

NOTES

A COMPARATIVE ANALYSIS OF THE EFFICACY OF BILATERAL AGREEMENTS IN RESOLVING DISPUTES BETWEEN SOVEREIGNS ARISING FROM EXTRATERRITORIAL APPLICATION OF ANTITRUST LAW: THE AUSTRALIAN AGREEMENT

I. BACKGROUND

The application of United States antitrust law to conduct engaged in by individuals and firms outside United States borders¹ frequently constitutes the source of international antitrust conflict.² The exportation of United States antitrust law, both direct³ and indirect,⁴ is perceived by the recipient national sovereign as an intrusion adversely affecting its ability to control and direct na-

¹ As early as 1945, United States courts espoused the principle of "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders, that has consequences within its borders, which the state reprehends" *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945). The strict standards of United States antitrust law declare illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations." Sherman Act, 15 U.S.C. § 1 (1976) (emphasis added). United States antitrust enforcement agencies have reaffirmed their commitment to the extraterritorial application of United States antitrust law by stating that no essential distinction is made between domestic and foreign firms concerning antitrust enforcement in the United States. See generally ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (1977) [hereinafter cited as ANTITRUST GUIDE]; Bell, *International Comity and the Extraterritorial Application of Antitrust Laws*, 51 AUSTL. L.J. 801 (1977).

² See, e.g., Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 CORNELL INT'L L.J. 195 (1978). The author observes that the "use of extraterritorial antitrust investigation, far from preventing diplomatic controversy and confrontation, tends to exacerbate these problems and to draw the legislature and judiciary into the fray as well." *Id.* at 201.

³ United States antitrust officials have participated extensively in the formulation of antitrust legislation and policy of the European Economic Communities, the Federal Republic of Germany, and Australia. King, *International Operations: Current Antitrust Environment*, 8 CASE W. RES. J. INT'L L. 452, 465 (1976). See also *infra* note 12.

⁴ See generally ANTITRUST GUIDE, *supra* note 1; Timberg, *An International Antitrust Convention: A Proposal to Harmonize Conflicting National Policies Towards the Multinational Corporation*, 8 J. INT'L L. & ECON. 157 (1973); Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165 (1978); Stanford, *supra* note 2, at 201.

tional economic policy effectively and, in many instances, to exploit and market natural resources adequately.⁵ The gravity of the purported effect of antitrust extraterritoriality on foreign national sovereignty⁶ invites a brief examination of United States justification for its antitrust enforcement policy.⁷

The basic economic principle of free market competition, with its attendant advantages to the small-to-medium size business as well as to the consumer in the form of higher quality goods and lower prices, constitutes a cornerstone of United States business regulation and economic policy.⁸ In view of the proliferation on an

⁵ Stanford, *supra* note 2, at 204-06, maintains that the threat to foreign companies of United States antitrust liability is a strong disincentive to compliance with national economic policies, thereby undermining national control over resource and industrial development.

⁶ For a detailed discussion of these effects and the consequent international hostility thereto, see *infra* text accompanying notes 18-45.

⁷ Although this Note examines primarily the effect of antitrust extraterritoriality on the sovereignty of foreign nations, it is essential to realize that the issue actually involves the broad question of extraterritorial jurisdiction not confined to the application of antitrust laws. Assistant Attorney General William F. Baxter has stated that:

[C]ontroversies with our trading partners and allies that have been said to stem from the extension of U.S. law into the sphere of international commerce and trade do not derive exclusively or even primarily from the application of the antitrust laws to international transactions. Other United States laws have been identified as posing serious or immediate problems for United States business and also for our trading partners. A representative sampling . . . would include the Export Administration Act's general export control provisions and anti-boycott regulations, the Ribicoff tax amendments of 1976, the Trading with the Enemy Act, CFTC regulation and enforcement actions . . . and the Foreign Corrupt Practices Act.

Commission on the International Application of the U.S. Antitrust Laws Act: Hearings on S. 432 Before the Comm. on the Judiciary, 97th Cong., 1st Sess. 49 (1981) [hereinafter cited as Hearings on S. 432]. For an illustrative sampling of foreign government reaction to controversial non-antitrust situations involving the extraterritorial application of United States laws, see *id.* at 53-55 (statement of Davis R. Robinson, Legal Advisor, Dep't of State). But *cf. id.* at 58 (views expressed by Kingman Brewster regarding the propriety of establishing a Commission to study the international application of antitrust laws). Arguing that the scope of the Commission's mandate should be restricted to the study of antitrust extraterritoriality, Brewster maintains serious doubts concerning the "usefulness of bundling together the study of laws which reflect quite disparate national interests and policies The conflicting interests of other States [as well as the priority urged by domestic national interests] which must be dealt with will also be quite different in the case of export control or anti-boycott legislation than they will be in antitrust." *Id.* Brewster concludes that any attempt to formulate a single jurisdictional rule to encompass all aspects of extraterritoriality would be illusory. *Id.*

⁸ See Marks, *State Department Perspectives on Antitrust Enforcement Abroad*, 13 J. INT'L L. & ECON. 153, 154 (1978); *Hearings on S. 432, supra* note 7, at 88-89, 153. In a diplomatic exchange concerning the enactment of British blocking legislation, the United States underscored the importance of United States antitrust law by stating that "United

international level of the business activity conducted by multinational enterprises, the extraterritorial application of United States antitrust law is seen as a prerequisite to effective regulation of the United States market in accordance with this pro-competitive economic philosophy.⁹ In addition to the proposition that effective regulation of the market mandates extraterritorial supervision, advocates of antitrust extraterritoriality maintain that the export of United States antitrust law brings to the international field the much-needed concepts of fairness and due process.¹⁰

Although the relative merits of this antitrust export policy are debatable, it is beyond dispute that during the past four decades, the United States has had ample opportunity to vigorously proselytize the anti-cartel,¹¹ pro-competition religion.¹² The problems raised by the export of this anti-cartel philosophy become particularly acute when viewed in the context of increasing resort to the

States antitrust law reflects a public policy so important to the United States that violations carry criminal penalties." United States Diplomatic Note concerning the U.K. Protection of Trading Interests Bill, No. 56 (Nov. 9, 1979), 21 I.L.M. 840, 843 (1982).

⁹ See generally ANTITRUST GUIDE, *supra* note 1; *Hearings on S. 432, supra* note 7, at 103. In addition to the comprehensive federal antitrust regulatory scheme which enables the United States to exercise effective control over the consequences of multinational enterprise conduct to the United States economy, the scope of domestic long-arm statutes (providing courts in the United States with jurisdiction to regulate business conduct) facilitates regulation of the multinational corporation. The willingness of United States courts to pierce the veil of corporate identity in order to secure effective relief for injury caused by anti-competitive corporate conduct further supports United States supervision of corporate conduct abroad. Davidow, *Extraterritorial Application of United States Antitrust Law in a Changing World*, 8 LAW & POL'Y IN INT'L BUS. 895, 900 (1976).

¹⁰ Davidow, *supra* note 9, at 895. The Supreme Court has characterized United States antitrust doctrine as a "charter of economic liberty". *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

¹¹ Members of a cartel typically raise the price of commodity goods above the long-run competitive equilibrium level by collectively agreeing to restrict the production level of that good. See Weintraub, *The Example of OPEC and the Possibility of Other Producer Cartels*, 24 AM. U.L. REV. 1097, 1103 (1975).

¹² See *supra* notes 3-4. See also Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247, 271 (1978), where the authors describe decartelization and the dissemination of United States antitrust law as United States goals during the post-war industrial restructuring of Germany and Japan. The United States has been a party to several international antitrust agreements, including three recommendations of the Organization of Economic Cooperation and Development (OECD) Council, a decision under the General Agreement of Tariffs and Trade (GATT), and two bilateral agreements. See *infra* notes 75-98 and accompanying text. For citations to these various international agreements, see *Antitrust Law: United Nations Guidelines*, 22 HARV. INT'L L.J. 405, 411 n. 35 (1981). Also, the United States sent antitrust experts to help in drafting the Havana Charter of 1948 and to participate in the 1952 Economic and Social Council (ECOSOC) Ad Hoc Committee. Davidow & Chiles, *supra*, at 271.

device of international cartelization by basic commodity-producing nations.¹³ It is against this scenario of prevalent foreign government involvement in international cartels¹⁴ coupled with intense extraterritorial antitrust enforcement by the United States that the specter of United States interference with foreign national sovereignty emerges.¹⁵

II. INTRODUCTION

On June 29, 1982, the United States and Australia reached an agreement providing for cooperation on antitrust matters.¹⁶ The agreement is designed to establish a bilateral framework for resolving antitrust law conflicts in a manner which would preclude impairment of national sovereignty and respect traditional considerations of comity.¹⁷ The objective of this Note is to assess the efficacy of the agreement in attenuating the Australian perception that the extraterritorial application of United States antitrust law has resulted in the infringement of national sovereignty. The Note examines the foreign and domestic objections advanced against United States antitrust extraterritoriality. The legislative attempts by foreign nations to circumvent the extraterritorial enforcement of federal antitrust law and the significant costs to the United States of

¹³ Bergsten, *Resource Scarcity: Cartelization and Contrived Shortages*, 24 AM. U.L. REV. 1128, 1128 (1975); Cira, *Current Problems in the Extraterritorial Application of United States Antitrust Law*, 13 J. INT'L L. & ECON. 157, 160 (1978); Note, *The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments*, 91 YALE L.J. 765, 765 n. 1 (1982). A 1974 study undertaken by the OECD concludes that nearly six hundred export cartels of some type were operating in the United States and Europe. ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT, COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, EXPORT CARTELS (1974).

¹⁴ Foreign government participation in a cartel is achieved in three ways: a) direct participation by the central foreign government; b) direct participation by an instrumentality of the central foreign government; or c) authorization or mandate by the central foreign government that a private producer become a cartel member. Note, *supra* note 13, at 765 n. 2. A peculiar problem arises when a private United States entity solicits foreign government authorization to implement a cartel in order to obtain effective antitrust immunity under the sovereign compulsion defense. See *infra* notes 110-12 and accompanying text for an analysis of this defense and for a suggestion that the United States-Australia Antitrust Agreement, *infra* note 16, would allow such a defense in this circumstance.

¹⁵ Former United States Senator Jacob Javits recently stated that United States antitrust extraterritoriality and international cartelization are the "Scylla and Charybdis which [the United States] must steer between . . ." *Hearings on S. 432, supra* note 7, at 19.

¹⁶ Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, 21 I.L.M. 702 [hereinafter cited as Antitrust Agreement].

¹⁷ See U.S. Dep't of Justice, Comment to United States-Australia Antitrust Agreement (press release June 29, 1982) (copy available in *Georgia Journal of International and Comparative Law Offices*) [hereinafter cited as Antitrust Agreement Press Release].

these foreign legislative efforts are assessed briefly. After describing the principal provisions of the United States-Australia antitrust agreement, the Note then discusses two earlier bilateral United States antitrust cooperation agreements in an effort to provide a context against which the success of the Australian agreement might be gauged. Various provisions in the agreement are examined with reference to whether Australian sovereignty will be enhanced appreciably by virtue of their inclusion in the agreement. These provisions relate to Australian export activity, information use restrictions, United States governmental participation in private antitrust suits against Australian firms, a clearance mechanism whereby Australian firms seek antitrust immunity for proposed private conduct, and the escape clause of the agreement. Finally, this Note questions whether these provisions will indeed operate to assure Australia of a greater degree of sovereign control over its domestic business and economic activity.

A. *Foreign and Domestic Objection to United States Antitrust Extraterritoriality*

The extraterritorial application of United States antitrust law has engendered both foreign¹⁸ and domestic¹⁹ opposition. In addi-

¹⁸ See *infra* notes 22-31 and accompanying text for a discussion of specific aspects of United States antitrust law inciting foreign legislative responses; see also *United States v. Imperial Chemical Industries, Inc.*, 100 F. Supp. 504 (S.D.N.Y. 1951), 105 F. Supp. 215 (S.D.N.Y. 1952) (complaints expressed by the United Kingdom); *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (1965) (complaints expressed by Switzerland).

For British criticism of the United States effort to "mould the international economic and trading world into its own image," see 404 PARL. DEB. H.L. (5th ser.) 555 (1980), cited in Note, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213, 236 n. 127 (1982).

Canadian objections to United States extraterritorial application of the antitrust law are grounded on the notion that Canadian firms should not be instrumentalities of United States economic policy. TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY, CANADIAN PRIVY COUNCIL OFFICE, *FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY* (1968), cited in Note, *supra*, at 256 n. 255. For a succinct review of Australian opposition to United States antitrust extraterritoriality, see Note, *supra*, at 244-53.

¹⁹ Domestic opponents view the policy of United States extraterritorial antitrust jurisdiction as short-sighted and legally indefensible. Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U.L. REV. 323, 324 (1981). Arguments have been proposed which imply that United States interference with foreign government cartels could thwart the economic development scheme of a foreign nation so as to endanger any eventual advantages to United States exporters accruing from the future build-up of foreign export markets. *Hearings on S. 432, supra* note 7, at 275. It also has been suggested that foreign entities will reduce net investments in the United

tion to the pragmatic objection that extraterritorial antitrust jurisdiction undermines a nation's sovereign ability to regulate and control the national economy²⁰ and to formulate not only stable national trading policies but also effective foreign policies, foreign critics premise objections to antitrust extraterritoriality on the perceived failure of the United States to respect basic principles of comity.²¹ This failure to respect comity is likely to occur when substantive provisions of United States antitrust law condemn conduct which is permissible under the antitrust laws of the foreign nation.²² Another source of objection to the extraterritorial application of United States antitrust law concerns the right to bring private antitrust suits pursuant to 15 U.S.C. § 15 (1976).²³ This

States in an effort to avoid the possibility of having assets within the United States subject to attachment in an antitrust proceeding. *Id.* at 268. Domestic critics also cite the substantial costs entailed by the extraterritorial application of United States antitrust law. *See infra* note 34 and accompanying text.

²⁰ *See supra* note 5; Feinberg, *supra* note 19, at 324, where the author states that "foreign criticism of United States antitrust extraterritoriality is two-pronged: on a political and foreign policy level, the United States is seen as a meddler, interfering in the internal political affairs of independent foreign states; on an economic level, United States interference is viewed as a misguided effort, undercutting policies of the foreign states that are designed to promote internal economic health and stability." *See also* Diplomatic Note No. 390/79 from the Australian Embassy to the United States Dep't of State, Oct. 19, 1979, at 3, *cited in* Note, *supra* note 18, at 244 n. 177, in which Australia alerts the United States of the severe effects which a damages judgment may have on the Australian economy, in such fields as the financing of resources projects, attraction of foreign investment, trade in uranium and other commodities, and the financial viability of the four companies concerned [in the Westinghouse uranium litigation], all of which play a major role in the production and export of Australian natural resources. These are Australian domestic concerns.

²¹ Comity is a very small word that stands for a very large principle. Comity is a way of saying . . . that each of two parties will yield to the one which has interests that are clearly paramount. It is a word signifying a concern for common courtesy and decency in conduct toward others. Where conflicts arise between sovereigns, the sovereigns have an obligation to resolve the conflicts with restraint, cooperation, and goodwill. That is the essence of comity . . .

Bell, *supra* note 1, at 801.

²² *See* Pengilly, *Public Benefit in Anticompetitive Arrangements? Australian Experience Since 1974*, 23 ANTITRUST BULL. 187 (1978) in which the author describes a provision of the Australian Trade Practices Act of 1974 under which an Australian business may be authorized by the government to engage in conduct which is or may be in breach of Australian antitrust law when such conduct is likely to result in a substantial benefit to the public. In a situation where an exemption by the Australian government has been granted on the ground of substantial public benefit, any attempt by the United States to apply its antitrust law to the exempted conduct is destined to run afoul of even the most restrictive concept of comity.

²³ This private right of action originated in section 7 of the Sherman Act and was expanded in 1914 in section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). Because it was effectively superseded by section 4 of the Clayton Act, section 7 of the Sherman Act was re-

"unleashed prosecutorial discretion" accorded to private litigants²⁴ is particularly objectionable to foreign nations because the private antitrust litigant is hardly inclined to account for considerations of comity and sovereignty in bringing the suit.²⁵ Foreign nations also take exception to the provision in United States antitrust law permitting a court to award treble damages to the private plaintiff.²⁶ This treble damage provision is considered grossly unfair by foreign nations whose antitrust laws typically do not permit recovery of treble damages.²⁷ This perception of inequity is perpetuated by certain policies of the United States government which, in the view of foreign nations, represent an internally inconsistent antitrust regime. These policies are designed to protect the United States domestic market from foreign competition, thereby effectively cir-

pealed in 1955. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282, 283.

²⁴ *Hearings on S. 432, supra* note 7, at 58. Brewster observed that "the ease with which private plaintiffs can threaten foreign companies not only with the heavy costs of litigation but the possibility of three times the recovery of actual damages outrages even those of our foreign friends and allies who understand us best." *Id.*

²⁵ The British Government registered objection to the private damage action by citing two basically undesirable consequences [which] follow from the enforcement of public law in this field by private remedies. First, the usual discretion of a public authority to enforce laws in a way which has regard to the interests of society is replaced by a motive on the part of the plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature. Secondly, where criminal and civil penalties co-exist, those engaged in international trade are exposed to double jeopardy.

United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interests Bill, No. 225 (Nov. 27, 1979), 21 I.L.M. 847, 849 (1982). An additional criticism of the private remedy under United States antitrust law is that an individual case will have an influence disproportionate to its initial factual setting due to the relative paucity of antitrust cases in the international field. Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORNELL INT'L L.J. 215, 257 (1978). For further criticism of this private remedy, see Note, *supra* note 18. Most foreign nations do not permit private antitrust actions. See generally ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1967).

²⁶ The treble damage remedy has been subject to intense criticism. See, e.g., *Commonwealth Nations Adopt Resolution Criticising United States Treble Damage Judgments*. [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 963, at A-10 (May 8, 1980); Sims and Lawlar, *Treble Damages Remedy Deserves Reexamination*, Legal Times of Washington, Oct. 26, 1981, at 10, col. 1.

²⁷ Australian antitrust law only enables a private enforcer to claim actual damages. Walter & Walsh, *Overseas Trade and Investment*, 2 AUSTR. BUS. L. REV. 307, 312 (1974). Although not objecting to the use of multiple damages to promote a particular domestic economic policy within the United States, Australian Attorney General Peter Durack notes that a quite different problem arises when the extraterritorial application of a private remedy permits Australian trading policies to be superseded. P. DURACK, AUSTRALIA'S POSITION ON U.S. ANTITRUST ENFORCEMENT 13 (1981), cited in Note, *supra* note 18, at 245 n. 182.

cumventing the application of United States antitrust laws.²⁸ The Webb-Pomerene Act, 15 U.S.C. §§ 61-64 (1976), which exempts United States export cartels from application of the Sherman Act, is illustrative of this inconsistency in federal antitrust enforcement.²⁹ Uncertainty with regard to the jurisdictional scope of United States antitrust law and to the nebulous standards³⁰ by

²⁸ See generally Ongman, *Is Somebody Crying Wolf?*, 1 NW. J. INT'L L. & BUS. 163, 165 (1979); Note, *supra* note 18, at 247. The United States efforts to negotiate commodity agreements regulating prices and establishing import quotas are essentially manifestations of economic protectionism which seriously implicate the sincerity of the asserted United States procompetition philosophy. For a discussion of this philosophy, see *supra* notes 8-12 and accompanying text. These commodity agreements are negotiated through a variety of mechanisms, including: a) international treaty, International Coffee Agreement, Aug. 1, 1977, 28 U.S.T. 6401, T.I.A.S. No. 8683; b) executive agreement, orderly marketing agreements pursuant to 19 U.S.C. § 2253 (1976); and c) diplomatic consultation, foreign steel import quotas, see, e.g., *Consumers Union of United States, Inc. v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973). Marks, *supra* note 8, at 156; see also Jones, *Extraterritoriality in United States Antitrust: An International "Hot Potatoe"*, 11 INT'L LAW. 415, 428 (1977).

²⁹ In *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59, 66-70 (S.D.N.Y. 1949), an argument is made to rebut the allegation that the export exemption allowed under the Webb-Pomerene Act is inconsistent with United States antitrust policy. This rebuttal is based on the idea that, even under the Webb-Pomerene Act, activities such as assigning international quotas, dividing markets, and fixing prices are not permitted. See Davidow, *supra* note 9, at 906. In view of the recently proposed Foreign Antitrust Improvements Act of 1982, H.R. 5235, 97th Cong., 2d Sess. (1982), however, this rationale may fail since this Act amends the Sherman and Clayton Acts to exclude from antitrust liability certain conduct involving trade with foreign nations so long as such conduct does not have a direct, substantial, and reasonably foreseeable effect on domestic commerce or on the export activities of a domestic individual. This legislative clarification of antitrust liability would arguably condone activities which had previously been disallowed as *per se* violations of United States antitrust law. Although this legislation may heighten the allegation of inconsistent and contradictory federal antitrust enforcement policy, its net effect may be to allay foreign government concern that United States antitrust extraterritoriality infringes on national sovereignty. See *Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading*, 1981 A.B.A. SEC. ANTITRUST L. 31-34, reprinted in *Hearings on S. 432*, *supra* note 7, at 216. See also *infra* note 127.

³⁰ The jurisdictional scope of United States antitrust law is determined by reference to a judicially created doctrine commonly referred to as the effects test. The formulations of this test by courts in the United States are varied and include: 1) the requirement that the challenged foreign conduct both intend to and actually affect United States imports or exports, *United States v. Aluminum Co. of America*, 148 F.2d at 443-44; 2) the requirement that certain effects be demonstrated regardless of whether they were intended or foreseeable, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979); *National Bank of Canada v. Interbank Card Ass'n*, 1980-81 Trade Cas. (CCH) ¶ 63,836, at 78,471-72 (2d Cir. 1981); 3) the requirement that a substantial effect on United States foreign commerce be demonstrated, *Mannington Mills, Inc. v. Congleum Corp.*, 598 F.2d at 1292; 4) the requirement that the challenged conduct directly affect United States export commerce, *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974), *modifying* 375 F. Supp. 610 (E.D. Pa. 1974); 5) the requirement that the challenged conduct have some effect on United States foreign commerce, *Timberlane Lumber Co. v. Anheuser-*

which such jurisdiction is determined further fuels the resentment of foreign nations to United States extraterritorial antitrust enforcement.³¹

A wholly domestic objection to the extraterritorial application of United States antitrust law concerns the stifling effect of alleged uncertainty regarding extraterritorial antitrust enforcement on the willingness of small and medium size United States manufacturers to undertake export initiatives in the face of potential antitrust liability.³² Domestic criticism also is founded on the substantial interference with the diplomatic process caused by United States extraterritorial antitrust enforcement policy.³³ The monetary costs

Busch, Inc., 549 F.2d 597, 613 (9th Cir. 1976), *clarified in* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 428 (9th Cir. 1977); 6) the requirement that the challenged conduct have any appreciable anticompetitive effects on United States commerce, *National Bank of Canada v. Interbank Card Ass'n*, 1980-81 Trade Cas. (CCH) ¶ 63,836, at 78,472; and 7) the requirement that the effect on foreign commerce be both substantial and direct as long as it is not *de minimus*, *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979). For an analysis of the judicial development of the effects test and a defense to charges of uncertainty inherent in the test, see *Hearings on S. 432, supra* note 7, at 226-36. For a concise history of the major developments of extraterritorial jurisdiction through United States case law, see 18 VA. J. INT'L L. 321, 328-31 (1978). The Department of Justice crystallizes the chameleon-like judicial effects test by stating that "when foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place." ANTITRUST GUIDE, *supra* note 1, at 6.

³¹ One commentator asserts that it is an "intolerable burden to the foreigner to require him or his lawyer to understand the intricacies of the case law [in the United States] under the antitrust statutes By its very nature this type of legislation is replete with uncertainty and unsuited to extraterritorial application." Haight, *International Law and the Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639, 649 (1954). Australian Attorney General Peter Durack confirms this objection by stating that "we live in a world in which the repercussions of economic conduct may be infinitely remote. And we criticise, on that ground, an effects test which is so wide, so vague, and so uncertain." P. DURACK, *supra* note 27, at 9.

³² This controversy concerning the effect of uncertainty in the extraterritorial application of United States antitrust law on domestic export potential has culminated in the passage of the Export Trading Company Act of 1982 which attempts to clarify the antitrust liability of a United States exporter. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233. For a related view, compare *The Export Trading Company Act of 1982: Hearings and Markup on H.R. 1799 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 55-56 (1982) (statement of Jay Angoff, Staff Attorney, Congress Watch, asserting that this export promotion legislation is a mere gimmick designed to impair domestic antitrust enforcement) [hereinafter cited as *Trading Company Hearings*], with *Hearings on S. 432, supra* note 7, at 28 (statement of the Committee on Ocean Liner Conferences of the Maritime Law Ass'n of the United States, asserting that antitrust uncertainty could effectively paralyze the United States shipping industry).

³³ Joseph P. Griffin, Chairman of the Committee on International Aspects of Antitrust Law of the International Law Section of the American Bar Association, stated that "the

incurred by resort to specialized attorneys and diplomats, who are required to resolve antitrust disputes as well as the loss of foreign government goodwill, have also been cited as drawbacks to United States antitrust extraterritoriality.³⁴

B. *Foreign Legislative Reaction to United States Antitrust Extraterritoriality*

Another significant cost to the United States flowing from the extraterritorial application of its antitrust law concerns the virulent reaction³⁵ on the part of foreign governments which have unilaterally responded to the previously mentioned objections to United States antitrust extraterritoriality. This foreign government hostility is reflected in foreign blocking legislation enacted to circumvent United States antitrust enforcement measures and to prohibit the disclosure of information and documents requested by a court in the United States pursuant to an antitrust proceeding.³⁶ Defensive responses on the part of foreign governments include the enactment of clawback statutes,³⁷ blocking statutes,³⁸ and restric-

commencement of an [American antitrust] agency enforcement action generally preempts such [diplomatic] consultations and even when they take place, undercuts their utility." *Hearings on S. 432, supra* note 7, at 30. In questioning the propriety of the role played by the judiciary in determining antitrust jurisdiction, one judge has commented that "when the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy . . ." *International Ass'n of Machinists v. O.P.E.C., 649 F.2d 1354, 1358 (9th Cir. 1981)*.

³⁴ Davis R. Robinson, Legal Adviser to the United States Department of State, stated that disputes regarding United States antitrust extraterritoriality

may deplete the good will of a foreign government as well as its willingness to cooperate with us on other projects of importance. Such conflicts have other costs for us. They require the time and effort of specialized attorneys and diplomats to sort out the pieces when conflicts occur. In the meantime, the U.S. regulatory interest that prompted our action in the first place may be thwarted.

Hearings on S. 432, supra note 7, at 37-38.

³⁵ See generally Stanford, *supra* note 2, at 204; Timberg, *supra* note 4, at 160; Comment, *Foreign Blocking Legislation: Recent Roadblocks to Effective Enforcement of American Antitrust Law*, 1981 ARIZ. ST. L.J. 945 (1981).

³⁶ Baker, *supra* note 4, at 185, cites a "growing number of statutes and orders . . . specifically designed to thwart antitrust investigations by any foreign power." See, e.g., *infra* notes 37-39.

³⁷ A clawback statute, designed to punish certain litigants, permits a foreign, multiple damage, antitrust judgment debtor to recollect from the plaintiff (assuming the plaintiff has assets within the jurisdiction of the foreign nation) any amount on the judgment in excess of the actual compensatory damages. Comment, *supra* note 35, at 956. See, e.g., Protection of Trading Interests Act, 1980, ch. 11, § 6, reprinted in 1 CURRENT L. STAT. ANN. 11/5 (British clawback statute). Both Canada and Australia are currently considering implementation of similar legislation. See, e.g., [1980] ANTITRUST & TRADE REG. REP. (BNA) No. 980, at A-13 (Australia); Foreign Proceedings and Judgments Bill, [U.S. Export Weekly] INT'L TRADE

tion of judgment legislation,³⁹ all of which represent a serious decline in foreign antitrust cooperation which is potentially devastating to the future enforcement of United States antitrust regulations. By effectively preventing a United States antitrust litigant from obtaining information and documents located abroad, foreign blocking legislation could arguably result in haphazard enforcement of United States antitrust regulations since antitrust enforcement agencies will be compelled to bring cases based on less evidence. The resulting prejudice to a defendant who is unable to obtain exculpatory evidence is apparent.⁴⁰

These attempts by foreign governments to shield their nationals from antitrust liability in the United States are not always successful. For example, the existence of a foreign legislative prohibition against the disclosure of certain information requested by a United States court pursuant to an antitrust investigation does not necessarily insulate a foreign defendant from United States antitrust liability based on a contempt order, since United States courts often compel the production of such evidence irrespective of the foreign nondisclosure law.⁴¹ The seemingly irreconcilable substan-

REP. (BNA) No. 316, at C-2 (July 22, 1980) (Canada).

³⁹ Blocking statutes render compliance with foreign judicial requests for evidence illegal. Comment, *supra* note 35, at 946 n. 6. For the Australian blocking statute, see Foreign Proceedings (Prohibition of Certain Evidence) Act, No. 121 (Austl. 1976), as amended by Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, No. 202 (Austl. 1976), cited in Note, *supra* note 18, at 248 n. 206. This Act permits the Australian Attorney General to issue orders ensuring that Australian documents will not be produced before foreign courts and tribunals when the foreign court exercises jurisdiction in a manner inconsistent with international law or comity or when such orders are needed for the protection of Australian national interests. *Id.* § 4. For a discussion of the nature of the actions taken by the Australian Attorney General to enforce these policies, see Note, *supra* note 18, at 249. For an extensive compilation of foreign nondisclosure legislation, see Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 *FORDHAM L. REV.* 877, 877 n. 1 (1982).

⁴⁰ Australia's Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 confers broad discretion on the Australian Attorney General to prohibit the enforcement of the foreign antitrust judgment or to reduce substantially the judgment amount when the foreign court has exercised jurisdiction "in a manner inconsistent with international law or comity and the recognition or enforcement of the judgment in Australia would or might be detrimental to or adversely affect, trade or commerce with other countries." No. 13, § 3(2)(b)(i) (Austl. 1979), reprinted in 18 *I.L.M.* 869 (1979) [hereinafter cited as Restriction of Enforcement Act].

⁴¹ Baker, *supra* note 4, at 187.

⁴² See, e.g., *Société Internationale v. Rogers*, 357 U.S. 197, 204-05 (1958); *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952-53 (D.C. Cir. 1979); *United States v. First National City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968). But see *Trade Development Bank v. Continental Ins. Co.*, 469 F.2d 35, 40-41 (2d Cir. 1972).

American courts invariably resort to one of three approaches in deciding whether to com-

tive differences between respective national economic policies, which are asserted in the context of the international antitrust disputes, are exacerbated by fundamental differences in national attitudes concerning the propriety of extraterritorial discovery procedures.⁴² Moreover, foreign legislation curtailing the extraterritorial enforcement of an antitrust judgment or contempt order immunizes a foreign defendant from United States antitrust liability

pel production of evidence located abroad. The "good faith" approach, applied in *Société Internationale v. Rogers*, *supra*, and in *Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, 480 F. Supp. 1138 (N.D. Ill. 1979), does not entail examination of the interests of the foreign nation in prohibiting the production of the evidence, but rather concentrates on whether the party whose evidence has been requested exercised its best efforts to achieve compliance with the disclosure order and whether such party deliberately induced the foreign nation to legislatively block the production of the evidence. This approach is criticised in Note, *supra* note 38, at 887, on the ground that it is relevant only to a determination of whether sanctions should be applied for the failure to produce documents and does not address the basic issue of whether document production is appropriate. A second approach would base the determination of whether to compel production of evidence on a consideration of five factors listed in the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 39-40 (1965). This "balancing test" approach has been rejected by one court as "inherently unworkable," *Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, *supra*, and has been criticised on the ground that its principal focus is on individual hardship rather than on the competing national interests at stake. See Note, *supra* note 38, at 901. For a judicial application of this approach, see *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976). A third approach, known as the Second Circuit international comity approach, would accord automatic deference to the foreign nondisclosure law without any assessment of the domestic interest at stake. This approach was abandoned by the Second Circuit in 1968 in favor of the Restatement balancing test. See Note, *supra* note 38, at 895 n. 159. For a comprehensive analysis of these three approaches to the nondisclosure dilemma, see generally *id.* The author proposes a scheme designed to minimize conflict potential by requiring consideration of, *inter alia*, the need for the information sought, whether alternative means of producing the information are available, and whether the resisting party is a plaintiff or defendant. *Id.* at 903-08. The author concludes that the success of the United States in obtaining information located abroad is contingent upon its ability to accommodate and respect the policies of foreign nations. *Id.* at 908.

⁴² United States discovery procedures are generally more liberal than those of foreign nations. 2 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 15.10 (2d ed. 1981). Discovery procedures in civil law countries, moreover, are typically a function exercised by the judiciary and not by the attorney. Note, *supra* note 38, at 866. One foreign court has characterized the United States discovery procedure as a "fishing expedition." *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 ALL. E.R. 434, 442 (H.L. 1977). For an examination of international jurisdictional principles regarding the production of documents and information, see generally Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 139 (1978); Lowenfeld, *Extraterritoriality: Conflict and Overlap in National and International Regulation*, 74 AM. SOC'Y INT'L L. PROC. 30 (1980); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U.L. REV. 487, 489-501 (1969). For a concise history of United States participation in international judicial cooperation efforts, see Bishop, *International Litigation in Texas: Obtaining Evidence in Foreign Countries*, 19 HOUS. L. REV. 361, 367-69 (1982).

only to the extent that the foreign defendant has no assets within the United States subject to execution in satisfaction of the debt.⁴³ Considering the enormous difficulties entailed by an asset removal strategy⁴⁴ as well as the susceptibility to execution of the foreign defendant's accounts receivable arising from sales within the United States,⁴⁵ the effective protection against United States antitrust sanctions accruing from foreign restriction of judgment legislation is impaired significantly. The legislative impotency of a foreign sovereign to insulate its nationals from antitrust sanctions by the United States can only serve to heighten the degree of international hostility toward United States antitrust extraterritoriality.

A recent example of international hostility to extraterritorial antitrust enforcement by the United States involved a suit for treble damages instituted by Westinghouse, Inc. against uranium producers from several nations, including Australia.⁴⁶ Westinghouse was unable to meet various contractual obligations to supply uranium because of an unprecedented increase in the price of uranium. Westinghouse alleged that the price increase was due to the forma-

⁴³ In Note, *supra* note 13, at 770 n. 20, the author observes that an asset withdrawal from the United States would not defeat *in personam* jurisdiction under section 22 of the Clayton Act, 15 U.S.C. § 22 (1976), since existing contacts between the foreign defendants and the United States arising from "the deliberate and significant impact of [the foreign cartelists'] price fixing activities on the U.S. economy and the substantiality of their United States sales" would nonetheless satisfy the jurisdictional dictates of United States antitrust statutes. An asset removal strategy is thus effective, if at all (see *infra* note 44), in thwarting the enforceability of an antitrust judgment and not in circumventing the jurisdictional basis for such judgment.

⁴⁴ Significant drawbacks to an asset removal strategy include the foreign enterprise's inability to realize the full value of its immovable assets since the price received for such assets in a "forced sale" undeniably reflects the urgency of the transaction and the necessity for payment in liquid funds or for exchange of assets located outside the United States. There also exists the risk that the asset purchaser might be considered by a United States court as an aider and abettor in the prosecuted cartel scheme. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). The sale price of the asset might be reduced further by the unfavorable economic conditions at the time of sale, the transaction costs involved, and any tax consequences arising from the sale. The loss of other advantages inherent in maintaining a United States subsidiary operation is alone sufficient to quell any incentive on the part of a foreign defendant to remove United States assets. Note, *supra* note 13, at 771-73.

⁴⁵ The situs of the debt owed by a United States purchaser to the foreign defendant/seller is the domicile of the purchaser/debtor. *Harris v. Balk*, 198 U.S. 215 (1905). As such, that debt, in the form of accounts receivable, becomes subject to execution to satisfy a judgment.

⁴⁶ Westinghouse filed suit against 12 foreign and 17 domestic uranium producers. Nine of the 12 foreign defendants defaulted. This barrage of suits, claims, and counterclaims has been consolidated in *Uranium Antitrust Litigation*, 473 F. Supp. 382 (N.D. Ill. 1979). For an itemization of the suits prior to consolidation, see Note, *supra* note 18, at 230 n. 91.

tion of an international uranium cartel which had anticompetitive effects in the United States.⁴⁷ The district court's grant of Westinghouse's motion for default, affirmed by the Seventh Circuit Court of Appeals,⁴⁸ subjected the foreign defendants to liability for compensatory and punitive damages estimated at six to seven billion dollars.⁴⁹ By reason of the potentially staggering effect of these default judgments on the foreign company's commercial viability, foreign nations enacted severe foreign blocking legislation⁵⁰ and restriction of judgment legislation.⁵¹ This uranium litigation and the attendant foreign government response thereto provided the impe-

⁴⁷ *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 617 F.2d 1248 (7th Cir. 1980). See generally *Westinghouse Elec. Corp. Uranium Litigation*, [1977] 3 W.L.R. 430 (C.A.), *rev'd on additional facts*, [1978] 2 W.L.R. 81 (H.L.); Note, *Discovery in Great Britain: The Evidence (Proceedings in Other Jurisdictions) Act*, 11 CORNELL INT'L L.J. 323 (1978). For commentary and analysis regarding the uranium litigation, see Joskow, *Commercial Impossibility, The Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1979); Comment, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEX. INT'L L.J. 59 (1979); Rothwell, *Market Coordination by the Uranium Oxide Industry*, 25 ANTITRUST BULL. 233 (1980); J. TAYLOR & M. YOKELL, *YELLOWCAKE: THE INTERNATIONAL URANIUM CARTEL AND ITS AFTERMATH* (1979). For a collection of the documents establishing the existence of the uranium cartel, see *International Supply and Demand: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 151-362 (1976).

⁴⁸ The Seventh Circuit Court of Appeals employed the intended effects test of *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), to determine jurisdiction. The court refused to accord further consideration to the balancing test established in *Timberlane Lumber Co. v. Bank of America*, *supra* note 30. The Court decided to stay the issue of damages until the question of liability had been settled as to the non-defaulting defendants. *Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).

⁴⁹ 457 AUSTR. PARL. DEB. 2186 (1976) (statement of Senator Durack), *cited in Note, supra* note 18, at 233 n. 109. The defendants could also be charged with payment of the substantial legal fees incurred by the plaintiff in addition to the costs of mounting their own defense. Note, *supra* note 18, at 233.

⁵⁰ The Canadian government reacted to a United States district court subpoena for information in connection with the uranium litigation by enacting legislation prohibiting the release from Canada of any written materials or documentation relating to any aspect of uranium mining, refining, or marketing. See, e.g., *Uranium Information Security Regulations*, 3 CAN. CONS. REGS. ch. 366 (1978); Can. Gaz., pt. 11, at 4619 (1977), *cited in Note, supra* note 18, at 255 n. 249. The Canadian Supreme Court upheld this blocking legislation in the face of a challenge by Westinghouse in *Westinghouse Elec. Corp. v. Duquesne Light Co.*, 16 Ont. 2d 273 (High Ct. Justice 1977). For Australian blocking legislation enacted pursuant to the uranium litigation, see *supra* note 38. For a defensive response expressed by a British court, see *Westinghouse Elec. Corp. Uranium Contract Litigation, supra* note 47 (House of Lords decision refusing to execute United States letters rogatory in the United Kingdom).

⁵¹ See *supra* note 39. The necessity of enacting this type of legislation has been questioned on the ground that a default judgment such as that entered in the *Westinghouse* case, *supra* note 48, would be unenforceable in Australian courts on the basis of common law principles. Nygh, *The Enforcement of United States Antitrust Judgments in Australia*, 16 GONZ. L. REV. 1, 14 (1980).

tus for renewed negotiations between the United States and Australia, eventually culminating in an antitrust cooperation agreement between these two nations.⁵²

III. UNITED STATES-AUSTRALIA AGREEMENT

The antitrust cooperation agreement between the United States and Australia establishes a detailed notification⁵³ and consultation procedure⁵⁴ which is intended to reduce the friction that has arisen in recent years over United States government and private antitrust actions involving Australian government policies and Australian companies.⁵⁵ The agreement provides that one country may request consultation when the other country's antitrust policies raise antitrust concerns in the requesting country.⁵⁶ The agreement stipulates that the United States should fully consider modification or discontinuation of antitrust investigations which are precipitated by Australian conduct undertaken for the purpose of obtaining export permits,⁵⁷ by conduct undertaken by an Australian export authority,⁵⁸ by conduct related exclusively to exportation to countries other than the United States,⁵⁹ or by conduct involving discussions with or representations to the Australian government regarding export policies.⁶⁰ Each country is further required to judicially and administratively assist the other with regard to an antitrust enforcement action, provided that the proposed action does not adversely affect the national interests of the assisting country.⁶¹ The agreement secures the confidentiality of information and documents⁶² by prohibiting the United States from using the information as evidence in an antitrust investigation.⁶³ The agreement also prohibits Australia from automatically blocking compliance by Australian companies with subpoenas from United States antitrust agencies and private litigants, provided that prior notice of the

⁵² Telephone interview with Charles Stark, Foreign Commerce Section, Antitrust Division, U.S. Dep't of Justice (Sept. 15, 1982); *see also* Note, *supra* note 18, at 250.

⁵³ Antitrust Agreement, *supra* note 16, art. 1.

⁵⁴ *Id.* art. 2.

⁵⁵ Antitrust Agreement Press Release, *supra* note 17, at 1.

⁵⁶ Antitrust Agreement, *supra* note 16, art. 2.

⁵⁷ *Id.* art. 2(6)(b)(1).

⁵⁸ *Id.* art. 2(6)(b)(2).

⁵⁹ *Id.* art. 2(6)(b)(3).

⁶⁰ *Id.* art. 2(6)(b)(4).

⁶¹ *Id.* art. 5(1).

⁶² *See id.*

⁶³ *Id.* art. 3.

subpoena has been given.⁶⁴ Most significant is the provision permitting Australia to request United States governmental participation in a private antitrust suit instigated pursuant to a policy of the Australian government that has previously been the subject of intergovernmental consultation.⁶⁵ Subsequent to governmental consultation concerning the implementation of an Australian trade policy and in the event that the United States concludes that such policy should not be the basis of an antitrust action, the Australian government may seek from the United States a statement in written form setting forth the basis for such conclusion.⁶⁶ Once a written memorialization has been obtained, the agreement establishes a clearance mechanism to approve proposed private conduct in implementation of the Australian policy.⁶⁷ In the event that consultation fails to result in a means for avoiding an antitrust conflict, the agreement establishes an escape clause pursuant to which each party remains free to protect its interests as it deems necessary.⁶⁸

An analysis of the United States-Australia antitrust agreement as well as an examination of its success in alleviating Australian concerns over national sovereignty requires a brief consideration of two previous United States antitrust cooperation agreements with Canada and with the Federal Republic of Germany. The United States-Australia agreement can be considered a significant step toward minimizing antitrust difficulties⁶⁹ only to the extent that its provisions are more responsive to antitrust sensitivities than these two previous bilateral⁷⁰ antitrust cooperation agreements. In an effort to achieve a contextually accurate analysis of the Australian agreement provisions it is necessary, therefore, to assess the success of the previous cooperation agreements in resolving international antitrust disputes. This attempt to gauge the success of the Australian agreement through a comparative approach is, however, inherently limited since a foreign nation's antitrust cooperation

⁶⁴ *Id.* art. 5(1).

⁶⁵ *Id.* art. 6.

⁶⁶ *Id.* art. 4(1).

⁶⁷ *Id.*

⁶⁸ *Id.* art. 4(2).

⁶⁹ See Antitrust Agreement Press Release, *supra* note 17, at 2.

⁷⁰ Although several international organizations have proposed multilateral antitrust cooperation agreements, a discussion of those efforts is outside the scope of this Note. For an assessment of these various efforts, see generally Timberg, *supra* note 4; *Antitrust Law: United Nations Guidelines*, 22 HARV. INT'L L.J. 405 (1981); Markert, *Recent Developments in International Antitrust Cooperation*, 13 ANTITRUST BULL. 355 (1968); Davidow, *Toward an International Antitrust Code*, 65 A.B.A.J. 631 (1979).

agreement with the United States will ostensibly reflect various disparities with respect to the extraterritorial scope of the foreign nation's own antitrust regime,⁷¹ the existence of a supranational antitrust enforcement body,⁷² the business and economic tenets of the particular foreign nation,⁷³ as well as the history of antitrust enforcement between that foreign nation and the United States.⁷⁴ Cognizant of these caveats, it is now appropriate to consider the success of previous United States bilateral antitrust cooperation agreements in resolving antitrust disputes between foreign nations.

A. *United States-Canadian Agreement*

An informal antitrust understanding between Canada and the

⁷¹ The reciprocity arising from the extraterritorial application of foreign antitrust laws which are substantively comparable to United States antitrust laws mitigates the real value of comparing an antitrust cooperation agreement between the United States and that foreign nation with, for example, an United States antitrust cooperation agreement with a foreign nation whose antitrust laws are not applied extraterritorially. This mitigating factor is particularly pertinent in the case of the United States-West Germany antitrust agreement, see *infra* notes 90-99, since West Germany's long arm jurisdiction is similar to the United States jurisdictional standard of minimum contacts. See U. DROBNIG, *AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW* 350 (1972). Furthermore, the scope of West German antitrust statutes embraces extraterritorial conduct which has anticompetitive affects within West German borders. See 4 J. RAHL, *COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT* 147 (1970).

⁷² For example, the existence of an antitrust regulatory authority within the European Community implicates the comparative value of the United States-West Germany antitrust agreement. Under the Treaty of Rome, Member States of the Common Market are obliged to enforce Common Market antitrust laws in their own national courts. Timberg, *supra* note 4, at 182 n. 87. For information concerning the antitrust regulatory system of the European Communities, see Allan, *The Development of European Economic Communities Antitrust Jurisdiction Over Alien Undertakings*, 2 *LEGAL ISSUES OF EUROPEAN INTEGRATION* 35 (1974). See also *BUSINESS REGULATION IN THE COMMON MARKET* (Blake ed. 1969) (exhaustive, three volume description of the antitrust laws of six European countries); Thiesing, *Remarks on the Extraterritorial Effect of "Antitrust Law" Concerning the European Economic Community*, 25 *REC. A. B. CITY N.Y.* 206 (1970).

⁷³ For an interesting discussion of the effect of the differing perspectives of Canadian and United States economic realities on the respective antitrust relationship, see Baker, *supra* note 4, at 166-71. The author states that the "Canadian tradition seems to be more of government oversight and control of private economic power, rather than the more structural approach that characterizes many antitrust and other public policies in the United States." *Id.* at 171.

⁷⁴ A well-established history of extraterritorial antitrust enforcement may render the implementation and effectiveness of an antitrust cooperation agreement more difficult. United States extraterritorial antitrust enforcement against Canadian companies, for example, reaches back nearly forty years, beginning with the United States investigation of the Canadian newsprint industry. See *Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Co.*, 72 *F. Supp.* 1013 (S.D.N.Y. 1947); see also Note, *supra* note 18, at 253.

United States⁷⁵ was negotiated to alleviate antitrust tensions between the two countries.⁷⁶ The efficacy of the understanding in achieving this objective has been seriously questioned. Reasons proffered for the failure of the understanding to reduce antitrust hostility between Canada and the United States center primarily on its failure to examine the role of antitrust regulation in each country.⁷⁷ This failure to appreciate and account for differing national perspectives regarding basic national antitrust policies is not, however, the sole explanation for the understanding's lack of success. Deficiencies inherent in the text of the understanding itself preclude the probability of securing tangible and substantial benefits from the agreement.

This informal antitrust understanding provides for antitrust notification and consultation on a voluntary basis.⁷⁸ Although the un-

⁷⁵ This informal "Antitrust Notification and Consultation Procedure" originated in discussions held in 1959 between Canadian Minister of Justice E.D. Fulton and United States Attorney General William P. Rodgers. In 1969, Canadian Consumer and Corporate Affairs Minister Ron Basford and United States Attorney General John Mitchell advanced the original Fulton-Rodgers understanding by agreeing that the OECD guidelines for antitrust cooperation contained in ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE (1967) should be actively implemented between the two countries. Canada-United States: Joint Statement Concerning Cooperation in Antitrust Matters, U.S. Dep't of Justice (press release Nov. 3, 1969), reprinted in 8 I.L.M. 1305 (1969) [hereinafter cited as United States-Canadian Joint Statement].

⁷⁶ Cambell, *The Canada-United States Antitrust Notification and Consultation Procedure: A Study in Bilateral Conflict Resolution*, 56 CAN. B. REV. 459 (1978). The author states that "the American Government, accepting the extraterritorial reach of [United States] antitrust law as rational and necessary, believed the procedure would lessen tensions by keeping Canada informed and in mind." *Id.* at 494.

⁷⁷ *Id.* at 480. The author analogizes the effectiveness of the Canadian-United States understanding in resolving antitrust disputes to "an attempt to treat a compound fracture with aspirin. The aspirin would no doubt relieve part of the pain, but could never really get to the root of the problem." *Id.* at 494.

⁷⁸ United States-Canadian Joint Statement, *supra* note 75, at 1306-07. That the United States-Australia agreement is an executive agreement rather than a treaty does not render its provisions any less binding on the signatories. In international law, "treaties and executive agreements both constitute equally binding obligations on the nation. The binding effect of international law takes place as soon as the state has properly consented to the obligation and does not depend on the form of the particular undertaking." The Under Secretary of State (Webb) to the Secretary of Defense (Johnson), Jan. 17, 1950, cited in 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 212 (1970); DRAFT CONVENTION ON THE LAW OF TREATIES art. 1 comment on use of the term "treaty" (Harvard Research in International Law 1935), reprinted in 29 AM. J. INT'L L. 653, 697 (Supp. 1935). The International Law Commission also has commented that "the law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements . . ." [1966] 2 Y.B. INT'L L. COMM'N 188. For an analy-

derstanding contemplates antitrust cooperation in the form of exchange of information, the confidentiality of such information is not secured by the agreement.⁷⁹ Without that necessary safeguard, information disclosure is inhibited. Although formally reciting the need for antitrust cooperation with due regard to sovereignty,⁸⁰ the understanding fails to set forth specific circumstances under which antitrust consultation should be implemented.⁸¹ Conspicuously absent from the understanding is any treatment of Canadian blocking legislation.⁸² Moreover, the agreement does not contemplate United States participation in an antitrust action where Canadian concerns over national sovereignty theoretically would be represented.⁸³ Unlike the Australian agreement, the Canadian understanding fails to grapple with the sensitive issue of foreign export cartel activity.⁸⁴ As previously mentioned, United States antitrust sanctions against foreign cartelization have operated as catalysts to the enactment of foreign blocking legislation.⁸⁵ The United States-Canadian agreement also fails to establish a mechanism comparable to that established under the Australian agreement, which enables Australia to request a written memorialization containing the official United States government position regarding the implementation of a specific Australian trade or export policy.⁸⁶ Lack of concrete terms, workable standards, and overall detail pervades

sis of the effect of the escape clause provision contained in article 4 of the Australian agreement, *supra* note 16, on the binding nature of the agreement, see *infra* notes 132-35 and accompanying text.

⁷⁹ Compare United States-Canadian Joint Statement, *supra* note 75, at 1307 with Antitrust Agreement, *supra* note 16, art. 3 (prohibiting the unconsented disclosure of information and documents exchanged pursuant to the agreement).

⁸⁰ United States-Canadian Joint Statement, *supra* note 75, *passim*.

⁸¹ The understanding recites that "each country has the responsibility to enforce its own laws and the discussions under these procedures do not in any way bind a country as to what action it decides to take." *Id.* at 1307. Compare *id.* with Antitrust Agreement, *supra* note 16, art. 2(6)(b)(1)-(4) (detailing specific circumstances which should lead United States antitrust authorities to discontinue or modify existing antitrust investigations). For a discussion of the binding effect of the United States-Australia agreement, see *supra* note 79, and *infra* notes 132-35 and accompanying text.

⁸² But cf. Antitrust Agreement, *supra* note 16, art. (5)1 (mandating disclosure of information in antitrust investigations).

⁸³ But cf. *id.* art. 6 (requiring the United States to participate in private antitrust suits and to disclose the substance and outcome of consultations with Australia).

⁸⁴ The Canadian understanding vaguely states that a "primary concern would be cartel and other restrictive agreements . . ." United States-Canadian Joint Statement, *supra* note 75, at 1308. Compare *id.* with Antitrust Agreement, *supra* note 16, art. 2(6)(b)(1-4) (detailed treatment accorded Australian export activity).

⁸⁵ See *supra* notes 9-15 and accompanying text.

⁸⁶ See discussion *infra* notes 123-25 and accompanying text.

the agreement. These various omissions and inadequacies reflect the above-mentioned failure to assess the fundamental underlying antitrust objectives of each nation. An unfortunate testimonial to the agreement's essential failure⁸⁷ was the ineffectiveness of the agreement in attenuating the antitrust conflicts concerning the potash and uranium litigation during the mid-1970's.⁸⁸ Thus, it already is apparent that, if the Australian antitrust agreement is to achieve a higher degree of efficacy in resolving United States-Australian antitrust disputes, it must fill the gaps which are present in the United States-Canadian antitrust understanding.

B. *United States-West German Agreement*

Although an antitrust cooperation agreement between the United States and the Federal Republic of Germany⁸⁹ more closely resembles the detailed provisions of the United States-Australia agreement than it does the United States-Canadian understanding, the success of the agreement in resolving antitrust disputes may be attributable to the substantive compatibility of the West German antitrust law with that of the United States, rather than to the viability of the actual technical apparatus of the agreement.⁹⁰ This factor, coupled with the existence of the European Economic Community,⁹¹ a supranational antitrust authority which provides an alternative route to exclusive negotiation with Germany, impairs the reliability of comparing the success of the Australian agreement with that of the West German agreement. It is useful, however, to examine the extent to which the West German agreement neglects to confront certain issues regarding antitrust cooperation since

⁸⁷ One Canadian commentator asserts that the main value of the agreement at this point is in explaining United States actions and thereby hopefully avoiding diplomatic repercussions. The author notes that the United States Antitrust Division "has never been deterred [by the agreement] from proceeding with an issue that it regarded as very serious." Cambell, *supra* note 76, at 492.

⁸⁸ See *id.* at 491.

⁸⁹ Agreement Relating to Multilateral Cooperation on Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291; [1978] 5 TRADE REG. REP. (CCH) ¶ 50,283 [hereinafter cited as United States-West German Agreement].

⁹⁰ See *supra* note 71. West German antitrust law accords the private plaintiff a cause of action, although recovery of treble damages is not permitted. 5 J. VON KALINOWSKI, *WORLD LAW OF COMPETITION* § 23.02 [6] (1981).

⁹¹ See *supra* note 72. The European Economic Community has accepted the effects test expressed by the Antitrust Division of the United States Department of Justice, *supra* note 30. See COMMISSION OF THE EUROPEAN COMMUNITIES, *SIXTH REPORT ON COMPETITION POLICY* 31 (1977).

these issues, for the most part similarly neglected by the United States-Canadian agreement, suggest those elements which must be addressed adequately by the Australian agreement to obtain even a semblance of antitrust harmony between Australia and the United States.

The United States-West German antitrust cooperation agreement addresses neither issues of blocking legislation⁹² nor United States governmental participation in private antitrust suits against West German companies.⁹³ The use of information and documents exchanged pursuant to the agreement is restricted; however, use of the information as evidence in a United States private antitrust action is permitted.⁹⁴ Similar to the Canadian agreement, the West German agreement does not address foreign export cartel activity.⁹⁵ In addition, compliance by either party with the terms of the agreement concerning information exchange and assistance is conditioned on consistency with the domestic law, security, public policy, or other important national interests of the complying party.⁹⁶ Although this is a desirable limitation, the agreement fails to define the circumstances under which compliance with an information request would be inconsistent with the public policy or national interests of the requested country.⁹⁷ Furthermore, the United States-West German antitrust agreement does not provide a clearance mechanism whereby antitrust conflict arising from West German private conduct could be prevented, and not merely

⁹² The agreement simply provides that no country will interfere with the antitrust investigation or proceeding of the other unless the proceeding is incompatible with the domestic laws, security, public policy, or other important national interests. United States-West German Agreement, *supra* note 89, art. 4(1). Compare *id.* with Antitrust Agreement, *supra* note 16, art. 5(2).

⁹³ The agreement, however, would seemingly authorize West German participation in such a suit. United States-West German Agreement, *supra* note 89, art. 2(3). Compare *id.* with Antitrust Agreement, *supra* note 16, art. 6.

⁹⁴ The agreement stipulates that information received pursuant to assistance under the agreement will be used only for the purposes set forth in article 2, paragraph 1, one of which specifies assistance in connection with an antitrust investigation or proceeding. See United States-West German Agreement, *supra* note 89, art. 5. Compare *id.* with Antitrust Agreement, *supra* note 16, art. 3. The West German agreement authorizes a requested party to impose conditions on the transmission of information in order to "protect the confidentiality of information requested." United States-West German Agreement, *supra* note 89, art. 3(1)(c).

⁹⁵ See *supra* note 84 and accompanying text.

⁹⁶ United States-West German Agreement, *supra* note 89, art. 3(1)(a)(b).

⁹⁷ But cf. Antitrust Agreement, *supra* note 16, art. 5(2) (stipulating that, given prior notice, a mere judicial request for information located in Australia does not constitute an adverse effect on the laws, policies, or national interests of Australia).

cured, as does the Australian antitrust agreement.⁹⁸ This brief analysis of the West German agreement reveals that the issues which were not addressed by the Canadian agreement remain largely unresolved by the West German agreement. The Australian agreement could prove equally ineffective in bridging these gaps in international antitrust harmony unless its provisions explicitly confront these omissions so as to give Australia effective sovereign control over national economic policy.

C. *Analysis of United States-Australia Agreement*

To the extent permissible in a bilateral agreement,⁹⁹ the United States-Australia agreement attenuates Australian concerns over national sovereignty caused by United States extraterritorial antitrust enforcement. This is largely because provisions concerning export activity, information use restrictions, and United States participation in domestic antitrust suits address the very reasons for which Australian blocking legislation was originally enacted.¹⁰⁰ In addition, the agreement contains an escape clause which, if judiciously invoked, further guarantees preservation of Australian sovereignty in areas of critical national economic importance. The agreement also establishes a clearance mechanism affording limited antitrust immunity to Australian firms and entities which, although subject to criticism as a misguided effort, does serve to perpetuate the spirit of antitrust cooperation and conflict avoidance.

1. *Language of Agreement*

Prefatory to a detailed analysis of these various factors, however, is the observation that the language of the agreement itself implicitly recognizes that the paramount issue at stake in the agreement is the effect of United States antitrust extraterritoriality on Australian national sovereignty. A basic imbalance in the language of

⁹⁸ See *infra* notes 123-25 and accompanying text.

⁹⁹ Many commentators insist that, because of fundamental differences between nations regarding antitrust philosophies and proper limits to national sovereignty, a bilateral antitrust cooperation procedure is an ultimately inadequate vehicle for the resolution of international antitrust disputes. See, e.g., Cambell, *supra* note 76, at 494.

¹⁰⁰ Although the agreement does not explicitly provide for the regulation or curtailment of the Restriction of Enforcement Act, *supra* note 39, the purpose in enacting this type of blocking legislation is consonant with the purpose of the antitrust agreement itself, i.e., to avoid antitrust activity which is inconsistent with comity and which adversely affects trade or commerce with other countries. The agreement therefore, implicitly addresses this type of blocking legislation.

the agreement supports this proposition. When the Australian government adopts a policy that it considers may have antitrust implications for the United States, the agreement provides that the Australian government *may* notify the United States of such policy.¹⁰¹ In the event, however, that the Department of Justice or the Federal Trade Commission undertakes an antitrust investigation that may implicate Australian laws, policies, or national interests, the agreement mandates that the United States *shall* notify Australia of the investigation.¹⁰² Subsequent to notification from the United States that an antitrust investigation may have antitrust implications for Australian laws, policies, or national interests, the government of Australia may request consultation concerning the investigation pursuant to the agreement.¹⁰³ The United States, on the other hand, may request such consultation only if the Australian policy may have *significant* antitrust implications under United States law.¹⁰⁴ In essence, the implications for Australian law of an antitrust investigation by the United States are not required to be significant in order for Australia to avail itself of the consultation procedure. The use of these differing standards suggests a recognition by the negotiating parties that one of the primary purposes of the agreement is to placate Australian resentment towards the usurpation of national sovereignty resulting from United States antitrust extraterritoriality. The ensuing analysis will therefore assess the efficacy of the agreement in achieving that objective.

2. *Export Provisions*

The Australian antitrust agreement deals with Australian export activity in a manner which preserves Australian national sovereignty in the face of extraterritorial antitrust enforcement. As a consequence of the agreement's treatment of Australian export activity, Australia's ability to implement national trading policies is enhanced.¹⁰⁵ The detailed treatment of Australian export activity,

¹⁰¹ Antitrust Agreement, *supra* note 16, art. 1(1).

¹⁰² "[T]he Government of the United States *shall* notify the Government of Australia . . ." *Id.* art. 1(2) (emphasis added).

¹⁰³ *Id.* art. 2(1).

¹⁰⁴ *Id.* art. 2(2).

¹⁰⁵ The jurisdictional threat to Australian export and other trading policies resulting from United States antitrust extraterritoriality is Australia's primary concern. Commentary by Mr. J.H. Greenwall, Attorney-General's Department, Australia, at the International Trade Law Seminar 1981, Extraterritorial Application of Canadian and Foreign Antitrust Laws 4,

including explicit reference to exportation of natural resources, assures Australia that United States antitrust interference with Australian economic policy and natural resource marketing and pricing practices will be minimized.¹⁰⁶ Assuming that the United States does, in fact, modify or discontinue antitrust investigations related to Australian export activity in accordance with article 2(6)(b)(3) of the agreement,¹⁰⁷ any Australian perception of inconsistency resulting from the United States Webb-Pomerene export cartel exemption¹⁰⁸ will also be substantially reduced.

Article 2(6)(b)(4) of the agreement may even compel United States courts to recognize to a greater extent Australian governmental representations to and discussions with an Australian exporter¹⁰⁹ as a valid defense in a United States antitrust action against the exporter.¹¹⁰ The present state of case law in the United States would exempt a private antitrust defendant from antitrust liability for an act committed abroad which was commanded, not merely encouraged, by the foreign government when the act occurs within the territory of the commanding sovereign and the private defendant has not induced the foreign sovereign to issue the com-

cited in Note, *supra* note 18, at 245 n. 181.

¹⁰⁶ See Antitrust Agreement, *supra* note 16, art. 2(6)(b)(1)-(4).

¹⁰⁷ Antitrust Agreement, *supra* note 16, art. 2(6)(b)(3), provides that United States antitrust enforcement agencies shall consider modification of an antitrust investigation aimed at Australian conduct "related exclusively to the exportation from Australia to countries other than the United States, and otherwise than for the purpose of re-exportation to the United States, of Australian natural resources of goods manufactured or produced in Australia" It should be noted that one Canadian commentator observes that despite the existing United States-Canadian antitrust understanding, the Canadian governmental involvement in a uranium cartel, although made abundantly clear to the United States Antitrust Division, resulted in no modification of the pending antitrust civil action in the absence of a solid legal ground for desisting. Cambell, *supra* note 76, at 471.

¹⁰⁸ See *supra* note 29 and accompanying text.

¹⁰⁹ Antitrust Agreement, *supra* note 16, art. 2(6)(b)(4), provides that United States antitrust enforcement agencies shall consider modification of an antitrust investigation aimed at Australian conduct which "consisted of representations to, or discussions with, the Government of Australia or an Australian authority in relation to the formulation or implementation of a policy of the Government of Australia with respect to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia."

¹¹⁰ United States courts recognize that when a private party is engaged in a trade restraint which has been commanded by the foreign state as sovereign, the private party constitutes an involuntary actor and is, therefore, exempt from United States antitrust laws. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359-63 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790-90 (1975); *Parker v. Brown*, 317 U.S. 341, 352 (1943). See generally Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Laws*, 7 VA. J. INT'L L. 100 (1967); Note, *International Law—Extraterritoriality—Antitrust Law—Development of the Defense of Sovereign Compulsion*, 69 MICH. L. REV. 888 (1971).

mand.¹¹¹ The Australian agreement impliedly relaxes the requirements for invocation of this foreign sovereign compulsion defense by requiring the Department of Justice or the Federal Trade Commission to fully consider suspension of an antitrust proceeding or investigation when such investigation concerns, not conduct arising from an Australian governmental mandate, but rather conduct resulting from export discussions with the Australian government or with an Australian export authority. If a moderation of the foreign compulsion defense is indeed the effect of this agreement provision, then the agreement has succeeded in securing Australian sovereignty in the area of export activity.

3. *Information Use Restrictions*

In addition to assuring Australian sovereign control over export and trade policy, the United States-Australia antitrust agreement also assures greater compliance by Australian companies with Australian governmental requests for information which will be transmitted to United States antitrust enforcement agencies pursuant to the antitrust agreement. Australian firms should be more willing to supply the requested information to the Australian government since the antitrust agreement mandates that information supplied by the Australian government will not be used as evidence without consent in a United States judicial or administrative proceeding.¹¹²

¹¹¹ The foreign sovereign compulsion defense is premised on the idea of according special deference to acts carried out under a foreign government mandate. Note, *supra* note 38, at 902. See, e.g., *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296-98 (D. Del. 1970). This court recognized a complete foreign compulsion defense since the defendant neither acted voluntarily in complying with the foreign government command nor induced the foreign government to issue the command. Griffin, *American Antitrust Law and Foreign Governments: An Introduction to the Problem*, 13 J. INT'L L. & ECON. 137, 143 (1978). The Antitrust Division of the Department of Justice disputes this decision and would premise the availability of the defense on the following five factors: (1) the foreign government must command and not merely encourage the proscribed conduct; (2) the conduct must have taken place within the territory of the foreign sovereign; (3) the command must have been legal under the law of the foreign nation; (4) the defendant must have acted reasonably in complying with the command; and (5) the balancing of comity interests must favor the foreign sovereign over American antitrust law. *Id.* at 144. The author criticizes this interpretation as an overextended judicial inquiry which fails to account for binding orders of a nonstatutory nature. For further criticism of the Department of Justice's restrictive interpretation of the foreign compulsion defense as hypothetically illustrated by Case K of the ANTITRUST GUIDE, *supra* note 1, see Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645, 682 (1977). For a listing of materials concerning the background of the foreign compulsion defense, see Note, *Foreign Sovereign Compulsion in American Antitrust Law*, 33 STAN. L. REV. 131, 142 n. 48.

¹¹² Antitrust Agreement, *supra* note 16, art. 3.

Thus, Australian control over private business conduct should not be appreciably influenced by the threat to Australian companies of United States antitrust liability which might have previously deterred the Australian firm from compliance with an Australian governmental request for information. This provision, moreover, assures viable Australian antitrust cooperation rather than a mere token exchange of information. Absent assurance that the information will not be used in a manner inimical to Australian national interests, Australia would understandably decline to provide the information sought.¹¹³ The agreement allows Australia to provide information about Australian companies without alienating those companies since any United States antitrust investigation involving the companies must arise independently of any information obtained from the Australian government pursuant to the agreement.¹¹⁴ This information use restriction also indirectly secures Australian national sovereignty since the resulting sincere and viable exchange of information will arguably increase the overall efficacy of the consultation procedure in resolving the antitrust conflicts between the United States and Australia.

4. *United States Government Participation in Antitrust Suits*

Another potential hallmark of the agreement's success in calming Australian concerns resulting from the threat to its national sovereignty presented by United States antitrust enforcement actions is the provision permitting Australia to request United States participation in a private antitrust suit against an Australian company.¹¹⁵ This provision, by requiring United States courts to take into account the substance and outcome of prior intergovernmental consultation, assures Australia that factors of sovereignty and comity will be represented in an antitrust action commenced by a private litigant.¹¹⁶ In addition to explicitly confronting the primary Australian objection to United States antitrust extraterritoriality,¹¹⁷ this provision also accords to both countries an incentive to cooperate actively in the consultation process since the fruits of

¹¹³ See Stanford, *supra* note 2, at 211.

¹¹⁴ Antitrust Agreement, *supra* note 16, art. 3, provides that "the Government of the United States shall not, however, be foreclosed . . . from initiating a proceeding based on evidence obtained from sources other than the Government of Australia."

¹¹⁵ *Id.* art. 6.

¹¹⁶ For a discussion of foreign government objections to the private damages remedy accorded an antitrust plaintiff, see *supra* notes 23-27 and accompanying text.

¹¹⁷ See *supra* note 105.

consultation, by virtue of use as evidence in an antitrust proceeding, will have a visible and concrete effect on the resolution of antitrust conflict. If United States government participation in private antitrust suits does result in a decreased threat of United States antitrust liability for Australian companies, then compliance by these companies with Australian government economic policies and directives¹¹⁸ has been further secured by the agreement.

By securing effective protection against infringement of Australian sovereignty by United States antitrust extraterritoriality, the cumulative effect of these three provisions is to minimize the incentive for Australian defensive blocking legislation. The agreement is not confined, however, to implicit treatment of blocking legislation.¹¹⁹ By defining a standard for antitrust cooperation¹²⁰ and by specifying that the mere seeking by legal process of information and documents is not violative of that standard,¹²¹ the agreement explicitly confronts what is perhaps the most sensitive antitrust difficulty between the United States and Australia.¹²² This direct treatment of Australian blocking legislation, buttressed by provisions regarding Australian export activity, information use restrictions, and United States government participation in private antitrust suits, not only assures a greater degree of antitrust harmony between the United States and Australia, but also provides a model for future bilateral antitrust cooperation agreements which fills the gaps in such previous United States antitrust cooperation agreements.

5. *Clearance Mechanism*

This conception of the Australian agreement as a model bilateral antitrust cooperation agreement is marred, however, in one respect. In an apparent effort to secure further tangible and concrete results from the consultation procedure, the United States-Australia antitrust agreement provides that if the Department of Justice

¹¹⁸ See *supra* note 5.

¹¹⁹ See *supra* note 100 and accompanying text.

¹²⁰ Cooperation is required in regard to an antitrust investigation to the extent permissible by applicable national law and so long as the investigation does not "*adversely affect* the laws, policies, or national interests" of the cooperating country. Antitrust Agreement, *supra* note 16, art. 5(1) (emphasis added).

¹²¹ *Id.* art. 5(2).

¹²² See generally Comment, *supra* note 35. United States Attorney General William French Smith stated that the Australian agreement's provision limiting the use of Australian blocking legislation was "particularly helpful". Antitrust Agreement Press Release, *supra* note 17, at 3.

or the Federal Trade Commission concludes that the implementation of a particular Australian policy which has previously been the subject of consultation should not be a basis for a United States antitrust action, the government of Australia may request a written memorialization stating the basis for the conclusion.¹²³ This innovative feature of the agreement initially resembles a preventive mechanism designed to achieve predictability and stability by forewarning Australian entities of activity which potentially would be actionable under United States antitrust law. Unfortunately, the agreement stops short of this blanket approval approach. The requested written memorialization is merely a prerequisite to a second stage in this clearance procedure, a request by a private Australian entity for a statement of enforcement intentions with respect to proposed private conduct in implementation of the Australian policy.¹²⁴ The statement of enforcement intentions is executed in accordance with the Department of Justice's Business Review Procedure or the Federal Trade Commission's Advisory Opinion Procedure, as the case may be.¹²⁵

This two-tier clearance mechanism appears contradictory, if not altogether unnecessary. If the United States government effectively concludes that the implementation of an Australian policy should not form the basis for an antitrust action, then it should not be necessary to embroil a private Australian firm in the bureaucratic intricacies¹²⁶ of United States antitrust enforcement agencies. Al-

¹²³ Antitrust Agreement, *supra* note 16, art. 4(1).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ For criticism of a comparable certification procedure recently enacted by Congress in the Export Trading Company Act of 1982, *supra* note 32, see *Hearings on S. 432, supra* note 7, at 239-42. Although the Export Trading Company Act establishes a certification scheme designed to immunize United States firms from antitrust liability for export activities, the criticism leveled at the certification procedure is equally applicable to the clearance procedure established by the Australian agreement. It has been argued that the mere availability of such clearance mechanisms would lead the courts, or at least some businessmen, to assume that activities undertaken without resort to the clearance mechanism would be more susceptible to a full-fledged antitrust challenge. *Id.* at 242 (statement of James R. Atwood). This represents the functional antithesis of the intended result under the Australian agreement. The debate concerning the effectiveness of the certification procedure under the Export Trading Company Act led to the proposal of the Foreign Antitrust Improvement Act, *supra* note 29. This legislation amends the Sherman Act and the Federal Trade Commission Act to immunize conduct from antitrust liability involving trade or commerce with foreign nations, other than import transactions, unless the conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce or on the export activities of a domestic individual. [U.S. Export Weekly] INT'L TRADE REP. (BNA) No. 419, at 679 (Aug. 10, 1982). This generic approach embraced by the Foreign Antitrust Improvement Act is conceptually

though this provision may afford a degree of precision and predictability to the Australian firm, such attributes are equally attainable through the blanket approval method of the first tier, the written memorialization. The disadvantages to the firm, of compliance with the Business Review Procedure in terms of usefulness,¹²⁷ reliability,¹²⁸ and disclosure requirements,¹²⁹ outweigh the slight advantage in resorting to the clearance mechanism. Rather than freeing Australian sovereignty from the harness of United States

equivalent to the blanket approval method established under the first tier of article 4 of the Australian agreement, *supra* note 16. If the Australian agreement were confined to a generic, blanket approval approach, the problem of illusory protection under the Business Review Procedure, discussed *infra* notes 127-29, would be largely circumvented while Australian sovereignty would be further secured. For a detailed discussion of the recently enacted Export Trading Company Act of 1982 and the Foreign Antitrust Improvement Act of 1982 and their relationship to United States antitrust laws, see generally *Hearings on S. 432*, *supra* note 7, and *Trading Company Hearings*, *supra* note 32.

¹²⁷ During the period from 1970 to 1980, approximately 22 business reviews were sought concerning proposed international activity. Davidow, *U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments*, 5 N.C.J. INT'L L. & COM. REG. 23, 31 (1980). In view of the apparent reluctance on the part of United States exporters to seek business review of proposed international business transactions, it seems misleading to anticipate that antitrust harmony will result by virtue of frequent recourse to this procedure by Australian entities.

¹²⁸ The protection available to an Australian firm pursuant to the Business Review Procedure is alarmingly fragile. "A business review letter states only the enforcement intention of the [Antitrust] Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest." Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6(9) (1982). The issuance of a business review letter is not to be interpreted as indicating that the Division believes that there are no anticompetitive consequences warranting consideration by an antitrust enforcement agency. *Id.* § 50.6(7)(a).

¹²⁹ Each request for review must be accompanied by "all relevant data including background information, complete copies of all operative documents, and detailed statements of all collateral oral understandings, if any . . ." *Id.* § 50.6(5). The Antitrust Division is further authorized not only to request additional information but also to conduct whatever independent investigation it believes is appropriate. *Id.* All information acquired pursuant to the Business Review Procedure is indexed and placed on public file. *Id.* § 50.6(10)(b). A requesting party may submit to the Antitrust Division a petition for nondisclosure by indicating that "disclosure would have a detrimental effect . . . upon the requesting parties' operations or relationships with actual or potential customers, employees, suppliers (including suppliers of credit), stockholders or competitors." *Id.* § 50.6(10)(c)(3). In the event that the Antitrust Division determines that nondisclosure is justified, the Division nonetheless retains the right to issue a press release generally describing the identity of the requesting party and the nature of the action taken by the Division with regard to the request. *Id.* § 50.6(10)(d). Significantly, any information obtained under the business review procedure may be used by the Division for all governmental purposes. *Id.* § 50.6(11) (emphasis added). Commentators argue that compulsory disclosure of competitively sensitive information functions as an effective deterrent to resort to a preclearance mechanism such as that established under the business review procedure. See, e.g., *Hearings on S. 432*, *supra* note 7, at 242.

antitrust regulation, this particular provision of the agreement brings Australian firms further into a regulatory quagmire. This provision is not consonant with the very purpose of the agreement¹³⁰ because it may leave Australian business conduct subject to intense examination by United States antitrust enforcement agencies. In light of the deficiencies inherent in this clearance procedure and the consequent improbability of resort to the procedure by Australian firms, the inclusion of this option in the agreement is difficult to reconcile on any basis other than an attempt by the Department of Justice to increase the importance and perceived value of domestic antitrust enforcement agencies at the expense of sincere concern regarding Australian sovereignty.¹³¹

6. *Escape Clause*

The deleterious effect on Australian sovereignty from the agreement's provision in article 4 subjecting Australian firms to the Department of Justice Business Review Procedure is mitigated somewhat by the escape clause contained in that same article. This provision states that if the consultation procedure fails to resolve conflicting antitrust laws, policies, or national interests, "each party shall be free to protect its interests as it deems necessary."¹³² An immediate and perhaps understandable reaction to the inclusion of an escape clause would be to construe its existence as effectively negating any binding or obligatory character of the bilateral agreement.¹³³ This reaction should be tempered, first, by the realization that the escape clause option becomes operative only after efforts have been made to resolve the controversy by resort to the consultation procedure.¹³⁴ Second, even assuming *arguendo* that

¹³⁰ The preamble to the Antitrust Agreement, *supra* note 16, recognizes the necessity of antitrust conflict resolution "with mutual respect for each other's sovereignty . . ." The force of this criticism is somewhat mitigated by the Australian government's repeated acknowledgment during negotiation of the agreement that "private suits brought by parties in the United States were a greater problem, in the Australian view, than enforcement actions of the United States Government." Antitrust Agreement Press Release, *supra* note 17, at 1.

¹³¹ Notwithstanding the lack of a viable substantive contribution to the resolution of antitrust conflicts, the two-tier clearance mechanism arguably is inequitable. Since Australian firms are subject to antitrust prosecution by United States agencies in the first place, a balanced and rational analysis should lead to a result whereby an Australian firm would have standing to seek a business review procedure from that agency *without* a prior written memorialization from the United States government.

¹³² Antitrust Agreement, *supra* note 16, art. 4(2).

¹³³ For authority asserting the proposition that consent by one nation to a treaty obligation establishes the binding nature of the agreement irrespective of form, see *supra* note 78.

¹³⁴ The escape clause is available if no method for avoiding conflict has been developed

the escape clause renders the Australian agreement voluntary and nonbinding in nature, it is quite plausible that a voluntary agreement would nonetheless result in substantial adherence to the provisions of the agreement.¹³⁵

A closer examination of the advantages to Australia accruing from the availability of the escape clause option further reveals the inappropriateness of the proposed argument that the escape clause renders the agreement voluntary. The escape clause essentially affords Australia a degree of flexibility and discretion to designate certain vital areas of commercial activity as immune from interference by United States antitrust enforcement agencies while simultaneously retaining the other advantages and benefits arising from the agreement. This power of selectivity assumes that invocation of the escape clause by Australia would free Australia to protect its interests by permitting enactment and application of the appropriate type of blocking legislation in order to prevent United States

"through consultations pursuant to [the] agreement." Antitrust Agreement, *supra* note 16, art. 4(2).

¹³⁵ With regard to multilateral agreements, the argument has been made that even an expressly voluntary code of international business conduct may be binding to a certain degree by virtue of the "considerable impact on the behavior of the parties involved" which results from implementation machinery providing for reporting, consultation, communication, and clarification. Sanders, *Implementing International Codes of Conduct for Multinational Enterprises*, 30 AM. J. COMP. L. 241, 254 (1982). Many commentators reason that the controversy as to the merits of a distinction between voluntary and binding international business codes is illusory since external factors arising from noncompliance will operate to assure a viable degree of adherence to the agreed voluntary code. See, e.g., Plaine, *The OECD Guidelines for Multinational Enterprises*, 11 INT'L LAW. 339, 343-45 (1977). These pragmatic factors include the difficulty encountered by a noncomplying business firm in obtaining diplomatic protection in the foreign country, in acquiring adequate insurance, and in procuring financing through international monetary institutions. For the United States position that a broad range of effective consultative mechanisms is possible even within the parameters of a voluntary code, see *Hearings on Codes of Conduct for Multinational Corporations Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 4 (1977) (statement of Deputy Assistant Secretary of State for Economic and Business Affairs). In view of these considerations, the argument that the existence of an escape clause renders the Australian agreement voluntary in nature loses a great deal of its persuasive force. Compare *id.* with Davidow & Chiles, *supra* note 12, at 268 (citing the general attitude that the voluntary, nonpublic, bilateral, diplomatic approach to international business conflict resolution constitutes a cosmetic formula designed to indicate goodwill and diplomatic accessibility while actually disguising a basic unwillingness to surrender national discretion in the economic arena). It also is argued that in the context of multilateral codes of business conduct, the voluntary nature—binding effect dispute is largely academic since most significant trading nations have existing national legislation concerning restrictive business practices which would tend to negate the independent effect of a multilateral international code of business conduct on the economic welfare of the nation. *Id.* at 270.

antitrust interference. This selectivity further assumes that, during the consultation procedure, the mere threat by Australia to invoke the escape clause would result in United States deference to the business activity under consideration. This latter assumption is valid only to the extent that Australian negotiating tactics during the consultation procedure remain judicious and sophisticated with regard to the circumstances under which invocation of the escape clause should be threatened. In essence, there may exist certain activities, such as mining, conducted by foreign entities in Australia which the Australian government deems so essential to its economy that interference with them by United States antitrust enforcement agencies would not be countenanced under any circumstances by the Australian government on the ground of protection of sovereignty over the national economy.¹³⁶ In this way, the determination of whether to invoke the escape clause mechanism becomes a function of the value of the business activity under consideration to Australian economic integrity. The escape clause, by operating as a bargaining chip for Australia during negotiation pursuant to the agreement,¹³⁷ goes to great lengths to soothe antitrust conflicts arising from the Australian perception of United States antitrust extraterritoriality as an intrusion on its sovereign right to direct and control vital domestic economic sectors.

IV. CONCLUSION

The United States-Australia antitrust agreement should operate to forestall and resolve antitrust conflicts because its provisions reconcile the substantive and procedural antitrust grievances between the United States and Australia. The agreement not only fosters Australian control over domestic export activity, but also

¹³⁶ Of course, the argument that absolute sovereignty in this sense would result in *all* cases if there were no antitrust agreement whatsoever misses the point since the United States would, absent any agreement, extraterritorially enforce antitrust laws. The existence of the agreement otherwise provides United States antitrust officials with an incentive to defer to Australian sovereignty, in circumstances in which Australia threatens to use the escape clause, in an attempt to perpetuate a cooperative basis for future consultation under the agreement.

¹³⁷ The bargaining value to Australia of threatened reliance on the escape clause to circumvent obligations of the antitrust cooperation agreement does not unduly tip the scales in favor of Australia. This is true especially in light of the extensive use made by the United States of its extraterritorial antitrust enforcement scheme, including private treble damages suits, as a potent foreign policy weapon to pressure foreign governments to accede to the United States anti-cartel philosophy and to comply with the terms of commodity agreements negotiated by the United States. See Note, *supra* note 13, at 768-70.

assuages Australian remonstrations concerning the private treble damage remedy in United States antitrust law. The prospect of antitrust conflict prevention is strengthened since the agreement establishes a meaningful and viable flow of information between the two countries by securing the confidentiality of such information. The application of Australian blocking legislation will no longer thwart antitrust cooperation because the agreement provisions largely eliminate the *raison d'être* of such defensive legislation. To view the Australian agreement as a panacea which completely eradicates antitrust strife between the United States and Australia would be naive. Transnational regulation of domestic economies simply cannot be tailored to fully accomodate foreign national sovereignty in a single bilateral agreement. The United States-Australia antitrust agreement can be viewed realistically, however, as an initial bilateral undertaking which identifies and confronts the primary obstacles to effective antitrust harmony between the United States and Australia.

James W. King

