December 17, 1999

REPORT OF THE ABA SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE CONCERNING PRIVATE ANTICOMPETITIVE PRACTICES AS MARKET ACCESS BARRIERS

This report is being submitted by the ABA Sections of Antitrust Law and International Law and Practice ("Sections") upon recommendation from the Joint Task Force on the Relationship of International Trade Law and Competition Law*. The views expressed herein are presented on behalf of the Sections and have not been approved by the ABA House of Delegates or the ABA Board of Governors and thus, should not be construed as representing the position of the ABA.

I. INTRODUCTION

Negotiations undertaken through a wide array of international trade agreements have enabled members of the international community to eliminate a substantial portion of the governmentally imposed restraints that historically have impeded international trade. However, while governmental barriers to market access remain the major focus of international trade law and negotiations, a number of

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governments have begun to perceive that the benefits they had expected to flow from these trade agreements have not been fully realized, due in part to the existence of private anticompetitive restraints in certain markets. This perception has prompted a search for mechanisms that may be used to address the anticompetitive conduct of private actors that inhibits market access for foreign competitors.

Both competition laws[1/] and international trade laws and agreements offer potential vehicles to facilitate the entry of firms into foreign markets encumbered by private anticompetitive conduct. It is important to note at the outset, that these bodies of law operate from somewhat different perspectives. It

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[1/] In this paper, we use the term "competition law" to refer to laws that prohibit anti-competitive conduct such as cartels, exclusionary practices by dominant firms, certain vertical restraints, and mergers that substantially lessen competition or that create or enhance a dominant position. Examples of such laws include the U.S. antitrust laws, the competition laws of the European Union (Articles 85 and 86 of the Treaty of Rome -- now Articles 81 and 82 under the Amsterdam Treaty -- and the Merger Regulation, Council Regulation (EEC) No. 4064/89), as well as the pertinent provisions of the Canadian Competition Act. We do not use the term to refer to so-called unfair competition laws, which, dealing with such issues as palming off, misrepresentation and false advertising, constitute a separate body of law.

is not surprising, therefore, that these different perspectives can and do give rise to disagreement about the definition of "market access," dissension over the methods that should be employed to facilitate market access, and differing perspectives on the circumstances in which market-opening action by the U.S. government or international bodies may be warranted.

This paper first provides an overview of the decline of governmentally imposed barriers to trade and the increasing focus on the conduct of private actors in excluding foreign competitors. Next, it compares the perspectives of competition policy and international trade policy and explores the manner in which these sometimes inconsistent perspectives affect views concerning when, and which types of, market-opening action would be appropriate. The paper examines present mechanisms that can be used to obtain market access in the face of private and hybrid anticompetitive conduct. In conclusion, the paper reviews current initiatives seeking different and more effective ways of addressing the problem of private-practice access barriers, and recommends an approach for the American Bar Association Sections of Antitrust Law and International Law & Practice to advance consistent with the Association's prior study of this issue.

II. THE INCREASING FOCUS ON THE EFFECTS OF PRIVATE CONDUCT BARRIERS TO TRADE

A. THE DECLINE OF GOVERNMENTALLY IMPOSED TRADE RESTRAINTS

During the decades following World War II, nations have concluded myriad agreements to facilitate the flow of international trade. Multilateral negotiations under the aegis of the General Agreement on Tariffs and Trade (GATT) have served as the principal vehicle for trade liberalization during the last 50 years. The GATT negotiations have sought to address an ever-wider array of governmentally imposed barriers to trade. While initially providing the basis for dramatic tariff reductions, subsequent rounds of GATT negotiations have addressed non-tariff barriers to trade, trade in services, intellectual property and trade-related investment. Most recently, the World Trade Organization (WTO) Agreements reached in the Uruguay Round of Multilateral Trade Negotiations not only greatly expanded the substantive scope of the rules governing fair conduct of international trade; they also included for the first time a Dispute Settlement Understanding, under which decisions of panels cannot be blocked by the losing party, as

was possible in the earlier GATT panel system of dispute resolution.[2/]

In addition to the multilateral trade liberalization efforts undertaken through the GATT and the WTO, nations have in recent years increasingly employed regional and bilateral mechanisms designed to enhance international trade. Perhaps the most successful regional effort is reflected in the formation of the European Union.[3/] Other regional trade agreements of note include the North American Free Trade Agreement (NAFTA),[4/] the Asia Pacific Economic Cooperation Forum (APEC)[5/] and the proposed Free Trade Area of the Americas.[6/] The number of bilateral free trade agreements also has grown significantly. The United

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[2/] A discussion of the events leading up to the formation of the WTO may be found in Christopher T. Fedderson, Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional Rules of Interpretation", 7 Minn. J. Global Trade 75, 79-82 (1998).

[3/] See Maastricht Treaty on European Union, 1992 0.J. (CC 191) 1, 1 C.M.L.R. 719 (1992).

[4/] See Agreement on North American Free Trade, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 and 32 I.L.M. 605 (1993).

[5/] See APEC Secretariat, Asia-Pacific Economic Cooperation, Selected APEC Documents, 1989-1994, at 117-119 (1995).

[6/] See Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808, 811 (1995).

States, for example, has negotiated bilateral agreements with Israel[7] and Canada,[8] among others.

The United States and other countries also have entered into a host of more narrowly tailored bilateral agreements designed to address barriers to trade in specific industries and sectors. Some of these sector-specific agreements have resulted from the United States' use, or threatened use, of unilateral measures under Section 301 of the Trade Act of 1974.[9] While most proceedings under Section 301 have resulted in bilateral market-opening agreements that contain most-favored nation provisions, a number have resulted in unilaterally imposed sanctions instead.[10]

B. THE EMERGENCE OF A NEW ISSUE: PRIVATE RESTRAINTS AS TRADE IMPEDIMENTS

As the importance of governmental barriers to trade has waned, the focus has shifted in significant part to the practices of private actors that exclude foreign competitors.

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[7] See United States-Israel Free Trade Agreement, Apr. 22, 1985, U.S.-Isr., 24 I.L.M. 653 (1985).

[8] See Canada-U.S.: Free Trade Agreement, Jan. 2, 1988, U.S.-Canada, 27 I.L.M. 281 (1988).

[9] 19 U.S.C. § 2411 (1994).

[10] See Alan O. Sykes, Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301, 23 Law & Pol'y Int'l Bus. 263, 307-17 (1992).

These private restraints may flow either from purely private conduct or from the conduct of private actors that is assisted or condoned by the actors' government. The former category are generally referred to as private restraints, while the latter category have come to be called hybrid restraints.

It may be argued that these private and hybrid restraints have always existed but have lived in the shadows of governmentally imposed restraints, and have become more noticeable only upon the dissolution of governmental barriers to trade. Alternatively, it may be argued that, as the barriers erected by governmentally imposed restraints have been progressively reduced, private actors sought to resurrect barriers or substitute new ones through private and hybrid practices designed to recreate the effects of the governmental restraints. Regardless of which view is adopted, the United States and a number of other governments have begun to perceive that the benefits they had expected to flow from the elimination of governmental restraints have not been realized, due in part to these private and hybrid restraints.[11/]

[11/] See, e.g., Hearings on Antitrust Enforcement Oversight Before the U.S. House of Rep. Comm. on the Judiciary, 105th Cong., 1st Sess. (Nov. 5, 1997) (statement of Joel Klein, Asst. Atty. Gen., Antitrust Div., U.S. Dept. of Justice); Diane P. Wood, The

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To some extent, the disappointment of these governments may be attributable to unrealistic expectations. After all, trade liberalization does not guarantee sales or other business success, but rather facilitates open competition that, with respect to any particular transaction, will result in losers as well as winners. However, substantial anecdotal evidence has been presented that competition in the international arena is significantly impeded by private anticompetitive conduct. Examples of private conduct that can impede access by foreign firms include agreements among local firms to refrain from purchasing or distributing products imported by or from foreign firms, agreements to withhold from foreign entrants materials, supplies or other necessary inputs, predatory pricing designed to drive out new entrants, industry-created standards that discriminate against foreign sellers' products or services, exclusionary distribution systems, and exclusive purchasing agreements with domestic suppliers by a company or companies representing a major portion of domestic demand. Practices of this nature may operate to deny foreign firms a reasonable

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Internationalization of Antitrust Laws, Address at the DePaul Law Review Symposium (Feb. 3, 1995).

opportunity to compete in markets clouded by this conduct, even though the governments of these countries have reduced or even eliminated governmental barriers to market access through trade negotiations. Set forth below are some recent examples of cases in which competition law and international trade law initiatives have sought to deal with alleged private and hybrid market access barriers.

A case involving allegations of private action to withhold necessary inputs from a new entrant is being pursued in the computer reservation system (CRS) industry. SABRE, owned by American Airlines, is the leading CRS in the U.S. industry. It has sought to establish and expand its presence in European markets for more than a decade.[12/] It has claimed that its entry into these markets has been inhibited by the anticompetitive conduct of the three large European airline owners of Amadeus, the leading European CRS.[13/] SABRE has contended that these airline owners, together with their affiliated travel providers,

[12/] See U.S. Department of Justice Press Release, Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting U.S. Airlines' Computer Reservations Systems (Apr. 28, 1997).

[13/] The Amadeus CRS is owned by Lufthansa Commercial Holdings GmbH, Compagnie Nationale Air France and Iberia Airlines, the

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have refused to provide SABRE with the same complete, timely and accurate fare data routinely provided to Amadeus and also have denied SABRE the ability to perform numerous booking and ticketing functions made available to Amadeus. The U.S. Department of Justice concluded that the inputs allegedly denied by the European travel providers to SABRE were "critical" to the ability of a CRS to compete effectively and requested under the U.S.-E.U. positive comity agreement that the European Communities investigate these practices.[14/] The European Commission initiated a formal procedure against Amadeus in March 1999. SABRE settled with Lufthansa and SAS, a former part owner of Amadeus, before the Commission began this procedure. In September 1999, the Commission closed its investigation, advising that it had not discovered any infringement as alleged.

In 1991, the American Electronics Association (AEA) urged the Office of the United States Trade Representative (USTR) to commence a sectoral negotiation with Japan aimed at removing

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national flag carriers in Germany, France and Spain, respectively, and by Continental Airlines.

[14/] See U.S. Dept. of Justice Press Release, supra note 12. The case is a complex and difficult one. In effect, it poses the

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governmental, private and hybrid market access restraints in the electronics sector.[15/] In support of that request, AEA submitted numerous detailed allegations by AEA members of a wide variety of access-denying practices.[16/] Among the experiences related in that submission and alleged to constitute examples of private access-denying conduct were the following:

- One U.S. company sought to sell an electronic component to three large Japanese industrial companies which accounted for more than 90 percent of purchases of that component in Japan. After seven years of effort, after technical approval by all three Japanese companies, after being recommended to top management as the superior (compared to Japanese competitors) component by the technical staffs of two of the three companies, and after having been told repeatedly by purchasing staff that its prices were "fully competitive" or "more than competitive," the U.S. company never made a single sale.

- A U.S. manufacturer of computer peripheral equipment repeatedly offered to Japanese computer companies a product that was universally acknowledged -- in the trade

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question whether and to what extent a firm has an obligation not to give preferential treatment to its own joint venture.

[15/] Submission of the American Electronics Association, July 1991. The issues raised by AEA were taken up by USTR in the Framework Negotiations with Japan.

[16/] Id.

press and by the purchasing staffs of the computer companies -- to be substantially superior to any competitive product made in Japan. Nevertheless, no Japanese computer company would even permit the U. S. manufacturer to quote a price. In each case, the purchaser said it had an exclusive supply relationship with a Japanese computer peripherals manufacturer.

- Cray, the U.S. supercomputer manufacturer, alleged documented predatory pricing, documenting prices below variable cost by Japanese competitors on those sales for which Cray competed in Japan. Discounts by Japanese companies on those sales averaged 75%-80%, and there were bids as low as one dollar.

- Three major U.S. semiconductor manufacturers, each an acknowledged technology leader, could make no significant sales in Japan until they established production facilities in Japan. Only then could their Japanese production could be sold to Japanese companies.

It must be emphasized that not all segments of the business community share the view that private access-denying practices are a significant problem in global trade. In commenting on the 1998 draft report of its Working Party on Competition and International Trade, the International Chamber of Commerce noted this divergence of business sector views and speculated that it may be traceable in substantial part to differences among various companies' international strategies:

> This divergence within the business community only becomes clear when one understands that businesses can have radically different market access strategies. Those asserting that there is no evidence of international private anti-competitive acts tend not to have highly developed market access strategies, or have found some way around them (for example joint ventures or licensing arrangements). However, those asserting that international private anti-competitive acts do exist tend to want to use such acts as a justification for measures opening third country markets.[17/]

While much of the public attention on private market access barriers has focused on Japan's keiretsu relationships and allegedly exclusionary distribution systems,[18/] Japan is by no means the only country in which private or hybrid access-denying

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[17/] Replies formulated by the ICC Joint Working Party on Competition and International Trade to questions asked by the WTO Working Group (International Chamber of Commerce, Oct. 6, 1998) (hereinafter "ICC Working Party Replies") at 2.

[18/] See, e.g., "Phase 1: Japan's Distribution System and Options for Improving U.S. Access" (USITC Pub. 2291, June, 1990); "Analysis of the U.S.-Japan Trade Problem," Advisory Committee for Trade Policy and Negotiations (1989); David Flath, "Vertical Restraints in Japan," in Japan and the World Economy (1989); Chalmers Johnson, Laura d'Andrea Tyson and John Zysman, eds., Politics and Productivity: How Japan's Development Strategy Works (Ballinger, 1989); Ishida Hideto, "Anticompetitve Practices in the Distribution of Goods and Services in Japan: The Problem of Distribution Keiretsu," in Journal of Japanese Studies, vol. 2 (1983); Robert Lawrence, "Does Japan Import Too Little? Closed Minds or Closed Markets?" in Brookings Papers on Economic Activity, No. 2 (1987); Susan MacKnight, "The United

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practices have been the subject of complaints. For example, U.S. and European makers of auto parts have complained about exclusive buying relationships, similar to the Japanese keiretsu, in Korea and Indonesia. In Europe, aeronautics industry projects to develop avionics systems for Airbus civil aircraft appear to have been effectively closed to non-European suppliers by the requirement that such suppliers must, as a condition of participation, make their proprietary technologies available to their European competitors.

A recent WTO Working Group report underlined the proliferation of private practices that "could have the effect of reducing or eliminating the potential gains from trade liberalization":

> With regard to ... practices affecting market access for imports, the specific examples cited by Members in the discussion included actual cases of domestic export cartels, international cartels that allocated national markets among participating firms, the unreasonable obstruction of parallel imports, control over importation facilities, exclusionary abuses of a dominant position and vertical market restraints that foreclosed markets to

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States Trade Deficit with Japan: Something Must Be Done," in JEI Report, No. 17A (Apr. 28, 1989).

> competitors, certain private standard-setting activities and other anti-competitive practices involving industry associations. Observers from intergovernmental organizations also referred to examples of practices that had come to light in their work, including vertical integration by local manufacturers into distribution, contractual arrangements that mimicked the effects of vertical integration, such as exclusive dealing and sole distribution rights; cartels involving local producers; anti-competitive agreements involving both local and offshore producers; possible instances of predatory pricing; and private standard-setting activities in addition to import cartels, vertical market restraints and more general exclusionary abuses of a dominant position.[19/]

Governmental participation in, or condonation of, restrictive private conduct may give rise to market access barriers known as hybrid restraints. An example of repeated allegations of hybrid restraints may be found in the history of the Japanese passenger vehicle industry.[20/] In an attempt to foster a domestic car industry, Japan enacted several protectionist measures following the withdrawal of the

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[19/] Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/2 at 28 (Dec. 8, 1998), at 28 para. 84. The Report went on to discuss the access-denying effects of private anticompetitive practices in Argentina and Peru. Id. at 28 para. 85.

Occupation Forces. These protectionist measures severely inhibited the ability of foreign car makers to sell their products in Japan. Eventually, these governmental restraints were, it has been contended by U. S. manufacturers, supplanted by private restraints on foreign competition constructed by the domestic automobile manufacturers. Although the active participation of the Japanese government in fostering these private restraints is debatable, the government's failure to address the restraints under Japan's Antimonopoly Law is frequently asserted. In the view of U.S. trade officials and American auto makers, the exclusionary effect of these hybrid restraints is evidenced by the minuscule share of the Japanese passenger vehicle market possessed by foreign automobile manufacturers. In 1970 and 1980, foreign autos possessed only 0.7 percent and 1.5 percent of the Japanese market,

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[20/] See generally James F. Rill and Christine S. Chambers, Antitrust Enforcement and Non-Enforcement as a Barrier to Import in the Japanese Automobile Industry, 24 Empirica 109 (1997).

respectively.[21/] The Japanese market share accounted for by foreign autos had reached only 4.1 percent by 1992.[22/]

A more recent hybrid restraint allegation that is currently the subject of a proceeding under Section 301 of the U.S. trade laws involves an alleged government-approved concerted refusal to deal in Mexico. According to a 1998 petition filed with the Office of the United States Trade Representative (USTR) by the Corn Refiners Association,[23/] senior officials of the Mexican Government encouraged, and later publicly expressed approval of, an agreement between the Mexican sugar producers' association and the major Mexican soft drink bottling companies pursuant to which the bottlers agreed to limit the amount of high fructose corn syrup (HFCS) they would buy.[24/] Since U.S. imports supplied the bulk of HFCS consumed in Mexico, the primary impact of the alleged agreement was on U.S. producers of HFCS. After efforts by the U.S. Corn Refiners Association (whose members produce

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[21/] World Motor Vehicle Data 18 (1994). [More current statistics to be supplied.]

[22/] Id.

[23/] Petition for Relief under Section 301 of the Trade Act of 1974, As Amended, on Behalf of Corn Refiners Association, Inc., Steptoe & Johnson (Apr. 2, 1998).

[24/] Id. at 5-6.

HFCS for export to Mexico) and by Mexican HFCS producers failed to persuade the Mexican antitrust authority to take action against the access-restricting agreement,[25/] the Section 301 petition was filed. USTR subsequently initiated a Section 301 proceeding,[26/] and concluded after investigation that there was "reason to believe" that the alleged agreement existed and that it operated to reduce imports of HFCS from the United States.[27/] USTR has not yet taken action, but is continuing its inquiries and is pursuing a negotiated resolution with the Government of Mexico.

The recent, much publicized effort by Eastman Kodak to attack alleged Japanese access-denying private practices in the distribution of photographic film attests to the growing concern of various American industries over the phenomenon of private practices allegedly instituted, sometimes with government support, to replace previous governmental barriers to import competition. The initial Kodak petition focused predominantly on

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[25/] Id. at 8.

[26/] 63 Fed. Reg. 28,544 (1998).

[27/] United States to Further Explore Mexican Practices Affecting High Fructose Corn Syrup, USTR Press Release 99-44 (May 14, 1999).

present-day private practices.[28/] However, the case ultimately put to the WTO by USTR alleged a complex intertwining of governmental and private practices, with the private practices allegedly being developed -- with the tolerance and even support of the government -- as a means of replacing governmental barriers that were gradually eliminated to comply with evolving WTO rules and to respond to U.S. government negotiating pressure.[29/]

It is worth noting that the involvement of the government in hybrid access-denying practices is a matter of legal significance in the analysis of such practices under both trade law and competition law. Interestingly, that significance works in opposite directions in the two disciplines.

In international trade law, both under the WTO and in U.S. international trade law, involvement of the government in an access-denying practice makes that practice more susceptible to

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[28/] Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper, Memorandum in Support of a Petition Filed Pursuant to Section 301 of the Trade Act of 1974, as amended (Dewey Ballantine for Eastman Kodak Co.) (May 1995).

[29/] Japan-Measures Affecting Photographic Film and Paper, First Submission of the United States, USTR (Feb. 20, 1997). See also Japan-Measures Affecting Photographic Film and Paper, Second Submission of the United States, USTR (May 20, 1997).

condemnation. As noted earlier, the original focus of GATT disciplines was predominantly on trade-distorting government practices. Even today, governments are often reluctant to cast WTO cases in terms of purely private practices, and instead seek -- as the United States did unsuccessfully in the Japan photographic film case -- to characterize the access-denying practices as sponsored, directed or orchestrated by the government. Whereas active participation in or direction of an access-denying practice by a government (for example, a discriminatory standard established by a trade association) can be WTO-violative, there is less certainty whether a lesser government role -- such as sanctioning or tolerating the private practice -- can be the subject of a viable WTO grievance. The U.S. Congress attempted to reach such lesser government roles by making governmental "toleration" of systematic anticompetitive practices specifically cognizable under Section 301.[30/] However, no case to date has been pursued under this provision.

In U.S. antitrust law, government direction or compulsion of what would otherwise be an anticompetitive private practice may insulate that practice from antitrust challenge. For

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[30/] See discussion of this provision in Section IV.B.1, infra.

example, there are narrow defenses under U.S. antitrust law for acts of foreign governments[31/] in their governmental (as opposed to a commercial) capacity (foreign sovereign immunity doctrine)[32/] and for private acts committed under the compelled direction -- as opposed to mere encouragement or approval -- of a foreign government (foreign sovereign compulsion).[33/] Moreover, the act of state doctrine prevents a party from seeking relief or invoking a defense that "declare(s) invalid the official act of a foreign sovereign."[34/] In addition, U.S. antitrust law recognizes a defense to charges of antitrust violations where challenged private conduct has been authorized by a U.S. state government as part of a clearly articulated policy to displace

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[31/] See generally ABA Antitrust Section, Antitrust Law Developments 1049 (4th ed. 1997).

[32/] Foreign sovereign immunity has long been recognized under U.S. law, starting with The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). Congress narrowed the immunity in 1976 by establishing that immunity does not extend to the commercial activity of foreign governments. The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2)(a) (1998).

[33/] Mannington Mills, Inc. v. Congoleum Corp., 696 F.2d 1287, 1293 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n, 549 F.2d 597 (9th Cir. 1976); Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1296-98 (D.Del. 1970); U.S. v. Watchmakers of Switz., 1963 Trade Cas.(CCH) ¶ 70,600 (S.D.N.Y. 1962).

[34/] W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International, 493 U.S. 400 (1990).

competition with regulation and where the state government actively supervises the conduct at issue (the state action doctrine).[35/] There are also defenses under U.S. antitrust law for private conduct that involves petitioning a domestic U.S. (or foreign) government to adopt anti-competitive governmental actions (the Noerr-Pennington doctrine).[36/] It should be noted, however, that governmental knowledge, tacit approval or toleration of private restraints will not insulate hybrid restraints from challenge under U.S. antitrust law.

Trade in services, which now represents more than half of all global trade flows, is an area in which private and hybrid market access restraints have received particular attention in international trade negotiations. Articles VIII and IX of the

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[35/] Parker v. Brown, 317 U.S. 341 (1943), and Southern Motor Carriers Rate Conference v. U.S., 471 U.S. 48 (1985).

[36/] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). Lower federal courts are split on the application of Noerr-Pennington to petitioning foreign governments. Compare Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358 (65th Cir. 1983) (Noerr applicable to the filing of lawsuits in a foreign court) with U.S. v. AMAX Inc., 1977-1 Trade Case. (CCH) ¶ 61,467 (N.D. Ill. 1977) (Noerr immunity not extended to attempts to influence Canadian government). In the Antitrust Enforcement Guidelines for International Operations, 4 Trade Reg. Rep. (CCH) ¶ 13,107, the Federal Trade Commission and Department of Justice stated that they would apply Noerr-

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General Agreement on Trade in Services (GATS) deal specifically with the obligations of Members to discipline the conduct of monopolies and exclusive services suppliers and to eliminate trade-restricting business practices of other service suppliers.[37/] Provisions ensuring access to facilities necessary for effective competition in the domestic market are of central importance in the GATS Decision on Commitments in Basic Telecommunications.[38/] As the International Chamber of Commerce ("ICC") observed with regard to the latter agreement:

> The focus on competition related issues in those negotiations resulted from the objective of market contestability -- i.e. effective entry. This is particularly important in an industry such as telecommunications, which in developed countries is often characterized by monopolies and exclusive service providers. In those circumstances, reducing barriers to foreign entry can be meaningless if potential entrants cannot get access to

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Pennington to the petitioning of foreign governments in the same manner they treat attempts to petition the U.S. government.

[37/] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B (hereinafter "GATS Agreement").

[38/] World Trade Organization Council for Trade in Services, Decision on Commitments in Basic Telecommunications, S/L/19 (Apr. 30, 1996) (hereinafter "Telecom Agreement").

> facilities essential to effective meaningful entry.[39/]

In a world in which access to proprietary technologies or to the facilities or services offered by a dominant supplier may be essential to effective participation in the market, as shown with respect to internet-related markets by the ongoing Microsoft case, both global trade policy and domestic competition policy seem likely to focus increasingly on private access-denying practices.

In summary, a major new element of the trade and competition policy debate has appeared over the past decade. While there are as yet no economic or statistical analyses on the effect of private anticompetitive practices on trade flows, repeated allegations of anticompetitive conduct undertaken by private actors to exclude competition from foreign firms have led to a developing view within significant sectors of the U.S. business community that purely private conduct can be as effective as governmental restraints in impeding trade. In addition, there is a growing view that the exclusionary conduct of private actors may be strengthened by government acts,

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[39/] Draft Report of the ICC Joint Working Party on Competition and International Trade (International Chamber of Commerce, Feb. 12, 1998) (hereinafter "ICC Draft Report") at 64.

policies and practices that tolerate, and perhaps even encourage, these exclusionary private practices. In a poll of member companies conducted by the American Electronics Association preparatory to its initiative seeking U.S.-Japan sectoral negotiations, private access-denying practices were named far more frequently than governmental practices as being serious barriers to exports to Japan. Similarly, in testimony to the Congress in 1989, the National Association of Manufacturers stated that private barriers to market access were the most serious problem in U.S.-Japan trade.[40/] Such complaints by major exporting groups have led to increasing pressure on governments to address private and hybrid restraints that nullify or impair the benefits of free trade that nations reasonably had expected to enjoy as a result of multilateral, regional and bilateral trade agreements.

III. ANTITRUST LAW AND INTERNATIONAL TRADE LAW PRINCIPLES AND PERSPECTIVES ON MARKET ACCESS

As a precursor to examining the mechanisms that may be used to combat private and hybrid restraints and achieve market access, it may be useful first to explore the term "market

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[40/] Testimony of R. J. Morris, National Association of Manufacturers, before the Subcommittee on Trade of the Senate Finance Committee, (Nov. 6, 1989).

access" in greater detail. There is no universal understanding as to how "market access" should be defined. Moreover, while elimination of artificial barriers to market access is perhaps the pre-eminent objective of international trade policy in the post-World War II era, there is no general agreement that ensuring fair market access is an appropriate goal for competition policy. It is often remarked that differing perspectives on the concept of market access flow from the disparate goals and objectives of competition policy and international trade policy. Because the distinctions are by no means self-evident, a closer examination of the differing goals and objectives of the two disciplines is warranted.[41/]

The goal of competition policy as conceived today in U. S. antitrust law[42/] lies in maximizing economic efficiency and

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[41/] For comparison of international trade policy and competition policy, see generally, Harvey M. Applebaum, The Interface of the Trade Laws and the Antitrust Laws, 6 Geo. Mason L. Rev. 479 (Spring 1998); Draft Report of the International Chamber of Commerce Joint Working Party on Competition and International Trade, Competition and Trade in the Global Arena: An International Business Perspective (Feb. 12, 1998).

[42/] The goals of competition policy in some other countries -- notably the European Union -- have differed from current U.S. policy in that they have had an additional component of protecting smaller or weaker competitors from certain types of activity by larger or stronger competitors. Moreover, the competition policies of many developing countries focus on

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enhancing welfare through the promotion of free and open market competition.[43/] Specifically, U.S. competition policy is grounded in the concept that protecting the competitive process will promote allocative, productive and innovative efficiencies. By focusing its efforts on the elimination of private anticompetitive conduct, U.S. competition policy seeks to rid the marketplace of distortions that impede the attainment of efficiencies. It is important to note that this policy seeks to attain its goals by perfecting the competitive process rather

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protecting their industries against larger and more sophisticated foreign competitors. See Eleanor M. Fox, "International Antitrust: Against Minimum Rules; For Cosmopolitan Principles" in Antitrust Bulletin, Spring 1998, 5, 7-8.

[43/] The U.S. Supreme Court, in Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958), discussed the purpose of the Sherman Act:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestricted interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time, providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

than by protecting individual competitors.[44] Competition policy under U.S. law is therefore willing to risk the health of any individual competitor to promote the health of the competitive process. Thus, the U.S. antitrust laws do not condone attempts by domestic competitors to shield themselves from foreign competitors, but instead assert that a healthy competitive process will promote the international competitiveness of domestic industry.

One distinction that is sometimes drawn between the two disciplines is that, while competition policy is concerned with eliminating adverse effects on competition caused by private restraints, the primary concern of international trade policy was until recently the elimination of governmental impediments to free cross-border trade.[45] As noted in the discussion of

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[44] Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884 (1990). ("The antitrust laws were enacted for 'the protection of competition, not competitors,'" 495 U.S. at 330, quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, (1962)).

[45] A secondary concern of international trade policy has been the extent to which governments may restrict imports for national security reasons, 19 U.S.C. § 1862 (1994), to protect domestic industries from serious injury, 19 U.S.C. § 2251 (1994), or to protect industries from imports deemed unfairly traded, either because they are sold at unfairly low prices, 19 U.S.C. § 1673 (1994 & Supp. III), or because they are

(footnote continued)

trade agreements above, international trade policy initially was directed at the reduction and ultimate removal of tariff and governmental non-tariff barriers to trade. This distinction has never been complete, and has become even more blurred in recent years as international trade rules have expanded to include private practices that are seen as distorting trade flows. From the outset in 1947, the GATT recognized dumping -- a private practice in the nature of discriminatory or (more recently) below-cost pricing -- as an "unfair" practice and prescribed the manner and extent to which corrective measures could be imposed.[46/] More recently, private discriminatory practices (collateral to governmental practices) have been proscribed in WTO Agreements on Government Procurement[47/] and on Standards.[48/]

(footnote continued)

subsidized, 19 U.S.C. § 1671 (1994 & Supp. III). This separate concern of trade policy is not within the scope of this report.

[46/] Art. VI, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (hereinafter "GATT").

[47/] Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing World Trade Organization, Annex 4(b) (hereinafter "Government Procurement Agreement").

[48/] Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (hereinafter "Standards Agreement").

As noted earlier, the General Agreement on Trade in Services devotes two Articles to monopolies, exclusive service providers and restrictive business practices and the Basic Telecommunications Agreement deals extensively with private practices relating to access to essential facilities.[49/] And, the Uruguay Round Agreement on Trade-Related Intellectual Property Measures is entirely devoted to the regulation of private practices concerning intellectual property rights.[50/]

A second distinction sometimes drawn is between eliminating market distortion at the border and dealing with the workings of the internal market. Generally speaking, international trade policy mechanisms are often characterized as facilitating domestic firms' entry into foreign markets by eliminating tariff and non-tariff barriers to trade at the border, a goal that may be characterized as "market access." In contrast, it is sometimes said that competition policy seeks to provide all firms an opportunity to establish a competitive presence in the market following entry, a goal that has been characterized as

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[49/] See text accompanying notes 37-39, supra.

[50/] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (hereinafter "TRIPS Agreement").

"market contestability."[51/] Thus it has been said that while international trade policy facilitates entry into foreign markets through the elimination of border barriers, competition policy ensures that the opportunity for entry is meaningful.[52/] Once again, this demarcation between the goals of international trade and competition policies is not a bright line. To the extent that international trade rules now require non-discriminatory treatment of the goods and services of foreign firms following their entry into a market, as is required by many of the WTO Agreements, international trade policy now also contributes to ensuring that entry is meaningful.

[51/] In an April 1996 policy statement, the International Chamber of Commerce recognized the need to expand the notion of market access:

> "Trade," in its traditional sense -- cross-border movements of goods and services -- is nowadays only a part of what constitutes the global marketplace and it is no longer sufficient to focus on "trade barriers" as the primary impediment to doing business across frontiers. Instead the focus must increasing shift to a wider conception of market access -- to the international rules for doing business on a global basis.

International Chamber of Commerce, The Present and Future Agenda of the World Trade Organization (Apr. 1996).

[52/] See ICC Draft Report, supra n.39, at Chapter 2 ¶ 16.

In the last analysis, differences on the issue of market access between current international trade policy (as embodied, for example, in the WTO Agreements) and current U.S. competition policy are subtler and more nuanced than is sometimes suggested by commentators who approach the issues entirely from a background in one or the other of two disciplines:

> It might be thought that this conflict is due to the different aims of liberal trade policy and competition policy. This is not the case, however. The aim of both policies is to improve the efficient allocation of resources. Trade policy contributes to efficiency by removing barriers that impede the ability of foreign firms to access new markets. Competition policy contributes to efficiency by preventing firms from substantially lessening competition. Under competition policy analysis, however, foreign or domestic competitors may be excluded from a market, so long as competition is not thereby lessened substantially. In these cases, the objective of both policy areas is met and an efficient outcome is achieved.[53/]

In this same vein, the 1998 Draft Report of the ICC Joint Working Group on Competition and International Trade expressed disagreement with those who contend that the objectives of trade and competition policy are wholly incompatible with respect to private practice market access issues:

[53/] Philip Marsden, The Impropriety of WTO "Market Access" Rules on Vertical Restraints, 21(6) World Competition 5, 9 (Great Britain: Kluwer, 1998) (hereinafter "Rules on Vertical Restraints").

> Traditional distinctions between foreign trade and investment measures or between trade and competition policy are seen as getting in the way of addressing the real issues, which are the inability to minimise production costs by locating each production activity where it can be carried out most cheaply, and the ability to compete for customers on a basis comparable to local competitors.
>
> The objective of a liberal international trade order is to enhance global economic welfare by promoting trade and investment flows according to the comparative economic advantage of nations. While the objectives of competition policy tend to differ across countries, there is a convergence towards fostering economic efficiency and consumer welfare, however defined. The usual objective of competition policy is to maintain and encourage competition in domestic markets in order to foster economic efficiency and consumer welfare. Given these objectives, one basic tenet which both trade and competition policy experts would be hard pressed to disagree with is that enhanced market access is desirable within the objective of promoting greater domestic and international efficiency with the view to providing a sounder basis for sustainable economic growth.[54/]

The divergence between the two disciplines' treatments of market access issues relates more to perspective than to principle. Trade policy starts with, and may in many cases restrict its attention to, the denial to a foreign competitor of access on the merits to a country's market. From the standpoint of trade policy, such denial is likely to be seen as a violation of one or both of the two cardinal principles of international trade law: most-favored nation ("MFN") treatment (i.e., non-

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[54/] ICC Draft Report, supra n.39, at 62.

discrimination among sellers from various foreign countries)[55/] or national treatment (i.e., non-discrimination against foreign sellers for the benefit of domestic sellers).[56/]

Competition policy approaches the same denial of access on the merits from a different viewpoint and poses different questions. Does the access-denying practice also generate efficiencies? What share of the relevant market is foreclosed? On balance, is there a substantial lessening of competition usually seen in terms of significant price increase or output limitation, as a result of the access-denying practice?

As to some types of private practices, this difference in perspective does not lead to divergent assessments. Where market access is denied by a practice considered a per se violation of competition law -- "hard core" cartels, market allocation, price-fixing, etc. -- both trade policy and competition policy could conclude that the practice is to be condemned.

[55/] Art. I, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1.

[56/] Id. at Art. III.

As is evident from the sampling of access-denial complaints earlier in this Report, many instances of private practice access-denial involve what a U.S. antitrust lawyer would characterize as "vertical restraints." Such restraints -- discriminatory distribution arrangements, requirements contracts, exclusive dealing arrangements, tying contracts, etc. -- are, in most jurisdictions including the United States, prohibited only when they are clearly anticompetitive and where efficiency is demonstrably reduced.[57/] Indeed, there is an underlying assumption in at least U.S. competition policy that such vertical arrangements would not be created if they were not efficiency-enhancing. Thus, as a competition law observer has noted,

> The issue, then, is not that lax competition enforcement is allowing anticompetitive activity to bar market access. The issue is that competition policy analysis is allowing pro-competitive activity to bar market access ....
>
> The confusion within trade policy may arise because those who focus on opening

[57/] For example, the European Commission has recently announced an effort to draw up and adopt broad regulations exempting all vertical agreements of certain types of companies and industries from regulation. See Council Agrees to Give Commission Power to Reform Vertical Restraints Policy, 76 Antitrust & Trade Reg. Rep. (BNA) 484 (May 6, 1999).

> markets do not understand how a competition authority can approve vertical restraints that foreclose entry to its market ....[58/]

Needless to say, a trade law practitioner would quarrel with some important aspects of this formulation. Where the foreign competitor offers a technologically competitive or superior product at a price lower than the favored domestic sellers -- as appears on the face of many of the complaints of unfair access-denial -- the exclusion of that competitor from the market at the very least raises serious issues of reduced efficiency and lessening of competition. On the other side of the "rule of reason" equation, it is certainly at least arguable that differences in social and corporate culture in some countries may weaken or invalidate any underlying assumption that a given vertical restraint arrangement is maintained for efficiency-enhancing reasons.[59/]

[58/] See Rules on Vertical Restraints, supra n.53, at 9-10.

[59/] See, e.g., Robert Lawrence, "Does Japan Import Too Little? Closed Minds or Closed Markets," Brookings Papers on Economic Activity, No. 2 (1987); Mesuo Wada, "Selling in Japan: Consumer Behavior and Distribution as Barriers to Imports," in Thomas Pagel, ed., in Fragile Interdependence (Lexington, MA: Lexington Books, 1986); Thomas B. Lifson, "What Do Japanese Corporate Customers Want? A Guide for American Firms Selling in Japan," in U.S.-Japan Relations: New Attitudes for a New Era (Boston: The Program on U.S.-Japan Relations, Center for International Affairs, Harvard Univ., 1984).

The divergence is often exacerbated -- perhaps unnecessarily -- by the way in which advocates from the international trade discipline shape the analysis. While the ultimate goal of both disciplines is to eliminate market inefficiencies and maximize competition, trade policy officials have an unfortunate tendency to phrase their criticism of competition authorities' analysis in terms of failure to take into account effects "on foreign competitors" or "on other trading partners." Former WTO Director General Ruggiero has posed the issue as follows:

> How should the situation be handled where there is an increasing reliance on a "rule of reason" approach which requires an assessment of the balance of pro- and anticompetitve effects of a practice to be made and yet national law does not require the effects on other trading partners to be taken into account?[60/]

[60/] Closing address of R. Ruggiero, "Conference on Antitrust: Rules, Institutions and International Regulations," (Nov. 21, 1995) (quoted in Rules on Vertical Restraints, supra n.53.

> [T]he criteria commonly employed by competition authorities in "rule of reason" cases may make relief more difficult to obtain in cases involving foreclosure of access for foreign supplies and suppliers .... This is because, in weighing the costs and benefits under the rule-of-reason, enforcement actions relating to vertical restraints may not take into account the adverse effects of such restraints on foreign producers.

(footnote continued)

Similarly, in a 1997 Special Report on Trade and Competition Policy by the WTO Secretariat.

This sort of statement puts the debate in a posture untenable for the international trade side. It seems unlikely in the extreme that competition policy officials -- in the United States or in other countries -- could accept the proposition that an analysis that finds no substantial lessening of competition in the domestic market must be modified to take into account adverse effects on foreign competitors. Indeed, such a characterization of the issue by trade policy proponents leads competition law analysts to view trade policy as serving the interests of an individual country's competitors, not the interests of open competition or efficiency of the marketplace.

Rather than seeking to impose a market access regime on private access-denying practices as a derogation from competition policy analysis, efforts should be directed toward devising approaches to this important access problem that are

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WTO Annual Report 1997, Special Topic: Trade and Competition Policy (Geneva: World Trade Organization, 1997), vol. 1, at 56 (hereinafter "WTO Annual Report").

consistent with the fundamental principles on which both competition policy and international trade policy are based. As the Section of International Law and Practice said in 1995,

> The idea of challenging access-restricting private conduct without an antitrust rationale raises the risk of prohibiting efficiency-enhancing conduct. It is therefore important to consider whether developing a competition-based set of principles for differentiating among private market access barriers that do not violate the antitrust laws is feasible or desirable.[61/]

As discussed in Part V, below, it is the thesis of this Report that such a principled approach to private market access barriers, consistent with current U.S. competition policy, is both feasible and desirable. Before turning to the substance of such an approach, however, it is necessary to review the procedural mechanisms for addressing private market access barriers, both under antitrust law and under international trade law.

[61/] American Bar Association Section of International Law and Practice, Report to the House of Delegates, February, 1995, at p. 11 (hereinafter "ABA Report").

IV. EXISTING MECHANISMS TO OBTAIN MARKET ACCESS

A. COMPETITION LAW OPTIONS

1. Extraterritorial Enforcement of U.S. Antitrust Laws

One way in which to address exclusionary restraints that impede the ability of U.S. firms to compete effectively overseas lies in the extraterritorial enforcement of the Sherman Act.[62/] The application of U.S. antitrust law is not limited to U.S. nationals or to activities occurring solely within the territorial jurisdiction of the U.S. Rather, the Sherman Act applies, inter alia, to "every contract, combination ... or conspiracy, in restraint of trade or commerce with foreign nations"[63/] and to every person who, among other things, shall

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[62/] One commentator argues that U.S. firms seeking to challenge private anticompetitive practices that result in market foreclosure abroad could file suit in U.S. federal court, but using choice of law principles, could ask that the challenged conduct be analyzed under the antitrust laws of country in which the conduct occurs. See Eleanor M. Fox, International Antitrust: Against Minimum Rules; For Cosmopolitan Principles, Antitrust Bull. 5 (Spring 1998) (arguing that in cases of "internal market harm" the applicable law is the law of the importing country regardless of where suit is filed).

[63/] 15 U.S.C. § 1 (1994 & Supp. III).

"monopolize, or attempt to monopolize, or combine or conspire ... to monopolize ... trade or commerce with foreign nations".[64/]

Until the end of World War II, it was generally held in the United States that "[t]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done."[65/] In 1945, the Second Circuit made the first break from this doctrine in the antitrust context, when it held in United States v. Aluminum Co. of America that the Sherman Act is applicable to conduct undertaken by foreign companies outside the U.S. that generates effects within the United States.[66/]

The "effects test" enunciated in Alcoa subsequently has been refined and expanded. Following the Alcoa decision, most courts held that civil enforcement of the Sherman Act is appropriate with respect to both foreign and domestic commerce, as long as an effect on U.S. commerce (including export commerce) can be shown. Within the context of the "effects test" however, most U.S. courts required consideration of

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[64/] 15 U.S.C. § 2 (1988).

[65/] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)

[66/] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (hereinafter "Alcoa").

international relations, or comity,[67] in the determination of whether to apply the Sherman Act to foreign conduct and actors.[68] In contrast, the Antitrust Division and the FTC have taken the position that the agencies' decision to bring an enforcement action "represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns" and that it is not "the role of the

[67] Comity is generally defined in this context as the deference or lack of deference to be accorded foreign sovereigns in determining the appropriateness of the exercise of jurisdiction by U.S. courts.

[68] See Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n, 549 F.2d 597 (9th Cir. 1976) (Timberlane I) (holding that to properly invoke jurisdiction over a foreign actor, (a) there must be some effect, actual or intended, on U.S. foreign commerce; (b) the restraint must be "of such a type and magnitude as to be cognizable as a violation of the Sherman Act" and (c) the court must find that, as a matter of international comity and fairness, jurisdiction should be asserted). Other courts held that the Timberlane I factors could be, but need not be, considered. See, e.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); In re Uranium Antitrust Litig. 617 F.2d 1248 (7th Cir. 1980). The Fifth Circuit held that a court "should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law or international law." Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), vacated and remanded on other grounds, 460 U.S. 1007, reaffirmed 704 F.2d 785 (5th Cir.), cert. denied, 464 U.S. 961 (1983).

courts to second guess the Executive Branch's judgment as to the proper role of comity concerns under these circumstances."[69/]

In an attempt to bring some consistency to the courts' and agencies' approaches to the issue of comity, and particularly in response to foreign governments' expressed concerns over perceived excessive extraterritorial exercise of jurisdiction by the United States, Congress amended the Sherman Act to clarify the scope of its jurisdiction over U.S. domestic, import and export commerce.[70/] Title IV of the ECTA, the Foreign Trade Antitrust Improvements Act (FTAIA) of 1982, provides that, before conduct may be challenged under the Sherman Act, such conduct must be found to have a direct, substantial and reasonably foreseeable effect on (1) the domestic or import commerce of the United States or (2) the export commerce of a person engaged in such commerce within the United States.[71/]

[69/] U.S. Department of Justice & Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations § 3.2 (1995) (hereinafter "1995 International Operational Guidelines").

[70/] 15 USC § 6a (1994).

[71/] Specifically, the FTAIA provides that the Sherman Act does not establish subject matter jurisdiction over conduct "involving trade or commerce (other than import trade or import commerce) with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on [domestic or import commerce], or (B) on export trade or export

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Thus, under the FTAIA, the determination of whether a U.S. court would possess subject matter jurisdiction to review the exclusionary activities of foreign companies that prevent U.S. firms from establishing a market presence in the foreign country depends upon whether the challenged conduct has a (1) direct, (2) substantial and (3) reasonably foreseeable effect on export trade or commerce with foreign nations by firms located in the United States. This approach was followed in the Antitrust Enforcement Guidelines for International Operations issued by the Antitrust Division and the FTC in 1995, which provide that the agencies will enforce the Sherman Act against conduct occurring outside the United States if the conduct restrains U.S. exports, and if the requirements of the FTAIA are met.[72/]

In its 1993 Hartford Fire decision, the Supreme Court focused its commity analysis on a simple test: whether the foreign defendant can comply with both the laws of its home

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commerce ... of a person engaged in such trade or commerce in the United States." 15 U.S.C. § 6a(l). Subclause (B) applies "only for injury to export business in the United States." 15 U.S.C. § 6a. Section 5 of the Federal Trade Commission Act contains an identical limitation. 15 U.S.C. § 45(a)(3) (1994).

[72/] See 1995 International Operational Guidelines, supra n.69.

jurisdiction and those of the United States.[73] Under Hartford Fire, exercise of Sherman Act jurisdiction is appropriate, without regard to considerations of international relations, unless there is a "true conflict between domestic and foreign law."[74] The 1995 International Operations Guidelines, while acknowledging the FTAIA's requirements, expressly adopt the essence of the Hartford Fire decision.[75]

Even before the adoption of the 1995 International Operations Guidelines, extraterritorial enforcement of the U.S. antitrust laws aimed at eliminating restrictions by foreign competitors on the access of U.S. firm to foreign markets had been undertaken by the Antitrust Division. For example, in 1982 the Division pursued a civil enforcement action against C. Itoh and seven other Japanese shellfish buyers when those firms

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[73] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

[74] Id. at 798 (Blackmun, J., concurring in part and dissenting in part).

[75] 1995 International Operations Guidelines § 3.2. ("no conflict exists for purposes of an international comity analysis in the courts if the person subject to regulation by two states can comply with the laws of both.")

entered into an agreement to fix the price that would be offered for processed tanner crab imported from Alaska.[76/]

The Division pursued a civil action against the British glass manufacturer Pilkington plc for violations of the U.S. antitrust laws because Pilkington was allegedly using exclusive technology licenses that it granted to U.S. companies to prohibit the entry of those companies into certain foreign markets that Pilkington wished to keep for itself. Although the conduct of Pilkington that the Division challenged was essentially conduct that was intimately tied to the United States (i.e., the execution of restrictive licensing agreements with U.S. firms), among the net effects was to limit restrictive practices Pilkington allegedly was using to effectively foreclose markets outside the United States.[77/]

The significant expansion of civil extraterritorial jurisdiction under the Sherman Act enunciated in Hartford Fire has led to a similar expansion of criminal jurisdiction. In 1995, the Division obtained a criminal antitrust indictment

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[76/] United States v. C. Itoh & Co., 1982-83 Trade Cas.(CCH) ¶ 65,010 (W.D. Wash. 1982)(consent decree).

[77/] United States v. Pilkington plc, 1994-2 Trade Cas.(CCH) ¶ 70,842 (1994)(consent decree).

against conduct by two Japanese companies alleging price-fixing conduct that took place entirely outside the United States.[78/] The district court dismissed the indictment, refusing to equate the Sherman Act's civil and criminal jurisdiction, noting that there is generally a strong presumption against extraterritorial application of federal criminal statutes, absent a clear expression by Congress.[79/]

On appeal the Government of Japan weighed in with a strongly worded amicus curiae brief, arguing, inter alia, that "extraterritorial application of the Sherman Act is invalid under international law and runs counter to the spirit of international comity." [80/] The First Circuit considered the issue one of straightforward statutory construction of the Sherman Act, and thus reviewed the district court's decision de novo. Under Hartford Fire, the court concluded that "the current state

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[78/] While a factual dispute exists between the Department of Justice and the defendant as to whether there was relevant conduct within the United States, the government has argued that criminal jurisdiction is appropriate even if all the allegedly unlawful conduct took place in Japan.

[79/] United States v. Nippon Paper Indus., 944 F. Supp. 55, 65 (D. Mass. 1996), citing E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).

[80/] Brief for Amicus Curiae, the Government of Japan, United States v. Nippon Paper Indus., 109 F.3d 1 (1st Cir. 1997) (No. 96-2001).

of the case law conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach."[81/] Finding that the language in the Sherman Act giving rise to criminal prosecution is identical to the language that gives rise to civil liability, the Court of Appeals held, under ordinary canons of statutory construction, that the case for interpreting the civil and criminal provisions in the same manner is "irresistible."[82/]

The Court of Appeals also rejected the comity arguments advanced by the Government of Japan, analogizing the extraterritorial application of the Sherman Act to the application of a state's criminal statute to conduct occurring outside that state's borders but within the United States. The court reasoned that "[ilt is not much of a stretch to apply this same principle internationally, especially in a shrinking world."[83/] Accordingly, the First Circuit panel unanimously[84/]

[81/] Nippon Paper, 109 F.3d at 4.

[82/] Id. at 5, citing United States v. Thompson/Center Arms Co., 504 U.S. 505, 518, n. 10 (1992)(plurality opinion).

[83/] Nippon Paper, 109 F.3d at 6.

[84/] Judge Lynch wrote a concurring opinion in which she gave greater deference to comity, but concluded that, in this case,

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reversed the district court and reinstated the indictment.[85/] The Supreme Court subsequently denied Nippon Paper's petition for certiorari.[86/] The prosecution proceeded in district court in the District of Massachusetts, ending in a hung jury after four weeks of trial.[87] Thereafter, the judge granted the defendant's motion for judgment of acquittal and directed a verdict of acquittal.[88]

The Nippon Paper case has heightened tensions with foreign governments over the appropriate extraterritorial exercise of jurisdiction in competition law cases. Those tensions could impact future exercises of extraterritorial jurisdiction by U.S. enforcement authorities, criminal or civil, where those authorities seek to remove foreign market access barriers, rather than to protect U.S. consumers from price-fixing agreements entered into overseas. The tensions are particularly

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exercise of jurisdiction was appropriate.

[85/] Nippon Paper, 109 F.3d at 8-9.

[86/] Nippon Paper Indus. v. United States, 118 S. Ct. 869 (1998).

[87/] See U.S. v. Nippon Paper Indus., 17 F. Supp. 2d 38 D. Mass. (1998).

[88/] U.S. v. Nippon Paper Indus., 62 F. Supp. 2d 173 D. Mass. (1999).

strong where foreign governments perceive a tenuous connection between the nationals and activities complained of, and in these instances they often object to the extraterritorial application of U.S. law.

Examples of international tensions generated by the extraterritorial application of U.S. antitrust law abound. For example, the United States antitrust authorities several decades ago began investigating activities related to international shipping. When the U.S. authorities sought documentation available only outside the U.S., a number of foreign governments enacted legislation blocking access both to their nationals and to evidence for use in these proceedings. Similarly, U.S. antitrust investigations of an alleged uranium cartel in the 1970s sparked strong protests by foreign governments, including Canada, Australia and Great Britain, which objected to the United States' assertion of its jurisdiction over conduct (arguably encouraged by those governments) occurring within their territories. The uranium cartel proceedings engendered a major international diplomatic dispute.

Aside from the international tensions that arise, U.S. antitrust enforcement agencies are likely to encounter practical difficulties in cases involving activities undertaken abroad by

foreign nationals. For example, it is frequently difficult to obtain personal jurisdiction over foreign nationals other than multinational corporations. It is also difficult to obtain access to witnesses and documentary evidence, particularly where blocking legislation has been enacted and is applied. While the Hague Convention on the Service of Process[89/] and the Hague Evidence Convention[90/] have ameliorated this problem as to the signatory states, serious impediments remain in other jurisdictions. These difficulties indicate that antitrust enforcement authorities and private plaintiffs often may not be able to obtain access to the witnesses and evidence needed to prove a meritorious case.

There are other drawbacks inherent in the extraterritorial application of U.S. antitrust law. For example, representation in these fact-intensive, adversarial proceedings can be quite expensive. The litigation generally is extraordinarily lengthy; there is no "quick fix" regardless of how controversial the underlying issues may be internationally. Finally, federal

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89/ The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 20 U.S.T. 361 (Nov. 15, 1969).

90/ The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 (July 27, 1970).

courts may very well lack remedies that ensure the discontinuation of private anticompetitive practices by foreign nations outside the United States.

On the other hand, there are advantages to this approach which must be noted. For example, it is widely perceived that U.S. antitrust enforcement authorities have been relatively independent (albeit that the Attorney General serves at the pleasure of the President), objective, non-political and professional. Therefore, most agency proceedings are viewed as being based on substance rather than motivated by politics. In addition, federal courts have exclusive jurisdiction over cases brought under the federal antitrust laws. While nominated by the President and subject to the advice and consent of the Senate, federal judges enjoy life-long appointments subject only to impeachment. They do not serve at the pleasure of the President, and they cannot be recalled by voters. The resulting relative independence of federal judges enhances confidence in their ability to proceed objectively while providing ample due process for all participants. Finally, the credibility of U.S. antitrust proceedings is enhanced by the right of appeal. The ability of a losing party to appeal an outcome adverse further

bolsters the appearance and likelihood of an objective, apolitical decision.[91/]

2. Reliance on the Effective Enforcement of Competition Laws by Local Authorities Through Increased Cooperation

The benefits flowing from increased cooperation among antitrust enforcement authorities are myriad. Cross-border cooperation offers antitrust authorities an attractive alternative to the problems inherent in the extraterritorial exercise of their jurisdiction.[92/] The difficulties of obtaining

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[91/] The right to appeal, of course, does not distinguish U.S. process; such rights in one form or another are available in virtually all industrialized countries. See, e.g., Civil Appeal Procedures Worldwide (C. Platto, ed., 1992).

[92/] See, e.g., Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995 reprinted in 4 Trade Reg. Rep.(CCH) ¶ 13,503 (Apr. 23, 1997). Former Assistant Attorney General Anne Bingaman, during her tenure as head of the Antitrust Division, even went so far as to state that these mutual assistance agreements were necessary for the effective exercise of extraterritorial jurisdiction by U.S. authorities and would remove the greatest barriers to investigating anticompetitive conduct abroad. Hearings Concerning the International Antitrust Enforcement Assistance Act ("IAEAA") Before the Senate Judiciary Committee, 103rd Cong., 2nd Sess., (Aug. 4, 1994) (statement of Anne K. Bingaman, Asst. Atty Gen., Antitrust Div., U.S. Dept. of Justice). Ms. Bingamam is not alone in her opinions as to the importance of the IAEAA. Other commentators have agreed that the enactment of the IAEAA is a good first step in facilitating international enforcement activity. E.g., Douglas E. Rosenthal, Equipping the Multilateral Trading System with a Style and

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personal jurisdiction over foreign individuals and foreign companies, gaining access to documents and other evidence located in other countries, and achieving satisfactory remedies for anticompetitive conduct all can be addressed through the coordination of enforcement efforts. Increased cooperation among enforcement authorities creates benefits for businesses, as well. The burdens of duplicative enforcement are minimized and the opportunities for consistent outcomes are maximized when authorities coordinate their enforcement activities. In seeking to eradicate anticompetitive conduct regardless of its locus, moreover, coordination of antitrust enforcement efforts enhances market access and promotes global trading opportunities.

Positive comity increasingly is recognized as a mechanism which may be used to facilitate cooperation among the enforcement authorities of different jurisdictions.[93/] The

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Principles to Increase Market Access, 6 Geo. Mason L. Rev. 543, 568 (1998).

[93/] For example, the OECD has issued a report entitled "Positive Comity and Related Benefits", in which it suggests six potential benefits of a positive comity approach to cross-border enforcement: Improved effectiveness in remedying illegal conduct, improved efficiency in investigations, reduced need for sharing confidential and other information, avoidance of jurisdictional conflict, prevention of damage to the requested

(footnote continued)

mechanism of positive comity permits one party (the requesting party) to request the other party (the requested party) to address anticompetitive conduct that is occurring within the requested party's territory and that is affecting the important interests of the requesting party.[94/] Positive comity principles facilitate effective antitrust enforcement by facilitating the prosecution of anticompetitive conduct by the jurisdiction that possesses superior enforcement tools (most notably, the ability to exercise jurisdiction and to obtain access to documents and witnesses). Indeed, most governments prefer that anticompetitive practices occurring within a given jurisdiction be addressed by the authorities of that jurisdiction.

The first agreement into which positive comity principles were incorporated was the Agreement Between the Government of the United States of America and the Commission of the European

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(footnote continued)

country's interests, and protection for other legitimate interests of the protected country. Organization for Economical Cooperation and Development, "Positive Comity and Related Benefits," discussed in OECD Committee Finishes Report on Positive Comity, 76 Antitrust & Trade Reg. Rep. (BNA) 557 (May 20, 1999).

[94/] In contrast, the principles of "traditional comity" or "negative comity" simply require each party to take into account

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Communities Regarding the Application of Their Competition Laws, an antitrust accord signed by the United States and the Commission of European Communities on September 23, 1991.[95/] The stated purpose of the 1991 Agreement lies in "promot[ing] cooperation and coordination and lessen[ing] the possibility or impact of differences between the Parties in the application of their competition laws."[96/] To achieve these goals, the 1991 Agreement incorporates provisions designed to increase the flow of information between enforcement authorities so as to facilitate cooperation and minimize conflict.

The positive comity provisions contained in Article V of the 1991 Agreement are founded upon the recognition that anticompetitive activities that occur within the territory of one Party to the Agreement (and which violate the antitrust laws of that Party) may aversely affect the interests of the other

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(footnote continued)

the important interests of the other party when engaging in enforcement activities within its own jurisdiction.

[95/] Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, reprinted in 4 Trade Reg. Rep.(CCH) ¶ 13,504 (June 7, 1998) (hereinafter "1991 Agreement").

[96/] Id. at Art. I, 4 Trade Reg. Rep.(CCH) at 21,428.

Party to the Agreement.[97] Based on this recognition, Article V permits a Party whose interests are being affected adversely to request the Party in whose territory the challenged conduct is occurring to initiate appropriate enforcement activities.[98] Action by the notified Party upon the request is voluntary: although the notified Party "will consider" whether to undertake enforcement activities, the Agreement in no way limits the prosecutorial discretion of the notified enforcement authorities.[99] Should the notified Party choose to initiate enforcement proceedings, it must notify the requesting Party of the outcome.[100] Nothing in the 1991 Agreement precludes the notifying Party from initiating enforcement activities with respect to the challenged conduct.[101]

In June 1998, the antitrust authorities of the U.S. and the EU signed an antitrust agreement intended to supplement the 1991 Agreement.[102] The purpose of the 1998 Positive Comity Agreement

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[97] See id. at Art. V(1), 4 Trade Reg. Rep.(CCH) at 21,430.

[98] Id., Art. V(2), 4 Trade Reg. Rep.(CCH) at 21,430.

[99] Id., Art. V(3-4), 4 Trade Reg. Rep.(CCH) at 21,430.

[100] Id., Art. V(3), 4 Trade Reg. Rep.(CCH) at 21,430.

[101] Id., Art. V(4), 4 Trade Reg. Rep.(CCH) at 21,430.

[102] Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their

(footnote continued)

lies in achieving efficient and effective antitrust enforcement by providing that anticompetitive conduct generally will be addressed by the Party in whose territory that conduct primarily occurs. The terms of the 1998 Positive Comity Agreement may be invoked when anticompetitive activities which are occurring primarily within the territory of one of the Parties (the "Territorial Party") and which are impermissible under the competition laws of that Party adversely affect the interests of the other Party (the "Affected Party").[103/]

The 1998 Positive Comity Agreement plays an important role in advancing the application of positive comity principles. Generally speaking, the 1998 Positive Comity Agreement signals the continued commitment of the U.S. and the EU to the use of positive comity principles through its reiteration of the concepts embodied in the 1991 Agreement. More specifically, the

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Competition Laws, June 4, 1999 reprinted in 4 Trade Reg. Rep.(CCH) ¶ 13,504A (June 17, 1998) (hereinafter "1998 Positive Comity Agreement"). Article VI of the 1998 Positive Comity Agreement states that "[t]his Agreement shall supplement and be interpreted consistently with the 1991 Agreement, which remains, fully in force."

[103/] 1998 Positive Comity Agreement, Art. I(1) 4 Trade Reg. Rep.(CCH) at 21,432.

provisions contained in the 1998 Positive Comity Agreement expand upon the concepts embodied in Article V of the 1991 Agreement, thereby clarifying the manner in which positive comity principles will be implemented.

The key provisions of the 1998 Positive Comity Agreement are contained within Article IV, which clarifies the circumstances under which the Affected Party normally will defer or suspend its own enforcement activities in favor of enforcement activities of the Territorial Party. Article IV indicates that suspension or deferral of the Affected Party's enforcement activities is contingent upon a number of factors, most of which are within the control of the Territorial Party. For example, the Affected Party normally will suspend enforcement activities where the challenged conduct likely will be "fully and adequately investigated and, as appropriate, eliminated or adequately remedied... [by] the Territorial party.[104/] Another notable factor upon which deferral or suspension is premised is agreement by the Territorial Party to

[104/] 1998 Positive Comity Agreement, Art. IV(2)(b), 4 Trade Reg. Rep.(CCH) at 21,433.

take definitive action concerning the matter within six months of deferral or suspension by the Affected Party.[105/]

Deferral or suspension by the Affected Party also is premised on agreement by the Territorial Party to facilitate the continued involvement of the Affected Party in the enforcement process. For example, the Territorial Party must use its best efforts to pursue sources of information suggested by the Affected Party[106/] and must take into account the views of the Affected Party at important stages of the enforcement process.[107/] The 1998 Positive Comity Agreement also addresses the reporting back duties of the Territorial Party, under which the Affected Party is to be updated regularly concerning the status of the

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[105/] 1998 Positive Comity Agreement, Art. IV(2)(c)(v) 4 Trade Reg. Rep (CCH) at 21,434. This six-month timeframe may be renegotiated on a case-by-case basis. Id.

[106/] 1998 Positive Comity Agreement, Art. IV(2)(c)(ii) 4 Trade Reg. Rep.(CCH) at 21,434.

[107/] 1998 Positive Comity Agreement, Art. IV(s)(c)(vi), 4 Trade Reg. Rep.(CCH) at 21,434. These stages include settlement, initiation of proceedings, adoption of remedies and termination of the investigation. Id.

Territorial Party's investigation[108/] and is to be notified of the results of the Territorial Party's enforcement activities.[109/]

As does the 1991 Agreement, the 1998 Positive Comity Agreement maintains the prosecutorial discretion of both the Affected and Territorial Parties. Nothing in the 1998 Positive Comity Agreement requires the Territorial Party to act upon the request of the Affected Party.[110/] Likewise, the Affected Party is under no obligation to suspend or defer its own enforcement activities, even if all of the conditions outlined in Article IV have been satisfied.[111/] Finally, the Agreement explicitly provides that the Affected Party is free to initiate or reinstitute enforcement activities that it had earlier deferred

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[108/] 1998 Positive Comity Agreement, Art. IV(2)(c)(iii), 4 Trade Reg. Rep.(CCH) at 21,434.

[109/] 1998 Positive Comity Agreement, Art. IV(2)(c)(vi), 4 Trade Reg. Rep.(CCH) at 21,434.

[110/] As noted above, however, the 1998 Positive Comity Agreement is to be interpreted in conjunction with the 1991 Agreement. At a minimum, the 1991 Agreement requires the Territorial Party to "consider" whether to initiate enforcement activities concerning the notified conduct. 1991 Agreement, Art. V(3), 4 Trade Reg. Rep.(CCH) 21,430.

[111/] At most, when the conditions for deferral or suspension are satisfied, the 1998 Positive Comity Agreement requires the Affected Party to explain to the Territorial Party its reasons for refusing to defer or suspend its enforcement activities should it choose to pursue its own investigation of the

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or suspended in favor of enforcement activities by the Territorial Party.[112/]

The increased emphasis on positive comity is reflected not only in the incorporation of these principles in a growing number of international antitrust accords,[113/] but also in formal and informal referrals by the United States to antitrust authorities of other jurisdictions. For example, the first formal invocation of the positive comity mechanism embodied in the antitrust accord signed by the United States and the

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challenged conduct. 1998 Positive Comity Agreement, supra n.103, Art. IV(2), 4 Trade Reg. Rep.(CCH) at 21,433.

[112/] 1998 Positive Comity Agreement, Art. IV(4), 4 Trade Reg. Rep.(CCH) at 21,434.

[113/] For example, a cooperative enforcement agreement between the Canadian Competition Bureau and the EU, provides for reciprocal notification and cross-border requests for enforcement action. Under the agreement, each competition authority is required to take the other's interests into consideration. In addition to placing a high degree of emphasis on traditional comity, the agreement provides protection for the confidentiality of information collected during the enforcement process. See Canadian Agency Negotiates Accord On Cooperative Enforcement with EU, 76 Antitrust & Trade Reg. Rep. (BNA) 705 (June 24, 1999). Another example is the agreement reached between the U.S. and Israel, which provides for enforcement cooperation and coordination, notification of enforcement action, and confidentiality protections. See Agreement Regarding the Application of Their Competition Laws, Mar. 15, 1999, U.S.-Israel. [http://www.usdoj.gov/atr/public/international/2296.htm]

European Union in 1991 occurred on April 28, 1997; the U.S. Department of Justice announced that it had formally requested the Directorate General IV (DG IV) of the Commission of European Communities to investigate activities within the European computer reservation system (CRS) markets that may be preventing U.S.-based CRSs from competing effectively in certain European countries.[114/]

As noted above, SABRE, the leading CRS in the United States, had lodged complaints with the Antitrust Division regarding the allegedly anticompetitive conduct of the three large European airline owners of Amadeus, the leading CRS in Europe. After investigating SABRE's complaints, the Antitrust Division decided that a formal referral was warranted. Joel Klein, (then) Acting Assistant Attorney General for Antitrust, explained the Antitrust Division's decision to invoke the positive comity provisions of the 1991 Agreement by noting that the "European Commission is in the best position to investigate this conduct because it occurred in its home territory and consumers there are the ones who are principally harmed if

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[114/] U.S. Department of Justice Press Release, Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting U.S. Airlines' Computer Reservation Systems (Apr. 28, 1997).

competition has been diminished."[115] In a comment which appears to indicate the willingness of the DOJ to consider extraterritorial enforcement if satisfactory relief is not obtained through DG IV, Assistant Attorney General Klein emphasized that the U.S. retains an interest in this matter because the challenged conduct may have prevented U.S. companies from establishing a foothold in the European CRS market."[116]

Statements made by Alexander Schaub, the Director General of DG IV, seem to indicate the importance with which DG IV views this formal positive comity referral. In a statement issued following a meeting between SABRE representatives and DG IV staff in late 1997, Mr. Schaub noted that this case was "important ... psychologically. We have given our people the instruction to consider this as a priority case because we are aware of the fact that how we handle American positive comity requests will certainly determine largely how the U.S. authorities will handle our future requests."[117] After more than two years of "initial inquiry, the European Commission commenced

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[115] Id. at 3.

[116] Id.

[117] Amelia Torres, E.U. Gives Priority to U.S. Airline Reservation Case, (Sept. 9, 1997).

a formal proceeding in March 1999 against Air France, one of the three European airline owners of Amadeus named in the U.S. request. The Commission stated, on the basis of its initial inquiry, "that the French airline has discriminated against SABRE, a computerised reservation system (CRS) owned by American Airlines, to favour a CRS which it partly owns, Amadeus."[118/] It remains to be seen whether this experience ultimately will inspire confidence in the U.S. Department of Justice and in U.S. firms regarding the efficacy of the positive comity mechanism.[119/]

The United States also has evinced a willingness to make de facto positive comity referrals even in the absence of a formal positive comity agreement. One example of an attempt at this type of referral stemmed from allegations that Eastman Kodak's ability to compete effectively in the Japanese photographic film and paper markets was impeded by the presence of both

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[118/] European Commission Press Release, Commission Opens Procedure Against Air France for Favouring Amadeus Reservation System (Mar. 15, 1999).

[119/] U.S. legislators have made positive statements regarding these first signs of European responses to U.S. requests for enforcement: Senator Herbert Kohl of the Antitrust, Business Rights and Competition Subcommittee stated "it is becoming clear that our most important positive comity agreement, with the European Union, is beginning to pay off." See Senate Subcommittee Focuses on International Enforcement, Positive Comity, 76 Antitrust & Trade Reg. Rep. (BNA) 482 (May 6, 1999).

governmental and private restraints. On June 14, 1996, the USTR lodged a complaint with the WTO alleging that unreasonable practices by the Japanese government had impeded foreign access to the Japanese photographic film and paper markets.[120/] In contrast, the USTR referred the allegations concerning the private anticompetitive practices of Fuji Photo Film Co. to the Japan Fair Trade Commission (JFTC). In a press release issued on June 13, 1996, the USTR announced that it was "requesting consultations under a GATT decision concerning consultations on restrictive business practices. Through this mechanism, the U.S. intends to "discuss with the Government of Japan the significant evidence of anticompetitive activities that it has uncovered in this sector, and to ask the Government of Japan to take appropriate action."[121/] The U.S. stated that it would

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[120/] See U.S. Launches Broad WTO Case Under GATT, GATS Against Japan on Film, 14 Inside U.S.Trade 1 (Jun. 14, 1996); Office of the United States Trade Representative, Section 304 Determination: Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 61 Fed. Reg. 30,929 (1996). A WTO panel decided this case adversely to the U.S. complaints. Japan--Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WTO Doc. WT/DS44/R (Apr. 3, 1997).

[121/] Office of the United States Trade Representative, Press Release, Acting U.S. Trade Representative Charlene Barshefsky Announces Action on Film (June 13, 1996).

provide to the JFTC information which would facilitate its investigation of restrictive practices in the relevant markets and noted that it would request that Kodak do the same. The U.S. Department of Justice offered to aid the JFTC in its analysis of alleged anticompetitive practices in the Japanese film market.

On July 23, 1997, the JFTC issued a report finding that Fuji's' business practices in the Japanese film and photographic paper markets did not violate the Antimonopoly Law. In its report, the JFTC concluded that both foreign and domestic manufacturers have access to adequate channels of distribution. Despite this conclusion, the JFTC suggested ways in which Fuji could alter its business practices so as to provide greater flexibility to the major film distributors.

Members of both government and industry within the United States expressed dissatisfaction with the outcome of the JFTC investigation.[122/] Although some of the dissatisfaction may be

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[122/] In May 1999, Senator Michael DeWine, chair of the Antitrust, Business Rights and Competition Subcommittee stated that while the U.S. was making "good progress with our colleagues in Europe" under the positive comity agreements in place, "serious problems remain with Japan." See Senate Subcommittee Focuses on International Enforcement, Positive Comity, 76 Antitrust & Trade Reg. Rep. (BNA) 482 (May 6, 1999).

attributed to the specific outcome of this informal referral, it seems more likely that a significant portion of the dissatisfaction may be attributed to a lack of confidence in the antitrust enforcement procedures and commitment in Japan.[123/] This lack of confidence stems from a number of factors, including historically inadequate levels of antitrust enforcement within Japan and Japan's reliance on administrative guidance and informal enforcement efforts rather than on formal and transparent decision-making processes.[124/]

[123/] A more recent example of the increasing dissatisfaction of the U.S., has been in the Japanese flat glass market. The JFTC recently announced, in response to U.S. complaints about overly restrictive vertical agreements between Japanese flat glass manufacturers and wholesalers, that it could not find any violations of the Japanese Anti-Monopoly Law. Predicting the outcome, a U.S. government source had earlier stated that the JFTC had not been expected to reach a decision adverse to the Japanese glass makers. See JFTC Sees No Antitrust Offense in Japanese Flat Glass Market, 76 Antitrust & Trade Reg. Rep. (BNA) 584 (May 27, 1999).

[124/] See generally, John O. Haley, Administrative Guidance versus Formal Regulation: Resolving the Paradox of Industrial Policy, in Law and Trade Issues of the Japanese Economy 107 (Gary R. Saxonhouse and Kozo Yamamura eds., 1986) (discussing the use of administrative guidance in Japan); Ivori Hiroshi, Antitrust and Industrial Policy in Japan: Competition and Cooperation in Law and Trade Issues of the Japanese Economy 56, 76 n. 36 (Gary R. Saxonhouse and Kozo Yamamura eds., 1986) (noting that, in one year, approximately one-third of all cases investigated by the JFTC were closed with the issuance of a warning and less than one-tenth resulted in any formal action). Japanese regulators themselves have recognized that a lack of resources have caused

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The experiences with the Kodak and SABRE referrals suggest some preliminary conclusions regarding the appropriate use of the positive comity mechanism. Perhaps most notably, these experiences indicate that the requesting party will possess confidence in the outcome of a positive comity referral only if it remains fully informed about the process undertaken by the investigating party. Frequent communications between the two jurisdictions, as described in the reporting-back requirements embodied in the 1998 Positive Comity Agreement between the United States and the European Union, will increase the level of transparency in the exercise of positive comity. Similarly beneficial results will be obtained if the requesting party is able to play an advisory role in the process, as described in the 1998 Positive Comity Agreement.

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Japan's antitrust enforcement measures to lag behind those of other jurisdictions. Noting that while the number of warnings in JFTC's fiscal year 1998 had fallen from fiscal year 1997's level, a JFTC official asserted that the number of violations was actually on the rise. The official attributed the drop in warnings to an enforcement resource shortage, which was the result of a large investigation into water meter bid rigging. See JFTC Issues Fewer Warnings, But Staff Perceives More Offenses, 76 Antitrust & Trade Reg. Rep. (BNA) 707 (June 24, 1999).

The Kodak and SABRE referrals also illustrate that some level of both procedural and substantive convergence between the two jurisdictions may facilitate the exercise of the positive comity mechanism. At a minimum, procedural differences between the two jurisdictions may cause the referral to proceed at a pace slower than expected. These differences may even undermine confidence in the positive comity process. Similarly, a level of substantive convergence may be necessary before a jurisdiction will be willing to forego its own investigation in deference to another jurisdiction's enforcement processes. The greater the similarities in substantive competition law principles and levels of vigor with which those principles are enforced, the greater the willingness of a jurisdiction to invoke the positive comity mechanism.

The first step toward improving the enforcement relationship between the U.S. and Japan appears to have been taken. On October 7, 1999 the U.S. and Japan announced the signing of an antitrust cooperation agreement, which provides for, among other things, enforcement cooperation and coordination, notification of enforcement activities, and positive comity. This arrangement will add some transparency to the current process, as each agency will notify the other of its

enforcement activities, and consult with the other on matters arising under the agreement. It should be noted, however, that the agreement will be implemented in accordance with the existing laws in each country, and the actual effects of the agreement remain to be seen: although the added transparency may generate more confidence in the outcome, it is not necessarily a substitute for more rigorous enforcement of the Anti-Monopoly law.[125/]

3. Other Competition Law Agreements

In addition to agreements that incorporate positive comity principles, there are many other types of accords that may be used to facilitate cooperation and coordination among competition authorities of different jurisdictions. These agreements range from the relatively simple to those that contain elaborate mechanisms for information sharing and closely coordinated enforcement efforts. Although these various categories of agreements may differ in many respects, each contributes to the goal of enhancing competition law enforcement globally. Furthermore, by seeking to prohibit anticompetitive

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[125/] See Agreement Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan. [http://www.usdoj.gov/atr/public/international/docs/3740.htm]

conduct regardless of where it occurs, each of these types of agreements potentially contributes to enhanced market access and the promotion of global trading opportunities. Finally, the proliferation of such agreements may lead to greater consistency in enforcement outcomes which, in conjunction with continued communication among enforcement authorities, may facilitate the processes of substantive harmonization and convergence.

Many of the provisions contained in the simplest types of agreements address the exchange of non-confidential information and other mechanisms for cooperation. For example, each Party may be required to notify the other when one Party's enforcement activities may have an impact on the other Party's "important interests." Premised upon the recognition that the exchange of information among competition authorities may facilitate the effective application of competition laws, these agreements also may establish annual consultations between the enforcement officials of the signatories. These agreements may provide that the Parties may share information relevant to enforcement activities being considered or undertaken by either Party. These agreements also address the conditions under which the Parties will render assistance to each other and may

further provide that under appropriate circumstances, the Parties may agree to coordinate enforcement activities.

Other provisions contained in the simplest types of agreements are designed to minimize conflict between the Parties arising from their respective enforcement activities. Provisions which embody the principle of "negative comity" may provide that each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. These agreements also may identify factors which should be considered in the event that competing interests arise. Finally, these agreements may establish mechanisms for consultation between the Parties. These consultations are designed in keeping with the tenet of cooperation and with a view to reaching mutually satisfactory conclusions.

There are a number of agreements that typify these early attempts at cooperation and coordination in competition law enforcement. Some examples may be found in agreements into which the United States entered prior to its signing of the 1991 Agreement with the European Union. In 1976, for example, the U.S. reached an agreement with the Federal Republic of

Germany.[126] This agreement with West Germany was followed by the signing of an agreement with Australia in 1982[127] and the implementation of a Memorandum of Understanding with Canada in 1984.[128] In addition, provisions very similar to those described above also appear in an OECD Recommendation issued in 1986[129] and

[126] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, reprinted in 4 Trade Reg. Rep.(CCH) ¶ 13,501 (Mar. 24, 1999).

[127] Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, reprinted in 4 Trade Reg. Rep.(CCH) ¶ 13,502 (Apr. 23, 1997).

[128] Memorandum of Understanding Between the Government of Canada. and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1934, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,503A (June 17, 1998). This Memorandum of Understanding was superseded in 1995 by the Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,503 (Apr. 23, 1997).

[129] Recommendation of the Council for Co-operation Between Member Countries in Areas of Potential Conflict Between Competition and Trade Policies, OECD Doc. C(86)65(Final) (Oct. 23, 1986). The October 1986 OECD Recommendation revised earlier versions issued on October 5, 1967 [C(567)53(Final)], July 3, 1983 [C(73)99(Final)], September 25, 1979 [C(79)154(Final)] and May 21, 1986 [C(86)44(Final)].

subsequently revised in 1995.[130/]

These early agreements, as well as the 1991 Agreement and the 1998 Positive Comity Agreement with the European Union, leave in place constraints on the signatories' ability to exchange confidential business information without the consent of the firms involved or the source of the information. In the absence of receipt of a waiver from the parties involved, competition authorities face severe restrictions on the types of information that they may share with their counterparts in other countries.[131/] Competition authorities long have lamented that this inability to obtain access to foreign-located antitrust evidence sometimes makes it impossible to prosecute anticompetitive conduct.

Drawing from examples in the securities and tax law areas, the U.S. Congress sought to address this need for information exchange through the enactment of the International Antitrust

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[130/] Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130(Final) (July 27-28, 1995).

[131/] For example, the Antitrust Civil Process Act, the Federal Trade Commission Act and Grand Jury Secrecy Rules contain confidentiality provisions which prohibit the antitrust authorities in the United States from disclosing investigative

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Enforcement Assistance Act of 1994 (IAEAA).[132] This statute permits the antitrust enforcement authorities in the United States to provide to their foreign counterparts investigative information otherwise protected by confidentiality provisions.[133] The IAEAA also authorizes the DOJ and the FTC to use their existing investigative powers to obtain evidence to assist foreign competition authorities in the enforcement of their competition laws.[134] Finally, the DOJ is authorized to seek a Federal court order requiring a person within the United States to provide testimony or to produce documents for use in an investigation or enforcement action by a foreign competition authority.[135]

The IAEAA specifies that certain elements must be present in any mutual assistance agreement which is established under its auspices. One element is that of mutuality: the foreign competition authorities must be able to provide the same types

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information to all but a very limited group of persons which does not include foreign counterparts.

[132] 15 U.S.C. §§ 6201-12 (1994).

[133] 15 U.S.C. § 6201 (1994).

[134] 15 U.S.C. § 6202 (1997 Supp).

[135] 15 U.S.C. § 6203 (1994).

of assistance to the DOJ and the FTC that these agencies are authorized to provide to their foreign counterparts under the IAEAA.[136/] Another element concerns the protection of confidential business information. The IAEAA provides that an agreement may be established only with a foreign competition authority that is subject to laws that provide no less protection to information received from the U.S. antitrust authorities than that information would receive under the laws of the United States.[137/]

Although the IAEAA was enacted in 1994, it was not until 1997 that the U.S. antitrust authorities were able to establish a mutual assistance agreement with another jurisdiction. On April 17, 1997, the DOJ and the FTC announced that they had

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[136/] Section 6211 of the IAEAA provides that any antitrust mutual assistance agreement must contain an "assurance that the foreign antitrust authority will provide to the Attorney General and the Commission assistance that is comparable in scope to the assistance the Attorney General and the Commission provide under such agreement or such memorandum." 15 U.S.C. § 6211(2)(A) (1997 Supp.).

[137/] The IAEAA states that any agreement under the IAEAA must contain an "assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received [from the United States antitrust authorities]... and will give protection to antitrust evidence received [from the United States] ... that is not less than the protection provided

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reached a proposed agreement with Australia.[138/] In announcing the proposed agreement, Assistant Attorney General Klein emphasized the potential of the agreement to "facilitate the prosecution of competition law violations and to serve as a model for similar bilateral agreements with major trading partners around the world in order to deal effectively with anticompetitive behavior that occurs on an international scale."[139/] The final version of this agreement was signed by the U.S. and Australia on April 26, 1999.

Another type of agreement which permits the exchange of confidential business information, albeit within a limited context, is the Mutual Legal Assistance Treaty (MLAT). MLATs provide that the authorities of the signatories, including competition authorities, may share confidential information for use in criminal investigations, including criminal competition

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under the laws of the United States to such antitrust evidence." 15 U.S.C. § 6211(2)(B) (1994).

[138/] See Federal Trade Commission Press Release, First International Antitrust Assistance Agreement Under New Law Announced by FTC and DOJ (Apr. 17, 1997); U.S. Department of Justice Press Release, International Enforcement to be Boosted by New Agreement with Australia (Apr. 17, 1997).

[139/] See International Enforcement to be Boosted by New Agreement with Australia, id. at 2-3.

law cases. The United States has entered into MLATs with several countries, including Canada.[140/] The US/Canadian MLAT has been employed successfully to prosecute price fixing in the plastic dinnerware and thermal fax paper industries.[141/] The application of MLATs to the field of antitrust enforcement is limited, however, because countries other than the United States and Canada do not criminalize violations of competition law and mutuality in this regard is required for such a treaty to become operative.

4. On-Going Negotiations Looking to an International Competition Code

Given the practical difficulties and built-in confrontation of extraterritorial antitrust enforcement and the inherently long-term nature of developing a globally comprehensive system of positive comity, it is not surprising that calls are

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[140/] Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, U.S. Antitrust Policies in World Trade 12, Before the World Trade Center Chicago Seminar on GATT After Uruguay, Chicago, Illinois (May 16, 1994). [http://www.usdoj.gov/atr/public/speeches/94-05-16.txt]

[141/] See U.S. Department of Justice, Opening Markets and Protecting Competition for America's Business and Consumers: Goals and Achievements of the Antitrust Division, U.S. Department of Justice 1-2 (Mar. 27, 1996) (thermal fax paper); Department of Justice Press Release, Antitrust Division Breaks Price Fixing Conspiracy in Disposable Plastic Dinnerware Industry (June 9, 1994).

sometimes heard for the negotiation of an international competition code, enforceable in some international forum. This subject is discussed at length in a separate Report of these Sections, entitled Report of the ABA Sections of Antitrust Law and International Law and Practice on the Internationalization of Competition Law Rules: Coordination and Convergence.

For purposes of the present paper, it is worth noting that agreement on substantive competition rules relating to private access-denying practices would be among the most difficult issues in negotiating an international competition code. While it might be possible to reach consensus on rules governing access-denying horizontal practices, cartel activities and perhaps even predatory (i.e., below variable cost) pricing, achieving agreement on specific rules dealing with the core issues relating to vertical restraints seems unlikely in the extreme. As one commentator has put it:

> [I]t is virtually impossible to imagine that countries could agree on a meaningful formulation of antitrust principles, especially on subjects of the highest importance such as exclusionary vertical restraints.[142/]

[142/] Eleanor Fox, Towards World Antitrust and Market Access, 91 Am. J Int'l L. 1, 18 (1997) (recommending a choice of law rule that designates the law of the putative excluding country.); see also Rules on Vertical Restraints, supra n.53.

There is also danger in inaction. There are groups within the business community -- in the United States and elsewhere -- that feel strongly aggrieved by perceived private practice access barriers and are likely to exert political pressure for unilateral action in specific cases or for legislation mandating unilateral action on bases not compatible with current U.S. competition policy.[143/] As the Draft Report of the ICC Joint Working Group noted,

> However, the reality is that some businesses will demand solutions to impediments to increased international trade and market access. It is imperative that a framework for resolving these issues is developed to address the concerns of business in a reasonable time-frame. There is a danger to proceeding in this fashion -- in the absence of a process for an overall examination of the links between trade and competition policy there is a risk that these issues will be handled case by case in an ad hoc, problematic way, and not necessarily as part of a coherent vision as to how these policies are mutually supportive. Nevertheless, the business community is not likely to be willing or able to wait until the debate is fully exhausted.[144/]

[143/] See infra notes 165-170 and accompanying text (discussing the proposals of the Coalition for Open Trade).[143/]

[144/] ICC Draft Report, supra n.39, at 66.

Accordingly, there is a need for the United States to devise and pursue policies that will both respond to the concerns being raised within the business community and advance the principles of current U.S. competition policy. With respect to the development of an international regime dealing with access-denying private practices, it seems most realistic -- as discussed in part V, below -- for the United States to advocate a regime that places primary responsibility on national enforcement, prescribes, at most, minimum basic principles (consistent with U.S. antitrust law), and leaves the development of anything resembling a universal code to an evolutionary process based on the accreted experiences under this looser regime.

B. TRADE OPTIONS

1. Unilateral/Bilateral -- Section 301

No U.S. trade law directly reaches private access-denying practices in foreign markets. However, in theory such practices may be reached indirectly under the "unreasonable foreign practices" subsection of Section 301 of the Trade Act of 1974.[145/] By its terms, Section 301 deals with unfair foreign governmental

[145/] 19 U.S.C. § 2411 (1994). The "unreasonable foreign practices" subsection is at 19 U.S.C. § 2411(d)(3).

practices: violations of trade agreements, policies or practices that are "unjustifiable" in the sense that they are inconsistent with international norms (such as MFN or national treatment), and policies or practices that are "unreasonable" and that "burden or restrict U.S. commerce." Among the "unreasonable" practices enumerated by the Congress in subsection 2411(d)(3) is the "toleration of systematic anticompetitive practices."

Under this "toleration" provision, Congress appears to have intended to address the situation in which one or more private parties in a foreign country engage "systematically" in an anticompetitive practice (e.g., a horizontal boycott) that "burdens or restricts U.S. commerce" (by denying to U.S. exporters access on the merits to that country's market), and it can be shown that the foreign government has "tolerated" that unfair practice, presumably by failing or refusing to enforce its competition law. But the key phrases -- "toleration," "anticompetitive" and "systematic" -- are not defined. Moreover, as discussed below, USTR -- the agency administering this statute -- has full discretion whether or not to take action in any given case.

To speak of a Section 301 proceeding as a "case" -- implying a litigation leading to an adjudication and then to corrective action -- is to fundamentally misconceive the nature of the statute. While the statute speaks of "initiation," followed by an "investigation," a hearing (in some cases) and ultimate trade "retaliation", in practice none of these elements are crucial to the outcome of a typical Section 301 proceeding. USTR has no investigative staff to speak of, and there is in fact little "investigation," often none at all. And while retaliation occurs in some cases -- about 10 percent of all proceedings -- "[r]etaliation is only the last resort," as then-U.S. Trade Representative Clayton Yeutter put it in testimony on Section 301 to the Senate Finance Subcommittee in 1986.[146/]

Section 301 is in fact not primarily an adjudicative procedure, but rather a vehicle for negotiating with a foreign government for the removal or amelioration of an unfair trade practice. That practice is generally fully defined and largely evidenced in the original U.S. industry petition. In some cases, the petition is in fact never filed. Instead, USTR uses the threat of the petition (and the consequent possible

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[146/] Prepared remarks of Amb. Yeutter, July 22, 1986 at 9.

initiation of a proceeding together with the possibility of trade retaliation in the course of that proceeding) as leverage to achieve a satisfactory negotiated resolution. Where the petition is filed and initiation ensues, the one-year period of the proceeding is predominantly devoted to negotiation, with negotiating activity increasing in intensity as the one year deadline (for a decision whether to retaliate with trade restrictions) approaches.

There are two fundamental reasons why Section 301 proceedings lead to negotiated resolutions rather than trade retaliation in the vast majority of cases. First, in almost all cases, the U.S. petitioning industry loses when trade retaliation is the final result. The reason is that the U.S. industry gets no benefit from trade retaliation except in those rare cases in which there is two-way trade in the product as to which the market access problem exists (in which case the retaliatory trade restrictions would benefit the petitioner in the U.S. market). Thus, the petitioner's problem -- the unfair practice in the foreign market -- remains unresolved and the retaliatory action taken provides the petitioner no offsetting benefit.

Second, in "unreasonable practice" cases, USTR is cautious about taking retaliatory measures because those measures themselves constitute a violation of WTO rules. The foreign country may well take the issue to WTO dispute resolution, where the United States is likely to be directed to cease the retaliation or face WTO-authorized counter-retaliation. The seriousness of that threat of authorized counter-retaliation is enhanced under the new WTO dispute settlement rules negotiated in the Uruguay Round. Previously, a losing party in a GATT dispute resolution could, albeit with some opprobrium, block the implementation of an adverse decision. Under the WTO, that is no longer possible; panel decisions are automatically adopted within 60 days, unless the panel's report is first rejected by "consensus" of the members of the WTO Dispute Settlement Body.[147/]

Despite these new rules, the Clinton Administration has very explicitly maintained that it will, in appropriate circumstances, retaliate in a Section 301 proceeding, even where it may mean accepting WTO-sanctioned counter-retaliation.

[147/] See Art. 16.4, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2. Adoption of a panel report may be delayed by an appeal to the WTO's Appellate Body.

Nevertheless, one must anticipate that such an "appropriate case" will be rare. In the Kodak proceeding, for example, USTR in the end decided not to take trade-restrictive action under Section 301 and instead went to the WTO with the claims of governmental unfair practices and took a positive comity route in dealing with the private anticompetitive practices. If Section 301 action was eschewed in a private practice case as politically potent as Kodak, it must be questioned whether many -- indeed, any -- private practice access denial cases under Section 301 will have credible negotiating leverage in the future.

2. Multilateral -- Existing WTO Provisions

At present, treatment of private practices that inhibit market access is scattered and fragmentary in the WTO Agreements.

Under the Standards Agreement, Member Governments are required to "take such reasonable measures as may be available to them to ensure" that non-governmental standard-setting bodies comply with the Agreement's MFN, national treatment and other requirements[148/] and, as to certain of the Agreement's

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[148/] Standards Agreement, supra n.48, at Art. 3.1 & 8.1.

requirements, Member Governments "shall formulate and implement positive measures and mechanisms in support of the observance by other than central government bodies."[149/]

The Government Procurement Agreement ("GPA") is not, in fact, explicitly limited to procurement by governmental entities. Rather, the Agreement's substantive and procedural fairness requirements are applicable to all entities designated by a Signatory Country under Annexes 1, 2 and 3 (Annex 3 includes utilities). During the Uruguay Round, the European Union sought -- but failed to obtain -- GPA imposition of certain disciplines on private-sector utilities generally. Despite this failure, some privatized utilities have been designated for Annex 3.[150/] In addition to MFN and national treatment requirements,[151/] the Agreement imposes quite detailed

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[149/] Id. at Art. 3.5.

[150/] See Marco C.E.J. Bronckers, "Privatized Utilities under the WTO and EU Procurement Rules," in Law and Policy in Public Purchasing, 243 (B. N. Hockman and D. C. Mavroides, eds., Univ. Mich. Press, 1997). Mr. Bronckers in general urges the elimination of regulation of procurement by privatized companies, although he believes that certain prohibitions are essential, including one -- "prohibiting offsets such as local content requirements" -- that relates to the private company's policies, not to governmental action. Id. at 256.

[151/] Government Procurement Agreement, supra n.47, at Art. III.

procedural requirements.[152] Moreover, it requires that the Signatory Government establish "non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement"; these challenges "must be heard by a court or by an impartial and independent review body."[153] Finally, where these domestic procedures are not effective to resolve an issue, the government of the supplier's country can take issues of alleged GPA violation to the WTO Dispute Settlement Mechanism.[154]

The GATS Agreement takes a somewhat different approach to the enforcement of disciplines on private access-denying practices. Article IX of the GATS provides:

> 1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII [i.e., other than government-established or authorized monopolies and exclusive service suppliers], may restrain competition and thereby restrict trade in services.
>
> 2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and

[152] Id. at Art. VI-VII.

[153] Id. at Art. XX.

[154] Id. at Art. XXII.

> sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory Agreement concerning the safeguarding of its confidentiality by the requesting Member.[155/]

The GATS provides no definition or explanation of the "certain business practices" that "may restrain competition and thereby restrict trade." That failure, together with the absence of an explicit requirement that a trade-restricting practice be eliminated, makes this a much less aggressive approach to private access-denying practices than is typical of other WTO Agreements disciplining such practices.

In the TRIPS Agreement,[156] Signatory Governments are required to ensure extensive protection of private parties' intellectual property rights. This includes not only the standards of MFN and national treatment,[157/] but also adherence to the Paris[158/] and Berne Conventions[159/] on intellectual property, and a wide range

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[155/] GATS Agreement, supra n.37, at Art. X.

[156/] TRIPS Agreement, supra n.50

[157/] Id. at Art. 3-4.

[158/] Id. at Art. 2.

[159/] Id. at Art. 9.

of other substantive protections. Part III of TRIPS requires a Signatory Government to "make available to right holders civil judicial procedures concerning enforcement of any intellectual property right covered by this Agreement,"[160/] and is quite specific as to the nature of those procedures, including evidence, injunctions, damages and other remedies.[161/] Finally, TRIPS requires a high degree of transparency as to decisions made by domestic courts and administrative bodies,[162/] to facilitate consultations between Signatory Governments concerning the implementation of TRIPS. Where such consultations do not resolve a dispute, a signatory Government may take the issue to the Dispute Settlement Mechanism.

In summary, while the WTO does not address the issue of private practice market access restraints in an across-the-board manner, the provisions discussed above make two things quite clear. First, the fact that the access-denying practice is private, rather than governmental, does not prevent the WTO from addressing it. Second, the structure by which the WTO addresses private practices is clear and consistent. The WTO looks in the

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[160/] Id. at Art. 42.

[161/] Id. at Art. 43-49.

[162/] Id. at Art. 63.

first instance to each Signatory Government to create and enforce a regime dealing with the private practice in question. The WTO Agreement may provide only general principles which the Signatory Government's regime must follow (e.g., the Standards Agreement or the GATS) or it may lay out detailed substantive provisions (e.g., the TRIPS Agreement). In some cases (GPA and TRIPS), the Signatory Government will be required to maintain a domestic procedure for private parties to enforce their rights under domestic law. Under most WTO Agreements, one Signatory Government may take another Signatory Government's alleged failure to implement the WTO Agreement to the WTO's Dispute Resolution Mechanism. Under the GATS (where the condemned restrictive business practices are not defined), the Agreement requires government-to-government consultations in which "full and sympathetic consideration must be given to the complaint of the foreign service provider's government.

V. Structuring an Effective and Principled Approach To Dealing With Market Access Barriers Created by Private Anticompetitive Practices

The preceding sections of this Report have discussed the increasing concern that private anticompetitive practices present a market access issue that the United States (indeed, the world trading system) must address, the differences in

perspective on this issue that have made it difficult for competition policy and international trade policy to agree on how the problem should be addressed, and the limitations on the capability of current competition law and international trade mechanisms to deal effectively with private anticompetitive access restraints. As a result of these factors, there is already substantial pressure, both in domestic U.S. politics and in the world trading system, to create new and/or stronger mechanisms to permit exporting nations to "obtain relief" against access-denying private practices in other countries.

The issue, therefore, may not be whether some new international regime or domestic law mechanism is created, but rather what form such new measures will take. As noted earlier, the most recent ABA analysis on this issue was clear as to the approach that should be taken on this issue if new substantive rules or mechanisms are to be created -- that is, any such measures should be predicated upon

> ... a competition-based set of principles for differentiating among private market access barriers that do not violate the antitrust laws ...[163/]

[163/] ABA Report, supra n.61.

There is reason for concern that current efforts to address this issue, whether domestic or international, are not headed in that direction. Accordingly, forceful support by the ABA of a principled, effective approach to the issue of private restraints on market access would be of substantial value.

A. Current Initiatives To Address the Problem of Private Restraints

Frustration at the inability of present U.S. and WTO disciplines to address foreign anticompetitive practices effectively has led a number of major U.S. companies and labor unions to call for a much more aggressive United States approach to such issues. An example of such proposals is the approach taken by the Coalition for Open Trade ("COT") which includes in its membership some of America's largest companies[164/] and labor unions.[165/] In a paper published in September, 1997,[166/] COT urged

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[164/] Bethlehem Steel, The Boeing Co., Chrysler Corp., Cincinnati Milacron, Inc., Corning, Inc. and Motorola, Inc.

[165/] American Flint Glass Workers; Communications Workers of America; Industrial Union Department (AFL-CIO); International Brotherhood of Electrical Workers; International Union of Electronic Workers; Union of Needletrades, Industrial and Textile Employees; United Paperworkers International Union; and United Steelworkers/United Rubber Workers Conference.

[166/] "Addressing Private Restraints of Trade: Industries and Governments Search for Answers Regarding Trade-and-Competition Policy" (Washington: COT, 1997).

two major changes in U.S. law to address foreign private anticompetitive practices.

First, it urged that USTR be given the authority, "after a full evidentiary proceeding," to issue cease and desist orders against foreign "restrictive business practices" that burden and restrict U.S. commerce.

> Restrictive business practices would be defined as coextensive with the practices identified by the U.S. courts as per se illegal under U.S. antitrust law .... Included would be horizontal and vertical price fixing, joint restraint of output to raise prices, bid-rigging, division and allocation of markets among competitors and some types of concerted refusals to deal, where the parties enjoy market power.[167/]

COT's second recommendation is even more sweeping and fundamental: a call for a "strict liability" market access rule, implemented first as a unilateral U.S. policy and then (if possible to negotiate) as an extension of the GATT/WTO concept of "nullification or impairment".

> At the core of the "trade-and-competition" conundrum is the failure of bargained-for market access to materialize as planned and promised. Governments come together in trade negotiations; they exchange and implement concessions; and then it remains impossible to sell across the

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[167/] Id. at 32.

border. The cause need not be classic "restraints of trade"; it could be any kind of private behavior, including criminal activity, that has the effect of keeping imports at bay. The point is that the expected sales -- or rather the expected ability to sell -- does not materialize.

U.S. law should authorize the President to follow a "strict liability" approach in these circumstances which encourages foreign governments to act as guarantors of their own market access commitments. As applied to private trade restraints, such an approach would bypass any questions about the existence of an antitrust law and the adequacy of enforcement; it would simply note that the U.S. Government had bargained for access, that access was missing, and that rebalancing the situation to where it had been before the exchange of concessions required some withdrawal of concessions on the U.S. side.

The WTO corollary of this approach would be a "strict liability" regime wherein a government's failure to correct any situation limiting bargained-for market access would be considered actionable under GATT Art. XXIII. U.S. representatives in the current WTO educational exercise could seek to develop international support for such a rule -- support that might prove useful in rule-oriented negotiations should such negotiations eventually occur. Such a rule might be useful not only in the antitrust context but also in addressing other kinds of measures, such as corrupt practices, which impair the value of trade concessions.[168/]

[168/] Id. at 33.

Perhaps the most disturbing aspect of this proposal is its direct rejection of the principle advocated in the 1995 ABA Report,[169] namely that the private anticompetitive access restraints issue should be addressed by "developing a competition-based set of principles."

The same failing -- albeit in a less dramatic form -- has characterized the European Union's advocacy of a WTO market access rule that would address, inter alia, private vertical restraints. The European Commission has been quite explicit in supporting a rule on vertical restraints that would condemn them for access-denying effects even where, taken individually, they are not inconsistent with domestic antitrust law:

> [C]ompetition law in the European Community and in many Member States provides that even when the different distribution networks on a market are in line with antitrust law, they can be condemned where access to the market is restricted by the cumulative effect of parallel networks of similar agreements.[170]

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[169] ABA Report, supra n.61.

[170] Communication of the Council of the European Commission, submitted by Sir Leon Brittan and Karel van Miert, COM (96) 296 Final at 11, quoted in Towards an International Framework of Competition Rules, (1996).

Studies of private access restraints by both the WTO and the OECD have criticized the domestic competition laws of most countries for taking the position that a private practice will be exonerated where on balance it benefits domestic consumers and enhances market efficiency, ignoring broader concepts of global welfare, including harm to foreign exporters who are denied access. A WTO "Special Topic" report states:

> Even where the criteria of allocative efficiency are solely applicable, the fact that such criteria are generally applied in respect of efficiency and welfare within the jurisdiction in question and may not take into account adverse effects on the welfare of producers and consumers abroad may lead to situations where the enforcement of national competition law will not adequately take into account the interests of trading partners.[171/]

Similarly, a 1995 OECD paper reaches the following conclusion:

> As trade policy should be made much more responsive to the interests of consumers, so should competition policy probably take international considerations and the interests of both producers and consumers beyond domestic jurisdictions greater into account.[172/]

[171/] WTO Annual Report, supra n.60, at 75.

[172/] New Dimensions of Market Access in Globalizing World Economy (Paris: OECD, 1995) at 254.

These analytical approaches run head-on into the fact that most national competition policy authorities -- and certainly those in the United States -- do not accept the concept that application of their domestic laws should consider the adverse effects on foreign companies or foreign economies as an element in their "rule of reason" analysis. In the United States, in particular, the focus on competition, allocative efficiencies and the interests of consumers addresses the role of foreign competitors (as it does for domestic competitors) from the standpoint of their contribution to the competitive efficiency of the marketplace, and not from the standpoint of whether those foreign companies suffer adverse effects from practices of domestic competitors.

More broadly, it is understandable that international organizations such as the WTO and the OECD would advocate that competition policy be applied on a more international basis, with national authorities looking to welfare and efficiencies on a global, rather than national basis. Whatever may be the merits of such an approach in the long run, there seems no prospect in the foreseeable future that such a re-orientation can achieve general acceptance, or that it will be advocated by

the U.S. competition authorities.[173/] Accordingly, a meaningful approach to the problem of private practice market access barriers must, if it is to be consistent with U.S. competition policy, take a different tack. Such an approach, the Sections believe, can be devised in a form that will advance both U.S. trade policy interests and U.S. competition policy interests -- provided that it is based on a proper understanding of the types of private practice access barriers that are truly significant in the trade arena.

B. The Importance of Correctly Defining the Problem of Private Anticompetitive Market Access Restraints

It is the view of the Sections that much of the perceived conflict between U.S. competition policy and the need for international trade approaches to private anticompetitive access-denying practices arises from misconceptions as to the

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[173/] Indeed, the International Chamber of Commerce has stated that it will not promote any effort to include discussions of competition policy in a new round of multilateral trade negotiations possibly to be staged by the World Trade Organization in 2000. The ICC stated that the "understanding of the complex issues involved [in trade and competition policy] and their ramifications has not progressed sufficiently for this subject to be included. "ICC Opposes Inclusion of Antitrust In Next Round of Trade Negotiations," 76 Antitrust & Trade Reg. Rep. (BNA) 707 (June 24, 1999).

nature of the situations in which trade policy needs to -- or would -- address such practices.

The concern of competition policy, of course, is that the United States should not argue to foreign governments that they should condemn private business practices which, if conducted in the United States, would not be condemned under current U.S. antitrust law. At the outset, it should be noted that this concern would not apply to those practices characterized by U.S. law as per se violations. It is the "rule of reason" class of practices -- and most notably non-price vertical restraints -- on which concern is legitimately focused. That concern is at least exaggerated by a misconception as to the nature of the vertical restraint situations which would attract serious trade policy attention.

One paradigmatic situation on which competition policymakers' concern would focus is a complaint by a U.S. exporter that simply says, "I have a good, competitive product which I tried to sell to customer A (or to customers A, B and C) in country X at a competitive price, and my offers were rejected or perhaps I was not permitted to submit an offer." Or perhaps this: A U.S. exporter's complaint is that his products, although competitive in quality and price, are not accepted --

or are given secondary status -- by the largest (or several of the largest) distribution systems in country X. Without more, neither of these complaints would succeed under U.S. antitrust law. Additional factors -- such as the extent of market foreclosure, the extent of domestic competition in the marketplace, efficiencies in interbrand competition attributable to the foreclosure of competitors, the existence of collusion among competitors, the extent to which the foreclosed seller offered a truly superior or lower-cost product -- would have to be evaluated in any "rule of reason" analysis. Accordingly, a trade complaint against country X on the evidence stated above would put the United States at just the risk that the International Law Section and the ABA cautioned against in 1995: "the risk of prohibiting efficiency-enhancing conduct."[174/]

The Sections would be equally concerned were the United States to endorse a market access principle that allowed action to be taken against country X for toleration of private practices in either of the two cases discussed above. But the fact is that the vertical restraints as to which trade policy has a legitimate concern are very different. They are cases in

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[174/] See ABA Report, supra n.61 and accompanying text.

which a seller offering an innovative or otherwise superior product and/or having a major cost advantage over producers in the destination country is systematically excluded from a major portion of the market in the destination country.[175/]

Instances of this nature are qualitatively different, both from the standpoint of a country's international trade interests and from the standpoint of competition policy. From the trade perspective, these are the exporters -- the technology-leading and/or cost-advantaged industries -- which are supposed to succeed if the international trading system is to work properly. If nations find that their companies in these categories cannot sell on their merits in export markets because of exclusionary practices, it is unlikely that the world trading system can be maintained in its present form.

From the competition policy standpoint, these additional facts also make a qualitative difference. Where the U.S. producer or industry shows extensive or systematic market preclusion (not isolated instances), where the excluding companies taken together have sufficient market power, and where

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[175/] See supra notes 15-16 and accompanying text (discussing the instances alleged by the American Electronics Association in its 1991 submission to USTR).

the presence in the market of the U.S. company would add a significant competitive dimension (a new technology, a demonstrably superior product, a substantial cost advantage), there is justification for investigation that could lead to a "rule of reason" finding of a substantial lessening of competition.

In short, the trade problem situations that need to be addressed are those that, in large part, can be addressed without conflict with current U.S. competition policy. The objective, therefore, must be to address this economically important trade issue in a manner that deals with these problems and does not seek to address cases which, in competition policy, could be found to be pro-competitive.

Placing an obligation to enforce on the government of the consuming country addresses one of the major problems perceived by the business community in the area of private access-denying practices. Many nations' competition laws -- including that of Japan -- deal comprehensively with the types of private practices relevant to the market access issue. But the claim is often made that these laws are not enforced, or are enforced in ways that discriminate against foreign sellers. A requirement to take action fairly and impartially, with a high level of

transparency, and to provide opportunity for aggrieved foreign companies to have their concerns impartially adjudicated, would go far toward allaying concerns that have been increasingly advanced by U.S. business.

Finally, the standard proposed herein would address another complaint often made concerning the inadequacy of competition law enforcement with regard to access-denying vertical restraints, namely, that domestic authorities' analysis of the "substantial lessening of competition" issue is too narrow. To the extent that such concerns are intended to direct consideration to injury to the foreign exporter, this standard does not and should not bring that about. Rather, this standard is intended to focus the analysis on the proper significance of the access denial for both competition and trade policy -- namely, the extent to which denial of access prevents a substantial improvement in the level of competition by introducing a superior product and/or a lower-cost competitor.

C. A Proposed Recommendation for a Competition-Based Approach to Private Anticompetitive Practices that Restrain Market Access

The Sections recommend that the United States advocate in international trade negotiations, and adopt as its own policy, the principle that it is generally beneficial to international

commerce for a government to take action against private anticompetitive practices that restrain market access by foreign competitors in ways that substantially lessen competition in the markets of that government's country.

Under the proposal, the United States would not seek agreement by any government to the details of substantive antitrust law or procedure. The United States would continue to maintain that the appropriate focus of competition law and policy is allocative efficiency and, in the last analysis, consumer welfare. With regard to the effect of domestic firms' practices on foreign competitors, it would not be the United States' position that mere denial of sales opportunities to a foreign firm, even a denial of access on the merits, would in and of itself be subject to government action. Rather, it is where the circumstances of the denial are such that competition in the relevant market is substantially lessened -- as compared to the level of competition that would exist absent the access-denying restraint -- that a government should take action to end the anticompetitive practice.

The United States would also insist, consistent with the approach taken in WTO Agreements that require Signatory Governments to regulate trade-restricting practices by private

actors, that governments should provide a fair, transparent and impartial process, accessible to foreign companies, whereby complaint can be made of access-denying practices and an adjudication on the merits will be made within a reasonable time. Thus, in the first instance, it would be the responsibility of domestic authorities or courts to decide whether a given alleged anticompetitive practice is to be remedied. Only if the government in question does not adopt a rule consistent with the general principle stated above, or if it provides no mechanism for redress, or if proceedings for redress can be shown not to have been fair and impartial or not to have fairly applied the principle discussed above, would the question arise of whether and to what extent the government of the complaining exporter could require that consultations be undertaken or would have recourse to some form of international dispute settlement or could take action under its domestic legislation.

The Sections emphasize that this recommendation takes no position on either the choices among international fora in which the United States might advance this recommended policy or on the question of possible enforcement procedures or dispute resolution mechanisms.

With respect to international fora, earlier sections of this Report[176/] have discussed -- and the Sections' Report on the Internationalization of Competition Rules analyses in greater detail -- the ongoing discussions of international competition policy in the WTO, the OECD, NAFTA and other regional trade fora. The Sections take no position as to which, if any, of these fora would be desirable vehicles, either for international discussion of the policy recommended herein or for embodiment of that policy in some form of international agreement. To the extent that the United States participates in bilateral, regional or multilateral discussions or negotiations on substantive issues of competition policy, it is the clear and intended implication of this recommendation that the positions taken by U.S. discussants or negotiators on issues of market access denial by anticompetitive private practices should be consistent with policy recommended herein.

This Report also takes no position on what, if any, international dispute resolution mechanism should be advocated or adopted to deal with situations in which the United States (or some other country) is aggrieved by a government's failure

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176/ See supra Section IV.A.4.

to take action against an access-denying private anticompetitive practice that creates a substantial lessening of competition. As discussed earlier, the range of international dispute resolution options is quite broad, ranging from the requirement that "sympathetic" consultations be held (GATS) to blockable panel decisions (GATT pre-1994) to binding panel/appellate body decisions (WTO).

Finally, the Sections take no position on the extent to which the United States should take affirmative steps under its antitrust or international trade laws to move in particular cases against private access-denying foreign practices that meet the criteria set forth in this recommended policy. It is, however, the clear view of the Sections that action should not be taken by the United States against foreign access-denying private practices that do not meet the "substantial lessening of competition" test once an agreement embodying the principle we recommend becomes effective.

In summary, the Sections recommend the following policy:

1. That the United States should reaffirm the importance of the issue of private anticompetitive practices that prevent or inhibit access by U.S. and other competitors to foreign markets, and

2. That the United States should adopt as its policy and advocate in international fora the principle

that it is generally beneficial to international commerce that a government

a. take action against private anticompetitive practices that restrain market access by foreign competitors in ways that substantially lessen competition in the markets within that government's jurisdiction,

b. take such action consistent with the principles of national treatment and most-favored nation, and

c. provide to aggrieved private parties, including foreign competitors, a fair, transparent and impartial process whereby complaint can be made of private access-denying anticompetitive practices and a resolution will be reached within a reasonable time.

3. That no position is taken as to what, if any, international dispute resolution mechanism should be advocated or established to deal with the situation in which one country is aggrieved by another country's failure to take action against an access-denying private practice that substantially lessens competition.

4. That nothing in these recommendations should be interpreted to derogate from the importance attached by the United States and other nations to taking actions against other anti-competitive practices in the international context, such as international cartels.