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Foreign Economic Policy and the Antitrust Laws

Kenneth S. Carlston

FOREIGN ECONOMIC POLICY AND THE ANTITRUST LAWS

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I

ELEMENTS OF THE PROBLEM

Within the territorial jurisdiction of the United States is found the largest common market in the world today The federal constitution insures that none of the states may interfere with the interstate operation of that market. The Sherman Act denies power to corporate organizations to impose restraints upon or monopolize any part of interstate commerce in that market. Given the physical and human resources found within the United States, the result has been an enormously productive economy characterized by competition and rivalry within the vast number of individual markets which, in the aggregate, become the interstate commerce of the United States.

The philosophy of the Sherman Act has been that the economic strength of the United States will best be served by open markets and a competitive system. In essence, the Sherman Act has insisted that no entrepreneur may relinquish to competitors the power to make decisions for him in respect to his market relations, and that the making of such decisions by an entrepreneur shall always be subject to the pressures of competition. An economic system so structured and conducted, it was felt, would best promote the national welfare in that it would bring about the most efficient utilization of national resources and create the maximum national power, consumer satisfaction and economic strength. The wealth of our nation and its military strength can be no greater than the economic base upon which they rest.

The premise of the Sherman Act has worked well in its application to interstate commerce of the United States. Here the legislative or judicial power can effectively repair the havoc which a too rigorous and logical application of the premise might create. Competition is always desirable until it hurts. When it hurts group interests numerous enough to make their outcries heard in the national forum, competition is no longer an ideal but becomes an evil. Statutory relief from the impact of the Sherman Act is then the usual result. The bleak blasts of competition are tempered by Robinson-Patman prohibitions against price-cutting and Fair Trade

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Act permission to fix prices. The marketing of agricultural products is to a large extent exempt from the command to compete. In the domain of the Sherman Act itself, only unreasonable restraints are unlawful, although certain types of restraints have been judicially declared to be inherently unreasonable and therefore illegal per se. All these measures are possible because of the sovereign supremacy of the United States within its territorial jurisdiction and the power of the legislature and the courts to channel business conduct toward desired goals.

Beyond the territorial confines of the United States, however, the legal supremacy of its sovereign power ceases to exist. No longer is there a common market which may be kept open by legislative fiat. No longer are all persons, including lesser governmental and corporate bodies, subject to the exclusive control of the federal government. The national government is but one among many governments which are in turn a product of their respective national cultures and histories. The policies of each government reflect its national system of values and pressures which the group interests within its society bring to bear.

In this context, the United States has adopted a number of premises, not always consistent with one another, designed to preserve its external avenues to power. Among these are

(1) Adequate supply of foreign products and services for American purchasers and disposition abroad of American products and services shall be primarily the responsibility of private (as opposed to governmental) initiative.

(2) Whenever adequate foreign supplies or foreign markets cannot be so obtained, public intervention through support and encouragement of private initiative or, when necessary, through public organizations such as the International Bank, is justified.

(3) Whenever domestic commerce is injured by foreign supply, public intervention, by means of tariff, import quotas or other restrictive devices designed to exclude the undesired foreign competition, is justified.

(4) The foreign commerce of the United States shall be protected from restraint or monopoly as against all persons who may properly be held to be subject to the extraterritorial jurisdiction of the United States. These are, in general, United States nationals and persons (physical and legal) who are not United States nationals but who are found in the United States and who perform, or cause to be performed, acts abroad intended to have, and

in fact having, effects within the territory of the United States or upon its commerce.[1]

Two observations concerning the foregoing structure of premises or postulates are in order: First, the premise of the Sherman Act contained in (4) above is antithetical to that of protectionism set forth in (3) above. Second, the system of premises as a whole proceeds from the fundamental assumption that our national power rests upon a national territorial base, and that, consequently, policy should be determined from the standpoint of the impact of specific measures upon national territorial interests. Each of these comments, and particularly the second, needs clarification.

The moment that we pass beyond the territorial jurisdiction of the United States we are no longer in an open market in which each state is by the federal constitution enjoined from imposing import or export duties and each corporate organization is by the Sherman Act enjoined from restrictive or monopolistic conduct. The policy objective in the extraterritorial application of the Sherman Act cannot be the creation of an open world market which will be analogous to our open national market. Though the threads of our commerce are intertwined with those of other states and though the national power of other states is, in varying degree, dependent upon our national power, we cannot by our legislative command create an open world market. Pressures to this end can be set in motion as against particular foreign economic organizations which may happen to become subject to our territorial jurisdiction by doing business here. These pressures are, however, at best fortuitous in their application. They are always subject to the necessity of recognizing overriding foreign law to the contrary.[2] Instead, the Sherman Act seeks to protect American foreign commerce in a world economy which is in fact characterized to a considerable extent by policies of restrictionism. It must be admitted that the United States is also pursuing similar policies of restrictionism. Furthermore, it never permits its antitrust hand to know what its tariff hand is doing.

1. See the discussion of the principles of extraterritorial jurisdiction in relation to the Sherman Act in Carlston, *Antitrust Policy Abroad*, 49 Nw. U. L. Rev. 569, 573-86 (1954).

2. See British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., [1952] All E. R. 780 (C.A.), discussed Carlston, *supra* note 1 at 582; see also United States v. General Electric Co., 115 F Supp. 835, 878 (D. N.J. 1953): "Philips shall not be in contempt of this Judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized or in the territory of which Philips or any such subsidiaries may be doing business."

Churchill is said to have remarked that it makes considerable difference which end of the rifle one is looking at. Policies which may seem consistent, desirable and even noble to their framer will not necessarily so appear to those subjected to their impact. To the foreign observer, our advocacy of a competitive open market appears to extend only to foreign markets for American products, he will point out that when domestic producers feel the impact of foreign competition, we quickly abandon our policy of free competition and adopt tariff and other restrictive barriers used by other nations. To him, our support of expanding, competitive, dynamic markets in the international scene is not an end of policy but a means to economic penetration of other states while we continue to maintain our own trade barriers for the protection of our domestic market.

So much for the antithesis between premises (3) and (4) as stated above. We now turn to the inadequacy of this system of premises in the light of the changed world of today and the need for their recasting in a larger framework of policy

Policy cannot be framed apart from facts. What is the economic world today of which the United States is a part? What are its major configurations of trade? How does the United States affect such trade patterns? What are its primary political and economic interests in shaping such trade patterns? Given these conditions, what changes in our antitrust laws are desirable?

II

The Economic World Today

Today no individual, no organization, no community or no state exists in isolation. Communities vary as to the character of their labor supply and accessibility of and endowment with natural resources. States vary as to their supply of labor, capital equipment, productive land, mineral deposits, accessibility and climate. Differences in the scarcity and character of these factor endowments inevitably produce trade. Members of a community or society may remain at home but the product of the labor of many of them is made possible by purchases abroad and is paid for by sales abroad. The forces of "relative endowment with the productive factors, social conditions of production, economies of large-scale production, and costs of transfer" are constantly acting and reacting upon one another [3]

By the end of 1953, the trade of the world had a volume of over

3. Ellsworth, International Economics 133 (1938)

75 billion dollars.[4] Before the second world war, the bulk of world trade was multilateral; trade balances were settled through a world-wide system which also provided for the service of foreign investment of European creditor countries, particularly the United Kingdom. After the first world war, the functioning of this system was supported by United States capital exports. As these capital exports began to dwindle after 1928 and creditor countries began to repatriate their liquid funds, the functioning of the system was disturbed. After the financial crisis of 1931, many countries sought to balance their foreign transactions by import restrictions. The spread of this practice and consequent retaliation resulted in the replacement of multilateral by bilateral trade. Yet inherently the diversity of the means of world production must lead to a multilateral pattern of trade embracing the world.[5]

By the end of 1947, Europe's working population and productive capital were up to the prewar level. However, the impact of the second world war fell unequally upon the industry of the individual countries; some increased their productive capacity greatly while the industry of other countries was seriously crippled.[6] The cleavage between eastern and western Europe and the change in the economies of the former created considerable difficulties. Western Europe lost its creditor position and its supply of much essential foodstuffs and raw materials which had to be found elsewhere. The dollar area proved to be the major substitute supplier, thereby enhancing the dollar shortage of western Europe. Yet the United States did not provide a market of commensurate scope. Its imports were notably of primary goods while tariffs prevented it from becoming a market which could absorb the imports of manufactured goods necessary to achieve a balance of payments. The loss of foreign investments, the diminishment of opportunities to earn dollars indirectly through trade with other regions selling in the dollar area, the considerable increase in the price of primary goods required by western Europe compared with the failure of the prices of its manufactures to advance correspondingly, were other forces leading to the precarious trade position of western Europe.[7] Although there has been some lessening of the dependence of world trade outside the United States upon its import balance with the

4. Contracting Parties to the General Agreement on Tariffs and Trade, International Trade 6 (1954).

5. League of Nations, The Network of World Trade 7-10 (Publications, II. Economic and Financial 1942. II. A. 3.).

6. United Nations, Economic Survey of Europe Since the War,1-9, 81 [U.N. Doc. No. E/ECE/157 (1953)].

7 *Id.*, Ch. 2.

United States,[8] the problem of the dollar shortage remains a major problem in international trade.

The underdeveloped countries are similarly exposed to the fluctuating forces of a world economy which they can do little to control. They are dependent on the export of raw materials for a substantial proportion of their income. The rather extreme fluctuations in the prices of primary commodities in world markets have led to correspondingly wide fluctuation of their income, and, in addition, have made it difficult to budget an orderly program of economic growth. Attempts to free themselves from their dependence on the sale of primary goods in the world markets by local industrial expansion have produced internal dislocations in their economies. The increased industrialization generated a rise in total money incomes which in turn led to an increased demand for consumer goods, especially food. The latter, however, were not forthcoming in a sufficiently increased supply to prevent inflation. Indeed, the expanded foreign exchange earnings were in considerable measure used to import foodstuffs. Yet the underlying social demand for imports of capital goods will continue to press upon the industrialized regions and to compete, in the latter, with the demands of rerarmament and expanding economies.[9]

As pointed out above, the fortunes of countries are a product not only of their native endowments but also of fate in that, thrust into a world economy, they have become subject to the vicissitudes of a world economy Prices, foreign exchange position and foreign investment influence trade as well as the factor of comparative advantage. The fall of prices for primary goods since 1951 has forced their producers to cut down their imports of manufactured goods from industrial areas. The deficit in the dollar trade of western Europe was balanced by United States economic assistance. Of late, the availability of competing goods at competitive prices from non-dollar countries has increased. This fact, and probably the influence of governmental pressures and controls, has resulted in a considerable shift of trade channels.

The monetary disorganization of the earlier postwar years has accelerated the emergence of patterns of regional trade. There has been a strong intensification of trade between each industrial region and that non-industrial area which, for monetary and other reasons, is most closely connected with it. This tendency is most marked in

8. United Nations, World Economic Report 1953-54, 91 [U.N. Doc. No. E/2729, ST/ECA/30 (1955)].

9. United Nations, World Economic Report 1951-1952, 14 [U.N. Doc. No. E/2353, Rev. 1, ST/ECA/19 (1953)].

the trade in manufactures. Trade has also tended to become more concentrated within certain monetary or political areas.[10]

As we move from the fortunes of particular countries to over-all patterns, trade has not grown as rapidly as world production and the share of world output entering international trade was much smaller during the postwar years than in the decade following World War I.[11] This is particularly the case in manufactured goods. Yet this very increase in productive power renders each industrialized country and each underdeveloped country increasingly at the mercy of the impersonal forces of a world economy

Although the United States is the repository of the greatest productive energy in the world today its economic strength rests to a great extent upon its imports. It "consumes about half the materials of the free world and is the major single importer of most materials."[12] An important consequence of this fact is that the countries supplying such imports are considerably dependent upon American purchases for their economic well-being. The United States is in addition "the world's major source of capital, equipment, technology, and management skills, all essential to promote materials production and general economic advancement in less developed areas."[13] Within the last ten years our government has made foreign loans or grants for economic purposes amounting to about forty billion dollars while private foreign investment has amounted to about twelve and a half billion dollars.[14]

There is a logic in the pattern of our economic relationships with the rest of the world which we cannot escape. We are faced with an increasing need for imports, particularly of raw materials and minerals, as our own natural resources are being exhausted and our economy continues to expand. At the same time, exports must be increased to maintain our national income, on the one hand, and to satisfy the demands of other countries of the world for their own economic development and growth, on the other hand. Since equilibrium between our imports and exports is lacking, particularly in manufactures, we must stimulate the process of foreign investment to assist in closing the dollar gap. Our dependence on the free world for supplies and markets is an economic fact which must be recognized in shaping our foreign policy.

10. Contracting Parties to the General Agreement on Tariff and Trade, *op. cit. supra* note 4, at 5-23, United Nations, *op. cit. supra* note 8, at 105.
11. *Id.* at 5.
12. 1 President's Materials Policy Commission, Resources for Freedom 59 (1952).
13. *Ibid.*
14. Address of Secretary Dulles, October 10, 1955, N. Y. Times, Oct. 11, 1955, p. 14, cols. 4-5.

Elsewhere in the world there is a drive toward economic as well as political freedom. The underdeveloped countries of the world are seeking to develop their own internal resources in order that their economies, and hence their policies, shall not be so closely tied with those states which are their markets. They are seeking to develop balanced economies of manufacture, agriculture and the extractive industries. They are seeking for their peoples the increased opportunities for participation which an industrial society provides. These drives are heightened by fear of colonialism and imperialism from whose pressures they feel they are not yet wholly free.

In the light of the foregoing discussion, the following conclusions would seem to be well sustained

(1) The free western world has not yet achieved a stable and enduring economic base for its international trade. Regional trading areas rather than multilateral world trading patterns predominate. Western Europe in particular has lost its creditor position and has had to turn to the dollar area for much of its supplies. Many of its former markets, particularly in the Communist sphere of influence, have been largely lost or lessened. The United States has not provided a substitute market of commensurate scope because of its essential disinterest in manufactures as compared with primary goods.

(2) The unstable and precarious basis upon which the present economic structure of the western world rests may at any time, if the elements of its support should change for the worse, thrust it into a period of bilateral and restrictionist approaches to international trade.

(3) The restrictionist policies of the United States are under present conditions a powerful discouragement to the opening of free world trade. Governmental loans and grants and the stockpiling of strategic materials have helped to diminish the instability implicit in the dollar gap but they can be no enduring solution for the dollar shortage. They can never be a substitute for stable and expanding trade relationships and the stable currency relations which such trade relationships will produce. They can never be a substitute for open, expanding markets characterized by an absence of restrictive trade barriers, whether they be public, such as tariffs and quotas, or private, such as cartel agreements.

(4) The creditor position of the United States, coupled with its reluctance to accept payments by its debtors in trade instead of dollars, erects a serious obstacle to the establishment of a healthy

international trade in the western world which is a primary objective of our foreign economic policy.

(5) Participating in and supported by a world economy, the United States has a responsibility to make that economy work well. The very size of the United States in world markets is a measure of its responsibility.

(6) One of the most serious and continuing problems faced in the development of world trade is the dollar shortage. Its solution rests not only in the gradual elimination of restrictionist policies in the United States, but also in the increase of foreign investment or capital export by the United States.

III

Foreign Economic Policy and the National Interest

Foreign economic policy cannot be considered apart from political objectives and realities. Indeed, the clarity of our thinking would be enormously helped if we would cease thinking of economic and political issues as occupying separate compartments for purposes of policy. As the writer has said elsewhere, "questions of foreign policy involve a system or structure of relationships, in which each component part involves stresses and strains upon each other and all are dependent upon one another and all must be preserved in a nice balance if the maximum effect of policy is to be achieved."[15]

Nevertheless, using the term "political" in its narrower sense, the postwar years have brought about the following developments in the political sphere:

(1) The separation of the sphere of Communist power and influence bounded by the Iron Curtain.

(2) The emergence of defense alliances in the western nations, notably NATO and the Pact of Mutual Cooperation signed at Baghdad on February 24, 1955.

(3) The emergence of neutralist groups of varying component elements, depending upon the issues of policy at stake. For example, issues of anti-colonialism will tend to elicit a larger grouping of states in the Middle East and in southern and southeast Asia than will issues limited to the Israeli-Arab conflict.

(4) Rivalry for influence and support in the neutralist groups between the United States and western European policy on the one hand and Soviet or Communist state policy on the other hand.

(5) The coordination of political policies of the United States and western European nations, insofar as they involve issues of

15. Carlston, *Elements of Peace*, 1 J. Pub. L. 11, 37 (1952).

East-West rivalry and power. Accompanying this development is the emergence of policies directed toward the economic integration of western Europe.

A salient fact which has become apparent in the conduct of foreign policy in the postwar years is that of competition. The United States has long realized and the Soviet has recently come to realize that each is a competitor for the support of other states. Through the Communist party it has been possible for the Soviet to coordinate the policies of its satellite states with its own. This fact remains considerably true even in China and Yugoslavia. Beyond the Iron Curtain and beyond the borders of the United States, however, Soviet and United States foreign policy are constantly subject to the critical examination of other states. The United States has learned, and the Soviet has just begun to learn, that each aspect of foreign policy must be so shaped that it will find the largest possible denominator of common interest with other states. Elements of national interest which might otherwise cast a policy measure in rigid and highly nationalistic terms must be minimized in favor of flexible terms which will reflect the interests and aspirations of other states, if their adherence and support is desired.

The makers of American foreign policy are thus constantly subject to two forces which often pull in opposite directions. Our foreign policy must be so framed as to command support within the United States itself, and also harmonize our national interest with those of other nations. In the economic sphere, this means that policies of restrictionism designed to protect particular group interests must always clash with policies of open markets designed to serve the national welfare as a whole. In the last analysis, American producers as a whole have little to fear from foreign competition. Furthermore, it is to the best interest of the American consumer and of the United States as a creditor nation to welcome foreign competitors who can serve American markets more efficiently than domestic producers. This is not to say that the displacement of the latter from the market as a result of foreign competition should not be orderly and with the minimum of individual detriment. It is not to say that their retirement from the market is not a matter of governmental concern. It is only to say that no longer can the United States treat issues involving the exclusion of foreign goods from its markets as issues of purely domestic policy Any such exclusion necessarily affects our relations with other states and the total structure and effect of our foreign economic policy

The United States has an affirmative interest in the develop-

ment of open, expanding markets in and among the western nations. As a means to that end, it has an interest in the elimination of restrictive business practices in international trade and in the internal trade of other countries. It has an interest that the economies of our friends and allies shall be viable and vigorous. These interests are a political necessity, for the military strength of the western nations is a product of their economic base.

In summary, our foreign economic policy may be said to comprise the following objectives.

(1) To preserve and develop markets for our products.

(2) To assure the supply of the materials necessary for the functioning of our economy and our armed forces.

(3) To strengthen the economies and trade of the free nations in order to promote our national interest in

(a) Establishing stable political regimes demonstrating the workability of the democratic processes.

(b) Strengthening the military potential of the western nations and the loyal support of their peoples.

(c) Assuring the continuance of the trade patterns of the free world upon which our national power depends.

(4) To achieve the benefits flowing from the international division of labor, multilateral trade, stable currencies and the elimination of restrictive business practices.

The extent to which our antitrust laws should be amended to help accomplish these objectives will be our next topic of inquiry.

IV

Foreign Economic Policy and the Antitrust Laws · Report of the Attorney General's National Committee

The recent Report of the Attorney General's National Committee to Study the Antitrust Laws of March 31, 1955, largely eschewed public issues of the kind dealt with up to this point. The report states that "this Committee has made no independent factual study to provide any basis for determining whether our antitrust laws have helped or hindered the foreign commerce of the United States or for generalizing about the effect of antitrust on any related governmental policy."[16]

This was a sound decision. The committee was largely composed of practising lawyers and law professors. Its time and funds were limited. It accordingly limited its inquiry to antitrust doctrine.

16. Report 66. Report of the Attorney General's National Committee to Study the Antitrust Laws of March 31, 1955, hereinafter referred to as—Report.

What is the law? Should any existing rules be changed? These were its two central questions. They must be answered as part of any general inquiry into the adequacy of our antitrust laws. The task is not, however, done until the additional question is answered Is the law satisfactory in the light of all relevant considerations of policy?

This paper can hardly suffice to answer this last question. That question is one which should be the subject of still another task force inquiry The Attorney General's National Committee may itself be regarded as a precedent for the appointment of a new committee to study foreign economic policy and, as part thereof, the incidence of the foreign application of the antitrust laws. Private funds could most usefully be made available for this purpose. A general study of this nature is a most important order of business today

Before beginning our inquiry into Chapter II of the committee's report, dealing with the application of the antitrust laws to "trade or commerce with foreign nations," this much can be said by way of an introduction The determination of policy in the promotion of our foreign trade and commerce and the strengthening of our political relationships with the free world cannot be shaped by the logic of the Sherman Act alone. Our interest in the elimination of restrictive business practices in international trade, which admittedly exists, is part of a larger interest in promoting our foreign commerce and developing the economies of the states in the free world. Hence the foreign application of the Sherman Act must be viewed from the standpoint of the realities of the process of foreign investment and the conduct of business abroad. In this context, value judgments as to specific policies must be made from the standpoint of the national interest.

There may well be measures which the national interest would dictate but the Sherman Act prevent. An underdeveloped state, long a victim of imperialist control by a single western power or under the dominance of a single international corporate enterprise, may insist on a joint sharing by corporate enterprises of a number of western states in the development of its new industries. The investment required and the risks involved in the foreign field may mean that foreign investment may be feasible only if there be a joint sharing of capital investment among several large corporations. Local business interests in a foreign country may demand certain assurances of protection without which their participation in a new enterprise cannot be had. All of these may raise issues

which cannot be solved within the terms of the antitrust laws but only through a weighing of the various values implicit in the term national interest.

We now turn to an examination of the committee's report.

(1) The committee does not approve "any proposal for blanket exemption of foreign commerce from the antitrust laws" or "their substantial revision to define specifically legal and illegal conduct in foreign commerce transactions."[17] It does, however, approve "advance discussions [by the Department of Justice] with affected agencies concerning projected antitrust proceedings seriously involving any of the Government's foreign programs."[18] In addition, it recommends that the immunity from antitrust prosecution accorded voluntary agreements among competitors requested by the President and approved by the Attorney General under the Defense Production Act[19] be extended for a designated period beyond the act's expiration, subject to certain conditions.[20]

If antitrust enforcement is to be coordinated with our foreign economic policy, it should be possible for any conduct abroad serving the national interest, as determined by the executive, to obtain antitrust immunity.[21] Such is the political climate in the United States that we may rest assured that the executive would not lightly make any such finding. When it is remembered that the exemption thus to be accorded will be limited to conduct abroad, i.e., production or market practices in foreign countries, the likelihood of prejudice to the national interest in the administration of this immunity would not appear to be substantial as against the advantages which it would achieve.

We have in the preceding pages of this study made evident the importance of the process of foreign investment today as a means toward reaching a number of the goals of our foreign economic policy. While we must not succumb to the restrictionist policies of other states, we must be free to permit such measures of joint action and joint risk-taking as may be necessary to promote our foreign commerce and expanding economies of the free nations. At least a procedure should be provided whereby the executive could consider

17 *Ibid.*
18. *Id.* at 97.
19. 64 Stat. 798 (1950), 50 U. S. C. App. §§ 2061-2066 (1951), as amended, 67 Stat. 129 (1953), 50 U. S. C. A. App. §§ 2061-6166, particularly § 2158 (Cum. Supp. 1955).
20. Report 109.
21. For a suggestive list of criteria for determining the national interest in this connection, see Carlston, Antitrust Policy Abroad, 49 Nw. U. L. Rev. 569, 572-573 (1954).

such questions of policy and permit business conduct which promotes the national interest that might otherwise be frustrated by the antitrust laws.

(2) The committee is of the view that the Sherman Act applies to conduct abroad of aliens when it is intended to have, and in fact has "substantial anticompetitive effects on our foreign commerce." When the foreign conduct involves foreign and American firms or American firms alone, then antitrust violation should occur when it produces "such substantial anticompetitive effects on this country's 'trade or commerce with foreign nations' as to constitute unreasonable restraints."[22]

The assertion of jurisdiction over the conduct of foreigners in their own country which is lawful under their system of laws raises serious questions of national policy In general, persons should be subject to only one system of law at a time.[23] Where it is clear that the effect of foreign conduct was intended to be primarily localized in the United States and was in fact so localized, there may be some justification for asserting jurisdiction and departing from the general rule. If conduct taking place in one state and having an intended effect in another is regarded by both states, as well as by civilized nations generally, to be criminal in nature, the objective territorial principle would permit the exercise of extraterritorial jurisdiction. It is an extreme step, however, to extend the objective territorial principle to a case involving conduct which produces effects in the state of the forum solely as a consequence of the fact that the conduct in question was a product of decision in the foreign state as to how business should be conducted generally outside the territory of such state.[24] It may finally be remarked that the prediction of antitrust consequences for specific conduct is highly complex and problematical for the American businessman and lawyer, much greater will be the hazards of prediction for the foreign businessman and his lawyer who are unfamiliar with our legal system. They may not even realize that an antitrust issue exists.

It may be questioned whether the existing principles of extraterritorial jurisdiction as they have been developed in antitrust

22. Report 76.

23. See opinion of Judge J. B. Moore in Case of S.S. "Lotus," P C. I. J., Ser. A., No. 10 at 92 (Sept. 7, 1927). "If two laws were present at the same time and in the same place upon the same subject we should also have a condition of anarchy." 1 Beale, A Treatise on the Conflict of Laws 46 (1935).

24. "If international trade and commerce is to expand and if nations are to live as neighbors, it is necessary that nations observe the first principle of good neighborly relations, which is. Do not try to tell your neighbor how to manage affairs in his own household." Vanity Fair Mills, Inc. v. T. Eaton Co., Ltd., 133 F Supp. 522, 529 (S.D. N.Y. 1955)

cases are justified as a matter of law or policy.[25] While we may not wish voluntarily to relinquish the principles of extraterritorial jurisdiction available to our legislative and judicial bodies for purposes of control, we may well wish not to become the captives of their logic. We should at least provide an opportunity to consider specific practices in the light of the national interest and not solely from the point of view of the rigorous postulates of the Sherman Act. It would seem desirable that the enforcement of the antitrust laws in respect of conduct abroad, whether by aliens or our own nationals, should be subject to the decision of the Department of State as well as the Department of Justice. The committee's proposal of advance discussion of projected antitrust suits in the foreign field with other governmental agencies concerned is to be commended. The coordination of our foreign economic policies and the principle of respect for other states demand no less. This is an area in which diplomacy, negotiation and compromise should be utilized rather than the brutal assertion of unilateral power arising from the fortuitous circumstance of personal jurisdiction over foreign defendants.

(3) The committee very properly condemns the implications of the *Timken*[26] and *Minnesota Mining*[27] cases that the Sherman Act prohibits American investment for production abroad as a restraint on American exports.[28] There is no justification in law or policy for such a narrow construction of the term "foreign commerce." If the misconception of these cases should persist, there will be imperative need for clarifying legislation.

(4) The committee points out that "the inquiry required by the Rule of Reason may in some foreign commerce cases involve consideration of market factors not operative in domestic commerce . . . We believe that defendants should be allowed to show that, due to foreign economic or political barriers, their conduct at bar was prerequisite to trade or investment in a foreign county . Similarly, we believe that should, for example, the laws of another country require uniform noncompetitive prices by companies doing business there, then compliance with that law should constitute a defense in this country to an antitrust charge of price-fixing solely in that country"[29]

25. See Carlston, *supra* note 21, at 574-586.
26. Timken Roller Bearing Co. v. United States, 341 U. S. 593, 599 (1951).
27 United States v. Minnesota Mining & Manufacturing Co., 92 F. Supp. 947, 962 (D. Mass. 1950).
28. Report 77-80.
29. *Id.*, at 81, 83.

Yet the fact remains, as the dissent remarked in the *Timken* case, that it is not for the courts "to formulate economic policy as to foreign commerce."[30] This fact reinforces the desirability of the suggestion made in (2) above that the Department of State participate in antitrust enforcement abroad. Flexibility must supersede rigidity in the foreign application of the antitrust laws.

(5) The committee rejected the implication of the *Timken* case that the conduct of a foreign business by an American firm through a subsidiary corporation might raise issues of "intra-enterprise conspiracy" under the Sherman Act.[31] It rightly felt that criteria of substance rather than form should here govern.[32]

The writer is not convinced that the pronouncements of the committee will suffice to remove the rule of "intra-enterprise conspiracy" from current antitrust doctrine, whether applied to interstate[33] or foreign commerce. The rule is one in which the economic soundness of its application in the particular case is a matter of chance rather than reason. It should be eliminated.[34]

(6) The risks of foreign enterprise are such that often it will be undertaken only if the venture be shared by two or more American firms. Sometimes it is highly desirable as a practical matter that entry to the foreign market be obtained through purchase of the goodwill of an existing foreign firm. Such a purchase may be made by a single American firm or sometimes it may be practicable only as a joint venture among two or more American firms.

The undertaking of such ventures is in the national interest, since they reflect the process of private foreign investment. Our government is taking vigorous steps to encourage this process. Its promotion is an established part of our foreign economic policy Yet the antitrust risks incident to ventures of this nature are such as to discourage them powerfully In predicting future judicial behavior, the antitrust counsellor cannot dismiss the *Minnesota Mining*[35] and the *Imperial Chemical Industries*[36] cases with the aplomb

30. Timken Roller Bearing Co. v. United States, 341 U. S. 593, 605 (1951).
31. *Id.* at 606-607
32. Report 88-89.
33. *Id.* at 30-36.
34. See the discussion on this point in Carlston, *Basic Antitrust Concepts*, 53 Mich. L. Rev. 1033, 1040-1045 (1955).
35. United States v. Minnesota Mining & Manufacturing Co., 92 F Supp. 947 (D. Mass. 1950).
36. United States v. Imperial Chemical Industries, Ltd., 100 F Supp. 504 (S.D. N.Y. 1951) and 105 F Supp. 215 (S.D. N.Y. 1952)

of the committee's report.[37] Nor can he afford to overlook the implications of *Timken*[38] regarding joint foreign ventures.

The formal legal permission to a single American company or group of American companies to establish manufacturing or distributing facilities abroad, absent dominance of the owner companies or restraint or monopoly, which the cases seem to concede,[39] and with which the committee seems to be satisfied,[40] is no solution of the basic problem. As has been pointed out elsewhere, the antitrust risk arises from the continued operation of the foreign enterprise and its consequent effect upon business decisions of the owner companies.[41] It is more or less inevitable that in such circumstances there will be an accumulation of business decisions among the owner companies that foreign business inquiries should be served by the foreign subsidiary rather than by the American owner company. The patterns of business conduct thus revealed will be charged to constitute a division of markets and perhaps price-fixing. The mere possibility of exclusion of American competitors from the foreign market served by the jointly owned foreign plant may be charged to be a restraint.[42] The sounder rule should be an acknowledgment of the fact that if the joint venture were in the first instance lawful, no antitrust violation should result from the circumstance that business was relinquished to the foreign enterprise by the owner companies as a matter of business judgment, rather than as a result of any independent agreement not to compete. Moreover, there should be no inhibitions upon the establishment of foreign facilities by American firms, whether jointly or otherwise, when they promote the national interest and where the effect upon American competitors is conjectural and incidental.

(7) The committee, by a majority vote, refrained from commenting on the control of restrictive business practices through

37. Report 90-91.

38. United States v. Timken Roller Bearing Co., 83 F Supp. 284 (N.D. Ohio 1949), *aff'd sub. nom.* Timken Roller Bearing Co. v. United States, 341 U. S. 593 (1951).

39. See notes 35, 36 and 38 *supra*; also United States v. E. I. du Pont de Nemours & Co., 118 F. Supp. 41, 219 (D. Del. 1953). See Note, *Foreign Subsidiaries in American Law*, 4 Stan. L. Rev. 559 (1952).

40. "Manufacturing or distribution activities carried on abroad by American firms alone, or combined with foreign competitors, should be upheld unless they create unreasonable restraints on the commerce of the United States. . They should thus be deemed beyond the reach of our antitrust laws if they involve no restrictions on American imports or exports of goods or capital and do not unreasonably restrain competition in American markets." Report 90.

41. Nitschke, *The Antitrust Laws in Foreign Commerce*, 53 Mich. L. Rev. 1059, 1067-1068 (1955).

42. United States v. Minnesota Mining & Manufacturing Co., 92 F. Supp. 947, 961 (D. Mass. 1950).

international procedures. It was felt (a) that this problem was one of international relations rather than national antitrust policy and (b) that decision on the need for international measures of control depended on a factual judgment of the extent to which our national antitrust laws can cope with international restraints, which the committee had not made. A minority of the committee was of the view that international measures of cooperation were desirable and that specific consideration should be given to the United Nations proposals to this end.[43] These were set forth in draft articles of agreement by the United Nations *Ad Hoc* Committee on Restrictive Business Practices.[44]

At almost the date of the publication of the Report of the Attorney General's National Committee, our government took the position before the United Nations that the proposed draft articles of agreement should not be adopted. Its conclusions were that national policies and practices in this field varied so widely that the proposed international agreement would be neither satisfactory nor effective in eliminating international restrictive business practices.[45] The present position of the Department of State has been set forth as follows

> "The Department continues to believe in the importance of developing greater cooperation among governments in other less formal ways in handling common problems in this area. But we believe that progress, to be healthy, must follow a normal pattern of growth. This, we believe, is provided by the resolution adopted by the Economic and Social Council in the spring."[46]

By its Resolution of May 26, 1955, the Economic and Social Council failed to approve the draft articles of agreement but nevertheless reaffirmed its continuing concern with the problem and urged governments to continue the examination of restrictive business practices and means for lessening them. It also requested the Secretary-General to arrange for the sharing of experience and information in this field and to suggest further consideration of the matter at a later session of the Council. It would appear, therefore,

43. Report 98-105. A rejoinder to the minority comment was made, Report 105-108.

44. United Nations, Report of the Ad Hoc Committee on Restrictive Business Practices 12 (U.N. Doc. E/2380, E/AC. 37/3, 30 March 1953)

45. Press release 2134, March 28, 1955. 32 Department of State Bulletin 665 (April 18, 1955).

46. Statement by Thorsten V Kalijarvi, Acting Deputy Under Secretary of State for Economic Affairs, before the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee, September 15, 1955. Kalijarvi, *Relation of Antitrust Policies to Foreign Trade and Investment*, 33 Department of State Bulletin 538, 542 (October 3, 1955)

that this problem has now been handled in the international forum by means appropriate to its character.[47]

In conclusion, the preoccupation of the committee with antitrust doctrine and its failure to inquire into larger issues of public policy should be neither a cause for criticism nor a source of satisfaction. If the committee's summary of antitrust doctrine were to become the future guide for judicial decision and its recommendations adopted, a remarkable forward step in antitrust policy would have been made. The dissents within the committee itself, the remarks of commentators, the public debate concerning its work, all indicate, however, that its report will have a persuasive rather than an authoritative effect. The committee's work is a first and necessary step but should not be the last step in developing antitrust policy in foreign commerce.

The ultimate objective of antitrust policy abroad is simply the promotion of our foreign commerce in the largest sense of that term. Specific rules should be examined from the standpoint of whether they encourage the development of our foreign trade and the increase of our foreign investment. Any relaxation in the foreign application of our antitrust law must clearly be demonstrated to be in the national interest. Nevertheless, the national interest should be served and not frustrated by the antitrust law.

47. See Carlston, *supra* note 21, at 723; Nitschke, *supra* note 41, at 1069; Domke, *The United Nations Draft Convention on Restrictive Business Practices,* 4 Int'l & Comp. L. Q. 129 (1955); Kopper, *The International Regulation of Cartels—Current Proposals,* 40 Va. L. Rev. 1005 (1954); Timberg, *Restrictive Business Practices.* 2 Am. J. Comp. L. 445 (1953).