see also* R. BORK, *THE ANTITRUST PARADOX* 905 (1978) (advocating consumer welfare, and not political considerations, as the standard for antitrust enforcement).

52. *See* R. BORK, *supra* note 51, at 405; *see also supra* note 9, *infra* note 80, and *infra* note 55 and accompanying text.

53. *See infra* text accompanying notes 59-84.

54. The genesis of international trade regulation was the belief that some "mechanism is essential to prevent the pursuit of self-interested national regulation of international trade in a manner that harms other nations and in a manner that, when combined with retaliatory actions, results in a sharp and chaotic restriction in the over-all level of international trade." J. JACKSON,

trust laws for they, too, seek to maximize social welfare through increased efficiency.⁵⁵ The antitrust laws are designed to promote competition within the United States because competition is viewed as the most effective means to achieve the lowest cost production. International trade regulations such as national treatment, by promoting international economic competition, further the same goal on a global scale.⁵⁶

Accordingly, national treatment obligations embody nothing more than a commitment to free competition without regard for the nationality of competitors. In the context of antitrust relief, this means that remedial measures must afford foreign suppliers evenhanded, non-discriminatory treatment. National treatment obligations, as well as antitrust principles, demand that relief be based upon objective economic standards such as technological development, marketing expertise, distribution capacity, and previous sales.⁵⁷ Although prescribed relief may still grant less favorable treatment to a foreign firm or group of foreign firms, national treatment principles are not implicated if the decision is based solely on uncolored economic criteria applied uniformly to foreign and domestic suppliers.⁵⁸ Recent antitrust decisions have not, however, recognized this distinction.

WORLD TRADE AND THE LAW OF GATT 9 (1969). Jackson identifies three premises underlying international trade agreements:

- (1) International trade is beneficial . . . ;
- (2) Self-interest economic policies on the international scene contribute to misunderstanding, instability, and war in international relations generally; and
- (3) International agreement on policy is necessary, or at least useful, because independent national actions to promote trade and stability will usually be frustrated by the actions of other states.

Id. at 9-10.

55. In theory, free international trade will maximize real income for all countries that produce and trade according to the doctrine of comparative advantage. Interference in trade through tariffs, quotas, and other preferences has a distorting effect, resulting in inefficient resource allocation and a loss of total world income. See M. KREININ, *supra* note 27, at 274-92. Regulations limiting such interferences, therefore, stem this inefficiency and income loss. See *supra* note 54; see also Kissinger, *Saving the World Economy*, NEWSWEEK, Jan. 24, 1983, at 46; THE ECONOMIST, Dec. 25, 1982, at 92. Other efficiencies arise from market exchange and economies of scale. J. JACKSON, *supra* note 54, at 9.

56. See generally J. Davidow, U.S. Competition Laws, Nontariff Barriers to Trade and the Role of the Antitrust Division, Remarks at 32d Conference on Aids and Safeguard Measures in International Trade Law (Oct. 19, 1979) (available from Antitrust Div., U.S. Dep't of Justice); J. Shenefield, Competition Advocacy and International Trade: A New Role for Antitrust Policy, Remarks at ALI-ABA Course of Study on International Antitrust Law (May 26, 1978) (available from Antitrust Div., U.S. Dep't of Justice) [hereinafter cited as Shenefield Remarks].

57. See *supra* text accompanying note 45.

58. The Second Circuit applied this standard to the similar problem engendered by a general regulation that has a disproportionate impact on foreign competitors. The court stated that bilateral treaty commitments required an airport noise regulation, barring the supersonic aircraft Concorde, merely to be "even-handed" and not based on arbitrary criteria. *British Airways Bd. v. Port Auth.*, 558 F.2d 75 (2d Cir.), *on remand*, 437 F. Supp. 804 (S.D.N.Y.), *aff'd and modified*, 564 F.2d 1002 (2d Cir. 1977).

B. Past Efforts

Antitrust tribunals appear unaware of their obligation to provide evenhandedly for both foreign and domestic firms. For instance, some orders have required compulsory licensing to "qualified domestic applicant[s],"⁵⁹ "any domestic applicant,"⁶⁰ "any United States citizen or domestic corporation,"⁶¹ and "any domestic applicant approved by the Federal Trade Commission."⁶² All of these orders violate principles of nondiscrimination embodied in national treatment guarantees.

Even those tribunals apprised of national treatment obligations have ignored such requirements, apparently regarding them as inconsequential. Two cases serve as examples. In the first, *Calnetics Corp. v. Volkswagen of America, Inc.*,⁶³ a federal district court displayed an unwillingness even to address the merits of a claim that its proposed relief violated national treatment guarantees. The second case, *In re Eli Lilly & Co.*,⁶⁴ shows the Federal Trade Commission ("FTC") caught in a crossfire brought about by an apparent misunderstanding of its national treatment obligations.

The plaintiff in *Calnetics Corp.*, an independent manufacturer of auto air conditioners, sought to enjoin the defendant's acquisition of a rival domestic auto air conditioner manufacturer, claiming that the acquisition would foreclose sales opportunities for independent air conditioner manufacturers, in violation of the Clayton Act.⁶⁵ The district court agreed and also prohibited the defendant from importing automobiles with factory-installed air conditioning.⁶⁶ The defendant Volkswagen and the West German government claimed that the latter provision illegally discriminated against the German manufacturer of the vehicles as well as German manufacturers of car air conditioners.⁶⁷

59. *United States v. Pitney-Bowes, Inc.*, 1959 Trade Cas. (CCH) ¶ 69,235, at 74,860 (D. Conn. 1959).

60. *United States v. Becton, Dickinson & Co.*, 1964 Trade Cas. ¶ 71,144, at 79,513 (D.N.J. 1964).

61. *United States v. United Aircraft Corp.*, 1973-1 Trade Cas. (CCH) ¶ 74,467, at 94,079-80 (D. Conn. 1973).

62. *In re Koppers Co.*, 79 F.T.C. 837, 843 (1971).

63. 353 F. Supp. 1219, 1222 (C.D. Cal. 1973), *aff'd in part, rev'd in part, and remanded*, 532 F.2d 674 (9th Cir. 1976). After remand the case was settled without retrial for monetary consideration. Letter from Maxwell M. Blecher, Counsel to Calnetics Corp., to the author (Jan. 12, 1982) (on file with the *Journal of Law Reform*).

64. 95 F.T.C. 538 (1980).

65. 15 U.S.C. §§ 12-27 (1976). See *Calnetics Corp. v. Volkswagen of Am., Inc.*, 348 F. Supp. 606, 609 (C.D. Cal. 1972), *enforced*, 353 F. Supp. 1219, (C.D. Cal. 1973).

66. 353 F. Supp. at 1221.

67. German auto air conditioner manufacturers would be precluded on a practical basis from furnishing air conditioners if they could not be installed until the cars reached the United States. The order also discriminated against the manufacturer because "an important factor in the sale of automobiles is the availability of integrated, factory-installed air conditioning." *Calnetics Corp.*, 532 F.2d at 693.

The district court's response exhibited little appreciation for treaty law, particularly national treatment obligations. The opinion first noted that no discrimination was intended by the court's order, the relief being aimed only at securing an "open and competitive market in automobile air conditioners for Volkswagen automobiles."⁶⁸ It then summarily dealt with the United States-West German FCN Treaty, cryptically declaring that "[t]here can be no escape for defendant [Volkswagen] in the claim that it is insulated from its violation by any United States treaty with Germany."⁶⁹

A similar insensitivity to national treatment guarantees was evidenced in *In re Eli Lilly & Co.*⁷⁰ The alleged national treatment violation in *Lilly* stemmed from a consent order, entered before trial, that discriminated between foreign and domestic suppliers. The FTC order required Eli Lilly, charged by the Commission with monopolizing the domestic insulin market, to license its patents and technology at a higher royalty to foreign companies than to domestic companies. In addition, access to certain technology and patents was restricted to domestic companies.⁷¹

Two Danish insulin manufacturers⁷² and the Danish government objected to the disparate licensing provision on national treatment grounds.⁷³ They asserted that a United States treaty with Denmark⁷⁴

68. 353 F. Supp. at 1222.

69. *Id.*

70. 95 F.T.C. 538 (1980).

71. The order required Eli Lilly to license the use of its existing insulin technology, patented and unpatented, to any domestic company on a royalty-free basis and to any foreign company at reasonable royalties. It further provided that Eli Lilly license the use of insulin technology it acquires from others for five years following the order, patented or not, on a non-profit basis to any domestic company. During this period, Eli Lilly also was to license, at reasonable royalties, domestic companies' use of United States-patented, insulin-related inventions that it developed. No provisions were included for access by foreign companies to the future insulin technology and inventions. *See id.* at 546-51.

72. The petitioning parties in *Lilly* were actually United States incorporated subsidiaries of Danish companies; as such they were included within the decree's definition of "foreign companies." 95 F.T.C. at 544. As discussed *supra* note 15, the recent Supreme Court's decision in *Sumitomo Shoji Am., Inc. v. Avagliano*, 102 S. Ct. 2374 (1982), precludes domestic corporations from claiming protection under national treatment provisions. *Lilly*, however, was litigated prior to the *Avagliano* decision, when conventional wisdom was that domestically incorporated subsidiaries were also covered by national treatment. *See, e.g., Spiess v. C. Itoh & Co.*, 643 F.2d 353 (5th Cir. 1981), *vacated*, 102 S. Ct. 2951 (1982); *Avigliano [sic] v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (1981), *rev'd and remanded*, 102 S. Ct. 2374 (1982). In any event, the accompanying analysis of *Lilly* is correct because, were the *Lilly* dispute to arise today, the Danish parent companies could be substituted as parties, bringing into play national treatment protection.

73. Petition of Nordisk-USA to Reopen, 95 F.T.C. at 546-51; Letter from Robert L. Wald, Robert A. Skitol, and Jeffrey F. Liss, Counsel to Novo Laboratories, Inc., to Carol M. Thomas, Secretary, Federal Trade Commission (Jan. 23, 1981) (joining petition of Nordisk-USA) (on file with the *Journal of Law Reform*); Note Verbale from Royal Danish Embassy to Department of State (Oct. 14, 1980) (on file with the *Journal of Law Reform*) [hereinafter cited as Danish Note Verbale].

74. Danish FCN Treaty, *supra* note 17, arts. VII(1), VIII(2), XXII(1) & XXIV.

and an international declaration signed by the United States⁷⁵ precluded preferential treatment for domestic firms and argued that the Danish competitors should be granted access to all licenses on equal terms with domestic firms.⁷⁶

In response, Eli Lilly claimed that to do so would bestow more than equal treatment — that it would actually favor foreign companies — because those companies were not injured by Eli Lilly's allegedly illegal conduct and were in no need of such relief to compete effectively.⁷⁷ Eli Lilly further maintained that the FTC, as an agency of the United States government, "owe[d] certain obligations to preserve and promote the well-being of domestic entities."⁷⁸

The FTC, though refusing to alter the consent order,⁷⁹ acknowledged that the order's provisions were a departure from its general policy of treating foreign and domestic companies alike.⁸⁰ It attempted to justify the exception, however, by citing without explanation the "special circumstances" of the case⁸¹ and emphasizing that the order was a "negotiated compromise between strongly-held positions."⁸² The Com-

75. Organisation for Economic Co-operation and Dev., Declaration on International Investment and Multinational Enterprises (June 21, 1976).

76. Petition of Nordisk-USA to Reopen, *supra* note 73; Letter from Robert L. Wald, Robert A. Skitol, and Jeffrey F. Liss, *supra* note 73.

77. Response of Eli Lilly and Co. to Petitions of Novo Laboratories, Inc., and Nordisk-USA Seeking to Amend Consent Order at 24, *Lilly*, 95 F.T.C. 538 (1980).

78. *Id.* at 25; see also Response of Eli Lilly and Co. to Comments on Proposed Consent Order at 6, *Lilly*, 95 F.T.C. 538 (1980) ("[T]he Government of the United States has a legitimate interest in the technological advance and competitive success of domestic companies as differentiated from their foreign competitors.").

79. See Letter from Carol M. Thomas, Secretary, FTC, to Robert L. Wald, Robert A. Skitol, and Jeffrey F. Liss, Counsel to Novo Laboratories, Inc. (Sept. 25, 1981) (on file with the *Journal of Law Reform*); Letter from Carol M. Thomas, Secretary, FTC, to John P. Wintrol and Frederick H. Graefe, Counsel to Nordisk-USA (Sept. 25, 1981) (on file with the *Journal of Law Reform*).

80. Letter from Carol M. Thomas, Secretary, FTC, to Charles E. Buffon, counsel to Eli Lilly and Co. (June 13, 1980) ("[T]he Commission wishes to make it clear that, in accepting the order, it does not intend a tacit statement of general Commission policy on the treatment of foreign versus domestic companies. The Commission's general policy is to treat all companies alike, whether foreign or domestic, since the fundamental focus of antitrust relief is upon 'competition' and not upon any particular competitor or group of competitors.") (on file with the *Journal of Law Reform*).

81. "It was determined that the special circumstances of this particular case warranted accepting the order in its current form rather than rejecting the order and forcing the case into lengthy and costly litigation." *Id.*

82. *Id.* The FTC may be asserting that as a "negotiated compromise" the consent order is closer to a contract between private parties than it is to governmental action covered by national treatment. See Response of Eli Lilly and Co. to Petitions of Novo Laboratories, Inc., and Nordisk-USA seeking to Amend Consent Order at 16-17, *Lilly*, 95 F.T.C. 538 (1980). If so, the Commission is incorrect. National treatment prohibits all discrimination by any department of the government — executive, legislative, judicial, or administrative — against foreign companies. See A. McNair, *THE LAW OF TREATIES* 550 (1961). It "comprehend[s] the whole range of factors affecting the competitive position of the foreign company in relation to the domestic company." R. WILSON, *UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL*

mission apparently felt that according national treatment to the Danish petitioners — under the mistaken belief that national treatment required their equal access to the technology⁸³ — would foreclose any agreement with Eli Lilly and result in time-consuming, expensive litigation.⁸⁴

By failing to correctly analyze the impact of national treatment obligations, both *Calnetics Corp.* and *Lilly* strained United States trade relations. In addition, at least in the case of *Lilly*, this lapse resulted in an economically faulty remedial order. Perhaps, had the tribunals been forced to articulate their economic analysis, the cases would have come out differently.

C. *A Modest Proposal: Explicit Statement of Supporting Grounds*

Tribunal ignorance or misunderstanding of national treatment obligations may be easily corrected. All remedial antitrust orders prescribing disparate treatment for a foreign firm or firms should be required to explicitly state supporting economic grounds.⁸⁵ Too often, antitrust orders fail to explain their logical underpinnings.⁸⁶ Explicit analysis of the criteria underlying relief orders should go far to neutralize claims of national treatment violations. This is particularly true in facially discriminatory situations such as *Lilly*. Such a procedure will not foreclose all argument; it should, however, focus the dispute on the relevant economic considerations behind the decision.⁸⁷

LAW 198 (1960). Moreover, a "consent decree, although based upon an agreement of the parties rather than a finding of facts by the court, is not a mere authentication or recording of that agreement. It is a judicial act." *United States v. Radio Corp. of Am.*, 46 F. Supp. 654, 655 (D. Del. 1942); see *United States v. Swift & Co.*, 286 U.S. 106, 115 (1931). It shares all the attributes of a litigated judgment. 2 W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 14.2 at 280 (3d ed. 1982).

83. See *infra* note 95 and accompanying text.

84. See *supra* note 81.

85. This general proposition was enthusiastically set forth in *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971):

[To protect from administrative arbitrariness, courts] should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible . . . [D]ecisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will . . . enhance[e] the integrity of the administrative process

Id. at 598.

86. The FTC for many years had a reputation for simply announcing its conclusions in general terms. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.29, at 129 (2d ed. 1980). The unsupported decision in *Lilly* concerning differential treatment for foreign competitors may be evidence of a return to that tradition. See *supra* note 81 and accompanying text. In any event, tribunals and the government long have been criticized for underemphasizing the importance of antitrust relief and prescribing ineffective remedial measures. See 1 NAT'L ANTITRUST COMM'N, *supra* note 1, at 114, 116, 125; K. ELZINGA & W. BREIT, *supra* note 3, at 45-48, 51.

87. The question on appeal would then be whether the listed criteria support the remedy

Implementing this policy will not entail far-reaching policy or procedural changes. The law already provides an enforcement mechanism at the appellate level: the Supreme Court has ruled that a reviewing court may vacate and remand when a tribunal has not adequately explained the basis for its decision.⁸⁸ Moreover, this vacate-and-remand procedure has been applied to a tribunal order where the grounds for the disparate treatment of similarly situated parties were not reasonably discernible.⁸⁹ Therefore, if a foreign company can show that it was without explanation accorded less favorable treatment than a comparable domestic company, the appellate court should vacate and remand. The lower tribunal must then articulate the grounds for the disparate treatment, including the criteria and logic employed in formulating such relief. This policy would force factfinding antitrust tribunals to rely openly and explicitly on objective economic criteria. Benefits in the form of decreased litigation and minimized international tension should greatly outweigh the cost of implementing what the tribunals putatively have been doing all along.

D. *Earlier Cases Revisited*

Remanding the cases discussed in Part III-B to the factfinding tribunals for articulation of the grounds supporting the remedy should result in improved economic analysis and decisionmaking.⁹⁰ The appellate court in *Calnetics Corp.* appears to have attempted this course. It remanded the case and ordered the district court to reevaluate the import ban in light of United States national treatment obligations as well as competitive effects in the markets for automobiles and automobile air conditioners.⁹¹ Because the parties settled,⁹² however, it cannot

— a much better defined issue for litigants and courts than a facially discriminatory decree without reasoning.

88. *Hatahley v. United States*, 351 U.S. 173, 182 (1956); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196-97 (1941). This policy finds support in the requirement of FED. R. CIV. P. 52(a) that "the court shall find the facts specially and state separately its conclusions of law;" see 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2577 (1971), and Administrative Procedure Act § 557(c), 5 U.S.C. 557(c) (1976), which calls for "findings and conclusions, and the reasons or basis" supporting agency action; K. DAVIS, *supra* note 86, § 14.21.

89. *Contractors Transp. Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (vacated and remanded to Interstate Commerce Commission for explanation of the basis for its uneven disposition of two substantially similar applications).

90. See Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 206-10; but see Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973). It should ensure the court's consideration of all relevant factors and permit more careful analysis. See *United States v. Merz*, 376 U.S. 192, 198-99 (1964); 9 C. WRIGHT & A. MILLER, *supra* note 88, at § 2571.

91. 532 F.2d 674, 693-94 (9th Cir. 1976).

92. See *supra* note 63.

be established whether upon second examination the trial court would have supported its relief order with objective economic analysis and, as a result, satisfied the treaty obligations.

The FTC's decision in *Lilly* should be remanded for a more adequate explanation of its economic reasoning. Closer analysis of antitrust and national treatment principles would force the FTC to impartially evaluate the market position of the petitioning Danish companies, using the same standards applied to domestic firms. This objective economic evaluation should uncover the flaw in the Commission's previous order. There is no conceivable economic rationale under which *all* foreign firms, including potential market entrants, should be excluded.⁹³ By excluding all foreign firms in its licensing order the FTC thus misapplied economic analysis and blatantly violated national treatment commitments to Denmark and every other country with which the United States has a similar treaty.⁹⁴

It does not necessarily follow, however, that the two Danish petitioners have an absolute right to acquire these licenses. Their arguments confuse the national treatment requirement that foreign and domestic firms be treated *equally* with the contention that all foreign and domestic firms be treated *as equals*.⁹⁵ Because these two firms are major producers in the world market⁹⁶ they may not require these licenses to compete effectively with Eli Lilly in the United States. Market conditions may be such that the optimum competitive climate will be established if only those firms with lower total sales have access to the Eli Lilly patents and technology.

Eli Lilly did argue that access to its patents and technology by the Danish petitioners was unnecessary because of the Danish companies' substantial market capabilities.⁹⁷ This argument, however, went too

93. There may, however, be a need for a narrow national security exception allowing the complete exclusion of foreign firms. This exception "should be explicitly limited in time and scope and adopted only where necessary to serve . . . overriding interests." Shenefield Remarks, *supra* note 56, at 6.

Protectionist tendencies can lead to the national security exception "swallowing the rule" as a recent dispute involving the Federal Communications Commission (FCC) illustrates. FCC regulations require telephone utilities to award all contracts to the lowest bidder. Nevertheless, when the lowest bid for part of a 700 mile fiberoptics line was from a Japanese company, the FCC and some members of Congress forced the telephone company to award the contract to the lowest domestic bidder on the grounds that the line was a "vital communications link" important to United States national security. N.Y. Times, Dec. 12, 1981, at 33, col. 6.

94. See *supra* note 10 and accompanying text.

95. The latter is a kind of formal egalitarianism that does not follow from the concept of equality. Equality is commonly thought to mean the proposition that "like types should be treated alike." Its correlative, that "unlike [types] should be treated unlike" illustrates that disparate provisions for foreign and domestic companies do not necessarily violate national treatment guarantees. See Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-40, 572 (1982).

96. See W. Mueller, *supra* note 45, at 7-10.

97. See *supra* text accompanying note 77.

far and overinclusively grouped all foreign firms with the two Danish petitioners.⁹⁸ Yet antitrust relief differentiates only on the basis of objective economic criteria, not alienage.⁹⁹ By proposing an alienage distinction along with protectionist arguments,¹⁰⁰ Eli Lilly seemed to be urging the United States government to shield American industry by illegally discriminating against foreign companies.¹⁰¹

The explicit use of evenhanded economic analysis, supported by a thorough understanding of the complementary relationship of antitrust and national treatment principles, would have narrowed, if not prevented the *Lilly* dispute. It might have allowed the FTC to exclude the two firms it apparently reasoned had little need for competitive assistance. Concomitantly, charges alleging national treatment violations would have been deterred by the explicit reliance on uncolored economic criteria.

CONCLUSION

Many remedial antitrust orders distinguishing between foreign and domestic competitors have prompted foreign government protests on national treatment grounds.¹⁰² As the United States finds itself in an increasingly interdependent world,¹⁰³ reliant to a great extent on international trade,¹⁰⁴ it must strive to avoid foreign relations conflicts caused by tribunal insensitivity or misinterpretation of sovereign obligations. Indeed, trade hostility and retaliation often result when a parent country believes impermissible discrimination is competitively hindering its overseas business entities.¹⁰⁵

98. See Response of Eli Lilly and Co., *supra* note 77, at 19-21, 23-24.

99. See *supra* text accompanying note 51.

100. See *supra* note 78 and accompanying text.

101. The FTC's acceptance of the alienage distinction, without repudiating Eli Lilly's protectionist justifications, adds weight to Danish national treatment claims. See Letter from John P. Wintrol and Frederick H. Graefe, Counsel to Nordisk-USA, to Carol M. Thomas, Secretary, Federal Trade Commission, 4 (Mar. 18, 1981) (on file with *Journal of Law Reform*).

102. See, e.g., Danish Note Verbale, *supra* note 73 (regarding alleged national treatment violations in *Lilly*); Note Verbale from Embassy of the Federal Republic of Germany to Department of State (Nov. 10, 1972), reprinted in *Calnetics Corp.*, 353 F. Supp. at 1225 app. (regarding alleged national treatment violations in *Calnetics Corp.* relief order). That all such remedial orders have not been opposed should not be taken to mean that observance of national treatment obligations is unnecessary or unimportant. Rather, where the remedial orders were unopposed, there was no direct impact on a foreign party.

103. See 2 NAT'L ANTITRUST COMM'N, *supra* note 1, at 292, 298; see generally R. COOPER, THE ECONOMICS OF INTERDEPENDENCE 3-23 (1968).

104. See Shenefield Remarks, *supra* note 56, at 3; see also *supra* notes 7 & 11.

105. See *British Airways Bd. v. Port Auth.*, 558 F.2d 75, 86 n.4 (2d Cir. 1977) (controversy over barring Concorde aircraft from New York airport results in difficulties in renegotiating international agreement regulating air transport between United States and United Kingdom); N.Y. Times, Mar. 29, 1982, at D2, col. 1 (European Economic Community files charges against Japan under the General Agreement on Tariffs and Trade ("GATT") alleging Japanese discrimina-

This Note attempts to overcome tribunal insensitivity and improve FCN treaty interpretation by developing a framework of analysis that reconciles national treatment and antitrust principles. This analysis establishes that antitrust remedies tailored to the facts and circumstances of a market, without separate allowance for foreign competitors, do not violate national treatment treaty provisions. The reverse is true: objective antitrust remedies will always be nondiscriminatory. This Note also advocates enhancing tribunal sensitivity to national treatment obligations through the increased use of explicit economic criteria in the formulation of antitrust relief. Such articulated decisionmaking can be easily encouraged by appellate remand when a remedial antitrust order's disparate foreign impact is based on grounds other than objective economic criteria.

—*Al Van Kampen*

tion against European exports); N.Y. Times, Mar. 2, 1982, § 4, at 3, col. 1 (United States Special Trade Representative William Brock warns Japan that United States will retaliate if not allowed equal access to the Japanese market); N.Y. Times, Jan. 27, 1982, at D14, col. 6 (United States Commerce Secretary Malcolm Baldrige states he "favor[s] retaliatory trade measures against Japan unless it showed a greater willingness to accept American exports."); N.Y. Times, Jan. 13, 1982, at D2, col. 4 (United States files complaint against Canada under GATT alleging that Canada's Foreign Investment Review Act violates national treatment provisions of GATT; if the United States proves discrimination, a GATT panel may authorize the United States to adopt retaliatory measures against Canadian trade.); N.Y. Times, Nov. 17, 1981, at D23, col. 1 (United States files countervailing duty suits against a number of foreign countries accusing them of unfairly subsidizing steel exports to the United States; Commerce Secretary Baldrige states concern over the prospect of a global trade war resulting from these actions.).

