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American Retreat from Extraterritorial Antitrust Enforcement

Consequences of New Legislative Policies for an International Competitive Economy

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J. Atwood/K. Brewster, Antitrust and American Business Abroad² I/II (1981); W. Fugate, Foreign Commerce and the Antitrust Laws³ I/II (1982); G. Garvey, Transnational Joint Ventures and Antitrust Analysis: Stanford J. Int. L. 21 (1985) 337–372 (cited: Transnational Joint Ventures); *id.*, Regulatory Reform in the Ocean Shipping Industry, An Extraordinary U.S. Commitment to Cartels: Geo. Wash. J. Int. L. Econ. 18 (1984/85) 1–54 (cited: Regulatory Reform); *id.*, Exports, Banking and Antitrust – The Export Trading Company Act, A Modest Tool for Export Promotion: NW. J. Int. L. Bus. 5 (1983) 818–843 (cited: Exports, Banking and Antitrust); *id.*, The Foreign Trade Antitrust Improvements Act of

I. Introduction

Following World War II, the industrialized nations of the West committed themselves to the creation of liberal international trade and investment policies. Such policies were considered essential to economic recovery and growth. Free market policies also responded to the belief that protectionist governmental activities and private trade restraints had contributed to an international environment that ultimately led to the War¹.

In order to minimize governmental constraints, developed Western nations created a stable international monetary system² and agreed to a framework intended to foster and enforce liberal trade policies³. The original commitment to free trade, manifested in the "General Agreement on Tariffs and Trade" (GATT)⁴, was cautious and tentative, but it did require that participating nations avoid discriminatory tariffs and the use of non-tariff barriers⁵. The members of GATT also agreed to periodic discussions on reductions in trade barriers⁶.

Private restraints of trade, however, have been left to national and, in the notable example of the European Community (hereafter: EC)⁷, multinational regulation. The international community has recognized the adverse consequences of restrictive trade practices, and encouraged cooperation among nations to limit such practices⁸. No institution exists, however, to enforce an internationally accepted code of conduct.

1981: L. Pol. Int. Bus. 14 (1982) 1–46 (cited: Antitrust Improvements Act); R. Geiger, International Antitrust and Related Trade Issues, in: The United States, Transnational Business, and the Law 1–21; H. Gray, International Trade, Investment, and Payments (1979); H. Kronstein, The Law of International Cartels (1973) [English text of *id.*, Das Recht der internationalen Kartelle (1967)]; A. Lowenfeld, Public Controls on International Trade² (1983) (International Economic Law, VI); J. Rahl, International Cartels and Their Regulation, in: Competition in International Business, ed. by O. Schachter/R. Hellawell (1981) 240–276; W. Reinsch, The Export Trading Company Act of 1981: L. Pol. Int. Bus. 14 (1982) 47–127; F. Root, International Trade and Investment⁴ (1970); J. Spero, The Politics of International Economic Relations² (1981).

¹ Lowenfeld § 2.1.

² Root 362f.; Spero 23f.

³ Lowenfeld § 2.2.

⁴ General Agreement on Tariffs and Trade, Opened for Signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187; see generally, E. Petersmann, Protektionismus als Ordnungsproblem und Rechtsproblem: Rabelsz 47 (1983) 478–507.

⁵ Lowenfeld § 2.3.

⁶ Lowenfeld § 2.3.

⁷ Arts. 85 and 86 EEC Treaty.

⁸ [United Nations Conference on Trade and Development] "Restrictive Business Practices in Relation to the Trade and Development of Developing Countries", UNCTAD-Doc. TD/B/C.2/119/Rev. 1 (1974), repr. in: Anti-Trust and Restrictive Business Practices I, Booklet 6, pp. 370–378.

The economic regime established after World War II worked remarkably well for several decades, at least for the industrialized nations of the West and Japan. The economic recoveries of war-ravaged Germany and Japan were extraordinary, and economies throughout the West were robust. Recent years, however, have brought significant changes. For one thing, the nations of the Third World have become increasingly critical of the system that frequently, they believe, frustrated their developmental goals⁹. The most dramatic contemporary changes, however, have been the result of developments in the economies of the major industrialized nations. The post-War system was built upon the dominant position of the United States and its currency¹⁰. The international economy of the non-Socialist World has, however, become tri-polar now that the EC (led economically by Germany) and Japan are major participants in the international marketplace¹¹. In light of this new reality, American economic leadership became an unacceptable burden to the United States and its major trading partners¹². The regime established after the War has been abandoned and the Western World is searching for a new order.

These new economic realities have probably brought the developed nations of the West and Japan to the most critical point in post-World War II history. Although the United States remains politically and militarily dominant in the West, Americans must adjust economically, politically and psychologically to a diminished economic role while Japan and Europe assume more of the responsibilities of leadership. The ultimate challenge of this decade may be the creation of an international framework that can support healthy commercial rivalry while maintaining vital economic and political unity; the greatest threat is that the major economic powers will turn to protectionist policies which in the past led to downward economic spirals which left the world poorer and politically and militarily unstable¹³. The dangers should not be exaggerated, but must be recognized if national policy-makers are to rise above parochial interests.

This article deals with a narrow aspect of the broader issue which has been outlined. It explores the extraterritorial application of the United States' antitrust laws as an instrument of progressive international economic policy.

American legal scholarship on extraterritorial application normally focuses on the rules periodically announced by federal courts in determining whether they may or should exercise jurisdiction in cases involving foreign nationals or conduct occurring outside of the United States¹⁴. The literature traces the

⁹ *Root* 431–438.

¹⁰ *Spero* 26 f.

¹¹ *Spero* 27 f.

¹² *Spero* 28.

¹³ *Spero* 25.

¹⁴ E. g., *Atwood/Brewster I* §§ 6.01–6.11; *Fugate* ch. 2.

developments from the rigid territorial approach announced by Justice Holmes in the *American Banana* decision¹⁵, through the expansive effects standard generally attributed to the *Alcoa* decision¹⁶, to the currently popular comity, or balancing of interests, analysis originally developed by the Ninth Circuit Court of Appeals in the *Timberlane* case¹⁷. This article concentrates on the implications of several contemporary legislative enactments as reflections of a policy of withdrawal from the American commitment to foster liberal international trade policies through the extraterritorial application of its antitrust laws.

Initially, two points should be clarified. First, the term “antitrust law” is used here in a very broad sense encompassing the fundamental American commitment to an economy that is organized by private choices made within the framework of competitive markets. This commitment is primarily embodied in the provisions of secs. 1 and 2 of the Sherman Act¹⁸ and sec. 7 of the Clayton Act¹⁹. Secondly, this article will not attempt to identify the outer

¹⁵ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

¹⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

¹⁷ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

¹⁸ Section 1 of the Sherman Act, 15 U.S.C. § 1, states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2, 15 U.S.C. § 2, provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

¹⁹ Section 7 of the Clayton Act, 15 U.S.C. § 18, provides in relevant part:

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

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisi-

limits of the extraterritorial reach of national laws under international law and convention. No clear line can be drawn. It is assumed, however, that the United States may impose its antitrust policies on domestic firms engaging in enterprise activities within American territory irrespective of the location of any adverse consequences of those activities. So, the United States may, for example, outlaw a domestic conspiracy to fix the prices of goods sold abroad. The article also assumes generally that foreign activities having at least a direct, substantial and foreseeable adverse effect on the commerce of the United States may be prohibited.

II. Economic Background

Economic theories regarding the benefits and drawbacks of free international trade are complex and cannot be fully developed here. The same applies in regard to the significant non-economic values fostered by international free markets and by restrictive trade policies. The following sections, though, present a brief synopsis of the rationale underlying the Western World's basic commitment to liberal trade policies, and the principal counter-arguments favoring somewhat restricted markets.

1. International Free Market Perspectives

Western economists attach significant positive value to competitive international markets. Important economic, political and social goals will be fostered by freely operating markets, unconstrained by either government action or private monopoly. A free market regime, one open to the free flow of goods and production factors such as capital and technology, will predictably promote the efficient allocation of scarce international resources²⁰. The wealth of the international community will increase as businesses, disciplined by the constant pressure of competition, bring together the various factors of production in efficient combinations²¹. Each nation will capture the benefits of its comparative advantages in the international marketplace²². The capital, technology and know-how of developed industrial nations, for example, may combine with the human and abundant natural resources of less developed nations to produce lower- priced finished goods. Consumers will

tion, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

²⁰ *Garvey*, *Transnational Joint Ventures* 352-354.

²¹ *Root* 86-91.

²² See *Gray* 16-25.

predictably be well served as the output of desired products increases and prices decrease.

An international economic regime committed to unrestrained private transactions would also have tangible macroeconomic consequences. Industry organized along international lines, efficiently exploiting the available resources of developing lands, will directly increase the productivity and wealth of the host nations. More importantly, they will bring skills, know-how, and sometimes technology that can be transferred to other productive enterprises. Such nations, therefore, develop over time the capacity for independent and more broadly based economic expansion²³.

Political and social benefits will also be likely to flow from the economic growth stimulated by an international competitive regime. History has demonstrated that privately concentrated and restrained industry can invite political intervention which is potentially untoward; the Sherman Act was, for example, intended in part to prevent more direct forms of government regulation which Congress feared might result if the perceived monopolistic abuses of the "trusts" were not otherwise curbed²⁴. Private cartels facilitated the total control of German industry as the National Socialist Regime consolidated its power²⁵. The expansion of wealth in developing nations (assuming the benefits of economic expansion are reasonably distributed) might be expected to promote social and political stability, as a substantial middle class often seems to be a principal prerequisite for stable democratic government.

2. The Theory of the Second-Best

There are many real world constraints that make the theoretical ideal of an international free market unattainable. Market failure, externalities and transaction costs exist in international, as well as national markets²⁶. They are in fact likely to be exaggerated in international transactions²⁷. International traders, for example, face national monopolies, heightened transportation costs, language barriers, and numerous legal restrictions generally not found in national markets.

National restrictions are imposed for a variety of reasons. Developed countries, including the United States, have restricted the free flow of goods, technology and capital. Some restrictions have been justified by legitimate security concerns²⁸, since national defense, for example, might be prejudiced

²³ *Gray* 379f.

²⁴ *H. Thorelli*, *The Federal Antitrust Policy* (1954) 226f.

²⁵ *Rahl* 245.

²⁶ *Root* 61–74.

²⁷ *Garvey*, *Transnational Joint Ventures* 354–357.

²⁸ *Root* 155f.

if confidential military equipment and know-how could readily pass to hostile nations. The preservation of jobs is the most likely significant political motivation for protective policies. Economic theory suggests, however, that such policies are not likely to serve national interests, and certainly will ill-serve the international community²⁹. Nevertheless, an analysis of trade policy that failed to appreciate the political influence of the labor force, or the social upheaval likely to accompany the loss of significant numbers of jobs would be seriously flawed.

The reasons for various restrictions of international commerce and the diverse nature of such legal and extra-legal constraints, only some of which have been identified above, provide an economic rationale for national responses which interfere with free market forces, a rationale encompassed by the so-called theory of the second-best³⁰. In essence, the theory assumes or recognizes that the first-best option – free international markets – is not possible, for whatever reason. The best policy, therefore, must accept real world limitations and impose such restraints on trade as are necessary to achieve the optimal performance possible under the circumstances.

The economic theory of the second-best assumes that second-best policies will foster the most efficient possible allocation of international resources. In the hands of national policy-makers, however, the concept may assume a less international orientation. Market distortions imposed by one nation are often likely to provoke protective or retaliatory responses that are unlikely to enhance the wealth of the international community.

3. Developmental Perspective

As briefly outlined (*supra*, 1), certain economic theories suppose that national economic growth and development will occur when previously scarce factors of production (such as management skills and technology) pass to nations hosting foreign enterprises. Many less-developed nations, however, believe that the liberal trade and investment policies established by industrialized nations substantially affect their domestic economies by limiting their ability to control development and denying them a fair share of the generated wealth³¹. Development supposedly driven by market forces has often failed to satisfy national economic, social and political needs. The view, given theoretical support within the theory of the second-best (*supra*, 2), that free international markets are in fact not possible, makes this conclusion less surprising. Imbalances of financial, technological and bargaining power and

²⁹ *Gray* 166–168.

³⁰ See *Root* 161 f.

³¹ *Spero* 27; *Gray* 287 f.

resources between trading partners in developed and less developed states respectively would be relevant elements in the specific application of the theory of the second-best in this context. The frustration of the desire, for example, for an independent, locally-controlled and diverse economy by an international market interested solely in exploiting an abundant resource such as unskilled labor can then be regarded as an expected outcome. In response to such concerns, many nations have imposed restrictions on trade in goods and investment in order to foster domestic developmental goals³².

Restrictive national policies intended to promote development are frequently intended to protect infant industries³³, to insure local participation in management³⁴, and to foster the transfer of valuable technology and know-how³⁵. Many developing countries apparently have little faith in the ability of markets alone to deliver the resources they need for independent economic vitality. Moreover, some of these concerns are not limited to less developed countries. Canada, for example, presumably in response to a fear that American corporations would dominate its economy, restricts investments by foreign firms in Canadian businesses³⁶.

In spite of demands that free market forces be moderated to achieve national developmental objectives, the developing nations of the West remain essentially committed to liberal trade and investment policies³⁷. They wish to purchase goods in competitive markets and to sell their natural resources and products to non-cartelized buyers³⁸. In any case, foreign capital and skills are essential to the growth of less developed economies. Therefore, the arguments favoring restrictive policies to foster development can justify only limited governmental restraint.

³² *Garvey*, *Transnational Joint Ventures* 354 f.; see *Gray* ch. 13.

³³ *Gray* 162–166.

³⁴ *R. Radway*, *Antitrust, Technology Transfer and Joint Ventures in Latin American Development: Lawyer Am.* 15 (1983/84) 47–70 (64). *Gray* (382–391) characterizes the problem as a perceived loss of sovereignty.

³⁵ “Restrictive Business Practices . . .” (supra n. 8) p. 374 f.; *Radway* (supra n. 34) 51–75.

³⁶ *Investment Canada Act* (S.C. 1985, c. 20), replacing the *Foreign Investment Review Act* (S.C. 1973–74, c. 46); see *S. Le Gouëff*, *Loi sur Investissement Canada, Le contrôle des investissements au Canada [Législation]*: *Can. Bar. Rev.* 64 (1986) 703–720; *Was the Sigh of Relief Premature?*, *The Investment Canada Act [Note]*: *Vand. J. Transn. L.* 19 (1986) 613–650. On October 4, 1987, the United States and Canada agreed in principle to establish free trade between the two nations; see *S. Auerbach*, *U.S.-Canada Pact to Cut Trade Rules: The Washington Post*, October 5, 1987, p. 1. col. 6. As to the former Canadian Act of 1973 see *T. Hadden/R. Forbes/R. Simmonds*, *Canadian Business Organization Law* (1984) 79–82.

³⁷ “Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on Its Sixth Session”, UNCTAD-Doc. TD/B/C. 1/AC.6/20 (1979), repr. in: *Anti-Trust and Restrictive Business Practices I*. Booklet 6, p. 134.

³⁸ “Principles and Rules and Other Issues Relating to Restrictive Business Practices”, UNCTAD-Doc. (TC/231) (1979), repr. in: *Anti-Trust and Restrictive Business Practices I*. Booklet 6, p. 59 f.

III. International Cartels and National Competition Policy

Cartels have been defined as “voluntary agreements among independent enterprises in a single industry or closely related industries with the purpose of exercising a monopolistic control of the market”³⁹. International cartels pursue the same goals but their actions can have implications for more than one nation.

Although governments often tolerate⁴⁰, and sometimes foster cartels to achieve national economic goals⁴¹, the theoretical and historical case against unregulated private cartels is overwhelming. Driven solely by the desire for profits, they distort and restrict international trade. Most industrialized nations, therefore, will not tolerate such activities if they affect their markets⁴² and the developing world considers private cartels to be inimical to their economic goals⁴³.

In the absence of an internationally accepted and enforceable prohibition against cartels, the extraterritorial application of national competition laws must play a key role in the battle against privately monopolized international trade. Measures taken to avoid anticompetitive domestic effects by the world’s major trading nations have prevented the re-creation of the cartels that dominated much international commerce between the two World Wars⁴⁴. Most nations have been unconcerned, however, about domestic cartels which direct their activities towards foreign consumers and competitors. The tolerance of such cartels represents, I believe, a short-sighted economic policy.

True international cartels, those achieving and exercising monopoly power, have undesirable political and economic consequences⁴⁵. Competing producers, including those within domestic markets, must necessarily discuss and reach agreements regarding production and prices if a cartel is to be effective. Although under most antitrust exemptions their decisions are not legally limited when applying to matters that affect only foreign sales and customers, the related exchange of information and decision making pro-

³⁹ “International Cartels” (1947) 1 (United Nations Department of Economic Affairs).

⁴⁰ *Rahl* 260–263.

⁴¹ *Rahl* 263–266.

⁴² *Rahl* 250.

⁴³ “Principles and Rules . . .” (supra n. 38).

⁴⁴ International Cartels (supra n. 39).

⁴⁵ The term “true international cartels” is intended to distinguish cooperative entities that may be appropriately identified as joint ventures. These terms – “cartel” and “joint venture” – lack precise meaning under American law. I am, however, using the term cartel to identify cooperative activities intended to achieve, maintain, or exercise monopoly power, i.e., restrict output and raise prices; see *J. Brodley*, *Joint Ventures and Antitrust Policy*: Harv. L. Rev. 95 (1982) 1521–1591 (1524–1527), and *Garvey*, *Transnational Joint Ventures* 335 f. (adopting Brodley’s definition).

cesses in industries having characteristics appropriate to cartels is almost certain to have domestic consequences. Rational business people are simply too aware of their own economic interests to blind themselves to the potential domestic benefits of their agreements. Similarly, when national cartels join with foreign producers, the temptation to respect each other's home markets will be great.

In the international marketplace, cartels impair economic growth and unfairly exploit the consumers and producers of vulnerable nations. Developing countries will be unlikely to enjoy the benefits of freer markets when they face cartels tolerated by the nations that could most effectively control them⁴⁶. Cartels, therefore, contribute to an international environment that limits growth, generates hostility, and prompts disadvantageous counter-measures that could and should be avoided.

IV. The Role of American Antitrust Law

The American antitrust laws have traditionally enjoyed a special legal status. The Sherman Act, for example, has been described by the United States' Supreme Court as the "Magna Carta of free enterprise"⁴⁷ and it has been treated with the reverence normally accorded only to constitutional provisions. Antitrust also fostered goals other than economic efficiency. Judge Hand, for example, stated in the landmark *Alcoa* decision that the legal aversion to monopoly is "based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results"⁴⁸. In 1962, the Supreme Court had adopted a similar interpretation of sec. 7 of the Clayton Act:

"We cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."⁴⁹

Interpreted in this way, the antitrust laws clearly represented a statement of fundamental political, social and economic policy.

Despite this strong philosophical commitment to the principles of antitrust, the American belief in competition has experienced lapses, in domestic as well as in foreign applications. Some industries have been exempted from the rule of competition although they are generally subject to some form of

⁴⁶ *Rahl* 261 f.

⁴⁷ *United States v. Topco Associates*, 405 U.S. 596, 610 (1972).

⁴⁸ *United States v. Aluminum Co. of America* (supra n. 16) 428.

⁴⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

government regulation intended to protect the public from monopolistic abuse. During the Great Depression the United States' commitment to competition had almost collapsed as the government turned to cartels sponsored by the National Recovery Administration (NRA) in order to pull the country out of its financial distress⁵⁰.

The international scope of the antitrust laws has also changed significantly with time. The first several decades of antitrust enforcement were marked by little interest in the extraterritorial reach of the laws. In 1909, the Supreme Court embraced a strict jurisdictional standard of territoriality that limited the Sherman Act's prohibitions primarily to domestic activities⁵¹. This rigid approach began to erode shortly after it was created⁵², but a sweeping "effects standard" was not adopted until 1945⁵³.

In 1894 Congress enacted the Wilson Tariff Act⁵⁴, making it illegal to restrain the import commerce of the United States. In 1918, however, the Legislature passed the Webb-Pomerene Act⁵⁵, demonstrating that it was less concerned about export restraints. Export associations were given a qualified exemption from the application of the antitrust laws. During this same time period, the Ocean Shipping Act of 1916⁵⁶ granted ocean carrier conferences an antitrust exemption subject to regulatory oversight.

It is not surprising that the United States' antitrust laws played a relatively minor role in the international arena prior to World War II. The regulation of international trade was the province of tariffs and the United States was in an isolationist mood⁵⁷. America came out of that War, however, with its industrial structure intact, great faith in its economic philosophy, with the antitrust laws at its core, and the ability and willingness to lead the World's non-Socialist industrialized nations⁵⁸.

For several decades during and following the War, therefore, the American commitment to competition was renewed. The Supreme Court, in the *Socony-Vacuum* decision⁵⁹, implicitly but emphatically abandoned the pro-cartel stance it had adopted only a few years earlier in the *Appalachian Coals* case⁶⁰. It also demonstrated in the *Timken* decision that it had no tolerance for

⁵⁰ The NRA was created under the authority of sec. 2 of the National Industrial Recovery Act of 1933, 15 U.S.C. §702 (1934), which was declared unconstitutional in *A. L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁵¹ *American Banana Co. v. United Fruit Co.* (supra n. 15).

⁵² *Garvey*, Antitrust Improvements Act 7f.

⁵³ *United States v. Aluminum Co. of America* (supra n. 16).

⁵⁴ Wilson Tariff Act, ch. 349, §§73–77, 28 Stat. 570 (1894), 15 U.S.C. §§8–11.

⁵⁵ Export Trade Act, ch. 50, 40 Stat. 516 (1918), 15 U.S.C. §§61–65.

⁵⁶ Shipping Act, ch. 451, 39 Stat. 728 (1916), 46 U.S.C. §§801–842.

⁵⁷ *Spero* 26.

⁵⁸ *Spero* 26f.

⁵⁹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

⁶⁰ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

international cartels and that it would not seriously consider the exigencies of international commerce as justifying such conduct⁶¹. Largely for economic reasons, the Webb-Pomerene exemption became insignificant⁶², and the Shipping Act, as amended in 1961⁶³, seriously limited the potential for anticompetitive abuses by ocean shipping conferences⁶⁴.

In the post-War environment, the United States pursued an expansive international antitrust policy on several fronts. The Allies, believing that cartels had played a major role in the growth of the totalitarian regimes that led the world to war, were willing to impose favored economic policies on defeated lands⁶⁵. The Justice Department was also determined to enforce vigorously the antitrust laws against international cartels⁶⁶. The *Alcoa*⁶⁷ decision's expansive jurisdictional standard based on "effects" made aggressive enforcement possible and the government demonstrated its resolve to dismantle cartels⁶⁸.

This expansive approach to antitrust enforcement had a natural impact on consumers and producers of other nations. The American economy was dominant in the non-Socialist World and participation in that vital economic market required, by and large, compliance with American competition policy. Moreover, American firms engaging in business abroad were generally unwilling to participate in local cartel activities for fear of potential antitrust liability in the United States⁶⁹. Competition was at times, therefore, injected into economies that were domestically open to cartelization. Consumers in other countries received both the benefits of enhanced competition and the right to claim treble damages under the Clayton Act for injuries resulting from an antitrust violation⁷⁰. Both the restrictions and rights of the antitrust laws were thus applied to American foreign commerce.

The extraterritorial enforcement of United States' antitrust laws has, of course, not been universally welcomed. Some nations consider that such activities tread on their sovereignty⁷¹, and American and foreign businessmen alike often claim they have been treated unfairly when made liable for activities that are legal in the countries where they occurred. American antitrust law has recognized the partial validity of these claims and tradition-

⁶¹ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

⁶² J. Ongman, *Is Somebody Crying "Wolf"?*, An Assessment of Whether Antitrust Impedes Export Trade: NW.J. Int. L. Bus. 1 (1979) 163–218 (193–202).

⁶³ Amendment of 1961, Pub. L. 87–254, 75 Stat. 522 (1961).

⁶⁴ *Garvey*, Regulatory Reform 16–19.

⁶⁵ *Rahl* 247.

⁶⁶ *Fugate* § 1.2; *Kronstein* 448f.

⁶⁷ *United States v. Aluminum Co. of America* (supra n. 16).

⁶⁸ *Fugate* § 1.2.

⁶⁹ *Rahl* 248.

⁷⁰ *Pfizer Inc. v. Government of India*, 434 U.S. 308, 313–315 (1978).

⁷¹ *Atwood/Brewster I* §§ 4.06–4.13.

ally employed three related doctrines to protect the sovereignty of other nations and to address the fairness concerns of private businesses. First, foreign sovereign immunity provides extensive protection in suits against foreign states for their non-commercial activities⁷². Second, the act of state doctrine precludes American courts from rendering a judgment in a private suit when the decision necessarily questions the wisdom or propriety of the acts of a foreign sovereign⁷³. Finally, the doctrine of foreign government compulsion protects private parties which have acted within a foreign state in a manner compelled by that state's government⁷⁴. In combination, these three doctrines drew the line – a blurry line to be sure – between activities having effects on United States' commerce requisite to successful prosecution under American antitrust law and those that are beyond the reach of that law.

V. Changing American Perceptions

The internationalist spirit that followed World War II lasted for several decades. Throughout this period the United States, through persuasion, agreement, and the application of its antitrust laws fostered freer international trade. Several factors in recent years have, however, produced a more parochial outlook in the United States.

1. Foreign Competition

In the 1970s, American producers began to face increasingly effective foreign competition in foreign and domestic markets that were once secure⁷⁵. Established American industries, communities, and workers suffered as a result of new international competitive realities. Not surprisingly, important

⁷² In 1976, the United States adopted the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (1976), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611, which does not exempt commercial activities from suit; see *H. Strebel*, *Staatenimmunität, Die Europaratskonvention und die neuen Gesetze der Vereinigten Staaten und Großbritanniens*: *RabelsZ* 44 (1980) 66-98 (comparing European Convention with British and American statutes); *Th. Hill*, *Sovereign Immunity and the Act of State Doctrine, Theory and Policy in United States Law*: *ibid.* 46 (1982) 118-164.

⁷³ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), affirmed: 461 F.2d 1261 (9th Cir.), certiorari denied: 409 U.S. 950 (1972); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), certiorari denied: 434 U.S. 984 (1977); see *Hill and Strebel* 71-73 (*supra* n. 72); *P. Hay*, *International Versus Interstate Conflicts Law in the United States*: *RabelsZ* 35 (1971) 429-495 (478-485).

⁷⁴ *Atwood/Brewster I* §§ 8.14-8.23.

⁷⁵ *Garvey*, *Antitrust Improvements Act 3*.

American political constituencies have sought protection, often claiming they were victims of unfair competitive practices. The political pressure to interfere with freely operating international markets became extreme as the United States experienced extraordinary trade imbalances over the past several years⁷⁶. In fact, the United States is now the greatest nation-debtor in history⁷⁷. Moreover, economic predictions that a weaker dollar would solve the problem of trade deficits have proven to be false; and, similarly, experience has shown that American producers cannot, as some had expected, dominate markets for high-technology products⁷⁸. In short, America's international economic problems are acute and the solutions are evasive.

The search for ready answers to complex problems involving American competitiveness and trade flows has often focused on antitrust⁷⁹. Some in the business community have claimed that the antitrust laws have impaired their ability to enter into efficient combinations needed to penetrate foreign markets⁸⁰. Neither legal analysis nor factual evidence support such claims, but they have credibility in the halls of Congress⁸¹. In this environment, it is not surprising that American policy-makers and legislators have largely abandoned a sweeping vision of international growth and development through free markets, as well as the resolve to extend the benefits and restrictions of the antitrust laws to foreign producers and consumers. The United States' commitment to competition has sagged.

2. The Influence of the "Chicago School"

The successful assault by the "Chicago School" of Neo-Classical economists on substantive antitrust law has also had substantial impact on the perceived nature of the laws and their appropriate goals⁸². In the process of

⁷⁶ The United States' current account deficit reached a record of 140.57 billion Dollars in 1986; *International Herald Tribune*, March 18, 1987, p. 1, col. 1.

⁷⁷ *International Herald Tribune* loc. cit. (supra n. 76).

⁷⁸ S. Auerbach, *A New Economic Role for U.S.*: *International Herald Tribune*, April 17, 1987, p. 1, col. 2.

⁷⁹ *Garvey*, *Antitrust Improvements Act* 3f.

⁸⁰ *Reinsch* 55f.

⁸¹ *Ongman* (supra n. 62) 216f.

⁸² The term "Chicago School" lacks precise meaning. It is a body of policies and assumptions developed by economic theoreticians at the University of Chicago over several decades and reflected in the approach to antitrust law originally adopted by certain legal scholars at that university. Advocates of both the general economic premises and of the specifically legal aspects of them are found at universities throughout the United States, among the judiciary, and in key government positions with responsibility for antitrust enforcement. At some risk of oversimplification it can be stated that the legal adherents of the "Chicago School" believe that antitrust should properly be concerned with classic cartel activities (agreements between competitors to limit output and raise prices) and horizontal

demonstrating some of the laws' more serious flaws, proponents of reform stripped the antitrust laws of the special legal status achieved when the federal courts viewed them as a "charter of freedom"⁸³ that embodied goals other than economic efficiency (see *supra*, IV).

Chicago school analysts focus solely on the efficiency implications of business activities, that is, on their ability to increase output or lower costs. Their economic model does not account for the political or social benefits believed to be derived from a less productively efficient industrial order, nor does it recognize that innovation prompted by competition among numerous independent businesses may ultimately produce a more efficient order than one committed to the immediate efficiencies of a concentrated and restrained industry. Their approach to the antitrust laws has, however, won widespread support. Even the Supreme Court has decided that the political and social content of the antitrust laws is too amorphous to significantly influence antitrust jurisprudence⁸⁴. Antitrust has been reduced to an instrument of economic efficiency and, under the prevailing economic view, it has failed badly in this purpose. Not surprisingly, it has now become respectable to challenge vigorously the basic antitrust laws⁸⁵.

The now dominant economic approach to antitrust policy also measures economic performance by its ability to satisfy consumer demands. The impact of competitive conduct on business rivals, workers and communities is, therefore, generally irrelevant to modern antitrust analysis. Judge Bork, for example, characterized antitrust law as a "consumer welfare prescription"⁸⁶ and the Supreme Court has adopted that characterization⁸⁷. This emphasis on consumer satisfaction has impact on the United States' resolve to apply its antitrust laws extraterritorially, at least to the extent that they grant the protection of American law to foreigners.

Earlier formulations of antitrust policy had placed greater emphasis on the value of the processes of competition. Neither market structures nor

mergers that achieve very high levels of industrial concentration. Other restraints that may traditionally be subject to antitrust scrutiny are, the Chicagoans believe, generally either efficiency-enhancing or subject to market-generated discipline. Classic works of the "Chicago School" include *R. Bork, The Antitrust Paradox* (1978); *R. Posner, Economic Analysis of Law*² (1977).

⁸³ *Appalachian Coals, Inc. v. United States* (*supra* n. 60) 359.

⁸⁴ See *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n. 21 (1977).

⁸⁵ Although the antitrust laws have gone through periods of lax enforcement, the current Administration is the first to endorse legislative proposals that would significantly alter and limit antitrust enforcement; see, in a paper read at the Conference on International Trade and Antitrust Laws, Nihon University, Tokyo, Nov. 6, 1986, *W. Grimes, Economic Theory and a Century of American Antitrust Policy: Nihon-Daigaku Hikakuhō* [Nihon U. Comp. L. Rev. (Journal)] 3 (1986) 71-90 (75).

⁸⁶ *Bork* (*supra* n. 82) 66.

⁸⁷ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

behavior should be allowed to impair the processes of competition. An environment that supports competition stimulates innovation and efficient marketing and production techniques. The intangible, and immeasurable benefits of constant competitive tension are valued more highly than the observable efficiency gains that sometimes accompany the elimination of competition⁸⁸. The difference between the consumer welfare approach and the competitive processes approach is largely a matter of emphasis. The competitive processes approach is more concerned with structure and less sensitive to specific efficiency claims, but both are ultimately intended to foster efficiency and, naturally, to benefit consumers. The competitive processes approach, however, better accommodates the political and social aspirations of the antitrust laws.

The emphasis on consumers, as opposed to the assumed benefits of competition itself, together with the rejection of political or social purposes for antitrust laws, reduces the will to impose the laws' restraints in certain international contexts. It perhaps removes the justification for certain extraterritorial applications. The United States has a clear interest in promoting the benefits of an international competitive order. Expanded international wealth, more stable political and economic regimes, and the efficiency born of sharp competition, all benefit the United States and its citizens. Politically, it is difficult, however, to justify the extraterritorial application of American law solely to protect foreign consumers, particularly when the direct and immediate effect may be to deny United States' producers the potential profits of monopoly.

3. Foreign Hostility

Various foreign governments have taken measures in recent years to thwart the successful prosecution of private antitrust suits against their nationals. Foreign hostility is, by and large, directed at American discovery procedures and the penal aspects of a multiple damages award in private suits⁸⁹. Legislative efforts abroad, therefore, have been intended to "block" discovery and execution of a treble damage judgment⁹⁰, or to provide for the

⁸⁸ See *E. Fox*, Modernization of Antitrust, A New Equilibrium: Cornell L. Rev. 66 (1980/81) 1140–1192 (1142 f.); *United States v. Aluminum Co. of America* (supra n. 16) 427; see also *E. Hoppmann*, Volkswirtschaftliche und wirtschaftspolitische Bedeutung des Kartell- und Monopolrechts, in: *E. Hoppmann/E.-J. Mestmäcker*, Normenzwecke und Systemfunktionen im Recht der Wettbewerbsbeschränkungen (1974) 5–19 (Walter Eucken Institut, Vorträge und Aufsätze, 50).

⁸⁹ *Atwood/Brewster I* §§ 4.09 f.

⁹⁰ See, e. g., Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cwth.) (No. 3 of 1984) (Australia); Protection of Trading Interests Act 1980 (c. 11) (United Kingdom);

recapture, in domestic courts, of all or part of treble damage judgments executed in the United States by so-called "clawback" statutes⁹¹.

Two significant antitrust proceedings in recent years have prompted some strong and well publicized anti-antitrust rhetoric from America's trading partners:

In the *North Atlantic Conference* cases of the late 1970s, a federal grand jury indicted several domestic and foreign shipping lines engaged in cartel activities in the North Atlantic trades⁹². Ocean Shipping cartels, known as "conferences", have enjoyed a qualified antitrust exemption since 1916 (see *infra*, VI 4). However, for immunity to attach, the specific conduct had to be identified in an agreement filed with, and approved by, the Federal Maritime Commission (FMC)⁹³. The North Atlantic liner firms were alleged to have fixed rates, pursuant to agreements never filed with the FMC, and to have otherwise secretly agreed to engage in conduct that violated specific prohibitions of the Shipping Act. Despite the egregious nature of the alleged violations, the liner firms expressed dismay when they were prosecuted, and the governments of the foreign carriers objected strenuously to the imposition of antitrust penalties on their national lines⁹⁴.

The second case was the *Laker* case in the 1980s. The civil suit commenced by Sir Freddie Laker against several American and European airlines alleging they had destroyed Laker's discount transatlantic airline prompted an occasionally sharp exchange between English and American courts. British judicial and executive orders were issued compelling Laker and others to refrain from prosecuting the American suit and from complying with discovery demands⁹⁵. For its part, the American court with jurisdiction over the case refused to honor the anti-suit injunction and ordered the parties to stop further efforts to have foreign jurisdictions interfere with the litigation⁹⁶. The House of Lords eventually held that the British carriers were subject to the American antitrust laws for conduct within the territorial jurisdiction of the United States and that only an American court could determine the merits of the claim⁹⁷.

Foreign Extraterritorial Measures Act (S.C. 1985, c. 49) (Canada); and for a general discussion of various "blocking statutes", see *Atwood/Brewster* I § 4.17.

⁹¹ E. g., Australia's Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cwth.) and the Canadian Foreign Extraterritorial Measures Act (*supra* n. 90).

⁹² *United States v. Atlantic Container Line*, Crim. No. 79-00271 (D.D.C., filed June 1, 1979).

⁹³ *United States v. American Union Transport*, 327 U.S. 437, 445-447 (1946).

⁹⁴ *Atwood/Brewster* I § 3.26.

⁹⁵ "House of Lords Frees Laker to Proceed with U.S. Antitrust Suit" [Article]: *Antitrust and Trade Reg. Rep.* 47 (1984) 175-176.

⁹⁶ *Laker Airways Limited v. Pan American World Airways*, 559 F. Supp. 1124 (D.D.C. 1983).

⁹⁷ *British Airways v. Laker Airways*, [1985] A.C. 85.

Both the *Laker* and the *North Atlantic Conference* cases involved industries that are international in scope and nature, and which possess the unique economic characteristics of transportation common carriers. Historically, such industries have created government sanctioned cartels in order to establish rates and conditions of service⁹⁸. The adverse reactions of the parties to potential antitrust liability, therefore, as well as their governments, is somewhat understandable. Their outcry, however, fed the perception in the United States that the American commitment to competition is generally not welcome beyond its borders.

VI. Modern Legislative Developments

The factors identified above – the search for simple solutions to America's sagging international competitiveness; the perception that the United States' antitrust policy is widely resented abroad; and the ascendancy of a narrow, purely economic, consumer-oriented model – laid the foundation for a notable legislative withdrawal from the expansive concept of antitrust law as an instrument of international economic development. Legislative proposals to adjust the international scope of the antitrust laws demanded increased congressional attention at the beginning of the current decade⁹⁹. In 1982, this effort came to fruition with the enactment of three laws: the Foreign Sovereign Antitrust Recoveries Act¹⁰⁰, the Foreign Trade Antitrust Improvements Act¹⁰¹, and the Export Trading Company Act¹⁰². In 1984 Congress also enacted the Shipping Act¹⁰³, and it continues to consider other proposals to adjust the international reach of the antitrust laws.

⁹⁸ See *B. Cheng*, *The Law of International Air Transport* (1962) 246–252; *W. Koffler*, *IATA – Its Legal Structure, A Critical Review*: *J. Air L. Com.* 32 (1966) 222–235; *R. Agman*, *Competition, Rationalization, and United States Shipping Policy*: *J. Marit. L. Com.* 8 (1976/77) 1–50 (9–29).

⁹⁹ See, e. g., *Export Trading Company Act of 1981*, S. 734, 97th Cong., 1st Sess. (1981); *Foreign Trade Antitrust Improvements Act of 1981*, H.R. 5235, 97th Cong., 1st Sess. (1981); *Reinsch* 47.

¹⁰⁰ Act of Dec. 29, 1982, Pub. L. No. 97–393, 96 Stat. 1964 (1982), codified at 15 U.S.C. § 15(b).

¹⁰¹ *Foreign Trade Antitrust Improvements Act of 1982*, Pub. L. No. 97–290, Title IV, 96 Stat. 1233 (1982), codified at 15 U.S.C. §§ 6a, 45(a) = *Int. Leg. Mat.* 22 (1983) 363 (370).

¹⁰² *Export Trading Company Act of 1982*, Pub. L. No. 97–290, Titles I and III, 96 Stat. 1233 (1982), codified at 15 U.S.C. §§ 4011–4021 = *Int. Leg. Mat.* (supra n. 101) 363 and 367.

¹⁰³ *Shipping Act of 1984*, Pub. L. No. 98–237, 98 Stat. 67 (1984), codified at 46 U.S.C. §§ 1709–1719.

1. Foreign Sovereign Antitrust Recoveries Act of 1982

The Foreign Sovereign Antitrust Recoveries Act of 1982¹⁰⁴ was a direct response to the Supreme Court's decision of 1978 in *Pfizer v. Government of India*¹⁰⁵. In *Pfizer*, the Court held that foreign governments are "persons" within the definition of sec. 4 of the Clayton Act. As persons, they are entitled to sue and recover treble damages for injuries suffered by reason of a violation of the antitrust laws. The fact that they are foreign, and sovereign states, does not, the Court held, justify a different conclusion.

The Supreme Court identified several reasons for its decision in *Pfizer*. Suits by foreign entities, private or sovereign, foster the enforcement goal of the private antitrust remedy; they "deter violators and deprive them of 'the fruits of their illegality'"¹⁰⁶. American consumers are, of course, indirect beneficiaries of such enforcement activities. The Court noted, however, that the compensatory purpose of the law attaches to foreign as well as domestic victims¹⁰⁷. Finally, the majority opinion relied on the general rule that foreign nations are, as a matter of comity, entitled to the same access to civil courts as are domestic corporations and individuals¹⁰⁸.

Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, has identified two aspects of the *Pfizer* decision that prompted a legislative response¹⁰⁹. First, treble damages were available for foreign governments while the government of the United States was under statutory law entitled only to actual damages¹¹⁰; and, second, nations that did not provide the United States with a remedy for similar acts were granted a right of action despite the lack of reciprocity.

As Congress considered various so-called "*Pfizer* bills", proposed reciprocity requirements became the major point of contention. In the Ninety-Seventh Congress, the Senate passed a bill with a reciprocity provision¹¹¹. The House of Representatives, however, would not agree to enact a law with that requirement. The House Judiciary Committee determined that a reciprocity requirement would be an extraordinary international provision and extremely difficult to administer¹¹². The House prevailed in this dispute. The

¹⁰⁴ *Supra* n. 100.

¹⁰⁵ *Pfizer Inc. v. Government of India* (*supra* n. 70).

¹⁰⁶ *Pfizer Inc. v. Government of India* (*supra* n. 70) 314.

¹⁰⁷ *Pfizer Inc. v. Government of India* (*supra* n. 70) 315.

¹⁰⁸ *Pfizer Inc. v. Government of India* (*supra* n. 70) 318 f.

¹⁰⁹ "Senate Passes Legislation Restricting Foreign Nations' Right to Recover Damages" [Article]: Antitrust and Trade Reg. Rep. 1981 No. 1023, pp. A-4 to A-5.

¹¹⁰ Section 4A of the Clayton Act (*supra* n. 19), 15 U.S.C. § 15a, provides the United States' government with actual damages for injuries suffered by reason of an antitrust violation.

¹¹¹ "Senate Passes Legislation . . ." (*supra* n. 109).

¹¹² See House Committee on the Judiciary, "Report on the Foreign Sovereign Antitrust

law as enacted limits the recovery of foreign sovereigns to actual damages, but does not require the injured state to provide the United States government with a similar right of recovery. If, however, a foreign government is acting in a commercial capacity that would deny it immunity under the United States' Foreign Sovereign Immunity Act, it is under the new law still (as under *Pfizer*) entitled to sue for treble damages¹¹³.

Although the Act's withdrawal of the protection of the antitrust laws is limited, the impact may be substantial in certain contexts. The law's apparent presumption that foreign sovereigns are, like the federal government of the United States, in a better position than private parties to detect and prosecute antitrust violations, or to take other selfhelp measures, is only partially true. The governments of developing nations, which may assume significant responsibility for the purchase of goods essential for the welfare of their citizens, such as the antibiotics at issue in the *Pfizer* case, may lack the resources to police agreements for violations of the United States' antitrust law. Moreover, in the face of an international cartel controlling substantial flows of an essential good, some governments may lack the will or power to protect themselves from monopolistic abuse¹¹⁴. In short, although countries with vital, diverse economies and a legal commitment to competition, such as the Federal Republic of Germany, are unlikely to be effected by the limitation of the American private antitrust remedy, developing nations may be more vulnerable to abuse.

2. Foreign Trade Antitrust Improvements Act of 1982

The Foreign Trade Antitrust Improvements Act of 1982¹¹⁵ represents the most comprehensive adjustment to date of the international reach of American antitrust law. In response to persistent claims that the antitrust laws are perceived to impair efficient organizational structures for United States export commerce, and in the face of legislative efforts to establish a complex, bureaucratic immunization process for export trade associations, the Chairman of the Judiciary Committee of the House of Representatives, Peter Rodino, introduced a bill with the simple objective of clarifying the jurisdic-

Recoveries Act", H.R. No. 97-476, 97th Cong., 2d Sess. (1982), repr. in: "House Judiciary Committee Report on Damage Recoveries by Foreign Nations": Antitrust and Trade Reg. Rep. 42 (1982) 797-800.

¹¹³ Foreign Sovereign Antitrust Recoveries Act (supra n. 100).

¹¹⁴ See "Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices", UNCTAD-Doc. TD/B/600, TD/B/C.2/166 and TD/B/C.2/AC.5/6 (1976) paras. 7-13, repr. in: Anti-Trust and Restrictive Business Practices I, Booklet 6, pp. 289-291.

¹¹⁵ Supra n. 101.

tional reach of the antitrust laws¹¹⁶. The bill, as introduced would have established that the antitrust laws apply only to foreign conduct having a “direct and substantial” effect on commerce within the United States or excluding American firms from participation in foreign commerce¹¹⁷. As ultimately enacted, the law contains a more complex formulation, as sec. 402 illustrates:

Sections 1 to 7 of 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 effect –
 - (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, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States¹¹⁸.

Section 5 of the Federal Trade Commission Act, which has been interpreted to prohibit trade restraints that violate the law or spirit of the Sherman Act¹¹⁹, was similarly amended¹²⁰. Surprisingly, Congress did not adopt a similar amendment to sec. 7 of the Clayton Act, which proscribes certain joint ventures based on their probable anticompetitive effects¹²¹.

The Foreign Trade Antitrust Improvements Act essentially codified existing enforcement policy¹²². It is consistent with the majority of relevant case law and was seen as necessary only to eliminate doubts generated by a few judicial decisions implying that a de-minimis effect would be sufficient¹²³. This Act also represents only a partial withdrawal of the protection afforded foreign victims of antitrust violations. Illegal activity having the proscribed effect on domestic or import commerce remains subject to suit by all injured

¹¹⁶ Foreign Trade Antitrust Improvements Act of 1981, H.R. 2326, 97th Cong., 1st Sess. (1981); see remarks of Representatives Rodino and McClory, 127 Cong. Rec. H 779 (daily ed. March 4, 1981).

¹¹⁷ Foreign Trade Antitrust Improvements Act of 1981 (supra n. 116).

¹¹⁸ Foreign Trade Antitrust Improvements Act of 1982 (supra n. 101) sec. 402.

¹¹⁹ See *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

¹²⁰ Federal Trade Commission Act of 1914, 38 Stat. 717 (codified at 15 U.S.C. §§ 41–51) sec. 5 as amended by the Foreign Trade Antitrust Improvements Act of 1982 (supra n. 101) sec. 403, codified at 15 U.S.C. § 45(a).

¹²¹ *Garvey*, Exports, Banking and Antitrust 834.

¹²² *Atwood/Brewster*, 1986 Cumulative Supplement § 6.21B.

¹²³ See *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977); *Dominicus Americana Bohio v. Gulf & Western Industries*, 473 F. Supp. 680 (S.D.N.Y. 1979).

parties, foreign and domestic¹²⁴. When an action, however, is based solely on the adverse impact on American export firms, any recovery is limited to the affected exporters¹²⁵.

Although the Act does not, in fact, significantly alter American competition law in so far as it relates to foreign commerce, the idea that the antitrust laws established rights for, as well as imposed obligations on, foreign entities has again suffered. Foreign consumers and producers are fully subject to the antitrust laws for conduct having the requisite impact on United States' commerce; they are, however, entitled to the protection of the American law only when their private actions help deter violations that have a direct, substantial and reasonably foreseeable anti-competitive effect on American consumers and producers.

3. Export Trading Company Act of 1982

Title III (secs. 307–312) of the Export Trading Company Act of 1982¹²⁶ established a certification procedure, allowing the Secretary of Commerce, with the concurrence of the Attorney General, to grant qualified immunity to export associations. Section 303(a) of the Act provides that applicants shall be certified to engage in export activities if such conduct will:

- (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,
- (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,
- (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and
- (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant¹²⁷.

¹²⁴ Courts interpreting the new law have been reluctant to find the requisite adverse effect on United States commerce when the immediate effects of alleged violations occur abroad, see *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102 (S.D.N.Y. 1984) (allegations of “spillover” price-enhancing effects in the United States through an international conspiracy to control sales of a specific antibiotic met the requisite domestic effects standard were rejected by the court); *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920 (E.D. N.Y. 1985); *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.), Inc.*, 629 F. Supp. 864 (S.D.N.Y. 1986).

¹²⁵ Foreign Trade Antitrust Improvements Act of 1982 (supra n. 100), codified at 15 U.S.C. § 6a.

¹²⁶ Supra n. 102.

¹²⁷ Export Trading Company Act of 1982 (supra n. 102) sec. 303(a), codified at 15 U.S.C. § 4013(a).

Certification protects the holder from criminal prosecution under the antitrust laws and limits any recovery in civil suits to actual damages¹²⁸.

As with the other laws enacted in 1982 (see *supra*, 1 and 2), the Trading Company Act does not represent a major change in American law; export associations have enjoyed a qualified exemption since 1918¹²⁹. It is also not unusual for export cartels to operate free of domestic competition policies¹³⁰. The Act, however, does provide additional evidence that the United States is increasingly reluctant to extend the benefits of the antitrust laws beyond its own nationals, and, perhaps more disturbingly, it represents a significant commitment of the United States to the supposed benefits of cartels.

The Webb-Pomerene Act of 1918, which has survived despite the enactment of the Trading Company Act, provides export associations with antitrust immunity, provided their activities do not have certain specified anti-competitive effects¹³¹. The government of the United States, however, plays a limited role under the Webb-Pomerene Act. Associations seeking the protection of the law must file a notice with the Federal Trade Commission (FTC), which may investigate when it has reason to believe that an association is not in compliance with the Act, and may ask the Justice Department to prosecute activities it regards as illegal¹³². The Government, however, does not encourage or approve export associations under the 1918 Act; it is essentially a neutral law-enforcer. By comparison, the Export Trading Company Act places primary antitrust oversight responsibility in an agency charged with promoting American business. The Department of Commerce must both promote and certify trading companies¹³³. Not surprisingly, it has demonstrated an insensitivity to the benefits of antitrust policy in the past¹³⁴, and there is already evidence that this insensitivity is being reflected in the certification process¹³⁵.

¹²⁸ Export Trading Company Act of 1982 (*supra* n. 102) sec. 306, codified at 15 U.S.C. § 4016.

¹²⁹ Export Trade Act (*supra* n. 55).

¹³⁰ See *Rahl* 261.

¹³¹ The legislative proposal that evolved into Title III of the Export Trading Company Act (*supra* n. 102) was intended to amend the Webb-Pomerene Act (*supra* n. 55). Concerns of existing Webb-Pomerene associations about the effects on them of the emerging legislation, however, resulted in enactment of an entirely new provision that left the Webb-Pomerene Act intact.

¹³² Webb-Pomerene Act (*supra* n. 55), 15 U.S.C. § 65.

¹³³ Title I of the Export Trading Company Act of 1982 (*supra* n. 102) sec. 104, codified at 15 U.S.C. § 4003, established an "Office of Export Trade" within the Commerce Department. This office is to promote the creation and use of export trading companies; *Reinsch* 48 f.

¹³⁴ *R. Folsom*, Antitrust Enforcement Under the Secretaries of Agriculture and Commerce: *Colum. L. Rev.* 80 (1980) 1623-1643 (1634).

¹³⁵ See *Horizons International, Inc. v. Baldrige*, 624 F. Supp. 1560, 1575 (E.D. Penn. 1986), reversed, 811 F. 2d 154 (3d Cir. 1987).

The policy judgments implicit in the determination to shift government from a neutral enforcement role to that of an active promoter of trade associations may prove detrimental to both domestic and international economic aspirations. This is so at least to the extent that such associations embody the characteristics of traditional cartels, such as the NRA sponsored associations of the 1930s¹³⁶. United States' producers, for example, may be diverted from the productive, efficiency-enhancing activities that are vital to a domestic and internationally competitive economy. Forming government-sponsored associations that need not compete will often be easier than assuming the risks and costs of innovation. Moreover, the Trading Company Act is based largely on certain assumptions: that efficiencies will necessarily flow from larger size; that power achieved through internal growth or combination will be directed solely at foreign consumers and competitors; and that the government can, in combination with industry, organize exporters and export intermediaries better than competitive market forces¹³⁷. Each of these assumptions is at best suspect under both economic theory and practical experience.

Internationally, the Trading Company Act erodes further the role that American antitrust law has played as an instrument of progressive international economic policy. Rather than promoting the allocation of international resources through the non-political actions of markets, American antitrust policy has assumed the appearance of a protectionist measure: forcing its competitive norms on all who do business in the United States, while tolerating, sometimes even promoting, anticompetitive combinations when the impact will be felt abroad.

4. Shipping Act of 1984

Two years after enacting the 1982 Acts (*supra*, 1–3), the Congress adopted the Shipping Act of 1984¹³⁸. This Act represents perhaps the most extraordinary American commitment to cartels since the Sherman Act was passed in 1890. After an extensive study of ocean-liner cartels, Congress determined in

¹³⁶ See *supra* n. 50.

¹³⁷ *Garvey, Exports, Banking and Antitrust* 821–827.

¹³⁸ *Supra* n. 103.

1916 that the economics of the ocean liner industry justified the cartelized conference system, but that regulatory oversight was essential to prevent the abuses that had been identified¹³⁹.

In the late 1950s, both the Judiciary Committee and the Committee on Merchant Marine and Fisheries of the House of Representatives conducted investigations of the liner industry¹⁴⁰. The Judiciary Committee found the industry to be essentially free of regulatory oversight and to have continually engaged in abusive practices¹⁴¹. As a result, sec. 15 of the Act of 1916 was amended in 1961¹⁴². Among other things, the amendments required: that conferences be “open”, i. e., that any qualified carrier be allowed to join; that members be free to resign without penalty; and that the members of conferences involved in interconference agreements retain a right of independent action¹⁴³. In combination, these requirements were intended to insure workable competition in the conference system. In addition, the 1961 amendments provided that conference agreements were to be disapproved if “contrary to the public interest”¹⁴⁴.

The “public interest” standard proved to be a major barrier to anticompetitive conference activities. The FMC construed the term “public interest” to embody the principles of the antitrust laws¹⁴⁵. An agreement that contravened antitrust policy, therefore, could be approved only if its proponents “bring forth such facts as would demonstrate that [the proposed activity] was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act”¹⁴⁶. This standard injected an element of competition unwelcome to the ocean shipping industry¹⁴⁷.

In the 1970s, the ocean liner industry was battered by a general slump in

¹³⁹ See House Committee on Merchant Marine and Fisheries, “Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade”, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914) 417 f. This report is popularly called the “Alexander Report” (the name is derived from the Chairman of the Merchant Marine and Fisheries Committee, *Joshua W. Alexander*). For an excellent discussion of the ocean liner industry see *D. Marx*, *International Shipping Cartels, A Study of Industrial Self Regulation by Shipping Conferences* (1953).

¹⁴⁰ *Garvey*, *Regulatory Reform* 14.

¹⁴¹ See Staff of the Antitrust Subcommittee of the Committee on the Judiciary, “Report on the Ocean Freight Industry”, Comm. Print, 87th Cong., 2d Sess. (1962) 391–396.

¹⁴² 1961 Shipping Act Amendments, Pub. L. No. 87–346, §2, 75 Stat. 763 (1961), codified at 46 U.S.C. §814.

¹⁴³ 1961 Shipping Act Amendments (supra n. 142) §2.

¹⁴⁴ 1961 Shipping Act Amendments (supra n. 142) §2.

¹⁴⁵ *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27, 33–35 (1966), affirmed sub. nom. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Garvey*, *Regulatory Reform* 15 f.

¹⁴⁶ *Investigation of Passenger Steamship Conferences Regarding Travel Agents* (supra n. 145) 45.

¹⁴⁷ See *Garvey*, *Regulatory Reform* 16–19.

international commerce and by rapidly expanding capacity resulting largely from the advent of container ships¹⁴⁸. The disequilibrium between supply and demand prompted aggressive competition from within and without the conferences, and the industry experienced many failures¹⁴⁹. The American-flag liner firms claimed they were at a particular disadvantage because anti-trust policy was applied to them while their foreign competitors were not so restricted¹⁵⁰.

There was some belief in Congress that the liner industry suffered substantially from the qualified application of the antitrust laws to conference activities¹⁵¹. The Shipping Act of 1984 was intended to remove all doubts, essentially freeing the liner industry from all antitrust exposure, even for acts that are illegal under the Shipping Act¹⁵². It also stripped the FMC of its authority to prohibit tariff agreements containing unreasonable rates, although the agency must enforce such tariffs¹⁵³. The new law, therefore, committed the United States more than ever before to a self-regulated, cartelized ocean liner system. In the face of an economically distressed domestic industry, the legislature opted for an NRA-type solution: cartels would rationalize the industry and hopefully save less efficient United States carriers.

It remains to be seen whether the new law will enable liner conferences to save themselves, or their members. Liner firms differ substantially in their levels of efficiency¹⁵⁴, which makes it difficult to reach and enforce agreements affecting rates and profit-levels. The new law has also authorized the use of "service contracts"¹⁵⁵, i. e., agreements with specific customers to provide service at non-tariff rates, which will prompt competition for the business of large, powerful shippers. Moreover, smaller shippers have combined to bargain with liner firms, and the Justice Department has indicated

¹⁴⁸ House Committee on Merchant Marine and Fisheries, "Report on International Ocean Commerce Transportation", H.R. No. 53, Part 1, 98th Cong., 1st Sess. (1983) 6 f.; Garvey, Regulatory Reform 20 f.

¹⁴⁹ Agman (supra n. 98) 27–29; Garvey, Regulatory Reform 9 n. 65.

¹⁵⁰ "Oversight Hearings on Maritime Antitrust, Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary", 97th Cong., 2d Sess. (1982) 133 f. (statement of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators).

¹⁵¹ Senate Committee on Commerce, Science, and Transportation, "Report on the Shipping Act of 1983", S. No. 3, 98th Cong., 1st Sess. (1983) 7–9.

¹⁵² Shipping Act of 1984 (supra n. 103) sec. 7, 46 U.S.C. § 1706(a)(2).

¹⁵³ Section 817(b)(5) of the 1916 Shipping Act (supra n. 56), as amended in 1961 (supra n. 142) required the FMC to disapprove rates that are "so unreasonably high or low as to be detrimental to the commerce of the United States", 46 U.S.C. § 817(b). This section was repealed by the Shipping Act of 1984 (supra n. 103) § 20(a).

¹⁵⁴ Garvey, Regulatory Reform 21.

¹⁵⁵ Shipping Act of 1984 (supra n. 103) sec. 8(c), codified at 46 U.S.C. § 1707(c).

that it does not intend to challenge such organizations¹⁵⁶. The fact remains, however, that the statutory law imposes very little restraint on the carriers' ability to organize cartels and jointly to establish the rates and conditions of service applicable to liner service in American trades. In addition, their agreements are enforced by an agency of the United States government.

Unlike the 1982 enactments (*supra*, 1–3), the Ocean Shipping Act of 1984 demonstrates little regard for American consumers. The conferences, made up largely of non-American carriers, may exact high rates from domestic producers wishing to ship goods abroad, as well as from those sending products for sale in the United States. The law, therefore, lacks the protectionist quality of other recent enactments. It does, however, represent a disturbing commitment to international cartels in an area where United States policy once pressed for reform.

5. Recent Legislative Proposals

The so-called "competitiveness issue" continues to occupy a prominent place in the American political agenda¹⁵⁷, and the antitrust laws continue to be viewed as partially responsible for the inability of many American producers to compete effectively in international markets. Numerous legislative proposals have been introduced to deal with the perceived problem. I will discuss only one bill that, I believe, demonstrates how seriously the American belief in the antitrust laws as instruments of domestic and foreign economic policy has eroded.

The Reagan Administration has recently proposed a package of legislative reforms, the so-called Trade, Employment, and Productivity Act of 1987, which includes six separate amendments to the antitrust laws¹⁵⁸. These amendments would: first, limit the application of the antitrust laws in the case of licenses for the use of intellectual property¹⁵⁹; secondly, establish claim reduction in private antitrust suits¹⁶⁰, i. e., the reduction of the judgment debt by an amount proportional to that portion of the total damage which could be attributed to a defendant who reaches a settlement with the plaintiffs before

¹⁵⁶ "Division Won't Question Shippers' Proposal to Collectively Negotiate Contracts, Rates" [News and Comment]: *Antitrust and Trade Reg. Rep.* 51 (1986) 96.

¹⁵⁷ *D. Broder*, *Washington's New Code Word*, "Competitiveness" Is the Undeclared Issue for 1988 Race: *International Herald Tribune*, April 18/19, 1987, p. 1, col. 5.

¹⁵⁸ "Trade, Employment, and Productivity Act of 1987", repr. in: "Proposals to Revise Antitrust and Intellectual Property Laws Excerpted from Reagan Administration's 'Trade, Employment, and Productivity Act of 1987'" [Article]: *Antitrust and Trade Reg. Rep.* 52 (1987) 348–352.

¹⁵⁹ "Technology Licensing Under the Antitrust Laws" (sec. 3102), repr. in: "Proposals . . ." (*supra* n. 158) 348.

¹⁶⁰ "Claim Reduction" (sec. 4103), repr. in: "Proposals . . ." (*supra* n. 158) 350.

judgment (irrespective of the actual amount of the settlement); thirdly, limit treble damages in private actions to those suits involving overcharges or underpayments¹⁶¹; fourthly, establish a jurisdictional rule of reason to be applied in suits involving foreign commerce¹⁶²; fifthly, increase the jurisdic-

¹⁶¹ “Treble Damage Reform” (secs. 4112–4114), repr. in: “Proposals . . .” (supra n. 158) 350f.

¹⁶² See

“ Foreign Trade Antitrust Improvements Act of 1987

Sec. 4121. This part may be cited as the ‘Foreign Trade Antitrust Improvements Act of 1987’.

Sec. 4122. Section 7 of the Sherman Act (15 U.S.C. 6a) is amended by –

- (1) inserting ‘(a)’ before ‘This Act’, and
- (2) adding at the end thereof the following new subsection:

‘(b) Whenever a motion to dismiss for lack of subject matter jurisdiction under this section shall be made, the court shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action.’

Sec. 4123. The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding after section 20 the following new section:

‘Sec. 21(a) Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws which involves trade or commerce with a foreign nation, the court shall enter a judgment dismissing the action as to all parties whenever it determines that the exercise of jurisdiction would be unreasonable primarily on the basis of the following factors –

- (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 with 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;

Provided, That nothing in this section shall be construed to authorize the court to consider the effect on the foreign political relations of the United States of any action sought to be dismissed.

(b) Whenever a motion to dismiss on the ground that the exercise of jurisdiction would be unreasonable under this section shall be made, the court shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action.’

Sec. 4124. Section 12 of the Clayton Act (15 U.S.C. 22) is amended by –

- (1) inserting ‘(a)’ before ‘That suit’, and
- (2) adding at the end thereof the following new subsection:

‘(b) The doctrine of *forum non conveniens* shall be applicable in any suit, action, or

tional amounts required under the "interlocking directorate" provisions of sec. 8 of the Clayton Act¹⁶³; and, sixthly, change the standards of sec. 7 of the Clayton Act to make mergers less problematic than under existing law¹⁶⁴.

The nature of the Administration's proposals demonstrates how sweeping the challenge to the basic American antitrust laws has become. The creation, for example, of a right of claim reduction, as well as the provisions relating to interlocking directorates, represent, in my judgment, sound legislative proposals. It is difficult, however, to find a nexus between such changes and the ability of the United States to compete in international markets. The relationship between a jurisdictional rule of reason and American productivity is also not obvious. Viewed as a whole, however, the proposed Act's message is fairly clear: greater industrial concentration through mergers, more private restraints on intellectual property, and less private enforcement of the antitrust laws are expected to enhance American competitiveness.

The jurisdictional rule of reason proposed by the Administration is the only provision that relates directly to the foreign application of the antitrust laws. It would require federal courts to engage in a balancing of interests analysis to determine if the exercise of jurisdiction is reasonable under the circumstances of the case¹⁶⁵. If enacted, this provision may perhaps ease some of the international tension over the extraterritorial application of American antitrust law, by authorizing courts to dismiss cases that would adversely affect significant foreign interests. There is, however, evidence that courts would generally find American interests to be more compelling than those of foreign parties¹⁶⁶. As well, representatives of the American business community have suggested that the proposed rule of reason would justify certain restraints on imports to the United States and that American firms should in fairness be permitted to participate in such conduct without fear of liability¹⁶⁷. There is, in short, some danger that an open-ended jurisdictional test could precipitate a general deterioration in the international application of competi-

proceeding under the antitrust laws that involves trade or commerce with a foreign nation, and nothing contained in this section or any other venue provision applicable to such suits, actions, or proceedings shall be construed to prevent dismissal of such a suit, action, or proceeding on the ground of *forum non conveniens*."

Repr. in: "Proposals . . ." (supra n. 158) 351 f.

¹⁶³ "Interlocking Directorate Act of 1987" (secs. 4131 and 4132), repr. in: "Proposals . . ." (supra n. 158) 352.

¹⁶⁴ "Merger Modernization Act of 1987" (secs. 4141 and 4142), repr. in: "Proposals . . ." (supra n. 158) 352.

¹⁶⁵ See "Foreign Trade Antitrust Improvements Act of 1987" (supra n. 162).

¹⁶⁶ L. Collins, English and Other Reactions to Extraterritorial Application of United States Law, in: *The United States, Transnational Business, and the Law* (supra n. *) 55-64 (60).

¹⁶⁷ "Revised Foreign Trade Antitrust Measure Receives Support From Business Community" [Article]: *Antitrust and Trade Reg. Rep.* 49 (1985) 684-685.

tion laws, exposing American consumers to restrained import markets, without significantly easing tensions over the extraterritorial enforcement of American law.

VII. International Challenge

America's trading partners may initially be relieved by the diminished resolve of the United States to extend the protection of the antitrust laws beyond its borders. They may be particularly satisfied with evolving jurisdictional standards that limit somewhat the protection American consumers have enjoyed against foreign restraints of trade. Careful consideration, however, should provoke a more sober response.

If the benefits of free commerce are to be fostered, the waning American commitment to competitive markets should not signal a general decline in international resolve. On the contrary, the burden of securing an international marketplace largely free of cartels must necessarily fall more heavily on the international community. Three principal tools are available: aggressive enforcement of national competition laws, more extensive cooperative enforcement efforts, and creation of an enforceable international code.

1. National Enforcement Activities

The growing American acceptance of export and ocean shipping cartels may have the effect of inducing a more relaxed international attitude towards such entities. Developed industrial nations may become more tolerant of each others export cartels, and the United States' extraordinary support for the cartelized ocean liner system will surely make it more difficult for other authorities to press for competition in the ocean trades.

The United States has in the past demonstrated some reluctance to prosecute foreign cartels which, if formed by similarly-situated American exporters, would be legal under the Webb-Pomerene Act¹⁶⁸. The more aggressively the United States pursues export promotion policies based on assumptions about the apparently competitive advantages of cartels, the more difficult it will be to attack foreign actors seeking the same supposed advantages through similar conduct directed at the American market. Prosecuting such foreign conduct would subject the United States to the embarrassment of a

¹⁶⁸ Letter of Assistant Attorney General *Donald I. Baker* to Senator Edward M. Kennedy of February 16, 1977, quoted in: *Rahl* 262; see "EEC Denies Hostility to American Export Trade Associations Led to Antitrust Suit" [Article]: *Antitrust and Trade Reg. Rep.* 1981 No. 1043, pp. A-4 to A-6 (A-4f.).

hypocritical competition policy¹⁶⁹ and would also invite foreign retaliation against American export associations.

If other nations responded similarly, refusing to challenge American export cartels to protect their own, then policies of mutual toleration could promote the re-development of international cartels controlling significant flows of commerce even between the major industrialized nations. The net result would be a major shift of economic power to unregulated private interests. Any national benefits derived from export cartels could be entirely offset, if not outweighed, by the harm inflicted by the export monopolies of other nations. International economic growth would predictably diminish as national and multinational combines restricted production to enhance private profits. The undesirable economic effects would likely be experienced by all nations engaging in international trade, but the impact on developing countries would be particularly acute, frustrating efforts to establish viable economies.

If these consequences are to be prevented, exemptions from the national competition laws of developed nations for export cartels should be considered unfortunate manifestations of nationalistic policies which exaggerate the benefits of cartels and ignore their impact on other nations. Non-cartelized trade, however, should continue to be pursued by refusing to tolerate foreign entities that abuse domestic consumers and sellers. Although such enforcement policies might be considered hypocritical, they better serve national and international economic interests than policies of reciprocal toleration.

The decision of the Commission of the European Community to investigate wood pulp dealers (including one of the largest American Webb-Pomerene associations) engaging in restrictive practices involving sales within the EC is encouraging¹⁷⁰. Although the EC-Commission assured representatives of the United States that it would not treat American export associations as per se illegal under EC law, it did insist that those having anticompetitive effects within the Community were subject to prosecution¹⁷¹. The Commission ultimately imposed fines on the wood pulp producers and their associations¹⁷².

If the trend of current United States policy of greater reliance on cartelized industries intended to enhance performance in the international marketplace continues, the resolve of the EC to resist such entities will play a major role if a significant deterioration in the structure of the international economy is to be avoided.

¹⁶⁹ *Ongman* (supra n. 62) 186–188.

¹⁷⁰ See “EEC Denies Hostility . . .” (supra n. 168).

¹⁷¹ *Atwood/Brewster*, 1986 Cumulative Supplement § 13.13.

¹⁷² Commission Decision of 19 December 1984 Relating to a Proceeding Under Article 85 of the EEC Treaty (85/202/EEC, IV/29.725 – *Wood Pulp*), O.J. EC 1985 L 85/1 (14f.).

2. Cooperative Enforcement Efforts

Antitrust laws are no longer a uniquely American phenomenon. Similar laws have been adopted by many, perhaps all, of the world's major trading nations¹⁷³. Although qualified in every nation, the basic commitment to a competitive economic regime is wide-spread among non-Socialist nations. This modern development may partially explain the American withdrawal from aggressive extraterritorial enforcement of its antitrust laws; it surely moderates the adverse potential of the United State's new attitude. It also lays the foundation for an international response to the problems of private monopoly through cooperative enforcement efforts.

The international community has long recognized the benefits of cooperative efforts to eliminate restrictive international trade practices. For example, both the Organization for Economic Cooperation and Development (OECD)¹⁷⁴ and the United Nations Conference on Trade and Development (UNCTAD)¹⁷⁵ have stressed the value of consultation and coordination of enforcement efforts. The United States has also entered into bilateral agreements intended to minimize the tension created by American enforcement activities through notification and conciliation efforts¹⁷⁶. A framework for cooperation, therefore, currently exists.

Unfortunately, many national legislative enactments have been intended to frustrate American enforcement efforts¹⁷⁷, and the consultative processes have often been used to attempt to prevent national enforcement¹⁷⁸. There is, however, evidence that a growing American awareness of foreign sensitivities in this area, demonstrated by a willingness to notify concerned foreign governments about investigations and to explain the basis for the

¹⁷³ See *Fugate* § 15.11.

¹⁷⁴ "Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade", OECD-Doc. C(79)154 (final) (September 25, 1979), repr. in: "Anti-Trust and Restrictive Business Practices", Booklet 6, pp. 129-132.

¹⁷⁵ See "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", UNCTAD-Doc. TD/RBP/CONF/10 (1980), repr. in: Anti-Trust and Restrictive Business Practices I, Booklet 6, pp. 8f.

¹⁷⁶ E. g., "Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters (June 29, 1982, repr. in: Anti-Trust and Restrictive Business Practices I, Booklet 2, pp. 1-8; Canada-United States' "Joint Statement Concerning Cooperation in Anti-Trust Matters" (November 3, 1969), repr. in: *ibid.* pp. 9-13; Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices (signed June 23, 1976, entered into force, September 11, 1976), BGBl. 1976 II 1711, repr. in: *ibid.*, pp. 15-19.

¹⁷⁷ See statutes cited *supra* nn. 90f.

¹⁷⁸ See *Atwood/Brewster*, 1986 Cumulative Supplement § 13.13; "EEC Denies Hostility . . ." (*supra* n. 168).

inquiry, has resulted in a more cooperative foreign posture¹⁷⁹. The existing bilateral agreements on cooperation also call upon non-American parties to respect the United States' interest in the preservation of competitive markets.

For its part, the United States should recognize the strong foreign aversion to private treble-damages actions¹⁸⁰ and to the extensive United States' discovery procedures¹⁸¹. Foreign cooperation would be more likely forthcoming if private suits were limited to compensatory damages and discovery demands more carefully scrutinized than is often the case in purely domestic proceedings¹⁸². On the other hand, the governments of other nations should appreciate the depth of the traditional American commitment to freer markets and the important role that private actions have played as an enforcement mechanism¹⁸³. They should also recognize that the foreign sovereign immunity, act of state, and foreign government compulsion doctrines (supra, IV) provide substantial protection for enterprises that foster national policy.

Effective multinational cooperative enforcement requires a basic understanding that the conduct under investigation is, like piracy, without redeeming value. As long as nation states continue to employ or tolerate national cartels as instruments of economic policy, however, it is unlikely that significant coordinated enforcement will seriously threaten trans-national cartels, at least not those that enhance domestic profit-levels at the expense of foreign consumers. Developmental and second-best economic policies (supra, II 2 and 3) will justify protective efforts. Classic private international cartels, however, should provoke wide-spread multinational cooperation for enforcement. The quinine cartel, for example, found little international sympathy during its prosecution in various jurisdictions¹⁸⁴.

3. Enforceable International Code

The ideal solution is an enforceable international code of conduct. Such codes currently exist, but they lack the force of law¹⁸⁵. To change an international instrument regarding restrictive business practices from an agreement

¹⁷⁹ *Atwood/Brester*, 1986 Cumulative Supplement § 15.02.

¹⁸⁰ See *Atwood/Brewster* II § 14.19.

¹⁸¹ "Restrictive Business Practices" Report by the UNCTAD Secretariat, UNCTAD-Doc. TD/122, in: Proceedings of the United Nations Conference on Trade and Development, Third Session II (1972) 249-252.

¹⁸² See *Garvey*, Study of the Antitrust Treble Damage Remedy, Report of the Committee on the Judiciary, U.S. House of Representatives, Serial No. 8, 98th Cong., 2d Sess. (1984) 39-41.

¹⁸³ *Garvey* (supra n. 182) 1.

¹⁸⁴ See *Fugate* § 4.2.

¹⁸⁵ *J. Kline*, International Codes and Multinational Business (1985) 72-76.

in principle, such as the UNCTAD Code¹⁸⁶, to an enforceable international document, like the competition provisions of the EEC Treaty¹⁸⁷, would require extraordinary political efforts. Participating nations would have to partially surrender sovereignty in the very sensitive area of economic regulation. Moreover, unlike the EEC Treaty, a binding international agreement would have to mediate conflicting interests between developed and developing nations. A comprehensive, enforceable international competition code is, therefore, unlikely to be established in the foreseeable future.

There is, however, a more modest possibility that would respond to the most serious threat of an increasingly parochial application of the United States' antitrust laws: the threat of development afresh of international cartels. Government-sanctioned cartels only occasionally serve legitimate economic interests, but they represent a reality that will not soon be abolished by international accord. Private cartels, however, including international combinations involving cartels permitted under national laws, serve no purpose but private gain. When they achieve and exercise monopoly power, international resources are misallocated, the world's consumers are exploited, and the ability of national political regimes to control domestic economic development is impaired. The international community, therefore, should have the resolve to prohibit such entities.

An enforceable prohibition against private international cartels would surely not eliminate monopoly from the international marketplace. The unilateral practices of multinational corporations, for example, would be beyond the reach of such legal restraints. Government created multinational cartels, such as OPEC, and private restraints sanctioned through bilateral or multilateral agreements would also escape condemnation.

Despite its limitations, an international prohibition against private cartels would serve several important purposes. It would fill the void created by the diminished American resolve to apply its antitrust laws extraterritorially, a policy that once promoted international economic growth and protected foreign buyers. An enforceable international code would also establish that the aversion to collective, private, unregulated monopoly is universal. Surely any temptation to engage in such conduct would be diminished by the existence of a legally enforceable statement of international condemnation. Finally, favorable experience with the enforcement of a clear and reasonable standard may eventually prompt more comprehensive agreements that would lead to the elimination of unjustifiable export and import cartels¹⁸⁸.

¹⁸⁶ "Restrictive Business Practices" (supra n. 175).

¹⁸⁷ Arts. 85 and 86 EEC Treaty.

¹⁸⁸ See *E.-J. Mestmäcker*, *Europäisches Wettbewerbsrecht* (1974) 26 f. (discussing earlier unsuccessful attempts to establish an international regime to control cartels); *Petersmann* (supra n. 4) 494–498.

VIII. Conclusion

The United States' antitrust laws were once a major instrument of international economic policy. America's economic dominance following World War II, its resolve to impose the antitrust laws extraterritorially, and the general acceptance by industrialized Western nations that liberal trade policies were desirable, contributed to the elimination of international cartels that had destabilized the world between the two great Wars. Americans believed that the antitrust laws were largely responsible for the nation's vital domestic economy and that the policies embodied in those laws could promote the economic growth and development of other countries as well. Much of the Western World seemed to have shared that view. They adopted competition laws of their own and there was no international outrage as the Antitrust Division launched its attack on international cartels (*supra*, IV).

The past decade, however, has witnessed significant changes in American perceptions about the value of antitrust policy and its role in the international economic order. Modern antitrust enactments have accordingly demonstrated two disturbing tendencies. First, they have largely withdrawn the benefits of American antitrust laws from foreign markets. American firms are now free to exploit foreign buyers as long as they avoid substantial domestic effects; they may even be encouraged by the government to do so through export cartels. Secondly, the modern legislation shows a remarkable tolerance for cartels. In the international sphere, the economic policy of the United States has shifted notably from a commitment to the benefits of competition to an acceptance of privately constrained trade.

Neither the benefits of aggressive antitrust enforcement nor the potential harm of the recently-enacted American laws should be exaggerated. The zealous application of the United States' antitrust laws to foreign activities and to the foreign consequences of domestic conduct did not and will not insure the existence of free, competitive international markets. Nor will free markets necessarily produce stable and progressive political and social development. As well, the American interest in foreign conduct is in some cases simply too attenuated to justify any legal response. The striking withdrawal of the United States' antitrust laws from international markets, however, eliminates a significant barrier to the private acquisition and abuse of monopoly power.

The waning American commitment to competitive international markets calls for renewed international efforts to control abusive private business practices. All nations should remain acutely aware of the dangers of isolationist and protectionist economic policies. National efforts to protect domestic industries from foreign competition, or to penetrate foreign markets with government-sponsored cartels invite retaliation that can lead the world into a

downward economic spiral. Policies of mutual toleration of export and import cartels would shift significant economic power to concerns interested solely in restricting trade in order to maximize private profits. Under any of these circumstances, international wealth would diminish and the world subjected to the political and social upheaval that often accompanies diminished economic expectations.

The international response to the new American antitrust policy should have several facets: efforts to eliminate existing tariff and non-tariff barriers should be intensified; national competition laws should be vigorously enforced against cartels having prohibited effects within the relevant jurisdiction; cooperative enforcement efforts enhanced; and an enforceable international code against private cartels seriously pursued.

The challenge is great, but the effort is justified by the experience of the past. Freer markets are not a panacea; but an international economic order characterized by national trade barriers and private cartels would frustrate development and pose a threat to world order and peace.