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The Justice Department's Recent Antitrust Enforcement Policy

Robert D. Shank

The Justice Department's Recent Antitrust Enforcement Policy: Toward a "Positive Comity" Solution to International Competition Problems?

ABSTRACT

Obstacles to free competition are abundant in the international economy. Before 1992, the United States Department of Justice only attacked such obstacles if they impeded the import commerce of the United States. But as more and more businesses enter the international markets, the ability of U.S. businesses to compete in foreign markets free of export cartels and other obstacles to free competition is of greater concern. In 1992, the U.S. Justice Department addressed this concern by reversing prior policy and announcing that the U.S. government would also attack obstacles that impede the ability of U.S. businesses to export their products to foreign markets. This Note analyzes the complaints that have been filed by the Justice Department since the 1992 policy change, focusing on the jurisdictional issues that have yet to be contested and the international implications of such a change in policy. It then focuses on the legislation passed in 1994 to assist the Justice Department in international antitrust enforcement efforts, the International Antitrust Enforcement Assistance Act of 1994. This new legislation emphasizes cooperation and mutual assistance between the Justice Department and foreign antitrust enforcement bodies as the means to free the international economy from anticompetitive obstacles to free competition. The author concludes that, if confidentiality concerns of U.S. businesses are adequately safeguarded, the new legislation emphasizing bilateral mutual assistance in antitrust enforcement efforts offers more promise than the 1992 policy change in combating obstacles to free competition in foreign markets.

TABLE OF CONTENTS

I. INTRODUCTION

In many ways, the problems that confront the world economy today confronted the U.S. economy at the end of the nineteenth century. Businesses with rapidly growing power were forming trusts or other anticompetitive business practices. When investigators tried to break up such businesses, they were met with corporate resistance, especially while gathering evidence. Even if a state judgment was obtained to break up the trusts, state borders limited a state court's remedial powers. The United States Congress enacted the Sherman Act[1] in 1890 to remedy

1. 15 U.S.C. §§ 1-7 (1994).

such discovery and jurisdictional obstacles to a competitive U.S. economy.

Faced with growing obstacles to competition in the international economy and a desire to reduce the trade deficit, the United States Justice Department (the Department) has recently decided to attack foreign export cartels directly through U.S. antitrust law by rescinding footnote 159 of the 1988 Antitrust Enforcement Guidelines for International Operations (1988 International Antitrust Guidelines).[2] A U.S. solution to an international antitrust problem, however, can only accomplish so much in freeing the international economy from anticompetitive restraints on trade.

This is not to say that the recent international antitrust enforcement policy of the United States has been a failure. From a U.S. vantage point, it certainly has not. But the political and diplomatic stakes continue to rise as more and more countries enact blocking statutes and diplomatically protest the extraterritorial application of U.S. antitrust law.

This Note explores the jurisdictional, diplomatic, and comity concerns that have arisen with the aggressive enforcement stance recently taken by the Department. It then compares the new legislation passed by Congress in 1994, and concludes that bilateral mutual assistance offers a better solution to the competitive obstacles that confront U.S. businesses.

Part II of this Note examines the legal and practical obstacles that the Department must consider when seeking to regulate foreign anticompetitive conduct. Part III then analyzes the first two "footnote 159" cases, which raise a host of jurisdictional and comity questions. These questions are then discussed in the context of the proposed 1994 Antitrust Enforcement Guidelines for International Operations (1994 International Antitrust Guidelines)[3] in Part IV. By way of contrast, Part V of this Note examines the International Antitrust Enforcement Assistance Act of 1994,[4] which ideally will allow the Department access to important antitrust evidence located abroad by promising foreign

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2. U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations, *reprinted in* 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988) (Special Supp.) [hereinafter 1988 International Antitrust Guidelines]. For a discussion of footnote 159 of the 1988 International Antitrust Guidelines and its ultimate rescission, see *infra* Part III of this Note.

3. U.S. Government's Draft Antitrust Enforcement Guidelines for International Operations, *reprinted in* 67 Antitrust & Trade Reg. Rep. (BNA) No. 1685, at 490 (Oct. 20, 1994) [hereinafter 1994 International Antitrust Guidelines].

4. International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C.A. §§ 6201-6212 (West Supp. 1995) [hereinafter IAEAA].

antitrust authorities reciprocal access to evidence from U.S. businesses. Part VI then explores multilateral solutions to the problems that hinder international antitrust enforcement, and concludes that multilateral bodies may be useful in identifying areas of agreement and promoting consensus in international antitrust enforcement.

II. THE LEGAL AND PRACTICAL OBSTACLES TO REGULATING FOREIGN ANTICOMPETITVE CONDUCT

A. *Case Law and Statutory Background*

In order to analyze the implications of two recent cases concerning the application of U.S. antitrust law to foreign businesses and the recently enacted International Antitrust Enforcement Assistance Act of 1994, a brief background of congressional authority to regulate foreign anticompetitive conduct is necessary. Congress has statutory authority to regulate foreign commerce under the Sherman Act, which declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . with foreign nations."[5] Although the United States Supreme Court has held a number of times that anticompetitive restrictions on U.S. exports are prohibited by the Sherman Act,[6] there are limits to the scope of the Sherman Act as applied to foreign anticompetitive conduct.

One limit has been imposed by prior case law. In *United States v. Aluminum Co. of America (Alcoa),*[7] the Second Circuit Court of Appeals held that the Sherman Act is applicable to foreign conduct, but only if such conduct has an intended effect on United States commerce.[8] However, this "effects" test of

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5. 15 U.S.C. § 1 (1994). As the legislative history of the Sherman Act reveals, to enact it Congress relied upon its power under the Commerce Clause of the United States Constitution. *See* 21 CONG. REC. 2456, 2461 (1890).

6. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (holding that there was sufficient evidence to sustain a Sherman Act violation based on a Canadian patent pool's refusal to license imported goods in the Canadian radio and television market); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (ruling that a conspiracy to monopolize or restrain the foreign commerce of the United States in vanadium oxide is not outside the reach of the Sherman Act just because part of the conduct occurred in Canada).

7. 148 F.2d 416 (2d Cir. 1945).

8. *Id.* at 443-44. The *Alcoa* decision carries almost Supreme Court stature, since the Court only certified the case to the Second Circuit because the Court lacked a quorum of six qualified justices. *See* Marina Lao, *Jurisdictional*

extraterritorial jurisdiction was deemed incomplete by the Ninth Circuit Court of Appeals in *Timberlane Lumber Co. v. Bank of America*.[9] To the *Alcoa* effects test, the Ninth Circuit added the interests of other nations in adopting a "jurisdictional rule of reason"[10] that balanced numerous factors in deciding whether a United States court has jurisdiction over foreign conduct that affects U.S. commerce.[11]

To clarify how domestic antitrust law reaches foreign conduct affecting U.S. export trade, Congress amended the Sherman Act by enacting the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).[12] Read together, the Sherman Act and the FTAIA

Reach of the U.S. Antitrust Laws: Yokosuka and Yokota, and "Footnote 159" Scenarios, 46 RUTGERS L. REV. 821, 828 (1994). For the Supreme Court's authority to certify such a case to the Second Circuit, see 15 U.S.C. § 29 (1994).

9. 549 F.2d 597 (9th Cir. 1976), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

10. Kingman Brewster is generally credited with coining the phrase "jurisdictional rule of reason." *See* KINGMAN BREWSTER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958). In defining the ability of United States antitrust law to reach foreign conduct, Brewster's jurisdictional rule of reason took into account the following factors: (1) the relative significance to the alleged violations of conduct within the United States versus conduct abroad; (2) whether there was an explicit purpose to harm or affect U.S. business opportunities; (3) the relative seriousness of effects on the United States as compared with those abroad; (4) the nationality of the parties involved, and the fairness of applying United States law to them; (5) the degree of conflict with foreign laws and policies; and (6) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country. *Id.*

11. To determine whether jurisdiction should be exercised in antitrust cases involving foreign parties, the *Timberlane* court looked at three factors: (1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness. 749 F.2d at 1382. The *Timberlane* test has been approved by the Third Circuit in Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979), by the Fifth Circuit in Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982), *cert. denied*, 464 U.S. 961 (1983), and by the Tenth Circuit in Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982). The Seventh Circuit rejected the *Timberlane* test in *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1254-55 (7th Cir. 1980), and the D.C. Circuit implicitly rejected it in Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-49 (D.C. Cir. 1984). In 1987, the *Restatement (Third) of the Foreign Relations Law of the United States* adopted a *Timberlane*-like approach. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). The Supreme Court has yet to rule on the *Timberlane* balancing test. In a recent decision, the Court expressly refused to rule on the merits of the test, saying that "international comity would not counsel against exercising jurisdiction," even assuming that a court may decline jurisdiction over foreign conduct in an appropriate case. Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891, 2910 (1993).

12. 15 U.S.C. § 6(a) (1994).

authorize Congress to regulate trade or commerce that has a "direct, substantial, and reasonably foreseeable effect . . . on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States . . . ."[13] Congress intended the "reasonably foreseeable effect" standard to be an objective, practical standard, which merely codified prior case law.[14] The enactment of the FTAIA had no effect on principles of international comity.[15] After the FTAIA, a court could still take into account the international nature of the case in whatever manner it saw fit.

B. *Comity Concerns Inherent in the Extraterritorial Application of Antitrust Law*

Case law and statutory restrictions are not the only obstacles that must be considered when the Department seeks to enjoin foreign anticompetitive conduct through the vehicle of U.S. antitrust law. International antitrust cases are inherently different from domestic cases, due to jurisdictional issues, principles of international comity, and the significance of foreign government involvement.[16]

International law obligates every state to "exercise moderation and restraint as to the extent of [its] jurisdiction" in order to "avoid undue encroachment on a jurisdiction more properly appertaining to . . . another State."[17] Thus, every exercise of extraterritorial jurisdiction by one country infringes on another country's sovereignty to some degree.[18] And although there has been a recent trend to limit sovereignty-based defenses to the

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13. *Id.*

14. H.R. REP. NO. 686, 97th Cong., 2d Sess. 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494.

15. H.R. REP. NO. 686, 97th Cong., 2d Sess. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 (FTAIA has "no effect on the courts' ability to employ notions of comity.").

16. Justice and FTC Issue Draft Guidelines on International Antitrust Enforcement, 67 Antitrust & Trade Reg. Rep. (BNA) No. 1685, at 489 (Oct. 20, 1994).

17. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on* Hartford Fire Ins. Co. v. California, 34 VA. J. INT'L L. 213, 231 (1994) (quoting Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4, 105 (Fitzmaurice, J., separate opinion)) (alterations in original).

18. Lao, *supra* note 8, at 821. The United States has traditionally been the most aggressive nation in exercising extraterritorial jurisdiction in antitrust cases, but the European Community has become increasingly aggressive in recent years. *Id.* at 821-22 n.1. *See, e.g.*, Cases 89/85, Ahlstrom v. Comm'n (*Wood Pulp*) (E.C.J., Sept. 27, 1988), 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988). For a discussion of a similar belief in the exercise of extraterritorial jurisdiction held by Japan, see Jiro Tamura, *U.S. Extraterritorial Application of Antitrust Law to Japanese Keiretsu*, 25 N.Y.U. J. INT'L L. & POL. 385, 392-99 (1993).

exercise of jurisdiction,[19] it is imperative that the Department remain sensitive to the interests of foreign states in deciding whether to prosecute anticompetitive conduct occurring entirely abroad.[20]

A consideration of the interests of foreign states in deciding whether to prosecute foreign anticompetitive conduct is known as comity. The traditional notion of comity is "the recognition [that] one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens."[21] This perception of comity involves concepts of moderation and restraint in the extraterritorial enforcement of domestic antitrust law.[22] In many ways, the traditional notion of comity seems aberrational, because "U.S. courts weighing nebulous criteria will simply assert the primacy of U.S. interests" to justify the exercise of jurisdiction.[23] But the consequences of relegating the interests of foreign states to a secondary status, at best, should be of real concern to the Department in deciding

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19. For example, the act of state doctrine has been limited, foreign government compulsion has been further distinguished from private activity, and commercial activity has been more clearly exempted from the sovereign immunity doctrine. Tamura, *supra* note 18, at 386-87 n.7. *See also* Barry E. Hawk, *Litigating in an International Context: Special Defenses and Issues, Including Subject Matter Jurisdiction, Act of State Doctrine, Foreign Government Compulsion and Sovereign Immunity*, 50 ANTITRUST L. J. 559 (1981).

20. *See* Tamura, *supra* note 18, at 386.

21. Hilton v. Guyot, 159 U.S. 113, 164 (1895). The 1988 International Antitrust Guidelines define comity as "the notion that foreign nations are due deference when acting within their legitimate spheres of authority." 1988 International Antitrust Guidelines, *supra* note 2, at S-22.

22. Joseph P. Griffin, *EC and US Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353, 376 n.134 (1994) (citing COMMISSION, TWENTY-FIRST REPORT ON COMPETITION POLICY § 64 (1992)).

23. Alford, *supra* note 17, at 216. *Compare* Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891, 2910 (1993) (holding that international comity does not require United States courts to abstain from exercising jurisdiction over British reinsurers in an antitrust case, despite the fact that the reinsurers conduct was perfectly consistent with British law and policy) *with* Montreal Trading, Ltd. v. Amax Indus., Inc., 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982) (dismissing a suit because any effects on U.S. commerce were "insubstantial" and "speculative," and were outweighed by comity concerns). *See* J. ATWOOD & K. BREWSTER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD, § 4.11 n.61 (2d ed. 1981) (discussing the problems that other nations, specifically Canada, have with United States enforcement officials and United States courts unilaterally interpreting foreign interests). *See also* Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 589-90 (1983) (asserting that courts applying a *Timberlane*-like balancing test usually ignore or "give short shrift" to foreign national interests).

under what circumstances to prosecute foreign anticompetitive conduct.

Department attacks on foreign conduct that allegedly restrain U.S. exports may result in strong diplomatic responses.[24] These responses may range from diplomatic notes of concern and protest to the enactment of foreign blocking legislation by other countries.[25] The United Kingdom,[26] Australia,[27] and Canada[28] are among the countries that have enacted legislation restricting or prohibiting enforcement of U.S. antitrust decrees or damage awards in their jurisdictions.[29] Moreover, not only have U.S. antitrust efforts abroad been blocked in some countries, but there is always the possibility that foreign governments could attack United States businesses for similar anticompetitive conduct.[30]

When the Department challenges anticompetitive conduct that is lawful in a foreign country, antitrust prosecution becomes all the more problematic and diplomatically controversial.[31] In these instances, foreign businesses are in a no-win dilemma. On

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24. *See* Joseph P. Griffin, *New U.S. Enforcement Policy Is Assessed*, NAT'L L.J., Mar. 16, 1992, at 23, 25.

25. *Id.* For a discussion of the trend of foreign governments reacting with hostility to the enforcement of U.S. antitrust laws abroad, see ATWOOD & BREWSTER, *supra* note 23, at §§ 4.14-.19.

26. *See* Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act, *reprinted in* 21 I.L.M. 834 (1982).

27. *See* Foreign Proceedings (Excess of Jurisdiction) Act No. 3, 1984 Austl. Acts. P. 8, *reprinted in* 23 I.L.M. 1088 (1984).

28. *See* Foreign Extraterritorial Measures Act of 1985, ch. 49, *reprinted in* 24 I.L.M. 794 (1985).

29. Although Japan currently has no blocking legislation per se, it has threatened to consider such legislation. Lao, *supra* note 8, at 868. Article 200 of the Japanese Civil Procedure Act does require certain preconditions to be met before a foreign court's judgment will be deemed valid. This provision was not intended to block the enforcement of United States court judgments in antitrust cases; however, that may change in the future in antitrust cases involving Japanese defendants. Seung Wha Chang, *Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts Within the Pacific Community*, 16 HASTINGS INT'L & COMP. L. REV. 295, 301-02 (1993). In Go-Video v. Akai Electric Co., Ltd., 885 F.2d 1406 (9th Cir. 1989), a Korean manufacturer and three Japanese manufacturers defended a suit in Arizona. Jurisdiction was asserted over the defendants based on nationwide contacts with the United States, the contacts with the forum district being irrelevant to the court. *Id.* at 1414-15. The defendants ultimately prevailed, but had they lost, and treble damages been awarded to the plaintiff, one commentator implies that Japan may have invoked Article 24 of the Japanese Civil Procedure Act to preclude enforcement of the U.S. judgment in Japan. Chang, *supra*, at 302 n.46.

30. Griffin, *supra* note 24, at 26. *See generally* Griffin, *supra* note 22 (comparing recent developments in extraterritoriality jurisprudence in the European Community and the United States, and the implications that they hold for international comity concerns in the future).

31. Griffin, *supra* note 24, at 25.

the one hand, they may take advantage of every possible competitive business practice permitted by their own country's laws and risk U.S. antitrust prosecution. On the other hand, they may abide by the generally more stringent United States antitrust laws, the laws of a country in which they are not domiciled and with which they have no "minimum contacts,"[32] and risk losing out to competitors in their own country.

Thus, in considering the recent developments this Note discusses in Part III, including the 1992 rescission of footnote 159 of the 1988 International Antitrust Guidelines and the first two post-rescission antitrust cases brought by the Department, it is important to consider two questions.

First, what is the basis of jurisdiction over a foreign defendant? Subject matter jurisdiction should not legally bar the prosecution of a foreign defendant under the Sherman Act as amended by the FTAIA, if the Department can prove a "direct, substantial, and reasonably foreseeable effect" on United States export trade or commerce.[33] However, the terms "direct" and "substantial" under the FTAIA as yet have not been judicially interpreted.[34] Nonetheless, the Sherman Act as amended by the FTAIA does not set different jurisdictional standards for citizens and noncitizens, or for conduct only partially outside the United States and conduct wholly outside the United States.[35] "Assuming that the government chooses its cases well, the 'effects' of foreign collusion in a 'footnote 159' case . . . would usually be significantly anticompetitive as well as 'direct, substantial, and reasonably foreseeable.'"[36]

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32. *See generally* International Shoe Co. v. Washington, 326 U.S. 310 (1945) (establishing that a party's minimum contacts with a state are sufficient to subject that party to the state's jurisdiction). *See also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987). In the typical "footnote 159" cases this Note discusses in Part III, U.S. presence should be assumed not to exist. Lao, *supra* note 8, at 858.

33. *See supra* notes 12-15 and accompanying text.

34. Lao, *supra* note 8, at 840. In its recent decision in *Hartford Fire Ins. Co. v. California*, the Supreme Court exercised jurisdiction under the Sherman Act over activities undertaken in London by certain British defendants. 113 S.Ct. 2891, 2909 (1993). The defendants, however, had conceded in oral argument that the Sherman Act applied. *Id.* (citing Transcript of Defendant's Oral Argument at 37). Thus, the Court did not reach the issue of defining "direct" and "substantial" under the FTAIA. In dicta, the Court seemed to suggest that the FTAIA was inapplicable to the conduct at issue, observing that the FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy. *Id.* at 2909 n.23.

35. Lao, *supra* note 8, at 858.

36. *Id.*

Personal jurisdiction is much more problematic. If a foreign company has U.S. subsidiaries, then the Department might consider filing suit against the United States subsidiaries as the "alter ego" of the foreign company.[37] However, it is assumed that a U.S. presence does not exist in a true footnote 159 case.[38] Based on this assumption, it is difficult to conceive how the Department can exercise personal jurisdiction in a true footnote 159 case.

If jurisdiction is found to exist, however, the second question to consider is what are the international implications of prosecuting foreign anticompetitive conduct? Under the traditional comity analysis, arguably, international implications are paid homage, but are not seriously considered by U.S. courts that view United States interests with "rose-colored glasses."[39] It is difficult to tell how much consideration the Department gave to international interests before filing suit in the footnote 159 cases, since they were settled by consent decree. But it is easy to distinguish the traditional comity analysis and even the footnote 159 cases (since litigation was still the means employed by the Department) from the recent trend toward positive comity agreements to solve antitrust problems cooperatively.[40] In an age when nearly one-quarter of U.S. gross domestic output is related to trade with other nations,[41] the international implications of prosecuting foreign anticompetitive conduct in one manner or the other is not a trivial concern.

III. THE JUSTICE DEPARTMENT'S CHANGE IN POLICY: THE RESCISSION OF FOOTNOTE 159

A. *Attacking Restraints on Export Opportunities*

Since the end of the Reagan Administration, the Department's policy on international antitrust enforcement has

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37. Under an alter ego theory, the Department might use agency and "piercing the corporate veil" principles to assert personal jurisdiction over a foreign company on the premise that foreign "parents" were transacting business in the United States through such subsidiaries. *Id.* at 847.

38. *See supra* note 32.

39. *See supra* note 23 and accompanying text.

40. *See infra* Part V of this Note for a definition of positive comity and for a discussion of the IAEAA, the first piece of positive comity legislation to assist in international antitrust enforcement.

41. Excerpts from H.R. REP. NO. 772, 103d Cong., 2d Sess. (1994), *reprinted in* 67 Antitrust & Trade Reg. Rep. (BNA) No. 1684, at 451 (Oct. 13, 1994) (citing Economic Report of the President, Feb. 1994, at 206-07).

changed markedly. In the 1988 International Antitrust Guidelines,[42] the Department included a significant footnote. Footnote 159 stated:

> Although the FTAIA extends jurisdiction under the Sherman Act to conduct that has a direct, substantial and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.[43]

Thus, by exercising self-restraint in terms of jurisdiction, the Department stated that it would only challenge foreign anticompetitive conduct that directly harmed United States consumers.[44]

In 1992, the Department rescinded footnote 159, discarding this self-imposed jurisdictional constraint.[45] Without footnote 159, the Department could challenge anticompetitive conduct that restrained United States exports if:

> (1) [T]he conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States;
> (2) [T]he conduct involves anticompetitive activities that violate the U.S. antitrust laws—in most cases, group boycotts, collusive pricing, and other exclusionary activities; and
> (3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.[46]

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42. For a discussion of the "legal value" of the 1988 International Antitrust Guidelines, see Wilbur L. Fugate, *The New Justice Department Antitrust Enforcement Guidelines for International Operations—A Reflection of Reagan and, Perhaps, Bush Administration Antitrust Policy*, 29 VA. J. INT'L L. 295, 297-300 (1989).

43. 1988 International Antitrust Guidelines, *supra* note 2, at S-21 n.159.

44. *See* Yoshio Ohara, *The New U.S. Policy on the Extraterritorial Application of Antitrust Laws, and Japan's Response*, WORLD COMP. L. & ECON. REV., Mar. 1994, at 49, 49 (Footnote 159 "had been interpreted as prohibiting challenges to anticompetitive conduct in foreign markets, unless there was direct harm to U.S. consumers."). For example, the footnote would have precluded challenges to most, if not all, agreements to limit purchases from United States exporters, or to fix the price paid for such exports. Lao, *supra* note 8, at 823-24.

45. *Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws*, 7 Trade Reg. Rep. (CCH) ¶ 50,084 (Apr. 3, 1992) [hereinafter *Foreign Restraints*].

46. *Justice Department's April 3 Statement of Enforcement Policy: Department of Justice Policy Regarding Anticompetitive Conduct That Restricts U. S.*

The Department reasoned that Congress did not intend the antitrust laws to be limited to cases where there is direct harm to consumers.[47] Since both exports and imports are important to the United States economy, the Department's concern for competition should not be limited to imports.[48]

The rescission of footnote 159 was met with great controversy internationally. Many countries objected to the application of United States antitrust law to remedy foreign anticompetitive behavior, asserting that this was a matter to be resolved via trade negotiations and agreements, not litigation.[49] Although the Department stated that the new policy "has general application and is aimed at no particular foreign market,"[50] many believed that Japan was the reason for the rescission of footnote 159.[51]

Japan itself called the new United States policy "a violation of national sovereignty that is contrary to international law."[52] Not only was Japan concerned with the extraterritorial application of United States domestic law, but the Japanese Federal Trade Commission also feared that U.S. exporters might initiate numerous private suits against Japan or Japanese businesses in order to obtain profit.[53] Some worry that because of the strong opposition to the rescission of footnote 159, the diplomatic costs of the new enforcement policy may ultimately outweigh the domestic benefits.[54]

The Department mentioned two cases as "precedent"[55] for its new policy.[56] The first was *Zenith Radio Corp. v. Hazeltine*

Exports, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 483 (April 9, 1992) [hereinafter *Enforcement Statement*].

47. *Foreign Restraints*, *supra* note 45 (quoting James F. Rill, Assistant Attorney General in charge of the Antitrust Division).

48. *Id.*

49. Lori B. Morgan & Helaine S. Rosenbaum, *U.S. Department of Justice Antitrust Enforcement Policy*, 34 HARV. INT'L L.J. 192, 202-03 & n.61 (1993).

50. *Enforcement Statement*, *supra* note 46, at 483.

51. *See* Ohara, *supra* note 44, at 51. Part of this belief probably stems from the fact that the United States currently has a trade deficit with Japan, and from efforts to open up Japan to U.S. imports. More specifically, many members of the United States Congress consider the Japanese practice of *keiretsu*, which is a system of close cooperation between parts suppliers and manufacturers or between manufacturers and dealers, as a vertical restraint on trade illegal under United States antitrust law. *Id.*

52. Morgan & Rosenbaum, *supra* note 49, at 203.

53. Ohara, *supra* note 44, at 52.

54. Morgan & Rosenbaum, *supra* note 49, at 202-03.

55. Obviously, cases settled by consent decree are of no legal value as precedent. *See* Lao, *supra* note 8, at 836. Nonetheless, what the Department has done in the past is important, and may reflect what it intends to do in the future to attack restraints on United States export opportunities.

56. *Enforcement Statement*, *supra* note 46, at 483.

Research, Inc., one of the Canadian *Patent Pool* cases.[57] In *Zenith*, Canadian subsidiaries of United States manufacturers that were members of a Canadian patent pool agreed to grant licenses only to home entertainment firms manufacturing in Canada.[58] The pool refused to grant licenses to U.S. firms that exported radios and televisions, among other products, to Canada.[59] Aside from the private patent suit filed by Zenith, the Department filed suit, alleging a violation of Sections 1 and 2 of the Sherman Act. Rejecting the defendants' argument that Canadian activities should be governed by Canadian law, the district court stated that "a conspiracy to restrain the domestic or foreign commerce of the United States to which any [U.S.] company is a party violates the Sherman Act irrespective of the fact that the conduct complained of occurs in whole or in part in foreign countries."[60] Since *Zenith* did not involve a truly foreign conspiracy, it is questionable whether its precedential value in a footnote 159 case—which is assumed to involve a foreign conspiracy among entirely foreign participants[61]—will be compromised.[62]

Another case cited as precedent by the Department for its rescission of footnote 159 was *United States v. C. Itoh & Co., Ltd.*[63] In this case, a group of eight Japanese shellfish buyers were charged with price-fixing under U.S. antitrust law for agreeing on the prices to be paid for processed tanner crab imported from Alaska. The Japanese shellfish buyers ultimately agreed, by consent decree, to refrain for a period of ten years from exchanging information with other importers concerning prices or other terms and conditions for the purchase of processed seafood from the United States.[64] Further, they agreed not to attend or participate in any meeting where such topics were to be discussed.[65] Thus, in *Itoh*, U.S. antitrust law was applied to an exclusively-foreign buyers' cartel on foreign soil that restrained

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57. Hazeltine Research, Inc. v. Zenith Radio Corp., 239 F. Supp. 51 (N.D. Ill. 1965), *rev'd*, 388 F.2d 25 (7th Cir. 1967), *aff'd in part, rev'd in part*, 395 U.S. 100 (1969). *Zenith* is a private patent infringement case. The rest of the Canadian *Patent Pool* cases are civil cases filed by the Department: United States v. General Electric Co., Westinghouse Electric Corp. and N.V. Philips, 1962 Trade Cas. (CCH), ¶ 70,342; ¶ 70,428; ¶ 70,546 (S.D.N.Y. 1962) (consent judgments).

58. 395 U.S. at 105-06.

59. *Id.*

60. *Id.* at 100.

61. *See supra* note 32.

62. Lao, *supra* note 8, at 839.

63. 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. 1982) (consent decree).

64. 1982-83 Trade Cas. (CCH), ¶ 65,010 at 70,608.

65. *Id.*

United States export opportunities.[66] With the rescission of footnote 159, it appeared that this was the type of case the Department intended to prosecute.[67]

B. *The First Two "Footnote 159" Cases*

In discussing the recent footnote 159 cases,[68] it is important to note that these cases are not being discussed for their precedential value per se.[69] Instead, these cases are being discussed as predictors of the distinct trend toward greater extraterritorial application of U.S. antitrust law. They are being discussed to better understand the prospects and problems associated with international antitrust enforcement. They are being discussed to emphasize that these are real cases, with tangible consequences to the United States and foreign nations.[70]

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66. The only other case against an exclusively-foreign buyers' cartel on foreign soil that restrained United States export opportunities is Daishowa Int'l v. North Coast Export Co., 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982) (consent decree). Here, a U.S. export trade association, not the United States government, filed antitrust charges against a Japanese paper company. The court denied the Japanese company's motion to dismiss the alleged charges under the Sherman Act for lack of jurisdiction. Applying a *Timberlane* test, the court stated:

> It is not clear from the comity and fairness decisions whether a conflict of law exists. . . . Additionally, there is no evidence of harm to the Japanese economy from the alleged activities. On the other hand, both parties are now in court in the United States. Because the party asserting the antitrust violations is [a U.S.] corporation, this Court has great interest in providing a convenient forum and a prompt remedy. In addition, no remedy may be available under Japanese antitrust law for this [U.S.] corporation. Due to the serious nature of the anticompetitive conduct alleged, and the foreseeability of the harm occurring from the alleged activities, the balance of factors under *Timberlane* directs that this Court refuse to dismiss or strike North Coast's antitrust claims and antitrust defenses.

1982-2 Trade Cas. (CCH), ¶ 64,774 at 71,789-90. Interestingly, personal jurisdiction over this Japanese corporation and its wholly-owned subsidiary were not really at issue in *Daishowa*, because the foreign company was suing in California for breach of contract. *Id.* at 71,786.

67. Lao, *supra* note 8, at 836-37.

68. Even though footnote 159 of the 1988 International Antitrust Guidelines was rescinded by the Department in 1992, many commentators still refer to cases brought by the Department because of the 1992 policy change as footnote 159 cases. *See* Lao, *supra* note 8, at 824; Joseph P. Griffin, *Antitrust Law: Recent Cases Show that the Justice Department Is Serious About Taking Action Against Foreign Companies Whose Overseas Conduct Restrains U.S. Exports*, NAT'L L. J. (Aug. 29, 1994), at B5-B6.

69. *See supra* note 55.

70. In two other disputes where antitrust charges were threatened, but not filed, the United States obtained approximately $70 million from Japanese firms for rigging bids on contracts with United States armed forces bases in Japan. For an in-depth discussion of the *Yokosuka* and *Yokota* cases, see Lao, *supra* note 8,

In short, footnote 159 cases are being discussed not to define the scope of subject matter jurisdiction and personal jurisdiction over entirely foreign anticompetitive conduct, but to emphasize that many of these jurisdictional issues have yet to be contested. For instance, what will be the result when foreign anticompetitive conduct clearly affects U.S. export commerce, but there is no U.S. subsidiary to sue, and the potential defendant will not consent to jurisdiction in the United States? Jurisdictional and comity questions such as these will be answered by analyzing the provisions of the proposed 1994 International Antitrust Guidelines.

In May 1994, the Department announced its first case since the rescission of footnote 159,[71] *United States v. Pilkington, plc.*[72] In a complaint and proposed consent decree against a British company and its U.S. subsidiary, the Department alleged that Pilkington's patent and trade secret licenses contained geographic and use restrictions designed to limit the export of foreign-made glass to the United States as well as the export of glass produced in the United States.[73] The Department also alleged that the licensed trade secrets had diminished in value to the point that restrictions in the licenses were no longer justified.[74] Finally, the Department contended that Pilkington was enforcing trade secrets that were matters of public knowledge.[75]

Contending that the restrictions had a direct, substantial, and reasonably foreseeable effect on U.S. export opportunities, the Department based its theory for subject matter jurisdiction on the 1982 FTAIA.[76] Without such restrictions, U.S. businesses could compete for contracts to design and construct glass plants

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at 845-62. Lao says that, based on a press release issued in *Yokota*, the United States government intended to support jurisdiction with a showing of an adverse effect on the United States export of construction and telecommunications goods and services. *Id.* at 859. Lao also analyzes the suggestion that the "effect" on United States exports might be the impact of overcharging United States taxpayers in their capacity as taxpayers or consumers. *Id.* at 862. Lao concludes that this latter argument would in reality be an effect on United States domestic commerce (imports). *Id.*

71. Griffin, *supra* note 68, at B5 (citing Dept. of Justice Press Release, *Justice Department Files First Antitrust Suit Against Foreign Company Since 1992 Policy Change* (May 26, 1994)).

72. 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994) (proposed consent decree); 59 Fed. Reg. 30604 (June 14, 1994) (competitive impact statement).

73. Griffin, *supra* note 68, at B5. *See also* 59 Fed. Reg. 30604, at 30608.

74. Griffin, *supra* note 68, at B5. *See also* 59 Fed. Reg. 30604, at 30608.

75. Griffin, *supra* note 68, at B5. *See also* 59 Fed. Reg. 30604, at 30608.

76. 15 U.S.C. §§ 1, 2, 6(a) (1994). *See also supra* notes 5, 12-15 and accompanying text.

outside the United States and would export these services.[77] Also, regardless of who built such plants, United States construction suppliers could export construction materials.[78]

The Department's theory of personal jurisdiction was not elaborated upon in the proposed consent decree. One commentator contends that the Department was prepared to argue that Pilkington owned and licensed United States intellectual property rights, and also owned eighty percent of a U.S. glass maker, thus making Pilkington subject to personal jurisdiction in the United States.[79] If this was the case, then *Pilkington* is not a true footnote 159 case, because it is assumed that a U.S. presence does not exist in a footnote 159 case.[80]

Personal jurisdiction over Pilkington was actually asserted via consent in this particular case, because Pilkington, while denying the Department's allegations,[81] wanted to avoid costly litigation.[82] Pilkington agreed not to enforce certain trade secrets licensed to United States licensees.[83] However, certain technology that did qualify as trade secrets would not be precluded from being labeled confidential by Pilkington in the future.[84]

In the second footnote 159 case announced by the Department, *United States v. MCI Communications Corp.*,[85] a complaint and proposed consent decree were filed contesting a proposal by British Telecommunications to purchase twenty percent of the shares of MCI Communications and form a joint venture providing global telecommunications services. The Department alleged that this was a violation of Section 7 of the Clayton Act.[86] The Department feared that such a vertically integrated joint venture would give British telecommunications

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77. 59 Fed. Reg. 30604, at 30608.

78. *Id.* It is estimated that when a United States firm designs and supervises construction of a foreign plant costing approximately $100 million, $35-$50 million of that eventually flows back into the United States economy in orders for domestic materials, equipment, and services. It is further estimated that, if not restrained, United States exporters of float glass technology may obtain between 10% and 50% of the 30 to 50 new plants projected to be built over the next few years. Thus, potential export sales for contractors, fabricators, and suppliers could amount to between $500 million and $2.5 billion. *Id.*

79. Griffin, *supra* note 68, at B6.

80. *See* Lao, *supra* note 8, at 858.

81. Griffin, *supra* note 68, at B6.

82. *Id.*

83. 59 Fed. Reg. 30604, at 30605-06.

84. *Id.*

85. 7 Trade Reg. Rep. (CCH) ¶ 50,761 (D.D.C. 1994) (proposed consent decree); 59 Fed. Reg. 33009 (June 27, 1994) (competitive impact statement).

86. 59 Fed. Reg. 33009. *See* 15 U.S.C. § 18 (1994). Section 7 of the Clayton Act prohibits certain acquisitions, the effect of which may be "substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

companies an unfair advantage over U.S. telecommunications companies in ease of access to the United Kingdom network.[87] This in turn would raise the price of international telephone calls and other telecommunications services.[88]

But as was the case in *Pilkington*, the Department's theories of jurisdiction were not put to the test. MCI and British Telecommunications accepted the proposed consent decree, agreeing to publish rates, terms, and conditions of access to British Telecommunications network, information that was otherwise confidential.[89] The decree included provisions that were designed to prevent discrimination against U.S. carriers in offering international telecommunications services.[90] According to the Department, the terms of the decree were tailored to avoid direct United States governmental involvement in British Telecommunications' network.[91]

Future cases, in which a foreign company may not consent to jurisdiction in the United States, will more clearly delineate the implications of the Department's footnote 159 policy. If these are truly footnote 159 cases, the potential for dispute over the extraterritorial application of U.S. antitrust law remains likely. One can only speculate how the Department might have argued that U.S. courts had personal jurisdiction over a foreign monopoly like British Telecommunications had the company not consented to the proposed decree. Also unknown is how important international comity concerns were to the Department before it decided to file a complaint. This question is particularly intriguing since the United Kingdom does have blocking legislation that prevents the enforcement of judgments by certain foreign jurisdictions.[92] It is clear that the Department has assumed an aggressive stance, embodied in the rescission of footnote 159, against anticompetitive conduct in foreign jurisdictions that is perceived to restrain U.S. export opportunities. How these jurisdictional and comity concerns figure into future antitrust enforcement efforts will be answered

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87. Griffin, *supra* note 68, at B6.

88. *Id.* (citing Dept. of Justice Press Release 3 (June 15, 1994)).

89. *Id.*

90. *Id.*

91. *Id.* Several weeks after the consent decree was entered, the United Kingdom Department of Trade and Industry announced that AT&T would be granted a license to provide services throughout the United Kingdom. Andrew Adonis, *AT & T to be Granted Telecoms License*, FIN. TIMES, July 9-10, 1994, at 7.

92. *See* Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act, *supra* note 26.

in the context of the proposed 1994 International Antitrust Guidelines.

IV. THE 1994 ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS: AN ANSWER TO JURISDICTIONAL AND COMITY CONCERNS?

On October 13, 1994, the Department and the Federal Trade Commission (FTC) proposed the 1994 International Antitrust Guidelines[93] (Guidelines), which will supersede the 1988 International Antitrust Guidelines. The new Guidelines have three distinct features. First, they take a broader view of antitrust jurisdiction involving imports.[94] Second, the new Guidelines confirm the 1992 rescission of footnote 159 of the 1988 International Antitrust Guidelines.[95] Finally, the new Guidelines discuss the practices and policies of the Department and the FTC for seeking evidence in foreign countries. This Note confines its discussion primarily to the second and third features of the new Guidelines.

As has been consistently implied, in the event that a footnote 159 case is ever litigated, subject matter jurisdiction over the foreign party should not represent the major obstacle. In a world in which economic transactions observe no boundaries, the United States has by no means been the only nation to recognize the effects doctrine of jurisdiction.[96] Under U.S. law, Section 1(B) of the FTAIA codifies this effects doctrine as applied to restraints on U.S. exports.[97] The Guidelines confirm that if "(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 the foreign persons or corporations engaged in such conduct,"[98] then a U.S. court has subject matter jurisdiction over the case.

Personal jurisdiction is the unknown factor in analyzing these footnote 159 cases, and will probably pose the largest

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93. 1994 International Antitrust Guidelines, *supra* note 3. The 1988 International Antitrust Guidelines will be withdrawn when the 1994 International Antitrust Guidelines are adopted in final form. *Id.*

94. *See* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

95. *See supra* notes 45-48 and accompanying text.

96. 1994 International Antitrust Guidelines, *supra* note 3, at 495. Other governments that endorse the effects doctrine of jurisdiction include the European Union, Canada, Germany, France, Australia, and the Czech and Slovak Republics. *Id.* at 495 n.44. *See also* Cases 89/85, Ahlstrom v. Comm'n (*Wood Pulp*) (E.C.J., Sept. 27, 1988), 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988).

97. 15 U.S.C. § 6(a) (1994). *See supra* notes 12-15 and accompanying text.

98. 1994 International Antitrust Guidelines, *supra* note 3, at 496. For an example demonstrating subject matter jurisdiction under the new Guidelines, *see id.* at 497 (Illustrative Example F).

obstacle for the Department should a true footnote 159 case ever be litigated. All of the cases this Note previously analyzes, both those before 1988[99] and those after the rescission of footnote 159 in 1992,[100] have been settled by consent decree. Section 4.1 of the Guidelines concludes that the Department will bring suit only if it believes that personal jurisdiction exists under the Due Process Clause of the United States Constitution.[101] Personal jurisdiction may exist, the 1994 International Antitrust Guidelines confirm, if a party acts as an agent or transacts business in the United States through a related corporation that is in reality the alter ego of the foreign party.[102] Thus, the Department's assertion of personal jurisdiction in *Pilkington*,[103] had it been forced to make one, may have satisfied the standard established in *International Shoe Co. v. Washington*.[104]

Under the Guidelines, the personal jurisdiction issue is less clear when considering *United States v. MCI Communications*.[105] On the one hand, British Telecommunications was purchasing twenty percent of the shares of MCI—a U.S. corporation. On the other hand, British Telecommunications is a foreign monopoly power. It is difficult to imagine how a purely foreign export cartel or a foreign monopoly power could be subject to personal jurisdiction in the United States. This is one reason why the International Antitrust Enforcement Assistance Act of 1994, that this Note discusses in Part V, might prove useful. If the United States cannot obtain jurisdiction over these foreign cartels, the Department might ask the foreign antitrust authority to investigate and remedy the cartel activity itself, supported by the reciprocal promise that the United States will do the same in a

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99. *See* United States v. C. Itoh & Co., Ltd., 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. 1982); Daishowa Int'l v. North Coast Export Co., 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982). *See also supra* notes 63-67 and accompanying text.

100. *See* United States v. Pilkington plc, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994); *see also supra* notes 72-84 and accompanying text (discussing the *Pilkington* case). *See* United States v. MCI Communications Corp., 7 Trade Reg. Rep. (CCH) ¶ 50,761 (D.D.C. 1994); *see also supra* notes 85-91 and accompanying text (discussing the *MCI* case).

101. 1994 International Antitrust Guidelines, *supra* note 3, at 501. *See generally* International Shoe v. Washington, 326 U.S. 310 (1945).

102. 1994 International Antitrust Guidelines, *supra* note 3, at 501.

103. *See supra* text accompanying note 79.

104. 326 U.S. 310 (1945). *See also* cases cited *supra* note 32.

105. *See supra* notes 85-91 and accompanying text.

future investigation of U.S. competitive activity by the foreign authority.[106]

Another unknown factor in footnote 159 cases concerns the role of comity in the Department's decisions to file antitrust charges attacking foreign practices. In addressing many of the concerns inherent in the extraterritorial application of U.S. antitrust laws, the Guidelines list eight factors to be considered as part of a comity analysis by the Department.[107]

One prominent factor is the degree of conflict with foreign law or articulated foreign economic policies. A true conflict between U.S. antitrust laws and foreign laws will probably counsel against the Department filing antitrust charges. However, the Guidelines suggest, as the Supreme Court in *Hartford Fire Ins. Co. v. California* already made clear, that the word "conflict" will be interpreted strictly.[108] As the Court in *Hartford Fire* stated, if the person or business subject to regulation can comply with the laws of both nations, then no conflict exists.[109] As more countries adopt antitrust or competition laws compatible with those of the United States, the focus will continue to shift from resolving conflicts in laws to exploring who should enforce antitrust actions and what remedies should be available.[110]

Whether a foreign country encourages or prohibits certain anticompetitive practices in its territory is a relevant factor in

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106. If the country refuses to cooperate with the Department and is not amenable to jurisdiction in the United States, the Department is not without enforcement options. One option is to file suit in the country of the foreign business. This, of course, could mean that United States antitrust law may not be applied. Instead, the law of the foreign jurisdiction may be applied to determine the legality of the conduct occurring in that jurisdiction. Another possibility is to pursue a satisfactory solution to the problem through trade negotiations.

107. In performing a comity analysis, the Department and the FTC should take into account the following eight factors:

> (1) [T]he relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect United States consumers, markets, or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the effect on foreign enforcement; and (8) the effectiveness of foreign enforcement.

1994 International Antitrust Guidelines, *supra* note 3, at 497.

108. *Id.* at 497-98.

109. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2910 (1993) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, cmt. e (1987)).

110. 1994 International Antitrust Guidelines, *supra* note 3, at 497-98.

considering the degree of conflict with foreign law.[111] Presumably, the more a foreign country encourages a certain course of conduct, the more the Department should worry about placing fundamentally irreconcilable obligations on a foreign business. If "encourages" means "suggests," then the Court in *Hartford Fire* stated that no conflict exists for comity purposes because a business can comply with both laws.[112] If "encourages" really signifies "mandates," then the Guidelines seem to advise against filing a complaint.[113] If the conduct in question is prohibited by both U.S. and foreign antitrust laws, the Department must decide whether the United States (as opposed to the foreign country) should pursue antitrust charges and, if so, what remedy it should seek.[114]

Other factors relevant to a comity analysis include the degree of harm caused by the foreign cartel to the United States, whether foreign parties purposefully benefited from doing business with the United States, and whether a foreign authority comparable to the Department or the FTC can more effectively take action to address the anticompetitive effects on U.S. commerce.[115] This Note will address this last factor, working cooperatively with foreign antitrust enforcement authorities, in the context of the newly enacted International Antitrust Enforcement Assistance Act of 1994.

V. "POSITIVE COMITY" LEGISLATION: THE INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994

A. *Prior Limitations to Antitrust Cooperation Between Nations*

Comity considerations, as this Note discusses in Parts II-IV, might affect the Department's decision whether to prosecute foreign anticompetitive conduct under U.S. antitrust law. These considerations, traditionally called "negative comity,"[116] involve concepts of moderation and restraint in the assertion of national

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111. *Id.*
112. *Hartford Fire*, 113 S.Ct. at 2910.
113. 1994 International Antitrust Guidelines, *supra* note 3, at 497-98.
114. *Id.* at 498.
115. *Id.*
116. For a brief explanation of the term "negative comity" and its implications, see Ohara, *supra* note 44, at 52-53. Other commentators simply refer to "negative comity" as the traditional notion of comity. *See* Griffin, *supra* note 22, at 376.

interests.[117] But in the last few years, there have arisen more examples of "positive comity," where countries seek to work together to remedy anticompetitive conduct and to avoid disputes under international law concerning assertions of extraterritorial jurisdiction. One commentator has concluded that any impact that positive comity might have will be marginal:

> It is not realistic to expect one government to prosecute its citizens solely for the benefit of another. It is no accident that this has not happened in the past, and it is unlikely to happen in the future. We should not expect the principle of positive comity . . . to impact dramatically on the proposition that laws are written and enforced to protect national interests.[118]

Nonetheless, U.S. antitrust authorities have urged for legislation to assist them in investigating and prosecuting violations of U.S. antitrust law in the international marketplace. Until the enactment of the International Antitrust Enforcement Assistance Act of 1994 (IAEAA), such investigations undertaken unilaterally have been met by foreign blocking statutes or foreign sovereignty concerns, which quite often restricted access to important evidence located abroad.[119]

Compared with other areas of law, the antitrust field has traditionally been constrained in its investigation of anticompetitive activity abroad. For almost a decade, the Securities and Exchange Commission (SEC) has concluded bilateral agreements with foreign securities authorities to share information and provide reciprocal investigatory assistance.[120] Having the authority to offer its foreign counterparts reciprocal assistance has put the SEC in an excellent position to "police the internationalized [securities] market."[121] In addition to securities enforcement, significant advances have also been made in the areas of taxation and money laundering via mutual assistance

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117. Griffin, *supra* note 22, at 376 n.134.

118. *Id.* at 377 (quoting James R. Atwood, *Positive Comity—Is It a Positive Step?*, 1992 FORDHAM CORP. L. INST. 79, 87 (Barry Hawk ed., 1993)).

119. Excerpts from H.R. REP. No. 772, 103d Cong., 2d Sess., *reprinted in* 67 Antitrust & Trade Reg. Rep. (BNA) No. 1684, at 451 (Oct. 13, 1994); excerpts from S. REP. No. 388, 103d Cong., 2d Sess., *reprinted in* 67 Antitrust & Trade Reg. Rep. (BNA) No. 1684, at 457 (Oct. 13, 1994).

120. *Clinton Administration Looks to Cooperative Enforcement Assistance and Other Cooperative Mechanisms to Strengthen Antitrust Enforcement*, 9 INT'L ENFORCEMENT L. REP. 402, 404 (1993). Section 21(a) of the Securities Exchange Act of 1934 gives the SEC authority to negotiate memoranda of understanding under which it can ask for and give assistance to its counterparts abroad. *See* 15 U.S.C. § 78(a) *et seq.* (1994). The SEC has concluded fifteen memoranda of understanding with foreign countries, which puts it in daily contact with its foreign counterparts. *ASIL Panel Outlines International Enforcement in the Clinton Administration*, 10 INT'L ENFORCEMENT L. REP. 204, 204-06 (1994).

121. Excerpts from S. REP. No. 388, 103d Cong., 2d Sess., *supra* note 119, at 458.

agreements.[122] The Working Party of the Organization for Economic Cooperation and Development (OECD) Committee for Competition Law and Policy has studied these advances to determine if they might apply to the realm of antitrust enforcement, where the need for mutual assistance and information sharing is just as great.[123]

The United States has entered into a number of cooperative relationships with foreign countries in recent years. In 1990, the United States and Canada signed a mutual legal assistance treaty (MLAT) covering criminal matters.[124] In 1994, this MLAT was used in a joint effort by the Justice Department, the Canadian Bureau of Competition Policy, and the Canadian Department of Justice to break up a cartel earning $120 million annually in the fax paper market.[125] Absent the cooperation and assistance of Canadian governmental agencies, the Department would have been unable to prosecute this conspiracy because "key evidence . . . was located in Canada and beyond the reach of [U.S.] investigative capabilities."[126] But, of the at least thirteen MLATs in force,[127] only the MLAT with Canada explicitly covers antitrust enforcement.[128] The other treaties are confined to criminal matters, and in most countries antitrust violations are not criminalized.[129]

United States antitrust authorities have also entered into nontreaty agreements, or memoranda of understanding, with

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122. *Clinton Administration Looks to Cooperative Enforcement Assistance and Other Cooperative Mechanisms to Strengthen Antitrust Enforcement*, *supra* note 120, at 404.

123. *Id.* at 403-04.

124. Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., *reprinted in* 24 I.L.M. 1092 (1985).

125. *See* United States v. Kanzaki Specialty Papers, Inc., 6 Trade Reg. Rep. (CCH) ¶ 45,094 (D. Mass. 1994) (charges were filed in the United States and in Canada against a Japanese corporation, two U.S. subsidiaries of Japanese companies, and a former president of one of the United States subsidiaries for their involvement in a price fixing conspiracy that raised the price of fax paper by approximately 10%; the defendants pleaded guilty and agreed to pay criminal fines totaling over $6 million).

126. *Bingaman Briefs Seminar on International Fronts*, 67 Antitrust & Trade Reg. Rep. (BNA) No. 1687, at 543 (Nov. 3, 1994).

127. The Department cites 13 criminal mutual legal assistance treaties currently in force, with the governments of Canada, Switzerland, the Netherlands, Spain, Italy, Turkey, Thailand, Morocco, Mexico, Argentina, Uruguay, the Bahamas, and the Cayman Islands. MLATs with Panama and Nigeria are awaiting Senate consideration, and MLATs with Belgium and Jamaica have been ratified by the Senate, but are awaiting action by the other country. Excerpts from H.R. REP. NO. 772, 103d Cong., 2d Sess. (1994), *supra* note 119, at 451 n.8.

128. *Id.* at 451.

129. *Id.*

Australia,[130] Canada,[131] Germany,[132] and the European Commission.[133] But these agreements represented diplomatic gestures more than substantive provisions facilitating international antitrust enforcement. This resulted from the fact that, until the passage of the IAEAA, domestic antitrust laws restricted the ability of the Department and the FTC to share information obtained under compulsory process.[134] Section 4 of the Antitrust Civil Process Act,[135] sections 6(f) and 21 of the Federal Trade Commission Act,[136] and Rule 6(e) of the Federal Rules of Criminal Procedure[137] all severely constrained the ability of the Department and the FTC to share information with foreign authorities.[138] The United States could hardly persuade foreign nations to provide it with useful, confidential information about competitive practices when the United States could not promise the same information in return.[139] Although these memoranda of understanding did not facilitate cooperation among United States and foreign antitrust authorities in the manner in which the Department had desired, perhaps such agreements were necessary to spark information flow between antitrust authorities.[140]

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130. Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Aus., 34 T.I.A.S. No. 10,365, *reprinted in* 21 I.L.M. 702 (1982).

131. Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, U.S.-Can., 23 I.L.M. 275 (1984).

132. Agreement on Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956.

133. Agreement on Application of Competition Laws, Sept. 23, 1991, U.S.-E.C., *reprinted in* 30 I.L.M. 1491 (1991). This particular agreement was invalidated on August 9, 1994 by the European Court of Justice because the European Commission did not have the power to conclude the antitrust agreement. The European Commission intends to take the steps necessary to have the agreement concluded in the proper manner. Griffin, *supra* note 68, at B6 n.32.

134. Excerpts from H.R. REP. No. 772, 103d Cong., 2d Sess., *supra* note 119, at 451.

135. 15 U.S.C. § 1313 (1994).

136. 15 U.S.C. §§ 46, 57b-2 (1994).

137. FED. R. CRIM. P. 6(e).

138. Excerpts from H.R. REP. No. 772, 103d Cong. 2d Sess., *supra* note 119, at 451.

139. *Id.*

140. In the year prior to the agreement between the United States and the European Community (EC), the United States sent four notifications to the EC to investigate certain practices and received two from the EC. In the first two years after entering into the agreement, United States enforcers sent about sixty notifications to the EC and received about forty in return. Griffin, *supra* note 22, at 375. The agreement also allows private practitioners to approach the Department to ask the EC to probe into alleged anticompetitive conduct. Finally, the agreement precludes United States agencies from claiming a lack of resources as a reason for refusing to act on a complaint about conduct in the EC. *Antitrust*

This conclusion is bolstered by considering the recent investigation of Microsoft's licensing practices in *United States v. Microsoft Corp.*[141] Faced with antitrust investigations by both the Department and the European Commission, Microsoft agreed to waive its confidentiality rights under United States antitrust law and permit the two authorities to exchange confidential information.[142] This represented the first joint effort between United States and European Community enforcement authorities in initiating, investigating, and settling an antitrust enforcement action.[143]

B. *The International Antitrust Enforcement Assistance Act of 1994*

The culmination of the Department's efforts to establish a mechanism to strengthen international antitrust enforcement capabilities is the International Antitrust Enforcement Assistance Act of 1994 (IAEAA),[144] which was passed in October of 1994. The IAEAA is the first legislative step in "response to the very real threat to business freedom and consumer welfare from foreign cartel activity, which has no place in our increasingly globalized economy."[145] In enacting the IAEAA, Congress recognized that the extraterritorial application of antitrust law was danger-ridden and required substantial deliberation as well as reciprocal mutual assistance between antitrust enforcement authorities in the United States and abroad.[146] To this end, the IAEAA seeks to balance the need of antitrust enforcers for probative evidence concerning business activities occurring abroad with the need of businesses competing in an unforgiving international marketplace to protect confidential information from rivals.[147] For positive comity legislation like the IAEAA to be successful in fostering an attitude of cooperation between United States and foreign antitrust authorities, U.S. businesses must be able to rely on

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Law "Bad Weapon" to Combat Trade Imbalance, Attorney Says, INT'L BUS. & FIN. DAILY (BNA), Feb. 2, 1993, *available in* Westlaw, BNA-IBFD database.

141. 1995-2 Trade Cas. (CCH) ¶ 71,096 (D.D.C. 1994) (proposed consent decree).

142. Griffin, *supra* note 68, at B6.

143. *Id.*

144. IAEAA, *supra* note 4.

145. Excerpts from H.R. REP. NO. 772, 103d Cong., 2d Sess. (1994), *supra* note 119, at 450.

146. *Id.*

147. *Id.*

assurances made by foreign authorities that their confidences will be protected absent evidence of a violation.[148]

The IAEAA authorizes the Attorney General of the United States and the FTC to provide antitrust evidence about U.S. businesses to assist a foreign antitrust authority "(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or (2) in enforcing any of such foreign antitrust laws."[149] Thus, the IAEAA overrides confidentiality restrictions in the Antitrust Civil Process Act[150] and the Federal Trade Commission Act,[151] freeing the Department or the FTC to disclose certain evidence to foreign authorities.

But United States assistance is not confined merely to disclosure of certain evidence. The Attorney General or the FTC may "conduct investigations to obtain antitrust evidence relating to a possible violation of the foreign antitrust laws administered or enforced by the foreign antitrust authority with respect to which such agreement is in effect . . . ."[152] Such investigations may be undertaken to determine whether foreign antitrust laws have been violated and to enforce foreign antitrust laws.[153]

The Attorney General has wide discretion in deciding whether to honor a request for investigative assistance under the IAEAA,[154] regardless of whether the conduct violates U.S. antitrust laws.[155] The only real limitation on the scope of investigations to assist a foreign antitrust authority is that "[a] person may not be compelled . . . to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege."[156] Presumably, in including such a protective provision, Congress had in mind the constitutional privilege against self-incrimination in criminal antitrust matters, though nowhere is this stated. To enforce the investigative powers of the Attorney General and the FTC, the Attorney General may ask a federal district court to order testimony or a statement to be given, or a document or other thing to be produced, to assist in determining whether a violation

148. *Id.*
149. 15 U.S.C.A. § 6201 (West Supp. 1995).
150. *See supra* note 135.
151. *See supra* note 136.
152. 15 U.S.C.A. § 6202(b) (West Supp. 1995).
153. *Id.*
154. "No further action shall be taken under this section with respect to any part of a request [for investigative assistance] that has been denied by the Attorney General." *Id.* § 6202(a).
155. *Id.* § 6202(c).
156. *Id.* § 6202(d).

of foreign antitrust law has occurred or is about to occur, or to enforce such antitrust laws.[157]

But these sections of the IAEAA may have less meaning to foreign antitrust authorities than Section 6211(2) of the IAEAA does to the Department and the FTC. Because the United States is the world's leader in enforcing antitrust laws, if there are inquiries from foreign antitrust authorities about alleged harmful anticompetitive activity in the United States, it is more than likely that U.S. antitrust authorities will prefer to prosecute under U.S. antitrust law. Under Section 6211(2), neither the Attorney General nor the FTC may conduct an investigation under Section 6202, apply for an order under Section 6203, or otherwise provide evidence to a foreign antitrust authority, unless an antitrust mutual assistance agreement is in effect. Such an agreement will be in effect only if the foreign antitrust authority provides:

> (A) An assurance that the foreign antitrust authority will provide to the Attorney General and the Commission assistance that is *comparable in scope* to the assistance the Attorney General and the Commission provide under such agreement or such memorandum; and
> (B) An assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received under section 6201, 6202, or 6203 of this title and will give protection to antitrust evidence received under such section that is *not less than the protection provided* under the laws of the United States to such antitrust evidence.[158]

These specifications require that the arrangement be reciprocal—that the foreign antitrust authority provide similar antitrust investigatory assistance in return—and that the foreign antitrust authority keep sensitive business data confidential and use it only for law enforcement purposes.[159] By giving United States authorities access to valuable evidence that has not been available in the past, these provisions will certainly assist the Department and the FTC in prosecuting foreign anticompetitive conduct that affects U.S. exports (or imports). Yet, the confidentiality provisions seem strict, in order to protect sensitive information that U.S. businesses may otherwise be reluctant to divulge to foreign antitrust authorities.

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157. *Id.* § 6203(a). Such an application should be filed by the Attorney General in the United States district court for the district in which a person resides, is found, or transacts business. *Id.*

158. *Id.* § 6211(2) (emphasis added).

159. Excerpts from H.R. REP. NO. 772, 103d Cong., 2d Sess., *supra* note 119, at 450.

An additional factor that the Attorney General or the FTC must consider is whether conducting an investigation, applying for a judicial order, or providing the requested evidence is consistent with the public interest of the United States.[160] This condition was included to provide the Attorney General and the FTC with discretion in considering whether special circumstances exist in a particular case that would render the provision of the requested assistance ill-advised.[161] In considering the public interest of the United States, it is important to determine whether the foreign state (or economic organization represented by the foreign antitrust authority) holds any proprietary interest that could benefit or otherwise be affected by an investigation, a judicial order, or the provision of such antitrust evidence.[162]

One final prerequisite must be satisfied before any evidence can be disclosed to foreign authorities. Namely, the antitrust mutual assistance agreement that is in effect must meet the publication requirements of Section 6206 of the IAEAA.[163]

Certain classes of information are exempted from the provisions of the IAEAA under Section 6204, because Congress deemed such information "too sensitive to be shared."[164] One such class that is absolutely prohibited from being disclosed is information received under the pre-merger notification provisions

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160. *Id.* § 6207(a)(3).

161. Excerpts from H.R. REP. NO. 772, 103d Cong., 2d Sess., *supra* note 119, at 453.

162. 15 U.S.C.A. § 6207(a)(3) (West Supp. 1995). Other factors that aid in a determination of the public interest of the United States include: (1) whether notice to a party affected by the disclosure is appropriate, since notice to affected parties is not mandatory; (2) in a case involving testimony under a grant of immunity, whether the foreign antitrust authority is prepared to grant immunity comparable in scope to that granted in the United States; (3) whether the evidence requested pertains to future business plans or product plans, which are inherently more sensitive than past business conduct and are generally subject to stricter scrutiny under antitrust laws. Excerpts from H.R. REP. NO. 772, 103d Cong. 2d Sess., *supra* note 119, at 454. In considering these public interest factors, the Attorney General and the FTC may decide to furnish certain evidence only on conditions further circumscribing its use. *Id.*

163. 15 U.S.C.A. § 6206 (West Supp. 1995). Section 6206 of the IAEAA requires that a proposed antitrust mutual assistance agreement be published in the Federal Register and public comment be requested not less than 45 days before the agreement is entered into, *id.* § 6206(a); that proposed amendments to an agreement in effect be published in the Federal Register and public comment be requested not less than 45 days before the amendment is to be effective, *id.* § 6206(b); and that antitrust mutual assistance agreements, amendments, and terminations be published in the Federal Register no later than 45 days after the entry date, amendment date, or termination date, *id.* § 6206(c).

164. Excerpts from H.R. REP. NO. 772, 103d Cong., 2d Sess., *supra* note 119, at 452.

of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[165] A second class of restricted information is antitrust evidence presented before a grand jury, the disclosure of which is prevented by federal law.[166] Unless a foreign antitrust authority can show a "particularized need"[167] for the grand jury evidence, it cannot be disclosed. Particularized need is not explicitly defined, so that courts may exercise some discretion in determining whether such a need exists.[168] A third class of evidence that is absolutely prohibited from being disclosed under the IAEAA is evidence that is authorized to be kept secret for national defense or foreign policy reasons and that is classified or pending classification.[169] Finally, antitrust evidence that is classified under section 2162 of the Atomic Energy Act of 1954 may not be disclosed.[170]

C. *Are There Adequate Safeguards to Protect United States Businesses?*

With confidentiality being of such great concern to U.S. businesses competing internationally, how the IAEAA treats breaches of confidentiality is an important issue. Like their foreign counterparts, U.S. antitrust authorities are bound not to disclose evidence in violation of an antitrust mutual assistance agreement.[171] One exception is that the Attorney General or the FTC shall *not* withhold evidence from a defendant in an action or

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165. 15 U.S.C.A. § 6204(1) (West Supp. 1995). *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1994). When the IAEAA was under consideration, the U.S. business community expressed concerns that improper release of such information could be devastating to the competitive international positions of United States businesses. This is the reason for the absolute prohibition. Excerpts from H.R. REP. No. 772, 103d Cong., 2d Sess., *supra* note 119, at 452.

166. 15 U.S.C.A. § 6204(2) (West Supp. 1995).

167. *Id.* § 6204(2)(A). *See generally* Illinois v. Abbott & Assoc., 1983-1 Trade Cas. ¶ 65,290, 460 U.S. 557 (1983). For purposes of determining whether a foreign antitrust authority has a particularized need for grand jury evidence, a foreign antitrust authority shall be considered an appropriate official of any of the states and a foreign antitrust law administered or enforced by the foreign antitrust authority shall be considered a state criminal law. 15 U.S.C.A. § 6204(2)(A)-(B) (West Supp. 1995). However, a particularized need of a foreign government official may be different from that of a state official. Excerpts from H.R. REP. No. 772, 103d Cong., 2d Sess., *supra* note 119, at 453.

168. Excerpts from H.R. REP. No. 772, 103d Cong., 2d Sess., *supra* note 119, at 453.

169. 15 U.S.C.A. § 6204(3) (West Supp. 1995).

170. *Id.* § 6204(4).

171. *Id.* § 6207(b).

proceeding brought by the Attorney General or the FTC if disclosure would otherwise be required by federal law.[172] If, however, a foreign antitrust authority improperly discloses evidence in violation of an antitrust mutual assistance agreement, the foreign antitrust authority shall notify the Attorney General or the FTC.[173] The Attorney General or the FTC then must give notice to the person who provided such evidence.[174] Herein lies a potential problem of the new legislation.

Sensitive, confidential information can be improperly disclosed by a foreign authority, and the party that provided the evidence will only be notified afterwards that the information has fallen into the hands of potential competitors. The Chairman of the Competition Committee of the U.S. Council for International Business voiced concerns that companies do not have to be notified before information is disclosed by the Attorney General or the FTC.[175] Congress chose not to mandate notice to affected parties before disclosure because it envisioned some instances where notice would not be advisable.[176] Whether a company that may be adversely affected by the disclosure of sensitive information should be notified of the foreign request and have an opportunity to express its concerns to the Attorney General or the FTC before disclosure is another public interest factor to be taken into account under Section 6207(a)(3).[177] For the IAEAA to be effective, the Attorney General and the FTC must closely scrutinize the confidentiality procedures of the foreign antitrust authority *before evidence is provided* to insure that instances of improper disclosure are kept to a bare minimum.[178]

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172. *Id.*

173. *Id.* § 6211(2)(H)(i).

174. *Id.* § 6211(2)(H)(ii).

175. *House Subcommittee Considers Bill for Reciprocal Antitrust Enforcement*, INT'L BUS. & FIN. DAILY (BNA), Aug. 9, 1994, at D2, *available in* Westlaw, BNA-IBFD database.

176. Excerpts from H.R. REP. NO. 772, 103d Cong., 2d Sess., *supra* note 119, at 454. For example, if the affected party is a target or subject of a criminal investigation by the foreign antitrust authority, notice could alert the affected party to take evasive action.

177. *Id. See also supra* notes 161-63 and accompanying text.

178. This is especially pertinent, since the determinations of the Attorney General and the FTC made before providing evidentiary, investigatory, or discovery assistance are completely exempt from judicial review. 15 U.S.C.A. § 6208(a) (West Supp. 1995). Due to the subjective and forward-looking nature of the reciprocity determinations and confidentiality assurances, the House Committee concluded that they must lie within the considered discretion of the Attorney General and the FTC. Excerpts from H.R. REP. NO. 772, 103d Cong., 2d Sess., *supra* note 119, at 454. The House Committee expects the Attorney General and the FTC to take utmost care in exercising this discretion. *Id.*

VI. THE POSSIBILITY OF MULTILATERAL CONSENSUS: A LOOK AT ALTERNATIVE SOLUTIONS TO INTERNATIONAL ANTITRUST PROBLEMS

A. *The Feasibility of Multilateral Solutions*

In many ways, it seems correct to assert that the recent footnote 159 cases and the Supreme Court decision in *Hartford Fire Ins. Co. v. California* are "swimming against a rising tide of cooperation in international antitrust enforcement."[179] Although it may be too early to determine the international implications, if any, of cases like *Pilkington* and *MCI Communications* on international antitrust enforcement, unilateral solutions to international problems are inherently limited.[180] Inevitably, U.S. courts will treat United States interests as worthy of special consideration and will find jurisdiction over foreign anticompetitive activity.[181] Just as inevitably, when domestic antitrust law is applied extraterritorially, distrust prevails between the United States and its foreign trading partners. The United States must worry about retaliatory actions, both in the form of blocking statutes and in the threat that foreign countries might sue U.S. businesses for anticompetitive behavior affecting them.[182]

Positive comity legislation like the IAEAA addresses the aforementioned shortcomings. When bilateral mutual assistance agreements are formed, reciprocity and cooperation become the proposed solutions to the problem of anticompetitive conduct in the international economy, not self-imposed restraints and moderation. A multilateral consensus on international antitrust law and its application extraterritorially is clearly overdue.[183]

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179. Alford, *supra* note 17, at 230.

180. Chang, *supra* note 29, at 309. The term "unilateral" refers to the process of United States courts weighing traditional comity concerns, including the interests of other nations, as seen in *Timberlane* and recommended by the FTAIA and the 1994 International Antitrust Guidelines. *See supra* Part II of this Note.

181. *See* Chang, *supra* note 29, at 305. *See also* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 951 (D.C. Cir. 1984) (stating that "courts inherently find it difficult neutrally to balance competing foreign interests [and, when] there is any doubt, national interests will tend to be favored over foreign interests. . . .").

182. *See supra* notes 24-30 and accompanying text.

183. *See, e.g.*, Joseph P. Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws*, 18 STAN. J. INT'L L. 279, 304-07 (1982). *Compare* Chang, *supra* note 29, at 309-10.

Such agreements would, if feasible, be a natural next step away from the unilateral trend of years past.

Throughout the 1980s and 1990s, proposed multilateral solutions to international antitrust conflicts have met with discouragingly little success. For example, in 1980, the United Nations adopted a voluntary antitrust code that created an antitrust secretariat committee in Geneva.[184] Since then, the Council of the OECD and the Institute of International Law have made recommendations concerning extraterritorial jurisdiction and anticompetitive practices affecting international trade.[185]

Most recently, a group of twelve experts known as the International Antitrust Code Working Group proposed an International Antitrust Code (Code) to be adopted as a plurilateral trade agreement under the General Agreement on Tariffs and Trade (GATT).[186] The more important provisions of the proposed Code include: (1) the prohibition of horizontal restraints on trade, which applies to all import, export, and international cartels,[187] with a specific emphasis on export cartels;[188] and (2) the establishment of an International Antitrust Authority (IAA) consisting of a President and an International Antitrust Council to ensure observance of the Code by contracting parties.[189] The proposed Code additionally empowers the IAA to bring actions against national antitrust authorities before national law courts, sue private persons who act to restrain competition before national law courts, and enforce provisions of the Code against contracting parties.[190]

The drafters of the Code consider an international antitrust code as useful internationally as was the development of a United States federal antitrust code domestically toward the end of the nineteenth century.[191] It would:

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184. *See Justice Official Predicts Scant Prospect of International Code*, BNA INT'L BUS. & FIN. DAILY, Feb. 8, 1994, at D6, *available in* Westlaw, BNS-IBFD database.

185. *See* Alford, *supra* note 17, at 230-31 n.78.

186. Int'l Antitrust Code Working Group, Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (July 10, 1993) [hereinafter GATT-MTO-Plurilateral Trade Agreement], *reprinted in* 65 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Spec. Supp. 1993).

187. GATT-MTO-Plurilateral Trade Agreement art. 4, § 1.

188. "[V]ictims of the export cartel may as a practical matter find it impossible to get relief by attempts to enforce the law of their own nation because of jurisdictional, discovery and enforcement problems. The export cartel problem is therefore a prime example of why an international antitrust regime is necessary, and it is a prime application of the principle that one may not do to non-nationals what one is not permitted to do at home." *Id.* art. 4, § 1 cmt. 2.

189. *Id.* art. 19, § 1(a).

190. *Id.* art. 19, § 2.

191. *Justice Official Predicts Scant Prospect of International Code*, *supra* note 184, at D6.

> 1) [A]llow antitrust enforcement to be considered from the interest of a world citizen, whether that be a consumer or business;
> 2) avoid the effects of parochial behavior by individual nations through such means as export cartels; and
> 3) eliminate the high transaction costs that spring from different rules by different nations.[192]

This particular proposal, if ever adopted, would also represent the first time that competition policy was explicitly included as part of a plan to accomplish trade goals,[193] although the Department was seeking to do the exact same thing when it rescinded footnote 159 and when it brought the *Pilkington* and *MCI Communications* cases.

B. *Multilateral vs. Bilateral Solutions*

An international antitrust code is of questionable feasibility. Plurilateral (or multilateral) trade agreements are limited to an even greater extent by what could hinder the IAEAA: lack of ability to bind nations that do not feel it is in their interest to abide by international antitrust or trade provisions. The more parties to an agreement, the greater is the potential for national interests to conflict and prevent consensus on principles of international antitrust enforcement. "Unless its substantive principles are made as non-binding suggestions, the Code would subject national antitrust enforcement to unacceptable standardization . . . [and would] be rejected out of hand by key nations such as the United States."[194]

This is not to say that international bodies should not continue actively identifying areas of agreement in the antitrust realm and promoting consensus in the international community.[195] But, in a world where many obstacles to free competition remain, bilateral antitrust assistance agreements like those mandated under the IAEAA, rather than multilateral agreements, seem more likely to have an impact on freeing the international marketplace from such competitive restraints.[196]

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192. *Id.*

193. *See* Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 427 (1994).

194. *Id.*

195. *Id.*

196. *See* Chang, *supra* note 29, at 309-10 ("[T]he United States and the other Pacific countries should initially attempt to enter into bilateral agreements in order to resolve the current [antitrust] conflict."). *Compare* Griffin, *supra* note 183, at 305 ("[T]he best long-term solutions are multilateral agreements on antitrust substance and procedure.").

An effective IAEAA can convince other nations to work cooperatively to resolve the conflicts posed by the extraterritorial application of national antitrust law.

VII. CONCLUSION

In sum, the footnote 159 cases are one approach the Justice Department has taken to solving trade problems that stem from foreign anticompetitive conduct. In theory, a host of comity considerations, which include the interests of other nations, are weighed by the Department before charges are filed. As a practical matter, if weighed by United States courts, United States interests will always favor jurisdiction, though in a true footnote 159 case it would be a stretch for the United States to satisfy domestic jurisdictional standards.

The newly-enacted International Antitrust Enforcement Assistance Act of 1994 endorses a positive comity approach to trade problems that stem from foreign anticompetitive conduct, and, accordingly, contrasts with the footnote 159 approach. Cooperation and reciprocity are the central legislative themes of the IAEAA. The Justice Department nevertheless retains full discretion to deny foreign requests for antitrust enforcement assistance when it sees fit. Multilateral proposals have also been entertained to solve antitrust problems that transcend national borders.

Whatever method or methods the Justice Department utilizes as part of its foreign antitrust policy, a number of goals must be included. First, anticompetitive cartel activity must be eliminated worldwide.[197] Second, the harmonization of national antitrust laws must be promoted, making the difficult questions of international enforcement focus not on whether the conduct should be prosecuted, but rather on what nation is in the best position to eliminate the anticompetitive activity. Third, the Department must assist other nations in developing an international trading community free of informational and jurisdictional obstacles. These barriers disrupt a nation's ability to seek redress from a foreign business for conduct foreseen to be harmful to that nation's economy. From the perspective of the international community, the International Antitrust Enforcement

197. One commentator notes the irony of lecturing our trading partners on the evils of cartels in international trade when the United States encourages their use domestically. United States exporters find export associations (cartels) of little value, "and any benefits to the United States are outweighed by the restrictive trade practices they cause or justify in response by our trading partners." Schoenbaum, *supra* note 194, at 418-20.

Assistance Act of 1994 best fulfills these goals through bilateral mutual assistance agreements. Whether the Justice Department accepts the perspective of the international community remains to be seen.

Robert D. Shank[*]

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