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## PERSPECTIVE

# Restrictive Trade Practices and the Extraterritorial Application of U.S. Antitrust and Trade Legislation<sup>†</sup>

*Mark A. A. Warner\**

### I. INTRODUCTION

The Japan-U.S. economic relationship has been marked by tremendous friction and misunderstanding. These tensions have given rise in the past to the extraterritorial application of U.S. trade and antitrust laws to perceived public and private restrictive trade practices. In this paper, I will review the U.S. approach to the extraterritorial application of trade and antitrust laws, particularly as they apply to Japan. I will conclude that although formal coercion has given way to more bilateral negotiations, demands will grow for a return to the more aggressive U.S. posture of the past unless meaningful and effective market access is achieved. I will conclude with some observa-

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<sup>†</sup> An earlier version of this paper was presented to the Japan-United States Study Group on Economic Relations after the Uruguay Round Meeting held in Tokyo, Japan – March 23-25, 1998.

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tions that both sides might consider a mutually beneficial multilateral alternative as a possible step towards finding a more stable equilibrium in settling their ongoing competition policy-related disputes.

## II. HISTORICAL REVIEW

### A. Inbound Commerce

#### 1. Case Law

U.S. law has long presumed that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>1</sup> The earliest Supreme Court case which undertook a comparable task with respect to Section 1 of the Sherman Act determined that the presumption against extraterritoriality had not been overcome.<sup>2</sup> In *American Banana Co. v. United Fruit Co.*, the Court considered the application of the Sherman Act in a civil action concerning conduct that occurred entirely in Central America, and that had no discernible effect on imports to the United States.<sup>3</sup> Starting with what Justice Holmes termed "the general and almost universal rule" holding "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,"<sup>4</sup> and the ancillary proposition that, in cases of doubt, a statute should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power,"<sup>5</sup> the Court held that the defendant's actions abroad were not proscribed by the Sherman Act.

By 1945, another court viewed a very similar problem differently. In *United States v. Aluminum Co. of Am. ("Alcoa")*,<sup>6</sup> the Second Circuit Court of Appeals, sitting as a court of last resort, considered a civil action brought under Section 1 of the Sherman Act against a Canadian corporation for acts committed entirely abroad that, the government averred, had produced substantial anticompetitive effects within the United States. The *Alcoa* court read *American Banana* narrowly. *American Banana*, Judge Learned Hand wrote, stood only for the principle that "we should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."<sup>7</sup> However, a sovereign ordinarily can impose liability for conduct outside its borders that produces consequences within them. Furthermore, while considerations of comity argue against ap-

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<sup>1</sup> EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).

<sup>2</sup> 15 U.S.C. § 1.

<sup>3</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

<sup>4</sup> *Id.* at 356.

<sup>5</sup> *Id.* at 357.

<sup>6</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>7</sup> *Id.* at 443.

plying Section 1 to situations in which no effect within the United States has been shown — the *American Banana* scenario — the statute, properly interpreted, does proscribe extraterritorial acts which were “intended to affect imports [to the United States] and did affect them.”<sup>8</sup> On the facts of *Alcoa*, therefore, the court concluded that the presumption against extraterritoriality had been overcome, and that the Sherman Act had been violated.<sup>9</sup>

Any perceived tension between *American Banana* and *Alcoa* was eased by the Supreme Court’s most recent exploration of the Sherman Act’s extraterritorial reach. In *Hartford Fire Ins. Co. v. California*,<sup>10</sup> by a 5-4 margin, the justices endorsed *Alcoa*’s core holding, permitting civil antitrust claims under Section 1 to go forward despite the fact that the actions which allegedly violated Section 1 occurred entirely on British soil. While noting *American Banana*’s initial disagreement with this proposition, Justice Souter, writing for the majority in *Hartford Fire*, deemed it “well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”<sup>11</sup> The conduct alleged in that case, a London-based conspiracy to alter the American insurance market, met that benchmark.

The *Hartford Fire* Court stated that “[t]he only substantial question in this litigation [is] whether there is in fact a true conflict between domestic and foreign law.”<sup>12</sup> Justice Souter reasoned that no conflict exists where a person subject to regulation by two states can comply with the laws of both. Because the London reinsurers did not argue that British law required them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries was otherwise impossible, there was no conflict with British law. Accordingly, Souter saw no need to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

In a powerful dissent, Justice Scalia argued that the district court had subject matter and personal jurisdiction in the case, and as a matter of legislative jurisdiction the Sherman Act did not apply extraterritorially.<sup>13</sup> Further, he noted that more recent lower court precedent tempered the

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<sup>8</sup> *Id.* at 444.

<sup>9</sup> *Id.* at 444-45.

<sup>10</sup> 509 U.S. 764 (1993).

<sup>11</sup> *Id.* at 796 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) (considering allegations that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American television set market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States)).

<sup>12</sup> *Id.* at 796, 798.

<sup>13</sup> *Id.* at 814.

extraterritorial application of the Sherman Act with considerations of "international comity."<sup>14</sup> He stated:

The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory.<sup>15</sup>

With respect to the majority's "true conflict" approach, Justice Scalia cautioned:

It [the majority] concludes that no "true conflict" counseling nonapplication of United States law (or rather, as it thinks, United States judicial jurisdiction) exists unless compliance with United States law would constitute a violation of another country's law. That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act

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<sup>14</sup> See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 & n.109 (D.C. Cir. 1984); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869-871 (10th Cir. 1981); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-1298 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America, Nat'l Trust & Sav. Assoc.*, 549 F.2d 597, 608-615 (9th Cir. 1976). See also *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 & n.31 (D.C. Cir. 1968).

<sup>15</sup> *Hartford*, 509 U.S. at 817. Justice Scalia adopted several of the factors enumerated in RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986):

Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) § 403(1). The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," *id.*, § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," *id.*, § 403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," *id.*, § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," *id.*, § 403(2)(g); and "the likelihood of conflict with regulation by another state," *id.*, § 403(2)(h). Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity," *id.*, § 403(2)(g). See 938 F.2d at 932-933; *In re Insurance Antitrust Litigation*, 723 F. Supp. 464, 487-488 (N.D. Cal. 1989); see also J. Butler & R. Merkin, *Reinsurance Law A.I.1-02* (1992). Finally, § 2(b) of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in § 3(b) — suggesting that "the importance of regulation to the [United States]," Restatement (Third) § 403(2)(c), is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

*Id.* at 818-19.

and other laws into sharp and unnecessary conflict with the legitimate interests of other countries — particularly our closest trading partners.<sup>16</sup>

In the more recent and apparently novel case of *United States v. Nippon Papers Industries, Co.*,<sup>17</sup> the First Circuit Court of Appeals has held that even criminal antitrust claims under Section 1 may apply extraterritorially where there is an intended and substantial effect in the United States. Essentially, the court reasoned that since the Sherman Act uses the same language for both the civil and criminal offenses, there was no legislative intent to distinguish between the two.<sup>18</sup> In that case, a federal grand jury handed down an indictment in 1995, naming as defendant Nippon Paper Industries, Co. ("NPI"), a Japanese manufacturer of facsimile paper. The indictment alleged that in 1990, NPI and certain unnamed coconspirators held a number of meetings in Japan, which culminated in an agreement to fix the price of thermal fax paper throughout North America. NPI and other manufacturers who were privy to the scheme purportedly accomplished their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States, who in turn sold it to American consumers at swollen prices.

The indictment further stated that, in 1990 alone, NPI sold thermal fax paper worth approximately \$6,100,000 for eventual import into the United States; and that in order to ensure the success of the venture, NPI monitored the paper trail and confirmed that the prices charged to end users were those that it had arranged. NPI moved to dismiss because, *inter alia*, if the conduct attributed to NPI occurred at all, it took place entirely in Japan, and, thus, the indictment failed to make out an offense under Section 1 of the Sherman Act. The government opposed this initiative on two grounds. First, it claimed that the law deserved a less grudging reading and that, properly read, Section 1 of the Sherman Act applied criminally to wholly foreign conduct as long as that conduct produced substantial and intended effects within the United States. Second, the government claimed that the indictment, too, deserved a less grudging reading and that, properly read, the bill alleged a vertical conspiracy

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<sup>16</sup> *Id.* at 820.

<sup>17</sup> 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 685 (1998), *reh'g denied*, 118 S. Ct. 1116 (1998), 17 F. Supp. 2d 38 (D. Mass. 1998), *on remand*, 1999 Lexis 11333 (D. Mass. July 16, 1999). The investigation has also spawned a number of private antitrust cases as well. See *Paper Systems Inc. v. Mitsubishi Corp.*, 967 F. Supp. 364 (E. D. Wis. 1997) (denying motion to dismiss for lack of personal jurisdiction), 177 F.R.D. 435 (1997) (denying motion for certification of a class).

<sup>18</sup> This reasoning is doubtful because at the time of passage of the Sherman Act, the "territorial" approach to jurisdiction was in vogue, and so it is particularly doubtful that Congress intended to reach extraterritorial criminal conduct even where it had an effect on U.S. commerce. See SPENCER WEBER WALLER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD ch. 2 (3d ed., 1997).

in restraint of trade that involved overt acts by certain coconspirators within the United States. Accepting a restrictive reading of both the statute and the indictment, the district court dismissed the case.<sup>19</sup>

It is interesting to consider the position of the Japanese Government in the *Nippon* case. In the appeal to the First Circuit, Japan filed an amicus curiae brief:

It is neither the wish nor the intention of the Japanese Government to take issue with the United States Government in this Court concerning the facts of the particular case. The concern of the Japanese Government is instead with the legal issue of the inappropriate reach and extent of United States legislation. The essence of the Japanese Government's position is that the conduct of Japanese legal persons in the Japanese market is for the Japanese authorities to regulate. Extraterritorial application of the Sherman Act is invalid under international law and violates Japanese jurisdiction.<sup>20</sup>

In its brief in the appeal to the Supreme Court, Japan stated:

It is the opinion of the Government of Japan that if the First Circuit's decision is allowed to stand, Section 1 of the Sherman Act will be applied in the criminal context in a manner inconsistent with well established international law. This will have profound implications for the sovereignty of Japan and for customary relations between nations.<sup>21</sup>

In both briefs, Japan stressed that international cooperation pursuant to bilateral or multilateral arrangements for mutual cooperation is the appropriate way to handle such conflicts even where criminal action is involved. Interestingly, in the brief to the First Circuit, Japan went so far as to publicly state that in respect of a 1992 related U.S. investigation into price-fixing conspiracies in the thermal fax paper industry and pursuant to a U.S. request, the Japanese Prosecutor's Office in 1994, raided and seized documents from the Tokyo headquarters of two Japanese companies, and secured the cooperation of other Japanese companies from which the United States sought additional documents. Furthermore, the Japanese Prosecutor's Office — again at the request of the United States — questioned representatives of Japanese thermal fax paper manufacturers in the presence of representatives of the U.S. Department of Justice ("U.S. DOJ" or "DOJ"). As a result of these cooperative efforts, between 1994 and 1996, the United States secured guilty pleas from three U.S. companies, four Japanese companies (including the two whose premises had been searched by Japanese authorities), and one Japanese national to criminal charges of price-fixing. According to the brief, what distinguished the earlier case from the instant case was that the meeting to fix prices in the earlier case occurred in the United States, while in the instant case there was no allegation that any of

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<sup>19</sup>944 F. Supp. 55, 64-66 (D. Mass. 1996).

<sup>20</sup>Brief of Amicus Curiae for the Gov't of Japan at 3, *U.S. v. Nippon Paper Industries, Co.* (1st Cir. 1996).

<sup>21</sup>Brief of Amicus Curiae for the Gov't of Japan at 2-3, *Nippon Paper Industries, Co. v. U.S.* (S. Ct. 1997).

the defendants engaged in any acts in the United States giving rise to criminal liability.<sup>22</sup>

On remand, the district court held on July 16, 1999 that the government had not proven the existence of a price-fixing conspiracy involving NPI within the period covered by the statute of limitations or that such a conspiracy had intended and substantial effects on United States commerce.<sup>23</sup> The case demonstrated some interesting procedural and substantive problems of prosecuting a criminal international conspiracy in U.S. courts.

On the procedural side, the Government sought to take the testimony of a critical witness in Japan through either a videotaped deposition pursuant to Fed. R. Crim. P. 15 or through the use of simultaneous video teleconferencing - two different techniques for recording testimony with different implications. The witness refused to come to the United States to testify (ostensibly for health reasons) although he had agreed in a plea agreement to be a cooperating witness. The government lacked the means to compel his presence in the courtroom.<sup>24</sup> In response, NPI objected to the government's motion for permission to take testimony by video deposition, but agreed to video teleconferencing. The court granted the Government's Motion for Permission to Take Testimony by Video Teleconference, however it did not, permit simultaneous transmission of the testimony in front of the jury, rather the proceedings were taped, edited and replayed before the jury during normal court hours.<sup>25</sup>

In terms of substantive law, the First Circuit's decision holding that criminal antitrust claims under Section 1 may apply extraterritorially where there is a substantial effect in the United States created additional difficulties. Section 1 jurisprudence has generally held that price-fixing agreements prosecuted as criminal cases are per se illegal, while other agreements prosecuted as civil cases are subject to a rule of reason analysis that could involve an examination of the effects of the conspiracy.<sup>26</sup> The district court rejected a Ninth Circuit decision which held that an international price-fixing, unlike a domestic price-fixing, is subject to a rule of reason analysis in all cases.<sup>27</sup> The district court held that the correct approach to a foreign price-fixing conspiracy a "per se plus" test, adding to the traditional domestic analysis the requirement that the government show substantial ef-

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<sup>22</sup> See *supra* note 20, at 4-5.

<sup>23</sup> See 1999 Lexis 11333 at 62.

<sup>24</sup> See 17 F. Supp. 2d at 38-39.

<sup>25</sup> See *id.* at 43.

<sup>26</sup> See 1999 Lexis 11333 at 52.

<sup>27</sup> *Metro Industries v. Sammi Corp.*, 82 F.3d 839, 845 (9th Cir. 1996), *cert. denied* 117 S.Ct. 189 (1997). While the Ninth Circuit based its decision on language from the well known treatise PHILLIP AREEDA & DONALD F. TURNER, 1 ANTITRUST LAW 237 (1978), the district court cited a later edition of the same treatise, PHILLIP AREEDA & HERBERT HOVENKAMP, 1 ANTITRUST LAW 273b, 379 (1997), as support for its own decision.



fects by showing a substantial connection to the United States market. Accordingly, the court instructed the jury by saying that substantial effects could be shown by proof that: the volume of commerce affected by the conspiracy was substantial; the share of the market allegedly impacted by alleged conspiracy was substantial; or the conspiracy as a whole substantially lessened competition in the thermal fax paper market.<sup>28</sup> The court held that the government had succeeded on the first two prongs but only within the relevant period covered by the statute of limitations.<sup>29</sup>

An examination of third prong suggested by the court, namely proof that the conspiracy substantially lessened competition in the United States, brings the trade and competition interface dimension of the case into stark relief. The evidence at trial demonstrated that U.S. producers had threatened to initiate antidumping procedures against the Japanese exporters (who accounted for 30% of the market as opposed to 70% by U.S. companies) unless prices increased.<sup>30</sup> There was wide agreement among witnesses that throughout 1990 there was a substantial downward pressure on prices because of an oversupply of thermal fax paper, and the entire product line was facing strong competition from "plain paper" fax machines. As the district court noted that:

[t]he stakes were high: If the dumping charges were proved, the imports of the offending companies would be subject to a tariff. Given the size of their market share, the weakness of the product, and the oversupply of thermal fax paper – any tariff increasing the cost of thermal fax paper would likely drive these companies out of the American market. They had to walk a fine line – raising prices to avoid a dumping charge, without going so far as to eliminate their market share entirely.<sup>31</sup>

Furthermore, she noted that "[t]here was the aroma of a setup in all of this by the American companies seeking not just to eliminate their Japanese rival's competitive edge, but to eliminate their Japanese rivals entirely."<sup>32</sup>

The district court went on to hold that there simply was no substantial lessening of competition in the U.S. market. The court's analysis is particularly trenchant. It said that:

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<sup>28</sup> See *supra* 1999 Lexis 11333 at 58-59.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 13.

<sup>31</sup> *Id.* at 14

<sup>32</sup> *Id.* And later on in the decision, the Court held that:

[f]inally, when the government's theory moved from price-fixing to price stabilization, the evidence was even more tenuous. Given the severe downward pressure on prices, if they stabilized at all during the period immediately following the March 30 meeting -- and as I describe there is reasonable doubt that they did for very long -- it was as likely or more likely to have been the result of the serious threat of (the U.S. company's) anti-dumping petition as any conspiracy to fix prices. A reasonable jury could not accept the latter version beyond a reasonable doubt.

*Id.* at 28.

Oversupply of thermal fax paper, the pressures driving down prices, coupled with the strength of the American competitors create a paradox in the core of the government's case: If there had been a conspiracy to fix prices in March of 1990, and prices were raised or even stabilized, that conspirator would immediately lose customers, market share and in short order, any impact on the American market. If, recognizing that, a conspirator jumped ship at the first opportunity, abandoning all efforts to increase or stabilize prices, then it would have abandoned the conspiracy. Indeed, the record reflects that both happened.<sup>33</sup>

Time will tell whether the "Per Se Plus" standard for assessing international price-fixing cases that the government elects to bring on a criminal theory will survive further judicial scrutiny in this or other cases. However, this case demonstrates the very difficult factual and evidentiary burden that the government will have in cases of this kind.<sup>34</sup> Furthermore, the predicate context of antidumping threats raises serious questions whether this or any international case of alleged price-fixing should ever be prosecuted criminally, let alone under a per se theory. Bear in mind that it is extremely unlikely that the competitive pricing of the Japanese firms would have been illegal in a purely domestic price discrimination or predatory pricing context, and so there would have been no reason to even contemplate a price-fixing conspiracy. Nor would it have made sense in a purely domestic context for producers with 30% market share to undertake a price stabilization conspiracy in response to threats from the dominant producers.

## 2. *The Agencies' International Guidelines*

In April 1995, the U.S. DOJ and the Federal Trade Commission ("FTC") ("Agencies") jointly issued the most recent iteration — and the first jointly issued — of the *Antitrust Enforcement Guidelines for International Operations* ("Guidelines"). These Guidelines are an important statement of when the Agencies might apply the antitrust laws extraterritorially. Section 3.1 sets forth the Agencies view about jurisdictional issues. Based on the case law discussed above, Section 3.1 states that:

Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved . . . . With respect to foreign import commerce, the Supreme Court has recently stated in *Hartford Fire Ins. Co. v. California* that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Second, with respect to foreign commerce other than imports, the Foreign Trade Antitrust Improvements Act of 1982 ("FTIA") applies to foreign con-

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<sup>33</sup> See *id.* at 18-19.

<sup>34</sup> It is worth noting that the trial was rendered very difficult by conflicting translations of terms as critical to the case as "agreement", and evidence of cross-cultural understanding. See *id.* at 19-22.

duct that has a *direct, substantial, and reasonably foreseeable effect* on U.S. commerce. [emphasis added.]

Section 3.11, dealing with jurisdiction over conduct involving import commerce, states that imports into the United States by definition affect the U.S. domestic market directly, and will, therefore, almost invariably satisfy the intent part of the *Hartford Fire* test. However, whether imports in fact produce the requisite substantial effects will depend on the facts of each case.<sup>35</sup>

The FTAIA amended the Sherman Act to provide that the Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless:

(1) such conduct has a direct, substantial, and reasonably foreseeable effect:

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States;

(2) such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section.

Section 3.121 of the Guidelines states that to the extent that conduct in foreign countries does not “involve” import commerce but does have an “effect” on either import transactions or commerce within the United States, the Agencies apply the “direct, substantial, and reasonably foreseeable” standard of the FTAIA. That standard is applied, for example, in cases in which a cartel of foreign enterprises, or a foreign monopolist, reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary, or in cases in which foreign vertical restrictions or intellectual property licensing arrangements have an anti-competitive effect on U.S. commerce.<sup>36</sup>

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<sup>35</sup> See U.S. DEP'T OF JUSTICE & FED. TRADE COMM., ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 13 (1995), *reprinted in* [Jan. - June 1995] 68 Antitrust & Trade Reg. Rep. (BNA) No. 1707, Spec. Supp. (April 6, 1995) [hereinafter Guidelines]. Illustrative Example A of the Guidelines states:

Situation: A, B, C, and D are foreign companies that produce a product in various foreign countries. None has any U.S. production, nor any U.S. subsidiaries. They organize a cartel for the purpose of raising the price for the product in question. Collectively, the cartel members make substantial sales into the United States, both in absolute terms and relative to total U.S. consumption. Discussion: These facts present the straightforward case of cartel participants selling products directly into the United States. In this situation, the transaction is unambiguously an import into the U.S. market, and the sale is not complete until the goods reach the United States. Thus, U.S. subject matter jurisdiction is clear under the general principles of antitrust law expressed most recently in *Hartford Fire*. The facts presented here demonstrate actual and intended participation in U.S. commerce.

*Id.*

<sup>36</sup> See *id.* at 14. Illustrative Example B of the Guidelines states:

Situation: As in Illustrative Example A, the foreign cartel produces a product in several foreign countries. None of its members has any U.S. production, nor do any of them have

## B. Outbound Commerce

### 1. *Antitrust laws*

#### (a) The Agencies' Guidelines

Section 3.122 states that with respect to jurisdiction in cases under subsection 1(B) of the FTAIA there are two categories of "export cases" that fall within the FTAIA's jurisdictional test. First, the Agencies may, in appropriate cases, take enforcement action against any anticompetitive conduct, regardless of where it occurs, that restrains U.S. exports, so long as (1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States, and (2) the U.S. courts can obtain jurisdiction over persons or corporations engaged in such conduct.

Section 3.2 explains more fully that if the conduct is unlawful under the importing country's antitrust laws as well, the Agencies are also prepared to work with that country's authorities if that country's authorities are better situated to remedy the conduct, and if those authorities are prepared to take action that will address the U.S. concerns, pursuant to their antitrust laws. Second, the Agencies may, in appropriate cases, take enforcement action against conduct by U.S. exporters that has a direct, substantial, and reasonably foreseeable effect on trade or commerce within the United States, or on import trade or commerce. This can arise in two principal ways. First, if U.S. supply and demand were not particularly elastic, an agreement among U.S. firms accounting for a substantial share of the relevant market, regarding the level of their exports, could reduce supply and raise prices in the United States. Second, conduct ostensibly export-related could affect the price of products sold or resold in the United States.<sup>37</sup> This

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U.S. subsidiaries. They organize a cartel for the purpose of raising the price for the product in question. Rather than selling directly into the United States, however, the cartel sells to an intermediary outside the United States, which they know will resell the product in the United States. The intermediary is not part of the cartel. Discussion: The jurisdictional analysis would change slightly from the one presented in Example A, because not only is the conduct being challenged entered into by cartelists in a foreign country, but it is also initially implemented through a sale made in a foreign country. Despite the different test, however, the outcome on these facts would in all likelihood remain the same. The fact that the illegal conduct occurs prior to the import would trigger the application of the FTAIA. The Agencies would have to determine whether the challenged conduct had "direct, substantial and reasonably foreseeable effects" on U.S. domestic or import commerce. Furthermore, since "the essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself — rather than the overt acts performed in furtherance of it," the Agencies would focus on the potential harm that would ensue if the conspiracy were successful, not on whether the actual conduct in furtherance of the conspiracy had in fact the prohibited effect upon interstate or foreign commerce.

*Id.*

<sup>37</sup> See *id.* at 16-17. Illustrative Example D of the Guidelines states:

Situation: Companies E and F are the only producers of product Q in country Epsilon, one of the biggest markets for sales of Q in the world. E and F together account for 99

kind of effect could occur if, for example, U.S. firms fixed the price of an input used to manufacture a product overseas for ultimate resale in the United States.<sup>38</sup>

(b) The Case Law

The U.S. rhetoric in this regard has been more aggressive than its actions. Thus far the only "pure export" cases have involved civil consent decrees, one against a Japanese buying cartel dealing with U.S. sellers,<sup>39</sup> and

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percent of the sales of product Q in Epsilon. In order to prevent a competing U.S. producer from entering the market in Epsilon, E and F agree that neither one of them will purchase or distribute the U.S. product, and that they will take "all feasible" measures to keep the U.S. company out of their market. Without specifically discussing what other measures they will take to carry out this plan, E and F meet with their distributors and, through a variety of threats and inducements, obtain agreement of all of the distributors not to carry the U.S. product. There are no commercially feasible substitute distribution channels available to the U.S. producer. Because of the actions of E and F, the U.S. producer cannot find any distributors to carry its product and is unable to make any sales in Epsilon. Discussion: The agreement between E and F not to purchase or distribute the U.S. product would clearly have a direct and reasonably foreseeable effect on U.S. export commerce, since it is aimed at a U.S. exporter. The substantiality of the effects on U.S. exports would depend on the significance of E and F as purchasers and distributors of Q, although on these facts the virtually total foreclosure from Epsilon would almost certainly qualify as a substantial effect for jurisdictional purposes. However, if the Agencies believe that they may encounter difficulties in establishing personal jurisdiction or in obtaining effective relief, the case may be one in which the Agencies would seek to resolve their concerns by working with other authorities who are examining the transaction.

*Id.*

<sup>38</sup> See *id.* at 17-18. Illustrative Example E of the Guidelines states:

Situation: Companies P, Q, R, and S, organized under the laws of country Alpha, all manufacture and distribute construction equipment. Much of that equipment is protected by patents in the various countries where it is sold, including Alpha. The companies all belong to a private trade association, which develops industry standards that are often (although not always) adopted by Alpha's regulatory authorities. Feeling threatened by competition from the United States, the companies agree at a trade association meeting (1) to refuse to adopt any U.S. company technology as an industry standard, and (2) to boycott the distribution of U.S. construction equipment. The U.S. companies have taken all necessary steps to protect their intellectual property under the law of Alpha. Discussion: In this example, the collective activity impedes U.S. companies in two ways: their technology is boycotted (even if U.S. companies are willing to license their intellectual property) and they are foreclosed from access to distribution channels. The jurisdictional question is whether these actions create a direct, substantial, and reasonably foreseeable effect on the exports of U.S. companies. The mere fact that only the market of Alpha appears to be foreclosed is not enough to defeat such an effect. Only if exclusion from Alpha as a quantitative measure were so *de minimis* in terms of actual volume of trade that there would not be a substantial effect on U.S. export commerce would jurisdiction be lacking. Given that this example involves construction equipment, a generally highly priced capital good, the exclusion from Alpha would probably satisfy the substantiality requirement for FTAIA jurisdiction. This arrangement appears to have been created with particular reference to competition from the United States, which indicates that the effects on U.S. exports are both direct and foreseeable.

*Id.*

<sup>39</sup> *United States v. C. Itoh & Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. Oct. 20, 1982) (proposed final judgment and consent decree).

another in which a U.K. defendant engaged in at least some conduct in the United States which restrained U.S. exports of glass-making technology.<sup>40</sup>

In one private antitrust suit that predates the FTAIA, *Daishowa International v. North Coast Export Co.* an association of U.S. wood chip exporters alleged that a group of Japanese importers engaged in market allocation, price-fixing and group boycotts.<sup>41</sup> The court held that subject matter jurisdiction existed because of the effect on U.S. export commerce despite the fact the conduct alleged involved only Japanese nationals in Japan.

In *United States v. C. Itoh & Co.*, the complaint alleged that the primary markets for processed tanner crab were the United States and Japan. In 1980, approximately two-thirds of the tanner crab harvested from waters off Alaska were processed for export to Japan. Over twenty Japanese companies, principally through their U.S. subsidiaries, purchased such crab in 1980, paying a combined total of nearly \$48 million. The defendants purchased, directly or through their U.S. subsidiaries, large quantities of processed Alaska seafood, including processed tanner crab, from Alaska processors for importation to Japan. In 1980, the eight defendants accounted for more than fifty percent of the purchases made by Japanese firms of tanner crab processed in the Dutch Harbor-Akutan area of the Alaska peninsula, the most important tanner crab processing region of Alaska. The defendants paid Alaska processors approximately \$24 million in total in 1980 for processed tanner crab.

The defendants were members of the Japan Marine Products Importers Association ("JMPIA"), a trade association located in Tokyo, Japan, whose membership includes the major Japanese seafood importers. The JMPIA operated through a number of committees, including a crab committee that deals with processed crab imported from Alaska. Beginning at least as early as 1979, the defendants used the JMPIA crab committee as a forum to discuss, agree upon, and coordinate prices to be offered to Alaska processors for processed tanner crab. Defendants also communicated among themselves outside the context of JMPIA meetings to coordinate the conduct of price negotiations with, and the price offers to be made to, Alaska processors for the purchase of processed tanner crab. The complaint alleged that the combination and conspiracy had the following effects, among others: (a) the prices paid for processed tanner crab were fixed at and depressed to artificial and non-competitive levels; (b) Alaska processors were deprived of the benefits of free and open competition in the purchase of processed tanner crab; and (c) competition in the purchase of processed tanner crab was restrained.<sup>42</sup>

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<sup>40</sup> *United States v. Pilkington plc.*, Part IV(D), 59 Fed. Reg. 30604 (proposed final judgment and competitive impact statement, June 14, 1994).

<sup>41</sup> 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. Oct. 20, 1982).

<sup>42</sup> See *supra* note 40.

In *United States v. Pilkington plc.*, the government alleged that the defendants violated Sections 1 and 2 of the Sherman Act by enforcing and maintaining agreements and understandings that unreasonably restrain interstate and foreign trade in the construction and operation of float glass plants and in float glass process technology, and by monopolizing the world market for the design and construction of float glass plants. Specifically, the complaint alleged that, without sufficiently valuable intellectual property rights and through a network of bilateral patent and know-how license agreements and various understandings with most other float glass manufacturers in the world, defendants:

(a) Allocated and divided territories for, and limited the use of, float glass technology worldwide;

(b) Interpreted and enforced the territorial and use restrictions in the license agreements so that their combined effect prevented competitors from using or developing competing float glass technology;

(c) Required competitors to prove that all of the licensed technology had become publicly known before being relieved of the territorial and use restrictions;

(d) Imposed and enforced restrictions on competitors' ability to sublicense float glass technology;

(e) Imposed and enforced reporting and grant-back provisions in the license agreements;

(f) Imposed and enforced restrictions on exports of glass by licensees from and to the United States; and

(g) Continued enforcement of the territorial, use, and sublicense restrictions indefinitely, even after no further licensing royalties were payable and the licensed patents had expired.

The complaint also alleged that Pilkington had monopolized the world market for the design and construction of float glass plants through license agreements that impose unreasonable restrictions on licensees and by other predatory and exclusionary conduct. Finally, the complaint alleged that the conduct described above has had and continues to have direct, substantial, and reasonably foreseeable adverse effects on U.S. export trade and commerce in providing services and related equipment and materials for the design and construction of float glass plants outside the United States.<sup>43</sup>

## 2. Trade Laws

With respect to the trade laws, Section 301 outlines certain practices that are subject to discretionary remedial action by the United States Trade Representative ("USTR"). Section 301(d)(3)(B) defines acts, policies, and practices that are "unreasonable" and include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which while not necessarily in violation, or inconsistent with international

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<sup>43</sup> See *supra* note 28.

legal rights of the United States, is otherwise unfair and inequitable but which

(i) denies fair and equitable . . .

(IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country 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 . . .<sup>44</sup>

Further, "[f]or purposes of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account, to the extent appropriate."<sup>45</sup>

As a matter of U.S. law, it would appear that regarding agreements covered by the World Trade Organization ("WTO") with respect to both the mandatory and discretionary provisions of Section 301 of the Trade Act of 1974, the duty of the USTR to take remedial action is triggered only after she has requested consultations, and requested proceedings on the matter under the formal WTO,<sup>46</sup> and after such procedure is concluded.<sup>47</sup> With respect to matters not subject to a covered agreement, recourse to the WTO cannot be considered to be *a priori* necessary or appropriate either according to the WTO Understanding<sup>48</sup> or according to U.S. law. In President

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<sup>44</sup>Trade Act of 1974 § 301 (B)(i)(IV), 19 U.S.C. § 2411(B)(i)(IV) (1980 & Supp. 1998) [hereinafter Trade Act].

<sup>45</sup>*Id.* § 301(d)(3)(D).

<sup>46</sup>*Id.* § 303(a)(2).

<sup>47</sup>*Id.* § 304(a)(1).

<sup>48</sup>Article 23:1 of the Uruguay Round WTO Settlement Understanding mandates that when WTO members seek the redress of a violation of obligations or other nullification or impairment of benefits under the "covered" WTO agreements or an impediment to the attainment of any objective of the covered agreement. (The covered agreements are: the Agreement Establishing the WTO; The Multilateral Trade Agreements, including the Multilateral Agreement on Trade in Goods, General Agreement on Trade in Services, Agreement on TRIPS, and the Understanding; and the Plurilateral Agreements to the extent determined by the parties to the Plurilateral agreements themselves). Final Text of the GATT Uruguay Round Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, Apr. 15, 1994, 33 I.L.M. 128 (1994) [hereinafter Understanding].

Article 23:2 further mandates that Members shall not unilaterally determine whether such conditions are met without following the rules and procedures set out in the Understanding. Similarly, members are mandated to follow the rules and procedures in the Understanding with respect to determining whether another Member is implementing recommendations and rulings in a reasonable period of time, and in determining the level of suspension of concessions or other obligations in the event that the other Member has not implemented the recommendations and rulings. Therefore, with respect to "covered agreements" according to the WTO Understanding, the WTO is pivotal with respect to U.S.-Japan economic disputes. However, as WTO members are sovereign states, the WTO cannot be considered to be a mandatory dispute settlement mechanism because it does not have the authority to force any Member to change its non-conforming laws or policies but instead only allows for compensation and the suspension of concessions or other obligations. In that limited sense, the WTO



Clinton's Statement of Administrative Action ("SAA") to Congress with respect to the Understanding, he stated: "[N]either Article 23 nor Section 301 requires the United States to use DSU procedures when the USTR considers that an investigation does not involve a [covered agreement]."<sup>49</sup> This wording suggests that the decision as to whether a matter is subject to a covered agreement, is to be determined exclusively by the USTR, not by any other Member of the WTO. In the SAA, the President stressed the intent to use Section 301 to pursue vigorously foreign unfair trade practices that violate U.S. rights or deny benefits to the United States under the covered agreements, and to pursue foreign unfair trade practices that are not covered by those agreements. In particular the SAA states:

For example, with minor exceptions, the [covered agreements] do not address governmental measures that encourage or tolerate private, anticompetitive practices. Should the USTR elect to investigate the failure by a foreign government to take action against systematic, anticompetitive distribution practices, including reciprocal dealing, exclusivity or tying arrangements, that deny access to U.S. firms, section 301 will also remain fully available to challenge such a failure.<sup>50</sup>

With respect to anticompetitive practices generally, the SAA states:

Among the foreign government practices that section 301 . . . defines as "unreasonable" are those that deny fair and equitable market opportunities, including toleration by a foreign government of systematic anticompetitive activities. The Administration will enforce vigorously the "toleration of . . . anticompetitive activities" provision in section 301 when appropriate to address foreign anticompetitive behavior. The practices covered by the provision include, but are not limited to, toleration of cartel behavior or toleration of closed purchasing behavior (including collusive coercion of distributors or customers) that precludes or limits U.S. access in a concerted or systematic way. . . . In making an assessment, the USTR will consider whether the pertinent foreign government, and especially its competition authorities, have been made aware of the alleged practices and, if so, how they were informed, the relevant evidence that has been provided to, or is known to be available to, the foreign authorities, and the nature of response those authorities have made.<sup>51</sup>

The SAA makes clear that where the foreign government practice at issue involves some "covered" actions and some action that is not covered, the dispute settlement proceedings will be initiated only with respect to the covered actions, while the non-covered actions would be addressed

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may be considered to be "almighty" in that Members must request the authorization of the WTO Dispute Settlement Board in order to suspend concessions or other obligations. *Id.*

<sup>49</sup>URUGUAY ROUND TRADE AGREEMENT, TEXTS OF AGREEMENT, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 103-316, at 349 (2d. Sess. 1994). *See also id.* at 366 ("Neither section 301 nor the DSU will require the USTR to invoke DSU dispute settlement procedures if the USTR does not consider that a matter involves a [covered Agreement].").

<sup>37</sup>*Id.* at 366.

<sup>51</sup>*Id.* at 367.

bilaterally. Further, the SAA states that the United States retains the right to apply section 301 sanctions that may be inconsistent with U.S. trade obligations, or take section 301 actions that are not authorized under the General Agreement on Tariffs and Trade ("GATT")<sup>52</sup> as in the past with respect to semiconductors, pharmaceuticals, beer and hormone-treated beef.

Despite the clear language in the SAA, it must be noted that with respect to U.S. disputes over automobiles and automobile parts sales in Japan, in 1995 the United States stepped away from Section 301 and/or WTO remedies, opting instead for a Comprehensive Bilateral Agreement.<sup>53</sup> Although there have been mixed results under the Agreement, there has been no further resort to Section 301 or WTO remedies in this regard.<sup>54</sup> Similarly, with respect to the U.S.-Japan dispute over access to the Japanese market for photographic film, the United States opted to pursue a WTO dispute settlement strategy rather than to pursue an outright Section 301 approach, leading some commentators to conclude that Section 301 is dead.<sup>55</sup>

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<sup>52</sup>33 I.L.M. 1141 (1994).

<sup>53</sup>See generally, *Report to President William Jefferson Clinton of the Interagency Enforcement Team Regarding the U.S.-Japan Agreement on Autos and Auto Parts: Fourth Report*, Prepared by the U.S. Department of Commerce and the Office of the U.S. Trade Representative (December 4, 1997).

<sup>54</sup>See *id.*

<sup>55</sup>See Kodak-Fuji WTO Decision: Hearing of the East Asia and Pacific Affairs Subcommittee of The Senate Foreign Affairs Committee, March 4, 1998 (statement of Clyde Prestowitz, President, Economic Strategy Institute); *but c.f. id.* The following is testimony of Susan Esserman, then General Counsel (now deputy U.S. Trade Representative) of the Office of the U.S. Trade Representative:

SEN. THOMAS: You're very welcome. Glad you could be here. I want to probably talk just a little more about the process rather than the detail. We have a number of trade agreements with Japan — isn't that correct? MS. ESSERMAN: Yes. SEN. THOMAS: In fact quite a number. MS. ESSERMAN: Quite a number. SEN. THOMAS: Forty or whatever. What is the conflict if there is what we think to be something that is inconsistent with one of these agreements and WTO? I guess what I am saying is when you enter into WTO do you have a certain set of operational standards, and what happens to your agreements? How do these two things work together? How are unilateral agreements in WTO? MS. ESSERMAN: If we have rights under WTO agreements, then we have an opportunity to enforce those agreements through this new WTO binding dispute settlement system. So we can take a case to the WTO, litigate it, and if we prevail seek resolution of the market access problem. The bilateral agreements are a separate track, and they've been a very important part of our approach to Japan over the years. And that is that we work intensively with Japan to resolve market access problems. Those agreements, if there is a violation of those agreements, we look at the full range of tools available under U.S. law and through further negotiation to try to address the problem. Those are not addressable if it's strictly a violation of a bilateral agreement that does not impact on other WTO violations, and those are not addressable at the WTO. SEN. THOMAS: So in this instance, assuming that some of the allegations of less than open market probably were conflicting with our agreement as well as WTO? You chose to go the WTO route — you could have gone the other route — is that true? MS. ESSERMAN: We chose the WTO route because we thought it was a potential avenue for addressing this problem. We very much believe that Japan's actions nullified concessions that they had given us. We are not at this point saying Japan has violated a specific existing bilateral agreement. What we are saying now is that the government of Japan has made very formal representations before a world body, and we are going to hold them to that and take appropriate

### III. RECENT U.S.-JAPAN CASES

#### A. Cartels

Perhaps the most apt analogy to describe the current situation with respect to the extraterritorial application of U.S. antitrust and trade laws is to the Cold War, which was followed by a gradual warming in disarmament talks, bouts of an escalating arms race, and finally alliances for peace and security embracing former adversaries. In antitrust and trade disputes between the United States and Japan, the weapons have been requisitioned and delivered, but to this point no serious shots have really been fired.

I discussed the criminal fax paper prosecution above, but this hardly seems worthy of the elaborate unilateral economic weaponry amassed by the United States. The current U.S. emphasis on international antitrust has concentrated almost exclusively on cartel behavior.<sup>56</sup> There are other types of activity that have been the subject of prosecutions of international conspiracies — the sodium gluconate (industrial cleaner) market involving U.S., Japanese, Dutch and French companies;<sup>57</sup> in graphite electrodes in-

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action if there is not — if they do not hold to their representation. SEN. THOMAS: But if you felt like they hadn't violated your agreement, what basis are you going to have to take bilateral action? MS. ESSERMAN: Well, we want to look at — we actually — the goal is to achieve market access here. That's what — we hope that Japan will live up to its representations. That is our goal, to achieve market access for Japan. That is the goal — not to take particular action. SEN. THOMAS: And if they don't? MS. ESSERMAN: And if they don't we're going to have to look at a full range of our actions. We have various opportunities under U.S. law and we — SEN. THOMAS: Could you be a little more specific? I've — we've had so much of this strong language — MS. ESSERMAN: Yes. SEN. THOMAS: — take responsible steps — what specifically are you talking about? MS. ESSERMAN: Well, we can pursue specific negotiations. We also have our own trade laws, including Section 301, and that is a potential avenue for action. SEN. THOMAS: But you don't know yet whether there was — MS. ESSERMAN: We are going to wait and see. We hope that Japan will live up to its obligations. That is what we hope for. That is what will serve Kodak's interests. If they don't we are going to have to look at the most effective way of proceeding.

<sup>56</sup> Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Joel Klein, *Criminal Enforcement in a Globalized Economy*, Paper Presented at the Advanced Criminal Antitrust Workshop: A Practical Approach to Criminal Investigations (Feb. 20, 1997) ; Dep. Ass't Att'y Gen., Antitrust Div. U.S. Dep't of Justice, Gary Spratling, *Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy – An Update*, Paper Presented to the Bar Association of the District of Columbia 35th Annual Symposium on Antitrust and Associations (Feb. 16, 1999); and Dep. Ass't Att'y Gen., Antitrust Div. U.S. Dep't of Justice, Gary Spratling, *International Cartel Prosecutions: Antitrust Division's Policies Relating to Plea Agreements in International Cases*, Paper Presented to the Thirteenth Annual National Institute on White Collar Crime (March 4, 1999).

<sup>57</sup> U.S. DEP'T OF JUSTICE, JAPANESE CHEMICAL GIANT TO PAY \$ 20 MILLION FINE (Press Release) (February 25, 1998); U.S. DEP'T OF JUSTICE, FRENCH COMPANY AGREES TO PAY \$2.5 MILLION FINE FOR PARTICIPATING IN INTERNATIONAL PRICE FIXING CONSPIRACY (Press Release) (December 17, 1997); U.S. DEP'T OF JUSTICE, TWO DUTCH COMPANIES PLEAD GUILTY TO INTERNATIONAL PRICE FIXING: SENTENCED TO PAY \$10 MILLION CRIMINAL FINE (Press Release) (September 24, 1997).

volving a U.S., German and Japanese companies;<sup>58</sup> in marine construction and transport services involving U.S., Dutch and Belgian companies;<sup>59</sup> in citric acid involving U.S., German, Dutch and Swiss companies;<sup>60</sup> in the lysine (a food and feed additive) market involving U.S., Korean and Japanese companies;<sup>61</sup> in maltol and sodium erythorbate (two food additives) involving a U.S. company;<sup>62</sup> in sorbates involving U.S., German and Japanese companies;<sup>63</sup> in vitamins involving French, Swiss and German companies;<sup>64</sup> and in tampico fiber involving a Mexican company.<sup>65</sup> In fact, of the twenty-three cartel cases where Sherman Act violations have yielded fines in excess of U.S. \$10 million, only five have involved Japanese companies (22% of the total). If one considers only the international cartel cases, Japanese companies accounted for five out of twenty of those cases (just over 25% of

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<sup>58</sup>U.S. DEP'T OF JUSTICE, JAPANESE SUBSIDIARY CHARGED WITH INTERNATIONAL CONSPIRACY TO FIX PRICES FOR GRAPHITE ELECTRODES IN THE U.S. (Press Release) (February 23, 1998); U.S. DEP'T. OF JUSTICE, U.S. COMPANY AGREES TO PAY \$110 MILLION FINE FOR INTERNATIONAL CONSPIRACY (Press Release) (April 7, 1998); U.S. DEP'T. OF JUSTICE, TOKAI CARBON CO. LTD. TO PLEAD GUILTY AND PAY FINE IN GRAPHITE ELECTRODE CONSPIRACY (Press Release) (April 29, 1999); U.S. DEP'T OF JUSTICE, GERMAN COMPANY AND CHIEF EXECUTIVE OFFICER EACH AGREE TO PAY RECORD FINES FOR INTERNATIONAL CONSPIRACY (Press Release) (May 4, 1999).

<sup>59</sup>U.S. DEP'T OF JUSTICE, CHARGED WITH INTERNATIONAL CONSPIRACIES, THREE COMPANIES TO PAY SECOND LARGEST FINE IN ANTITRUST HISTORY (Press Release) (December 22, 1997).

<sup>60</sup>U.S. DEP'T OF JUSTICE, DUTCH COMPANY CHARGED WITH PRICE FIXING ON CITRIC ACID: AGREES TO PAY \$400,00 CRIMINAL FINE (Press Release) (June 23, 1998); U.S. DEP'T OF JUSTICE, BAYER SUBSIDIARY AGREES TO PAY \$50 MILLION CRIMINAL FINE (Press Release) (January 29, 1997).

<sup>61</sup>U.S. DEP'T OF JUSTICE, FORMER TOP ADM EXECUTIVES, JAPANESE EXECUTIVE, INDICTED IN LYSINE PRICE FIXING CONSPIRACY (Press Release) (December 3, 1996); U.S. DEP'T OF JUSTICE, ARCHER DANIELS MIDLAND CO. TO PLEAD GUILTY AND PAY 100 MILLION FOR ROLE IN TWO INTERNATIONAL PRICE FIXING CONSPIRACIES (Press Release) (October 15, 1996); U.S. DEP'T OF JUSTICE, JUSTICE DEPARTMENT TAKES FIRST ACTION AGAINST INTERNATIONAL FOOD AND FEED ADDITIVE PRICE FIXERS (Press Release) (August 27, 1996).

<sup>62</sup>U.S. DEP'T OF JUSTICE, U.S. PHARMECEUTICAL GIANT AGREES TO PAY CRIMINAL FINES FOR PARTICIPATING IN TWO INTERNATIONAL PRICE-FIXING CONSPIRACIES (Press Release) (July 19, 1999)

<sup>63</sup>U.S. DEP'T OF JUSTICE, EASTMAN CHEMICAL COMPANY AGREES TO PLEAD GUILTY TO PRICE-FIXING AND PAY \$11 MILLION CRIMINAL FINE (Press Release) (September 30, 1998); U.S. DEP'T OF JUSTICE GERMAN CHEMICAL GIANT CHARGED WITH PARTICIPATING IN 17 YEAR INTERNATIONAL PRICE-FIXING CONSPIRACY (Press Release) (May 5, 1999); U.S. DEP'T OF JUSTICE, JAPANESE CHEMICAL COMPANY THIRD TO BE CHARGED IN 17 YEAR INTERNATIONAL PRICE-FIXING CONSPIRACY (Press Release) (July 14, 1999)

<sup>64</sup>U.S. DEP'T OF JUSTICE, FIVE EXECUTIVES, ONE COMPANY CHARGED WITH PRICE-FIXING AND AGREE TO COOPERATE IN WORLDWIDE VITAMINS PRICE-FIXING CONSPIRACY (Press Release) (March 2, 1999) AND U.S. DEP'T OF JUSTICE, F. HOFFMAN LAROCHE AND BASF AGREE TO PAY RECORD CRIMINAL FINES FOR PARTICIPATING IN INTERNATIONAL VITAMIN CARTEL (Press Release) (May 20, 1999).

<sup>65</sup>U.S. DEP'T OF JUSTICE, MEXICAN-BASED TAMPICO PRODUCER AND TEXAS DISTRIBUTOR CHARGED WITH PRICE FIXING (Press Release) (September 26, 1996).

the total). The fines over \$10 million collected to date total \$1.51 billion, of which the fines imposed on the five Japanese companies totaled \$90 million (just over 6% of the total).<sup>66</sup> The five U.S. companies on this list accounted for just over 17% of the total fines. By contrast, European companies accounted for around 57% of the companies involved, and just over 77% of the total fines.<sup>67</sup>

While Japanese companies figure prominently on this list, this does not necessarily represent a discriminatory or selective focus on Japan given that in 1998 Japan was the third largest trading partner of the United States (after Canada, and the European Union, and just before Mexico) in terms of total goods exports and imports, and in terms of goods imports alone.<sup>68</sup> Moreover, none of these markets would seem to be the focus of current U.S.-Japan disputes. Furthermore, it is not possible from the available public record to gauge the extent, if any, of Japanese governmental participation in any of these investigations as was the case for some of the fax paper investigations. In short, despite the rhetoric, the recent record with respect to the extraterritorial enforcement of U.S. antitrust and trade laws to alleged Japanese cartel behavior seems hardly impressive.

## B. Market Access

As discussed above, the extraterritorial application of U.S. antitrust trade laws with respect to market access concerns has not been any more of a problem in recent years in the dispute over the Japanese market for photographic film. This matter began as an antitrust matter. Kodak filed lengthy papers in a Section 301 proceeding, alleging that Fuji used rebates to obtain exclusivity in violation of Japan's Antimonopoly Act, and cooperated in illegal resale price maintenance that prevented Kodak from using low price to gain market share. However, Kodak, apparently did not initially bring its

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<sup>66</sup> See *supra* notes 57-65; Gary R. Spratling, Deputy Ass't Att'y Gen., Antitrust Division, U.S. Dep't of Justice, *Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg*, Speech to the Twelfth Annual National Institute on White Collar Crime (Mar. 6, 1998).

<sup>67</sup> See *id.*

<sup>68</sup> United States Trade Representative, 1998 Annual Report of the President on the Trade Agreements Program and 1999 Trade Policy Agenda (1999) at Chapter III, Tables 2 and 4. This is even more evident considering that in 1998 Canada and Europe accounted for just over 21% of total U.S. goods trade, while Japan and Mexico each accounted for around 11% of total U.S. goods trade. These data also demonstrate that Japanese companies account for around twice as many of these cases as the Japanese share of either total trade with the United States, or total United States imports, while their European counterparts account for around three times as many of these cases as either their share of total U.S. trade or imports. Alternatively stated, the ratio of the Japanese share of these fines to the Japanese share of total U.S. trade or imports is around 0.5, while for Europe the ratio is around 4.0. Interestingly, Canadian firms do not figure in the list of firms paying fines over \$10 million. It is not clear why this is the case. Perhaps, it says something about the Canadian enforcement efforts against cartels, or the nature and extent of the bilateral cooperation relationship between the Canadian and U.S. competition authorities.

evidence to either the U.S. Department of Justice Antitrust Division, or to the Japan Fair Trade Commission. Subsequently in August 1996, Kodak did complain to the Japanese Fair Trade Commission ("JFTC") (at the direction of USTR at the time of filing the WTO panel case in June 1996), which investigated and found no grounds for any major action, but announced that it would periodically monitor the Japanese market for photographic film.<sup>69</sup>

For the most part, the U.S. antitrust concerns relating to the Japanese film market were not the subject of the formal WTO dispute settlement procedures. Instead the United States requested consultations with the Japan under a 1960 GATT Contracting Parties' Decision on Restrictive Business Practices: Arrangements for Consultations ("Decision"), which had apparently never been used before.<sup>70</sup> In particular, the United States sought consultations with respect to: factors and conditions (such as market structure and government measures) relating to the structural and competitive environment in which business practices take place; all practices that the United States believes restrict competition in international trade; mutually satisfactory conclusions, which may include commitments by Japan to take certain actions to eliminate the restrictive business practices of concern or remove the restrictions on competition in international trade; and the scope of practices that are not limited to practices that Japan has found, or would have grounds to find, to be a violation of Japanese antitrust law.<sup>71</sup> In the Decision, the contracting parties recommend that, at the request of any contracting parties, a contracting party should enter into consultations on harmful restrictive practices in international trade on a bilateral or multilateral basis as appropriate. If it agrees that such harmful effects are present, it should take such measures as it deems appropriate to eliminate these effects.

Given the breathtakingly broad scope of coverage requested by the United States, it is not surprising that Japan chose not to accept the requested consultations. The U.S. request purported to use a multilateral framework, but in fact, the nature of the request went very deep into the sovereign authority of the government of Japan to determine whether its laws had been violated, and whether a violation should be found even where no Japanese law was even implicated. This might be termed an example of "soft-extraterritoriality" or extraterritoriality by convergence and consultation. As I

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<sup>69</sup> See *Kodak Cites Private Anticompetitive Practices in JFTC Complaint*, INSIDE U.S. TRADE (Aug. 9, 1996).

<sup>70</sup> See Restrictive Business Practices: Arrangements for Consultations, Nov. 18, 1960, GATT B.I.S.D. (9th Supp.) at 28-29 (1961); see also Letter from U.S. Ambassador Booth Gardner to Ambassador Minoru Endo, Permanent Mission of Japan to the WTO (Aug. 21, 1996), reprinted in INSIDE U.S. TRADE, Aug. 30, 1996, at 1, 21-23 [hereinafter Gardner Letter].

<sup>71</sup> See Gardner Letter, *supra* note 70.

will discuss more fully below, this has tended to be the model for U.S. extra-territoriality with respect to Japan in recent years.

Some antitrust issues, however, did survive in the actual WTO complaint. The WTO panel found that with respect to certain Japanese governmental "measures" taken by the Japanese competition authority, the JFTC fell inside its terms of reference and were properly before the Panel.<sup>72</sup> Some other JFTC measures, however, were excluded.<sup>73</sup> In the Panel proceedings, the United States and Japan first addressed the U.S. claims of non-violation nullification or impairment under GATT 1947 Article XXIII:1(b), followed by those dealing with allegations of violations of specific GATT Articles III:4 (national treatment) and X:1 (publication and administration of trade regulations) under Article XXIII:1(a) WTO dispute settlement procedures.

The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure. I shall proceed with my analysis by considering in turn each of these three elements. In beginning its analysis, the panel set forth a broad interpretation of non-violation that would also address issues of competition. The panel stated that:

In GATT jurisprudence, most of the cases of non-violation nullification or impairment have dealt with situations where a GATT-consistent domestic subsidy for the producer of a product has been introduced or modified following the grant of a tariff concession on that product. The instant case presents a different sort of non-violation claim. At the outset, however, we wish to make clear that we do not *a priori* consider it inappropriate to apply the Article XXIII:1(b) remedy to other governmental actions, such as those designed

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<sup>72</sup> The panel found that the specific "measures" were the subject of the US claims, and that were within their terms of reference. The first set were the "Distribution countermeasures", including the 1967 JFTC Notification 17 on Premiums to Businesses, the 1967 Cabinet Decision on Liberalization of Inward Direct Investment, the 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film, and the 1971 Basic Plan for the Systemization of Distribution. The second set were the Restrictions on large retail stores, including the 1974 Large Stores Law, and the 1979 Amendment to the Large Stores Law. Finally, the third set were the "Promotion countermeasures", including the 1967 JFTC Notification 17 on Premiums to Businesses, the 1967 Cabinet Decision on Liberalization of Inward Direct Investment, the 1977 JFTC Notification 5 on Premiums to Consumers, the 1981 JFTC Guidance on Dispatched Employees, 1982 Self-Regulating Rules Concerning Fairness in Trade with Business, the 1982 Establishment of Fair Trade Promotion Council, the 1984 Self-Regulating Standards Concerning Display of Processing Fees for Colour Negative Film, and the 1987 JFTC approval of the Retailers Fair Competition Code and its enforcement body, the Retailers Fair Trade Council.

<sup>73</sup> E.g., 1971 JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (International Contract Notification Requirement); 1971 JFTC Notification No. 34 on open lotteries; and 1983 JFTC guidance on the establishment of rules on loss-leader advertising and dumping. See WTO Panel Report with respect to Japan — Measures Affecting Consumer Photographic Film and Paper, complaint by the United States, Findings at para 10.20 (WT/DS44/R 31, March 1998) Panel Report Adopted 22 April 1998.

to strengthen the competitiveness of certain distribution or industrial sectors through non-financial assistance. Whether assistance is financial or non-financial, direct or indirect, does not determine whether its effect may offset the expected result of tariff negotiations. Thus, a Member's industrial policy, pursuing the goal of increasing efficiency in a sector, could in some circumstances upset the competitive relationship in the market place between domestic and imported products in a way that could give rise to a cause of action under Article XXIII:1(b). In the context of a Member's distribution system, for example, it is conceivable that measures that do not infringe GATT rules could be implemented in a manner that effectively results in a disproportionate impact on market conditions for imported products. In this regard, however, we must also bear in mind that tariff concessions have never been viewed as creating a guarantee of trade volumes, but rather, as explained below, as creating expectations as to competitive relationships.<sup>74</sup>

In Japan, it is accepted that the government sometimes acts through what is referred to as administrative guidance.<sup>75</sup> In such a case, the company receiving guidance from the Government of Japan may not be legally bound to act in accordance with it, but compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy.<sup>76</sup> As noted by the parties, administrative guidance in Japan takes various forms. It may be "regulatory administrative guidance," which effectively substitutes for formal government action or promotional administrative guidance, where companies are urged to do things that are in their interest to do in any event.<sup>77</sup> Accordingly, the panel went beyond the previous GATT jurisprudence developed in the 1988 GATT Panel Report on Japan — trade in semiconductors — a case brought by the European Community.<sup>78</sup> The panel stated that:

In our view, a government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access. For example, a number of non-violation cases have involved subsidies, receipt of which requires only voluntary compliance with eligibility criteria. Moreover, we also consider it conceivable, in cases where there is a high degree of cooperation and collaboration between government and business, e.g., where there is substantial reliance on administrative guidance and other more informal forms of

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<sup>74</sup> *Id.* ¶ 10.38 (emphasis added).

<sup>75</sup> *See generally*, OECD Regulatory Reform in Japan, Chapters 3 and 4, 59 (1999).

<sup>76</sup> *See id.*

<sup>77</sup> *See supra* note 73 at 10.44.

<sup>78</sup> Derestriction of Future Panel Report — Decision by the Council of 4 May 1988, GATT B.I.S.D. (35th Supp.) at 331-35 (1988).



government-business cooperation, that even non-binding, hortatory wording in a government statement of policy could have a similar effect on private actors to a legally binding measure or what Japan refers to as regulatory administrative guidance. Consequently, we believe we should be open to a broad definition of the term *measure* for purposes of Article XXIII:1(b), which considers whether or not a non-binding government action has an effect similar to a binding one.<sup>79</sup>

Similarly, the panel concluded that the past GATT cases demonstrate the fact that an action taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement. The panel stated that “[i]t is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.”<sup>80</sup>

There is a problem, however, that would soon arise for the United States’ chances of succeeding on the non-violation complaint (and also on the violation complaints as well because the panel applied the same analysis for those complaints, correctly or incorrectly) related to the proof of causation. The panel held that in this case, it was up to the United States to prove that the governmental measures that it cited have upset the competitive relationship between domestic and imported photographic film and paper in Japan to the detriment of imports. In other words, the United States had to show a “clear correlation between the measures and the adverse effect on the relevant competitive relationships.”<sup>81</sup> Simply put, it could not. Pointedly, with respect to the distribution measures, the panel concluded that:

The essence of the US claim in respect of distribution “countermeasures” is that Japan created vertical integration and single-brand distribution in the Japanese film and paper market. In the US view, this was done through standardization of transaction terms, systemization and limitations on premiums to businesses. As we have found above, the United States has not been able to show that the various “measures” it cites have upset competitive relationships between domestic and US film and paper in Japan, principally because single-brand distribution appears to have occurred before and independently of those “measures,” but also because the United States has not demonstrated that these “measures” are directed at promoting vertical integration or single-brand distribution. In answering the timing problem, the United States has provided no convincing evidence or arguments that the cited “measures” in fact had the effect of reinforcing single-brand distribution. Equally, the United States has not explained why the vertically integrated, single-brand distribution structure of the film sector in Japan — a state of affairs that the evidence suggests is similar to that occurring elsewhere in the world (including in the United States) — would have broken down in the absence of continuing government intervention.<sup>82</sup>

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<sup>79</sup> *Supra* note 54, ¶ 10.49.

<sup>80</sup> *Id.* ¶ 10.56.

<sup>81</sup> *Id.* ¶ 10.82.

<sup>82</sup> *Id.* ¶ 10.204 (emphasis added).

The panel then went on to analyze the violation complaints under the same analysis, holding that “measures” as used in GATT Article XXIII:(1)(b) are equivalent to the GATT Article III:4 “laws, regulations, and requirements affecting (the) internal sale, offering for sale, purchase, transportation, distribution or use.” The panel stated that:

We recall our earlier findings that none of the eight distribution “measures” cited by the United States had been shown to discriminate against imported products, either in terms of a *de jure* discrimination (a measure that discriminates *on its face* as to the origin of products) or in terms of a *de facto* discrimination (a measure that in its application upsets the relative competitive position between domestic and imported products, as it existed at the time when a relevant tariff concession was granted). In this connection, it could be argued that the standard we enunciated and applied under Article XXIII:1(b) — that of “upsetting the competitive relationship” — may be different from the standard of “upsetting effective equality of competitive opportunities” applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e., when the concession was granted and currently. . . . Here, as in our examination of the same measures in light of the US claim of non-violation nullification or impairment, the evidence cited by the United States indicates that the measures neither (i) discriminate on their face against imported film or paper (they are formally neutral as to the origin of products), nor (ii) in their application have a disparate impact on imported film or paper. . . . Additionally, as we also noted earlier, single brand wholesale distribution is the common market structure — indeed the norm — in most major national film markets, including the US market. It is unclear why the same economic forces acting to promote single brand wholesale distribution in the United States would not also exist in Japan. . . . Accordingly, and essentially for the reasons already stated in our findings on non-violation nullification and impairment, we find that the United States has failed to demonstrate that any of the distribution “measures” in issue accords less favourable treatment to imported film and paper than to film and paper of Japanese origin. The US claim under Article III:4 must therefore be rejected.<sup>83</sup>

If a challenge to the panel decision were to be mounted, it would most likely be with respect to the collapsing of the non-violation and violation analyses into one. It has long been well established that there is no “market power” or “market effect” test under Article III of GATT.<sup>84</sup>

In short, the United States gambled on the WTO dispute settlement option, and although it apparently lost on the facts, if not the law, the United States has not resorted either to a direct appeal of the decision

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<sup>83</sup> *Id.* ¶ 10.380-10.382 (emphasis added).

<sup>84</sup> See, e.g., Canada — Administration of the Foreign Investment Review Act (FIRA), Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 167 ¶ 6.6 (1984).

(which arguably would be necessary under U.S. law before embarking on any Section 301 action having brought the dispute to the WTO in the first place) or to any controversial Section 301 action. Instead, the USTR has announced that it would regard the Japanese Government's representations to the WTO panel, including those relating to Japan's distribution policies administered by the JFTC, access to large stores, and enforcement of competition laws — as commitments subject to an interagency monitoring scheme.<sup>85</sup> The only Administration reference to Section 301 came from the General Counsel to the USTR in an extended exchange in recent congressional hearings.<sup>86</sup>

It is also worth noting that in President Clinton's October 1, 1997 Identification of Trade Expansion Priorities Pursuant to Executive Order 12901 regarding "Super 301,"<sup>87</sup> only one priority foreign country practice was identified — Korean barriers to auto imports, and four WTO cases were announced in respect of Japanese fruit testing, Canadian dairy export subsidies and import quotas, EU dairy export subsidies, and Australian export subsidies on automotive leather. That being said, it is worth adding that the same report touts the use of sanctions by the Federal Maritime Commission to address certain Japanese port practices. Certain other key industries, notably autos and auto parts and flat glass are (despite varied results) subject to ongoing bilateral agreements, while the United States would like to bring certain others such as paper and paper products under bilateral agreements.

### C. Other Bilateral Initiatives

It is not difficult to determine why the U.S. extraterritorial economic arsenal has not been fully deployed against the alleged anticompetitive practices in Japan. The bilateral economic relationship is now largely governed by the June 10, 1993 Framework for a new Economic Partnership ("Framework Agreement") announced by President Clinton and then-Prime Minister Miyazawa and by the June 1997 Enhanced Initiative on Deregulation and Competition Policy ("Enhanced Initiative") announced by President Clinton and Prime Minister Hashimoto.

The Framework Agreement addressed sector-specific barriers and structural obstacles to trade, emphasizing objective quantitative and qualitative criteria for monitoring and implementing each agreement. The En-

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<sup>85</sup> U.S. TRADE REPRESENTATIVE, USTR AND DEPARTMENT OF COMMERCE ANNOUNCE NEXT STEPS ON IMPROVING ACCESS TO THE JAPANESE MARKET FOR FILM (Press Release) (Feb. 3, 1998). Japan has apparently indicated that it does not find it necessary or appropriate to participate in this initiative, and rejected the idea that its WTO panel submissions could be regarded as commitments.

<sup>86</sup> See *supra*, note 56.

<sup>87</sup> As extended by Exec. Order No. 12,973, 60 Fed. Reg. 51665 (1995).

hanced Initiative stresses structural issues relating to distribution and competition policy generally.<sup>88</sup>

The 1997 Submission listed priorities for action by the Japanese Government relating to inter alia: wholesale distribution and structurally exclusionary markets;<sup>89</sup> JFTC enforcement policy; private remedies for injunctions and damages under the Anti-Monopoly Act; elimination or substantial reduction of all exemptions to the Anti-Monopoly Act; JFTC prosecution of bid-rigging; and expanded budget, resources, and position of the JFTC in Cabinet meetings regarding economic policy.

The 1998 Submission listed priorities for the Japanese Government relating to inter alia: customs/import processing; retailing and services; transportation and warehousing; competition policy advocacy; private remedies; anticartel enforcement; distribution; Anti-Monopoly Act exemptions; Merger Policy; and JFTC Budget and Resources.<sup>90</sup>

The United States credits this initiative in leading to the abolition as of June 1, 2000, of the Large Scale Retail Store legislation, which allegedly increased the length and uncertainty for gaining approval for new construction of large stores.<sup>91</sup> The replacement legislation will limit the ability of local governments only to restrict floor space, operating hours, and opening

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<sup>88</sup> Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Competition Policy and Transparency and Other Government Practices in Japan (Nov. 7, 1997) [hereinafter 1997 Submission]. Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Competition Policy and Transparency and Other Government Practices in Japan (Oct. 7, 1998) [hereinafter 1998 Submission]

<sup>89</sup> As stated in the 1997 Submission, *supra* note 89:

Several Japanese markets (e.g., flat glass, paper and photographic film) have common characteristics often associated with noncompetitive performance, including: (1) highly oligopolistic market structures; (2) a high degree of vertical integration between the main manufacturers and primary distributors or *de facto* exclusive arrangements between the manufacturer and primary distributors; (3) use by manufacturers of various measures (e.g., security deposits, rebates) to hinder primary distributors from distributing competitors products beyond a token level; (4) a history of collusion; and (5) low import competition.

*Id.* at 16-18. See also, F.M. Scherer, *Retail Distribution Barriers to International Trade* 67 ANTITRUST L.J. 77 (1999); Sadao Nagaoka & Akira Goto, *Vertical Restraints and Market Access* 24 EMPIRICA 21 (1997).

<sup>90</sup> See 1998 Submission, *supra* note 89.

<sup>91</sup> U.S. TRADE REPRESENTATIVE, U.S.-JAPAN ENHANCED INITIATIVE ON DEREGULATION AND COMPETITION POLICY — FACT SHEET 3 (May 15, 1998) [hereinafter 1998 FACT SHEET]. See also FIRST JOINT STATUS REPORT ON THE U.S.-JAPAN ENHANCED INITIATIVE ON DEREGULATION AND COMPETITION POLICY 8 (May 15, 1998) [hereinafter 1998 STATUS REPORT]. U.S. TRADE REPRESENTATIVE, U.S.-JAPAN ENHANCED INITIATIVE ON DEREGULATION AND COMPETITION POLICY — FACT SHEET (May 3, 1999) [hereinafter 1999 FACT SHEET]. See also SECOND JOINT STATUS REPORT ON THE U.S.-JAPAN ENHANCED INITIATIVE ON DEREGULATION AND COMPETITION POLICY 8 (May 3, 1999) [hereinafter 1999 STATUS REPORT].

days or other such transparent criteria.<sup>92</sup> In the 1999 Status Report, Japan further agreed to measures by which the Ministry of International Trade and Industry ("MITI") would supervise the adoption of the local laws to ensure that the purposes of the law are not impeded.<sup>93</sup>

Furthermore, Japan has undertaken to have MITI and the JFTC consider expanded private injunctive remedies for violations of the Antimonopoly Act, and substantial reform to the exemption system to the Antimonopoly Act.<sup>94</sup> In 1999, JFTC undertook a number of commitments to increase anti-cartel enforcement, including actively filing criminal accusations with the Prosecutor's Office in such cases.<sup>95</sup> Japan has also agreed to take further steps to act against bid-rigging, amending its bidding instructions to make clear that firms cannot consult with competing firms about price when bidding on a project.<sup>96</sup>

Additionally, under the Enhanced Initiative, the JFTC agreed in 1998 to survey Japan's top 2,000 firms to assess their compliance programs as part of its efforts to more vigorously enforce its antitrust laws.<sup>97</sup> The JFTC also agreed in 1998 to begin following up on its industry surveys to ensure that firms take appropriate actions to correct practices about which the JFTC has raised concerns, including the film and glass sectors.<sup>98</sup> Moreover, the JFTC agreed to monitor Japanese manufacturers to ensure that they do not restrict foreign competition by threatening retaliation against distributors who handle imported products.<sup>99</sup>

These may be examples of bilateral initiatives, however they still involve a significant degree of coercion. In fact, having regard to the actual practice under Section 301,<sup>100</sup> one might ask whether Section 301 is alive and well but functioning under another name. However, one might also ask whether the lack of a real coercive threat is sustainable unless significant

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<sup>92</sup> See 1999 STATUS REPORT, *supra* note 92.

<sup>93</sup> See 1999 STATUS REPORT, *supra* note 92, at 16-17.

<sup>94</sup> See 1998 STATUS REPORT, *supra* note 92, at 11; 1999 STATUS REPORT, *supra* note 92 at 20, 22.

<sup>95</sup> See 1999 FACT SHEET, *supra* note 92, at 13-14.

<sup>96</sup> See *Id.*

<sup>97</sup> See 1999 FACT SHEET, *supra* note 92, at 4.

<sup>98</sup> See *Id.*

<sup>99</sup> See *Id.* See also 1998 STATUS REPORT, *supra* note 92, at 10-11. For a critique of JFTC enforcement of antitrust cases involving market access, see Hiroko Yamane & Shingo Seryo, Restrictive Practices and Market Access in Japan: Has the JFTC Been Effective in Eliminating Barriers in Distribution, WORLD COMPETITION (June 1999).

<sup>100</sup> Merit E. Janow, *U.S. Trade policy Towards Japan and China: Integrating Bilateral, Multilateral and Regional Approaches*, in TRADE STRATEGIES FOR A NEW ERA: ENSURING U.S. LEADERSHIP IN A GLOBAL ECONOMY 175 (Geza Feketekuty & Bruce Stokes eds., 1998); Merit E. Janow, A Comparison of Unilateral and Bilateral Experiences in Trade and Antitrust Law and Policy, Working Draft Prepared for the Brookings Institution Conference on Private Practices and Trade Policy (Oct. 1997); see also Thomas O. Bayard & Kimberly Ann Elliott, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY (1994).

and tangible progress is made to achieve market access in a number of key sectors. Still further, one might ask, how are we really to judge whether effective market access has been achieved, and what do we do if import penetration still remains low after the fact.

#### IV. BILATERAL AND MULTILATERAL APPROACHES

If the trend in U.S. Japan economic relations is towards bilateral negotiation and cooperation, and away from extraterritorial application of U.S. antitrust and trade laws, the picture is still not so easy to reconcile. For instance, above I discussed the Japanese cooperation in a fax paper conspiracy investigation, but also a strong legal challenge in the United States to the extraterritorial assertion of U.S. criminal antitrust laws in a related case.

Against this backdrop, it is worth noting that in the multilateral context, both nations have been supportive of a non-binding OECD Council Recommendation Concerning Effective Action Against Hard Core Cartels ("OECD Recommendation" or "Recommendation").<sup>101</sup> The practical utility of the Recommendation in resolving U.S.-Japan issues remains to be seen. However, one thing that is clear is that faced with an import boycott of the kind at issue in *Itoh*, the OECD Recommendation would be of little use as the definition of a "hard core cartel" excludes boycotts.<sup>102</sup> Similarly, while the Members agree that "their laws should provide for effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels,"<sup>103</sup> it is not clear that the OECD Recommendation will help resolve disputes, such as the one in *Nippon*, over the appropriateness of criminal sanctions, especially applied extraterritorially.

Perhaps more telling questions arise from what the OECD Recommendation has to say about international cooperation and comity in enforcing laws prohibiting hard core cartels. The Recommendation recognizes that Members have a common interest in preventing hard core cartels (providing that they can mutually agree about when one actually exists), and exhorts them to seek ways in which cooperation "might be improved by positive

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<sup>101</sup> *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, C/M(98)7/PROV (adopted by the Council on Mar. 25, 1998).

<sup>102</sup> *Id.*, Part I.A.2(a).

A 'hard core cartel' is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce"; *id.*, Part I.A.2(b) ("The hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. *Id.*

<sup>103</sup> *Id.*, Part I.A.1(a).

comity principles applicable to requests that another country remedy anti-competitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests."<sup>104</sup> Two thoughts come to mind. First, this is the first reference to "positive comity" in a U.S.-Japan context, albeit under the umbrella of a non-binding multilateral agreement.<sup>105</sup> If that provision works with respect to hard core cartels, then it may prove to be a useful tool to help resolve other disputes between the two countries over private anticompetitive practices. (However, positive comity seems to suffer from incentive problems so that requests are unlikely to be readily accepted where countries are adverse in interest.) Second, one wonders how two countries who could not even agree on the scope of comity in international law in *Nippon*, will find many successful occasions to use the positive comity provisions if they don't agree on the meaning or scope of "negative" comity.

In May 1999, the Governments of Japan and the United States announced their intention to conclude a bilateral antitrust cooperation agreement ("Draft Agreement").<sup>106</sup> This is significant because at present Japan and the United States do not have a bilateral cooperation agreement or a mutual legal assistance treaty ("MLAT").<sup>107</sup> However, while the United States does not now have an MLAT with Japan, it apparently has received, pursuant to Japan's legal assistance law and more traditional letters rogatory, helpful assistance from the Ministry of Justice in certain antitrust enforcement matters.<sup>108</sup>

The Draft Agreement contains the following key elements: notification of enforcement activities; enforcement cooperation and coordination, and positive comity; positive comity; conflict avoidance, consultations and ex-

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<sup>104</sup> *Id.*, Part I.B.1.

<sup>105</sup> The notion of "positive comity" emerged in a 1991 agreement between the United States and the European Community, Regarding the Application of Their Competition Laws; See <http://www.usdoj.gov/atr/public/international/docs/ec.txt>. (visited Aug. 15, 1999) See generally, Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 368-70 (1997) So far the only formal positive comity request under the 1991 agreement has been made by the United States in relation to possible anticompetitive conduct of European airlines that may be preventing U.S.-based airline computer reservation systems from competing effectively in certain European countries. See U.S. DEP'T OF JUSTICE, JUSTICE DEPARTMENT ASKS EUROPEAN COMMUNITIES TO INVESTIGATE POSSIBLE ANTICOMPETITIVE CONDUCT AFFECTING U.S. AIRLINES' COMPUTER RESERVATION SYSTEMS (Press Release) (Apr. 28, 1997).

<sup>106</sup> UNITED STATES DEP'T OF JUSTICE, UNITED STATES ANNOUNCES SUBSTANTIVE AGREEMENT ON AN ANTITRUST COOPERATION AGREEMENT WITH JAPAN (Press Release) (May 3, 1999).

<sup>107</sup> Principal Dep. Ass't Att. Gen. Antitrust Div., Dep't of Justice, A. Douglas Malamed, *An Important First Step: A U.S./Japan Bilateral Antitrust Cooperation Agreement*, Paper Presented to the Japan Fair Trade Institute (Nov. 12, 1998).

<sup>108</sup> See *id.* at 12.

change of information; and the agreement will be implemented in accordance with existing laws in each country.<sup>109</sup> With respect to positive comity, the Draft Agreement does not contain the deferral mechanism that is included in the EC/U.S. cooperation agreement.<sup>110</sup>

The innovative feature of that agreement is provided in Article IV, which sets out a detailed deferral or suspension mechanism under which one party would "normally" defer or suspend its own enforcement activity in reliance upon enforcement by the other. This mechanism only applies where the anticompetitive activities at issue do not have a direct, substantial and reasonably foreseeable impact on consumers in the requesting country, or where if they do have such impact, the activities occur principally in and are directed principally towards the other party's territory. A further condition for the operation of this mechanism is that the adverse effects can be, and are likely to be fully and adequately investigated, eliminated, or adequately remedied under the laws of the requested party.

It is not clear from the public record at this stage why there is no deferral mechanism in the Draft Agreement. However, one can only guess that that the Agencies were skeptical about the prospect of reporting to Congress that hence forth all antitrust and market access disputes with Japan had been subcontracted to the JFTC. While the bilateral initiatives discussed above have emphasized the importance of strengthening the role of the JFTC, and antitrust enforcement in Japan generally, it probably is still too early to expect the Agencies to go that far. Their reluctance to do so, however, should give pause to all of the commentators who have suggested that positive comity is a solution to market access problems something akin to the "Second Coming" in the antitrust religion.

The Draft Agreement is also not a comprehensive antitrust mutual assistance agreement of the sort authorized by the International Antitrust Enforcement Assistance Act of 1994 ("IAEAA") and recently signed with Australia.<sup>111</sup> An IAEAA agreement would have envisaged the sharing of all confidential information (except for Hart-Scot-Rodino pre-merger notifications)<sup>112</sup> with Japan if it agreed to reciprocal and equivalent cooperation such that both country would agree to enforce its laws to assist the other country without regard to whether the conduct under investigation violates the law of the requested country.<sup>113</sup>

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<sup>109</sup> See *supra* note 108.

<sup>110</sup> In April 1998, the United States and the European Communities refined the 1991 Agreement with a further Agreement on the Application of Positive Comity principles in the Enforcement of Their Competition Laws. See <http://www.usdoj.gov/atr/public/international/docs/1781.htm>.

<sup>111</sup> See *supra* note 108.

<sup>112</sup> See 15 U.S.C. § 6204(1).

<sup>113</sup> See *id.* § 6202(c).



And yet there is a deeper cause for questioning the practical utility of the cooperation provisions of the OECD Recommendation. In this respect it is worth recalling that the WTO panel case on photographic film began as a Section 301 petition by the Eastman Kodak Company in 1995. It was the first — and to this point only — petition accepted by the USTR under the “toleration or encouragement” provision of Section 301. When the USTR sought to consult their Japanese counterparts, the Japanese side refused to hold formal bilateral trade consultations, even after a finding of “unfairness” by the USTR. The Japanese Government insisted that the appropriate forum in which to air the governmental aspects of the complaint was the WTO, and the issue of allegedly anticompetitive business practices fell solely within the jurisdiction of the JFTC. The U.S. side blinked — despite the clarity of U.S. law in this regard — and the case proceeded to a WTO panel pursuant to a U.S. request. In addition, the United States called for consultations on restrictive business practices under a never-used 1960 GATT Contracting Parties Decision (“1960 Decision” or “1960 GATT Decision”).<sup>114</sup> Despite the only three requests ever made under the Decision — all during 1996 — bilateral consultations were never held. Needless to say, the 1960 Decision was never used to settle any other Japan-U.S. economic dispute.

The 1960 GATT Decision stands along side a panoply on non-binding OECD Council Recommendations calling for conciliation and consultation in competition policy related disputes. The closest thing to an international agreement in respect of competition law matters remains the competition provisions of the OECD Guidelines for Multinational Enterprises (“OECD Guidelines” or “Guidelines”) set forth in the 1976 OECD Declaration on International Investment and Multinational Enterprises.<sup>115</sup> These Guidelines are, of course, not binding, but they do specify the matters that if made mandatory, could form the basis of a limited agreement on substantive competition law matters. For instance, enterprises are advised to conform

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<sup>114</sup>The GATT was based on the Chapter on Commercial Policy in the Havana Charter for the International Trade Organization (“ITO”) Chapter V of which directly addressed restrictive business practices. When it became clear that the Havana Charter would not enter into force, a Working Party of GATT Contracting Parties in 1954-55 considered proposals to include provisions along the lines of Chapter V in the GATT. It was agreed to postpone further consideration of this pending the outcome of discussions on related issues in the Economic and Social Council of the United Nations. In 1958, the GATT Contracting Parties appointed a Group of Experts on whether they should address restrictive business practices in international trade. In 1960, on the basis of the Report of the Group of Experts, the Contracting Parties adopted a Decision recommending that at the request of any contracting party, a contracting party should enter into consultations on harmful restrictive practices in international trade on a bilateral or multilateral basis as appropriate. *See generally*, WTO Working Group on the Interaction of Trade and Competition Policy, *Competition-Related Provisions in Existing WTO Agreements: Informal Note by the Secretariat* (June 17, 1997).

<sup>115</sup>*See generally*, <<http://www.oecd.org/daf/cmisi/codes/declarat1.htm>>; <<http://www.oecd.org/daf/cmisi/cime/mnetext.htm#competition>> (visited Aug. 15, 1999).

to the official competition rules of the countries in which they operate. Specifically, enterprises are advised to refrain from taking actions that would adversely affect competition in a relevant market, by abusing market power or a dominant position with respect to: anticompetitive acquisitions; predatory behavior towards competitors; unreasonable refusals to deal; anticompetitive abuse of intellectual property rights; discriminatory pricing, including transfer pricing; cartel behavior. However, other enumerated provisions would probably be the subject of intense debate as some relate to vertical practices which, as discussed above, probably tend not to be anticompetitive in the absence of market power. Of course, to be operationalized, the OECD Guidelines would also probably require intense negotiations around such issues as binding and enforceable dispute settlement provisions.

Nonetheless, the Committee of Experts on Restrictive Business Practices of the OECD has prepared several recommendations on cooperation between member states on restrictive business practices affecting international trade that have been adopted by the Council of the OECD. The recommendation of July 20, 1978 provided for inter-governmental cooperation on a purely voluntary basis without impairment of sovereignty and in accordance with each state's laws and policies in the following areas: investigation and discovery, exchange of information, coordination and cooperation.<sup>116</sup> In 1984, at a ministerial meeting to review the 1976 Guidelines for Multinational Enterprises as amended in 1979, the ministers endorsed certain general considerations and practical approaches dealing with conflicting legal requirements.<sup>117</sup> In 1995, the OECD revised its Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade ("1995 Recommendation").<sup>118</sup> The 1995 Recommendation emphasizes coordination of investigations, and assistance in an investigation or proceeding in a member country; strengthens the protections for confidentiality information; and specifies more detail to be included in merger investigations.

The point is simple. Japan and the United States are already tied into a network of non-binding multilateral trade and antitrust agreements that do not seem to have played a prominent role in the settling of any of their disputes about either public or private restrictive trade practices.

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<sup>116</sup> OECD Council Recommendation Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises *See* <<http://www.oecd.org/daf/clp/rec3com.htm>> (visited Aug. 15, 1999).

<sup>117</sup> The relevant OECD recommendations can be found via the Internet, *see* <<http://www.oecd.org/daf/cm/s/codes/declarat1.htm>>; <<http://www.oecd.org/daf/cm/s/cime/conflict.htm>> (visited on Aug. 15, 1999).

<sup>118</sup> *See* <<http://www.oecd.org/daf/clp/rec8com.htm>> (visited on Aug. 15, 1999). The 1995 Recommendation replaced the 1986 Recommendation, which itself had replaced the 1979 version of the Recommendation.

## V. CONCLUSIONS

In short, the existence of non-binding multilateral competition rules or frameworks for dispute settlement have not shown much prominence in Japan-U.S. economic relations to this point. Not surprisingly, therefore the United States has not abandoned potential recourse to the extraterritorial application of its trade and antitrust laws to address perceived public and private anticompetitive practices in Japan. Japan for its part has shown a willingness to enter into the formal WTO dispute settlement mechanisms where it feels protected from the capriciousness of U.S. unilateral action. Lying somewhere along this continuum is the current emphasis on bilateral negotiated outcomes. The question that emerges is whether that point can represent a stable equilibrium over time. It is worth considering whether a stable equilibrium would be better provided by some measure of negotiated multilateral minimum competition rules backed up by multilateral dispute mechanisms.<sup>119</sup> Such an approach might offer Japan the comfort that it seeks from unilateralism, while providing the United States with the enforceable market principles that it seeks. This multilateral approach would require Japan to challenge the United States to seek more than non-binding consultations or cooperation, but it would also require the United States to challenge Japan to commit itself once and for all to the establishment of an open and competitive domestic market.<sup>120</sup>

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<sup>119</sup> *C.f. The Proposal of the Coalition for Open Trade (COT) Addressing Private Restraints of Trade: Industries and Governments Search for Answers Regarding Trade-And-Competition Policy* 32 (Sept. 1997) (proposing to amend Section 301 "to give the USTR authority to take appropriate action to eliminate foreign 'restrictive business practices' that burden U.S. commerce [by giving] . . . USTR authority to issue cease and desist orders directing foreign enterprises to halt such practices or eliminate the burden that they place on U.S. commerce, and in case of violations of cease and desist orders, to seek civil penalties and injunctive relief in federal district court")

<sup>120</sup> See Ambassador Charlene Barchefsky, Keynote Address: The Global Trading System. A GATT 50th Anniversary Forum, The Brookings Institution, at 6 (Mar. 4, 1998):

It has been a long-held theory among many countries that sound competition law enforcement is crucial to the health of national economies. Indeed, economic globalization has dramatically increased the importance of strong competition policies due to the increased risk of international cartels and the tremendous growth in transnational mergers. Reaching agreement on competition policy within the WTO will be difficult, given the great disparity between countries on antitrust rules — both in substance and in the vigilance of their enforcement — and the fact that half of the WTO members do not have competition laws of their own. What is critical, however, is that we develop an international culture of competition and sound antitrust enforcement, built on the basis of shared experience, bilateral cooperation and technical assistance. From that base we should focus on those particular practices and industries where the most egregious anticompetitive practices have been concentrated. If we can do that, we will have a solid foundation from which to build a more comprehensive regulatory framework for competition policy.