

12-1-1982

## Antitrust and American Business Abroad By James R. Atwood and Kingman Brewster

David E. Behrman

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Antitrust and Trade Regulation Commons](#)

---

### Recommended Citation

David E. Behrman, *Antitrust and American Business Abroad By James R. Atwood and Kingman Brewster*, 5 B.C. Int'l & Comp. L. Rev. 271 (1982), <http://lawdigitalcommons.bc.edu/iclr/vol5/iss1/9>

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

## BOOK REVIEWS

DAVID E. BEHRMAN\*

ANTITRUST AND AMERICAN BUSINESS ABROAD, 2d ed. BY JAMES R. ATWOOD AND KINGMAN BREWSTER. Colorado Springs, Colorado: Shepard's/McGraw-Hill, 1981, 2 volumes, 884 pp. \$120.00, cloth.

American antitrust statutes apply to both domestic and foreign commerce.<sup>1</sup> Nevertheless, American antitrust doctrine has evolved almost exclusively in the domestic context. In an increasingly interdependent world economy, American courts now face the problem of what to do when these doctrines, applied to foreign parties, run head-on into contrary foreign notions of antitrust and trade regulation.

The second edition of *Antitrust and American Business Abroad*, by James R. Atwood and Kingman Brewster,<sup>2</sup> deals with a number of the issues that have arisen as American antitrust confronts the modern realities of international trade. The book serves two functions. It explores current antitrust doctrine and the way that doctrine treats various business problems; in this respect it serves as a practical tool for the counsellor and litigant.<sup>3</sup> The book is also prescriptive; the authors venture beyond precedent to recommend, in light of the problems they describe, modifications of present law.

Because of this dual emphasis, and the vast body of existing antitrust law, the book lacks a central theme. Instead, it focuses sequentially on various policy problems associated with antitrust and foreign trade.

Part One describes the decline of U.S. dominance of international markets,<sup>4</sup> and the rise of comity-oriented antitrust analysis. Most important, it analyzes foreign reaction to the application of American antitrust law beyond U.S. bor-

---

\* B.A. 1977 Haverford College; J.D. 1981 Stanford University. Member of the California Bar. Mr. Behrman is in private practice with the law firm of Brobeck, Phleger & Harrison in San Francisco.

1. See, e.g., Sherman Act § 1, 15 U.S.C. § 1 (1976) which covers "Every contract . . . in restraint of trade or commerce among the several states, or with foreign nations . . ."

2. J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (2d ed. 1981) [hereinafter cited as *ATWOOD & BREWSTER*].

3. 1 *id.* at iii.

4. 1 *id.* § 1.01, at 4.

ders. This reaction, a result of differing notions of antitrust's role,<sup>5</sup> now threatens cooperative relationships among various national enforcement authorities<sup>6</sup> and, according to Atwood and Brewster, stems from a combination of differing economic interests,<sup>7</sup> varying notions of competition,<sup>8</sup> and the political inflexibility of U.S. courts.<sup>9</sup>

Part Two discusses the extent to which American antitrust covers foreign persons and acts. The authors note a trend toward greater jurisdictional reach over persons.<sup>10</sup> They review jurisdiction over foreign acts,<sup>11</sup> describing its evolution from the "effects" test of the *Alcoa* decision<sup>12</sup> to the "jurisdictional rule of reason" test of *Timberlane Lumber Co. v. Bank of America*.<sup>13</sup> The latter test, a comity analysis, balances U.S. and foreign interests in assessing the propriety of extraterritorial jurisdiction, and has been well received by other U.S. courts.<sup>14</sup>

Atwood and Brewster also examine the applicability of domestic antitrust doctrine in the international context, especially in light of the vastly different policy considerations which are involved in an international antitrust suit. They note that many per se rules of illegality may be inappropriate internationally, and that a rule of reason analysis may also differ when foreign parties are involved.<sup>15</sup> Furthermore, special concerns exist when a foreign government is a party to an international transaction.<sup>16</sup> The United States should not apply domestic rules to international antitrust before these factors are considered.

5. 1 *id.* § 4.03.

6. See *infra* notes 23-38 and accompanying text.

7. 1 ATWOOD & BREWSTER, *supra* note 2, § 4.04.

8. 1 *id.* § 4.03.

9. 1 *id.* §§ 4.10-11. See 1 *id.* § 2.19 at 38. The authors state: "Exactly how to incorporate foreign views into the rather rigidly legalistic American system is an issue with which both the government and the courts are now grappling." *Id.*

10. 1 *id.* § 5.10, at 123.

11. 1 *id.* §§ 6.05-10.

12. *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945).

13. 549 F.2d 597, 613 & n.29 (9th Cir. 1976).

14. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680, 687-88 (S.D.N.Y. 1979).

15. 1 ATWOOD & BREWSTER, *supra* note 2, §§ 7.18-21. Thus, per se rules apply to practices which the court can characterize as "manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977). In the international context, it may be difficult to judge whether behavior is manifestly anticompetitive. Atwood and Brewster note several reasons why domestically anticompetitive practices may not be harmful internationally: the impossibility of any trade at all in the absence of a practice or restraint, 1 ATWOOD & BREWSTER, *supra* note 2, § 7.19; the lack of effect on U.S. commerce, 1 *id.* § 7.20; and the courts' lack of expertise in the rapidly changing area of international trade, 1 *id.* § 7.21. For example, a horizontal price-fixing arrangement — clearly a domestic per se violation — might in a foreign market be legal under U.S. law if there was no effect on domestic commerce. See § 7.21 at 207. Cooperation in a cartel "[i]f it operates merely to restrain trade within or among foreign markets . . . may not be in the Sherman Act's reach at all." *Id.*

16. 1 ATWOOD & BREWSTER, *supra* note 2, ch. 8. The presence of a foreign government may indicate that important national policies of that country are implicated. U.S. courts may wish to defer to these concerns, or at least assess whether they are outweighed by affected U.S. interests. See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1978). On the other hand, transactions of the

Part Three emphasizes precedent and policy considerations, and explores the treatment of particular business arrangements by antitrust laws. This section should be of great aid to a practitioner in assessing the antitrust implications of various business practices. Finally, Parts Four and Five examine current administration of the law, suggesting changes in substantive antitrust doctrine and in procedure to make them more compatible with foreign policy considerations.

*Antitrust and American Business Abroad* will be valuable to the practitioner for its discussion of the state of the law. Because the authors also discuss the intricacies of various American enforcement mechanisms<sup>17</sup> — who is charged with enforcement, the available means of discovery, what sanctions may be imposed — it will help the counsellor to anticipate the consequences of antitrust liability. Equally important, the book's focus on political and economic considerations should promote a greater understanding of the problems facing international antitrust enforcement, and will assist those who wish to develop new antitrust doctrine.

One of the most difficult problems facing American antitrust today is the increasing fury it creates abroad.<sup>18</sup> In the last several years it has generated such hostility that foreign governments have taken retaliatory action aimed at frustrating its enforcement.<sup>19</sup>

Atwood and Brewster are aware of the tension between U.S. and foreign antitrust doctrine,<sup>20</sup> and they propose a twofold resolution: eliminate the treble-damage remedy in international actions — or at least establish a presumption of single damages<sup>21</sup> — and encourage a “multivariable comity approach” by U.S. courts when they extend the reach of antitrust beyond U.S. borders.<sup>22</sup> But the authors' proposal seems inadequate. It asks the courts to balance foreign policy considerations against what traditionally have been fundamental rights of antitrust plaintiffs. Ultimately this is a political decision, and a task that courts seem ill-equipped to perform.

Conflicts between American and foreign trade regulation are inevitable.<sup>23</sup> The

---

most routine commercial nature, with state-controlled economies, take place between U.S. firms and the arms of foreign governments. See *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978).

17. 2 *id.* pt. IV.

18. See A. NEALE & D. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 356-69 (3d ed. 1980); Silkin, *The Perception of the Attorney General of England and Wales*, in *PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS* 28 (J. Griffin ed. 1979); Wiloughby, *Remarks by an English Solicitor*, in *id.* at 56.

For a discussion of foreign reaction to the *Swiss Watchmakers* case, see H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 1040-46 (1976) [hereinafter cited as STEINER & VAGTS].

19. See notes 41-42 and accompanying text, *infra*.

20. See 2 ATWOOD & BREWSTER, *supra* note 2, §§ 16.33-34.

21. 2 *id.* § 18.32, at 341.

22. 1 *id.* § 6.21, at 180.

23. In fact, they may be irreconcilable. See *In re Uranium Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979), where the court refused to engage in a balancing process because “[t]he competing

most important goal of American antitrust is protecting competition.<sup>24</sup> Any regulatory deviation from this norm must come from Congress; the courts are not free to weigh other interests against competition.<sup>25</sup>

Foreign nations, however, often give greater weight to policy interests other than competition.<sup>26</sup> Supervision of industrial and commercial decisions — decisions made by the private sector in the United States — is often pervasive.<sup>27</sup> While foreign governments should certainly have the right to promote their own definition of self-interest, foreign regulation may prevent U.S. enforcement of its own antitrust policies, specifically the protection of competition.<sup>28</sup> There are no right or wrong positions, only deep-seated and differing notions about the role of government and the purpose of regulation. Conflicts are inevitable in the face of these differences, and they require political resolution.

Conflicts with foreign law have arisen on three levels. Most fundamentally, substantive American antitrust doctrine often conflicts with foreign law. Asserting jurisdiction over a foreign party for an act which is not illegal abroad may be highly offensive to a sovereign nation. And the potential liability, even against a private party, may threaten foreign national interests. *In re Uranium Antitrust Litigation*<sup>29</sup> is an illustration of an antitrust claim so massive that the United Kingdom perceives its national interests to be threatened by the claim.<sup>30</sup> However, if U.S. courts are to protect American consumers from anticompetitive acts,<sup>31</sup> they must be willing to assert such jurisdiction. For example, foreign exporters might form a cartel, thereby raising export prices paid by U.S. con-

---

interests . . . display[ed] an irreconcilable conflict on precisely the same plane of national policy." *Id.* at 1148. If these conflicts are irreconcilable, the courts should not be faulted for failing to resolve them. However, before policymakers abandon hope of harmonizing U.S. and foreign law, new solutions should be tried.

24. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS I (1955).

25. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

26. See 1 ATWOOD & BREWSTER, *supra* note 2, §§ 4.02-.03; 2 *id.* §§ 13.15, 13.20.

27. For example, the Japanese government operates an agency to coordinate the steel industry. *Japanese Steelmakers Thrive With the Aid of Government Body*, Wall St. J., Apr. 10, 1981, at 1, col. 1. See generally R. CAVES & M. UERUSA, INDUSTRIAL ORGANIZATION IN JAPAN 148-54 (1976) (discussing the extensive nature of Japanese governmental control over industry).

28. See, e.g., *Is The U.S. Sabotaging its International Airlines?* BUS. WEEK 74 (Jan. 26, 1981) (arguing that enforcing competition among international airlines is harmful in the face of competition from regulated and subsidized foreign carriers).

Of course, the U.S. government subsidizes industry, as well. See, e.g., 12 U.S.C. §§ 635a-n (1976) (export loan guarantees from the Export-Import Bank); 15 U.S.C. §§ 631, 1861-75, 2003, 2412 (Supp. III 1979) (Chrysler Corp. loan guarantees); 46 U.S.C. §§ 1271-1280 (1976) (ship mortgage guarantees).

29. 617 F.2d 1248 (7th Cir. 1980). See generally 21 HARV. INT'L L.J. 515 (1980).

30. See, e.g., Danaher, *Anti-Antitrust Law: The Clawback and Other Features of the United Kingdom Protection of Trading Interests Act, 1980*, 12 L. & POL'Y INT'L BUS. 947, 948 (1980) (effect of private suits on important British industries).

31. Anticompetitive, of course, in the eyes of U.S. antitrust law. A foreign government may not see them in the same light.

sumers. Courts must be able to assert jurisdiction over these sellers to effectively protect American buyers.<sup>32</sup>

Second, antitrust enforcement mechanisms — the means by which these differing notions are implemented — also cause conflicts with foreign systems. American criminal antitrust provisions<sup>33</sup> are unique; almost no statutory trade regulation is punitive.<sup>34</sup> Treble damages awarded to successful private plaintiffs are also unique to U.S. antitrust.<sup>35</sup>

A third area has recently emerged as a potent source of conflict: discovery of evidence located abroad. Just as jurisdiction over foreign parties may be necessary to protect American consumers, discovery must be available to facilitate proof of antitrust claims. But the voluminous discovery process intrinsic to American antitrust litigation vastly exceeds the scope of inquiry permitted by foreign law.<sup>36</sup> In the *Uranium* litigation, discovery requests aimed at foreign parties greatly offended foreign governments. The United Kingdom passed retaliatory legislation, partly in response to the affront caused by the discovery process.<sup>37</sup>

Fundamentally different notions of the role courts should play in the investigative process causes much of the conflict over discovery. In the U.S., discovery is a broad tool supervised by the courts, and is used with general notice pleading to disclose and narrow the issues involved in litigation.<sup>38</sup> Foreign discovery procedures are generally much more restricted.<sup>39</sup> Atwood and Brewster suggest that conflicts over discovery may worsen, pointing out that courts have recently taken a hard line against foreign defendants which invoke foreign blocking statutes in civil discovery and claim that evidence is therefore unavailable.<sup>40</sup>

Foreign governments have retaliated against perceived threats to their na-

32. The necessity of jurisdiction is reflected in the "effects" test of the *Alcoa* case. See note 12 and accompany text *supra*. Under this test, a court may exercise jurisdiction over a defendant whenever an act produces a substantial effect on U.S. commerce. It is somewhat moderated by the "jurisdictional rule of reason" of *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-15 (9th Cir. 1976), which allows for a comity-oriented balancing approach.

33. *E.g.*, Sherman Act §§ 1-2, 15 U.S.C. §§ 1-2 (1976).

34. Jacobs & Hove, *Remedies for Unfair Import Competition in the U.S.*, 13 CORNELL INT'L L.J. 1, 3 (1980).

35. The United Kingdom has expressed extreme displeasure over the notion of treble damages. 2 ATWOOD & BREWSTER, *supra* note 2, §§ 14.19 at 203-04, 16.07.

36. American discovery procedures are much more permissive than foreign procedures; civil law discovery is a judicial, rather than a private, function. 2 *id.* § 15.10.

37. See Danaher, *supra* note 30, at 947-49. Cf. Becker, *The Antitrust Law and Relations with Foreign Nations*, 40 DEP'T STATE BULL. 272, 275 (1959) ("Trial or discussion in open court of issues of the foreign policy of the United States with regard to one or more foreign countries would exacerbate rather than solve our foreign relations problems.").

38. See *United States v. Procter & Gamble*, 356 U.S. 677, 682-83 (1958); *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

39. 2 ATWOOD & BREWSTER, *supra* note 2, § 15.10.

40. 2 *id.* § 15.06 at 223. Courts are reluctant to recognize comity limitations on discovery, 2 *id.* § 15.16, at 233, perhaps because the legitimacy of the claim is uncertain at this stage in the proceedings.

tional interests and prying by the American judicial system. They have passed so-called blocking statutes, which prohibit foreign parties from complying with U.S. discovery requests,<sup>41</sup> and clawback provisions, which allow those foreign defendants found liable in antitrust actions to recover two-thirds of the assessed damages.<sup>42</sup> Both types of statutes serve to frustrate the application of U.S. antitrust law.

These statutes represent a twofold failure in the attempt to reconcile American and foreign antitrust. Clawbacks, which attempt to frustrate American law, reflect a lack of accommodation between two sets of divergent substantive law. Such attempts seem likely to prompt American retaliation in turn.<sup>43</sup> Blocking statutes reflect the inability of U.S. and foreign enforcement authorities to develop mutually agreeable systems of international trial cooperation.

American legal doctrine has proved inadequate to reconcile U.S. and foreign law. The act of state<sup>44</sup> and sovereign immunity<sup>45</sup> doctrines give courts some flexibility in avoiding offense to foreign governments. But sovereign immunity is unavailable in disputes over the ordinary commercial acts of a foreign state.<sup>46</sup> And courts may be unwilling to apply the doctrine early in a judicial proceeding, before each side has had an opportunity to develop evidence.<sup>47</sup> As a result, discovery, with its concomitant potential for foreign offense, will continue largely unchecked.

It is hardly surprising that the courts have been unable to resolve these differences. The United States and its trading partners are trying to implement vastly divergent, possibly incompatible, views of economic regulation and judicial dispute resolution. A compromise, in which each side sacrifices some of its interests, will be necessary before the various national antitrust systems can function harmoniously.<sup>48</sup>

---

41. See, e.g., Foreign Antitrust Judgements (Restriction of Enforcement) Act, No. 13 of 1979, [1979] ACTS AUSTRAL. P. 142 (Australia); Protection of Trading Interests Act, 1980, ch. 11 (Great Britain); Protection of Businesses Act, No. 99 of 1978, *amended by* Protection of Businesses Amendment Act, No. 114 of 1979 (Republic of South Africa). Similar legislation is before the Parliament of Canada. Bill C-41, 1st Sess., 32d Parliament, 29 Eliz. II (1980).

42. See Protection of Trading Interests Act, 1980, ch. 11, § 6 (Great Britain), which permits recovery by the defendant of the punitive portion of an antitrust judgment.

43. See 2 ATWOOD & BREWSTER, *supra* note 2, § 16.34, at 282 (suggesting that in some circumstances it may be appropriate for courts to direct foreign defendants not to invoke foreign clawback provisions). If the full force of U.S. antitrust law is to be brought to bear against foreign defendants, then U.S. courts will have to, in some way, frustrate the effect of the clawbacks. Acquiescence in the clawbacks would, in effect, allow a foreign repeal of part of the U.S. antitrust laws.

44. See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Underhill v. Hernandez, 168 U.S. 250 (1897); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

45. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611 (1976).

46. *Id.* § 1605.

47. See note 40 *supra*.

48. See STEINER & VAGTS, *supra* note 18, at 807. "In view of the diversity among legal systems . . .

But courts are ill-equipped to reach such compromises. Until a case reaches the Supreme Court, U.S. courts speak with many voices, a phenomenon no doubt confusing for a foreign government trying to identify the U.S. position. Nor are courts trained in foreign affairs;<sup>49</sup> they may be unaware of other national interests which are implicated in antitrust disputes.<sup>50</sup> Through insensitivity, they may insult foreign governments.<sup>51</sup> Most importantly, when courts identify particular interests as fundamentally important — for example, protection of competition — they are unable, or at least extraordinarily reluctant, to compromise those interests in the name of comity and foreign relations.<sup>52</sup>

Conflicts over antitrust are generated by deeply-held and divergent sets of national beliefs. If the United States is to take part in a compromise of these beliefs, the executive branch must be given the resources to reach international agreements. Specifically, Congress must recognize that in any compromise between conflicting systems, certain rights and remedies must be sacrificed,<sup>53</sup> and it should, therefore, amend the antitrust laws to give the President more discretion over international enforcement as a first step toward negotiation. Of course, Congress could simply reduce the scope of American antitrust to alleviate international tensions. But reciprocity is a cornerstone of international agreements.<sup>54</sup>

treaties would appear to be the best means for establishing an effective international legal order responsive to the contemporary needs of the international community." *Id.*

International law is established in two ways: through customary practice which is accepted by all nations or by written treaty. Lenhoff, *Reciprocity, The Legal Aspect of a Perennial Idea*, 49 Nw. U. L.R. 619, 622 (1954). The former alternative is unavailable; therefore, treaties are the only way to reconcile the various antitrust regimes.

International antitrust agreements do exist. However, their requirements are vague. Such agreements are easily avoided and it is apparent that neither side sacrifices a great deal by entering into one. *See, e.g., Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices*, June 23, 1976, United States — Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291.

49. 1 ATWOOD & BREWSTER, *supra* note 2, §§ 4.02 at 85, 6.16 at 172-73.

50. *See, e.g., AT&T Suit's Dismissal Urged By Defense Chief, Citing Nation's Security*, Wall. St. J. April 8, 1981, at 6, col. 1 (Secretary of Defense Weinberger asserted a national security interest in the outcome of the Department of Justice suit against American Telephone & Telegraph).

51. *E.g., In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255-56 (7th Cir. 1980). The court stated: "[S]hockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction. . . ." *Id.* This language caused "serious embarrassment" to the U.S. *See* letter to John H. Shenefield, Associate Attorney General, Antitrust Division, from Robert B. Owen, Legal Adviser, Department of State, *reprinted in* Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 657, 665 (1980). The Department of Justice later filed a formal statement of interest in the case. 5 TRADE REG. REP. (CCH). ¶ 50,416.

52. *See National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (held that antitrust analysis should assess the "competitive significance" of a restraint. Any deviation from the norm of competition must come from Congress.).

53. Securing political support for agreements, without acknowledging that some concessions have been made, risks reinforcing protectionist sentiments, and places the agreement in danger once knowledge of those concessions becomes widespread. *See* K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 65 (1970). The fundamental defect of reciprocal trade agreements was that they failed to acknowledge that concessions were being made.

54. STEINER & VAGTS, *supra* note 18, at 627. *See* Lenhoff, *supra* note 48, at 629; K. DAM, *supra* note 53,



It is certainly in the interest of the United States to extract maximum concessions from foreign governments in return for such a cutback, and unilateral action will not accomplish that end.<sup>55</sup>

Only if the President is able to make credible commitments to remove the most offensive aspects of U.S. antitrust law will foreign nations be willing to make reciprocal concessions. Therefore, Congress should authorize the President to negotiate agreements which clearly define the extraterritorial scope of U.S. antitrust law. Although any such agreements will almost certainly reduce its current scope, foreign nations should be willing, in return, to cooperate more fully with American antitrust discovery and enforcement, or to use their trade laws to promote a new and mutually satisfactory definition of impermissible anticompetitive acts. Without such an agreement, adverse foreign reaction to U.S. antitrust will probably continue, followed, in all likelihood, by American retaliatory legislation and deteriorating antitrust cooperation.

Compromise between the U.S. and its trading partners could take many forms. For example, a foreign government might identify enterprises which are vital to its national interests, and the U.S. could then agree not to recognize lawsuits against those enterprises. Alternatively, particular business practices, important to a foreign government's national interest, could be identified by that government and declared exempt from the scope of U.S. law. And discovery requests could be screened or controlled by an international tribunal whose decisions would be binding on all parties.

Concessions from abroad would come as particular business practices and foreign parties were omitted from the protected lists. American antitrust enforcement authorities could legitimately expect foreign cooperation in actions against such practices and persons, since by omitting them from the protected list, a foreign government will have indicated that its important national interests are not implicated. Thus, the process of negotiating agreements will help define those foreign interests with which U.S. courts should not interfere, and in return the courts should receive greater cooperation from foreign authorities in discovery and enforcement when those interests are not implicated.

These agreements would have a number of advantages over the current system of *ad hoc* dispute resolution. They would force governments to identify their own vital interests, and to balance these interests against those of other nations. To obtain protection or immunization for an industry, a nation would have to trade off cooperation in other areas. This process would force govern-

---

at 54. It has played an important part of many international agreements. See S. REP. No. 96-249, 96th Cong., 1st Sess. 1 (1979) (tariff concessions apply only on a reciprocal basis); S. REP. No. 93-1298, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7199 (goal of trade negotiations is full reciprocity).

55. Cf. S. REP. No. 93-1298, 93d Cong., 2d Sess., 1 *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7243 (unconditional grants of most-favored-nation treatment have led to one-sided agreements).

ments to evaluate the worth of each interest, rather than granting blanket immunity to their industries and nationals through blocking statutes and claw-backs.

Negotiated agreements are also advantageous because they inject certainty into international transactions. Under these agreements, businesses would be able to predict the antitrust consequences of their actions. Prospective plaintiffs would be aware of any implicated foreign interests and, therefore, of the viability of their claims. And the courts would be able to refer to the agreements, in some cases, for definitive rules on the coverage of antitrust laws.

Once agreements are in place, Congress should authorize the President to remove the immunization of protected foreign parties or practices in the event of foreign noncompliance with the agreements. The President's ability to quickly impose retaliatory sanctions will itself help deter foreign deviation from negotiated agreements.<sup>56</sup> Furthermore, foreign governments vest much greater discretion over trade regulation in administrative hands,<sup>57</sup> making foreign trade regulation more adaptable to changing political and economic conditions. American antitrust enforcement should be equally flexible.

This proposal certainly goes beyond current antitrust dispute resolution. But American antitrust authorities face, in the international context, a set of political constraints which are absent domestically. A number of co-equal enforcement agencies are present. Some nations prohibit, while others encourage, the same forms of behavior. Clearly, the present system has failed and a new system should be developed.

Furthermore, the proposal is not without precedent. Congress faced similar problems — the need to establish reciprocal agreements and the concomitant need for centralized negotiating authority — in the area of tariffs and trade barriers, and responded by passing the Trade Act of 1974.<sup>58</sup> This Act authorized the President to negotiate tariff reductions, subject only to Congressional veto of the package as a whole.<sup>59</sup> Thus, Congress delegated negotiating authority in an

---

56. Reciprocity and retaliation are interrelated concepts. STEINER & VAGTS, *supra* note 18, at 627. The ability to retaliate ensures a state that if a treaty or agreement partner fails to adhere to part of an agreement — which would make the agreement nonreciprocal — it can reduce or eliminate its compliance, thereby reestablishing reciprocity. Retaliation is a common way for an injured state to respond to a partial breach without abrogating the entire agreement. A. MCNAIR, *THE LAW OF TREATIES* 573 (2d ed. 1961). Dam has pointed out that prohibiting withdrawal of concessions discourages a government from making them in the first place. K. DAM, *supra* note 53, at 80. *See id.* at 81 (retaliation and other self help is at the heart of GATT). *See also* Trade Act of 1974, 19 U.S.C. § 2136(b) (1976). (GATT retaliation); Walker, *Dispute Settlement: The Chicken War*, 58 AM. J. INT'L L. 671 (1964) (example of the operation of retaliatory tariffs).

57. For example, the U.K. blocking statute is invoked at the discretion of the British Secretary of State. Protection of Trading Interests Act, 1980, ch. 11, §§ 4-5 (Great Britain).

58. Pub. L. No. 93-618, 88 Stat. 1978 (1975).

59. Trade Act of 1974, 19 U.S.C. § 2131 (1976).

area, international trade regulation, over which it has ultimate constitutional authority.<sup>60</sup>

Increased centralization of American antitrust authority should facilitate the harmonization of various nations' antitrust laws, and a reduction in the political tensions which are now present. Reciprocal negotiations over tariff levels have produced large-scale tariff reductions.<sup>61</sup> As in the case of tariffs, unilateral antitrust concessions will seldom occur — it is in no nation's self-interest to make such concessions. But the process of negotiating international antitrust agreements will force nations to define more clearly the goals they seek to promote through antitrust and trade regulation. Ultimately bi- or multi-lateral agreements offer the best chance to achieve at least some degree of international compromise.

*Antitrust and American Business Abroad* seems certain to play an important role in the development of the jurisprudence of international antitrust. As noted earlier, the book will serve as a valuable resource for the litigant, counsellor and scholar. Far more important, however, is the understanding that the authors bring to the difficulties facing antitrust law as it is applied to a world economy completely unforeseen at the time that much of the law was developed. The reader may differ with Atwood and Brewster on specific proposals. However, the authors' analysis provides a firm foundation for policy discussion and formulation. Finally, only when Congress and the courts acquire at least some measure of the authors' sensitivity to foreign concerns will there be a real hope for reconciling American and foreign antitrust.

---

60. U.S. CONST. art. I, § 8, cl. 2. Even outright discretionary authority of the President over specific litigation may be authorized in the international context. *See generally* Exec. Order No. 12,283, 46 Fed. Reg. 7,927 (1981) (barring all claims in U.S. courts against the government of Iran arising from seizure of 52 American hostages); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981) (referring all claims against Iran to the Iran-United States Claims Commission for final and binding resolution). *But cf.* *Electronic Data Systems Corp. Iran v. Social Sec. Org. of the Gov't of Iran*, No. CA3-79-0218-F, *mem.* at 25 (N.D. Tex. Feb. 12, 1981), *reprinted in* C. BROWER, L. MARKS, & J. OLSON, *AFTER ALGIERS: PROTECTING AND PERFECTING AMERICAN CLAIMS AGAINST IRAN* 101, 125 (1981) (held a related Executive Order unconstitutional, but partly on the grounds that it was issued after issuance of a final judgment); *National Airmotive Corp. v. Government of Iran*, 499 F. Supp. 401, 405 (D.D.C. 1980) (stated in dicta that it is doubtful that the Executive can regulate operations of the courts with regard to a particular subject matter).

61. K. DAM, *supra* note 53, at 56.