THE ROLE OF POSITIVE COMITY IN U.S. ANTITRUST ENFORCEMENT AGAINST JAPANESE FIRMS: A MIXED REVIEW

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Abstract: On October 7, 1999, the United States and Japan signed an antitrust cooperation agreement. The agreement contains provisions for notification and consultation, coordination and cooperation, and positive comity. These provisions address Japanese sovereignty concerns arising from the unilateral application of U.S. antitrust laws to the conduct of Japanese firms that occurs outside the territorial borders of the United States. The agreement also addresses U.S. perceptions that Japanese markets are closed to American businesses because it offers tools, other than unilateral antitrust enforcement, to open Japanese markets to American businesses. However, the positive comity provision does not proscribe unilateral antitrust enforcement. This Comment analyzes the strengths and weaknesses of the positive comity provision and recommends several improvements.

I. INTRODUCTION

While markets for goods and services extend beyond national boundaries, antitrust laws regulating these markets are national in scope. This paradox presents a challenge to effective application of U.S. antitrust laws to anticompetitive conduct occurring outside national borders. Cooperation between the United States and international competition authorities is increasing. This is a welcome departure from previous U.S. foreign antitrust enforcement policy that often "led to instances of sharp conflict with other sovereigns." However, continued unilateral application of U.S. antitrust laws to the conduct of Japanese firms occurring outside of the United States continues to cause tension between the United States and Japan. Additionally, some American politicians and industries view unilateral antitrust enforcement as a necessary means to open Japanese markets to U.S businesses.

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2 In this Comment, anticompetitive conduct is conduct that is prohibited by the Sherman Act and Clayton Act. See infra Part II.A-B.
3 FINAL REPORT, supra note 1, at 36.
4 Id.
Despite the misgivings of several U.S. Senators, the United States and Japan signed an antitrust cooperation agreement ("Cooperation Agreement") on October 7, 1999. The Cooperation Agreement includes provisions for notification and consultation, cooperation and coordination, and positive comity. The positive comity provision in particular addresses the top two concerns of both countries: U.S. market access in Japan and Japanese sovereignty.

This Comment reviews the Cooperation Agreement. Part II provides a brief overview of U.S. antitrust laws. Part III outlines the views of some U.S. Senators and businesses toward Japanese markets and how unilateral application of U.S. antitrust laws infringes upon Japanese sovereignty. Part IV describes the history of formal efforts at cooperation by the United States and Japan. Part V examines the strengths and weaknesses of the positive comity provision of the Cooperation Agreement. Part VI provides recommendations for strengthening the Cooperation Agreement’s positive comity provision.

II. OVERVIEW OF U.S. ANTITRUST LAWS AND THEIR APPLICATION TO CONDUCT OCCURRING OUTSIDE U.S. TERRITORIAL BORDERS

An overview of two basic U.S. antitrust laws, the Sherman Act and the Clayton Act, is necessary to understand how the application of these laws to the conduct of Japanese firms causes tension between the United States and Japan. Specifically, it is important to understand Section 1 of

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7 Id.
9 Id. §§ 12-27.
10 These statutes are defined as the antitrust laws relevant to the Cooperation Agreement. Cooperation Agreement, supra note 6, art. 1, at 2. The Federal Trade Commission Act ("FTCA") is also specifically referenced in the Cooperation Agreement. Id. However, this Comment does not discuss the FTCA because it does not generally apply to foreign entities. 15 U.S.C. § 45(a)(3). For a review of all U.S. antitrust laws enforced against foreign firms, see U.S. DEP’T OF JUSTICE AND THE FED. TRADE COMM’N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 2-11 (1995) [hereinafter INT’L GUIDELINES].
the Sherman Act, which governs contracts, combinations, and conspiracies; Section 2 of the Sherman Act, which governs monopolies and monopolization; and Section 7 of the Clayton Act, which governs mergers and acquisitions that substantially lessen competition or tend to create a monopoly.

A. Sherman Act

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy in restraint of trade or commerce.\(^\text{12}\) Under Section 2, persons\(^\text{13}\) who monopolize, attempt to monopolize, or combine or conspire to monopolize are guilty of a felony.\(^\text{14}\) The Department of Justice ("DOJ") and private plaintiffs enforce the Sherman Act,\(^\text{15}\) and violations of the Act may result in civil penalties, criminal penalties,\(^\text{16}\) and injunctive relief.\(^\text{17}\)

\(^\text{12}\) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

\(^\text{13}\) Persons include corporations. 15 U.S.C. § 7.

\(^\text{14}\) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

\(^\text{15}\) The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

\(^\text{16}\) Id. §§ 4, 15.

\(^\text{17}\) Id. §§ 1, 2.
Private parties can seek treble damages.\textsuperscript{18} Both sections grant jurisdiction over foreign firms.\textsuperscript{19}

\textbf{B. Clayton Act}

The Clayton Act is the other central antitrust statute. Section 7 of the Clayton Act prohibits mergers or corporate acquisitions that lessen competition or tend to create a monopoly.\textsuperscript{20} The DOJ, the Federal Trade Commission ("FTC"), and private plaintiffs may bring actions under the Clayton Act,\textsuperscript{21} and all three may seek injunctive relief.\textsuperscript{22} The Clayton Act grants jurisdiction over foreign firms.\textsuperscript{23} Table 1 helps summarize the important aspects of these statutes.

\textbf{Table 1. Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act}

<table>
<thead>
<tr>
<th>Act</th>
<th>Enforcement</th>
<th>Prohibited</th>
<th>Remedy</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clayton Act § 7</td>
<td>DOJ, FTC, private plaintiffs.</td>
<td>Conduct &quot;may&quot; substantially lessen competition or tend to create a monopoly.</td>
<td>Civil, Injunctive.</td>
<td>Domestic / Foreign.</td>
</tr>
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In summary, the U.S. antitrust statutes "provide a system for control and review by the courts of monopolization, of mergers (horizontal, vertical and conglomerate), and of restraint of trade arising from agreement or

\textsuperscript{18} Id. § 15. Although the statute authorizing treble damages is technically within the Clayton Act, the statute applies to the Sherman Act because the Clayton Act includes the Sherman Act in its definition of "antitrust laws." Id. § 12.

\textsuperscript{19} Id. §§ 1, 2. The Supreme Court held, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Hartford Fire Insurance Co. v. California, 509 U.S. 764, 796 (1993).

\textsuperscript{20} 15 U.S.C. § 18 provides:

\begin{quote}
No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.
\end{quote}

\textsuperscript{21} Id. §§ 15, 15a.

\textsuperscript{22} Id. § 26.

\textsuperscript{23} See 15 U.S.C. § 12 (defining commerce as "trade or commerce among the several States and with foreign nations...").
combination."\(^24\) The statutory provisions, however, merely represent the starting point for understanding antitrust law. Antitrust statutes are not conducive to interpretation by looking at their plain language because they are often "vague and conclusory," and thus their "meaning must be discerned from collateral sources."\(^25\) Thus, federal courts have an important role in defining the ambiguous statutory language\(^26\) because the judicial interpretation of these statutes changes with "ideology, politics and theory" and "American economic and business policy."\(^27\)

C. Application of U.S. Antitrust Laws to Conduct Occurring Outside of its Borders

The United States has been called the most aggressive antitrust enforcer in the world.\(^28\) DOJ statistics support the proposition that the United States aggressively enforces its antitrust laws internationally: since 1990, approximately twenty-five percent of the DOJ's 625 criminal cartel\(^29\) antitrust cases were international in scope.\(^30\) Between 1996 and 1999, the DOJ and FTC challenged 271 mergers,\(^31\) thirty-seven of which involved a foreign firm.\(^32\) In fact, the 1995 joint DOJ-FTC Antitrust Enforcement Guidelines for International Operations, which provide businesses engaged in international operations with antitrust guidance, identify international antitrust enforcement (and cooperation) as a high priority for the DOJ and FTC.\(^33\)

Eight of the twenty-four antitrust actions brought between 1995 and 1999 by the United States under the Sherman Act that resulted in a fine over

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\(^{24}\) ENFORCING ANTITRUST AGAINST FOREIGN ENTERPRISES 1 (Cornelis Canenbley ed., 1981) [hereinafter ENFORCING ANTITRUST].

\(^{25}\) FEDERAL ANTITRUST POLICY, supra note 11, at 48-49.

\(^{26}\) Id. at 51-52.

\(^{27}\) Id. at 55.


\(^{29}\) "A cartel is an agreement among firms who should be competitors to reduce their output to agreed upon levels, or sell at an agreed upon price." FEDERAL ANTITRUST POLICY, supra note 11, at 140. Cartel behavior includes price fixing; volume, customer, and market allocation; and bid rigging. FINAL REPORT, supra note 1, at 163.

\(^{30}\) FINAL REPORT, supra note 1, at 167. In the context of this Comment, the term "international" should be distinguished from the term "foreign." International antitrust enforcement encompasses the conduct of firms, including U.S. firms, occurring outside U.S. territorial borders, whereas foreign enforcement only encompasses the conduct of non-U.S. firms.

\(^{31}\) Id. at Annex 2-A.

\(^{32}\) Id. at Annex 2-B.

\(^{33}\) INT'L GUIDELINES, supra note 10, at 1.
$10 million were against Japanese firms. In comparison, the United States successfully prosecuted claims resulting in a $10 million fine against five German firms, four Swiss firms, four U.S. firms, two Dutch firms, and one Belgian firm. U.S. antitrust enforcement against Japanese firms continues to cause tension between the United States and Japan because Japan feels such enforcement infringes upon Japanese sovereignty.

III. UNILATERAL APPLICATION OF U.S. ANTITRUST LAWS AGAINST JAPANESE FIRMS

International antitrust enforcement by the U.S. plus anticompetitive conduct by Japanese firms cause tension between the United States and Japan. For example, the Subcommittee on Antitrust, Business Rights, and Competition of the Committee on the Judiciary of the United States Senate ("Subcommittee") held a hearing on May 4, 1999, to address, in part, problems with American business access to Japan's domestic market. At the hearing, Senator DeWine, the Chairman of the Subcommittee, stated, "[w]hile we seem to be making good progress [regarding cooperation] with our colleagues in Europe, serious problems still remain in Japan.

The Subcommittee and several U.S. businesses are concerned that anticompetitive conduct by Japanese firms is keeping Japanese markets closed to American business. The Japanese have challenged U.S. antitrust actions against Japanese firms, arguing that application of U.S. domestic law outside its borders infringes upon Japanese sovereignty.

A. U.S. Perception that Japan Keeps its Markets Closed to U.S. Firms

Several U.S. politicians and industries argue that Japan has failed to open its markets to American firms. Barriers to U.S. entry in the Japanese market were first addressed in 1989 through the Structural Impediment Initiative ("SII") talks between the United States and Japan. Systems for

34 Final Report, supra note 1, at Annex 4-A. The United States brought twenty-seven actions overall resulting in fines over $10 million, but three of these actions were purely domestic. Id. The Final Report did not include any actions that resulted in fines less than $10 million. Id. The Japanese firms were Takeda Chemical Industries, Ltd., Eisai Co., Ltd., Showa Denko Carbon, Inc., Daiichi Pharmaceutical Co., Ltd., Nippon Gosei, Fujisawa Pharmaceuticals Co., Ajinomoto Co., Inc., and Kyowa Hakko Kogyo, Co., Ltd. Id.

35 Id. at Annex 4-A.
36 Hearing, supra note 5.
37 Id. at 2.
distributing goods, exclusionary business practices, keiretsu relationships (reciprocal dealings between Japanese enterprises), and pricing mechanisms were among the market barriers that Japan agreed to address as a result of the SII talks. Nonetheless, continued complaints about market access caused the Subcommittee to hold a hearing on international antitrust cooperation and enforcement, positive comity agreements, the flat glass industry, and “problems with the Japanese market” in May 1999. Senator Kohl stated at the 1999 Subcommittee hearing that “after decades of trying to open the Japanese markets to paper, flat glass, and rice, and after we have signed several bilateral treaties to do just this, American companies are still frozen out of the Japanese market.” At the hearing, three officers of U.S. corporations testified about the difficulty they faced entering Japanese flat glass and paper markets. This testimony reflects the frustrations of U.S. corporations. Mr. Evans, the president and CEO of Consolidated Papers, testified, “Japan is a protectionist society, but I know it is a cultural thing, so I am frustrated. I know we cannot go in there and police their culture. We cannot impose what we would like to see on them.” Mr. Walters, Group Vice President of Guardian Industries Corporation testified in regard to the flat glass market that “the Japanese do not seem to take a U.S. point of view seriously if there is not some form of threat or retaliation or leverage on our side of the negotiating table.”

The International Competition Policy Advisory Committee (“ICPAC”) specifically addressed these allegations in its Final Report

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39 Mitsuo Matushita, The Structural Impediments Initiative, 12 U. MICH. J. INT’L L. 436, 440-44. For further discussion of the SII talks, see infra Part IV.C.
40 Hearing, supra note 5.
41 Id. at 3. One claim is that “de facto” trade barriers deny firms access to the Japanese market. Mitsuo Matushita, Special Issue from the Conference on Legal Framework of U.S.-Japan Economic Relation, The Legal Framework of Trade and Investment in Japan, 27 HARV. INT’L L.J. 361, 372 (1986). One example of a de facto barrier is the claim that the Japanese distribution system is so “complex and exclusive that it has been a trade barrier to foreign enterprises.” Id. Another claim is that there are closed business groups in Japan that exclude foreign enterprises, thereby creating trade barriers. Id. at 373.
42 The testimony included that of Peter S. Walters, Group Vice President of Guardian Industries Corporation, regarding the flat glass market; Gorton M. Evans, President and CEO of Consolidated Papers, regarding the paper market; and John C. Reichenback, Director of Government Affairs for PPG Industries, Inc., regarding the flat glass market. Hearing, supra note 5, at 25-46 (statements of Peter S. Walters, Group Vice President, Guardian Industries Corporation, Gorton M. Evans, President and Chief Executive Officer, Consolidated Papers, and John C. Reichenback, Director of Government Affairs, PPG Industries Incorporated).
43 Id. at 52 (statement of Gorton M. Evans, President and Chief Executive Officer, Consolidated Papers).
44 Id. at 53 (statement of Peter S. Walters, Group Vice President, Guardian Industries Corporation).
45 CHARTER: INTERNATIONAL COMPETITIVENESS ADVISORY COMMITTEE (Oct. 3, 1997), http://www.usdoj.gov/atr/icpac/icpac1.htm. Attorney General Janet Reno chartered the ICPAC on October 3, 1997 to address broad international competition issues. Id. Specifically, the ICPAC was charged with
issued on February 28, 2000. The ICPAC reported complaints by U.S. businesses that their entry or expansion into Japanese markets was hindered by the business practices of Japanese competitors, sometimes with the support of the government. Further, U.S. companies have complained about access to the Japanese auto industry, flat glass market, paper industry, film market, electronic equipment market, and soda ash industry. The ICPAC report concluded that there was no single policy tool capable of addressing the problems raised by U.S. firms. Instead, the ICPAC suggested three different tools to counter anticompetitive conduct by foreign firms: bilateral agreements with positive comity provisions, unilateral extraterritorial enforcement of U.S. antitrust laws, and development of international competition policy initiatives. Rather than embrace cooperation and positive comity, however, Senator DeWine, the Subcommittee Chairman, argued that the DOJ should "strongly consider the extraterritorial enforcement of our antitrust laws in order to prevent Japanese companies from violating the rights of American companies." Senator DeWine appears to base his distrust of a positive comity agreement on his belief that Japan has failed to honor past trade agreements.

making recommendations regarding how the United States can best work with foreign nations to deter anticompetitive international cartels, coordinate efforts with foreign nations to review multinational mergers, and protect the United States' economy from international antitrust violations. Id. The ICPAC made its final report to the Attorney General and Assistant Attorney General for Antitrust on February 28, 2000. FINAL REPORT, supra note 1. 46 See generally FINAL REPORT, supra note 1, ch. 5. 47 Id. at 211. 48 Id. at 211-15. 49 Id. at 226. 50 Id. Positive comity is a central topic in this Comment and is discussed infra Part V.A. Unilateral extraterritorial antitrust enforcement is discussed supra Part III.B. Regarding the development of international competition policy initiatives, the ICPAC found that bilateral agreements with positive comity provisions are "unlikely to be a sufficient response to all of the competition problems and the opportunities presented by the global economy." FINAL REPORT, supra note 1, at 255. In particular, the ICPAC recommends developing comprehensive competition policy under the auspices of the Organization for Economic Development ("OECD") and the World Trade Organization ("WTO"). Id. Analysis of such initiatives is outside the scope of this comment, but may warrant future research. 51 Hearing, supra note 5, at 3 (statement of Senator DeWine). 52 Id. at 2 (statement of Senator DeWine). Senator DeWine does not specify what trade agreements Japan failed to honor. Id.
B. The Matsushita and Nippon Paper Cases: U.S. Antitrust Laws Apply to Conduct by Japanese Firms that Occurs Outside U.S. Territorial Boundaries

The unilateral application of U.S. antitrust laws to the conduct of Japanese firms may infringe upon Japanese sovereignty. According to the principle of state sovereignty, "each state is the sole arbiter of the legal nature of acts performed within its territory. Only the public authorities of that State have the right to act within the territory. Thus an act of public authority of State A performed within the territory of State B, is an infringement of the Sovereignty of State B, unless previously consented to by the government or other designated authority of State B." Even so, U.S. courts have put aside Japanese sovereignty concerns in two major cases: *In re Japanese Electronic Products Antitrust Litigation* ("Matsushita") and *United States v. Nippon Paper Co.*

1. The Matsushita case

In *Matsushita*, two U.S. firms, National Union Electric Corporation and Zenith Radio Corporation, filed antitrust claims against seven Japanese television manufacturers under Sections 1 and 2 of the Sherman Act. The plaintiffs alleged a conspiracy by Japanese television manufacturers to drive American television manufacturers out of business by a scheme to raise, fix, and maintain artificially high prices for televisions sold by the defendants in Japan while simultaneously maintaining artificially low prices for televisions exported to and sold in the United States. Zenith also alleged that two of the seven Japanese companies violated Section 7 of the

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53 Enforcing Antitrust, supra note 24, at 12.

54 Id. Implications of sovereignty have historically elicited the most objections from foreign governments to the application of U.S. antitrust laws to foreign firms. Final Report, supra note 1, Annex 1-Ci.


56 United States v. Nippon Paper Co., Ltd. 109 F.3d 1 (1st Cir. 1997).

57 Antitrust Litigation, supra note 55, at 251. The principal defendants were Mitsubishi Corp., Matsushita Electrical Industrial Co. Ltd., Toshiba Corp., Hitachi, Ltd., Sharp Corp., Sanyo Electric Co., Ltd. Sony Corp., and Mitsubishi Electric Corp. Id.


59 Id.
Clayton Act by acquiring interests in American companies. The plaintiffs sought treble damages and injunctive relief. The district court granted summary judgment in favor of the defendant corporations.

On appeal, the Third Circuit reversed the lower court in favor of the plaintiffs on the majority of the claims. One ground for reversal was the Third Circuit's rejection of the defendant's sovereign compulsion defense. Under the sovereign compulsion defense, "American courts will refuse to base liability on the acts of private individuals or firms that were compelled by a foreign sovereign to be performed in that sovereign's territory. The courts have construed the doctrine rather strictly. If conduct is merely authorized, not compelled, the defense cannot be raised; nor can it if the foreign sovereign compels extraterritorial acts." The defendants argued that they were entitled to summary judgment because the "activities of those defendants in Japan were undertaken at the direction of the Japanese government, as an integral part of its trade policy toward the United States." In particular, the defendants argued that the Japanese Ministry of International Trade and Industry ("MITI") mandated agreements between Japanese firms fixing minimum prices for exports. The Third Circuit rejected these arguments.


68 Antitrust Litigation, supra note 55, at 315. The court reasoned that there was not sufficient evidence that MITI determined the pricing arrangement and that there was ample evidence suggesting that
Following the Third Circuit’s summary judgment reversal, the defendants appealed to the United States Supreme Court. The amicus curiae brief in support of certiorari submitted by the government of Japan focused on the sovereign compulsion defense and outlined how Japan compelled the conduct of the Japanese firms. The brief also explained the potential adverse impact on the U.S.-Japan trade relationship if the Court rejected the sovereign compulsion defense. Likewise, one commentator criticized the Third Circuit’s rejection of the sovereign compulsion defense because it “disregarded express Japanese government requirements and the strong political overtones in Matsushita. Ultimately, the conclusion that an exercise of jurisdiction under these circumstances was viable may adversely affect U.S.-Japanese trade relations.” The Supreme Court reversed and remanded the case without deciding the sovereign compulsion defense argued by the petitioner-defendants. Thus, since the Supreme Court’s decision did not answer the sovereign compulsion question, the Third Circuit’s rejection of Japan’s sovereign compulsion defense remained intact.

2. The Nippon Paper Case

Following a criminal investigation that began in 1992, a federal grand jury indicted Nippon Paper Industries Co. (“NPI”), a Japanese manufacturer of facsimile paper, for violations of Section 1 of the Sherman Act. The indictment alleged that NPI and unnamed co-conspirators held meetings in Japan to fix the price of thermal fax paper in North America. Again, the
Japanese firms raised the foreign sovereign compulsion defense arguing that the MITI mandated their conduct. The district court dismissed the indictment, holding that a criminal antitrust prosecution could not be based on conduct that occurred entirely outside the United States. The DOJ appealed the district court decision to the First Circuit Court of Appeals and the government of Japan submitted a brief of amicus curiae.

Japan’s amicus brief to the First Circuit emphasized principles of international law and the potential transgressions into areas of national sovereignty. Nippon Paper was more controversial than Matsushita because the case sought to impose criminal penalties on Japanese firms. Japan argued to the First Circuit:

In light of the basic principles of international law, business activities conducted by Japanese enterprises within the territory of Japan fall primarily under the scope of Japanese legislation, and should not be regulated by extraterritorial application of United States law. Any such extraterritorial exercise of public authority may infringe the sovereign rights of other countries and must therefore be strictly limited. The attempt to impose foreign economic regulation of private operators through criminal sanctions is of course particularly problematic.

The First Circuit reinstated the indictment after finding that Section 1 of the Sherman Act “applies to wholly foreign conduct which has an intended and substantial effect in the United States.” In its brief to the Supreme Court supporting certiorari, the government of Japan argued the First Circuit’s application of the Sherman Act was inconsistent with international law and would profoundly infringe upon Japan’s sovereignty. In addition, the Japanese government suggested in its briefs to both the First Circuit and the Supreme Court that cooperation was a more attractive

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76 Id. See also supra note 67 (discussion of the MITI letters).
77 Nippon Paper, supra note 56, at 2.
79 Criminal sanctions under Section 1 of the Sherman Act include a $350,000 fine and imprisonment for three years for persons, and a $10 million fine for corporations. See supra notes 12 and 14.
80 Brief of Amicus Curiae of the Government of Japan, United States v. Nippon Paper Co., Ltd, 109 F.3d 1, 7-8 (1st Cir. 1997) [hereinafter Brief of Amicus Curiae].
alternative to unilateral antitrust enforcement by the United States. In short, U.S. courts have put aside Japanese sovereignty concerns, allowing the unilateral application of U.S. antitrust laws to conduct by Japanese firms that occurs outside of the United States.

IV. FORMAL EFFORTS BY THE UNITED STATES AND JAPAN TO COOPERATE IN INTERNATIONAL ANTITRUST ENFORCEMENT

Japan’s amicus brief to the First Circuit in Nippon Paper argued that jurisdictional conflicts should be settled with cooperation and coordination, and through a bilateral agreement, rather than unilateral extraterritorial application of national antitrust laws. In fact, the governments of the United States and Japan began investigations into the Nippon Paper situation cooperatively. At the DOJ’s request in an investigation related to Nippon Paper, the Japanese Prosecutor’s Office raided and seized documents from two Japanese companies in 1994. The Japanese Prosecutor’s Office also secured the cooperation of other Japanese thermal fax paper companies to produce documents and questioned representatives of Japanese thermal fax paper manufacturers in the presence of U.S. officials. These efforts resulted in guilty pleas from three U.S. companies, four Japanese companies, and one Japanese national. The United States and Japan have made several attempts at cooperation through traditional international law mechanisms, mutual legal assistance treaties, and bilateral discussions.

A. Traditional International Law Mechanisms

Traditional international law mechanisms provide one avenue for cooperation. These traditional mechanisms include the use of diplomatic channels and court-to-court letter rogatory requests. The thermal fax paper investigation, where the Japanese Prosecutor’s Office acted at the request of

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83 Id.
85 Brief of Amicus Curiae, supra note 80.
86 Id. at 4.
87 Id. See also Warner, supra note 82, at 335; FINAL REPORT, supra note 1, at 183.
88 Brief of Amicus Curiae, supra note 80, at 4; see also FINAL REPORT, supra note 1, at 183.
89 Brief of Amicus Curiae, supra note 80, at 4.
the United States, is one example of cooperation through traditional mechanisms. The DOJ used diplomatic channels in that investigation to request assistance from the Japanese government. Comity is another traditional international law mechanism that may lead to cooperation. The principle of comity means "nations are under a moral duty to cooperate with each other in enforcing their respective laws, and to resolve international conflicts fairly with a sensitivity to each other's interests." The application of comity in antitrust cases against foreign firms is an unsettled area of law.

B. Mutual Legal Assistance Treaties

The United States and Japan have also entered into Mutual Legal Assistance Treaties ("MLATs"). MLATs are cooperative agreements that offer a formal mechanism to provide assistance in criminal matters, including compelling production of materials and obtaining confidential information from foreign competition authorities. MLATs, however, address criminal matters generally; they are not specific to antitrust investigations. There is very little disclosed about investigations under MLATs. In fact, there are only three instances where the details of MLAT assistance have been disclosed, and all three involve Canada.

91 FINAL REPORT, supra note 1, at 183.
92 Id.
93 ENFORCING ANTITRUST, supra note 24, at 13 ("Such is the request made by the United States Federal Court. It is our duty and our pleasure to do all we can to assist that court, just as we would expect the United States court to help us in like circumstances. Do unto others as you would be done by.") (quoting Lord Denning in the Westinghouse case, regarding a letters rogatory request).
94 Hartford Fire Insurance Co. v. California, 509 U.S. 764, 796 (1993). The Supreme Court held, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Id. at 796. The Court went on to say that the principle of comity, even if applied, did not preclude jurisdiction over the foreign defendants. Id. at 770. The Nippon Paper decision supports this position. See Nippon Paper, supra note 56, at 9. See also FINAL REPORT, supra note 1, Annex I-Cii.
96 FINAL REPORT, supra note 1, at 181.
97 Id. Annex 1-Cix.
98 Id. at 182. The U.S. government discloses very few details about criminal investigations due to their sensitive nature. Id.
C. Bilateral Discussions

1. General Initiatives

The United States and Japan have engaged in bilateral discussions regarding international antitrust enforcement. These discussions first occurred within the context of the Structural Impediments Initiative ("SII") between 1989 and 1992.99 The SII talks addressed market access issues and led to an increase in the Japan Fair Trade Commission ("JFTC") budget and staff, increased penalties for anti-competitive conduct, increased enforcement against violators, reinstatement of criminal enforcement, and procedural changes to reduce obstacles to private actions against antitrust violators.100 The Clinton administration also engaged in talks with Japan about competition policy through the Enhanced Initiative on Deregulation and Competition Policy ("Enhanced Initiative").101 The Enhanced Initiative has also led to an increase in budget and personnel for the JFTC.102 Additionally, the JFTC also agreed to reaffirm its commitment to effectively enforce Japanese antitrust laws, to survey compliance with antitrust laws, and to submit legislation to abolish exemptions from antitrust laws for certain types of cartels.103

2. Industry-Specific Initiatives

The United States and Japan have also engaged in bilateral discussions regarding the paper and flat glass markets that have resulted in cooperation agreements.104 Following a year of negotiations, the United States and Japan entered into a five-year agreement to substantially increase U.S. access to the Japanese paper market.105 However, Gorton M. Evans, a representative of the U.S. paper industry, argues that the agreement is

100 See supra note 38 and accompanying text.
101 The Japan Fair Trade Commission is the competition authority in Japan analogous to the DOJ and FTC in the United States. Cooperation Agreement, supra note 6, art. I, §§ 1, 2.
102 Final Report, supra note 1, at 216.
103 Id.
105 Id. at 11-12.
106 Hearing, supra note 5, at 29, 37.
107 Id. at 29.
ineffective. He noted that in 1998, U.S. paper exports accounted for 1.7% of the Japanese paper market. This was roughly the same percentage of the Japanese paper market occupied by U.S. paper exports prior to the agreement. Mr. Evans concluded, "[o]ur experience with the 1992 U.S.-Japan Paper Market Access Agreement and the Japanese Government's unwillingness even to discuss its renewal illustrates the limitations of trade negotiations as a tool to open Japanese markets to competition."  

The 1995 U.S.-Japan flat glass agreement has likewise been ineffective in the eyes of U.S. flat glass producers. John C. Reichenback, Director of Government Affairs for PPG Industries Inc., stated that "[t]he U.S.-Japan Flat Glass Agreement held out hope for change, but after nearly five years of its operation, it has not lived up to its initial promise. Today, the Japanese flat glass market remains largely unchanged." Although Japan claimed the agreement was effective in enhancing foreign access to Japanese markets, some believe the evidence is far from conclusive.

3. Skepticism Surrounding Bilateral Agreements

Based on these observations by U.S. corporations, those present at the 1999 Subcommittee hearing were skeptical about a U.S.-Japan Cooperation Agreement. In his opening remarks to the Subcommittee hearing, Senator DeWine, Chairman of the Subcommittee, commented on the proposed Cooperation Agreement. He said, "I believe positive comity agreements are generally a good thing. Based on our experience, it seems that they help to diffuse some of the tensions that sometimes arise in the course of antitrust investigations involving companies from different countries." However, he felt that the United States should be cautious about entering into such an agreement with Japan because of his belief that Japan failed to honor previous agreements and the "interests of American companies." Alternatively, he suggested "extraterritorial enforcement of our antitrust

108 Id. at 28.
109 Id.
110 Id. at 31.
111 Id. at 37.
112 Id.
114 Hearing, supra note 5, at 2.
115 Id. The Subcommittee did not provide any examples of previous agreements that Japan had failed to honor. Id.
laws in order to prevent Japanese companies from violating the rights of American companies.\textsuperscript{116}

V. THE U.S.-JAPAN ANTITRUST COOPERATION AGREEMENT

On October 7, 1999, Attorney General Janet Reno and the heads of American and Japanese competition authorities signed the antitrust cooperation agreement "to strengthen their cooperation in the antitrust area."\textsuperscript{117} The Cooperation Agreement is a bilateral Executive Agreement between the United States and Japan.\textsuperscript{118} However, it does not override inconsistent provisions of U.S. law because it is not a treaty ratified by the United States Senate.\textsuperscript{119} The purpose of the Cooperation Agreement is "to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of [the United States and Japan]."\textsuperscript{120} Attorney General Reno lauded the Cooperation Agreement as an "important milestone."\textsuperscript{121} Joel I. Klein, Assistant Attorney General in charge of the Antitrust Division, called the agreement a "significant step that will benefit antitrust enforcement in both countries" that will "promote a new level of cooperation between the United States and Japan in investigating practices that harm competition in our markets."\textsuperscript{122} The Cooperation Agreement is an important milestone because it addresses U.S. market access and Japanese sovereignty concerns through its positive comity provision.

A. The Cooperation Agreement Positive Comity Provision

Article V of the Cooperation Agreement is the positive comity provision.\textsuperscript{123} Positive comity is one of the "more significant recent

\textsuperscript{116} Id. at 3.
\textsuperscript{118} FINAL REPORT, supra note 1, Annex 1-Cv-vii. An Executive Agreement is entered into by the Executive Branch of the U.S. government, of which the DOJ is part, and a foreign government. Id.
\textsuperscript{119} Id. Annex 1-Cv.
\textsuperscript{120} Cooperation Agreement, supra note 6, art. I, § 1.
\textsuperscript{121} U.S. Department of Justice, supra note 117.
\textsuperscript{122} Id.
\textsuperscript{123} Cooperation Agreement, supra note 6, art. V. Article V reads as follows:

1. If the competition authority of a Party believes that anticompetitive activities carried out in the territory of the other country adversely affect the important interests of the former Party, such competition authority, taking into account the importance of avoiding conflicts regarding jurisdiction and taking into account that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to such anticompetitive
developments" in bilateral antitrust cooperation agreements. Positive comity attempts to avoid jurisdictional and sovereignty tensions "by placing initial responsibility for investigation of market access barriers into the hands of the jurisdiction where the alleged anticompetitive conduct occurs." Put another way, positive comity is a "mechanism whereby the jurisdiction most closely associated with the alleged anticompetitive conduct assumes primary responsibility for the investigation and possible remedy." It is important to note that while positive comity describes a form of voluntary cooperation in competition law enforcement, it is "not a general term for cooperation that involves ‘positive’ (affirmative) steps by the requested country or has ‘positive’ (beneficial) results."

Generally, a positive comity request results in an initial investigation by the requested party, and the requested competition authority reports back to the referring competition authority. The referring competition authority can accept these results, try to persuade the other competition authority to modify its findings, or initiate an antitrust action under its own laws. Positive comity fosters cooperation by avoiding potential jurisdictional and sovereignty issues. Sovereignty is not implicated because positive comity

activities, may request that the competition authority of the other Party initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effect on the important interests of the Party of the requesting competition authority, and shall include an offer of such further information and other cooperation as the requesting competition authority is able to provide.

2. The requested competition authority shall carefully consider whether to initiate enforcement activities, or whether to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request. The requested competition authority shall inform the requesting competition authority of its decision as soon as practically possible. If enforcement activities are initiated, the requested competition authority shall inform the requesting competition authority of their outcome and, to the extent possible, of significant interim developments.

Id. at 227.

Id. The FINAL REPORT continues: "Specifically, when anticompetitive conduct that adversely affects the important interests of one party occurs within the borders of another party, the ‘affected party’ may request that the ‘territorial party’ initiate appropriate enforcement action." Id.

COMM. ON COMPETITION LAW AND POLICY, ORG. FOR ECON. COOP. AND DEV., CLP REPORT ON POSITIVE COMITY 17 (1999) [hereinafter CLP Report].


Id. at 10.

Id. at 227.
presents the opportunity to obviate the need for extraterritorial enforcement.\textsuperscript{131}

Figure 1 illustrates how positive comity under the cooperation agreement would work if the United States initiated the positive comity request.

\textbf{Fig. 1. Summary of U.S. Antitrust Laws}

\begin{itemize}
  \item \textbf{United States}
  \begin{itemize}
    \item (1) Must ask:
      \begin{itemize}
        \item Does anticompetitive activity in Japan adversely affect U.S. interests?
        \item Is it important to avoid jurisdictional conflict?
        \item Is Japan in a position to more effectively enforce antitrust laws?
      \end{itemize}
    \end{itemize}
  \end{itemize}

  If the answer to all three questions is yes, then the United States makes a positive comity request.

  \begin{itemize}
    \item The request will be specific about the nature of the anticompetitive activities and how they affect the United States.
    \item The United States will provide as much information and cooperation as possible.
  \end{itemize}

\begin{itemize}
  \item (2) Request that Japan initiate appropriate enforcement
  \end{itemize}

\begin{itemize}
  \item \textbf{Japan}
  \begin{itemize}
    \item (3) Must:
      \begin{itemize}
        \item Carefully consider whether to initiate (or expand) enforcement activities.
        \item Make a decision and inform the United States.
      \end{itemize}

    \begin{itemize}
      \item (4) Inform United States of decision as soon as possible. If initiate enforcement activities, inform the United States of the outcome and significant interim developments.
    \end{itemize}
  \end{itemize}

\textsuperscript{131} \textit{Id.}
B. Positive Comity as a Means to Address U.S. and Japanese Antitrust Enforcement Concerns

1. The Strength of Positive Comity

The Cooperation Agreement's positive comity provision has several potential benefits. The main strength of the positive comity provision is that it addresses Japanese sovereignty concerns and U.S. market access concerns. Positive comity provides for improved effectiveness in antitrust enforcement because it is designed to avoid jurisdictional conflicts.\textsuperscript{132} If the United States makes a positive comity request and Japan takes action under its own laws, the jurisdictional conflict that leads to the implication of Japanese sovereignty is avoided. Likewise, if the United States feels that Japanese markets are closed to U.S. businesses, a request by the United States under the positive comity provision would require Japan to investigate and potentially end the conduct keeping the Japanese market closed.

2. Weaknesses of Positive Comity

The positive comity provision has several weaknesses that all seem to fall within the same category: it does not strictly proscribe unilateral antitrust enforcement actions against foreign firms.

The first weakness of positive comity is that it is constrained by the antitrust laws of each country.\textsuperscript{133} Specifically, in order for enforcement to follow a positive comity request, the conduct in question must be illegal in the country from which cooperation is requested.\textsuperscript{134} For example, conduct that the United States asks Japan to act upon may be exempted from Japan's antitrust laws.\textsuperscript{135} Whether or not differences in U.S. and Japanese antitrust laws will cause a significant obstacle is still unclear, however. While some commentators argue that U.S. and Japanese antitrust laws differ in their application,\textsuperscript{136} others believe that both the United States and Japan file similar complaints with enforcement authorities.\textsuperscript{137}

\begin{itemize}
  \item \textsuperscript{132} CLP Report, supra note 127, at 22.
  \item \textsuperscript{133} Id. at 23.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Matsushita, supra note 38, at 253. One example of conduct that is exempted from Japanese antitrust law is the export cartel. Id.
  \item \textsuperscript{136} See, e.g., Brill & Carlson, supra note 28.
  \item \textsuperscript{137} Harry First, Antitrust Enforcement in Japan, 64 ANTITRUST L.J. 137, 138 (1995).
\end{itemize}
Second, the positive comity provision is voluntary. Neither Japan nor the United States can be compelled to engage in positive comity, even if positive comity would result in the "best or only remedy." Under Article V of the Cooperation Agreement, the country that receives the request to initiate antitrust enforcement actions decides whether or not it will, in fact, initiate an enforcement action. There is no language in Article V stating that after a positive comity request, the requesting country cannot initiate an antitrust action. In fact, Article XI provides that "[n]othing in this Agreement shall be construed to prejudice the policy or legal position of either Party regarding any issue related to jurisdiction." Therefore, it remains easy for the United States to engage in a unilateral antitrust action against a Japanese firm.

Third, positive comity is a relatively unproven method that requires experience, confidence, and trust between countries in order to operate effectively. While the positive comity concept has been around for a significant amount of time, it has only recently come into relatively frequent use. For example, as of February 2000, there had been only one formal positive comity request from the United States to the European Community (EC). Although the EC indicated that it kept the DOJ informed of its investigation, the EC still has not taken any final action under the positive comity provision.

Fourth, the Cooperation Agreement itself is susceptible to dissolution by the parties or to contradictory laws. Article XIII of the Cooperation Agreement provides that "[e]ither Party may terminate this Agreement by giving two months written notice to the other Party through diplomatic channels." Another related flaw is that the Cooperation Agreement is not

138 CLP Report, supra note 127, at 23.
139 Id.
140 Cooperation Agreement, supra note 6, art. V.2.
141 See generally Cooperation Agreement, supra note 6, art. V.
142 Id. art. XI.4.
143 Under the agreement, however, one country should notify the other country in the event of a unilateral antitrust action that affects the important interests of the other country. Cooperation Agreement, supra note 6, art. II.1.
144 CLP Report, supra note 127, at 23.
145 The roots of positive comity principle can be traced to the 1954 Friendship, Commerce, and Navigation Treaty between Germany and the United States. FINAL REPORT, supra note 1, at 227.
146 See id. Positive comity was first included in the 1991 U.S.-European Community Agreement. Id. at 229.
147 Id. Annex 1-Cvi.
148 Id. at 233. The EC did issue a "Statement of Objections" indicating the EC "maintained regular contact" with the DOJ. Id. at 234. However, the Statement of Objections "does not represent any final determination on the part of the Commission." Id.
149 Cooperation Agreement, supra note 6, art. XIII.2.
a formal treaty ratified by the U.S. Senate.\textsuperscript{150} This means that the Cooperation Agreement does not supersede any contradictory law and is susceptible to being overridden by new laws.\textsuperscript{151} The language in the Cooperation Agreement itself indicates that the provisions will be carried out only to the extent consistent with the laws of each country.\textsuperscript{152} Despite these shortcomings, positive comity can still be an effective tool to solve antitrust and sovereignty-related issues.\textsuperscript{153}

VI. RECOMMENDATIONS TO STRENGTHEN THE U.S.-JAPAN ANTITRUST COOPERATION AGREEMENT

The United States and Japan should strengthen the positive comity provision to better address its weaknesses. The Final Report of the International Policy Advisory Committee ("ICPAC")\textsuperscript{154} suggests ways in which positive comity provisions can be strengthened.\textsuperscript{155} The ICPAC report included two relevant recommendations for improving positive comity in bilateral agreements: integrating parts of the U.S.-EC 1998 Positive Comity supplement and applying the positive comity experience of the Sabre corporation.\textsuperscript{156}

A. The U.S.-EC Positive Comity Agreement as a Model

The U.S.-EC positive comity agreement\textsuperscript{157} is a useful model with which to address some weaknesses in the U.S.-Japan Cooperation Agreement. The United States and the European Commission supplemented their antitrust cooperation agreement on June 4, 1998 with provisions that reaffirmed and enhanced the commitment of both countries to the principle of positive comity.\textsuperscript{158} Under Article IV, entitled, "Deferral or Suspension of

\textsuperscript{150} See supra note 119 and accompanying text.
\textsuperscript{151} Id.
\textsuperscript{152} Cooperation Agreement, supra note 6, art. I.1, XI.1.
\textsuperscript{153} FINAL REPORT, supra note 1, at 239.
\textsuperscript{154} See supra note 45 and accompanying text.
\textsuperscript{155} FINAL REPORT, supra note 1, at 239.
\textsuperscript{156} The other recommendations are increasing communication and transparency in the positive comity process and encouraging competition authorities to endorse positive comity in their mission statements. Id. at 277.
\textsuperscript{158} FINAL REPORT, supra note 1, at 230. The basic comity provision reads:
Investigations in Reliance on Enforcement Activity by the Requested Party,\(^{159}\) the parties \textit{may agree} that the party making a positive comity

\begin{quote}
The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.

\textit{EC Positive Comity Agreement, supra} note \textit{157}, arts. III, IV.

\textit{159} EC Positive Comity Agreement, \textit{supra} note 157, art. IV. Article IV in its entirety reads:

1. The competition authorities of the Parties may agree that the competition authorities of the Requesting Party will defer or suspend pending or contemplated enforcement activities during the pendency of enforcement activities of the Requested Party.

2. The competition authorities of a Requesting Party will normally defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party when the following conditions are satisfied:

(a) The anticompetitive activities at issue:

(i) do not have a direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party's territory, or

(ii) where the anticompetitive activities do have such an impact on the Requesting Party's consumers, they occur principally in and are directed principally towards the other Party's territory;

(b) The adverse effects on the interests of the Requesting Party can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied pursuant to the laws, procedures, and available remedies of the Requested Party. The Parties recognize that it may be appropriate to pursue separate enforcement activities where anticompetitive activities affecting both territories justify the imposition of penalties within both jurisdictions; and

(c) The competition authorities of the Requested Party agree that in conducting their own enforcement activities, they will:

(i) devote adequate resources to investigate the anticompetitive activities and, where appropriate, promptly pursue adequate enforcement activities;

(ii) use their best efforts to pursue all reasonably available sources of information, including such sources of information as may be suggested by the competition authorities of the Requesting Party;

(iii) inform the competition authorities of the Requesting Party, on request or at reasonable intervals, of the status of their enforcement activities and intentions, and where appropriate provide to the competition authorities of the Requesting Party relevant confidential information if consent has been obtained from the source concerned. The use and disclosure of such information shall be governed by Article V;

(iv) promptly notify the competition authorities of the Requesting Party of any change in their intentions with respect to investigation or enforcement;
\end{quote}
request defer or suspend enforcement action pending the enforcement activities of the country to which the request is made. The agreement also contains a provision that outlines conditions under which the party making the positive comity request will normally defer or suspend its antitrust enforcement activities.

These provisions address the overarching weakness—that positive comity is dependent on the requested country's laws—of the U.S.-Japan Cooperation Agreement. By allowing deferral or suspension of enforcement activities, the U.S.-EC Agreement limits the potential for unilateral extraterritorial antitrust enforcement. However, the U.S.-EC Agreement still allows unilateral actions. The agreement states that "[n]othing in this Agreement precludes the competition authorities of a Requesting Party that choose to defer or suspend independent enforcement activities from later initiating or reinstituting such activities." Although unilateral actions are

(v) use their best efforts to complete their investigation and to obtain a remedy or initiate proceedings within six months, or such other time as agreed to by the competition authorities of the Parties, of the deferral or suspension of enforcement activities by the competition authorities of the Requesting Party;

(vi) fully inform the competition authorities of the Requesting Party of the results of their investigation, and take into account the views of the competition authorities of the Requesting Party, prior to any settlement, initiation of proceedings, adoption of remedies, or termination of the investigation; and

(vii) comply with any reasonable request that may be made by the competition authorities of the Requesting Party.

When the above conditions are satisfied, a Requesting Party which chooses not to defer or suspend its enforcement activities shall inform the competition authorities of the Requested Party of its reasons.

3. The competition authorities of the Requesting Party may defer or suspend their own enforcement activities if fewer than all of the conditions set out in paragraph 2 are satisfied.

4. Nothing in this Agreement precludes the competition authorities of a Requesting Party that choose to defer or suspend independent enforcement activities from later initiating or reinstituting such activities. In such circumstances, the competition authorities of the Requesting Party will promptly inform the competition authorities of the Requested Party of their intentions and reasons. If the competition authorities of the Requested Party continue with their own investigation, the competition authorities of the two Parties shall, where appropriate, coordinate their respective investigations under the criteria and procedures of Article IV of the 1991 Agreement.

EC Positive Comity Agreement, supra note 157, art. IV.
160 EC Positive Comity Agreement, supra note 157, art. IV.1.
161 Id. art. IV.2.
162 Id. art. IV.4.
not proscribed, the parties are under a duty to inform each other of their “intentions and reasons” for taking unilateral action.\textsuperscript{163}

Article IV of the U.S.-EC agreement also provides more structure to the actual positive comity process by outlining a course of action to follow for the party to which a request is made. A competition authority responding to a positive comity request should: (1) devote adequate resources to the investigation, (2) pursue all reasonable sources of information, (3) regularly update the requesting party, and (4) take into account the views of the requesting party throughout the process.\textsuperscript{164} The supplement states that requested investigations should be completed within six months.\textsuperscript{165} These provisions ensure that a positive comity request will be enforced to the extent of the requested party’s laws and establish some expectations as to how the process will be carried out.

Finally, the U.S.-EC Agreement does not contain any provisions for dissolution of the agreement or preemption by contradictory laws. Article VIII provides that the agreement can be terminated with sixty days notice.\textsuperscript{166} Furthermore, Article VII provides that nothing in the agreement will be interpreted in a manner inconsistent with the existing laws of the United States or the European Communities.\textsuperscript{167}

B. Practical Positive Comity Experience of the Sabre Corporation

The ICPAC Final Report also suggests adopting the recommendations of Sabre, the only private party involved in a positive comity referral at the date of the final report.\textsuperscript{168} The ICPAC endorsed the following recommendations:

- Providing a realistic assessment at the outset of an investigation whether the requested party can devote adequate resources to the investigation;\textsuperscript{169}

\textsuperscript{163} Id. art. IV.4.
\textsuperscript{164} Id. art. IV.2.c.
\textsuperscript{165} Id. art. IV.2.c.v.
\textsuperscript{166} Id. art. VII.2.
\textsuperscript{167} Id. art. VII.
\textsuperscript{168} FINAL REPORT, supra note 1, at 239-40. Sabre is a U.S.-based airline reservation system that lodged complaints with the DOJ against a European airlines reservation system in 1997. Id. at 232. Sabre and the DOJ alleged that the European reservation system was denying Sabre the information it needed to compete effectively. Id.
\textsuperscript{169} FINAL REPORT, supra note 1, at 240.
• Updating private parties whose complaint is at issue to the degree permitted by law, and
• Establishing a timetable to complete the referral.

These recommendations ensure that the jurisdiction investigating a complaint will vigorously pursue the case and keep the requesting parties informed. Perhaps the most important recommendation is to actually use the positive comity provision in a real case so the process can be refined and confidence can be established. Nonetheless, the positive comity provision as written does not preclude the unilateral application of U.S. antitrust laws, even if the recommendations are followed.

C. Alternate Approaches to International Competition Law

One commentator has identified four approaches to international competition law that may resolve the tension between the United States and Japan. The first approach is the “complete international code with a supranational enforcement agency.” The second approach involves the “harmonization of national antitrust laws” and the “persistent coaxing of national laws into identity, or near identity.” This approach would include uniform laws, modeled after the approach of the Uniform Commercial Code in the United States. Under the third approach, nations would develop bilateral agreements, including agreements with positive comity provisions, upon which they would build a framework of “minimum appropriate competition rules, a binding positive comity instrument and an effective dispute settlement instrument.” Finally, the fourth approach assumes that all problems can be resolved through the enforcement of national antitrust laws.

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170 Id.
171 Id.
172 Id.
173 Id. at 239-41; CLP Report, supra note 127, at 11-14.
175 Id.
176 Id.
177 Id.
178 Id. at 13-14.
D. Summary of Weaknesses in the U.S.-Japan Positive Comity Agreement and Recommendations for Improvement

Weaknesses in the U.S.-Japan Positive Comity Provision and several recommendations for improvement are summarized in Table 2.

Table 2. Weaknesses in the U.S.-Japan Positive Comity Provision and Recommendations for Improvement

<table>
<thead>
<tr>
<th>Weaknesses of U.S.-Japan Positive Comity Provision</th>
<th>Recommendations for Improvement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Differences in Antitrust Laws</td>
<td>• Incorporate the course of action provisions from Article IV of the U.S.-EC Positive Comity Agreement to ensure that the requested party will vigorously enforce its antitrust laws.</td>
</tr>
<tr>
<td></td>
<td>• Harmonization of antitrust laws.</td>
</tr>
<tr>
<td>Positive Comity is Voluntary</td>
<td>• Use positive comity in real situations to build trust and confidence.</td>
</tr>
<tr>
<td>Positive Comity is an Unproven Concept</td>
<td>• Use positive comity in real situations to build trust and confidence.</td>
</tr>
<tr>
<td></td>
<td>• Incorporate the course of action and time limit provisions from Article IV of the U.S.-EC Positive Comity Agreement into the U.S.-Japan Cooperation Agreement.</td>
</tr>
<tr>
<td>The Cooperation Agreement is Easily Dissolved or Preempted by Contrary Law</td>
<td>• Make the Cooperation Agreement more difficult to dissolve.</td>
</tr>
<tr>
<td></td>
<td>• Formalize the Cooperation Agreement as a treaty.</td>
</tr>
<tr>
<td></td>
<td>• Harmonization of antitrust laws.</td>
</tr>
</tbody>
</table>

Presently, the harmonization of U.S. and Japanese antitrust laws is unlikely. One significant obstacle is the United States' fear that accommodating the antitrust laws of other countries would weaken its relatively stringent antitrust laws.\(^{180}\) Furthermore, "[e]limination of national differences in the fundamental processes of law enforcement, ranging from attorney fee arrangements to the jury system, is simply not feasible."\(^{181}\) What is possible, however, is "greater coordination and cooperation" between competition authorities.\(^{182}\)

\(^{180}\) Swindle, supra note 179.


\(^{182}\) Id.
VII. CONCLUSION

The positive comity provision of the U.S.-Japan Cooperation Agreement is important because it provides an alternative to unilateral antitrust enforcement actions against Japanese firms, thereby allowing the United States to raise market access concerns without infringing upon Japanese sovereignty. Nonetheless, although the Cooperation Agreement's positive comity provision is more comprehensive than in previous agreements between the United States and Japan, positive comity has several weaknesses. First, positive comity only allows enforcement to the extent available under the laws of the country to which the enforcement request is made. Second, both requests and responses to positive comity requests are voluntary. Third, positive comity is a concept untested by the United States and Japan. Finally, the parties or contrary national laws may easily void the Cooperation Agreement itself. In short, the positive comity provision of the Cooperation Agreement does not proscribe unilateral antitrust actions. This leaves open the possibility that the United States will continue to take unilateral action against Japanese firms rather than operating under the positive comity provision.

To enhance positive comity, the ICPAC and commentators have made several recommendations. The recommendations include strengthening the positive comity provision itself and moving toward harmonization of substantive antitrust laws. However, complete substantive harmonization is impossible. Professor John O. Haley of the Washington University School of Law in St. Louis succinctly summarizes the inherent problem: "[N]o proposal fully resolves the problems and conflicts of enforcement without major reforms to reduce the fundamental differences that distinguish the U.S. legal system from those of its trading partners. The best alternatives are those that provide mechanisms to reduce and ameliorate conflicts."\textsuperscript{183}

\textsuperscript{183} Id. at 324-25.