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Can U.S. Antitrust Laws Open International Markets?

*Spencer Weber Waller**

I. INTRODUCTION

In the recently published third edition of the book *Antitrust & American Business Abroad,*[1] I examined the historic concerns of the legal and business communities that United States antitrust law has penalized United States firms and individuals in their international market activities. This article examines the very different and more recent issue of whether United States antitrust law can be an affirmative tool to help United States firms sell products and services into markets that have been closed to foreign competition as a result of either governmental or private barriers to trade. This issue originally surfaced in the 1980s in connection with bilateral trade disputes between the United States and Japan over the failure of leading American firms to gain meaningful access to the Japanese market.[2] More recently, the issue of antitrust and market access more generally has arisen in connection with the hearings of the International Competition Policy Advisory Committee of the Antitrust Division of the Department of Justice[3]

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[1] JAMES R. ATWOOD, KINGMAN BREWSTER, & SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD (3d ed. 1997). The late Kingman Brewster was the author of the first edition published in 1958. James Atwood prepared the second edition in 1981. I had the privilege of preparing the third edition. For a comparison of the various editions see Spencer Weber Waller, *Antitrust and American Business Abroad Today,* 44 DEPAUL L. REV. 1251 (1995).

[2] *See infra* footnotes 18-22, 102-12 and accompanying text.

[3] *See* U.S. Dept. of Justice, Antitrust Division, International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Final Report (2000). *See also* Report of the ABA Sections of Antitrust Law and International Law and Practice Concerning Private Anticompetitive Practices as Market Access Barriers, (vis-

and the continuing controversy over the proper role of the World Trade Organization in the area of competition law.[4]

The vigorous and non-discriminatory enforcement of antitrust law can contribute to promoting an international marketplace characterized by an open competitive process. However, antitrust law is, at best, a supporting player in constructing a liberal multilateral trading order, and is incapable of promoting any single country's exports. This article suggests a small, but important, role for United States antitrust law in promoting that competitive marketplace in conjunction with a developing wave of competition law around the globe.

II. MARKET ACCESS AND COMPETITION HISTORICALLY

The perception that international markets have been closed to American competition as a result of collusive or monopolistic practices is a notion that has been around as long as the country itself. During the administration of George Washington, Thomas Jefferson, while Minister to France, engaged in extensive diplomatic efforts to dissolve exclusive export arrangements that excluded American products from European markets.[5] Throughout the eighteenth and nineteenth century, American exporters confronted British trading companies operating under Parliamentary monopoly grants with exclusive export and import rights for vast areas of the British Empire.[6]

In the early decades of the twentieth century, American exporters confronted, and sometimes participated in, private international cartels which divided markets by country, restricted national markets to domestic producers, and limited exports between countries. Other markets were perceived as closed by reason of domination by public monopolies, state trading enterprises, public control of natural resources, domestic firms being given exclusive privileges by their governments, and the maintenance of both tariff and non-tariff barriers that excluded foreign competition.

The United States has used both trade and antitrust policy to address issues of market access. The 1940s saw many antitrust prosecutions to

ited Feb. 5, 2000) <http://www.usdoj.gov/atr/icpac//icpac.htm>; also available at <http://www.abanet.org/antitrust/marketaccess.html> (visited Feb. 5, 2000) [hereinafter *ABA Report*].

[4] *See* Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, Dec. 8, 1998, WT/WGTCP/2. *See generally* Dimosthenis Papakrivopoulos, *The Role of Competition Law as an International Trade Remedy in the Context of the WTO*, 22 WORLD COMP. L. & ECON. REV. 45 (Sept. 1999); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997).

[5] DUMAS MALONE, JEFFERSON AND HIS TIME, JEFFERSON AND THE RIGHTS OF MAN, 39-42, 47-48 (1951).

[6] *See, e.g.*, PETER C. NEWMAN, COMPANY OF ADVENTURERS (1992).

break up cartels which were perceived as related to the Nazi war effort and impeding the expansion of United States exports and investment.

Most markets were closed however because of the protective tariff and trade laws adopted by the United States and the rest of the world beginning with the Smoot-Hawley Tariff Act of 1930.[7] On the trade side, the United States executive branch began in 1934 negotiating bilateral tariff reduction agreements with significant trading partners.[8] These efforts expanded significantly with the creation of the General Agreement on Tariffs and Trade ("GATT") in 1947[9] and the subsequent "rounds" of multilateral trade negotiations which have ensued.[10]

The early GATT rounds were devoted exclusively to tariff reductions. By 1967 the Kennedy Round of GATT negotiations introduced the reduction of non-tariff barriers as a topic for multilateral negotiations. The Kennedy Round produced only modest results in this area, consisting of a listing of significant non-tariff barriers and the creation of an antidumping code amplifying on the language already contained in the GATT.[11] Even these limited results were undermined by the United States Congress which refused to authorize the President to either negotiate or implement an International Antidumping Code which conflicted with existing United States law.[12]

Greater progress was made in the Tokyo Round of GATT negotiations which successfully concluded in 1979. In addition to significant additional tariff reductions, the Tokyo Round produced a series of important side codes regarding the reduction of non-tariff barriers to trade related to dumping, subsidies, technical standards, government procurement, customs valuation, and other areas where the GATT's language was ambiguous or non-existent.[13]

The code process was used extensively in the recently concluded Uruguay Round of multilateral trade negotiations as well. Continued progress was made on both the tariff and non-tariff fronts. Tariffs were reduced to zero or near zero for a significant portion of world trade. Separate codes

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[7] *See* I. BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW § 7 (1991). A more detailed history of protectionism in the United States can be found in ALFRED E. ECKES, U.S. FOREIGN TRADE POLICY SINCE 1776 (1995).

[8] These agreements were negotiated pursuant to the Reciprocal Trade Agreements Act of 1934, 48 Stat. 943.

[9] General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

[10] The process of trade liberalization would have been significantly increased had the International Trade Organization come into existence as originally contemplated.

[11] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT Doc. L/2812 (1967), *reprinted in*, JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT § 16.6 (1969).

[12] CLUBB, *supra* note 7, at § 10.2.

[13] *Id.* at § 10.3.

strengthened existing rules on dumping, subsidies, government procurement, and dispute resolution.[14] New codes were created relating to intellectual property rights, foreign investment, and trade in services.[15] Most codes were made mandatory, as opposed to the prior system where each country chose which, if any, codes it wished to sign.[16] A new World Trade Organization ("WTO") also was created[17] to enforce a new version of the GATT, new rules on trade in services and intellectual property rights, the new mandatory dispute resolution system, and any future trade liberalizing agreements.

The progressive reduction of formal governmental trade barriers have created incentives to address more private and informal barriers to market access. There is a growing sense of frustration on the part of the United States that diplomatic negotiating successes have not been accompanied by tangible results in terms of American exports and investment opportunities. These frustrations have been aimed primarily, but not exclusively, at Japan.

There is a growing perception that the removal of traditional formal trade barriers by the Japanese government have resulted in only trivial gains for American producers in the Japanese market. American policy makers have been frustrated that a long series of escalating multilateral and bilateral approaches have not been successful in creating the proverbial level playing field.

Since the late 1980s the United States increasingly has invoked antitrust-style rhetoric in seeking greater access to Japan and other national markets perceived to be closed. In 1988 section 301 of the Trade Act of 1974 was amended to permit the United States to retaliate unilaterally against foreign governments which tolerate systematic anticompetitive conduct by or among private firms that have the effect of restricting the purchase of United States goods or services.[18] Pursuant to the so-called "Super 301" provisions,[19] the United States also threatened to retaliate against a

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[14] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *reprinted in*, JOHN JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1995 DOCUMENT SUPPLEMENT 174 [hereinafter LEGAL PROBLEMS]; Agreement on Subsidies and Countervailing Measures. *Id.* at 253; Agreement on Government Procurement. *Id.* at 395; Understanding on Rules and Procedures Governing the Settlement of Disputes. *Id.* at 366.

[15] Agreement on Trade-Related Aspects of Intellectual Property Rights. *Id.* at 335. Agreement on Trade-Related Investment Measures. *Id.*, at 170. General Agreement on Trade in Services. *Id.* at 304.

[16] Of the codes mentioned in notes 14-15, all but the government procurement code are mandatory for members of the World Trade Organization.

[17] Agreement Establishing the World Trade Organization. LEGAL PROBLEMS, *supra* note 14, at 3.

[18] 19 U.S.C. § 2411(d)(3)(B)(III) (1999). *See infra* notes 102-114 and accompanying text.

[19] Super 301 originally operated by statute, and now by Executive Order, to require the United States Trade Representative to initiate investigations against countries which persis-

wide sector of Japanese goods and services unless Japan opened its market more broadly.

The United States and Japan settled the threat of retaliation through negotiations designed to address the structural impediments to trade and investment in Japan and the resulting persistent trade surplus in favor of Japan. These Structural Impediments Initiative ("SII") talks addressed such diverse issues as land prices, tax policy, distribution systems, savings and investment patterns, and, to a significant degree, the lack of antitrust enforcement in Japan.

As part of SII the United States insisted, and Japan agreed, to increase enforcement of the Anti-Monopoly Act by the Japanese Fair Trade Commission ("JFTC").[20] Japan agreed to increase the budget and personnel of the JFTC, bring more criminal actions, increase administrative surcharges for civil violations, and issue guidelines addressing a variety of common horizontal and vertical practices which were perceived as restricting access of foreign firms to the Japanese market.[21] While the SII talks formally have lapsed, they have been replaced by framework discussions which continue to include a significant component relating to competition policy and enforcement in Japan.[22] In addition, similar discussions have been instituted with South Korea, with one aspect of the talks specifically aimed at reform and increased enforcement of competition laws of South Korea. On the horizon lies the possibility of an action program on competition by the new World Trade Organization.[23]

Outside the realm of diplomacy, the United States has contemplated increased antitrust enforcement as a weapon in securing free trade in a number of ways. In addition to enacting the competition provisions of Section 301, the United States Congress has contemplated creating a private treble damage antitrust remedy for ordinary dumping violations,[24] and other draconian measures to force other countries to allow U.S. firms to compete in their markets. United States trade policy officials meanwhile have seized on the existing array of United States antitrust laws as a means of gaining enhanced access to foreign markets.

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tently deny market access to United States firms. *See* 19 U.S.C. § 2420 (1999); Executive Order No. 12901, 59 Fed. Reg. 10,727 (1994).

[20] For a detailed discussion of the substance and enforcement of Japanese competition law see HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAW AND POLICIES OF JAPAN (1994); MITSUO MATSUSHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN (1993).

[21] SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 12.07 (1996).

[22] *U.S. Official Calls Trade Talks with Japan on New Framework "Productive"*, 10 INT'L TRADE REP. (BNA) 977 (1993).

[23] ATWOOD, BREWSTER & WALLER, *supra* note 1, at § 18.11.

[24] This would amend the limited treble damage remedy currently available under the Antidumping Act of 1916, 15 U.S.C. § 72.

III. WHY TURN TO THE ANTITRUST LAWS?

Antitrust principles have been such a prominent part of current thinking about trade barriers for several reasons. Tariffs virtually have disappeared as a significant barrier to international trade for most industries. Non-tariff barriers have replaced the tariff as the continuing issue for trade liberalization, especially in the area of trade in services and the transfer of technology. Even when trade negotiations have been successful, public barriers to trade may simply be replaced with private agreements that effectively prevent imports and foreign investment. The host of invisible rules, regulations, practices, and customs that work against the interests of foreign firms often stem as much from private conduct as from formal governmental decisions. Unfortunately, the international trade laws work best in attacking foreign public policies and rules and can do little to address the private aspects of the trade barriers.

Antitrust is perceived as the antidote for the private barriers to trade that are not truly addressable through the WTO or traditional diplomacy. Antitrust also is perceived as a relatively untried weapon with great power given the resources of the Antitrust Division, the Federal Trade Commission, and private litigants who may investigate anticompetitive conduct that affects the United States, utilize grand juries, Civil Investigative Demands, and the discovery process set out in the Federal Rules of Civil Procedure to force the disclosure of information, expose foreign conduct to judgment by American judges and juries, and obtain broad criminal, injunctive, and treble damage relief, all unavailable to our trade negotiators through normal trade processes and remedies. In addition, antitrust is perceived as an across-the-board non-political weapon that avoids the delays, the linkages, and the niceties of negotiation and diplomacy.[25]

IV. WHERE ANTITRUST CAN HELP

There are a group of hard core antitrust violations which can be effectively attacked where they exist in foreign markets. The more interesting question is whether the use of antitrust law against such practices would have any significant impact on the volume of United States export and investment opportunities.

Foreign cartel practices are amenable to attack by United States antitrust laws where there is jurisdiction to prescribe personal jurisdiction, access to discovery or other means of proof, and where an effective remedy can be enforced.[26] There is no doubt that the antitrust laws may be applied

[25] The irony here is the past criticism of antitrust enforcement by many of the same institutional interests within the United States government on the very same grounds.

[26] These limitations are explored in chapters 5, 6, 14 and 15 of ANTITRUST AND AMERICAN BUSINESS ABROAD, *supra* note 1. A relatively unusual case where most of these elements were present was reported in United States v. Nippon Paper Industries, 109 F.3d 1

to foreign activity which either affects the United States market[27] or United States export opportunities[28] in a direct, substantial, and foreseeable manner.

The Foreign Trade Antitrust Improvements Act codifies this sensible interpretation of the Sherman Act and its applicability to the export trade of the United States.[29] The Justice Department first articulated this point of view in its 1977 International Antitrust Guidelines and stated that the Department viewed its "essential function" as "protecting the competitiveness of U.S. markets and export opportunities."[30] Justice Department briefly abandoned this point of view in the 1988 International Guidelines by limiting executive branch enforcement of the United States antitrust laws solely to the type of conduct which produced adverse effects on competition within the United States market. This limitation contained in footnote 159 of the 1988 Guidelines was explicitly withdrawn by the Bush Administration in 1992,[31] and the reach of the antitrust laws to restrictions on export opportunities has been affirmed repeatedly by officials of the Clinton Antitrust Division.[32]

United States antitrust law clearly can reach foreign cartels which either sell into the United States or buy from United States producers. One form of classic cartel amenable to antitrust challenge in the United States is the international agreement between competitors dividing up territories and markets, typically reserving national markets for each member and eliminating or reducing exports to other markets.

A foreign cartel seeking to pressure or coerce customers into refraining from purchasing United States products would be equally amenable to antitrust scrutiny. Such activity would probably constitute a classic group boycott by competitors seeking to deprive actual or potential rivals from access to the market.[33] Here, the problems of antitrust enforcement are more prac-

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(1st Cir. 1997) in which the Justice Department brought a series of criminal complaints against a price fixing cartel composed entirely of non-U.S. citizens acting entirely outside of the United States.

[27] *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, at § 6.

[28] *Id.* at § 9.

[29] Sherman Act of 1890, 15 U.S.C. § 6(a) (1982); Violent Crime Control and Law Enforcement Act of 1994, 15 U.S.C. §45(a) (1994).

[30] ANTITRUST DIVISION, U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 8 (1977).

[31] U.S. DEPT. OF JUSTICE, FOREIGN RESTRAINTS ON U.S. EXPORTS UNDER ANTITRUST LAWS (Apr. 3, 1992).

[32] *See, e.g.*, Anne Bingaman, ADDRESS TO THE JAPAN SOCIETY ON THE SUBJECT OF THE ROLE OF ANTITRUST IN INTERNATIONAL TRADE (March 3, 1994), *reprinted in* DEPARTMENT OF JUSTICE CURRENT DOCUMENTS, (1994) (Document 3-3-1). See also 137 Cong. Rec. S18, 070-071 (Nov. 25, 1991) (Remarks of Senator Charles Grassley urging greater use of antitrust against closed foreign markets).

[33] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); United States v. Gen. Motors Corp., 384 U.S. 127 (1966).

tical than theoretical or legal in nature.[34] In such circumstances, foreign firms are seeking to protect their own markets from external competition. In many such instances, the foreign firms do not export to the United States nor do business in the United States. They merely are seeking to protect their own domestic market, often a static or declining market, and may not be subject to personal jurisdiction, jurisdiction to prescribe, or any meaningful relief in the United States.[35]

There are few cases dealing with foreign buying cartels which collude to reduce the price of goods and services purchased from United States firms. The principal Department of Justice initiative in this area was the Tanner Crab investigation in the early 1980s. The Antitrust Division was armed with fortuitous and dramatic proof that a group of Japanese trading companies had conspired to depress the price they paid for Alaskan Tanner crab. The Antitrust Division investigated the matter through the grand jury process and was prepared to bring criminal indictments against the Japanese firms until diplomatic pressure, and the novelty of the proposed case, persuaded the Division to bring a civil case which was promptly settled by consent decree.[36]

The principal private treble damage action in this area was *Daishowa International v. North Coast Export Co.*[37] That suit involved the challenge by an American export association to an agreement by Japanese paper manufacturers to depress the prices paid for wood chips and to boycott the American producers who refused to comply with the Japanese terms of purchase. The United States court held that the complaint stated a cause of action despite the fact that the Japanese producers were acting together to counteract the lawful joint selling agreement of the American sellers under the Webb-Pomerene Act.[38]

Another potential area for the application of antitrust principles in aid of open markets would be anticompetitive agreements aimed at the operations of American firms in other countries. Such agreements could come in the form of price fixing, raising the cost of doing business, or boycotts which deny the American firms access to needed sources of supply or distribution. Here, American firms may have to turn to local antitrust or other

[34] Report, Special Committee on International Antitrust, American Bar Association, Section of Antitrust Law at § 4.II.D (1991).

[35] Edward M. Graham, *U.S. Antitrust Laws and Market Access to Japan*, in UNILATERAL APPLICATION OF ANTITRUST AND TRADE LAW 95, 96-99 (Henry B. Cortesi ed., 1994); Stroock, Stroock & Lavan, *Convergence of Trade Laws and Antitrust Laws: Unilateral, Extraterritorial U.S. Antitrust Enforcement - Can it Work to Open Japan's Markets?*, in *id.* at 113, 121-24, 130-32.

[36] United States v. C. Itoh & Co., Ltd., 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. Oct. 20, 1982).

[37] Daishowa Int. v. North Coast Export Co., 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. May 24, 1982).

[38] *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, at § 9.11-21.

remedies, rather than American antitrust law for relief.[39] In this situation as well, many of the international defendants will have no contacts with the United States and operate strictly within foreign markets which they seek to protect from any new competition. There appear to be no reported cases applying United States antitrust law in these circumstances, although the United States government has used the threat of legal action under both United States and Japanese law to negotiate lucrative settlements with a variety of Japanese service providers who allegedly conspired to raise prices on goods and services purchased by U.S. government and military installations located in Japan.[40]

V. WHERE ANTITRUST MAY HELP

Antitrust may be more helpful as a market access tool if the United States enforcement agencies and the courts are willing to revive a variety of antitrust doctrines dealing with the anticompetitive effects of vertical agreements and restrictions that have been largely abandoned over the past twenty years in United States domestic antitrust policy. The proposed application of antitrust principles to the Japanese keiretsu system is the classic illustration of this issue, especially since much of the pressure to apply antitrust to vertical restrictions in Japanese markets relates to trade tensions between the United States and Japan.

Despite loose talk from political officials and certain commentators, the keiretsu is not a cartel.[41] Rather, it is a loosely integrated group of affiliated companies brought together through a degree of cross-ownership and long standing business dealings. The prevalence of keiretsus in the Japanese economy and the ingrained preference for keiretsu members to do business with other group members have raised concerns that the system has fostered anticompetitive foreclosure of opportunities for any new entrants (whether Japanese, American, or other producers) both in the Japanese market and in selected United States markets.[42]

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[39] *See* Robert D. Shank, Note, *The Justice Department's Recent Antitrust Enforcement Policy: Toward a "Positive Comity" Solution to International Competition Problems*, 29 VAND. J. TRANSNAT'L L. 155 (1996) (suggesting international cooperation and positive comity will be more effective than unilateral enforcement by the U.S.).

[40] *See* Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka and Yokota and "Footnote 159" Scenarios*, 46 RUTGERS L. REV. 821 (1994).

[41] WALLER, INTERNATIONAL TRADE, *supra* note 21, at § 12.07; Joel Davidow, *Application of U.S. Antitrust Laws to Keiretsu Practices*, 18 WORLD COMP. L. & ECON. REV. 5, 8 (Sept. 1994); Joel Davidow, *Keiretsu and Antitrust*, 24 LAW & POL'Y INT'L BUS. 1035 (1993); Suzanna C. Miller, Note, *A Double Standard: The United States' Plea for Per Se Illegality of the Japanese Keiretsu*, 19 BROOK. J. INT'L L. 1101 (1993).

[42] In the United States, the issue arises primarily in the automotive industry where American subsidiaries of Japanese auto producers allegedly favor Japanese parts suppliers over their American counterparts. The solutions to date have been to apply stringent customs rules of origins to prevent the duty free movement of automobiles manufactured with a

Since the landmark 1977 *Sylvania* case,[43] vertical non-price restraints have been judged under a very broad rule of reason standard requiring a balancing of harm to intra-brand competition against potential gains in interbrand competition because of the importance of such restrictions in promoting efficiency gains, non-price competition, curtailment of free riders, and the maintenance of an optimal dealer network. Subsequent Supreme Court cases like *Monsanto,*[44] *Business Electronics,*[45] and *Discon*[46] have made it more difficult to characterize any particular restriction or dealer termination as a horizontal conspiracy or resale price maintenance in order to avoid the application of the *Sylvania* rule.

The general approach of *Sylvania* has spread to other statutes such as section 3 of the Clayton Act[47] where the standards for recovery arguably are more favorable to a plaintiff. The various Antitrust Guidelines issued by the Reagan and Bush administrations ruthlessly applied the teaching of *Sylvania* and its progeny and antitrust enforcement against all types of vertical restrictions virtually ceased.[48] Like-minded judges made vertical restriction cases difficult to win and a fertile source of sanctions against losing plaintiffs.[49]

The exclusionary effects of cross-ownership in foreign markets similarly simply may not be amenable to effective challenge under United States antitrust law.[50] The most analogous statute is section 8 of the Clayton Act which states:

> No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are -
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> (A) engaged in whole or in part in commerce; and

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high degree of foreign parts between the United States, Canada, and Mexico under the Canada-United States Free Trade Agreement and the North American Free Trade Agreement.

[43] *See* Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977).

[44] *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

[45] *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988).

[46] *See* NYNEX Corp. v. DISCON , Inc., 525 U.S. 128 (1998).

[47] Clayton Act of 1914, 15 U.S.C. § 14 (1914). The potential application of Clayton § 3 to keiretsu practices is discussed in Davidow, *Application of U.S. Antitrust Laws, supra* note 41, at 9-10.

[48] U.S. DEPT. OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995); U.S. DEPT. OF JUSTICE GUIDELINES FOR VERTICAL RESTRAINTS. The Vertical Restraint guidelines were subsequently withdrawn by the Clinton Administration. *See* DIVISION TO RECALL VERTICAL GUIDE, EXPAND AMNESTY POLICY FOR CORPORATIONS, 65 Antitrust & Trade Reg. Rep. (BNA) 227 (1993).

[49] *See, e.g.,* Center Video Indus. Co. v. United Media, Inc., 995 F.2d 735 (7th Cir. 1993).

[50] Graham, *supra* note 35, at 96; Davidow, *Application of U.S. Antitrust Laws, supra* note 41, at 12-13.

(B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.[51]

Section 8 has additional exceptions that permit simultaneous service as officers or directors of competing corporations if either corporation has less than $10 million in adjusted capital, surplus, and undivided profits,[52] or if the adjusted competing sales of the corporations is less than $1 million,[53] less than two percent of either corporation's sales, or less than four percent of combined sales.[54] Even these modest prohibitions do not apply to interlocking directorates between and among banking entities.[55] The Supreme Court has furthermore interpreted section 8 as not applying to interlocking directorates between bank and non-bank entities.[56]

Section 8 only applies to bar simultaneous service of officers and directors between corporations which are *competitors*. The courts have required some proof of the relevant market in order to determine whether the corporations with overlapping officers and directors actually are competitors.[57]

As a result of its many limitations, section 8 rarely is used successfully to disentangle overlapping officers and directors in United States corporations. Its application to keiretsu practices and structures appears to be even more limited. Most of the members of any given keiretsu do no compete with each other, but stand in vertical relationships as supplier or customer, or as part of a true conglomerate, and hence are not covered by section 8. Other keiretsu relationships would fall within the exceptions for links between bank and non-bank entities.

A better weapon would appear to be Section 7 of the Clayton Act which prohibits any acquisition which would tend to substantially lessen competition or tend to create a monopoly.[58] Section 7 has been applied regardless of the form of acquisition to horizontal,[59] vertical,[60] and conglomerate mergers.[61] There is no statute of limitations on the application of section 7 and courts have granted relief decades after the initial acquisi-

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[51] 15 U.S.C. § 19(a)(1) (1999).

[52] *Id.*

[53] 15 U.S.C. § 19(a)(2)(A) (1999). The monetary thresholds are adjusted for changes in the Gross National Product after September 30, 1990.

[54] 15 U.S.C. § 19(a)(2)(A-C) (1999).

[55] 15 U.S.C. § 19(a)(1) (1999).

[56] Bank America Corp. v. United States, 462 U.S. 122 (1983).

[57] North Am. Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982); Protectoseal Co. v. Barancik, 484 F.2d 585 (7th Cir. 1973); American Bakeries Co. v. Gourmet Bakers, Inc., 515 F.Supp. 977 (D. Md. 1981).

[58] 15 U.S.C. § 18 (1999).

[59] *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, at § 12.13.

[60] *See id.*

[61] *See id.* at § 12.16-.17.

tion.[62] Section 7 also has been applied successfully to joint ventures as well as traditional mergers and acquisitions,[63] and has even been used to attack acquisitions between two corporations outside the United States.[64]

However, in the past two decades, the reach and use of section 7 has been circumscribed in a dramatic fashion. Presumptions of violations based on increases in market shares and industry concentration have been discarded both as an enforcement tool and a decision rule by the courts.[65] The process of market definition has become more sophisticated from an economic perspective and more complicated on a factual basis.[66] The kind of theories which would be most useful to American firms seeking to effect structural change in international markets have not been used successfully to challenge vertical mergers in contested litigation for years.[67] In recent years, even the largest conglomerate mergers have gone unchallenged despite the theoretical viability of theories such as entrenchment,[68] potential competition,[69] and reciprocal dealing[70] which have been used successfully in the past and have never been formally overruled. Newer restrictive theories of standing and antitrust injury further make it increasingly difficult for private parties to invoke section 7 where the enforcement agencies choose not to do so.[71]

Exclusive dealing arrangements blocking the access of American goods to foreign markets would be covered by section 3 of the Clayton Act which prohibits arrangements to sell or lease any commodity on the condition that the person not use the commodities of a competitor where the effect of such practice may be to substantially lessen competition or tend to create a monopoly.[72] Again, the express limitations of this statute and more

[62] *See* United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316 (1961) (government challenge almost 30 years after partial stock acquisition).

[63] *See* United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

[64] *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, § 12.11.

[65] *See* United States v. General Dynamics Corp., 415 U.S. 486 (1974). Evidence of market share and concentration have been given progressively less weight in the published Merger Guidelines of the enforcement agencies. *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, at § 12.13.

[66] *See e.g.*, U.S. Dep't of Justice & Federal Trade Commission, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992).

[67] Recently, the Clinton Administration has negotiated a number of consent decrees modifying the terms of vertical mergers. *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, at § 12.13.

[68] *See* FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967).

[69] *See* Ford Motor Co. v. United States, 405 U.S. 562, 569-70 (1972).

[70] *See* FTC v. Consolidated Foods Corp., 380 U.S. 592, 594 (1965).

[71] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986). *But see,* California v. American Stores Co., 495 U.S. 271 (1990) (private parties permitted to seek divestiture regardless of prior governmental review of transaction).

[72] *See* 15 U.S.C. § 14 (1999).

recent interpretations make this provision something less than the all powerful trade weapon some would prefer. By its very terms, section 3 applies to goods, and not services or investment opportunities.[73] While its language is broader than that of the Sherman Act, recent decisions have tended to interpret section 3 in such a way to make it congruent with the basic prohibition in section 1 of the Sherman Act against contracts, combinations, and conspiracies in restraint of trade.[74]

Historically, this was not so. For example, the Supreme Court in *Standard Oil Co. v. United States* found a violation of section 3 whenever a substantial volume of commerce was foreclosed because of the exclusive agreement and widespread industry practice.[75] However, in *Tampa Electric Co. v. Nashville Coal Co.*, the Court later required a showing of foreclosure of a substantial proportion of the relevant market before a violation would be found.[76] Despite much of the older case law which could be helpful as a market access tool, section 3 claims have not been brought in recent years by either the Antitrust Division or the Federal Trade Commission. Successful private section 3 actions have been few, and only in those cases where the defendant's market power was so substantial as to constitute a violation of the rule of reason under section 1 of the Sherman Act as well.

Reciprocal dealing is another practice which in the past has attracted antitrust scrutiny, but currently is a moribund doctrine for enforcement purposes. Reciprocal dealing arises "when two parties face each other as both buyer and seller and one party agrees to buy the other party's goods on condition that the second party buys other goods from it."[77] The Supreme Court announced in *FTC v. Consolidated Foods Corp.*[78] that reciprocity is "one of the congeries of anticompetitive practices at which the antitrust laws are aimed."[79] In *Consolidated Foods*, the Supreme Court barred a merger under section 7 of the Clayton Act on the grounds that the merger produced reciprocal dealing in the relevant market. However, reciprocal dealing after *Consolidated Foods* was invoked as a weapon under section 1

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[73] *See id.*

[74] *See, e.g.*, Barr Lab., Inc. v. Abbott Lab., 978 F.2d 98 (3d Cir. 1992); Town Sound and Custom Tops, Inc. v. Chrysler Motor Corp., 743 F.Supp. 353, 361 (E.D. Pa. 1990), *aff'd in part and rev'd in part on other grounds*, 959 F.2d 468 (3d Cir.1992), *cert. denied*, 506 U.S. 868 (1992).

[75] *See* Standard Oil Co. v. United States, 337 U.S. 293 (1949).

[76] *See* Tampa Elec. Co. v. Nashville Coal, 365 U.S. 320, 334 (1961).

[77] *See* Betaseed v. U & I, Inc., 681 F.2d 1203, 1216 (9th Cir. 1982).

[78] *See* FTC v. Consolidated Foods Corp., 380 U.S. at 594.

[79] *See id.* at 594. *See* W.L. Gore & Assocs. Inc. v. Carlisle Corp., 381 F. Supp. 680 (D. Del. 1974), *modified*, 529 F.2d 614 (3d Cir. 1976) (reciprocal dealing as part of alleged attempted monopolization).

and section 2 of the Sherman Act more commonly by a variety of commentators[80] as well as in both government[81] and private antitrust litigation.

After an initial flurry of litigation following *Consolidated Foods*, claims involving reciprocal dealing slowed to a trickle and vanished for all practical purposes as a distinct type of antitrust claim. Courts began to treat reciprocal dealing claims under the same legal standards as tying, largely ignoring any factual distinctions between the two practices.[82] Tying claims (and reciprocal dealings) were subject to skepticism and criticisms because of their reliance on theories of foreclosure and leverage.[83]

The Supreme Court has never taken another reciprocal dealing case, and the analogous tying claims brought following *Sylvania* were subject to a lower level of judicial scrutiny. This decrease in scrutiny was made evident by the Supreme Court in *Jefferson Parrish Hospital Dist. No. 2 v. Hyde* where the court required that the defendant have substantial market power before even a modified per se test would be applied.[84] These developments, along with a virtual cessation of government enforcement activity, have made successful reciprocal dealing cases few and far between.[85]

At the present, the massive and sudden reversal of all of these developments in order to address perceived barriers in international markets raises serious issues. Most would question the wisdom of these changes if applied inconsistently to both foreign and domestic commercial markets. In addition to rank hypocrisy,[86] the unequal application of United States antitrust law on the basis of the nationality of the respondents risks violations of principles of national treatment found in the WTO rules for which the United States would bear international responsibility.[87]

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[80] A list of articles in the wake of *Consolidated Foods* addressing the anticompetitive potential of reciprocal dealing can be found in John R. Allison, *The Antitrust Implications of Barter*, 58 CHI.-KENT L. REV. 89, 93 n. 25 (1981).

[81] *See id.* at n. 24 for a substantial number of consent decrees dealing with reciprocal dealing between 1970 and 1974.

[82] *See Betaseed*, 681 F.2d at 1216-17; Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 425 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979), *after remand*, 735 F.2d 1284 (11th Cir. 1984). *But see* Key Enterprises of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550, 1562 (11th Cir. 1990) (refusing to require same type of coercion as required in tying cases).

[83] *See, e.g.*, Richard S. Markovits, *Tie-Ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 TEX. L. REV. 1363 (1980). *But see* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515 (1985) (concern over leverage as serious continuing problem).

[84] *See* Jefferson Parish Hosp. Dist. No. 2. v. Hyde, 466 U.S. 2, 16 (1984).

[85] *But see generally* Key Enterprises, 919 F.2d 1550; *see also* Betaseed, 681 F.2d at 1220-21 (reversing grant of summary judgment on reciprocity claims).

[86] *See* Suzanna C. Miller, Note, *A Double Standard: The United States' Plea for Per Se Illegality of the Japanese Keiretsu*, 19 BROOK. J. INT'L L. 1101, 1104 (1993).

[87] Selective enforcement of otherwise valid national laws could constitute violations of the national treatment provisions contained in Article III of the GATT. Somewhat analogous is the GATT dispute resolution panel which found that the existence of a more favorable

There is some evidence that attitudes in the United States are beginning to change in an evenhanded way that would revive certain aspects of the law against vertical restraints and exclusive dealing. The Supreme Court in *Eastman Kodak Co. v. Image Technical Services, Inc.* has reaffirmed the limited per se rule governing tying, and refused to grant summary judgment to a defendant whose theoretically based economic defense was rebutted by contested issues of fact.[88] In so doing, the Supreme Court is responding favorably to a variety of new theories that suggest that there is good reason to be concerned over non-price vertical restraints under certain circumstances.[89] The Antitrust Division under the Clinton administration has responded similarly by repealing the 1985 Vertical Restraint Guidelines[90] which made it virtually impossible for the Justice Department to bring a case against non-price vertical restraints. Furthermore, the Antitrust Division and the FTC have announced in a series of speeches by key officials that they intend to bring civil non-merger cases when harm to competition can be demonstrated in accordance with sound economics.[91]

The ultimate success of this evolving enforcement policy will depend on the receptivity to the new theories and cases by a federal judiciary largely appointed by the Reagan and Bush administration and committed to a vision of antitrust more receptive to vertical restraints of all types. What is beginning to emerge, though, are old doctrines and new tools that would make the bringing of cases challenging vertical restraints more likely than anytime since 1980. What remains to be seen is whether this likely trend constitutes a victory for United States business, either at home or abroad.

VI. WHAT CONSTITUTES SUCCESS?

Even if United States antitrust law can be applied with renewed vigor to anticompetitive practices in international markets by firms subject to the

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remedy for patent infringement regarding infringing products of foreign origin, as opposed to infringing products from the United States, violated Article III of the GATT. United States - Section 337 - Section 337 of Tariff Act of 1930, Nov. 7, 1989, GATT, B.I.S.D. 36th Supp. 345, 391 (1990).

[88] *See generally* Eastman Kodak Co. v. Image Tech. Serv. Inc., 504 U.S. 451 (1992).

[89] *See* Jonathan B. Baker, *Recent Developments in Economics That Challenge Chicago School Views*, 58 ANTITRUST L. J. 645 (1989).

[90] *See Division to Recall Verticals Guide, Expand Amnesty Policy for Corporations*, 65 ANTITRUST & TRADE REG. REP. (BNA) 227 (1993).

[91] *See, e.g.*, Jonathan B. Baker, *Horizontal Price-Fixing in Cyber Space*, Speech before the 1996 Antitrust Conference, The Conference Board, New York, N.Y. (Mar. 7, 1996)(Director of Bureau of Economics, FTC); *FTC Antitrust Enforcement- FTC's Chairman's Views* (Apr. 8, 1994), *reprinted in*, 7 Trade Reg. Rep. (CCH) ¶ 50,136 (Remarks of FTC Chairman Janet D. Steiger); *U.S. Antitrust Enforcement Roundup-1993* (Apr. 2, 1993), *reprinted in*, 7 Trade Reg. Rep. (CCH) ¶ 50,099 (Remarks of John W. Clark); *PLI Conference Explores Ins and Outs of Federal Agencies' Antitrust Enforcement*, 63 Antitrust & Trade Reg. Rep. (BNA) 615 (1992).

jurisdiction of U.S. courts, the net outcome may not be the dramatic surge in exports or the net positive change in the United States trade balance predicted by some. The unknown result of this application is the same for both the hard core and softer violations being alleged in international markets. In addition, "success" in using the antitrust weapon may have other less congenial effects for U.S. business both at home and abroad.

Antitrust laws as an imperfect trade weapon are first and foremost the product of the differing purposes between trade laws and antitrust laws. The trade laws presumably are intended to advance United States national interests in its relations with trading partners through open markets when those international commercial interests do not conflict with other national goals and interests. The antitrust laws are designed to promote competition in the United States market. The antitrust laws are largely indifferent to the nationality of the actors. From an antitrust perspective, more competition is better, less competition is worse. Less competition, if caused by collusion by competitors, significant foreclosure of markets, or the exclusionary conduct of firms with substantial market power is illegal.

In addition, the sole focus of United States antitrust law is on private restraints of trade and anticompetitive behavior. For statutory construction, federalism, and constitutional reasons, the United States antitrust laws do not reach the anticompetitive actions of U.S. governmental entities,[92] most state or local government action,[93] or the actions of private persons seeking to obtain anticompetitive outcomes from those governmental actors.[94]

In the international arena, antitrust law would be limited in the same manner, but for different reasons. International law, respect for the sovereign status of our trading partners, and the need for successful diplomatic relations with both friends and foes, means that U.S. antitrust law rarely will be applied directly to the actions of foreign governments or the private firms which persuaded the foreign government to take such anticompetitive action.[95] Accepting the Sherman Act as being limited to private restraints means that the public acts and policies of foreign governments were no more intended to be reached by Congress in passing the antitrust laws than those acts when performed by state or local governments in the United States. Thus, many of the barriers to market access which derive from foreign governmental laws, practices, pressure, or lobbying may formally or practically be beyond the scope of U.S. antitrust enforcement. These are

[92] *See* Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243, 244-45 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982).

[93] *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Parker v. Brown, 317 U.S. 341 (1943). *See also* Local Government Antitrust Act of 1980, 15 U.S.C. §§ 34-36 (1997).

[94] *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, at § 8.15.

[95] *See generally* A.B.A. ANTITRUST SECTION MONOGRAPH NO. 20, SPECIAL DEFENSES IN GENERALLY INTERNATIONAL ANTITRUST LITIGATION (1995).

precisely the type of trade barriers which have been the subject of action under section 301 and bilateral and multilateral trade negotiations. But antitrust hardly adds another weapon to deal with these governmental barriers.

Starting with the hard core antitrust violations by private persons, which U.S. antitrust laws can reach if the offenders have sufficient contacts with the United States, the elimination of explicit cartel arrangements in foreign and international markets would not necessarily increase United States exports. The classic international cartel has consisted of a market division scheme reserving markets to domestic producers and eliminating or severely restricting transnational exports.[96]

Eliminating such an arrangement would create the incentive for a former American cartel member to begin to export to international markets, as well as encourage the other firms to begin to sell into the United States. While American firms in the past often have benefited from the elimination of these restrictions, there is no way to predict the net gain or loss to United States producers in such a situation. Similarly, there is no clear way to predict the net effect of eliminating the more complicated type of international cartel which is organized around a price agreement. The inability to predict results should not undercut the vigor of competition enforcement efforts in this area, but only illustrates the obvious point that increases in competition and allocative efficiency do not automatically translate into net export gains for the United States.

The same indeterminacy holds for efforts to eliminate local arrangements which are perceived as restricting market access by United States firms. Enforcing competition by law may eliminate the foreign cartel practices, but may also remove the high prices, the allocative, productive, and technological inefficiencies, and the lack of ambition that made the non-United States market attractive to American and other foreign firms in the first place.

Targeting international cartels thought to impede American exports and investment also may have the unfortunate effect of mutating the private cartel into a creature of the state beyond the effective reach of U.S. antitrust. This could be achieved through either outright compulsion or direction by the foreign government to achieve the same goals, or by private lobbying for other forms of protection from foreign competition. For example, one of the first reactions to the announcement of the Justice Department's intention to reapply antitrust to attempts to block United States export opportunities was the Japanese announcement that it was considering the adoption of a blocking statute along the lines of the British Protection of Trading Interests Act.[97]

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[96] *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, at § 2.13.

[97] *See id.* at § 4.17. *See also Convergence of Trade Law*, *supra* note 32, at 133 (warning of potential for backlash).

Pressing for the vigorous prosecution of the exclusionary vertical practices that block the distribution of American goods and services in foreign markets also has the potential for a mixed blessing in the U.S. It is difficult to argue seriously that foreign governments should condemn the type of business arrangement which, if practiced in the United States, would not be condemned under our own law. Moreover, achieving consistency would mean condemning the type of restricted distribution and dealer selection and termination policies that typically have been upheld against antitrust challenge since *Sylvania*, *Jefferson Parrish*, and *Business Electronics* in return for a very uncertain payoff in other markets.

Pressuring other countries to apply their own antitrust laws to such practices also raises the risk of enhanced condemnation of vertical restraints being used *against* United States firms who use exclusive or restricted arrangements to penetrate new markets. This issue was raised most clearly in the United States reaction to proposed Japanese Fair Trade Commission antitrust guidelines. Although the proposed Guidelines were the result of political pressure by the United States through the Structural Impediments Initiative talks,[98] the United States Government criticized the proposed guidelines for prohibiting the type of exclusive vertical arrangements that would make it easier for a new firm to sell into the Japanese market.[99] These fears may be well-founded to the extent that it always will be easier to use facially neutral antitrust laws (whether in the U.S. or in other countries) to attack foreign firms than to promote competition by aiding foreign firms at the expense of powerfully entrenched domestic constituencies.

VII. A MODEST ROLE FOR BOTH U.S. AND OTHER NATIONAL ANTITRUST LAW

What seems clear is that United States and the antitrust laws of other nations can be a modestly useful weapon in the fight for free markets, but is not the panacea that some have claimed. Antitrust can be helpful because the United States and the rest of the world trading community have committed themselves since the end of World War II to a regime of free competition and open markets. Antitrust can help when private restraints have supplemented or replaced governmental barriers to trade. But antitrust does not work well on the basis of nationality. Markets are either workably competitive or not. Restoring competition by eliminating collusion and meaningful vertical restrictions will not ensure more American exports. Occasionally, it will even mean less.

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[98] *See infra* notes 20-22 and accompanying text.

[99] *See Comments of the Government of the United States of America on the Japanese Fair Trade Commission Draft Guidelines for the Regulation of Unfair Trade Practices in Sole Import Distributorship Contracts, etc. and Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices*, 14 WORLD COMP. L. & ECON. REV. 51 (1991).

Antitrust must play an important, but subsidiary, role to United States trade policy aimed at private restrictions in international markets, thus falling somewhere in between the elimination of governmental and quasi-government trade barriers and ingrained cultural barriers to trade which may be immune from any serious challenge whatsoever. But even private collusion and competition distorting distribution agreements will only be subject to occasional challenge when business strategies, market forces, or sheer luck make international agreements detectable and subject to the jurisdiction and meaningful remedial measures of United States courts.

The United States should focus on precisely those kinds of agreements which are aimed at United States exporters or the American market. Collusive agreements aimed at the United States market should be investigated and challenged when the enforcement agencies have solid evidence of jurisdiction and violation as long as overall United States interests are not jeopardized. But they should be investigated and challenged as antitrust violations, not because their elimination may have some negligible effect on the United States balance of trade or foreign investment opportunities. Similarly, collusive agreements to lower the price of United States exports should be attacked because they are hard core traditional antitrust violations, not because such agreements marginally decrease the dollar value of United States exports.

The United States should tread lightly in challenging vertical practices in other markets which appear to restrict United States market access. We are far from a consensus in our domestic antitrust enforcement as to the competitive significance of these practices, and risk reducing the domestic and international credibility of our antitrust enforcement if a double standard emerges based on the nationality of the defendant.[100]

VIII. THE MISUSE OF UNITED STATES ANTITRUST AS A TRADE SANCTION

The antitrust provisions of section 301 of the 1974 Trade Act should be eliminated. They were inserted in that statute in 1988 in a meaningless political exercise by the Congress to reap the benefits of getting tough on trade, without actually assuming the responsibility for doing something.

One of the practices which is actionable under section 301 is the "toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign countries that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market."[101] This provision, added in 1988, has yet to be used to retaliate. However, a

[100] *Accord ABA Report*, *supra* note 3, at VC (urging all actions to achieve market access must comport with national treatment and most favored nation principles).

[101] 19 U.S.C. § 2411(d)(3)(B)(i)(IV) (1994).

number of petitions have been filed with the U.S. Trade Representative ("USTR") on these grounds.

The most prominent example was the section 301 petition that Kodak with the USTR in 1995. The petition alleged that Kodak had been systematically denied access to the Japanese consumer photographic film and paper market. Kodak contended that the government of Japan was aware of the routine anticompetitive activities by Japanese photographic firms and permitted such activities to continue. On a number of occasions, the Japanese Fair Trade Commission ("JFTC") had allegedly observed price-fixing in the industry and either took no action at all or merely instructed that the activity cease.[102] The petition alleges that the anticompetitive practices can be found throughout the industry, but primarily involve Fuji Photo Film and its affiliated distributors.[103]

The petition filed with the USTR could have led to the imposition of trade sanctions against Fuji film. However, Eastman Kodak Company Chairman George Fisher stated that trade sanctions were not Kodak's objective.[104] Rather, Kodak was attempting to generate talks between the U.S. government and the Japanese government which would serve to remove trade barriers in Japan's film market and make the market more accessible to U.S. firms. The USTR responded to Kodak's petition by filing a ultimately unsuccessful complaint with the WTO alleging that Japan's actions violated the GATT or otherwise nullified or impaired U.S. trade benefits.[105]

Aside from the Kodak petition, only two antitrust-type petition has been filed with the USTR pursuant to this provision of the Trade Act. Most recently, the USTR has made a tentative finding that the Government of Mexico encouraged and approved private agreements to exclude U.S. exports of high fructose corn syrup from the Mexican market.[106] Similarly, a U.S. firm with U.S. patent rights to amorphous metals filed a petition in 1990 alleging that it had been denied market access through Japanese "targeting and toleration of other anticompetitive practices." This petition paved the way to U.S.-Japanese negotiations that culminated with an

[102] *See* "Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper: Memorandum in Support of a Petition Filed Pursuant to Section 301 of the Trade Act of 1974, as Amended," at n. 433 and n. 434 (May 1995).

[103] *See generally,* Petition of Eastman Kodak Co., Before the Section 301 Committee, Office of the United States Trade Representative, (tariff petition pursuant to Trade Act of 1974) (filed May 18, 1995) (on file with author) [*hereinafter* Kodak].

[104] *See generally,* Kodak, *supra* note 103.

[105] *See* U.S.-Japan Film Decision Slated for Adoption April 22, 15 INT'L TRADE REP. (BNA) 679 (1998). *See also U.S. to Seek Resolution in WTO of Japan Film Market Complaint,* 13 INT'L TRADE REP. 1001 (1996).

[106] *See International Trade,* 16 INT'L. TRADE REP. 117 (1999).

agreement between the two governments to make efforts to fulfill certain agreed upon strategies.[107]

Another area in which the use of the new provision was suggested as a possible means to affect market access involves Japanese auto parts. In 1991, the United States Automotive Parts Advisory Committee ("APAC") recommended that "the U.S. government begin preparation of a self-initiated section 301 action against Japan on auto parts based on the failure of the Japanese government to enforce actions to open its markets, to stop anticompetitive actions in auto parts trade, and to promptly comply with Market-Oriented Sector Specific ("MOSS") agreements which affect auto parts trade."[108]

Two petitions filed with the USTR prior to the 1988 amendments also relied on similar grounds. Following the Justice Department's determination not to bring U.S. antitrust charges, a U.S. Trade association, the Auto International Association, filed a petition with the USTR asserting that the Japanese government was tolerating activities in the automobile market that were allegedly in violation of Japanese antitrust law.[109] This petition, however, was not a normal section 301 petition. Although it was directed at the government of Japan for toleration of anticompetitive practices by Japanese firms, the petition was essentially aimed against restraints on imports into the U.S.[110] The petition was later withdrawn following a determination by the U.S.T.R. that the alleged practices of the Japanese government were not actionable under section 301.

The other pre-1988 petition relying on antitrust-type theories was aimed at eliminating trade barriers in the Japanese semiconductor market. The petitioner contended, in part, that the Japanese government was af-

[107] *See* Jean H. Grier, *Recent Agreements and Developments Affecting Trade With Japan,* 789 PLI/Corp 403, n. 237, *citing* Office of the United States Trade Representative, Press Release No. 90-52 (Sept. 21, 1990).

[108] *Id.* at n. 247, *citing* APAC Policy Positions Affecting U.S. Japan Auto Parts Trade (adopted April 10, 1991, by the APAC). *See also Possible Violations of U.S. Antitrust Laws by Foreign Corporations,* Subcomm. on Economic and Commercial Law, House Comm. on the Judiciary, Comm. Ser. No. 151 (May 3, 1990) (discussing alleged anticompetitive effects of keiretsus on auto parts trade).

[109] *See* Jean H. Grier, *The Use of Section 301 to Open Japanese Markets to Foreign Firms,* 17 N. C. J. INT'L L. & COM. REG.. 241, 286 (1992). *See also* Section 301 Petition of the Auto International Association (filed May 9, 1988; withdrawn June 30, 1988) [hereinafter *Petition*].

[110] *See* Aubry D. Smith, *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,* 16 MICH. J. INT'L L. 241, 286 (1994)(citing to Section 301 Petition of the Auto International Assocation, filed May 9, 1988, withdraw June 30, 1988). *See also* Jean H. Grier, *The Use of Section 301 to Open Japanese Markets to Foreign Firms,* 17 N.C. J. INT'L L. & COMM REG. 1, 42 n.247 (1992) (describing later 1991 recommendation to USTR to self-initiate similar 301 petition against toleration of anticompetitive practices in Japanese auto parts market).

fording leniency to cartels under the antitrust laws. This practice by the Japanese government allegedly aided Japanese firms to participate in price-fixing and other anticompetitive activities throughout the Japanese semiconductor industry. The USTR accepted the petition, initiated an investigation, and eventually reached a settlement through negotiations with Japan.[111]

This portion of section 301 is flawed both substantively and procedurally. Its prohibitions are broad and ill-defined by reference to United States or international standards. The terms have received no further clarifications from legislative history or agency practice.

More importantly, the USTR is not the appropriate body to be making the factual or legal determinations as to whether a foreign government is tolerating "systematic anticompetitive activities by private firms."[112] The USTR is not a lawyer-driven agency. Its general counsel's office is small and often left on the periphery in setting agency policy. Neither its lawyers nor its policy makers are in a position to determine factually or economically the systematic anticompetitive practices by private firms within the strict time limits imposed by section 301. Moreover, the USTR does not have the power of subpoena or civil investigative demand to investigate the allegations brought by a domestic United States producer, or the means or the time for developing and analyzing the facts on its own.

Even if the USTR accepted all the allegations and proceeded through consultations to sanctions, section 301 is ill-suited for eliminating anticompetitive conduct. It authorizes retaliation in the form of trade sanctions, not limited to the specific industry where the "violation" occurred.[113] This provides significant opportunities for all manner of lobbyists for domestic interests, but no real chance of antitrust relief.

If the antitrust type provisions of section 301 are retained, they should be restructured to direct antitrust complaints to the antitrust enforcement agencies themselves. Of course, there is nothing in current law that prevents firms from bringing these matters directly to the attention of the Antitrust Division or the Federal Trade Commission, since such complaints from the victims of alleged antitrust violations have always been a fertile source of investigations and enforcement actions by both agencies. Now with the repeal of footnote 159 of the 1988 International Guidelines, both the Department of Justice and the Federal Trade Commission are prepared to investigate such cases.

Nonetheless, section 301 would be more effective as a formal method of notification requiring the agencies with the time and expertise to investigate such matters to consider formally such complaints and to have a voice

[111] See Smith, *supra* note 111, at 286.
[112] *See* 19 U.S.C. § 2411(d)(3)(B)(i)(IV) (1994).
[113] *Id.* at § 2411(c).

in trade policy. A "successful" 301 antitrust complaint should result in the opening of a formal antitrust investigation by the appropriate agency. Then the Antitrust Division or FTC could apply its full expertise, including institutional expertise from past or current investigations, to the problem at hand with the full investigative tools for antitrust investigation, including grand jury proceedings and civil investigative demands. The agencies also would have access to positive comity and other provisions in cooperation agreements with other country's antitrust authorities to develop and assess the complicated record necessary to make an informed decision to bring a case under U.S. antitrust law or seek foreign governmental cooperation in bringing a case under the applicable foreign law.[114] In the alternative, the agency could report, within set time limits, to the USTR that further trade policy action would be inconsistent with United States antitrust policy or would interfere with a pending investigation of similar practices.

An antitrust 301 of this sort could be valuable for giving antitrust a bigger voice in trade policy rather than the reverse of antitrust policy being held hostage to the demands of trade policy. In addition, giving United States producers a more formal pipeline to the enforcement agencies over anticompetitive practices in international markets would return section 301 to its original conception as a means of communication between the private sector and the United States government over international trade issues rather than the blunt and unsophisticated cause of action as it has emerged in recent years.[115]

IX. CONCLUSION

The reality is that most market access problems amenable to antitrust problems are violations of other country's antitrust regimes and not those of the United States. The solution is much less far reaching than the passage of international antitrust codes or the creation of an elaborate role for the WTO in the competition area.[116] Since the 1980s dozens of countries have adopted new competition laws or significantly amended existing laws. The United States should continue to encourage such developments in order to provide a meaningful remedy under local law to United States firms and the United States government itself when they are the victim of private anticompetitive agreements.[117] Private rights of actions, whether or not they

[114] *See* Shank, *supra* note 39, at 175-179.

[115] *See* Julia Christine Bliss, *The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response*, 20 LAW & POL'Y INT'L BUS. 501 (1989). *See also* Judith H. Bello & Alan F. Holmer, *The Post-Uruguay Round Future of Section 301*, 25 LAW & POL'Y INT'L BUS. 1297 (1994)

[116] *See, e.g.*, Fox, *supra* note 4.

[117] *See* American Bar Association, Section of International Law and Practice, *Report to the House of Delegates on Using Antitrust Laws to Enhance Access of U.S. Firms to Foreign Markets* (1994), *reprinted in* 29 INT'L LAW. 945, 946(1995).

correspond closely to private treble damage actions in the United States, should be encouraged for any party injured in the local market. The antitrust authorities of all nations should be encouraged to take action against private restraints when United States interests are threatened.[118]

There is evidence that such contacts are occurring and could be a serious substitute to the worst excesses of antitrust trade bashing. The Antitrust Division and the FTC have regular bilateral consultations with other antitrust enforcement agencies. These agencies have assisted when asked in the drafting and analysis of other national competition laws. In Japan, cooperation between the JFTC and the United States government resulted in a series of lucrative settlements where the United States government was the victim of price fixing and bid rigging in connection with the operation of military facilities on Japanese territory.[119] These recoveries by the United States were substantially in excess of the likely recoveries if the United States had acted unilaterally in either United States or Japanese courts.

These type of diplomatic solutions are embodied in the most recent antitrust cooperation agreement. In the 1991 U.S.-EU, 1995 U.S.-Canada, the 1997 U.S.-Australia, and the new U.S.-Japan antitrust cooperation agreements, each side agreed to a provision dubbed "positive comity" in which the parties agree to inform each other when they learn of anticompetitive activity affecting their own nationals in the other party's territory.[120] While the enforcement authority is not obligated to take action as a result of notification, it is expected that each party will investigate and make a good faith enforcement decision on the basis of its competition law and not on the basis of the nationality of the alleged victim or respondent. These type of provisions should be models for future antitrust cooperation agreements and should be included in broader types of economic cooperation agreements such as Mutual Assistance Treaties and Bilateral Investment Treaties. Once again, positive comity is not a trade or antitrust panacea, but it is a realistic step which can be far more effective than the unilateral invocation of United States antitrust law as a trade weapon.[121]

A true test of an effective competition regime is whether a country has taken significant enforcement action, either civilly or criminally, against its own nationals and not just foreign enterprise. By this test, only a few systems qualify. Even fewer can meet the stricter, but more germane, test for trade purposes of whether a country has taken significant enforcement action against its own nationals for injuring foreign competitors. The United States should nudge, but not bully, other countries toward reaching this lofty goal of making local law a meaningful remedy for their own citizens

[118] *See id.*
[119] *See generally* Lao, *supra* note 40.
[120] *See* ATWOOD, BREWSTER & WALLER, *supra* note 1, at §§ 14.05 - 06.
[121] *See* Graham, *supra* note 35, at 99-100; *see generally* Shank, *supra* note 39.

as well as for United States and other foreign firms competing in their market. This will only be possible if the United States continues to enforce its own antitrust laws on the basis of competitive harm and not national identity.