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Notes: The Role of the American Corporation in the Economic Development of Latin America:

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NOTES

The Role of the American Corporation in the Economic Development of Latin America: A Study of the Conflict Between the Extra-Territorial Application of United States Antitrust Laws and United States Foreign Policy*

I. INTRODUCTION

Following the turn of the last decade, the emergence of new European commercial powers with antitrust philosophies different from our own gave rise to concern over the potential for conflict between the application of our antitrust laws and our foreign relations.[1] In 1964, following almost two years of hearings,[2] the Senate Judiciary Subcommittee on Antitrust and Monopoly dispelled most of that concern by reporting that the United States antitrust laws did not threaten to disrupt our political or commercial relations with the industrial nations of Europe.[3] Yet some concern still exists over the potential for conflict between our antitrust policies and our foreign policies toward the underdeveloped countries in our own hemisphere.[4]

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1. The Rome Treaty, 298 U.N.T.S. 14 (1958), spotlighted the problem which had already begun to draw attention. See, *e.g.*, BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (1958). See also Loevinger, *Antitrust in the Modern World,* 6 A.B.A. SEC. INT. COMP. L. 20, 30-31 (1961), pointing out the principal differences in antitrust philosophy between the United States and Western Europe. Evidently the United States is in favor of economic decentralization, see Brown Shoe Co. v. United States, 370 U.S. 294 (1962), while the countries of Western Europe are moving in the opposite direction. See Rome Treaty, *supra,* arts. 85 ("concerted practices") and 86 ("abuse of dominant market position"); Council Regulation No. 17, as amended, [1962] *Journal Officiel des Communaut'es Européennes* 204; Adelman, *Problems and Prospects in Antitrust Policy II,* PERSPECTIVES ON ANTITRUST POLICY 46 (Phillips ed. 1965).

2. *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 88th Cong., 2d Sess. (1964) [hereinafter cited as *Hart Committee Hearings*]; *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 88th Ccng., 1st Sess. (1963) [hereinafter cited as *Kefauver Committee Hearings*].

3. S. RES. 262, 88th Cong., 2d Sess. (1964). For comment on the impact of this report see Day & Bodner, *Developments in Antitrust During the Past Year,* 28 A.B.A. ANTITRUST SEC. 3, 117 (1965).

4. Brewster, *The Influence of International Factors,* PERSPECTIVES ON ANTITRUST POLICY 366 (Phillips ed. 1965); Friedmann, *Antitrust Law and Joint International*

This potential for conflict results from two principal phenomena. First, private American concerns are necessarily playing an ever increasing role in our programs to aid and assist developing nations.[5] As private American concerns enter this endeavor the extent to which they may cooperate with each other and with foreign interests becomes a major business problem—a problem which cannot be resolved without reference to American antitrust legislation. Second, the expanding European industrial powers are beginning to take part in this endeavor.[6] The resultant bilateral effort by American and European businessmen suggests a need for some degree of equivalence in the antitrust standards applicable to each.[7]

This note will examine the potential conflict between United States' antitrust policy and United States' foreign policy in Latin America. As background, Part II will provide a brief discussion of the United States' foreign policy objective in Latin America. In Part III, the discussion will turn to the most likely context for conflict—the potentials of the American corporation for advancing that foreign policy objective. Part IV will illustrate how the possibility of extra-territorial application of United States' antitrust laws gives rise to the potential for conflict between those laws and the United States' foreign policy in Latin America. Part V will examine the most likely context for conflict and determine whether a conflict actually exists. Finally, Part VI will define the nature of the actual conflict and suggest a resolution.

II. The Foreign Policy Objective—The Economic Development of Latin America

United States foreign policy is clear in at least one respect; the economic development of the backward nations of Latin America is one of our foremost objectives.[8] This foreign policy objective is not

Business Ventures in Economically Underdeveloped Countries, 60 Colum. L. Rev. 780 (1960) (the problems raised therein were not answered by the 1964 report).

5. Dean, Statement before the Congressional hearings, *Hart Committee Hearings* 66. This result is almost inevitable, see notes 55 & 56 *infra* and accompanying text.

6. See, *e.g.*, Wall Street Journal, Jan. 24, 1966, p. 22, col. 2 (French investment in Puerto Rico); Wall Street Journal, Jan. 4, 1966, p. 6, col. 2 (British investment in Brazil); Wall Street Journal, Dec. 27, 1965, p. 2, col. 5 (British and Dutch investment in Argentina).

7. "In view of the likelihood of increase in capital export to underdeveloped nations in the future 'approximation of equivalent antitrust standards between such countries as the United States, Canada, and the Nations of Western Europe will become more and more important.'" Friedman, *supra* note 4, at 790. See note 1 *supra* for discussion of the present lack of equivalence.

8. 1963 President Kennedy's Budget Message, N.Y. Times, Jan. 19, 1962, § 1, p. 1, col. 17; Interview with Harold R. Levin, Division of Restrictive Business Practices, U.S. State Department, in Washington, D.C., Dec. 29, 1965. This is not merely a national objective: "the economic progress of the underdeveloped nations is one of

motivated solely by the immediate economic,[9] political[10] and strategic[11] value of continued amicable relations with these countries but reflects a broader goal—the increase of all world trade and a more favorable allocation of the productive resources of the world.[12]

In order to understand how the United States may advance this foreign policy objective, some understanding of the problems facing these underdeveloped nations and the solutions to those problems is essential. Yet the road to economic development is paved with a multitude of pitfalls; the nature and extent of these hazards vary substantially from one Latin American country to another. For that reason alone, generalizations are subject to criticism. Yet any attempt to deal with the development of the economically backward countries of Latin America within the scope of a law review note is bound to produce generalities.[13] On the other hand, a failure to consider the

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the paramount international problems of our time." FRIEDMAN & PUGH, LEGAL ASPECTS OF FOREIGN INVESTMENTS (1959). The present administration is attempting to encourage the countries of Europe to take a larger part in reaching this objective, Wall Street Journal, Jan. 14, 1966, p. 6, col. 1.

9. The foreign commerce segment of American business has experienced its fastest growth since 1955; during that period, its importance to the American economy has grown correspondingly. Celler, *A Congressman's View of the Foreign Commerce Aspects of the Sherman Act, Symposium on Trade Associations,* 27 A.B.A. ANTITRUST SEC. 1, 3 (1965). The underdeveloped nations of the world have supplied a major portion of the sources of supply and market expansion which have made this growth in United States foreign commerce possible, MOUSSA, THE UNDERPRIVILEGED NATIONS 171-72 (1962); Monthly Review of the Federal Reserve Bank of Kansas City, May-June 1965, p. 7 (table 3).

10. "The ideological, military, political, and economic challenge the United States now faces requires a reappraisal of inherited concepts, policies and laws. What we do makes more difference to the rest of the world than it ever did before. The conduct of our foreign business and our policies with respect to it are a not insignificant part of this picture." BREWSTER, *op. cit. supra* note 1, at 3. However, the efficacy, as a political tool, of economic assistance to the underdeveloped nations is questionable. The political gains, if any, are slow to accrue. Most underdeveloped nations accept all hands extended in their direction. Their non-commital politics are justified on a theory something like this: "If an underdeveloped country receives assistance toward financing its investment from both sides the two efforts do not cancel one another out, but reinforce one another. Other things being equal development takes place more rapidly, as does trade, and the two groups of industrial countries are simultaneously creating the possibility of commercial expansion for both of them." MOUSSA, *op. cit. supra* note 9, at 178.

11. The strategic significance of the underdeveloped countries of Latin America in terms of materials necessary to national defense, communication routes, and land mass is obvious. See Dean, *supra* note 5, at 80-82. For example COMSAT recently expressed the necessity for satellite tracking stations in Puerto Rico, Wall Street Journal, March 14, 1966, p. 4, col. 3.

12. Economists would use the expression, "international division of labor." However, that expression covers a broader area than a non-economist might expect. The objective is the promotion of international specialization, with a resultant free flow of goods, services, labor and capital throughout the world. See 1 KIRSCHEN, POLICY IN OUR TIME 12-13 (Kirschen ed. 1964).

13. The danger of generalization is its tendency to mislead. By staying close to the basics, this note will attempt to avoid this tendency.

nature of our foriegn policy objective would produce an inadequate appreciation of considerations relevant to any resolution of a conflict between that policy and our antitrust policies should such a conflict exist. Any approach must be at best a compromise.

A. *The Problem—The Underdeveloped Countries of Latin America*[14]

Of the many and varied economic problems facing the individual Latin American nations, three appear to be fundamental. All of these countries suffer from a low standard of living, industrial stagnation, and a low level of agricultural production.[15]

Most of these countries can trace the cause of their low standard of living[16] to their early, colonial development. Colonial overlords collected the meager profits and promptly sent them over-seas to their king or queen; reinvestment for the economic growth of the colony was non-existent.[17] The longer-lasting inability to disengage these colonial bonds resulted in a problem of greater proportions than that

14. Geographically Latin America includes the conntries of Central and South America, a sizable area. Yet these conntries are only representative of a much larger problem. The underdeveloped nations of the world cover over one third of the earth's land mass, KRAUSE, ECONOMIC DEVELOPMENT 7-8 (figure 1) (1961). In terms of population the problem is equally broad, MEADE, WAR ON WANT 6 (1962). Moreover, the current prognosis is for the problem to increase unless intervening factors turn the tide. The prevailing low rate of economic growth, together with a high rate of population growth, promises a decline in per capita income in most of the world's underdeveloped countries. See DOBB, ECONOMIC GROWTH AND UNDERDEVELOPED COUNTRIES 19, 21, 37-40 (1965); 1964 U.N. STATISTICAL YEARBOOK (table 2). For definition of "per capita income" see note 16 *infra.*

15. REPORT No. 7811 of the Subcommittee on Inter-American Economie Relationships of the Joint Economic Committee, 87th Cong., 2d Sess. *passim* (1962) [hereinafter cited as 1962 REPORT].

16. Developmental economics is itself a recent development, ELLSWORTH, THE INTERNATIONAL ECONOMY 463-64 (1958), and economists are not yet in complete accord regarding terminology. Ellsworth calls this first basic problem a low level of material welfare. *Id.* at 462. While most economists use the term "low per capita income," see, *e.g.*, KRAUSE, *op. cit. supra* note 14, at 6-7; STERN, POLICIES FOR TRADE AND DEVELOPMENT 7 (1964), Ellsworth's terminology does emphasize the effeet of this economic phenomenon on the material welfare of the inhabitants of underdeveloped countries. For example, as the per capita income decreases caloric intake per person, protein consumption, literarcy and percentage of current income invested all tend to decrease; at the same time infant mortality and population density tend to increase. ELLSWORTH, *op. cit. supra*, at 463 (table 26.1).

The non-economist will need a definition of terms if this discussion is to have much meaning. Economists measure a country's level of economic development in terms of gross national produce (GNP); that is, the total value of all goods and serviee produced by the public and private sector of the economy. SAMUELSON, ECONOMICS 243 (1st ed. 1948). The gross national product may be measured on an absolute basis—not relative to any other quantum—or it may be measured on a per capita basis—relative to the population of the country. Economists find a country's per capita income by dividing the gross national product by the population. This latter measure is the more meaningful of the two in terms of economic development since it correlates with the material welfare of the people.

17. DOBB, *op. cit. supra* note 14, at 17.

experienced by the United States after its brief colonial conception.[18] Other factors have helped to perpetuate the problem. When colonialism ended, foreign nations continued to invest in these countries according to their own needs. While foreign control no longer existed, the novelty of independence blinded many of the new governments to the need for controlling foreign investment. Thus neo-colonialism tended to thwart the economic growth of these countries even after colonialism ended.[19] In addition, a lack of domestic capital prevented these countries from helping themselves with investment according to their own needs.[20] Thus fate has played havoc with these countries; suffering from economic exploitation from without and a lack of capital within, they have been unable to raise their standard of living and in some cases have been unable to stop its decline.[21]

The present low level of industrial development[22] also emanated from colonialism. The colonizing countries tended to exploit only the most obvious potentials of the Latin America colonies. Since the principal attraction of most of these colonies was an abundant supply of one or two natural resources,[23] colonial industry was limited to the extraction of these primary[24] products.[25] The other needs of the colony were either supplied by a subsistence type of production or imported from the colonizing country. This dependence upon principal raw materials has continued to the present,[26] primarily due to

18. While the colonial bonds on the United States fell loose in 1776, many Latin American countries remained under colonial rule until the late nineteenth century.

19. DOBB, *op. cit. supra* note 14, at 18.

20. Gunwald, *Why Not Invest in Latin America?*, Harv. Bus. Rev., Nov.-Dec. 1963, p. 123. This shortage is beginning to ease. Individuals are gradually accumulating savings and are beginning to invest them. However, this source of capital is too widely spread to be effectively utilized for economic development. Moreover, the nouveau riche of Latin America apparently prefer to invest in the securities of developed nations like the United States rather than risk their wealth in an investment for the future of their own shaky economies. See Wall Street Journal, April 14, 1966, p. 22, col. 2.

21. KRAUSE, *op. cit. supra* note 14, at 20-22.

22. Most economists view the expansion of production as the basis for economic growth. In fact, they usually measure economic growth in terms of the rate of change in the GNP, see note 16 *supra*. Measured on a year-to-year basis the rate of change in the GNP gives some indication of how rapidly production is expanding. However, this absolute measure may be misleading. For example, in 1963 the rate of growth in Brazil's GNP was 1.1%. However, when adjusted to account for a population growth of 3.4% in that same year, Brazil's per capita income actually decreased at a rate of 1.8%. Gilbert, *New Latin Tempo*, Barron's Magazine, Oct. 4, 1965, p. 9. For this reason many economists prefer to measure the rate of economic growth in terms of the rate of change in the per capita income.

23. KRAUSE, *op. cit. supra* note 14, at 47-48.

24. "Primary" is used here in its technical economic sense meaning products incorporating few or no factors of production other than raw materials. Crude oil, mineral ores in the raw or semi-refined state are examples of primary products.

25. DOBB, *op. cit. supra* note 14, at 17; KRAUSE, *op. cit. supra* note 14, at 66-67.

26. *1962 Report*. For example, consider the dependence of the following countries

the interaction of neo-colonialism[27] and a lack of domestic technology, managerial expertise and investment capital.[28]

The early colonial development had its most lasting and economically crippling effect upon Latin American agriculture. During that period, agricultural production took place primarily on large estates belonging to foreign overlords.[29] Independent agriculture,

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on the product in parentheses: Bolivia (tin); Brazil (coffee); Chile (copper); Costa Rica (coffee). The extent of Latin American industry's emphasis on production of primary goods is apparent from the following table compiled from the information in 1963 U.N. STATISTICAL YEARBOOK 62-63 (table 11):

Nature of Product	Latin America	Rest of World	Gap
(1) food & tobacco	117	125	8
(2) metal products (crude ore)	131	141	10
(3) metal products (semi-refined)	162	158	(4)
(4) electricity & gas	143	154	11
(5) coal, crude petroleum, basie chemicals & rubber	133	147	14
(6) textiles, clothing & leather	111	126	15
(7) manufactured products	128	144	16
(8) non-metalic mineral products—refined	118	143	25

In explanation, the figures represent an index of the 1963 level of production relative to that in 1958 of 100. The products have been arranged in order from the most primary to the more complex. The chart shows Latin America's production level falling further and further behind that of the rest of the world as the production process becomes more complex. The apparent oddity of the third entry is the result of the emphasis of the colonial period on the colonial production of precious metals. On the whole the point is obvious. Yet two factors make the 1963 gap conservative. First, the index used started Latin America and the rest of the world at the same level in 1958. Second, the index for the rest of the world includes not just the developed countries, but the underdeveloped countries as well.

27. One writer contends that the tendency of investing nations to withdraw all profits from their investments during the neo-colonial period was the major cause of the present low level of economic development, DOBB, *op. cit. supra* note 14, at 25. However true that may be, a stronger case exists against the developed nations of the world today based upon their current trade policies. Those trade policies may well tend to cause Latin American emphasis on primary good production. For example, the escaladed tariff structure of the United States makes Latin American production of commodities for export to the United States less profitable than the production of primary products for export to the United States. Address by Harry G. Johnston of the University of Chicago, *Theory of Tariff Structure for Economic Development,* at Vanderbilt University, Nashville, Tennessee, Oct. 7, 1965. In view of the limited market for commodities or capital goods in Latin America, this factor is very significant at the initial level of decision, investment—the level of decision in most Latin American countries today. Apparently, this rationale is the basis for the recommendation by the Subcommittee on Inter-American Economic Relationships of the Joint Economic Committee that the United States reconsider its escaladed tariff structure in light of the problems facing Latin America. *1962 Report.*

28. DOBB, *op. cit. supra* note 14, at 17 (lack of technology and management); Gunwald, *supra* note 20, at 123-24 (lack of capital); KRAUSE, *op. cit. supra* note 14, at 64-66 (lack of capital); *1962 Report* 9 & 14 (lack of technology, managerial know-how and investment capital).

29. DOBB, *op. cit. supra* note 14, at 25.

what little the peasant did develop, was a mere subsistence variety.[30] Following the demise of colonialism, agriculture broke down completely. Dissatisfaction with the rural life and the attraction of the tourist-studded cities, led to mass urbanization.[31] Despite apparent need, land reform programs have not succeeded; political unrest and social inertia have resisted the breakup of the large estates.[32] At the same time, backward farming technology and insufficient investment capital have made a new start virtually impossible.[33] Thus today, agricultural production in Latin America remains at a barely subsistent level; at the same time, dependence upon imported foodstuff is increasing rapidly.[34]

While the foregoing problems are the heart of the economic troubles facing most Latin American nations, two other characteristics are frequently associated with these countries. Actually, these characteristics are only symptomatic of the problems already discussed. Yet a brief discussion of them will serve to illustrate the complexity of Latin America's economic ills.

The first of these characteristics is high unemployment. The social structure of the colonial period created a caste society in which there was little social fluidity; the labor force was primarily agrarian peasantry, for the most part unskilled and immoble.[35] The rapid urbanization following the breakdown of the agricultural system deposited this labor force in underdeveloped industrial centers unable to employ it.[36] Due to the slow rate of industrial expansion and the inability to reassemble the ruins of the agricultural system, this rapidly growing mass of unemployed labor represents the most tragic waste in Latin America today.[37]

The second symptomatic characteristic of the Latin American countries is economic instability. The source of this problem originated with colonialism and its concommitant tendency to arrest the

30. *Ibid.*

31. *1962 Report* 17.

32. Political unrest has retarded the implementation of economic development programs generally. Brazil's recent history is a good illustration. During a period of relative political stability prior to 1964, Brazil experienced the economic growth which comes with successful economic planning. However, the government's inability to cope with inflation was a significant factor leading to the overthrow of President Goulart in early 1964. Gilbert, *supra* note 22, at 9. The new military regime is finding the economic problems equally disconcerting, see Wall Street Journal, Dec. 13, 1965, p. 1, col. 1.

33. Williams, *Private Investment in World Agriculture*, Harv. Bus. Rev., Nov.-Dec. 1965, p. 97.

34. *1962 Report* 19-20.

35. KRAUSE, *op. cit. supra* note 14, at 55.

36. *1962 Report* 17.

37. *Ibid.*

development of economic self-sufficiency.[38] When colonialism ended, the importance of the world trade position of the new Latin nations became immediately apparent. What the colonizing countries once supplied to keep their colonies alive, these small nations now had to purchase on the competitive world market. For a while their exports of primary products enabled them to hold their own.[39] Yet, as the rest of the world turned to the manufacture of commodities and capital goods, the price which Latin American primary exports could command became volatile and began a steady decline.[40] When the depression of the 1930's weakened the world markets, those volatile prices hit bottom throwing many of the Latin American countries into economic collapse.[41] In an effort to recoup their economies, the governments devalued their currency to create necessary investment capital.[42] However, those measures provided only temporary relief and engendered a more serious problem prevailing throughout Latin America today—inflation.[43] The failure to expand industrial and agricultural production to meet the increasing needs of the swelling urban population has resulted in additional inflationary pressure.[44] Even today expansion is proceeding at an extremely slow pace; private investment capital is noticeably lacking and governments hesitate to contribute to further inflation by increased spending.[45] Meanwhile inflationary pressures and economic instability continue to plague these countries.

B. *The Solution—A Theory for Economic Development*

The preceding description of Latin America's economic ills is a simplification. Even so, the complexity of the problem is apparent. Necessarily, any solution will be equally complex. Yet at the theoretical level, the basic aspects of a program for the economic development of Latin America are relatively simple and no longer subject to serious debate.[46] Planners advocate a three-pronged program

38. See note 17 *supra* and accompanying text.
39. DOBB, *op. cit. supra* note 14, at 23.
40. *Ibid.*
41. Gunwald, *supra* note 20, at 123-25.
42. *Ibid.*
43. *Ibid.; 1962 Report* 9-10.
44. Williams, *supra* note 33, at 96-97.
45. Inflation and the fear of increasing it may be responsible for much of the inability of these countries to expand. Commenting on the difficulty of using the 2.8 billion dollar of foreign currencies that the United States has accumulated, a recent article said: "In practice, much of this money is more likely to wind up in the bank. One reason is that heavy government spending in most underdeveloped nations could cause inflation. For another, it is seldom used for large-scale development projects, since these would demand additional investment and operating expenses that few poor countries can afford." Time Magazine, Feb. 25, 1966, p. 26; *Accord,* Williams, *supra* note 33, at 96-97.
46. DOBB, *op. cit. supra* note 14, at 36 (citing concensus at the theoretical level).

aimed at the development of an attractive investment climate, industrial diversification and agrarian reform.

The infrastructure of a country includes its roads, water and power supplies, communication facilities and generally the conveniences which are essential for a healthy, attractive investment climate.[47] An adequate infrastructure is a prerequisite to any effective development program in most Latin American countries.[48] Industrial diversification and agrarian reform presuppose substantial capital investment—investment that will be forthcoming only when the investment climate in Latin America has improved.

Economic growth and stability demand an expansion of the limited industrial potential of the Latin American countries.[49] By diversifying into the production of capital and consumer goods, these nations can steady their shaky position in world trade and can eliminate some of the internal inflationary pressure resulting from the inflexible supply of industrial produce.[50]

The remainder of the inflationary pressure, that caused by the inadequate supply of agricultural produce,[51] suggests the third prong of the program for economic development. Agrarian reform is needed not only to feed the swelling urban population but also to avoid increased dependence upon importation of foodstuff—a serious threat to the world trade position of the Latin American countries.[52]

A well-planned program aimed at each of these immediate goals promises some measure of relief for the troubled economies of the Latin American countries. Yet more than careful planning is needed.[53] Each of these immediate goals will require substantial amounts of capital, technology and managerial knowhow. It is this need that gives rise to the role of the American corporation in the economic development of Latin America.

47. Williams, *supra* note 33, at 96.

48. *1962 Report* 29-30.

49. KRAUSE, *op. cit. supra* note 14, at 129-42.

50. See notes 40-44 *supra* and accompanying text. Consider the effect of the recent mine workers' strike on the economy of Chile which is almost completely dependent upon the production of copper; the estimated cost of the strike to the Chilean government was over sixty million dollars. See Wall Street Journal, March 24, 1966, p. 21, col. 1. Another current example has arisen following the sharp rebound in the world supply of coffee. The repercussions of this swelling supply threaten many of the fragile Latin American economies dependent on the export of coffee. See Wall Street Journal, April 18, 1966, p. 18, col. 1-2.

51. See note 34 *supra* and accompanying text.

52. *Ibid.*

53. Both sides of the socio-political thicket agree that balanced planning is needed. See DOBB, *op. cit. supra* note 14, at 36 (a socialistic view); *1962 Report* (a capitalistic view); Gunwald, *supra* note 20, at 127 (a private businessman's view).

III. The Context for Conflict—The Role of the American Corporation in the Economic Development of Latin America

Broadly speaking the context for any conflict between our foreign policy in Latin America and the extra-territorial application of our antitrust laws is the role of direct, private American investment in the economic development of those countries. However, the context for this examination of that potential conflict is limited to the role of the American corporation in the economic development of Latin America. This limitation is justifiable on two grounds. First, existing corporations are the most likely private American concerns to have the necessary motivation and capital for direct investment in Latin America. Second, if non-corporate concerns should decide to invest in Latin America, the high risks and tax considerations would compel them to incorporate the venture.[54]

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54. Risk considerations are probably the primary motivation for the use of the corporate form. The risks inherent in Latin American investment are discussed notes 61-66 *infra* and accompanying text.

While tax considerations have never been a major incentive to foreign investment, see Barlow & Wender, Foreign Investment and Taxation *passim* (1955), they have been a major factor in the choice of form for such investment, Devine, *Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle Forms of Investment by American Corporations in Foreign Markets*, 57 Nw. U.L. Rev. 400 (1960). The tax advantages of the corporate form vary depending whether the foreign operation is incorporated in the United States or in the foreign country.

If the foreign operation is to be organized in the foreign country, several tax considerations compel the use of the corporate form. Generally in the case of non-corporate business organizations, income is taxed to the investors in the year in which it is earned. See, *e.g.*, Int. Rev. Code of 1954 §§ 701, 703 (partnerships). The same is true where the non-corporate business is organized and conducted in a foreign country; the income is taxed currently to the American investors. In contrast, corporate income is taxed to American stockholders only when the corporate earnings and profits are distributed to them. Until the passage of the Revenue Act of 1962, this rule applied to earnings and profits of foreign corporations, Dowdle, *Can Domestic Shareholders Be Taxed on Foreign Corporate Earnings Prior to Distribution?*, 40 Taxes 436 (1962). This fact and the immunity of foreign corporations from the United States income tax presented an opportunity for accumulating earnings and profits without incurring the income tax. American investors took advantage of this opportunity. Not until they attempted to sell the stock of the foreign corporation and bring those accumulated earnings home as long term capital gain, did Congress react. In the Revenue Act of 1962, Congress qualified this advantage of the foreign corporation in two respects. First, all income of "controlled foreign corporations," defined in section 957(a), other than that derived from the operation of a trade or business in the foreign country, is taxed currently to domestic stockholders holding more than ten per cent of the combined voting power. Int. Rev. Code of 1954 §§ 951(a)(1), 952(2), 953 & 954. The effect of this provision on the advantage of the foreign corporation vis-a-vis non-corporate foreign business organizations is limited since the act still permits the tax-free accumulation of the foreign corporation's *operating* income. The second qualification is more significant. Upon the sale of "controlled foreign corporation" stock by a shareholder holding ten per cent of the combined voting power, the total gain is subject to taxation as ordinary income to the stockholder. Int. Rev. Code of 1954 § 1243. See also Johnson, *Beware of Ordinary Income When Selling Foreign*

A. *The Role of the American Corporation—Its Potentials and Proper Sphere of Investment Competence*

The role of the American corporation in Latin America's economic growth arises out its potentials as a means for utilizing the vast reservoir of private American capital, technology and managerial talent to assist in the economic development of those backward countries. Not only are the potentials obvious, but the need to utilize these potentials is beyond dispute.

The need for private American investment in Latin America's economic recovery results from the interaction of three factors. First, the task is enormous and complex. Second, the individual Latin American countries cannot accomplish this enormous endeavor without foreign assistance.[55] Finally, the public sector of the United States,

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Stock; Final Regs Show Impact of 1248, J. TAXATION, March 1966, p. 180. While this provision does remove the foreign corporation from the tax "haven," it does not eliminate the tax advantages of the corporate form in foreign operations; the law still permits the tax-free accumulation of operating income—a substantial advantage for the young growing operation. Moreover, when the foreign corporation is to operate in Latin America, the impact of the 1962 Act is less severe. Neither provision of the act applies to the earnings and profits of "less developed country corporations," which are defined in section 902(d) to include controlled foreign corporations in most Latin American countries, if the shareholders or shareholder concerned holds his stock in such a corporation for ten years. The ten year restriction does not apply to the exclusion from taxation on current income, only to the exclusion from section 1248, *supra*. As applied to section 1248, the ten year restriction has met heavy criticism on the ground that in view of the risk of investment in underdeveloped countries a ten year commitment is too great. See Popkin, *Less Developed Countries and the Revenue Act of 1962*, 40 IND. L.J. 1, 3 (1964).

If a foreign operation is organized in the United States, the corporate form has more tax advantages. Of course earnings and profits may still be accumulated without being taxed to the stockholders. Some qualification is needed here, because the accumulation is not tax-free. The earnings and profits of the domestic corporation are taxed to the corporation currently, though at rates generally lower than those applied to individuals. Moreover, accumulation is limited by the accumulated earnings tax sections, INT. REV. CODE OF 1954 §§ 531-37. In addition to the advantages of the corporation as a devise for accumulating earnings, The Western Hemisphere Trade Corporation Act makes the corporate form more advantageous where the business is to operate in Central and South America. Such domestic corporations receive a special deduction from taxable income if they come within the provisions of that act. See INT. REV. CODE OF 1954 §§ 921-22. This deduction is available only to domestic *corporations*. *Ibid.*

55. The need for foreign capital and other assistance is an issue upon which the socialistic and capitalistie economic theorists have disagreed. The socialists argne that the underdeveloped countries could pull themselves up by their own economic bootstraps, see, *e.g.*, DOBB, *op. cit. supra* note 14, at 38-39. Reduced to simple terms the argument for self-sufficiency is that by programing a high rate of investment relative to currently employed capital, the rate of economic growth may be increased to a level which over a period of years would permit the underdeveloped countries to catch up with the rest of the world. The economic derivation of this theory is as follows:

(1) $\text{growth rate} = \dfrac{\text{investment ratio}}{\text{aggregate output ratio}}$

(2) $\text{aggregate output ratio} = \dfrac{\text{presently employed capital}}{\text{total current output}}$

the leader in free world assistance to Latin America, simply cannot provide all the foreign aid needed.[56]

$$\text{(3) investment ratio} = \frac{\text{current investment}}{\text{current total income}}$$

$$\text{(4) total current income} = \text{total current output}$$

$$\text{(5) growth rate} = \frac{\text{current investment}}{\text{total current output}} \times \frac{\text{total current income}}{\text{presently employed capital}} = \frac{\text{current investment}}{\text{presently employed capital}}$$

Since the amount of presently employed capital is extremely low, relative to current income, the socialists conclude that by reinvesting most of the current income the rate of growth will be high.

The weakness of the argument for self-sufficiency as applied to the Latin American countries is generally accepted by those governments today. While current income is high relative to currently employed capital, it is not sufficient to initiate that grand spiral upward. Williams, *supra note* 33, at 96: "[T]he reality facing developing nations, no matter what its political predilection, is that there is just not enough money in the public till to satisfy its demands for infrastructure development. This being the case, what chance is there for ample public investment in production?" Moreover, economic growth requires more than a mere increase in the proportion of national income which goes into productive investment. Technological progress (education and research), employment efficiency and many other intermediate goals must be attained. KIRSCHEN, *op. cit. supra* note 12, at 11-12. The argument for self-sufficiency assumes that there is time: time to develop technology, time to train unskilled labor and time to amass the capital needed for the initial productive investments. Yet time is something these underdeveloped countries do not have. Many of their potentials may be of limited duration. For example, the development of oil resources could provide the impetus for economic growth in many of the Latin American countries, MOUSSA, *op. cit. supra* note 9, at 172. The United States may need as much as three hundred thousand barrels per day in 1966—an enormous opportunity for these countries. N.Y. Times, Jan. 17, 1966, p. 78, cols. 3-8. Yet twenty years from now the need for oil may disappear. The need for economic development is urgent. BLACK, THE DIPLOMACY OF ECONOMIC DEVELOPMENT 3 (1960); Butler & Dearden, *Managing a Worldwide Business*, Harv. Bus. Rev., May-June 1965, p. 93.

56. Economically these efforts are limited by several factors. First, is the limited utility of such investment as a stimulus to the economy of the United States. Some economists have argued that assistance to underdeveloped countries can be justified solely on the basis of the economic stimulus of such contributions on the economy of the contributor, MOUSSA, *op. cit. supra* note 9, at 173-75. The argument is that the investment in the underdeveloped countries will stimulate growth which in turn will result in orders to the contributing country for machines and other materials needed in that growth process. However, practice has shown the fallacy of that argument, KIRSCHEN, *op. cit. supra* note 12, pp. 30-31, 48-49 & 59. The fallacy results from what has been termed "leakage"—the economic stimulus from the newly engendered orders may not be directed at the contributing country, but may leak out as the orders are made with other countries where the price may be better.

The second economic factor limiting the efforts of the public sector of the United States is the limited utility of foreign aid as a stimulus to the economic development of the Latin American countries. Apparently this has been the result of ineffective management and planning behind such financial assistance, Clee & Lindsay, *New Patterns for Overseas Operations*, Harv. Bus. Rev., Jan.-Feb. 1961, pp. 67-68.

Finally, even if such assistance were of greater economic utility, there are limits on the ability of the United States government to help. Assisting in the economic development of Latin America is only one of the many objectives of the United States government. Competing with that objective are the war on poverty, the war in Vietnam, and the attempt to balance the unfavorable imbalance of payments, to name just a few. Morever, if the United States should ear-mark funds for Latin America, Some understanding of the proper role of direct private investment in Latin America is a prerequisite to a full appreciation of the potential contribution of the American corporation. A consensus now exists that the spheres of competence for private and public investment in economic development programs ought to correspond to the almost natural dichotomy between the two basic types of investment needed. On the one hand, there is a need for investment in the infrastructure.[57] On the other is the need for investment in productive facilities—in farms, factories and distribution systems.[58] Generally, private investment should be limited to the development of productive facilities; only when infrastructure improvements are essential to a productive investment should private capital be used to make them.[59]

Within its sphere of competence, the theoretical potentials of the American corporation are unlimited.[60] Utilizing American in-

they may be used for projects with priority over productive investment, such as the food for peace program. See, *e.g.*, Wall Street Journal, Jan. 13, 1966, p. 6, col. 2.

57. See notes 47 & 48 *supra* and accompanying text.

58. See notes 49-52 *supra* and accompanying text.

59. Williams, *supra* note 33, at 96; *1962 Report* 25-26. Of course, some investment in infrastructure improvements may be necessary in order to begin productive investments. For example, a mining venture may require the construction of a railroad link to the site of the mine. However, where such investments have not been reasonably necessary for productive investment they have aroused the ire of Latin American governments. See MOUSSA, *op. cit. supra* note 9, at 187.

60. Many of the limitations upon the efforts of the public sector of the United States' economy do not limit the efforts of private American businessmen, compare discussion in note 56 *supra*. In the first place, private investment has proven to have greater utility. For the most part it has been profitable for the economies of the Latin American countries and for the United States investors, Gunwald, *supra* note 20, at 128. Moreover, private investment in Latin America has been a greater stimulus to the American economy than has United States government assistance to those countries. Apparently there is less leakage, compare note 56 *supra*. In addition, part of the profits accruing from those investments return to the United States in the form of dividends. For example, consider the following table comparing the income receipts with the direct investment flows of Uuited States dollars into and out of Latin America for the past ten years:

Year	1950	1955	1960	1963	1964
Receipts	522.0	678.0	641.0	801.0	909.0
Payments	1.0	.5(–)	-0-	.5(–)	.5(–)

In explanation, the figures represent millions of dollars. U.S. BUREAU OF CENSUS, 1966 STATISTICAL ABSTRACT OF THE UNITED STATES 856 (table 1224).

In the second place, private investment is not limited by the various competing public objectives limiting government assistance. Consider, for example, the impact of the balance of payments problem on direct private investment in Latin America. Putting to one side the merits of the present program of voluntary restraints [see, *e.g.*, Wall Street Journal, Dec. 22, 1965, (general editorial criticism); Wall Street Journal, Dec. 24, 1965, p. 3, col. 3 (need for a long-range view); Dean, statement before the Congressional hearings, *Hart Committee Hearings* 82-83 (over the long haul direct foreign investment and the returns thereon have been a net plus factor in payments posture); NATIONAL INDUSTRIAL CONFERENCE BOARD, U.S. PRODUCTION ABROAD AND THE BALANCE OF PAYMENTS *passim* (1966) (substantial reduction in current investment abroad is likely to produce a long range decline in earnings from abroad)] under which American business is being asked to curb their foreign investments according to vestment capital, technology and managerial expertise the American corporation can play a vital part in the economic development of Latin America by doing what it already does well—combining factors of production into efficient, profitable and, in the case of Latin America, vital industrial operations.

B. *The Investment Problems and the Possible Solutions—the Methods of Direct Private Investment and Their Ancillary Arrangements*

Merely pointing out that the American corporation could and must make a valuable contribution to the industrial development of Latin America does not make that contribution possible. Foreign investment in any form faces a multitude of problems, and direct investment in Latin America is no exception.

Even though accumulation of capital through the corporate device insulates stockholders from the full effect of financial disaster, most corporations are unwilling to commit an unlimited amount of investment capital to Latin America enterprises. Any direct investment in Latin America is more risky than a similar investment in economically stable nations. In addition to the vagaries of the Latin American economies, political uncertainty adds many hazards: expropriation, politically motivated labor problems and the annoyance of inexpert and erratic governmental regulations resulting from periodic political upheavals are timely examples.[61] In addition, the virtual requirement

a formula based upon net outflow of dollars in the immediately preceeding year, see Wall Street Journal, Dec. 6, 1965, p. 2, col. 1. This program does not promise to have a negative impact on private investment in Latin America. Apparently, the administration has determined that the public interest in the development of the economically backward countries of the world overrides the objectives of the voluntary restraints program; that program does not apply to investments in Latin America, see *Id.* at p. 2, cols. 1-2. In total effect, the present program may encourage private investment in Latin America.

61. In addition to the risks caused by the undesirable investment climate and the shaky economies of these countries, see notes 43-45 & 48 *supra* and accompanying text, political instability adds many hazards.

The danger of expropriation is constantly present. At least one writer believes that the absence of guarantees against expropriation was partly responsible for the drop in movement of private capital to underdeveloped countries in 1960, MOUSSA, THE UNDERPRIVILEGED NATIONS 125-26. *But see* FRIEDMANN & PUGH, LEGAL ASPECTS OF FOREIGN INVESTMENTS 732-33: "[I]t is the continuing community of interests between foreign investors and the capital-receiving state, which . . . [provides] the real basis for the investor's security." The International Cooperative Administration has attempted to insure private investment against wars and expropriation, Devine, *supra* note 54, at 405 n.23.

Politically motivated labor problems are frequent. Kennecott Copper Corporation and Anaconda Company, Chile's leading copper producers, have experienced recent politically motivated mine worker strikes costing the companies millions of dollars. For history, see Wall Street Journal, Dec. 18, 1965, p. 3, cols. 4-6; Wall Street Journal, March 22, 1966, p. 3, col. 2; Wall Street Journal, March 29, 1966, p. 21, col. 1. See that business operations in Latin American countries have local equity and management interests has caused many American corporations to hesitate.[62] Local participation does present an opportunity for sharing risks with local capital. It may even tend to reduce risks by eliminating the natural friction that exists between a foreign dominated business and the community in which it is conducted. Yet local participation creates a possibility that the facility may be used to compete with the American corporation for United States markets. Investments in facilities for the manufacture of capital or consumer goods are particularly subject to this consideration. The desirability from an economic standpoint of exporting such products[63] would be ample motivation for local government action encouraging their export. Moreover, the limited Latin American market for these products,[64] the proximity of the United States market[65] and the distinct

also Wall Street Journal, March 22, 1966, p. 3, col. 2 (politically motivated labor problems in Dominican Republic caused the South Puerto Rico Sugar Company losses of almost 900,000 dollars in 1965).

Finally, political instability with a concomitant turnover of government personnel often brings inexpert and erratic government regulation of local industry, see note 33 *supra.*

62. The requirements are seldom complete, but operate only to insure that effective control of the enterprise will remain in the hands of nationals. These restrictions usually take the form of limitations on the percentage of capital which may be owned by foreign interests and the percentage of directors which may be foreigners. FRIEDMANN & PUGH, *op. cit. supra* note 61, at 743-47.

In view of the unfortunate experience most of the Latin American countries had with earlier foreign investment, see notes 17-19 *supra* and accompanying text, the existence of these regulations is easy to understand. In the first place they tend to keep a portion of the investment returns in the underdeveloped country for reinvestment. In the second place they give those with a genuine interest in the economic growth of the country a voice—and often a majority voice—in the management.

Even in those countries where no such regulations exist, the natural friction between an alien business and the local community bas lead many American corporations to seek foreign participation. Devine, *supra* note 54, at 439. See also, Friedmann, *Antitrust Law and Joint International Business Ventures in Economically Underdeveloped Countries,* 60 COLUM. L. REV. 780, 784 (1960) (friction often takes the form of national economic or administrative policies operating in favor of firms with local capital or management participation).

63. See notes 40 & 50 *supra* and accompanying text. Export of heavy-consumer and capital goods would tend to stabilize the shaky international trade position of the Latin American countries.

64. While the production of heavy-consumer and capital goods is one of the vital economic needs of the Latin American countries, the prevailing low standard of living and the slow pace of industrial expansion make Latin America a very limited market for these products. Of course, Latin America is a promising market for light-consumer and agricultural produce, see Williams, *supra* note 33 (agricultural produce); Time Magazine, March 4, 1966, p. 98, cols. 2-3 (light-consumer goods).

65. The proximity of the American markets is obvions. That fact probably explains why the United States has been the major market for Latin American exports, see note 9 *supra* and authorities cited therein. The extremely protectionistic policies of the common market countries with respect to heavy-consumer and capital goods production, see Rome Treaty, 298 U.N.T.S. 14, tit. 1, ch. 1, § 2 & annex 1, and the likelihood that the United States will adopt less protective policies in the future, see note 27

possibility that the Latin American venture might compete for the United States market at an advantage over American producers[66] are all strong incentives for such action on the part of the local participants.

These investment problems might limit the actual role of the American corporation in Latin America, if businessmen were unable to devise effective methods of dealing with them.

However, American business acumen has not found these obstacles insurmountable. New methods of risk evaluation are evolving.[67] Joint ventures between American corporations and between American corporations and Latin American interests are being used to minimize the risks and meet local participation requirements.[68] Where foreign participation is used, businessmen have suggested the use of price-fixing and market division arrangements to reduce the impact of competition from the foreign operation.[69] Unless these business solu-

supra, indicate that the United States may well remain the major market for Latin American exports when those countries begin to export heavy-consumer and capital goods in the future.

66. Several conditions discussed in Part II make it likely that Latin American joint ventures could compete for United States markets at an advantage over American producers. First, unemployment is high. Naturally the labor expense for operations in these countries is low—extremely low relative to that in the United States. Second, intelligent business planning on the part of American investors on the one hand and broad economic planning on the part of Latin American governments on the other are bound to result in the location of productive facilities close to the component factors of production. Finally, when these low cost factors of production are combined in processes developed and managed by American technological and managerial talent, the likely result is a product with a cost basis substanially lower than that of similar products manufactured in the United States. Even if the United States' present escaladed tariff structure and freight costs do impose an additional cost factor on the Latin American products, these products could conceivably reach the United States market with a cost basis comparing favorably with that of similar domestic products. In the long run, should the United States revise its tariff policies, the competitive advantage may be increased. For an expansion on the last point, see note 27 *supra*.

67. See, *e.g.*, Butler & Dearden, *supra* note 55, at 93 (political and economic risk analysis); Clee & Lindsay, *supra* note 56, at 67 (management problems in international operations); Hertz, *Risk Analysis in Capital Investment*, Harv. Bus. Rev., Jan.-Feb. 1964, p. 961.

68. Devine, *supra* note 54, at 439; Friedmann, *supra* note 62, at 781.

69. There are two possible approaches to this dilemma. On the one hand, the United States investor may simply decide against the investment, see Persen, written statement, *Hart Committee Hearings* 52-54. This approach is not desirable from the standpoint of United States foreign policy encouraging such investment. On the other hand, the United States private investor may go ahead with the investment, taking steps to reduce the potential competitive threat. For example, he might enter a price-fixing agreement under which the newly formed joint venture would agree not to sell its products in the United States for less than the prevailing price for simliar domestic products at the time of the sale. Another possible solution would be an agreement dividing market territories in the United States thereby assuring the United States investor his own domestic market and at the same time providing a market for the newly formed joint venture. Neither arrangement necessarily involves anticompetitive motives in the traditional sense. In fact both agreements would be temporary—until a

tions run afoul of United States antitrust laws, there is every reason for cautious optimism about the American corporation's role in the industrial development of Latin America.

IV. The Potential for Conflict—The Extra-Territorial Application of United States Antitrust Laws

At one time the possibility that the proposed Latin American joint venture or the ancillary price-fixing or market division agreements might run afoul of United States antitrust laws would never have occurred to students of international law. Conduct beyond the territorial boundaries of a country was thought to be outside its legislative jurisdiction. Today, however, the possible applicability of United States antitrust laws to conduct beyond the territorial confines of the United States is widely recognized. This possibility gives rise to the potential for conflict between those laws and United States foreign policy encouraging direct private investment in Latin America.

The following discussion will attempt to illustrate how our antitrust laws have been applied to extra-territorial conduct in the past and how several jurisdictional problems may limit that application in the future.

A. *The United States Antitrust Laws Applied Extra-Territorially—in General*

Most of the principles of United States antitrust law have been developed by our courts in cases arising in a purely interstate context. In the foreign commerce arena many factors come into play which are not present in interstate commerce.[70] *Timken Roller Bearing Company v. United States*[71] was the first case squarely meeting the argument that some modification of existing antitrust principles is justified by the vicissitudes of foreign trade.[72] To the defendants' con-

Latin American market for the product involved develops, compare note 64 *supra* and accompanying text.

70. Brewster, *The Influence of International Factors,* Perspectives on Antitrust Policy 335 (Phillips ed. 1965).

71. 341 U.S. 593 (1951).

72. Actually, United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950), dealt with this issue first. However, the significance of that discussion is questionable in view of the court's conclusion that the vicissitudes of foreign commerce were not the actual motivation behind the questioned agreements. The court found that the defendants had acted out of a desire to improve the profit margin on their sales in certain European markets. In view of those conclusions, the often quoted passage from the opinion is clearly dicta: "It may very well be that even though there is an economic or political barrier which entirely precludes American exports to a foreign country, a combination of dominant American manufacturers to establish joint factories for the sole purpose of serving the internal commerce of that country is a *per se* violation of . . . the Sherman Act." *Id.* at 967.

tention that they were justified by international trade conditions[73] in entering a European cartel, the Supreme Court of the United States answered:

> This position ignores the fact that the provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. Those provisions . . . are wholly inconsistent with . . . the defendants' argument . . . . Acceptance of . . . that view would make the Sherman Act a dead letter insofar as it prohibits contracts and conspiracies in restraint of foreign trade. If such a drastic change is to be made in the statute, Congress is the one to do it.[74]

That rationale was properly criticised by Justice Frankfurter's strong dissent.[75] Yet with only one qualification, to be discussed momentarily, the courts have continued to apply to foreign commerce without alteration antitrust principles tailored to fit interstate commerce.[76]

One general observation about the case following the *Timken* approach will suggest a qualification. Practically all have involved commerce between the United States and the other *developed* nations of the world.[77] Commercial competition is quite apposite to com-

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In Timken Roller Bearing Co. v. United States, *supra* note 71, on the other hand, the United States Supreme Court met the issue squarely. While the district court had found that the dominant purpose in this case was equally anticompetitive, the appellants challenged that finding. The Supreme Court proceeded as though there had been no such finding: "Regardless of this, however, appellant's argument must be rejected." *Id.* at 598.

73. "The argument in this regard seems to be that tariffs, quota restrictions and the like are now such that the export and import of antifriction bearings can no longer be expected as a practical matter; that appellant cannot successfully sell its American-made goods abroad; and that the only way it can profit from business in England, France and other countries is through the ownership of stock in companies organized and manufacturing there." *Id.* at 599.

74. *Ibid.*

75. "Of course, it is not for this court to formulate economic policy as to foreign commerce. But the conditions controlling foreign commerce may be relevant . . . (to this court's application of the policies set by Congress in the Sherman Act)" 341 U.S. at 605. Certainly, in light of the well established notion that Congress, by enacting the Sherman Act, has placed upon the courts the responsibility for determining what restraints of commerce are unreasonable, the rationale of the Supreme Court in *Timken* is unacceptable. The defendants were not arguing for a judicial rejection of Congressional policy. Their plea was merely one for a reasonable application of that policy.

76. Brewster, Antitrust and American Business Abroad 362 (business justification defense); Fugate, Foreign Commerce and the Antitrust Laws 101 (price fixing), 110, 113 & 114 (market sharing arrangements), 121 (refusals to deal), 135 (the per se rule and the rule of reason).

77. Friedmann, *supra* note 62, at 785. Aside from American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), discussed note 107 *infra* and accompanying text, this writer is aware of only five exceptions to this statement. Two of those, United States v. United Fruit Co., Trade Reg. Rep. (1958 Trade Cas.) ¶ 68,941 (E. D. La. 1958), and Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955), turned upon

merce between the United States and those nations with whom our foreign policy is one of cooperative competition.[78]

The major criticism of the commentators is directed at the possibility that the same approach might be taken toward foreign commerce between the United States and the *underdeveloped* countries of the world.[79] Based upon the present case-law, this criticism may be premature. Thus far, the only cases applying the antitrust laws to United States commerce with underdeveloped nations have taken a more liberal approach.[80] The rationale behind this treatment is not entirely clear. Some of the cases seem to be applying international law principles of legislative jurisdiction[81] to find United States antitrust laws inapplicable.[82] Others seem to contradict the rationale of the *Timken* case by holding that the peculiar difficulties of investment in underdeveloped countries justify a modification of antitrust principles.[83] Whichever rationale is used, the inherent logic of

international law principles of legislative jurisdiction, see note 106 *infra* and accompanying text, rather than United States antitrust policy. The remaining three are United States v. American Cyanamid Co., TRADE REG. REP. (1964 Trade Cas.) ¶ 71,166 (S.D.N.Y. 1964) (consent decree); United States v. Pan American World Airways, 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd on other grounds,* 371 U.S. 296 (1963); and United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952).

78. Brewster, *supra* note 70, 357.

79. *Ibid.;* Friedmann, *supra* note 62, 785.

80. See note 77 *supra* and cases cited therein.

81. See note 106 *infra* and accompanying text.

82. The consent decrees in United States v. American Cynamid Co., *supra* note 77, and in United States v. United Fruit Co., *supra* note 77, applied only to conduct having an effect on United States imports or interstate commerce. Compare notes 118-27 *infra* and accompanying text. Likewise, Sanib Corp. v. United Fruit Co., *supra* note 77, was primarily concerned with the legislative jurisdiction of the United States, *Id.* at 766.

83. United States v. Pan American World Airways, *supra* note 77, indicated that a joint venture between two air-line companies for the purpose of establishing an air-freight route to the southern coast of South America would be perfectly legal. Rather than dismiss the case for lack of legislative jurisdiction, see note 106 *infra* and accompanying text, the court assumed that the application of our antitrust laws was appropriate. Under existing case-law a joint venture between substantial competitors like those before the court might have been unreasonable per se, see note 135 *infra* and accompanying text. Yet the court held that the high risks and the unlikelihood that either company would have made the investment alone made this joint venture reasonable, *Id.* at 32-36. The court did go on to hold that when the defendant, Pan American, used its ownership interest to thwart the venture's effort to extend its line to a United States terminal, it did run afoul of the Sherman Act, *Ibid.* One could rationalize the case in terms of legislative jurisdiction; however, that was not the rationale of the court. *Accord,* 3 B.C. IND. & COM. L.R. 107, 111-12 (1961). Nevertheless, the possibility of such a rationalization and the subsequent reversal on the ground that the Civil Aeronauties Board had exclusive original jurisdiction may weaken the value of this case as precedent. However, in United States v. Imperial Chemical Industries, Ltd., *supra* note 77, the United States clearly had legislative jurisdiction; the Brazilian joint venture had been organized and used as part of a plan for dividing world markets—including the United States markets. *Id.* at 238-39. Yet the court did not order divestiture until it had considered the value of the joint venture

modifying antitrust policies as applied to foreign trade between the United States and those countries with whom our foreign policy is not based upon absolute competitive assumptions may point the way for future cases. However, one factor which may tend to divert the courts from that rational course and give substance to the anticipation of commentators is the position of the Justice Department.

The position of the Justice Department is more unyielding than that of the courts. The federal antitrust laws expressly include foreign commerce within their scope,[84] and the Antitrust Division of the Justice Department apparently feels duty-bound to enforce those laws as written.[85] The Division has specifically rejected the suggestion that it use its discretion as a prosecutor to act in the capacity of a regulatory agency mitigating the harshness of a strict application of existing antitrust principles to foreign commerce.[86] A liaison does exist between the Foreign Commerce Section of the Antitrust Division and the Division of Restrictive Business Practices of the Department of State.[87] However, any modifications of Justice Department enforcement policy resulting from consultations through that medium are based solely upon grounds of international politics and not upon the basis of economic or business considerations.[88]

The Justice Department's approach toward the application of the antitrust laws to foreign conduct is the result of several factors, of which the least important is the oath of office usually cited as para-

in the industrial development of Brazil. The court concluded: "While it is true that the joint companies have made substantial contributions to the industrialization of the countries in which they were formed, we find that greater progress in that direction might have been made . . . (if that noble ambition, rather than the desire to divide world markets, had been paramount)." *Id.* at 239.

84. Actually, the Sherman Act is the only federal antitrust law expressly including "foreign" commerce within its scope. The Clayton Act uses the term "commerce" without specifying whether that term includes foreign as well as domestic commerce. The Justice Department believes that by using the term "commerce" without the adjective "domestic," Congress was expressly including foreign commerce within the reach of the Clayton Act. See notes 98-105 *infra* and accompanying text.

85. Address by William H. Orrick, Jr., the former Assistant Atorney General in charge of the Antitrust Division, before the Quarterly Meeting of the United States Inter-American Council, Inc., in New York City, New York, Dec. 7, 1964.

86. "Gentleman, I say to you that such a role is completely incompatible with my oath of office." *Ibid.*

87. The liaison referred to is interesting. However, due to its informal operation, a precise definition of its nature is impossible. Broadly speaking any pending action by the Justice Department likely to have political repercussions with foreign governments is referred to the Division of Restrictive Business Practices. When such a referral is made, the Division of Restrictive Business Practices concerns itself with only one issue: Are there any political reasons why the pending action should not be brought? If the answer to that question is in the negative, the consultation ends at that point. Questions of economic policy and antitrust law are left entirely to the Justice Department. Interview with David B. Ortman, Division of Restrictive Business Practices of the United States Department of State, in Washington, D.C., Dec. 29, 1965.

88. See note 87 *supra.*

mount.[89] First, the Antitrust Division, with its present, limited facilities, could not possibly take a regulatory approach to foreign commerce. An attempt to do so would not only foreclose it from executing its responsibilities regarding interstate commerce, but would also overwhelm its present personnel completely.[90] Second, the Justice Department is simply not convinced that the application of the antitrust laws to foreign conduct results in any real hardship to American businesses operating in foreign countries.[91] Until this attitude is changed the Justice Department is unlikely to alter its current enforcement policy.[92]

In view of the position of the courts and the Justice Department, one might reasonably conclude the extra-territorial application of United States antitrust laws is not substantially different from the application of those laws to conduct entirely within the United States. Yet such a conclusion would be erroneous. Several jurisdictional problems have tended to modify, to some extent, the application of our antitrust principles to foreign conduct.

B. *Jurisdictional Obstacles to Extra-Territorial Application*[93]

In order to simplify, the following discussion will be limited to those problems that arise where an American corporation located within the territorial confines of the United States operates a joint venture incorporated under the laws of a foreign country or enters agreements with that joint venture in the foreign country. The jurisdictional problems are of two types. The first involves the judicial jurisdiction

89. See note 86 *supra*.

90. Interview with Wilbur L. Fugate, Chief of the Foreign Commerce Section of the Justice Department's Antitrust Division, in Washington, D.C., Dec. 29, 1965. *Accord*, Orrick, *supra* note 85.

91. "[W]e are most anxious to learn of instances in which the antitrust laws deter export transactions. I must tell you that to date not one, I repeat, not one such instance has been brought to my attention from any source whatever. I must marvel over the persistency of this myth." *Ibid.* The Justice Department has traditionally inferred that the foreign commerce aspects of the antitrust laws work no hardship from the absence of any showing of specific instances where the antitrust laws have deterred worthwhile business endeavors. However, it has been argued that the absence of such showings are a result of the business communities' unwillingness to bring the intimate details of their dealings under the gaze of the Justice Department. Interview with Mark S. Massel, at the Brookings Institution in Washington, D.C., Dec. 29, 1965.

92. William Persen, Vice President and editor of *Business International*, attempted to change the Justice Department's attitude by listing twenty specific instances where antitrust considerations had deterred worthwhile business endeavors at the recent Congressional hearings. *Hart Committee Hearings* 52-54. To date this is the only response to Mr. Orrick's plea, see note 91 *supra*. To what extent statements like that of Mr. Persen may change the Justice Department's enforcement policies is difficult to prediet. This diffieulty is compounded by the very recent appointment of Donald F. Turner to head the Antitrust Division.

93. Brewster apparently coined the expression "jurisdictional obstacles," Brewster, *supra* note 70, at 364.

of the United States courts. Can they effectively control the conduct of the foreign joint venture? The second problem concerns the jurisdiction of the United States courts over the subject matter of the alleged antitrust violations. Can the United States antitrust laws be applied to the extra-territorial conduct of the foreign joint venture?

1. *Judicial Jurisdiction.*—Clearly, in the limited situation proposed, finding effective judicial jurisdiction presents no problem. Assuming *arguendo* that the United States courts would not have *in personam* jurisdiction either over the joint venture incorporated under the laws of a Latin American country or over a national or government of that country,[94] they would have jurisdiction over the American corporation investing in Latin America.[95] This would enable United States courts to dissolve the joint venture or to enjoin the American corporation from carrying out the extra-territorial agreements.[96]

94. Of course the United States courts could not exercise judicial jurisdiction over the governments of any Latin American country; sovereign immunity would prevent that. American Banana Co. v. United Fruit Co., *supra* note 77. Likewise doubtful is the judicial jurisdiction of United States courts over the Latin American nationals investing in the joint venture.

There are three possible bases for granting the United States courts judicial jurisdiction over the joint venture incorporated in Latin America. Section twelve of the Clayton Act provides three grounds for judicial jurisdiction over corporations under the antitrust laws: (1) if the corporation is an "inhabitant" of the jurisdiction in which the suit is brought; (2) if the corporation is "found" within the jurisdiction in which the suit is brought; and (3) if the corporation "transacts business" within the jurisdiction in which the suit is brought. See 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958). A Latin American venture with an import agent in the United States may be held to be an inhabitant, see Goldlaur, Inc. v. Shubert, 169 F. Supp. 677 (E.D. Pa. 1958). See also Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' and Exhibitors' Assoc., 344 F.2d 860 (9th Cir. 1965). United States v. Watchmakers of Switzerland Information Center, 133 F. Supp. 40 (S.D.N.Y. 1955), went farther than any other case to date to hold a foreign corporation "found" within the United States. In that case the foreign subsidiaries of United States corporations were found within the United States because the corporate parents had acted as agents for the foreign subsidiaries in the United States. Due to the diplomatic frenzy following that decision, future holdings going that far are unlikely. Moreover, that case involved a wholly owned foreign subsidiary. In the typical situation dealt with in this paper the foreign venture may have a foreign national stockholder interest. In fact, majority control in the board of directors is possible. On this point consider some interesting dicta in the *Swiss Watch* case: "Here there is a further distinction, jurisdiction over the parent is not being sought through a subsidiary but jurisdiction over the subsidiary is being sought through the parent. We are free of the danger that a corporation may be drawn into litigation in a strange forum by the acts of someone relatively unfamiliar with its major policies and unimportant in its corporate hierarchy. Here, the court already has jurisdiction over the policy making body which gave its deliberate assent to the alleged unlawful enterprises." *Id.* at 48. Extension of jurisdiction over the supposed Latin American joint venture would run squarely into the "danger" which the court in the *Swiss Watch* case believed it had avoided. It is unlikely that our Latin American joint venture would be held to "transact business" in the United States. See United States v. Scophony Corp., 333 U.S. 795 (1948); Snyder v. Eastern Auto Distributors, Inc., TRADE REG. REP. (1966 Trade Cas.) ¶ 71,703 (4th Cir. 1966).

95. See discussion in note 94 *supra*.

96. Of course the absence of the foreign asscciates would have a limiting effect

2. *Jurisdiction Over the Subject Matter.*—Whether United States courts have jurisdiction over the subject matter of antitrust violations arising out of conduct beyond the territorial boundaries of the United States is a double-barrelled question. The first aspect of this question is a problem of competence, *i.e.*, did Congress intend that the courts would apply the antitrust laws to the particular extra-territorial conduct in question. The second aspect involves a problem of legislative jurisdiction, *i.e.*, could Congress have intended to reach this particular extra-territorial conduct consistent with principles of international law. Both aspects of this double-barrelled question are interrelated. If the courts find that Congress does not have legislative jurisdiction over particular conduct as a matter of international law, they would probably hold that Congress did not intend to reach that conduct.[97] Yet for purposes of discussion it is helpful to treat the two issues separately.

The starting point for either inquiry is article I, section eight of the United States Constitution providing that Congress "shall have power . . . to regulate Commerce with foreign Nations . . . ." The question of competence is one of statutory construction; to what extent has Congress exercised that power? Once Congress has exercised that power, the question of legislative jurisdiction is the extent to which international law would permit that exercise.

a. *Competence.*—The Sherman Act, the first trade regulation statute passed by Congress, is a broadly phrased policy statement evidencing an intention that the courts should develop United States antitrust principles.[98] Yet the Sherman Act is specific in declaring illegal restraints of trade or commerce "among the several States, *or with foreign nations* . . . ."[99] Taking this expression literally, the courts have applied the Sherman Act to extra-territorial conduct affecting the foreign commerce of the United States regardless of whether or not interstate commerce is involved.[100] In addition, the courts have held

upon the scope of the court's decree, see United States v. National Lead Co., 63 F. Supp. 513, 526 (S.D.N.Y. 1945), *aff'd per curiam*, 332 U.S. 319 (1947). Yet practically speaking, the effectiveness of the decree will not be diminished. See, *e.g.*, United States v. Imperial Chemical Industries, Ltd., *supra* note 77, at 238; Skiold, *Antitrust Problems in International Trade*, 10 ANTITRUST BULL. 442, 445 (1965).

97. See, *e.g.*, United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945).

98. "[I]t was purposely drawn in general terms for the courts to interpret, the intention being that no business legitimately carried on need fear interference." FAULKNER, AMERICAN ECONOMIC HISTORY 438 (8th ed. 1958).

99. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958), (Emphasis added.) Section 2 of the Act also applies to trade or commerce with foreign nations, 26 Stat. 209 (1890), 15 U.S.C. § 2 (1958).

100. The Supreme Court of the United States has not gone this far. However, it has applied the Sherman Act to international cartel arrangements which seem to have an insignificant impact upon the interstate commerce of the United States. Timken Roller Bearing Co. v. United States, *supra* note 71, applied the Sherman Act to an international

that Congress intended such an extra-territorial application of the Sherman Act whenever such an application would be consistent with international law principles of legislative jurisdiction.[101]

The Clayton Act's applicability to foreign conduct is not so clear. Section 7 of that act refers to corporations engaged in "commerce."[102] Unlike the Sherman Act, section 7 does not define "commerce" to include foreign commerce. Until now, the courts have not applied section 7 to cases involving only foreign conduct.[103] However, the Justice Department believes that Congress intended to include foreign as well as interstate commerce within the term "commerce."[104] In view of the absence of any impelling reason to the contrary, courts are likely to accept the Justice Department's construction and apply the Clayton Act extra-territorially to the extent that such an application does not exceed the legislative jurisdiction of the United States.[105]

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cartel arrangement dividing world markets. The territorial arrangements treated the United States as one market area, yet the arrangement was held to restrain interstate and foreign commerce. *Id.* at 595. *Accord,* on similar facts, United States v. Aluminum Co., *supra* note 97; United States v. National Lead Co., *supra* note 96; United States v. R. P. Oldham Co., 152 F. Supp. 818 (N.D. Calif. 1957); United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944). One recent district court decision has gone all the way. United States v. Learner Co., 215 F. Supp. 603 (D. Hawaii 1963), involved United States foreign commerce exclusively. Several west-coast exporters of scrap metal had entered a cartel arrangement with Japanese steel mills. The arrangement allocated supply territories. Defendants had exclusive control over the export of scrap metal from the west coast to Japan.

101. See note 97 *supra* and authorities cited therein.

102. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1950).

103. *But see* United States v. American Cyanamid Co., *supra* note 77, where a consent decree terminating a prosecution under both the Sherman Act and section 7 of the Clayton Act provided in Part XIII (D): "For a period of twenty . . . years . . . Cyanamid is . . . enjoined . . . from aquiring . . . any . . . business . . . of . . . any person engaged in any country outside the United States in the manufacture . . . of . . . [the relevant products] where the effeet of such acquisition will be *substantially to lessen competition in, or tend to create a monopoly in . . . the manufacture . . .* of any of . . . [the relevant products] . . . ." *Id.* at ¶ 79,636 (Emphasis added.) The italicized phrases are definitely section 7 language.

104. Orrick, *supra* note 85. Of eourse, it is not yet possible to tell whether Donald F. Turner, who has succeeded to Mr. Orrick's position, will exploit this possibility. There is certainly every reason to believe that he will. Moreover, the man who will probably formulate Division policy on this partieular question seems to be in accord with Mr. Orrick. Mr. Wilbur L. Fugate, Chief of the Antitrust Division's Foreign Commerce Section, takes the position that though the problems in foreign commerce "are naturally quite different, as far as the law is concerned no difference is recognized." Fugate, *supra* note 90.

105. *Accord,* Bridges, *Foreign Mergers Under Section 7 of the Clayton Act,* 52 A.B.A.J. 360 (1965); FUGATE, *op. cit. supra* note 76, at 254. Consider one additional point on the competence of our courts to apply the antitrust laws to foreign commerce. The Webb-Pomerene Act, 40 Stat. 517, ch. 50, § 2 (1918), 15 U.S.C. §§ 61-65 (1958), excludes from the operation of the Sherman Act and Clayton Act otherwise prohibited agreements between United States exporters under certain limited circumstances. This exclusion is inapplicable to the Latin American joint venture. While one

Thus, since the applicability of our antitrust laws to extra-territorial conduct is ultimately a question of legislative jurisdiction, some consideration of that concept is appropriate at this point.

b. *Legislative Jurisdiction.*—Legislative jurisdiction is a relatively new term for a concept of long standing. Broadly speaking it refers to the legal ability of one country or state to make laws applicable to given conduct. When the legislative jurisdiction of a country is in question, principles of international law provide the answer.

Five principles of international law might be relevant in determining whether the United States has legislative jurisdiction over the conduct of a joint venture incorporated in a foreign country. Generally the universality principle, determining jurisdiction according to the country who has custody of the actor, and the passive personality principle, determining jurisdiction according to the nationality of the person injured, have not been applied in conjunction with antitrust legislation. A third, the territorial principle, would compel a negative answer to this inquiry. That principle gives legislative jurisdiction to the country in which the conduct in question occurs. A similar result would be reached under the nationality principle giving a country legislative jurisdiction over the conduct of its own nationals. In contrast, the protective principle compels an affirmative answer. The protective principle establishes legislative jurisdiction in the country whose interests have been injured by the conduct in question.[106]

The extra-territorial reach of United States antitrust laws was first considered in the now famous case of *American Banana Company v. United Fruit Company.*[107] The Supreme Court's application of the territorial principle in that case was thought to preclude the extra-territorial application of American antitrust laws for all time.[108] However, the current significance of the *Banana* case is extremely limited.[109]

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could argue that such ventures are agreements for the export of capital entitled to the Webb-Pomerene Act exclusion; the courts are unlikely to agree. The object of the exclusion was to permit American commodity exporters to compete collectively against European export cartels for foreign markets, F.T.C., REPORT ON COOPERATION IN AMERICAN EXPORT TRADE vol. 1, p. 8 (1916). United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949), and United States v. Minnesota Mining & Mfg. Co., *supra* note 72, make it clear that the Webb-Pomerene exception is narrow and strictly construed in accordance with its limited purpose. For further discussion of the Webb-Pomerene Act, see Simmons, *Webb-Pomerene Act and Antitrust Policy*, 1963 WIS. L. REV. 426 (1963).

106. The preceding paragraph relies reavily upon *Harvard Research in International Law: Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 443 (1935).

107. *Supra* note 77.

108. United States v. United States Alkali Export Ass'n, *supra* note 105, at 67. See also Haight, *International Law and the Extra-territorial Application of the Antitrust Laws*, 63 YALE L.J. 639, 639-40 (1954) (apparently outdated).

109. "Thus, after 54 years it is now appropriate to say, if you'll forgive me, in the title of a famous American jazz song of the nineteen twenties, "Yes we have no

Subsequent cases have indicated that the factual situation in *Banana* prevented the application of the protective principle of international law; today the territorial principle is no longer a viable limitation upon the extra-territorial application of United States' antitrust laws.[110]

Several attempts have been made to limit the extra-territorial application of our antitrust laws by invoking the nationality principle of international law. However this principle has only a narrow range of application. Only where the challenged conduct is specifically required by the foreign country in which it occurs will the nationality principle shield it from the application of United States antitrust laws.[111] The mere fact that the conduct proscribed by the United States antitrust laws is permitted or encouraged by the foreign country in which it occurs is no ground for invoking the principle.[112] Similarly, though more a question of sovereign immunity than an application of the nationality principle, the existence of a foreign government or a foreign national interest in the properties involved does not insulate the conduct.[113] The doctrine of sovereign immunity will insulate

Banana!" Now perhaps this is a bit strong, for *Banana* still stands for the limited proposition that the antitrust laws do not apply to the actions of another sovereign government in its own jurisdiction." Address by William H. Orrick, Jr., former Assistant Attorney General in charge of the Antitrust Division, before the Conference on Antitrust and the European Communities, in Brussels, Sept. 25, 1963.

110. United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927), laid the groundwork for this process of distinction: "[The gist of that case was] that . . . a conspiracy in one country to do acts in another . . . does not draw to itself those acts and make them unlawful, if they are permitted by the local law [of that other country]." Following that lead, United States v. Aluminum Co., *supra* note 97, distinguished *Banana* on the ground that there had been no allegation of an effect on United States commerce in that case. *Id.* at 443. Subsequent cases have used the same basis of distinction. United States v. Learner Co., *supra* note 100, at 606; United States v. R. P. Oldham Co., *supra* note 100, at 822; Sanib Corp. v. United Fruit Co., *supra* note 77, at 766; United States v. Imperial Chemical Industries, Ltd., *supra* note 77, at 237; United States v. United States Alkali Export Ass'n, *supra* note 105, at 67; United States v. National Lead Co., *supra* note 96, at 524-25.

111. United States v. Watchmakers of Switzerland Information Center, Inc., TRADE REG. REP. (1963 Trade Cas.) ¶ 70,600 (S.D.N.Y. 1962) (dicta); United States v. General Electric Co., 82 F. Supp. 753 (S.D.N.Y. 1949) (conduct required by foreign government of country in which it took place was not in contempt of decree). In accord are a number of consent decrees, United States v. Standard Oil Co., TRADE REG. REP. (1960 Trade Cas.) ¶ 69,849 (S.D.N.Y. 1960); United States v. Gulf Oil Corp., TRADE REG. REP. (1960 Trade Gas.) ¶ 69,851 (S.D.N.Y. 1960); United States v. American Type Founders Co., TRADE REG. REP. (1958 Trade Cas.) ¶ 69,065 (D.N.J. 1958); United States v. United Fruit Co., TRADE REG. REP. (1958 Trade Cas.) ¶ 68,941 (E.D. La. 1958). *Contra*, RESTATEMENT, UNITED STATES FOREIGN RELATIONS LAW § 29 (Tent. Draft No. 2, 1958).

112. United States v. Learner Co., *supra* note 100; United States v. Watchmakers of Switzerland Information Center, Inc., *supra* note 111; United States v. R. P. Oldham Co., *supra* note 110.

113. United States v. General Dyestuff Corp., *supra* note 100 (foreign government); Sanib Corp. v. United Fruit Co., *supra* note 77 (foreign national).

only the conduct of a foreign government acting in its governmental capacity.[114]

The protective principle is now a well-established basis for extending the application of our antitrust laws beyond the territorial confines of the United States.[115] Originally, the protective principle of international law was used to determine the outer-most limits upon the extra-territorial application of a country's criminal laws.[116] In view of the criminal nature of some of the offenses enumerated in our antitrust laws, the application of this principle to our antitrust legislation is not surprising.[117] While civil actions are now the rule rather than the exception in antitrust litigation, the protective principle is still applicable; the civil offense under those laws is in the nature of an intentional tort—differing from the criminal offenses only in the nature of the penalty imposed.

Broadly speaking, the protective principle justifies the extra-territorial extension of a country's legislative jurisdiction, when necessary, in order to protect a substantial national interest.[118] In the antitrust field there are only two interests which are legitimately protected by antitrust legislation. One is the domestic businessman's interest in free access to foreign markets and the other is the domestic consumer's interest in getting the benefit of competition from foreign suppliers.[119]

While the protective principle is now firmly established in American antitrust jurisprudence, the application of that principle by our courts has been at best haphazard.[120] The *Alcoa* case[121] is generally thought to be the first application of the protective principle in conjunction

114. When the foreign government acts in its own capacity the United States courts could not get judicial jurisdiction, see note 94 *supra* and accompanying text. *But see* United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 202 (S.D.N.Y. 1929), where a corporation owned entirely by a foreign government was held amenable to a decree. "The defendant company being an entity distinct from its stockholders, immunity cannot be claimed by it . . . on the ground that it and the government of France are identical in any respect." *Id.* at 202.

115. See note 110 *supra* and cases cited therein. Two United States Supreme Court cases have applied the protective principle to reach extra-territorial violations of the Landam Act, Steele v. Bulova Watch Co., 344 U.S. 280 (1952), and a conspiracy to defraud a corporation with an American stockholder interest, United States v. Bowman, 260 U.S. 94 (1922) (although in this case, since the defendants had conspired within the territorial confines of the United States the territorial principle was actually not necessary).

116. See note 106 *supra* and authorities cited therein.

117. Section 1 of the Sherman Act declares the proscribed aets unlawful, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958). Section 2 declares the aets proscribed therein nisdemeanors, 26 Stat. 209, 15 U.S.C. § 2 (1958).

118. See note 106 *supra* and authorities cited therein.

119. Brewster, *supra* note 70 at 357.

120. Apparently, many courts apply the concept without understanding the principle or its derivation.

121. *Supra* note 97.

with our antitrust laws.[122] The court spoke in general terms of "consequences within . . . (our nation's) borders which . . . (our nation) reprehends," suggesting that whenever an effect is felt internally the United States might act extra-territorially to relieve it.[123] Some cases, following *Alcoa's* suggestion, have tended to apply the principle mechanically. Rather than weigh all factors which might legitimately bear upon the United States' interest in applying its antitrust laws to a given situation,[124] they merely inquire whether the extra-territorial conduct has a direct and substantial effect upon the interstate or foreign commerce of the United States.[125] Once found, it does not matter how substantial that effect may be so long as it is not insubstantial.[126] Other cases, dissatisfied with *Alcoa's* mechanistic approach, have determined the applicability of the protective principle by considering all factors which legitimately bear upon the United States' interest in applying its antitrust laws to a given situation.[127]

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122. See Skiold, *supra* note 96. Actually, however, United States v. Sisal Sales Corp., *supra* note 110, introduced the principle: "[T]he conspirators . . . by their own deliberate acts, here and elsewhere, brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." *Id.* at 274. As the quotation indicates, some of the conduct involved took place in the United States. Yet those acts, by themselves, would not have constituted a violation of the Sherman Act. In order to bring the extra-territorial conduct into consideration, the territorial principle was necessary.

123. *Supra* note 97, at 443.

124. For example, consider the relevance of the following factors to the question whether the United States has a legitimate interest in applying its antitrust laws to extra-territorial conduct: (1) the actual or potential effect of the conduet on competition in the interstate commerce of the United States; (2) the actual or potential effect of the conduct on the access of United States business to foreign markets; (3) the actual or potential effect of the conduct on the access of foreign business to United States markets; and (4) the actual or potential effects of the conduct on any other economic objective of the United States.

125. See, *e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950); United States v. National Lead Co., *supra* note 96; United States v. Aluminum Co., *supra* note 97; United States v. American Cyanimid Co., *supra* note 77; United States v. Learner Co., *supra* note 100; United States v. United Fruit, *supra* note 77; Sanib Corp. v. United Fruit Co., *supra* note 77. It is interesting to note, however, that all of these cases, with the exception of the last two, involved commerce between the United States and the developed countries of the world, see notes 77-78 *supra* and accompanying text. In both of the last cited cases a different result would he unlikely under the more liberal construction of the protective principle, see note 127 *infra* accompanying text.

126. In a recent case following the *Timken* approach, the court held that a conspiracy to fix prices on a commodity is an unreasonable restraint on trade per se if it affects United States interstate or foreign commerce: "the amount of the interstate or foreign trade involved is immaterial." United States v. Leaner Co., *supra* note 100, at 605. Of conrse, that statement must be modified in light of substantial amount of foreign commerce involved in that case.

127. In Alfred Bell & Co., Ltd., v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951), the court held that the United States' interest in enforcing American patent rights outweighed the United States' interest in applying the Sherman Act to an extra-

It is obvious that this interpretation of the protective principle may modify the application of antitrust principles. The extent of that modification will now be examined as this discussion turns to the extra-territorial application of our antitrust laws to the methods of direct investment in Latin America.

V. The Potential Conflict Examined—The Extra-Territorial Application of United States Antitrust Laws to the Methods of Direct Private Investment and Its Impact on the Role of the American Corporation in the Economic Development of Latin America

Part IV discussed the possibility that our antitrust laws might apply extra-territorially to the American investment activities in Latin America. That possibility gives rise to a *potential* for conflict between our antitrust laws and United States' foreign policy encouraging those investment activities. If there is any *actual* conflict, it must arise because the extra-territorial application of our antitrust laws prohibits or threatens to prohibit arrangements that American corporations find essential for sound investment in those countries. On the basis of the conclusions reached in Part III, this examination may be limited to the application of United States antitrust laws to foreign joint ventures and ancilliary price-fixing and market allocation arrangements.

Two questions will be answered here. One is how the courts and the Justice Department are likely to view such arrangements. The other is whether antitrust considerations deter the use of such arrangements by the business community.

A. *The Extra-Territorial Application of the United States Antitrust Laws to the Methods of Direct Investment and Their Ancillary Arrangements*

1. *The Foreign Joint Venture.*—The case-law concerning the foreign joint venture is virtually useless for the purposes of this investigation.

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territorial price-fixing arrangement. *Accord*, on the balancing of interests approach, United States v. R. P. Oldham Co., *supra* note 100. See also discussion in note 83 *supra* and accompanying text; Dean, Statement before the Congressional Hearings, *Hart Committee Hearings* 85: "In no event do I believe a U.S. Court should entertain an antitrust proceeding arising out of conduct outside the United States, unless the impact of that conduct on U.S. trade is so substantial, and our ability to punish that conduct appears so important to our economic well-being, that our interest in regulating that conduct outweighs what should otherwise be a normal policy of deferring out of comity, to the courts of the foreign nations most directly concerned." It is interesting to note that most of these cases involved commerce between the United States and the underdeveloped countries of the world.

In the first place all of the relevant cases involve complex business arrangements in which the joint venture is coupled with restrictive ancillary agreements: cartel connections, price-fixing and division of world markets.[128] In addition, most of the applications of our antitrust laws to foreign joint ventures have involved joint ventures in the developed countries rather than in underdeveloped ones where they have greater economic and business justifications.[129] Some of the dicta in these cases are helpful. Yet the bulk of the following discussion will rely upon a logical extension of existing legal principles applicable to domestic joint ventures with such modifications as are required by principles of international law. Based upon the discussion in Part IV, this is the approach that the courts are most likely to take.

The highly uncertain status of the foreign joint venture under the antitrust laws of the United States has been a constant source of concern among commentators, the practicing bar and the business community.[130] In large measure this uncertainty is due to the possible applicability of two substantially variant lines of case-law dealing with domestic joint ventures—one line construing the Sherman Act and the other construing section seven of the Clayton Act. While the line of cases under the Clayton Act has apparently superseded the cases under the Sherman Act regarding domestic joint ventures,[131] until the applicability of the Clayton Act to foreign conduct is definitely estab-

128. See, *e.g.*, Timken Roller Bearing Co. v. United States, *supra* note 125 (allocation of trade territories & participation in international cartels); United States v. National Lead Co., *supra* note 96 (world market allocations); United States v. American Tobacco Co., 221 U.S. 106 (1911) (world market allocations); United States v. Learner Co., *supra* note 100 (allocation of supply territories, price-fixing & exclusive sales agencies); United States v. Pan American World Airways, Inc., 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296 (1963) (allocation of markets); United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952) (allocation of markets); United States v. Minnesota Mining & Mfg. Co., *supra* note 125 (market division on a world scale); United States v. General Dyestuff Corp., *supra* note 100 (market allocations).

129. *Compare* cases cited in note 125 *supra*, *with* those cited in note 127 *supra*.

130. Commentaries on the problem are too numerous to list. See, *e.g.*, Gesell, *Joint Ventures and the Prosecutor*, 10 ANTITRUST BULL. 31 (1965). The unpublished Report of the Joint Committee on Antitrust Problems in International Trade and Investment, July 7, 1962, evidences the concern of the practicing bar. Celler, *A Congressman's View of the Foreign Commerce Aspects of the Sherman Act, Symposium on Trade Associations*, 27 A.B.A. ANTITRUST SEC. 1, 6 (1965), records the anxiety of the business community.

131. "The legislative history of the amendment makes it plain that Congress intended by § 7 to forbid mergers [and joint ventures, not 143 *infra*] which were beyond the reach of the Sherman Act as judicially interpreted. . . . Thus under § 7 as amended the Sherman Act test is no longer appropriate . . . and conduct may fall under the ban of amended § 7 before it has attained the stature of an unreasonable restraint of trade." American Crystal Sugar Co. v. Cuban-American Sugar Co., 359 F.2d 524, 527 (2d Cir. 1958).

lished, the foreign joint venture is potentially subject to either line of authority.[132]

Under the Sherman Act joint ventures are not necessarily illegal. Yet their inherent tendency to eliminate competition renders them fit subjects for close, case-by-case scrutiny by the courts.[133] While few concrete rules have developed out of these *ad hoc* decisions, some generalizations can be made. Like any other business arrangement, a domestic joint venture will run afoul of the Sherman Act if organized or used for the purpose of restraining competition.[134] Likewise, a business motivated domestic joint venture between substantial competitors may be illegal per se because of its inevitable anticompetitive consequences;[135] later cases evidence a reluctance to consider economic or business justifications for joint ventures that eliminate competition between substantial competitors.[136] On the other hand, business motivated joint ventures between firms which do not compete are generally legal.[137] Between these two extremes the courts are taking a rule-of-reason approach to business–motivated joint ventures—weighing the actual restraint on competition against the justifications for the particular joint venture.[138] In determining whether there is

132. See notes 102-05 *supra* and accompanying text.

133. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 151-54 (1948).

134. While the original combining of interests may be lawful, the manner in which an interest is subsequently used may bring the combination within the condemnation of the Sherman Act. See United States v. Paramount Pictures, Inc., *supra* note 133; United States v. Pan American World Airways, Inc., *supra* note 128. *Accord*, United States v. E. I. du Pont de Nemours, & Co., 118 F. Supp. 41 (D. Del. 1955), *aff'd*, 351 U.S. 377 (1956) (dicta); United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952) (dicta). Likewise, a joint venture which is the fruit or culmination of monopolistic practices or is motivated by anticompetitive purposes violates the Sherman Act. See United States v. Paramount Pictures, Inc., *supra* note 133 (order divestiture to the extent that the joint ventures were the fruits of monopolistic or restrictive practices); United States v. Crescent Amusement, 323 U.S. 183 (1944); United States v. Imperial Chemical Industries, Ltd., *supra*.

135. This principle developed out of a long line of cases holding that competing railroads could not merge, see FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 260 (1958).

136. Witness, for example, the short-shrift manner in which the United States Supreme Court dealt with a joint venture between competitors in United States v. Paramount Pictures, Inc., *supra* note 133, at 149: "[These joint ventures] were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine." Of course, the facts in that case evidence a long history of monopolization which seemed to convince the court that the only motives for the joint ventures were anticompetitive.

137. United States v. Penn-Olin Chemical Co., 378 U.S. 158, 161 (1964); United States v. Paramount Pictures, Inc., *supra* note 133.

138. "In short, we see no reason to place a ban on this type of ownership . . . ." United States v. Paramount Pictures, Inc., *supra* note 133, at 151. *Accord*, United States v. E. I. du Pont de Nemours, & Co., *supra* note 134, at 222; United States v. United States Rubber Co., TRADE REG. REP. (1954 Trade Cas.) ¶ 67,771 (S.D.N.Y. 1954) (consent judgment enjoined market allocations, limitations on production, price-

any actual restraint the controlling issues are whether the joint venturers are actual competitors, and if so whether the joint undertaking has actually eliminated that competition.[139] Potential competition between the joint venturers is not a factor to be considered.[140] Equally irrelevant is the possibility of a restraint on potential competition between the joint venture and one or more of the joint venturers.[141]

When applying the Clayton Act, the courts seem to take a much dimmer view of domestic joint venturers.[142] Section 7 forbids joint ventures between corporations whenever the effect "*may* be substantially to lessen competition."[143] The emphasis is on the reasonable probability of anticompetitive effects.[144] The act itself makes no provision for consideration of countervailing economic or business justifications for a domestic joint venture,[145] but the extent to which the courts will consider such factors is still an open question.[146] Under section 7 the courts assess the venture's effects upon *any* potential

fixing and interlocking directorates, but permitted joint ownership). See also United States v. Imperial Chemical Industries, Ltd., *supra* note 134, at 557; Devine, *Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principal Forms of Investment by American Corporations In Foreign Markets*, 57 Nw. U.L. REV. 400, 440 (1960); 26 OHIO ST. L.J. 439, 444-45 (1965).

139. See, *e.g.*, United States v. Columbia Steel Co., 334 U.S. 495 (1948). See also FUGATE, *op. cit. supra* note 135, at 265.

140. United States v. Penn-Olin Chemical Co., *supra* note 137, at 161.

141. See United States v. E. I. du Pont de Nemours, & Co., *supra* note 134. See also Bernstein, *Joint Ventures in the Light of Recent Antitrust Developments: Anticompetitive Joint Ventures*, 10 ANTITRUST BULL. 25, 26 (1965).

142. Gesell, *supra* note 130, at 33.

143. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1950). The same section also forbids joint ventures which "tend to create a monopoly." *Ibid.* This second test is not apt to be relevant to the subject matter of this paper.

While some doubt did exist at one time whether § 7 would apply to joint ventures, the Celler-Kefauver amendment of 1950 dismissed it. Congress contemplated that the 1950 admendment would . . . bring the entire range of corporate amalgamations . . . within the scope of § 7." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 342 (1963).

144. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Penn-Olin Chemical Co., *supra* note 137. Were it otherwise, section 7 would be inconsistent with the purpose of the Clayton Act—arresting anticompetitive arrangements at their incipiency, see United States v. Bethlehem Steel Corp., 168 F. Supp. 516 (S.D.N.Y. 1958). See also Bernstein, *supra* note 141, at 26.

145. See note 142 *supra*.

146. See United States v. Penn-Olin Chemical Co., *supra* note 137. In that case the Supreme Court did not foreclose consideration of economic or business justifications. Yet its under-emphasis of such considerations has been noted and criticised, 17 VAND. L. REV. 1502, 1505-06 (1964). One writer went so far as to conclude that such considerations are irrelevant under section 7, see Gesell, *supra* note 130, at 33. In view of the position of Donald F. Turner, Assistant Attorney General in charge of the Antitrust Divisiou, see notes 171-72 *infra* and accompanying text, the courts are not likely to go that far. Instead, they are more apt to treat section 7 as raising a rebuttable presumption against joint ventures which show a reasonable probability of having substantial anticompetitive effects.

competition.[147] Competition between the joint venturers *inter sese* as well as that between either joint venturer and the joint venture itself may be considered.[148] Thus, if each of the venturers are likely to enter a market on their own, a joint venture between them to exploit that market would probably be illegal.[149] Likewise, if a joint venture, initially organized to exploit one market into which neither venturer was likely to proceed alone, has potential for competition with one of the venturers for another market, such a venture may violate section 7.[150]

In view of these highly variant and as yet uncertain standards, the concern shared by the commentators, practicing bar and business community is easy to understand. Curiously, however, when the joint venture is removed from the domestic setting to a foreign country, some of the legal uncertainty may disappear.[151]

If the courts decide to apply the Clayton Act to Latin American joint ventures, the protective principle of international law may require substantial modification of the existing case-law construing section 7.[152] Recall the lenient tendencies of the courts when applying United States antitrust laws to commerce between the United States and the less developed countries of the world.[153] Apparently, that leniency has led to a rejection of the mechanical interpretation of the protective principle, *i.e.*, that a mere finding of a direct and substantial impact upon United States commerce is sufficient to justify extra-territorial application.[154] Instead, when faced with joint ventures operating in underdeveloped countries, the majority of courts have construed the protective principle more conservatively. Thus, they have used it to justify extra-territorial extention of our antitrust laws only when compelled by a consideration of all factors having a legitimate bearing upon the United States' interest in applying its

147. Bernstein, *supra* note 141, at 27.

148. *Ibid.*

149. United States v. Penn-Olin Chemical Co., *supra* note 137 (found potential competition between the joint venturers); United States v. Columbia Steel Co., *supra* note 139 (Court could find no potential competition between merging companies). "[W]hen the proseeutor chooses to proceed he will be very likely to succeed if the joint ventures are actual or probably competitors." Gesell, *supra* note 130, at 33.

150. This seems a logieal extention of the *Penn-Olin* rationale, *supra* note 137. *Accord*, Bernstein, *supra* note 141, at 27.

151. This is contrary to popular opinion, see note 130 *supra* and authorities cited therein. "It may be that the antitrust bar should question whether it may have been too eautious in its advice and as a result has perhaps permitted unnecessarily a state of apprehension to be created in the business community." Celler, *supra* note 130, at 6.

152. For a discussion of the protective principle see notes 115-27 *supra* and accompanying text.

153. See notes 80-83 *supra* and accompanying text.

154. See note 127 *supra* and aceompanying text.

antitrust legislation to the joint venture under consideration.[155] In effect, this construction of the protective principle superimposes upon section 7 something like the Sherman Act "rule-of-reason" approach to domestic joint ventures.

Several hypotheticals will illustrate how this modification comes about. The following discussion assumes that the foreign joint venture is business motivated and not organized or availed of for the purpose of destroying or preventing competition. The legality of foreign joint ventures will be analyzed in four situations: (1) a joint venture between an American corporation and a Latin American national or government for the purpose of exploiting Latin American markets; (2) a joint venture between American competitors for the purpose of exploiting Latin American markets; (3) a joint venture between American competitors for the primary purpose of exploiting Latin American markets with some export to the United States; and (4) a joint venture between an American corporation and a Latin American national or government for the purpose of exploiting United States markets.

a. *First Hypothetical.*—A Latin American joint venture between an American corporation and a Latin American national or government for the purpose of exploiting Latin American markets. Consider a hypothetical joint venture between a major American oil company and a Colombian oil producer for the purpose of constructing a refinery and marketing petroleum products in Colombia. Prior to this joint undertaking the Colombian firm was extracting crude oil for sale in Colombia and had no potential for expanding its facilities to supply a foreign market. Likewise, the American firm did not have sufficient capital to enter Colombia on its own. The joint refinery does not have a capacity permitting export to foreign markets.

Clearly, under existing principles of antitrust law this joint venture would be legal.[156] Moreover, even if the protective principle were applied mechanistically, no direct and substantial effect on United States commerce exists to justify the extra-territorial application of those laws to this foreign joint venture.[157]

b. *Second Hypothetical.*—A Latin American joint venture between American competitors for the purpose of exploiting Latin American markets. Suppose that a major American oil company, desirous of

155. See notes 83 & 127 *supra* and accompanying text.

156. Since there is no combination of competitors actual or potential and since the joint venture is not a potential competitor with either joint venturer, neither section 7 of the Clayton Act nor the Sherman Act rule of per se illegality would apply. Clearly, the rule of reason would vindicate this joint venture.

157. Compare note 125 *supra* and accompanying text.

exploiting Colombian markets for refined petroleum products, is unable to find a Colombian firm interested in a joint undertaking. Unable to finance such an undertaking on its own, it combines with an American competitor in a Colombian joint venture. The joint operation has no export potential.

Unlike the first hypothetical, this joint venture is suspect under existing principles of antitrust law. If the American corporations are substantial competitors the arrangement may be illegal per se under the Sherman Act.[158] If they are not substantial competitors, the rule-of-reason approach would probably vindicate the arrangement in light of the substantial business and economic justifications.[159] On the other hand, if the courts were to apply the Clayton Act to this joint venture, those justifications might be irrelevant even though the corporations are not substantial competitors.[160]

Once again, however, the protective principle will not justify the extra-territorial application of United States antitrust principles to this joint venture. There is no effect on United States commerce.

c. *Third Hypothetical.*—A Latin American joint venture between American competitors for the primary purpose of exploiting Latin American markets with some export to the United States. Suppose that the hypothetical joint venture just considered expands, enabling it to export some of the refined petroleum products to the United States. Now two American competitors are carrying on a joint venture which also competes with them for United States markets.

As in the preceding hypothetical, this joint venture may be illegal under either line of domestic case-law. There is some possibility that the Sherman Act rule of reason might vindicate the arrangement.[161] However, under the Clayton Act the case against this joint venture is even stronger than that against the one in the preceding hypothetical.[162]

Unlike the preceding hypothetical, a mechanical application of the protective principle will not insulate this joint venture from the application of United States antitrust laws. Since the joint venture exports to the United States, the effect on United States commerce is not insubstantial.[163] In contrast, the majority of American courts might find that the protective principle did not justify the extra-territorial extension of those laws to this joint venture. They would consider all factors having a legitimate bearing upon the United

158. Compare note 136 *supra* and accompanying text.
159. See United States v. Pan American World Airways, *supra* note 128.
160. Compare notes 45-46 *supra* and accompanying text.
161. Compare United States v. Pan American World Airways, *supra* note 128.
162. Compare notes 45-46 *supra* and accompanying text.
163. Compare note 126 *supra* and accompanying text.

States' interest in such an extension.[164] Several of those factors militate against such an extension. First, the joint venture promises to stabilize the Colombian economy by diversifying its industrial and export capacities beyond the primary product field; the United States' foreign policy objective—the economic development of Latin America—is being advanced to that extent.[165] Second, the joint venture has created a new source of supply for the United States' markets which would not have been possible otherwise.[166] Finally, unless some further collusion takes place between the American corporations and the joint venture, competition in the supply of petroleum products to the United States has increased. On the other hand, the only relevant factor justifying an extra-territorial application of our antitrust laws to this joint venture is the possibility that the American corporations will use their ownership interest in the joint venture to eliminate this new source of competition.[167] On the basis of this analysis, the majority of American courts would conclude that the United States has no substantial interest in applying its antitrust laws to this joint venture.

d. *Fourth Hypothetical.*—A Latin American joint venture between an American corporation and a Latin American national or government for the purpose of exploiting United States markets. Consider a hypothetical joint venture between a major American oil company and a Colombian oil producer for the purpose of constructing a refinery and exporting petroleum products to the United States. Prior to the joint undertaking, the Colombian firm extracted crude oil for Colombian markets and had no potential for expanding its facilities. The American oil company had considered a solo operation in Colombia. However, the high risks of Latin American investment militated against that possibility. The proposed joint venture was an ideal solution.

Under the existing Sherman Act principles this joint venture would be perfectly legal. The joint venturers were not actual competitors

164. Compare note 83 *supra* and accompanying text.

165. See note 63 *supra* and accompanying text.

166. A dissolution of the proposed joint venture would eliminate this source of supply unless a Latin American purchaser can be found for the American corporations' interests. In view of the limited availability of investment capital in Latin America, see note 20 *supra* and accompanying text, this is unlikely. Even if such a purchaser were found, the venture would lack the technological and managerial assistance which the American corporations would have supplied and the Latin American industry so desperately needs.

167. One might argue that the United States' current balance of payments difficulty militates an application of the Clayton Act to this joint venture. Yet even under the present administration's hard-nosed approach to foreign investment generally, private investment in Latin America is recognized as a plus factor in the balance of payments picture, see note 60 *supra*.

prior to the joint undertaking. When the rule of reason is applied there will be no actual anticompetitive effects to offset the several obvious business and economic justifications. Potential competition between the joint venture and the American corporation will not be considered.

Section 7 of the Clayton Act would require a consideration of the potential competition between the joint venture and the American corporation. However, the emphasis of section 7 is on the reasonable probability of anticompetitive effects.[168] Several factors militate against the possibility that the American corporation might use its interest to eliminate competition between itself and the joint venture. The first is the existence of the Latin American interest. That interest will resist any attempt by the American corporation to thwart the purpose of the joint undertaking. Second, the American corporation entered the venture for the purpose of creating a competitor. Finally, if the joint venture is able to compete in the American markets at an advantage over the American corporation, the American corporation will realize the profits in the form of dividends. On the balance there is no reasonable probability of anticompetitive effects. Aside from the modifications required by the protective principle, United States antitrust laws would probably not condemn this joint venture.

Of course, a mechanistic application of the protective principle would prohibit the foregoing analysis. Some courts would find United States' antitrust laws applicable because of the joint venture's export to the United States. Clearly, that export has a direct and substantial effect on United States commerce.

However, the majority of American courts would probably find that the protective principle did not justify the extra-territorial extension of the Clayton or Sherman Acts to this joint venture. Considering all factors having a legitimate bearing upon the United States' interest in such an extension, they would conclude, on the basis of an analysis substantially the same as that in the third hypothetical, that this joint venture threatens no substantial United States interest.[169]

The preceding hypotheticals illustrate that the majority of our courts would reach substantially the same result whether they apply the Sherman Act or the Clayton Act to a Latin American joint venture. In most cases the economic and business justifications relevant to the Sherman Act rule of reason would also be relevant in determining whether the protective principle justifies an extra-territorial extension of the Clayton Act. While the Clayton Act's consideration of potential

168. See note 144 *supra* and accompanying text.
169. See note 168 *supra* and accompanying text.

competition still distinguishes it from the Sherman Act emphasis upon actual competition, the majority construction of the protective principle considerably reduces the importance of that consideration.

The first two hypotheticals also illustrate that unless the venture exports its produce to the United States, not even the mechanistic construction of the protective principle will justify the extra-territorial application of United States antitrust laws to a business-motivated, Latin American joint venture.

When there are such exports, as in hypotheticals three and four, only those courts construing the protective principle mechanically are likely to condemn a business-motivated venture. Moreover, their condemnation is likely only where the joint venture is between American competitors as in hypothetical three. Where an American corporation and a Latin American national or government join forces for the express purpose of exporting to the United States, these courts may attempt to apply the Clayton Act. Yet in that situation, as in hypothetical four, section 7 will not condemn the joint venture.

The only uncertainty under existing case-law is that surrounding the combination of American competitors in a Latin American joint venture exporting produce to the United States. If the combination is business-motivated, a majority of American courts will not apply United States antitrust laws to the joint venture. However, the possibility that those American courts construing the protective principle mechanically may apply section 7 puts the legal status of such joint ventures in doubt.

With this analysis of the case-law in mind, consider the Justice Department's position.

Though the Justice Department has been criticized for an inconsistent enforcement policy,[170] the truth seems to be that the varied settings in which joint ventures have been found rather than variation in enforcement policy have created the incoherent record. For some time now the Justice Department has followed a policy of judging each individual joint venture by its nature, purpose and effect.[171] That policy is likely to continue in the future.[172]

The Justice Department can be expected to push hard for the

170. See, *e.g.*, Gesell, *supra* note 130, at 34.

171. Address by William H. Orrick, Jr., former Assistant Attorney General in charge of the Antitrust Division, before the Conference on Antitrust and the European Communities, in Brussels, Sept. 25, 1963.

172. Donald F. Turner, Assistant Attorney General in charge of the Antitrust Division, is evidently in favor of guide-lines in the merger area, see Wall Street Journal, Dec. 16, 1965, p. 1, col. 1. Yet in the joint venture area he seems to be in favor of a case-by-case approach. Address by Donald F. Turner, before the Eighteenth Annual Meeting of the Antitrust Law Section of the New York Bar Association, in New York City, Feb. 2, 1966.

application of the Clayton Act to foreign joint ventures.[173] In this regard the Department's current interpretation of the protective principle is particularly interesting. Evidently the Antitrust Division still follows the mechanistic test, *i.e.*, is there a direct and substantial effect on United States commerce.[174] Consider the impact of this construction of the protective principle on the Clayton Act's emphasis on potential competition. Without more, Latin American joint ventures for the purpose of exploiting Latin American markets do not involve any direct or substantial effect on United States commerce.[175] However, if the joint venture had a potential for competition in American markets, an application of section 7 of the Clayton Act might be possible. Yet it seems unlikely that a mere potential for competition would have any direct and substantial effect on United States commerce. Only where such ventures actually compete for American markets will the Justice Department's construction of the protective principle justify an extra-territorial application of our antitrust laws.[176]

This construction of the protective principle may explain the absence of any substantial number of prosecutions against Latin American joint ventures. The Antitrust Division's Foreign Commerce Section apparently feels that most Latin American joint ventures pose little or no competitive threat to United States producers.[177]

When and if the Department does take a closer look at joint ventures in Latin America, it will do so with a view of the law substantially the same as that taken by the courts in domestic cases. Evidently the Antitrust Division is in favor of a rule-of-reason approach, taking advantage of whatever presumption section seven of the Clayton Act may provide in its favor.[178] Of course, where the joint venture is organized or used to eliminate competition, the Department can be expected to act without regard to business or economic justifications.[179] Absent such anticompetitive motives, joint ventures which are reasonably necessary for sound investment in Latin America will probably not call forth Justice Department objections.[180]

173. *Supra* note 104 and accompanying text. The Antitrust Division hopes to use the Clayton Act to raise a presumption of illegality when the joint venture's anticompetitive consequences are reasonably probable. See Turner, *supra* note 172.

174. Orrick, *supra* note 171.

175. See hypotheticals 1 & 2 above.

176. See hypotheticals 3 & 4 above.

177. Interview with Wilbur L. Fugate, Chief of the Foreign Commerce Section of the Justice Department's Antitrust Division, in Washington, D.C., Dec. 29, 1965.

178. See note 173 *supra*.

179. Orrick, *supra* note 171.

180. "I believe that there is hardly an area of antitrust law where understanding and analysis could not be improved by asking the question 'Is this restraint reasonably necessary to carry out an object which is deserving of antitrust regard?' " Turner, *supra* note 172 (referring specifically to joint ventures).

The foregoing discussion assumed that the American corporation did not object to the joint venture's potential for competing in the American markets. Suppose the American joint venturer did object. For example, consider a hypothetical joint venture between an American corporation and a Colombian oil company for the purpose of constructing a refinery for the production of gasoline for sale in Colombia. At the present time, the Colombian market for gasoline has not developed to the point where it would support a refinery large enough to be economical.[181] Yet both interests foresee a rapid expansion of that market in the near future—probably by the time the refinery reaches its full productive capacity.

Under Colombian law, local business operations must have local stockholder control.[182] The American corporation realizes that the Latin American participants may decide to export gasoline to the United States if the Colombian market does not expand as rapidly as anticipated.[183] This possibility poses a substantial competitive threat. Due to the extremely cheap labor supply in Colombia and the low cost of Colombian crude oil, the joint venture might be able to place gasoline on the United States market at a price below that now prevailing there.[184]

In order to dispel this anticipation, the Colombian oil company proposes two alternative agreements. Under the first alternative the Colombian joint venture would agree not to sell gasoline on the American market at a price below that prevailing there at the time of the sale. Under the second alternative the Colombian joint venture and the American corporation would divide the American market, each agreeing not to sell gasoline in the other's territory. Both alternatives are limited in time—just long enough for the Colombian market for gasoline to expand.

Either agreement will overcome the American corporation's objec-

181. Compare note 21 *supra* and accompanying text. The present low standard of living in most Latin American countries makes general ownership of automobiles unlikely.

The following discussion assumes that the American corporation decides to make a large initial investment, rather than a small one designed to establish a factory just large enough to satisfy the current Latin American demand. Obviously, the possibility of making a small initial investment provides one method by which an American corporation may proteet itself from the joint venture's competition. *But see* BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 77-78 (1958) (Does the foreign commerce clause in the Sherman Act refer to capital as well as goods? If so, what effect does this have on the possible application of the antitrust laws to anticompetitive dealings in capital?). Yet small initial investments may be uneconomical, particularly when the need for rapid expansion is imminently likely.

182. Compare note 62 *supra* and accompanying text.

183. For a discussion of the likelihood of such a decision see notes 63-65 *supra* and accompanying text.

184. See discussion in note 66 *supra*.

tions. The issue is whether United States antitrust laws would prevent their enforcement.

2. *The First Ancillary Agreement—Price Fixing.*—Section 1 of the Sherman Act forbids any contract, combination or conspiracy within the territorial confines of the United States for the purpose of fixing the price on goods offered for sale to the American consumer.[185] At an early date the courts abandoned the impossible task of applying the rule of reason to price-fixing arrangements and adopted instead a rule of per se illegality, forbidding price-fixing in any form regardless of the business or economic justifications that might seem apposite.[186] Whether the parties to the arrangement be economically strong or weak;[187] whether the arrangement be horizontal, as between competitors, or vertical, as in resale price maintenance;[188] whether the arrangement be open and direct or covert and devious;[189] whether the price set be fair or unreasonable;[190] or whether the arrangement be

185. Prices are fixed when they are agreed upon, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). United States v. Addyston Pipe & Steel Co., 85 Fed. 272, 291 (6th Cir. 1898), was the first case to hold that price-fixing arrangements fall within the prohibition of section 1 of the Sherman Act.

186. United States v. Trenton Potteries Co., 273 U.S. 392 (1927), laid the basis for the per se rule with the following rationale: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves the power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." *Id.* at 397-98. The expression "illegal per se" first appeared in United States v. Masonite Corp., 316 U.S. 265, 274 (1942). There, after christening the rule, the Court went on to explain its significance: "Since there was price-fixing, the fact that there were business reasons which made the arrangements desirable to the appellees, the fact that the effect of the combination may have been to increase the distribution of hardboard without increase in price to the consumer or even to promote competition between dealers, or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more legal justification . . . ." *Id.* at 276. Today, the literal validity of that statement is beyond any doubt, see, *e.g.*, United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

187. The existence of market control is unnecessary, United States v. McKesson & Robbins, Inc., *supra* note 186.

188. Two of the latest cases condemning horizontal price-fixing are Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir. 1963), and Northern Calif. Pharmaceutical Ass'n v. United States, 306 F.2d 374 (9th Cir. 1962). The latest United States Supreme Court case dealing with resale price maintenance is Simpson v. Union Oil Co., 377 U.S. 13 (1964), 18 VAND. L. REV. 222 (1964).

189. See American Column & Lumber Co. v. United States, 257 U.S. 377 (1921), in which the Supreme Court of the United States struck down a price-fixing arrangement of the most elusive variety.

190. That the price fixed is reasonable or permits only a reasonable rate of return is no defense, see United States v. Trenton Potteries Co., *supra* note 186. Nor is it defensible to fix prices at the going market level for the commodity, United States v.

successful or ineffectual;[191] an arrangement to fix prices is illegal per se.

Aside from the modifications required by the protective principle of international law,[192] the courts have applied the same rule to price-fixing arrangements conceived outside of the United States.[193] In contrast to their position in regard to foreign joint ventures, a majority of the courts seem to apply the mechanistic interpretation of the protective principle when dealing with extra-territorial price-fixing arrangements.[194] Thus applied, the protective principle has required no modification of the per se rule of illegality where the price-fixing arrangement has had a direct and substantial effect on the commerce of the United States.[195] Where the effect on United States commerce has been indirect or insubstantial the courts have simply refused to apply the Sherman Act.[196] Between these two extremes there is no case authority.

One interesting question to which our courts have alluded may

Socony-Vacuum Oil, *supra* note 185. Even though the ultimate effect of the arrangement may be increased competition, if the arrangement is to fix prices it is illegal per se, United States v. Masonite Corp., *supra* note 186. Whatever the motive, be it good or bad, it cannot vindicate a price-fixing arrangement, United States v. McKesson & Robbins, Inc., *supra* note 186.

191. The leading authority on this point is United States v. Socony-Vacuum Oil, *supra* note 185, at 224 n.59: "[I]t is well established that a person 'may be guilty of conspiring, although incapable of committing the objective offense.' . . . And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. . . . It is the 'contract, combination . . . or conspiracy, in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. . . . Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market price does not nceessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors . . . . Whatever eeonomic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their aetual or potential threat to the central nervous system of the economy."

192. See notes 115-27 *supra* and accompanying text for general discussion of the protective principle.

193. See United States v. Learner Co., 215 F. Supp. 603 (D. Hawaii 1963); United States v. R. P. Oldham Co., 154 F. Supp. 878 (N.D. Calif. 1957). *But see* United States v. Aluminum Co., 148 F.2d 416, 443 (2d Cir. 1945) (some of dicta suggests a more liberal approach).

194. Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); United States v. Aluminum Co., *supra* note 193; United States v. Learner Co., *supra* note 193; United States v. R. P. Oldham Co., *supra* note 193; United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951).

195. United States v. Timken Roller Bearing Co., *supra* note 194; United States v. Aluminum Co., *supra* note 193; United States v. Learner Co., *supra* note 193; United States v. R. P. Oldham Co., *supra* note 193; United States v. United States Alkali Export Ass'n, Inc., 86 F. Supp. 59 (S.D.N.Y. 1949).

196. Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., *supra* note 194; United States v. Aluminum Co., *supra* note 193 (dictum).

prove to be the undoing of the mechanistic interpretation of the protective principle in this area. The case-law applicable to domestic price-fixing arrangements forbids such arrangements regardless of their effectiveness.[197] The *Alcoa* case[198] raised the question whether an extra-territorial agreement to fix prices in United States imports would be subject to the application of the Sherman Act if the agreement were ineffectual.[199] The court did not decide the question, but assumed, *arguendo*, that the answer would be no.[200] To this day that question remains open. Clearly, however, a mechanistic application of the protective principle would prohibit an affirmative answer.[201] Thus, if faced with a blatant extra-territorial attempt to fix prices in United States imports, our courts would be powerless to enforce the legitimate interest of the United States in punishing such conduct unless they could find an effect on prices. No doubt, in such a case our courts would be unanimous in adopting the more conservative application of the protective principle to permit the application of our antitrust laws. With the door thus opened, perhaps the more liberal approach could be extended to modify the per se rule regarding price-fixing when other equally important United States interests so demand. Such extensions could conceivably lead to something like a rule-of-reason approach to extra-territorial price-fixing arrangements.[202] However in view of the position of the Justice Department that possibility is extremely slim.

The Justice Department is convinced that the rule of per se illegality applicable to domestic price fixing arrangements is equally applicable to foreign commerce whenever there is a direct and substantial effect upon United States imports or interstate commerce.[203] Aside from the limited situation in which an extra-territorial attempt to fix prices on American imports or interstate commerce is unsuccessful, the present approach of the courts is quite favorable to the Department. The difficulty of proof in attempt cases probably minimizes the impact of that limited loophole. This factor, and the possibility that a switch to the more conservative interpretation of the protective principle in that limited situation might spawn a rule-of-reason approach to extra-territorial price-fixing arrangements generally,[204] both render it unlikely

197. *Supra* note 191 and accompanying text.

198. Fashion Originators' Guild v. F.T.C., 312 U.S. 457 (1941); United States v. Aluminum Co., *supra* note 193; The Gray Line, Inc. v. Gray Line Sightseeing Cos. Associated, Inc., TRADE REG. REP. (1966 Trade Cas.) ¶ 71,704 (N.D. Calif. 1965).

199. United States v. Aluminum Co., *supra* note 193, at 443.

200. *Id.* at 444.

201. Compare note 175 *supra* and accompanying text.

202. Compare note 155 *supra* and accompanying text.

203. Orrick, *supra* note 171.

204. See note 202 *supra* and accompanying text.

that the Justice Department will attempt to fill that loophole.[205]

Returning to the first alternative proposed by the Colombian firm in the above hypothetical—that the Latin American joint venture would agree not to sell gasoline on the American market below the prevailing price level at the time of the sale—the position of the courts and the Justice Department would preclude acceptance by the American corporation. The proposal is one to fix prices on American imports, illegal per se under the Sherman Act. The economic and business justifications that could be advanced in favor of the arrangement would not be considered by the courts. Nor would the reasonableness of fixing the price at the prevailing price level justify the proposal.

If either arrangement will solve the American corporation's dilemma, it must be the second ancillary agreement.

3. *The Second Ancillary Agreement—Market Division.*—Standing alone, domestic agreements to allocate portions of the American market between competitors are per se violations of the Sherman Act.[206] Similarly, quota arrangements whereby competitors restrict the supply of goods they offer for sale in a given section of the United States are forbidden.[207] Only where these arrangements are reasonably necessary and ancillary to the assignment of a valid patent, trademark or secret process do the courts recognize a limited exception to the per se rule.[208]

The classic case of per se illegality in foreign commerce is the cartel arrangement allocating European and United States markets.[209]

205. It is unlikely that Donald F. Turner's recent remarks, indicating a more liberal approach toward arrangements ancillary to joint ventures, see note 215 *infra*, were meant to apply to ancillary price-fixing arrangements. The Justice Department, like the courts, is simply not equipped to police price-fixing arrangements.

206. United States v. Addyston Pipe & Steel Co., *supra* note 185. *Accord*, White Motor Co. v. United States, 372 U.S. 253 (1963) (dictum); Timken Roller Bearing Co. v. United States, *supra* note 194 (dictum).

207. United States v. Aluminum Co., *supra* note 193 (implied); United States v. United States Alkali Export Ass'n, *supra* note 195 (implied).

208. United States v. E. I. du Pont de Nemours & Co., 118 F. Supp. 41 (D. Del. 1955), *aff'd*, 351 U.S. 377 (1956) (license of patent); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962) (license of patent). This exception has two major limitations: (1) the territorial restrictions may not be more restrictive than necessary to accomplish a legitimate primary objective, The Gray Line, Inc. v. Gray Line Sightseeing Cos. Associated, Inc., *supra* note 198; and (2) the object to which the territorial arrangements are ancillary must be the primary motivation for the arrangements, see Denison Mattress Factory v. Spring-Air Co., *supra* note 208, at 409 (dicta).

209. Brewster, *The Influence of International Factors*, Perspectives on Antitrust Policy 358 (Phillips ed. 1965). See, *e.g.*, Timken Roller Bearing Co. v. United States, *supra* note 194; United States National Lead Co., 63 F. Supp. 513 (S.D. N.Y. 1945, *aff'd per curiam*, 332 U.S. 319 (1947); United States v. Watchmakers of Switzerland Information Center, 133 F. Supp. 40 (S.D.N.Y. 1955).

When the cartel element is removed the same rule applies to the naked agreement between American and foreign producers to allocate world markets.[210] The protective principle is responsible for only one exception to this rule.[211] Where a domestic producer agrees to refrain from competing in a foreign market no violation of section one of the Sherman Act occurs; no legitimate United States interest has been injured.[212] Whether the domestic exception to the per se rule, where the arrangement is reasonably necessary and ancillary to a vast patent, trademark or secret process, will be extended to the foreign commerce arena is still an open question.[213] Commentators generally believe that such an extension is probable; one has gone so far as to suggest that the exception might be expanded to include territorial arrangements which are reasonably necessary and ancillary to the transfer of capital or technology to underdeveloped countries.[214]

210. United States v. Learner Co., *supra* note 193 (exporters of scrap metal from the west coast of the United States allocated supply territories among themselves and excluded other potential exporters); United States v. R. P. Oldham Co., *supra* note 193 (Japanese nail importers allocated sales territories in the United States); United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944) (reciprocal agreement between a European and an American producer not to infringe upon each other's market).

211. For a general discussion of the protective principle see notes 115-27 *supra* and accompanying text.

212. Alfred Bell & Co., Ltd., v. Catalda Fine Arts, Inc., *supra* note 194, although not preeisely in point, held that agreements to restrict outputs for sale in Great Britain and Ireland did not violate section 1 of the Sherman Act because they did not affect sales in the United States. Clearly, the same principle would apply to territorial divisions which affect only foreign markets. Accord, Brewster, *supra* note 209, at 358.

213. Open at least, to the extent that the holding in United States v. Pan American World Airways, 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296 (1963), is not solid precedent due to the subsequent reversal on the ground that the Civil Aeronautics Board had exelusive original jurisdiction, see note 83 *supra*. That case held that the original use of territorial arrangements ancillary to the establishment of a joint venture to supply an air-freight line to the southern coast of South America was reasonable. However, after the venture had been established, the use of territorial arrangements to thwart its efforts to expand violated section 1 of the Sherman Act. 193 F. Supp. at 32-36. Of like import is United States v. General Dyestuff Corp., *supra* note 210, apparently the first case discussing the ancillary doctrine in a foreign commerce context. There the American defendants contended that their territorial agreements were ancillary to the sale of their foreign business in European concerns. The court held that the primary purpose of the arrangements was the avoidance of competition, after assuming, *arguendo*, that the arrangement was "lawful when severed from their . . . [unlawful] purpose and object." *Id.* at 645. United States v. National Lead Co., *supra* note 209, reached the same result in another situation where the anticompetitive motive was paramount. Subsequent cases rejecting the ancillary doctrine have all involved situations in which the paramount motives were anticompetitive, see, *e.g.*, Timken Roller Bearing Co. v. United States, *supra* note 194; United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952). Certainly, on the basis of the foregoing case-law, one can make a strong argument in favor of applying the ancillary doctrine to foreign commerce in the same manner and to the same extent that courts apply it to interstate commerce. Compare note 208 *supra* and accompanying text.

214. BREWSTER, *op. cit. supra* note 181, at 448.

The official statements of Justice Department personnel offer little assistance to one seeking information regarding their approach to territorial restrictions in foreign commerce.[215] Yet in view of the case-law, one should expect the Department to view such arrangements with a jaundiced eye whenever they eliminate foreign competitors from the domestic market.[216]

In view of the uncertain status of the law, the American corporation in our hypothetical would be ill-advised to accept the second alternative proposed by the Colombian firm.

B. *The Impact of United States Antitrust Laws—Actual and Imagined*

Turning from this examination of the position of the courts and the Justice Department, the question now asked is whether the foregoing legal principles prohibit or discourage the use of foreign joint ventures or price-fixing and market division arrangements ancillary to foreign joint ventures.

In view of the foregoing analysis, it is not surprising to learn that few business-motivated joint ventures are deterred by antitrust considerations.[217] The Wall Street Journal is reporting daily instances where American corporations and foreign concerns are joining forces in foreign operations.[218] In 1965, one hundred and thirteen of the one hundred and seventy-one recorded joint ventures were of the latter

215. In fact, the official statements are somewhat inconsistent. In a recent speech, Donald F. Turner, Assistant Attorney General in charge of the Antitrust Division, made these two apparently inconsistent statements. "[I]t is certainly appropriate to make sure that any agreement entered into by the parents in connection therewith are no more restrictive than necessary to the launching and operation of the venture." He then addressed himself to territorial arrangements specifically. "I am frank to say that so far I am not convinced that territorial restrictions are reasonably necessary to any legitimate purpose save for one case, that involving the entry of new firms and/or the introduction of new products." Turner, *supra* note 172. While at first blush one might conclude that the second statement would justify the use of territorial arrangements ancillary to joint ventures in underdeveloped countries, yet this conclusion seems to stretch Mr. Turner's words too far. His limited concession seems merely to evidence a willingness to sacrifice competition in the short run in order to advance the interests of the American consumer in the long run.

216. Orrick, *supra* note 171.

217. Brewster, *supra* note 209, at 366. There may be some concern that the position of the Justice Department may take a more restrictive turn in the future, see Celler, *A Congressman's View of the Foreign Commerce Aspects of the Sherman Act, Symposium on Trade Associations*, 27 A.B.A. Antitrust Sec. 1 at 6 (1965). Yet in view of the desirability of investment in underdeveloped countries, such a change is unlikely with respect to joint ventures in Latin America, see Friedmann, *Antitrust Law and Joint International Business Ventures in Economically Undeveloped Countries*, 60 Colum. L. Rev. 780, 785 (1960).

218. See, *e.g.*, Wall Street Journal, Feb. 15, 1966, p. 11, col. 1 (Guinean joint venture between American corporation and the government of Guinea); Wall Street Journal, Jan. 24, 1966, p. 22, col. 2 (Puerto Rican joint venture between American corporation and French company); Wall Street Journal, Jan. 5, 1966, p. 9, col. 2 (Mexican joint venture between American corporation and Mexican concern).

variety.[219] Yet, as that figure suggests, joint ventures between competing American corporations for foreign operations have been rare. While there seems to be no reason to doubt the legality of such arrangements where they produce goods for sale in foreign markets only, the possibility that the Justice Department might conclude that the joint venture is a potential competitor for American markets has evidently led many American corporations to decide against such joint ventures.[220] In view of the Justice Department's current conviction that Latin American joint ventures rarely compete for American markets, some of that hesitancy appears unwarranted.[221] Aside from the limited situations where competing American corporations combine in a foreign joint venture for the purpose of export to the United States, or where the joint venture is accompanied by other more restrictive arrangements, the antitrust laws should have no actual impact on the decision to enter a business motivated joint venture in Latin America.

In contrast the impact of antitrust considerations on the use of price-fixing and territorial arrangements has been substantial. In view of the existing case law regarding price-fixing[222] and the uncertain legal status of ancillary territorial arrangements,[223] it is not surprising to find that antitrust considerations absolutely deter agreements between American corporations and foreign competitors (whether they be a joint venture in which the American corporation has an interest or entirely independent) to fix prices on American imports or to limit those imports in any way.[224] Moreover, where a foreign joint venture with foreign interests is likely to compete for American markets at an advantage over the American corporation, American corporations have refrained from entering such ventures because of

219. TRADE REG. REP. No. 240 3(1966).

220. BREWSTER, *op. cit. supra* note 181, at 272-73.

221. At the 1964 hearings on foreign trade and the antitrust laws, several instances were brought to the attention of the Senate Subcommittee on Antitrust and Monopoly where antitrust considerations had allegedly deterred joint ventures between competing American corporations. Persen, *Hart Committee Hearings* 52-54. With only three exceptions (cases X, XII & XIII), the instances referred to involved situations where the American corporation wanted to use additional, more restrictive arrangements to avoid competition from the foreign joint venture. Of the three exceptions, cases XII and XIII seem to be based upon erroneous legal advice; neither case involved joint ventures likely to compete in American markets. In case X the decision not to invest followed a Justice Department dispensation containing too many restrictions to be useful. In view of the intended scope of the venture, the need for dispensation was questionable.

221. See textual discussion following note 176 *supra*.

222. See textual discussion following note 205 *supra*.

223. See textual discussion following note 216 *supra*.

224. Persen, *supra* note 221.

their legal inability to protect themselves with price-fixing or territorial agreements.[225]

VI. THE CONFLICT AND ITS RESOLUTION

The existence of an actual conflict between our antitrust policies and our foreign policy objectives in Latin America is apparent from the foregoing examination. However, before approaching alternative resolutions, a clear definition of the nature of that conflict is needed.

A. *The Nature of Conflict*

Parts I and II illustrated the risks of Latin American investment prohibiting intelligently managed American corporations from committing all of their assets to business operations in those countries. While some of our domestic corporations are large enough to finance a small venture in Latin America without committing an inordinate percentage of their capital, most are not. The small to medium size corporations represent a large segment of the American reservoir of private capital, technological skill, and management expertise which could be used to advance our foreign policy objectives in Latin America. Yet in order for these smaller firms to take part in this endeavor, they must be permitted to share the risks. Where partnership with Latin American interests is not possible, the ability of these corporations to combine a portion of their resources with other interested American corporations is a prerequisite to any effective contribution by this important segment of our economy. The community of interest necessary for such joint efforts is most likely to exist between corporations in similar lines of endeavor. Yet Parts IV and V illustrated that joint ventures between American competitors are absolutely deterred by antitrust considerations. To the extent that this deterrent prevents a realization of the fullest potentials of the American corporation's role in the development of Latin America, a conflict exists.

While Part III of this paper did indicate that foreign participation often permits smaller American corporations to enter Latin America without combining with an American competitor, it also indicated that such ventures are likely to compete for American markets at an advantage over their American parent. Part V illustrated how the inability of American corporations to protect themselves from this threat of competition without running afoul of the antitrust laws poses another obstacle to the full realization of the potentials of the

225. *Ibid.* See also discussion in note 221 *supra.*

American corporation in the economic development of Latin America. Here again, a conflict exists.

B. *Alternative Resolutions and Recommendations*

The resolution of this conflict involves the reconciliation of competing policies. On the one hand, the United States seeks to remove all unreasonable restraints from its trade relations with the rest of the world. On the other, the United States seeks to promote the economic development of the Latin American countries so that they may eventually engage in world trade on a competitive basis. Only when those two policies actually conflict must a reconciliation be made.

This paper has searched a broad context but has discovered only two specific instances of conflict. On this basis the only justifiable approach to reconciliation is to make whatever specific adjustments are necessary to eliminate those limited instances of conflict.[226]

1. *The First Instance of Conflict—Foreign Joint Ventures Between American Competitors.*—No one will question the desirability from a foreign policy viewpoint of allowing competing American corporations to enter business-motivated foreign joint ventures for the purpose of supplying Latin American markets. Nor are there any serious objections to such arrangements from an antitrust point of view; there is no adverse effect on either the American consumer's access to foreign competition or the American businessman's access to foreign markets.

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226. No responsible sentiment urges a blank exclusion of foreign commerce from the operation of American antitrust laws. Celler, *supra* note 217, at 5. "Do . . . [those who would restrict the application of the antitrust laws to foreign commerce] genuinely believe that Congress will permit agreements of private business to control the extent of our foreign trade without at the same time subjecting such agreements to controls more stringent and pervasive than the prohibitions of the existing antitrust laws? To me the probable Congressional response is clear." Orrick, Address by William H. Orrick, Jr., the former Assistant Attorney General in Charge of the Antitrust Division, before the Quarterly Meeting of the United States Inter-American Council, Inc., in New York City, Dec. 7, 1964. *But see* Hass, *Economic Peace Through Private Agreements,* Harv. Bus. Rev., 1944, p. 139. To do so would promote an infinite number of restraints on world trade at a time when the world is striving desperately for a freer flow of international commerce. 1 KIRSCHEN, ECONOMIC POLICY IN OUR TIME 113 (Kirschen ed. 1964). Moreover, our current policy encouraging competition in foreign commerce is quite apposite to commerce between the United States and the developed countries of the world, see note 78 *supra* and accompanying text.

While this last statement seems to suggest an antitrust exclusion for commerce between the United States and the underdeveloped nations of the world, even that approach would go too far. Clearly, our foreign policy toward these countries indicates an awareness that something more than cooperative competition is needed. Yet from that alone, it does not follow that our antitrust laws should not apply at all. The immediate problem is to determine how much more than the natural forces of competition is necessary.

In fact, the present state of the law under United States antitrust statutes indicate that such joint ventures are lawful. Even the Justice Department, with its insistence upon a direct and substantial effect on American commerce, is unlikely to question them.

Evidently the existing deterrent is a result of over-cautious legal advice. To the extent that this is true, a better informed antitrust bar is the only practicable solution to this aspect of conflict between our antitrust laws and our foreign policy—this conflict exists only in the minds of the business community.

However, where the foreign joint venture between American competitors is to compete for United States markets, an actual conflict arises. Once again the value of such arrangements to our foreign policy objectives in Latin America is clear. Yet in this case there is room for objection based upon antitrust policy. While these joint ventures do create an additional source of supply for the American consumer, and to that extent intensify competition they do have an inherent potential for eliminating competition. Nevertheless, until that potential is utilized, the obvious values of this type of arrangement both in terms of antitrust and foreign policy ought to vindicate them in the eyes of the law.

If such vindication is to occur, some clarification of the existing case-law is essential. The more liberal approach taken by many American courts promises to remove the antitrust deterrent now facing such ventures. Yet, unless something more is done, the obstinacy of some courts will continue to discourage this type of arrangement for some time to come.

Legislative clarification is needed now. However, this type of legislation presents difficult drafting problems. If such legislation is couched in terms that are too specific, the courts may be tempted to treat them as rules rather than guides. If broad standards, such as "reasonably necessary," are used, courts will continue in their present state of confusion as to the factors which ought to be considered.

Any successful clarifying legislation must be preceded by an analysis of the source of confusion. The divergence between the two judicial approaches to foreign joint ventures results from their variant interpretations of the protective principle. Some take the position that the protective principle requires a consideration of all factors having a legitimate bearing upon the United States' interest in applying its antitrust legislation to a given foreign operation. This interpretation results in something like a rule of reason approach to foreign joint ventures. Others take the position that the protective principle requires merely that the joint venture have a direct and substantial effect upon United States' commerce. This mechanical interpretation of the protective principle exposes the foreign joint venture to the confused state of domestic law whenever a direct and substantial effect upon American commerce exists.

The foregoing analysis suggests a solution to the clarification problem. A legislative definition of the protective principle and its proper application to foreign joint ventures would place all of our courts on the same track. This sort of clarifying legislation does not involve the codification of rules which may tempt courts to take a mechanical approach. Nor does it miss the source of confusion as would a broad standard. Instead it focuses the courts' attention on the pertinent issue—does the United States have a substantial interest in applying its antitrust laws to this extra-territorial conduct?

A legislative definition of the protective principle should attempt to codify the interpretation of the more conservative American courts. That is, consideration ought to be given to all factors, not just the effect upon United States commerce, which have a legitimate bearing upon the United States' interest in applying its antitrust laws to a given foreign operation. This approach is most consistent with the rationale behind the protective principle. Whenever the United States extends its legislative jurisdiction beyond its borders that extension must be justified. The protective principle justifies such an extension only when it is necessary in order to protect a substantial national interest. Its applicability depends, therefore, upon the existence of a threat to some substantial United States interest. In order for our courts to make an intelligent assessment of the national interest threatened by a foreign joint venture, they must consider all relevant factors. If they could pick and choose the factors to be considered, American courts could conceivably extend the legislative jurisdiction of the United States to extra-territorial conduct having only incidental connections with our country. If this approach were taken by the courts of all nations, the existing international legal structure built upon concepts of legislative jurisdiction would crumble.

A draft of the legislative definition of the protective principle is annexed to this paper. This legislation would seem to eliminate the existing confusion regarding the legal status of Latin American joint ventures between American competitors to exploit United States markets. Clearly, unless such joint ventures are actually used to eliminate competition in American markets, the United States has no legitimate interest in applying its antitrust laws to this type of extra-territorial conduct.

2. *The Second Instance of Conflict—Ancillary Protective Arrangements.*—Due to the interchangeability of price-fixing and market allocation arrangements the following discussion will treat them to-

gether. A change in the law permitting either arrangement would eliminate the conflict arising because of American corporations' legal inability to protect themselves from the threat of competition from Latin American joint ventures involving local participation.

A resolution of this instance of conflict is difficult because of its intensity. From a foreign policy standpoint, the use of one of these ancillary arrangements is desirable to the extent that it is necessary to encourage Latin American joint ventures between American corporations and foreign interests. Yet both arrangements fly in the face of our antitrust policies when they affect the prices on or the quality of United States imports.

To the extent that the courts are able to separate those ancillary arrangements that are reasonably necessary to encourage Latin American joint ventures between American corporations and foreign interests from those that are not, the intensity of this conflict is reduced. Of course, existing precedents do not permit such case-by-case resolutions of this policy conflict. Yet, before releasing the courts from the bonds of precedent, their ability to separate the "sheep from the goats" must be considered.

The rationale of the rule of per se illegality presently applied to ancillary price-fixing arrangements was born of necessity; courts found themselves unable to separate the reasonable from the not-so-reasonable price-fixing arrangements. This was primarily due to the difficulty of determining the reasonableness of a given price in a constantly changing market. This rationale seems to apply with equal force whether the arrangement be ancillary to a foreign or domestic joint venture. Perhaps these same considerations are the basis for the similar absolute prohibitions against price-fixing in European and many Latin American countries. In view of the inability of courts to separate the "sheep from the goats" in this type of situation, a change in the existing law is undesirable.

In contrast, courts have had little difficulty separating reasonable territorial arrangements from those which are unreasonable or unnecessary as ancillary to legitimate business endeavors. Dealing with market allocations involves some of the complex economic analysis necessary in determining the reasonableness of prices. The general acceptance of ancillary territorial arrangements by European and Latin American countries has resulted from the ease of preventing their abuse. United States courts should be released from those precedents which prohibit a case-by-case analysis of ancillary territorial arrangements.

A reinterpretation of the protective principle as applied to such arrangements when ancillary to foreign joint ventures would release the courts from the bonds of precedent and permit a case-by-case reconciliation of the present conflict between the antitrust policies and foreign policies. Application of the conservative interpretation of the protective principle renders the rule of per se illegality unnecessary. As a prerequisite to the application of any antitrust principle, the courts would have to consider countervailing economic and business considerations, such as the value of the arrangement in furthering United States economic objectives in Latin America. If in the face of all such considerations, the court can fairly conclude that the United States has a substantial interest in applying its antitrust laws, the arrangement has already had the benefit of what is in essence a rule of reason evaluation.

Of course, this solution does not resolve the conflict entirely. The proposed statute would not add a great deal of certainty to the legal status of these arrangements.

On the other hand, the way is now open for an intelligent resolution of this conflict by the courts. The applicable legal principles would be clear, and the relevant considerations would be apparent. Once the courts begin to recognize the conflict and resolve it intelligently, one thing will be certain: Latin American joint ventures and market allocation arrangements reasonably necessary and ancillary to such ventures will not run afoul of United States antitrust laws if they are motivated by the desire to invest in Latin America's economic growth and are designed with a view toward restraining competition only so far as necessary to make investment worthwhile.

JAMES H. HANCOCK

Appendix

PROPOSED STATUTE

Applicability of United States Antitrust Legislation to Foreign Joint Ventures and Market Allocation Arrangements Reasonably Necessary and Ancillary Thereto

I. United States antitrust legislation shall not be applied to foreign joint ventures between United States concerns or between United States concerns and foreign concerns unless the United States is shown to have a substantial economic interest in applying its antitrust legislation to such joint ventures.

II. United States antitrust legislation shall not be applied to market allocation arrangements reasonably necessary and ancillary to foreign joint ventures between United States concerns or between United States concerns and foreign concerns unless the United States is shown to have a substantial economic interest in applying its antitrust legislation to such arrangements.

III. For purposes of I and II, a foreign joint venture includes all joint operations organized and operated within any country or territory other than the United States or its territories or possessions.

IV. In determining whether the United States has a substantial economic interest in applying its antitrust legislation to a foreign joint venture included in I or to an ancillary market allocation arrangement included in II, all faetors having a legitimate bearing on that interest shall be considered.

V. For purposes of IV, factors having a legitimate bearing on the United State's economic interest may include, but shall not be limited to: (1) the actual or potential effect of the joint venture or its ancillary market allocation arrangement on competition in the interstate commerce of the United States; (2) the actual or potential effects of the joint venture or its ancillary market allocation arrangement on the access of United States business to foreign markets; (3) the actual or potential effects of the joint venture or its ancillary market allocation arrangement on the access of foreign bnsiness to United States markets; and (4) the actual or potential effects of the joint venture or its ancillary market allocation arrangement on any other economic objective of the United States.