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Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts within the Pacific Community

By Seung Wha Chang*

I. INTRODUCTION

The basic antitrust statutes of the United States, such as the Sherman Act,1 the Clayton Act,2 and the Federal Trade Commission Act,3 provide some form of jurisdiction over international commerce. In the landmark decision of United States v. Aluminum Co. of America (Alcoa), Judge Learned Hand of the Second Circuit held that U.S. courts have subject matter jurisdiction over antitrust activity committed abroad if it affected, and was intended to affect, U.S. commerce.4 This decision has

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1. 15 U.S.C. §§ 1-7 (1988). Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce... with foreign nations" is illegal. Section 2 also prohibits monopolization and attempts to monopolize "any part of trade or commerce... with foreign nations."


4. 148 F.2d 416, 443-44 (2d Cir. 1945). The Second Circuit heard the case on certification from the Supreme Court because four Justices of the Supreme Court disqualified themselves and thus deprived the Court of the minimum statutory quorum of six Justices. For a
become the cornerstone of extraterritorial application of U.S. antitrust laws.

U.S. Federal Courts hearing antitrust often use the relatively liberal standard of the *Alcoa* "effects doctrine" to find jurisdiction over conduct occurring outside the U.S. by foreign corporations. From the perspective of foreign nations, the long-arm jurisdiction of U.S. courts has resulted in the erosion of the "territoriality principle," which derives from a state's sovereignty over national territory. Further, only U.S. antitrust law permits the recovery of treble damages in private antitrust suits. This is viewed by foreign nations as too harsh a remedy to impose on foreign defendants.

As a result, extraterritorial application of U.S. antitrust laws has led to several "international conflicts." One of the most serious was marked by retaliatory legislation initiated by several foreign countries. There are two kinds of "blocking statutes." First, "discovery blocking statutes" restrict the extent to which U.S. litigants can obtain evidence or compel production of commercial documents abroad for use in U.S. proceedings. Second, "judgment blocking statutes" restrict, directly or indirectly, the enforcement of U.S. judgments.

This Article analyzes problems involved in international conflicts caused by extraterritorial enforcement of U.S. antitrust laws and the resulting foreign retaliatory response. This Article proposes adopting bilateral treaties to resolve such extraterritoriality conflicts. The scope of this analysis will be limited to the conflicts between the U.S. and other countries belonging to Pacific Community (Pacific Countries) which

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brief description of the background of the *Alcoa* litigation, see PHILIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 475-76 (4th ed. 1988).


6. Most countries have traditionally not enforced their domestic antitrust laws, if they have them, as rigorously as the U.S. has. For this reason, foreign countries would be more sensitive to the extraterritorial application of U.S. antitrust laws.

7. For illustration of specific conflicts stemming from extraterritorial enforcement of U.S. antitrust laws, see *Hearings, supra* note 5, at 62-68.

8. European Countries legislating the blocking statutes include Great Britain, France, West Germany, the Netherlands, and Switzerland. For a brief description of these statutes, see P.C.F. Pettit & C.J.D. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 Bus. Law. 697 (1982); Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982). For a discussion of blocking statutes of countries belonging to Pacific Community, see *infra* Part II.

9. See *infra* notes 13, 22, 28, 38-39 and accompanying text.

10. See *infra* notes 23, 29-30, 40 and accompanying text.

11. The term "Pacific Community" is not new. This term has been used by many scholars for the last two decades. For the definition of this term, see International Legal Note, *The*
have blocking statutes. This Article does not review the extraterritorial application of the Pacific Countries' antitrust laws.

Part II of this Article examines several blocking statutes of the Pacific Countries and the likelihood that the countries will actually invoke these statutes.

Part III looks at the unilateral efforts of the U.S. to mitigate foreign resistance to the extraterritorial application of U.S. antitrust laws. Such efforts include, not only the "jurisdictional rule of reason" developed by some Federal Courts, but also legislative and governmental initiatives that propose to revise U.S. antitrust laws in order to accommodate foreign concerns. Part III concludes that a unilateral approach is fundamentally limited as a solution to conflicts caused by extraterritorial application of U.S. antitrust laws.

Part IV begins with an examination of the core issues involved with proposals for resolving such conflicts, and concludes that bilateral treaties, based upon mutual concession, be adopted as a solution. The balance of Part IV examines possible treaty provisions which would benefit both the U.S. and other Pacific Countries. In conclusion, this Article recommends that instead of substantive rules, jurisdictional and remedial rules (e.g. jurisdictional rule of reason, detrebling provisions, and provisions invalidating blocking statutes) should be included within the proposed treaties.

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*Concept of a "Pacific Community;"* 54 Austl. L.J. 689 (1980); Alex Chin Guan Lee & Anjana Bahl, Pacific Basin, 24 Int'l Law. 559 (1990); Peter Bentley & Yuk Tong Cheung, Pacific Basin, 22 Int'l Law. 1235 (1988). There could be a variety of standards by which one defines the scope of the Pacific Community. In any event, this Article includes at least North America, Oceania, and East and South Asian countries in the ambit of the pacific community. Also, the term "Pacific Countries" hereinafter will be used to denote the countries belonging to the Pacific Community.

12. International conflicts caused by extraterritorial application of U.S. antitrust laws began first between the U.S. and European countries. See supra note 8. Hence, most institutional and scholarly works on the issues relating to extraterritorial application of U.S. antitrust laws have focused on the conflicts between the U.S. and European countries. See e.g., Edward F. Glynn, Jr., *International Agreements to Allocate Jurisdiction Over Mergers,* 1990 Fordham Corp. L. Inst. 35 (Barry E. Hawk ed., 1991); *Antitrust and Trade Policy in the United States and the European Community,* 1985 Fordham Corp. L. Inst. (Barry E. Hawk ed., 1986); Bates C. Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws,* 15 Int'l Law. 585 (1981); Pettit & Styles, *supra* note 8; Cira, *supra* note 8. In contrast, the extraterritoriality conflicts between the U.S. and other Pacific Countries emerged recently with the increase in international trade and commerce between these countries. This development has drawn relatively little scholarly attention in comparison with the conflicts between the U.S. and European countries. As with the existing and potential trade frictions between the U.S. and Pacific Countries, especially East Asian countries, extraterritorial application of U.S. antitrust laws has become a sensitive contemporary issue within the Pacific Community.
II. THE RETALIATORY RESPONSES: “BLOCKING STATUTES” OF SEVERAL PACIFIC COUNTRIES

The following sections examine several statutes of the various Pacific Countries that are directly or indirectly intended to block extraterritorial application of U.S. antitrust laws. Some of these blocking statutes preclude the discovery of documents located in their territory and bar the enforcement of foreign judgments. Others concentrate only on a single goal.

A. Canada

In 1976, the Combines Investigation Act of 1923 was amended to empower the Restrictive Trade Practices Commission to permit persons in Canada to disregard certain foreign laws, judgments, or decrees. Later that year the Canadian Parliament blocked attempts by Westinghouse Electric Corporation (Westinghouse) to obtain documents from Canada relating to operations of an alleged uranium cartel. This occurred while a private antitrust action, brought by Westinghouse, was pending against several domestic and foreign competitors, including Canadian companies. In addition to Canada, other countries have invoked blocking legislation to resist requests by Westinghouse for documents of foreign defendants. Invocation of blocking statutes by foreign countries demonstrates foreign hostility toward the exercise of extraterritorial jurisdiction by U.S. district courts.

In 1984, Canada also adopted the Foreign Extraterritorial Measures Act. This statute was designed to block enforcement of U.S. antitrust laws. The Act contains a “clawback” provision, similar to that con-

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13. Combines Investigation Act, ch. 76, § 31.5, 1974-75-76 S.C. 1552. This authority could be invoked only after inquiry and for reasons of “national interest.”
15. See In re Uranium Antitrust Litig., 617 F.2d 1248, 1253-54 (7th Cir. 1980) (holding that the district court had jurisdiction under the “effects doctrine” articulated in the Alcoa decision, and rejecting the foreign defendants’ argument that the court should adopt a broader balancing of interests approach in finding jurisdiction over foreign defendants).
tained in the British Protection of Trading Interests Act. This provision permits the Canadian government to order Canadian companies not to comply with foreign regulations. It also provides that the Attorney General of Canada may issue orders restricting the production or disclosure of any records in the possession or control of a Canadian resident to a foreign court asserting extraterritorial jurisdiction. Further, it can prevent the enforcement of foreign antitrust judgments in Canadian courts.

In order to address the existing and potential tension resulting from the extraterritorial application of U.S. antitrust laws and the blocking statutes of Canada, both countries entered into an antitrust cooperation agreement in 1984. This agreement includes several provisions regarding notification, consultation, cooperation and the application of each country's antitrust laws. Despite the existence of this agreement, it is still likely that Canada will invoke blocking legislation in "appropriate" circumstances. The agreement fails to prevent U.S. courts from ordering the production of a foreign defendant's documents should the circumstances warrant. Thus, a U.S. court can order document production in the discovery process if following notification, consultation, and request for cooperation, conflicts of interest still exist between the two countries. In such a situation, Canada could respond by invoking its discovery blocking statute. Moreover, the agreement contains no provisions dealing with the enforcement of foreign judgments. Thus, Canada can still invoke the judgment blocking provisions when a final judgment is viewed as improper. This can occur even if the Canadian government has cooperated with the U.S. in the proceedings of the litigation. Finally, "the agreements cannot resolve the problems stemming from private antitrust litigation, because the government cannot control private treble damages

20. Protection of Trading Interests Act 1980, ch. 11, § 6, reprinted in Antitrust & Trade Reg. Rep. (BNA) No. 959, at F-1 (Apr. 10, 1980). Where British firms have made treble damage payments under the U.S. antitrust laws, section 6 of this Act enables British defendants to recover damage payments by making a claim against U.S. subsidiaries in Britain. Id. This "claw back" statute is an example of extreme foreign resistance to U.S. antitrust laws. Britain also legislated this Act to retaliate for U.S. antitrust enforcement against British subjects. Discovery and judgment blocking provisions are also included in this Act. Id. §§ 1-2, 4-5.

22. Id. § 3, 1984 S.C. at 1864-65.
23. Id. § 8, 1984 S.C. at 1868.
25. Id.
actions.” Thus, until there is a solution to the problem of private treble damages actions, Canada is likely to continue to apply its blocking legislation to these types of cases.

B. Australia

The Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976\(^{27}\) conferred on the Australian Attorney-General extensive powers to control the production of documents or giving of oral evidence to foreign courts.\(^{28}\) The Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979\(^{29}\) also empowered the Attorney-General to restrict or prevent enforcement of judgments rendered by foreign courts in proceedings instituted under an antitrust law if certain conditions are met.\(^{30}\) Interestingly, these two blocking statutes were enacted while Westinghouse was attempting to obtain documents belonging to Australian defendants in *In re Uranium Antitrust Litigation*.\(^{31}\)

In 1982 Australia, like Canada, also entered into a mutual assistance agreement with the U.S.\(^{32}\) Most provisions in this agreement are similar to those contained in the Canada-U.S. agreement.\(^{33}\) Thus, despite the existence of the agreement, Australia is likely to invoke its blocking statutes in the same circumstances that Canada might invoke its own block-

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28. Foreign Proceedings (Prohibition of Certain Evidence) Act No. 121, § 5(1), 1976 Austl. Acts P. 1126. These powers arise only if the Attorney-General is satisfied that a foreign tribunal is exercising or likely to exercise jurisdiction, or powers of a kind or in a manner not consistent with international law or comity, or if he/she is satisfied that the imposition of restrictions is desirable to protect the national interest. *Id.* § 4(1). Judicial review of whether these conditions precedent to the exercise of the Attorney-General’s powers have been met is effectively excluded by § 4(2).


30. Three conditions precedent limit that power. The Attorney-General must be satisfied that either the judgment was (1) rendered in a manner inconsistent with international law or comity, or (2) that acquiescence to or enforcement of the judgment would prejudice Australian domestic commercial interests, or (3) that complete or partial recognition of the judgment would jeopardize Australian international trading interests. *See* John Cannon, III, *Foreign Statutory Response to Extraterritorial Application of United States Antitrust Law*, 1 DICK. INT’L L. ANN. 125, 146-47 (1982).

31. *See supra* notes 15-16 and accompanying text.


33. One important difference is that the Australia-U.S. agreement requires Australia to exercise forbearance in the use of its discovery blocking legislation. *See id.*
ing statutes.34

Further, Australia passed a new blocking statute in 1984.35 Section 10 of this new statute36 goes even farther than the "clawback" provision contained in the British Protection of Trading Interests Act.37 It thus appears that the Australia-U.S. agreement of 1982 is ineffective in resolving the extraterritoriality conflict between Australia and the U.S.

C. Republic of the Philippines

In 1980, in reaction to a U.S. Justice Department grand jury investigation into activities involving U.S. coconut oil sales by American subsidiaries of Philippine parent companies, the Philippine President decreed a blocking statute.38 The statute bars production of documents located in the Philippines to foreign competition law authorities.39 It also prohibits enforcement of foreign judgments for multiple damages without clearance from a designated representative of the Philippine President.40 Despite the new law the U.S. still filed a civil suit in the coconut oil matter.41

It is likely that the Philippines will utilize this blocking statute in situations similar to the coconut oil case, unless an effective means for resolving extraterritorial conflicts involving U.S. antitrust law is adopted.

D. Japan and Korea

Japan, like the countries already mentioned, places obstacles in the way of foreign application of U.S. antitrust laws. Article 200 of the Japanese Civil Procedure Act42 requires Preconditions to be met before a foreign court's judgment will be deemed valid.43 It is the duty of Japanese

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34. See supra notes 24-26 and accompanying text.
36. Id. § 10. This section authorizes recovery by an Australian national of the full amount, not just the noncompensatory portion, of any foreign treble damages judgment imposed in a foreign country for violating that nation's antitrust laws. Recall that only the U.S. antitrust laws allow recovery of treble damages in private actions. See supra note 5 and accompanying text.
37. See supra note 20.
39. Id. § 1.
40. Id.
41. The grand jury investigation resulted in the filing of United States v. Crown Oil Corp., (C.D. Cal. Feb. 17, 1981) (Civ. No. 81-0787-TJH), which was resolved by a consent decree entered on June 18, 1982. Id., 1982-2 Trade Cas. (CCH) ¶ 64,823 (C.D. Cal.).
42. Act No. 61 (1926).
43. The conditions illustrated in Article 200 of the Act are as follows:
   (1) That jurisdiction of the foreign court is not denied by laws and orders or by treaty;
courts to examine whether these conditions are satisfied. Originally, this provision was not intended to block the enforcement of U.S. court judgments in antitrust cases. However, it is likely that it will be used for blocking the enforcement of U.S. court judgments in antitrust cases involving Japanese defendants. For instance, a U.S. judgment allowing recovery of treble damages, not just compensatory damages, against Japanese companies might be held to be "contrary to the public order or good morals in Japan" and therefore invalid. It is also possible that Japanese courts will invoke this provision to reject enforcement of U.S. judgments, if the U.S. courts use an excessively liberal standard in finding venue or personal jurisdiction over Japanese companies.

Article 203 of the Korean Civil Procedure Act was modelled after Article 200 of its Japanese counterpart. The key language of both provisions is very similar. Thus, like Japanese courts, Korean courts are also likely to invoke Article 203 and reject enforcement of U.S. judgments.

(2) That the defendant defeated, being a Japanese, has received service of summons or any other necessary orders to commence procedure otherwise by a public notice or has appeared without receiving service thereof;
(3) That the judgment of a foreign court is not contrary to the public order or good morals in Japan;
(4) That there is mutual guarantee.

44. Id.

45. In order to enforce a foreign judgment in Japan, one must obtain an "enforcement judgment" from the Japanese court. One of the requirements for obtaining such an "enforcement judgment" is that a foreign judgment must satisfy the conditions illustrated in Jap. Civil Proc. Act, art. 200. See Article 24 of the Civil Enforcement Act. Act No. 4 (1979).

46. Go-Video v. Akai Electric Co., Ltd., 885 F.2d 1406 (9th Cir. 1989), in which one Korean and three Japanese manufacturers were defendants, is a typical case of "long-arm jurisdiction." The Ninth Circuit held that a United States antitrust plaintiff can sue a foreign defendant in any U.S. federal court, based on the defendant's "nationwide contacts" with the United States, regardless of the existence or non-existence of its contacts with the forum district. Id. at 1414-15. In Go-Video, many of the defendant Japanese electronic companies settled with Go-Video. The three defendant Japanese companies that chose not to settle with Go-Video litigated the case in Arizona, and on May 30, 1991, the jury found for the defendants. Go-Video has announced it would appeal this decision. See Morrison & Foerster, Case Study No.5, Go-Video Case: Enforcement and Extraterritorial Application of Antitrust Laws 2-3 (Unpublished Memorandum in U.S. Antitrust Law Seminar sponsored by Morrison & Foerster, June 28, 1991, Seoul, Korea) [hereinafter Morrison & Foerster]. If many of the defendant Japanese companies had lost the case without settling and the final judgment had granted treble damages for the plaintiff, it is likely that Go-Video would have tried to enforce the final judgment in Japan. If so, the Japanese court would have to determine whether enforcement of the U.S. court judgment under Article 24 of the Japanese Civil Enforcement Act was warranted.

47. Civil Procedure Act No. 547 (1960).

48. Korean Civil Procedure Act, Articles 476 and 477, dealing with enforcement of foreign judgments, were also modeled after Article 24 of the Japanese Civil Enforcement Act. See supra note 45.
in antitrust cases under similar circumstances.49

III. U.S. EFFORTS TO RESOLVE THE INTERNATIONAL CONFLICT

The U.S. courts' use of long-arm jurisdiction over acts committed abroad in antitrust cases based upon the "effects doctrine," has faced retaliation from several Pacific Countries in the form of blocking statutes. The existing bilateral agreements between the U.S. and two Pacific Countries (i.e. Canada and Austria) are ineffective in resolving the conflict. For these reasons, international conflicts stemming from the extra-territorial application of U.S. antitrust laws have continued. Part III reviews the domestic efforts of the U.S. to mitigate international tension. This part also examines the practical limitations of unilateral efforts to resolve these extraterritorial conflicts.

A. Jurisdictional Rule of Reason

Starting in 1976, with the decision in Timberlane Lumber Co. v. Bank of America (Timberlane I),50 a trend has emerged where the exercise of national jurisdiction over extraterritorial activities, which are also subject to foreign law, is tempered by international comity.51 The Ninth Circuit in Timberlane I52 and the Third Circuit in Mannington Mills, Inc. v. Congoleum Corp.53 modified the "effects" test by adding considerations of comity to the determination of whether the court should exercise jurisdiction over antitrust cases involving foreign defendants. The result was termed a "jurisdictional rule of reason."54 The Third and Ninth Circuits employed balancing tests in such jurisdictional determina-

49. In Go-Video, the defendant Korean electronic company (Samsung Electronics) reached an out-of-court monetary settlement resulting in a substantial payment to Go-Video. See Morrison & Foerster, supra note 46, at 2-3. If Samsung Electronics had not settled the case and the final judgment had granted treble damages for the plaintiff, Go-Video would have been required to enforce the final judgment in Korea, unless Samsung Electronics had substantial assets within the U.S. Under such a hypothetical situation, the Korean court might reject enforcement of the U.S. court judgment, pursuant to Articles 476 and 477 of the Korean Civil Procedure Act.

52. 549 F.2d 597.
53. 595 F.2d 1287 (3d Cir. 1979).
tions. Both tests, although slightly different, require the court to consider whether the interests of the U.S. in exercising jurisdiction are sufficiently strong, "vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." In other words, U.S. antitrust laws should be applied to foreign conduct only when the U.S., on balance, is the most interested nation state.

Timberlane I and Mannington Mills reformulated the existing test for U.S. extraterritorial jurisdiction under the antitrust laws. The Third and Ninth Circuits also offered a "mechanism that permitted emphasis on strong antitrust enforcement to be reconciled with a sensitivity to the legitimate concerns of foreign states regarding intrusions on their sovereignty."

However, this "jurisdictional rule of reason" test is not the best de-

55. The difference between the two is that Timberlane I combined effects and international comity as one question in determining whether to exercise jurisdiction. 549 F.2d at 613-14. In contrast, Mannington Mills found the existence of jurisdiction first and then evaluated international comity factors to determine whether the court should exercise jurisdiction. 595 F.2d at 1297-98.
56. Timberlane I, 549 F.2d at 613.
57. In balancing interests, the Timberlane I court considered the following factors: [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is [an] explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.
vice for resolving international conflicts involving extraterritorial application of U.S. antitrust laws, because it has significant flaws. First, the court is not the proper place to interpret various political factors and balance national interests. Even if courts were competent to address foreign affairs, the "jurisdictional rule of reason" would remain problematic because it does not lead to predictable results. That is to say, Circuit courts do not define or apply it uniformly. This unpredictability creates problems in business-planning. Lastly, the principle is unworkable in cases where both the U.S. and the foreign nation have strong but juxtaposed interests. Since the balancing approach in Timberlane I and Mannington Mills was formulated, courts have placed greater emphasis on the interests of the U.S. while giving less consideration to the legitimate interests of the foreign nation.

The Supreme Court has yet to expressly adopt the "balancing test" developed by the Timberlane I and Mannington Mills courts. Even though some Federal Courts have adopted this balancing approach, other Federal Courts have explicitly rejected it and continued to adhere to the "effects doctrine" articulated in the Alcoa decision. In conclu-

59. This criticism was upheld by the D.C. Circuit in Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 953 (D.C. Cir. 1984) (noting that it is improper for federal courts, which are not "organs of political compromise" to defuse a conflict with foreign law by "jettisoning our jurisdiction."). See also id. at 954 (concluding that "both institutional limitations on the judicial process and Constitutional restrictions on the exercise of judicial power make it unacceptable for the Judiciary to seize the political initiative and determine that legitimate application of American laws must evaporate when challenged by a foreign jurisdiction.").

60. For instance, even the Timberlane test is slightly different from that of Mannington Mills. See supra notes 57-59.

61. Comment, supra note 54, at 1416-18.

62. Id. See also In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (noting that a balancing test is inherently unworkable where the competing interests at stake are totally at odds with each other).

63. Donald J. Curotto, Comment, Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries, 11 Golden Gate U. L. Rev. 577, 591 (1981). See also Laker Airways, 731 F.2d at 951 n.156. (stating that "courts inherently find it difficult neutrally to balance competing foreign interests, [and w]hen there is any doubt, national interests will tend to be favored over foreign interests.").

64. Rather, a recent Supreme Court case seemed to reaffirm the "effects" doctrine. See Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 583 (1986).


66. See Laker Airways, 731 F.2d at 949-54; In re Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980) (stating that the court does not find the Timberlane I and Mannington Mills decisions controlling).

67. Uranium, 617 F.2d at 1254 (holding that the district court had jurisdiction under the "effects doctrine").
sion, the "jurisdictional rule of reason" formulated by the Third and Ninth Circuits has not contributed in a practical way to resolving the existing extraterritorial conflict between the U.S. and the other Pacific Countries.

B. Congressional Efforts

To reduce international conflicts, the U.S. Congress enacted the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA). This Act amended the broad and general jurisdiction provisions of the Sherman Act and the FTC Act by providing that those provisions shall not extend to conduct involving commerce with foreign nations, unless that conduct has a direct, substantial, and "reasonably foreseeable effect" on U.S. related commerce.

The "reasonably foreseeable effects" requirement placed FTAIA in a neutral position between the "intended effects" test of Alcoa and the "jurisdictional rule of reason." FTAIA leaves the court with the discretion to consider international comity in determining the jurisdictional issue. Yet, in a practical sense, FTAIA does not resolve the international conflict because the Act does not apply in the import trade or commerce context where most conflicts arise.

Senate Bill 572, amending the FTAIA of 1982, attempted to resolve the conflict among the Circuit Courts covering the proper jurisdictional test in international antitrust cases. More importantly, the bill

69. FTAIA § 402, 15 U.S.C. § 6a(1), provides:
   [the Sherman Act] shall not apply to 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 effects-
      (A) on trade or commerce which is not trade or commerce with foreign nations,
      or on import trade or import commerce with foreign nations; or
      (B) on export trade or export commerce with foreign nations, or a person en-
      gaged in such trade or commerce in the United States. (emphasis added).
71. But see Laker Airways, 731 F.2d at 946 n.137 (suggesting that, in passing FTAIA, Congress did not intend to alter the current rules or the "effects" doctrine articulated in the Alcoa decision, for application of the antitrust laws to conduct producing effects within the U.S.). See also Harold R. Schmidt, The Extraterritorial Application of the United States Antitrust Laws, 5 J.L. & COM. 321, 334-45 (asserting that the Alcoa test and "reasonably foreseeable effects" test are virtually the same in effect).
74. Eleanor M. Fox, Extraterritoriality, Antitrust, And The New Restatement: Is "Reason-
represented an attempt by the U.S. to lessen international tension arising from the extraterritorial enforcement of U.S. antitrust laws. Section 103 of the bill codifies the "jurisdictional rule of reason" applied in the Timberlane and Mannington Mills decisions. It requires a dismissal of an antitrust action whenever the "rule of reason" would mandate dismissal. An earlier version of the bill, Senate Bill 397, proposed to eliminate the treble damage remedy in antitrust suits brought against foreign defendants.

Codification of the "jurisdictional rule of reason" coupled with detrebling provisions may improve foreign relations. However, it is questionable whether these unilateral efforts of the U.S. Congress will result in other countries altering their blocking legislation. Even if Congress adopted the "balancing" test bill, it is still likely that the U.S. courts will refrain from exercising jurisdiction only where the U.S. interests are de minimis. For this reason, foreign countries will not view adoption of a "balancing" test as much of a concession. Thus, the unilateral efforts of Congress are of limited effectiveness in addressing the extraterritorial problems of U.S. antitrust law. The bill (S. 572,) has yet to reach the Congressional floor.

C. Justice Department Guidelines

The Antitrust Guidelines (Guidelines) of the Justice Department (Department) state "[t]he reach of the U.S. antitrust laws is not limited solely to conduct and transactions that occur within the United States." The Guidelines adopt the "direct, substantial, and reasonably foreseeable effect" test provided in FTAIA for finding a violation of U.S.

76. Id. § 103.
77. See Note, supra note 16, at 214. The balancing test adopted in this bill, however, is slightly different from the Timberlane I and Mannington Mills tests. The bill excludes some obvious political factors contained in the latter. Compare S. 572 § 103 with the Timberlane I and Mannington Mills factors illustrated supra note 57. For criticism of the bill's balancing test, see, e.g., Note, supra note 16, at 214-16 (asserting that [absent] guidance from the executive branch, the court therefore tend to favor U.S. interests’); Janusz A. Ordover, Conflicts of Jurisdiction: Antitrust & Industrial Policy, 50 LAW & CONTEMP. PROBS. 165, 177 (Summer 1987).
78. S. 397, 99th Cong., 1st Sess. § 6 (1985). This provision was deleted in S.572 after the Reagan Administration unsuccessfully proposed its own, more comprehensive, antitrust reform package, including proposals for limiting the treble damage remedy to certain antitrust injuries. See S. 539, 100th., 1st Sess. § 4113 (1987). For a criticism of this provision, see Note, supra note 16, at 217-19.
79. See supra note 63 and accompanying text.
81. Antitrust Enforcement Guidelines for International Operations, U.S. Department of
antitrust laws and the existence of jurisdiction. Nonetheless, the Department asserts jurisdiction only when such an assertion is reasonable considering international comity. In performing a comity analysis, the Department attempts to "balance" the interests of the U.S. and foreign countries. This approach is virtually the same as that of *Mannington Mills.* In practical effect, the Department has adopted the jurisdictional rule of reason principle. However, unlike FTAIA, the Guidelines cover import trade, and commerce with foreign nations.

Despite the merits of this approach, the Guidelines cannot wholly resolve the international conflict discussed. "These Guidelines are intended only to provide general guidance as to how the Department analyzes certain commonly occurring issues affecting its own enforcement decisions." Thus, the Guidelines are unable to affect antitrust suits brought by state enforcement agencies, or private antitrust suits in which plaintiffs seek treble damages.

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82. Id. at 19, 31.

83. Id. at 21-22. The Guidelines state, "[t]hus, in determining whether it would be reasonable to assert jurisdiction... the Department considers whether significant interests of any foreign sovereign would be affected and asserts jurisdiction only when the Department concludes that it would be reasonable to do so." Id. In bringing enforcement actions, the Department should "consult with interested foreign sovereigns through appropriate diplomatic channels to attempt to eliminate or substantially reduce anticompetitive effects in the United States." Id. at 22 n.167.

84. Id. at 22. In balancing the interests, the Department considers various factors including:

1. the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
2. the nationality of the persons involved in or affected by the conduct;
3. the presence or absence of a purpose to affect United States consumers or competitors;
4. the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
5. the existence of reasonable expectations that would be furthered or defeated by the action; and
6. the degree of conflict with foreign law or articulated foreign economic policies.

Id. at 22 n.170.

85. 595 F.2d 1287, 1296-97 (3d Cir. 1979). For a comparison of these two approaches, see supra notes 57, 84.


87. Guidelines, supra note 81, at 21 (explicitly stating that "the Department also applies the 'direct, substantial, and reasonably foreseeable [effects]' standard to import commerce.'").

88. Id. at 3 (emphasis added).

89. Id. (stating that "[r]eaders [of the Guidelines] should separately evaluate the risk of private litigation by competitors, consumers, and suppliers, as well as the risk of enforcement by state prosecutors under state and federal antitrust laws.").
IV. PROPOSALS FOR RESOLUTIONS OF INTERNATIONAL CONFLICTS OVER EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAWS

The analysis in Part III leads to the conclusion that unilateral attempts by the U.S. to resolve international conflicts caused by extraterritorial application of U.S. antitrust laws are fundamentally limited. This is not only because each effort contains inherent flaws, but also because it is ineffective in inducing other Pacific Countries to change their blocking statutes. As an alternative to these unilateral attempts, Part IV proposes that the U.S. enter into bilateral agreements with other Pacific Countries to arrive at permanent solutions to such international conflicts. After reviewing general issues relating to this proposal, Part IV examines what specific provisions can or should be included in those agreements to resolve the extraterritorial antitrust conflicts within the Pacific Community.

A. Proposals for International Treaties: A Preview

Many commentators suggest that diplomatic negotiations resulting in either bilateral treaties or international conventions offer the best solution to international conflicts over extraterritorial application of U.S. antitrust laws.90 However, very few commentators explore in detail what types of provisions should be included in these treaties and whether such provisions would be welcomed by the parties involved. Before exploring these delicate issues, it is useful to resolve the following questions: (1) Do bilateral or multilateral treaties provide the best solution to extraterritorial antitrust conflicts?, and (2) What provisions should such treaties include among their substantive, procedural, and remedial rules?

1. Bilateral Agreements or Multilateral Treaties

In the short term, bilateral agreements, as opposed to multilateral treaties, are more likely to be reached. The existence of Canadian and Australian agreements with the U.S.91 supports this view. However, one

90. See, e.g., David J. Gerber, Foreword: Antitrust and the Challenge of Internationalization, 64 CHI.-KENT L. REV. 689, 704 (1988); Joseph P. Griffin, Possible Resolutions of International Disputes over Enforcement of U.S. Antitrust Laws, 18 STAN. J. INT'L L. 279, 304-07 (1982); Glynn, supra note 12, at 48-49; Shin, supra note 80, at 205; Cannon, supra note 30, at 154; Comment, supra note 54, at 1418-20.

91. See supra note 24. To be sure, this does not mean that these existing bilateral agreements are effective measures to solve the existing extraterritorial conflict. See supra notes 24-26, 32-33 and accompanying text.
commentator argues that "as the number of bilateral agreements increases, so does the likelihood of inconsistency" and that "[t]his inconsistency could eventually create as much confusion and dissension as do the unilateral actions of the United States."92 The commentator concludes that the best long-term solution lies with multilateral agreements rather than bilateral agreements.93 However, in the context of the Pacific Community, this argument is not entirely correct. Some Pacific Countries such as Canada and Australia have strong blocking statutes, where others have weaker indirect blocking statutes94 or none at all. The degree of extraterritorial conflict between the U.S. and each Pacific Country can vary, not only according to the frequency of antitrust disputes, but also according to the contents of blocking statutes. Thus, inconsistency among bilateral agreements is inevitable and unavoidable. Further, from a practical point of view it is unlikely that multilateral agreements with regard to international antitrust litigation can be made within the Pacific Community. Even though the common concerns of most Pacific Countries regarding extraterritorial conflict can be verified, it is doubtful that multilateral agreements addressing only those concerns can significantly contribute to the resolution of such conflicts.

For these reasons, this Article recommends that the U.S. and the other Pacific Countries should initially attempt to enter into bilateral agreements in order to resolve the current conflict. Once these bilateral agreements have been shown to work, they can then be converted to multilateral agreements, unless such conversion is precluded by the conflicting national interests of parties.

2. Substantive, Jurisdictional, and Remedial Rules

It can be envisioned that the international treaties suggested would include specific substantive rules. However, such agreements will be difficult to reach because each country has a distinct antitrust policy and different substantive standards relating to their domestic antitrust laws.95

One commentator argues that "the basic functional objectives of competition law . . . are everywhere much the same"96 and that "some problems such as the potential harm from international cartelization are widely recognized, and agreement on substantive principles to combat

92. Griffin, supra note 90, at 305.
93. Id.
94. Japan and Korea fall into this category. See supra Part II, § 4.
95. See Shin, supra note 80, at 205.
96. Gerber, supra note 90, at 705.
such cartelization may be attainable among discrete groups of states." 97 Within the Pacific Community this argument has less merit. Many Pacific Countries do not have any domestic antitrust statute. Even the Pacific Countries which have antitrust laws that reflect similar objectives are likely to hold different perspectives regarding enforcement of antitrust laws in the international context. 98 The conflicting national interests surrounding international competition functions to deter countries from adopting similar substantive rules regulating anticompetitive behaviors in international trade. This is true although most countries have similar objectives of competition law.

More importantly, agreements on substantive antitrust principles would not contribute to resolution of international conflicts caused by the extraterritorial application of U.S. antitrust laws. Such conflicts arise basically from jurisdictional matters, even in the absence of substantive disagreements between the U.S. and its counterparts. The United Kingdom, for instance, has a set of laws prohibiting anticompetitive behavior such as cartels and restrictive practices. 99 These laws are very similar to U.S. antitrust laws. 100 The substantive similarity in policies, however, has not prevented the emergence of jurisdictional disputes between the U.S. and Great Britain. 101

In sum, agreements on the substantive rules of antitrust laws are difficult to reach for many reasons. Furthermore, these agreements would be ineffective in resolving the extraterritorial conflicts caused mainly by the jurisdictional disputes. Thus, this Article recommends

97. Id. at 704.
that the proposed agreements should directly address the issues of jurisdiction, treble damages, and blocking statutes, out of which most extraterrestrial antitrust conflicts arise.

B. Contents of the Proposed International Treaties

The primary goal of international treaties proposed in this Article is the resolution of international conflicts between the extraterritorial application of U.S. antitrust laws and the existing or potential retaliatory responses of other countries. In order to attain this goal, the proposed treaties must directly deal with the precise causes of such conflicts. As noted earlier, the extraterritorial conflict stems from the actions of both the U.S. and various foreign countries. Generally, foreign countries complain that the U.S. federal courts have often exercised excessive “long-arm” jurisdiction over the foreign defendants. Hence, most of the international conflicts referred to emerge from a jurisdictional dispute. In addition, one of the most objectionable aspects of U.S. antitrust laws, from the perspective of foreign governments, is the existence of the private treble damage remedy. Thus, any effective agreement must address these two issues: jurisdiction and treble damages.

Foreign countries’ complaints have resulted in the legislation of, or threats to, invoke already existing blocking statutes. In the U.S., plaintiffs attempting to obtain evidence or enforce U.S. court judgments in another Pacific Country are often faced with that country’s invocation of a blocking provision. Therefore, any proposed agreement should also contribute to changes in these blocking statutes.

As a result, any proposed agreement should include provisions affecting both U.S. antitrust law and the foreign country’s existing or potential blocking legislation. In other words, the agreements should be premised on “reciprocity.” The reciprocal nature of such proposals would enhance the possibility of enacting such agreements. This Article now addresses how specific provisions of the proposed agreements should deal with the issues illustrated above and whether these provisions are plausible.

102. See Peter Durack, Attorney-General of Australia, Press Release No. 73/80 (Oct. 5, 1980) (stating, “[I]t is coming to be recognized that perhaps the major difficulty experienced by foreign governments through the extraterritorial enforcement of United States antitrust laws results from private treble damage actions.”). See also Shenefield, supra note 58, at 356.
1. Provisions Affecting the U.S. Antitrust Rules

a. Allocation of Jurisdiction

To avoid jurisdictional disputes in antitrust cases involving foreign defendants, a bilateral agreement between the U.S. and each of the other Pacific Countries mentioned should provide for allocation of jurisdiction. There are two possible approaches to allocation of jurisdiction.

The first type of allocational rule is hierarchical. This rule attempts to create a standard hierarchy among the various bases of jurisdiction. One commentator illustrates a possible hierarchy as follows: "The country where the activities took place, with the 'pure territorial jurisdiction,' may have the highest claim; the country that wishes to prescribe rules for its nationals might be next; and the country wishing to protect itself against adverse effects from abroad might be last." However, this approach could be unattractive to both the U.S. and other Pacific Countries. Most jurisdictional disputes in the U.S. courts arise as a result of applying the "effects doctrine" to antitrust activities committed abroad. The hierarchical approach, in such disputes, would place the U.S. last in the hierarchy. Clearly, the U.S. would argue against this position. Further, there are also cases where the U.S. counterparts would object to a hierarchical approach. For instance, assume that foreign producers are in collusion outside the U.S. with the purpose of predatory pricing and to export their products to the U.S. If the prohibited "activities" are construed broadly enough to include acts of purveying products at predatory prices, as well as the collusion itself, the "activities" could be deemed to also occur in the U.S. U.S. plaintiffs, in such a case, could argue that the U.S. has the highest claim of jurisdiction. It seems likely that U.S. courts would favorably view such an argument. Given this possibility, other Pacific Countries might view adopting this hierarchical rule as disadvantageous. Thus, each of the parties may be unwilling to accept such an arrangement.

The alternative allocational rule is termed the "jurisdictional rule of reason." A bilateral agreement could stipulate the precise factors that courts should consider in determining whether to exercise jurisdiction.

These factors, of course, may contain little more than those suggested in Timberlane I, FTAIA of 1982, or the Antitrust Guidelines of Justice Department. However, jurisdictional rules stipulated in proposed bilateral agreements have advantages to the extent they contribute

103. Wood, supra note 100, at 182.
104. See supra notes 57, 69.
to resolutions of extraterritoriality conflicts over the unilateral efforts of the U.S.

A comparison of the proposed allocational rule with the *Timberlane I* test illustrates this point. As discussed, the *Timberlane I* approach is weak in three areas. First, the court is not in a proper position to balance conflicting national interests and consider foreign relations. In contrast, the proposed jurisdictional rule is free from this criticism, since the rule is created not by the court, but by the political representatives of each sovereign. The latter has superior expertise and authority to negotiate with foreign sovereigns on jurisdictional matters. Further, a court would encounter little difficulty in applying a standard which reflects political factors that are expressed in the bilateral treaties. An additional flaw of the *Timberlane I* approach is that courts do not apply the balancing test in a uniform manner. This results in unpredictability. The proposed rule resolves this dilemma. Under a jurisdictional rule adopted in a bilateral treaty, the balancing test will be standardized. A final weakness of the *Timberlane I* approach is that it does not provide a solution in cases where both the U.S. and a foreign nation have strong but conflicting interests. This problem could be resolved by use of a supplementary provision creating a diplomatic mechanism which provides for advance consultation of the parties.

The FTAIA of 1982 is also inferior to the proposed jurisdiction rule as a device for resolving the international antitrust conflict. As noted earlier, section 402 of the FTAIA does not apply to import trade or com-

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105. *See supra* note 59 and accompanying text.
106. *See supra* notes 60-61 and accompanying text.
107. *See supra* note 62 and accompanying text.

The Recommendation provides that when a member country concludes that the enterprises in a second member country are having an adverse effect on its interests, the first country may request the competition agency of the second country to engage in consultations designed to encourage the second country to take steps to ensure that its enterprises cease the harmful behavior. To date, there are no public records of any member country taking advantage of this provision. *See* Glynn, *supra* note 12, at 39. The ineffectiveness of this provision, however, results not from the nature of the provision, but from the lack of legal binding force of the Recommendation. In other words, such a provision would be effective if it is included in a bilateral treaties which is legally binding on both parties.
Extraterritorial Application of U.S. Antitrust Laws

This is viewed as the most significant limitation of the Act. Bilateral agreements, however, can compel the U.S. and its trading partners to apply the "jurisdictional rule of reason" even to antitrust cases involving foreign commerce. The "reciprocal" nature of bilateral agreements will ensure that neither country will exercise "long-arm jurisdiction" which is too extensive over foreign activities. This includes imports from parties to such agreement.

Lastly, the proposed jurisdictional rule is free from the practical limitations that plague the Antitrust Guidelines of the Justice Department. The Guidelines adopting the jurisdictional rule of reason are unable to affect private treble damage suits. The agreements proposed can and should address private antitrust suits.

In conclusion, contrary to the unilateral efforts of the U.S., an allocational rule of jurisdiction stipulated in proposed bilateral agreements will contribute significantly to the resolution of international conflicts caused by the issue of jurisdiction in antitrust cases.

b. Detrebling Provisions

Because it is viewed as punitive, the treble damage remedy is one of the principal catalysts of international antitrust disputes. Thus, in terms of foreign relations, treble damages in antitrust cases involving foreign defendants should be eliminated or minimized. From a U.S. perspective, since these provisions can undermine U.S. domestic antitrust policies, it is necessary to analyze the costs and benefits of detrebling provisions. This analysis depends upon how and to what extent bilateral agreements alter treble damage recovery. There are several approaches to this question.

First, an agreement could require that "foreign commerce treble damage cases be prosecuted exclusively by the U.S. government on behalf of the injured plaintiffs." A national parens patriae role is conceptually attractive in the sense that it only brings meritorious claims to

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109. See supra note 73 and accompanying text.
110. See supra notes 88-89 and accompanying text.
112. Gerber, supra note 90, at 704 (stating that "effective response to the impact of internationalizing competition requires analysis of the opportunities for cooperation as well as the feasibility, benefits and costs of such cooperation.").
113. Cira, supra note 8, at 273.
court. However, this proposal is an inadequate incentive for foreign countries to modify their blocking statutes. The typical blocking provisions, so-called "clawback" provisions, are intended to enable the defendant to recover damage payments above the amount of compensatory damages. Regardless of how cautious the U.S. is in bringing treble damage suits, it would not alleviate international conflicts caused by a foreign government’s distaste for treble damage recovery system itself.

Second, domestic provisions for automatic trebling of damage awards could be amended by a bilateral agreement to provide for the imposition of treble damages at the discretion of the court after consideration of various factors set forth in the agreement. Such factors might include: "[1.] the foreign parties' knowledge of U.S. law, [2.] the intent of the foreign party to violate U.S. law, [3.] the degree of foreign governmental involvement, and [4.] whether the U.S. government [has] engaged in anticompetitive conduct that had precipitated foreign anticompetitive responses." This second approach is also seriously flawed because it would be difficult for a court to apply such subjective factors as "knowledge" or "intent" of foreign parties. This could result in unpredictability. In addition, factors 3 and 4 lack relevance to the illegality of the challenged activities. Rather, these factors are relevant to political considerations. It is undesirable to have political considerations, rather than the nature of anticompetitive activities, determine the antitrust remedy in a specific case. Finally, and most importantly, this proposal would not be a sufficient incentive for foreign countries to change their blocking legislation, and thus also fails to resolve extraterritorial conflict surrounding antitrust law.

This Article proposes to include in bilateral agreements provisions which eliminate treble damages in antitrust cases involving foreign commerce. The adoption of detrebling provisions would represent only one way to effectively induce foreign countries to repeal or at least to cease invoking their blocking statutes.

It is generally accepted that treble damages provide an incentive for a plaintiff to detect antitrust violations. Focusing on this incentive issue, one commentator argues that, the detrebling scheme would "discourage private U.S. plaintiffs with meritorious claims from suing foreign defendants." This argument is misplaced in the context of extraterritorial

114. Griffin, supra note 90, at 302
115. Id. (emphasis added).
116. See generally Areeda & Kaplow, supra note 4, at 83-84.
Extraterritorial Application of U.S. Antitrust Laws. As noted earlier, the most objectionable aspect of U.S. antitrust laws, from the perspective of foreign governments, is the private treble damage remedy.\textsuperscript{118} Foreign governments are more likely to invoke their blocking statutes when private U.S. plaintiffs involved in treble damages actions attempt to obtain evidence or enforce U.S. judgments abroad. Realizing that foreign legislative barriers against treble damages recovery exist anyway, private U.S. plaintiffs will likely still be deterred from suing foreign defendants. Thus, the existence of treble damages recovery in antitrust cases involving foreign defendants actually results in chilling, rather than promoting, private antitrust actions.\textsuperscript{119} In this sense, a detrebling scheme is consistent with incentive considerations.

A detrebling scheme as applied to foreign commerce might be criticized for resulting in uneven enforcement of U.S. antitrust laws. However, treble damages recovery is not an absolute remedy under U.S. antitrust laws. For example, the National Cooperative Research Act of 1984,\textsuperscript{120} which passed both houses of Congress unanimously, created exceptions to treble damage recovery in private antitrust cases. If joint research and development ventures are held unlawful, only actual damages, rather than treble damages, are to be awarded for any resulting injuries provided that certain conditions are met. This new Act indicates Congressional willingness to reduce treble damages to only actual damages if the justifications are reasonable for creating such an exception. Antitrust cases involving foreign commerce fall within this exception.

Any proposal involving a detrebling scheme will possess some practical problems. Difficulty lies in attempting to segregate "foreign commerce" cases for special treatment, since there is no line between the domestic and foreign commerce. In practice, the degree of "foreignness" of a given case varies widely.\textsuperscript{121} Nonetheless, despite this drawback, this proposal still has merit. The primary goal of a detrebling scheme is not to draw the perfect line for making such a distinction, but rather to contribute to resolving extraterritorial conflicts. Hence, although detrebling provisions cannot perfectly draw an objective line between domestic and foreign commerce, this is not a material drawback if the parties to a bilateral treaty agree to "specific lines."

\textsuperscript{118} See supra note 102 and accompanying text.

\textsuperscript{119} Some might also argue that "the benefits of the deterrent effects of treble damages are not worth their cost in terms of their detrimental impact on foreign relations." See Griffin, supra note 90, at 302.


\textsuperscript{121} For a discussion of this problem, see Cira, supra note 8, at 273.
In conclusion, the treble damage recovery should be eliminated in U.S. antitrust cases involving foreign commerce through detrebling provisions within bilateral treaties.

2. Provisions Affecting the Blocking Statutes of Other Pacific Countries

Subsection A recommended that an allocation of jurisdiction and detrebling scheme should be included in any proposed agreement in an effort to induce other Pacific Countries to amend their blocking legislation. In response to such provisions directly affecting U.S. antitrust laws, the proposed agreements should also aim to affect other Pacific Countries' blocking statutes. This subsection examines this aspect of such agreements.


As discussed earlier, discovery blocking statutes of other Pacific Countries contribute to the extraterritorial antitrust conflict with the U.S. discovery blocking legislation, and, therefore, should be altered to resolve these conflicts.

Some countries may believe that to repeal their discovery blocking statutes in exchange for U.S. modifications of its antitrust laws, such as allocation of jurisdiction rules and eliminating treble damage recovery, is not an equitable solution. This perception is erroneous. Repealing discovery blocking statutes through bilateral agreements will not result in a significant loss for Pacific Countries. For one, the U.S. government has more often than not filed antitrust suits regardless of the foreign government's invocation of blocking legislation. The coconut oil case in the Philippines is a typical example.\(^{122}\) Further, in the *Uranium* case, the U.S. district court held a Canadian corporation in contempt for failing to produce documents located in its Canadian office.\(^{123}\) The order imposed a significant fine on the Canadian company and authorized, if the fine was not paid, a U.S. marshal to seize its corporate property located within the U.S. to satisfy the fine.\(^{124}\) Such examples imply that discovery blocking statutes of Pacific Countries are not as effective in protecting national interests when the U.S. government or court is determined to overcome the operation of such statutes.

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122. See supra note 41 and accompanying text.
124. Id.
Thus, Pacific Countries are encouraged to reach agreement with the U.S. by repealing their discovery blocking statutes in exchange for provisions modifying U.S. antitrust laws. Clearly, in cases where the statutes serve other legitimate purposes, any agreement should be constructed so as not to affect these legitimate alternative goals.

b. Enforcement of U.S. Court Judgments

Judgment blocking statutes of the Pacific Countries have also promoted international conflict resulting from extraterritorial application of U.S. antitrust laws. As a resolution, foreign countries should attempt to reach agreement with the U.S. by repealing the blocking provisions at least in the context of enforcement of U.S. court judgments in antitrust cases.

As in the case of discovery blocking statutes, foreign countries might also believe that, to the extent they can refuse to enforce U.S. court judgments, they have nothing to lose by rejecting a bilateral agreement with the U.S. This would ignore the fact that enforcement of U.S. judgments can be accomplished solely within the U.S. For example, if a foreign defendant company owns corporate assets of sufficient value in the U.S., then U.S. plaintiffs can enforce treble damage judgments in the U.S. This is true, despite the existence of a judgment blocking statute in the Pacific Country. Moreover, even if foreign defendants have no assets in the U.S., invoking a judgment blocking statute without justifiable reasons could damage relations between the U.S. and the Pacific Country.

For these reasons, Pacific Countries with judgment blocking statutes would benefit by entering into bilateral agreements with the U.S. to repeal the blocking statutes in exchange for the U.S. adopting jurisdictional rules and detrebling provisions. To be sure, in the cases where the statutes were not legislated directly for purposes of blocking U.S. judgments in antitrust cases, as in Japan and Korea, an alternative solution may exist. A bilateral agreement could provide that a blocking statute shall not be invoked for the purpose of blocking U.S. judgments in antitrust cases provided the U.S. courts comply with other provisions of the agreement.

V. CONCLUSION

For the last decade, extraterritorial application of U.S. antitrust laws has resulted in continued international conflict between the U.S. and its trading partners, including the Pacific Countries. These conflicts stem mainly from the complaints of the other Pacific Countries about the
long-arm jurisdiction of the U.S. courts based upon the "effects doctrine" and the treble damage remedy available in private U.S. antitrust cases. Several Pacific Countries have responded by legislating retaliatory blocking statutes. The domestic efforts of the U.S. to resolve these international conflicts are significantly limited due to their unilateral nature. Diplomatic negotiations resulting in bilateral treaties offer the best solution. In order to enhance their feasibility, such bilateral agreements should be based upon reciprocity and balancing of the parties' national interests. For this reason, any agreement should include provisions affecting both the U.S. antitrust laws and the blocking statutes of other Pacific Countries.

This Article recommends that the U.S. accept proposals for the allocation of jurisdiction rules and the elimination of treble damage recovery in antitrust cases involving foreign commerce. In exchange, other Pacific Countries are encouraged to repeal or to cease invoking their blocking statutes.