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International Application of American Antitrust Laws: Issues and Proposals

James A. Rahl*

American antitrust policy in foreign commerce is once again under the pressure of complaints from at home and abroad. It may seem anomalous that laws intended to protect competition are charged with impairing American "competitiveness," but that is the contention heard in Congress and in business quarters. Meanwhile, some foreign nations, including a few who have recently enacted new antitrust laws of their own, complain that our antitrust laws are too aggressive.

Given the large amount of current discussion and the number of different proposals in Congress, careful study of the issues and of possible solutions is certainly indicated. Antitrust policy is fundamental to

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2 See S. 1010 Hearings, supra note 1, at 12-14 (statement of Senator Mathias); id. at 1-6 (statement of Senator Javits); Foreign Interests Seek to Curb Extraterritorial Application of Sherman Act, 966 ANTITRUST TRADE REG. REP. (BNA), at A-6 (May 29, 1980); ANTITRUST TASK FORCE ON INTERNATIONAL TRADE AND INVESTMENT OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, FINAL REPORT ON U.S. ANTITRUST LAWS AND AMERICAN EXPORTS (Feb. 26, 1974), reprinted in International Aspects of Antitrust Laws, Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong., 1st & 2d Sess. 163 (1973-1974).


4 I testified in favor of S. 1010. S. 1010 Hearings, supra note 1, at 92-106.
American private enterprise capitalism, and any study which fails to appreciate that may easily go astray. At the same time, there are problems of possible business injury from some applications of the law which deserve consideration, and there are international problems of good relations with other countries and of frustration of our antitrust policies which ought to be addressed.

Under the circumstances, the subjects to be studied must be carefully chosen, and the methods of study should be as enlightened as possible. Topics to be examined might be approached under the following three broad headings, discussed below:

(1) Rules of law and their extraterritorial application.
(2) Benefits and injuries from antitrust policy.
(3) Laws and policies of foreign governments, both consistent with and in conflict with antitrust.

Some methods of approaching these topics are suggested to supplement traditional testimonial techniques.

RULES OF LAW AND THEIR EXTRATERRITORIAL APPLICATION

A study should begin with some analysis of legal principles governing international application of American antitrust laws, particularly those which give rise to problems. Foremost among the problems are the “extraterritorial” issues, falling into three categories: (a) the “effects” doctrine, of applicability to activities abroad which affect American commerce; (b) conversely, the “foreign markets” issue, of applicability to activities at home whose chief effects are abroad; and (c) discovery and enforcement procedures of American antitrust abroad. A fourth set of problems involves the actual substantive antitrust rules applied to foreign commerce, especially the issue of per se vs. reasonableness tests. These questions have been discussed extensively in writings, hearings, and other forums, and examination of the best of the large literature on the subject should be part of the study.5

The Extraterritoriality Issues

The following example will illustrate the effects doctrine, the foreign markets question and procedural problems of extraterritoriality.

5 To avoid over-extending this article and to concentrate on the issues themselves, I have refrained from including references to most of the many excellent writings which one should consult in this field. For extensive bibliographies, see B. Hawk, United States, Common Market and International Antitrust: A Comparative Guide 16-18 (1979); Common Market and American Antitrust: Overlap and Conflict 54-56 n.13 (J. Rahl ed. 1970) [hereinafter cited as Rahl]; W. Fugate, Foreign Commerce and the Antitrust Laws 577-93 (2d ed. 1973).
Suppose that several private British firms together control the entire free world supply of a commodity produced in England which is of vital importance to the American economy. Meeting in London, these firms take a page from the OPEC book and double the price in exports to the United States, though not at home, knowing that the effect will be drastic and on a par with the recent oil price increases.

Assume that diplomatic appeals will be unavailing. The United Kingdom has enacted several antitrust-type statutes since World War II, but the most immediately relevant of these, the Restrictive Trade Practices Act, 1976, provides for exemption of export cartels. It, like the antitrust laws of most other nations, would not be given a "foreign markets" applicability in a case like this unless there were domestic effects as well.

How may American law approach this situation? The cartel's activities are mainly abroad, but they reach our shores in the form of restrictive effect on our imports and thence on our domestic prices. This is then a combination in restraint of trade which is carried out in our foreign import commerce and which also affects our domestic interstate commerce. As a matter of subject matter jurisdiction, the Sherman Act, not to mention the Wilson Tariff Act, clearly applies, and as a matter of substantive law, the Act plainly would make this private price-fixing combination illegal. Under the Alcoa decision, U.S. law may and does prohibit this foreign combination because it is intended to affect U.S. imports and domestic commerce, and it actually has that effect. Using a slightly more liberal test in recognizing jurisdiction, Section 18 of the Restatement (Second) of Foreign Relations Law of

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7 The U.K. Restrictive Trade Practices Act, 1976, c. 34, schedule 3, ¶ 6(1)(a) states that the Act does not apply to an agreement in which all the restrictions relate exclusively "to the supply of goods by export from the United Kingdom."


11 Hawk, supra note 5, at 104.

12 United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945).
the United States supports this conclusion.\textsuperscript{13}

There are several doctrines which, given special facts, could affect applicability of the Act. If the British Government required the firms to raise their prices, a defense of "foreign government compulsion" could arise, and there could be an "act of state" defense also if an American suit sought to question the acts of the British Government.\textsuperscript{14}

Even in the absence of foreign compulsion, if British public policy strongly supported the cartel for some reason, this might be taken into account as a matter of "comity," under recent federal court of appeals decisions.\textsuperscript{15} On the facts given, however, Sherman Act applicability seems clear.

Strangely, the Department of Justice might decide not to prosecute despite the apparently clear violation, if it follows a policy stated in 1977. In a letter to Senator Kennedy as chairman of the Senate Judiciary Committee, the then head of the Antitrust Division, Donald Baker, indicated that the Division did not proceed against foreign export cartels if they were of a kind allowed to American exporters under the Webb-Pomerene Act.\textsuperscript{16} A later head of the Division, John Shenefield, however, indicated the following year that this might change.\textsuperscript{17}

In order to proceed, American suits might face difficulties in obtaining personal jurisdiction over the British firms in an American court.\textsuperscript{18} An equally difficult practical problem of obtaining evidence might arise if necessary witnesses and documents are in England.\textsuperscript{19} Moreover, any remedy against the cartel might be rendered ineffective by the foreign location of the parties and the activity.\textsuperscript{20}

At each step of the way, American action would be likely to en-

\textsuperscript{13} Section 18 of the \textit{Restatement (Second) of Foreign Relations Law of the United States} (1965) states that a nation has jurisdiction over conduct outside its territory causing an effect within the territory, \textit{inter alia}, if the effect occurs "as a direct and foreseeable result of the conduct." § 18(b)(iii). The Alcoa case's intent requirement is thus replaced by a foreseeability test.

\textsuperscript{14} \textit{See} text accompanying notes 106-09 \textit{infra}.

\textsuperscript{15} \textit{See} text accompanying notes 115-18 \textit{infra}.


\textsuperscript{17} Hawk, supra note 5, at 106.

\textsuperscript{18} \textit{See} id. at 59-70; Fugate, supra note 5 at 87-114; Rahl, supra note 5, at 131-35.

\textsuperscript{19} Hawk, supra note 5, at 314-43; \textit{see} Lever, \textit{Aspects of Jurisdictional Conflict in the Field of Discovery}, in \textit{International Antitrust, Fifth Annual Fordham Law Institute 358} (1979) [hereinafter cited as \textit{Fifth Fordham Antitrust}]; Flexner, \textit{Foreign Discovery and U.S. Antitrust Policy—The Conflict Resolving Mechanisms}, in \textit{id}. at 380; Rahl, \textit{Enforcement and Discovery Conflicts: A View from the United States}, in \textit{id}. at 347-55; General Enforcement Policy in International Trade, in \textit{id}. at 328 (panel discussion with Bertrand, Davidow, Haight and Stockmann); Fugate, supra note 5, at 114; Rahl, supra note 5, at 118.

\textsuperscript{20} Hawk, supra note 5, at 344-64; Fugate, supra note 5, at 128; Rahl, supra note 5, at 118.
counter British Government objection and interference. The British object to the effects doctrine as a matter of substantive law on the ground that it is an effort by the United States to enforce an economic regulation in the United Kingdom, contrary to British sovereignty and international law.\(^{21}\) Even if substantive applicability were clear—as it would be if all of the activity occurred in the United States—the British probably would still object to procedural activities in the United Kingdom in aid of American antitrust enforcement.\(^{22}\) The recently enacted U.K. Protection of Trading Interests Act could be used to prevent the taking of evidence from the U.K. in aid of the American proceeding.\(^{23}\) If the voluntary aid of British courts were sought through letters rogatory, this too would probably encounter objections.\(^{24}\) A U.S. court injunction against the cartel would certainly be ineffective in England.\(^{25}\) And if a party obtained a treble damage judgment against the cartel, as might well occur, the new U.K. Act permits the defendants to sue in England to recover the punitive portion of the damages.\(^{26}\)

In the example given, both substantive and procedural problems may occur, but procedural extraterritoriality may be a problem even if subject-matter jurisdiction is beyond question. Conversely, it is possible to have personal jurisdiction and evidence available, but have subject matter jurisdiction in question because the activity is outside the United States.

At various times, other nations have protested American antitrust actions on grounds of extraterritoriality, and a few have enacted "blocking" statutes to prevent obtaining of evidence.\(^{27}\) On the other

\(^{21}\) See Silkin, The Perspective of the Attorney General of England and Wales, in PERSPECTIVES, supra note 1, at 28; Willoughby, Remarks of an English Solicitor, in id. at 56.


\(^{25}\) See British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., [1953] Ch. 19 (affirming injunction of lower court, [1952] 2 All E.R. 780 (C.A.), against compliance with U.S. antitrust decree which ordered I.C.I. not to assert certain British patent rights; decree was "intrusion" on British sovereignty).

\(^{26}\) 1980, c. 11, § 6.

\(^{27}\) For a discussion of blocking statutes, see HAWK, supra note 5, at 315-43. For a discussion of protests of foreign nations, see K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 45 (1958); INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST CONFERENCE (Tokyo) 565-92 (1964) (compilation by G.W. Haight of various protests); Commonwealth Nations
International Antitrust Policy
2:336(1980)

hand, West Germany and Austria explicitly provide for "effects" juris-
diction in their antitrust laws and seem to have no objection to ours. Moreover, the Commission of the European Communities has en-
dorsed the effects doctrine for application of the Rome Treaty antitrust provisions. Ironically, while the United Kingdom objects to U.S. antitrust extraterritoriality, and previously objected also to EEC use of the effects doctrine prior to British entry into the Common Market, it now—like it or not—enjoys the protection of the doctrine by virtue of membership in the EEC.

The effects doctrine substantively and procedurally raises problems both of international relations and of impact on American business abroad, and is thus central to questions of possible injury to American business. But it is difficult to conceive of either the United States or the EEC rejecting the doctrine. The relevant markets of anti-
trust concern are not neatly arranged according to national boundaries.

Study may be addressed more profitably to possible limitations on the doctrine than to its validity in the abstract. Neither Section 18 of the Restatement nor the Department of Justice Antitrust Guide require proof of actual intent on the part of a foreign combination to affect U.S. commerce, whereas intent was a part of Judge Learned Hand's formula. Contrariwise, Judge Hand was willing to presume the nec-


serve the Freedom of Competition, § 4 (Austria), reprinted in 1 OECD Guide, supra note 6, at Austria § 1.0. For a discussion of German attitudes, see Stockmann, Antitrust in the Federal Re-
public of Germany, in Fifth Fordham Antitrust, supra note 19, at 392. Recently, relying on the "effects" doctrine, the German Federal Cartel Office issued a decision barring an acquisition by a Germany company's French subsidiary, Bayer France, of another French company, Fire-

29 Commission of European Communities, Sixth Report on Competition Policy 31 (1977); Hawk, supra note 5, at 455.

30 U.S. Department of Justice, Antitrust Division, Antitrust Guide for Interna-
tional Operations 6 (1977) [hereinafter cited as international Antitrust Guide] asserts jurisdicti
on over foreign transactions if they have a "substantial and foreseeable effect on U.S. commerce."

31 Acts abroad were unlawful if "intended to affect imports and did affect them." United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).

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ecessary effect on U.S. commerce from the intent, rather than put the plaintiff to strict proof.\textsuperscript{32} Also doubt exists as to whether the effect must be really "adverse" as distinguished from simply "substantial."\textsuperscript{33}

Consideration could be given to a statutory change requiring proof of both intent and substantial adverse effect on the price, the supply or some other significant market factor where the activity occurs abroad. Also, American firms and their foreign subsidiaries, unlike purely foreign enterprises, probably do not enjoy the benefit of the \textit{Alcoa} rule requiring proof of intent when acting abroad, but perhaps should have this differentiation removed. Such changes would limit jurisdiction to cases where conduct is deliberate and especially culpable and effects are sufficiently objectionable to make a strong case for extraterritorial applicability. This approach might be more fair and less injurious to both American and foreign firms in their activities abroad, without sacrificing clear American interests. It would not remove all the objections of foreign governments, but it might reduce them.

In the example given, it is assumed that the United Kingdom's antitrust laws would not come to the aid of the United States. Let us suppose that the situation were reversed, and that the highly objectionable cartel is composed of Americans who conspire in New York to raise the price in exports to the United Kingdom. While the British presumably would not like this, they could do nothing under their antitrust laws to stop it, if they applied their own principles against extraterritoriality. I assume that for the same reason they would not urge the EEC Commission to act.

But would American law be applicable?\textsuperscript{34} If so, in another para-

\textsuperscript{32} After proof of intent, the burden of proving lack of effect on imports shifted to defendant. \textit{Id.} at 444.

\textsuperscript{33} With respect to the interstate commerce requirement of the Rome Treaty antitrust provisions, the European Common Market Commission applies a test amounting to one of abnormal effect, rather than adverse effect. A restrictive agreement causing a "considerable increase" in trade could be brought within the requirement. \textit{Etablissements Consten S.A. and Grundig-Verkaufs-GmbH v. Commission, [1967 Transfer Binder] COMM. MKT. REP. (CCH) \| 8046, at 7652 (E.C. Ct. of Justice 1966).}

\textsuperscript{34} The Sherman Act unquestionably applies to export restraints. \textit{Hawk, supra} note 5, at 45; \textit{Pfizer, Inc. v. Government of India, 434 U.S. 308, 313-14 n.11 (1978).} The cartel might register with the Federal Trade Commission and try to come within the exemption for export trade associations under the Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-65 (1976). If the cartel operates exclusively in export trade, avoids any restrictive effect on competition within the United States and does not artificially raise or depress prices in the United States, it may gain exemption under section 2. 15 U.S.C. \S 62 (1976). In 1978, only twenty-seven active associations were registered, and available data indicates that as of 1976, exempt associations accounted for only 1.5% of total U.S. exports. \textit{FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: TEN YEARS LATER 6, 15 (1978) (staff analysis).}
dox of this field, suits would be permitted in American courts by British citizens. Even the British Government, if it is an injured party, could use our courts to sue, for treble damages and an injunction\(^3\) (although the U.K. Protection of Trading Interests Act might allow the U.S. defendants to go to Britain and "claw back" the punitive damages).

The United States Government itself could certainly seek to apply the Sherman Act, because the restraint of trade would be carried out in U.S. export commerce. Justice Department officials, however, have recently argued that the Act should not apply in such a case, saying that it is not designed to protect foreigners in foreign markets.\(^3\) Foreign nations should protect themselves, it is said, and they can use their own laws against such a combination. It will be recalled, however, that the Department in 1977 said that we would not attack foreign export cartels if they were like our Webb-Pomerene associations.\(^3\) Most foreign nations follow the same policy. The result is a kind of paralysis allowing export cartels to operate freely in both our import and our export trade. This situation certainly requires study.

To treat the question as simply an issue of "protection of foreigners in foreign markets" is erroneous, however, because it ignores the basic policy on which American antitrust laws is based\(^3\)—that competition is the desired system for the economic activity regulated by Congress. In the foreign commerce clause of the Sherman Act, Congress clearly extended jurisdiction to restraints of competition and monopolization carried out in export, as well as import trade. The competitive


\(36\) HAWK, supra note 5, at 45-52. In a paper entitled Subject Matter Jurisdiction in U.S. Export Trade, delivered before the American Society of International Law on April 23, 1977, Douglas E. Rosenthal, then Chief of the Foreign Commerce Section of the Antitrust Division, argued that "as a matter of law, restraints in U.S. export trade which only injure persons in foreign markets may not be made subject to the jurisdiction of U.S. courts." HAWK, supra, at 49; see Rosenthal, An Overview of The Guide and Its Objectives, in PERSPECTIVES, supra note 1, at 85-87, 146. Earlier, Donald I. Baker, then Deputy Assistant and later Assistant Attorney General in charge of the Antitrust Division, said this is not an issue of jurisdiction, but argued strongly that as a matter of "substance," the Sherman Act should apply only to restraints which have impact on the U.S. domestic market or which restrict export opportunities of U.S. exporters. Baker, Antitrust and World Trade: Tempest in an International Teapot?, 8 CORNELL INT'L L.J. 16, 32-38 (1974). The INTERNATIONAL ANTITRUST GUIDE, supra note 30, at 4-6 adopts this approach as a matter of enforcement policy.

\(37\) See text accompanying note 16 supra.

process is protected for its own value, not for the benefit of selected
groups of persons. Those who argue for a more limited, protectionist
interpretation do not explain how they justify a rationale which would
give jurisdiction, for example, over an exclusive dealing agreement
with a foreign distributor because it cuts off an outlet for a U.S. ex-
porter, but would deny jurisdiction over a boycott or a price-fixing
combination by all U.S. exporters because these would injure no U.S.
competitors or domestic consumers.

To say that there is jurisdiction, however, is not to say that there is
a violation; this would be a complete non-sequitur. In another article in
this issue, Douglas Rosenthal, former Chief of the Foreign Commerce
Section of the Antitrust Division, states my analysis correctly while in-
dicating that "[m]ost antitrust scholars" (unnamed) would not agree
with it, at least as to foreign joint ventures.39 He adds that "others"
(also unnamed), however, might apply the Sherman Act to find liability
from the mere fact of jurisdiction alone, and implies that the latter, if
not I, would therefore question the legality of a foreign joint venture,
which was cleared by the Department of Justice, to construct a large
hydroelectric project abroad. I strongly disagree with any inference, if
intended, that my analysis supports such a conclusion. If there is sub-
ject-matter jurisdiction in the example he gives, which depends upon
facts not stated, there is still the decisive question of whether the sub-
stantive law would invalidate the venture. In my opinion, even if the
parties are potential competitors, there would be no violation if they
would not be able or willing to undertake the project alone or in a less
restrictive way.

This "foreign markets" issue needs careful examination. It is not
one in which our international relations are heavily involved, but it is
important to the question of whether antitrust injures more than it ben-
efits American interests. Does antitrust as it may apply in export trade
injure that trade more than it stimulates it? Does it unduly deter Amer-
ican competition and investment abroad? Are limited exemptions
needed, such as in the Webb-Pomerene Act and the proposed Export
Trading Company Act?40

Account should be taken of the unequal impact of the laws of dif-

39 Rosenthal, What Should be the Agenda of a Presidential Commission to Study the Interna-
40 At this writing, an "Export Trading Company" bill, S. 2718, 96th Cong., 1st Sess., 126
Cong. Rec. S11,935 (daily ed. Sept. 3, 1980), has passed the Senate and is pending in the House
of Representatives. The bill and a similar House bill, H.R. 7230, 96th Cong., 1st Sess. (1980),
would give the Secretary of Commerce power to grant antitrust exemptions to export associations
ferent nations. As with the United Kingdom, most nations and the EEC, however strict their antitrust laws may be domestically, do not apply their laws to export cartels, just as we permit those registered under Webb-Pomerene to enjoy exemption. Only a tiny number of our exporting firms use the Webb-Pomerene exemption, and currently it covers only about 1.5% of our total export activity, but in some other nations, export cartels flourish.

If the United States applies its law to an export combination, or to an activity abroad which may affect our foreign commerce, and if the result is to prohibit the combination, it is possible that combinations from other countries which do not extend antitrust rules to their foreign commerce, or which have no such rules anyway, may have an advantage. It remains to be seen whether this is a serious problem in actual practice, and the study should focus on that question.

Other problems arise from this "foreign markets" jurisdiction. In theory, the Act could be applied to various kinds of vertical agreements with distributors abroad, such as resale price maintenance, exclusive dealing, and tying, even in the absence of effects on imports or on the domestic economy. It could apply where these practices are carried out in the course of export commerce, or where they have a substantial effect on it, as is doubtless the case sometimes. Whether the result would be illegality would still depend upon the substantive rules of law to be applied. Similar analysis brings some licensing arrangements, joint ventures, consortia, acquisitions and other activities within the scope of the Act.

To describe this as the "scope" of the Act is neither to say that this is as it should be, nor that the activities covered are illegal. It is simply a matter of realistic application of language, case law, and ordinary legal theory. A sensible study cannot be conducted without objective appraisal of the law's impact as it actually is, and the actuality is that legal advisors today cannot afford to ignore the different theories outlined above.

Congress could solve most of this by the radical step of simply repealing the foreign commerce clause of the Act. This would put U.S. law on a par with most other nations' antitrust laws, which apply to

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41 See notes 7 and 8 supra.
42 Note 34 supra.
43 Note 34 supra.
44 I have discussed this in Rahl, International Application of United States Antitrust Laws: Distribution Arrangements, in INTERNATIONAL ANTITRUST, FIRST ANNUAL FORDHAM CORPORATE LAW INSTITUTE 17 (B. Hawk ed. 1975).
45 See S. 1010 Hearings, supra note 1, at 66 (statement of W.F. Kennedy).
restraints in their domestic markets, sometimes with extraterritorial application, but have no express "foreign commerce" language. As a policy decision, this would be highly questionable. It probably could be done without catastrophic consequences,\textsuperscript{46} but something would be lost. Through the interstate commerce clause, and the effects doctrine, the law would still provide protection against most of the serious restraints because most of them have effects on the U.S. domestic economy. I would not favor this change, however.

A more sensible approach would be to consider carefully what, if any, harms are now occurring which overbalance the benefits of the present scope of the law. If a negative balance is clear, an amendment could be considered to provide that a restraint confined to export trade would not be a violation absent proof of a substantial, adverse effect on U.S. commerce, as well as the usual proof of a substantive violation. This would eliminate jurisdiction based on the "in" commerce theory, and would also require a showing of \textit{adverse} effect. It would probably not be wise, however, to add an intent requirement here.

\textit{Substantive Rules of Law}

It is often argued that per se rules should not be as frequently applied in foreign commerce cases as in domestic cases, and that reasonableness tests should be given greater sway.\textsuperscript{47} The Department of Justice Guide gives some general support to this idea, but as a concrete matter takes little away from the present-day force of per se rules.\textsuperscript{48} The proposition is more easily said than implemented. Of the four basic per se rules, two—price-fixing and market allocation—are probably so sound as applied in horizontal cases that it would be difficult to make a good case for changing them. The whole presently successful struggle against great international cartels could thereby be lost. The one major qualification might be that genuinely "ancillary" restraints

\textsuperscript{46} The \textsc{International Antitrust Guide}'s concern for protecting export opportunities of U.S. exporters could be preserved with new language limited to that. \textsc{International Antitrust Guide}, note 30 \textit{supra}.


\textsuperscript{48} The \textsc{International Antitrust Guide}, \textit{supra} note 30, at 2, says that the rule of reason may have a broader application in some international situations, but \textit{id.} at 3 emphasizes that normal \textsc{per se} rules will apply to horizontal price and market division restraints.
should be given a greater reasonableness analysis.\(^49\) The Supreme Court seems to be heading in that direction anyway, however, and it would probably be better to leave this delicate problem to them.

Insofar as vertical restraints are concerned, the Court has abandoned a per se rule as to territorial restriction of distributors,\(^50\) leaving only resale price maintenance and tying arrangements in the per se category. The former is perhaps best left there. The latter is undergoing continuing erosion in the courts, and I would recommend allowing this process to continue without interference.

The per se rule against boycotts certainly needs restatement generally, but it does not seem to be a frequent problem in international commerce, apart from the Arab boycott, which has been dealt with by separate legislation.\(^51\)

Other substantive questions could be considered, such as the law applied to mergers, joint ventures and consortia abroad.\(^52\) Section 7 of the Clayton Act has no applicability where there are no effects on competition in a "section of the country" (U.S.), as the statute requires. That is probably as it should be. It is occasionally argued, however, that even the more lenient Sherman Act tests which apply to these transactions deter some valuable transactions. This is another instance in which a somewhat broadened allowance for reasonably ancillary restraints would substantially reduce the problem, but it is not clear that this should be accomplished by legislation. Judicial interpretation may well move in that direction.

Joint ventures and mergers which adversely affect competition in the U.S. domestic economy are, of course, another matter. Although these sometimes involve foreign parties, they are problems which must be dealt with in the same way as other domestic activities.

Licensing of industrial property is another important area in which substantive law rules may, if not carefully shaped, operate to deter valuable transactions.\(^53\) One of the greatest concerns to a prospective American licensor may be whether the licensee can be pre-

\(^{49}\) The \textit{International Antitrust Guide}, note 30 \textit{supra}, supports this, using as an example territorial limitations of know-how licenses. \textit{Id.} at 3, 34.


\(^{52}\) See generally \textit{Hawk}, \textit{supra} note 5, at 241-307; \textit{International Antitrust Guide}, \textit{supra} note 30, at 15, 19, 28.

\(^{53}\) See text accompanying notes 62-69 \textit{infra}.
vented from using licensed technology to compete with the licensor in geographic areas or fields of use in which the licensor is operating. In some cases, the licensor will be unwilling to grant a license unless a restrictive license provision is allowable. In the area of unpatented know-how, the Department of Justice Antitrust Guide endorses the use of the ancillary restraints doctrine to allow for such restrictions in demonstrably reasonable cases.\textsuperscript{54} Where patents are concerned, however, stricter rules are applied, and it would be desirable to study the practical impact of this distinction. Other questions in the industrial property area also would warrant examination.

Legislative revision of substantive rules is a controversial and difficult task. In some instances it may be more productive of desirable change to recommend revision of judicial and administrative interpretation and policy rather than statutory amendment.

**ANALYSIS OF INJURY AND BENEFIT**

The contention often made that American business is injured in foreign operations by the antitrust laws and that American interests therefore suffer raises complex issues. A cost-benefit analysis is needed; injury should be balanced with benefit before policy is decided. I suggest that the subject be broken down into the following questions:

*What is Meant by “Injury”?*

A firm may think that whenever it is prevented from pursuing a specific course of action, this interference with its freedom is itself injurious, but the analysis should go further than the philosophical. Does the firm have workable alternative courses of action? Business judgment and legal counseling solve most antitrust problems by working out lawful adjustments. A firm probably should not be considered to be injured unless antitrust law either prevents a profitable operation entirely with no reasonable alternative, thereby having a prohibitive effect, or at least substantially reduces its profitability, having a disadvantageous effect.

By way of example, if a firm wishes to join an international cartel but is advised that this would violate the Sherman Act, it is not “injured” if it can stay out of the cartel and still suffer no significant business disadvantage. The mere fact that its foreign competitors may belong does not itself show injury. On the other hand, if the cartel controls access to or success in the market in some way and there is no

\textsuperscript{54} *INTERNATIONAL ANTITRUST GUIDE*, *supra* note 30, at 3, 34.
way around this barrier, the firm is injured, unless it can effectively change the situation, for example, by inducing antitrust authorities, either U.S. or foreign, to take helpful action. The latter approach occurs occasionally.\textsuperscript{55} Often, however, the firm will not wish to incur the cost, delay and unpleasantness of taking or inducing legal action against competitors.

In the example given, if membership in the cartel is compelled by a foreign government, the firm may be legally secure in joining, but this conclusion depends upon some rather complex legal analysis and involves certain risks.\textsuperscript{56} If membership is encouraged but not required by a foreign government, legal security is probably absent.

Other situations may be more involved. Suppose that an American exporter wishes to enter into a distribution arrangement abroad with an agreement which will prevent the foreign distributor from reselling back into the United States market in competition with the American firm. Present doctrine requires a “rule of reason” analysis to determine the legality of this arrangement,\textsuperscript{57} which adds uncertainty. But if the exporter decides to abandon the restriction because of the law and allow competition by the distributor, is the firm thereby “injured” if its domestic sales are reduced, but still profitable? The question is different from one involving outright foreclosure of access to a foreign market. Here the injury complained of would be that produced by competition in the U.S. domestic market, and it can be argued that this is not a cognizable injury because of our basic domestic competition policy.

But suppose that the firm’s honest business judgment is that such competition would be so costly as to make it simply unwilling to sell to the foreign distributor without some restriction? If the law would make this illegal (I repeat, it may not), the proposed exports may be prevented entirely—unless of course the exporter can adopt an alternative means of selling abroad. If it can, but at higher cost, is this “injury”? A frequent complaint is that foreign competitors in foreign markets sometimes have an advantage because they do not have to comply with antitrust laws which are as strict as those of the United States. An attempt should be made to determine the frequency of prohibitive or

\textsuperscript{55} Both American and foreign antitrust enforcement agencies receive and investigate complaints. In the EEC, Reg. 17, Art. 3, \S 2(b) makes provision for persons, who claim a “legitimate interest” to apply for action by the Commission.\textsuperscript{56} See text accompanying note 106-07 infra.\textsuperscript{57} Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
disadvantageous effects caused by such legal imbalances.\textsuperscript{58} This, of course, is not a simple matter. One must understand in each instance what the actual applicable foreign law is. It may or may not be as strict as American law.\textsuperscript{59}

One must also look closely at the question of whether U.S. antitrust law applies jurisdictionally\textsuperscript{60} and if it does, whether substantive antitrust law will prohibit what other laws will permit. There is a habit of exaggerating the actual reach of American law on the part of some who object to its extraterritoriality.

An exaggerated view is also encouraged by the practice in commercial discussions of giving U.S. antitrust laws as an excuse for not agreeing to something which a party really does not wish to do for business reasons. I have seen instances in which American firms abroad were asked to participate in cartel activity which they wished to avoid because the cartel would restrict their markets and sales. The U.S. antitrust laws were given as a convenient reason for not participating, rather than business considerations, thereby avoiding giving offense to foreign sensibilities. In some of these cases, American law would not apply.

Application of American law when it does occur, however, is not always injurious; indeed, it may be helpful. There are situations in which the American law prevents, or assists in preventing, American firms from entering into arrangements abroad which would limit their sales. Most horizontal cartels do that—they allocate markets and customers and often also fix prices. Such restrictions impede business expansion far more often than they encourage it. By staying out of such cartels, American firms have often been able to expand their sales abroad.

But this is not to say that there are no truly injurious situations. The possibilities are greatest with respect to "third country" markets where U.S. law might apply because of the Sherman Act's foreign commerce clause, with no corresponding foreign law being applicable because of lack of a foreign commerce clause in foreign antitrust laws.\textsuperscript{61}

\textsuperscript{58} Analysis of differences and of overlap and conflict between U.S. and European antitrust laws as to different kinds of business activities is offered in Rahl, \textit{supra} note 5, at 148-310.

\textsuperscript{59} See text accompanying notes 84-89 \textit{infra}.

\textsuperscript{60} See text accompanying notes 5-46 \textit{supra}.

\textsuperscript{61} American firms interested in large engineering and construction projects in third countries may encounter handicaps in engaging in some forms of cooperation on these projects which their European competitors are free to use. As the EEC Dutch Engineers case [\textit{[1967 Transfer Binder] COMM. MKT. REP. (CCH)] \textcircled{2412.31, [1965] 4 COMM. MKT. L.R. 50}] shows, consortia to pool capital and personnel and share the costs, risks, and profits of large projects of this nature are lawful under European law, if limited in operation to areas outside the
Certain types of transactions are often mentioned as ones in which valuable activity is sometimes discouraged or prevented, depending upon a judgment as to whether American law will apply, and how. These include joint ventures and consortia to operate abroad, distribution arrangements in foreign markets, export associations and trading companies, and foreign licensing of industrial property.

Although the Justice Department almost never attacks a joint venture or consortium formed to do business abroad, there are operating restrictions which some of the parties often want that may produce genuine antitrust problems. For example, the participants may be unwilling to invest capital in the joint venture if it will be free to sell in their own home markets, or to furnish important supplies to their competitors. Covenants not to compete to protect against these risks are a natural desire, but their legal status is often doubtful and pursuing the legally safe course may make the whole deal unattractive.

Such cases should be carefully studied, preferably with the aid of empirical information as suggested below.

**Measuring Types and Extent of Injury**

Before policy conclusions are drawn, judgments must be made as to the frequency and practical importance of injuries to foreign business opportunities caused by American antitrust. Obtaining such information is difficult for a variety of reasons, but it should not be considered impossible. Recently I supervised a project at Northwestern in which Joel A. Bleeke, a senior law student, sought to determine empirically the impact on licensing of unpatented know-how caused by U.S., EEC, and developing-country rules regulating territorial and field-of-use restrictions.\(^6^2\) Research in secondary sources yielded little information, except to help to refine the issues. A questionnaire was developed in consultation with business lawyers and executives. Under a guarantee of confidentiality, licensing attorneys or executives of fifty-

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EEC. Moreover, the Commission's policy statement on permissible cooperation indicates that such arrangements may fall outside Article 85(1) even though they affect domestic competition, if the participants would be unable to carry out the job individually. The same statement also reminds firms that an Article 85(3) exemption may still be available, even if Article 85(1) applies.

Consortia of this kind normally require agreement upon prices and allocation of shares in the job, and American law would therefore impose certain risks of violation upon firms forming them, although they may be lawful under some circumstances. If American firms wishing to undertake jobs of this sort decide for legal reasons that they must operate unilaterally, and if the costs and risks would be too great for single-firm operation, the imbalance in American and European law would produce prohibitive consequences for Americans.


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three major American companies responded. The results strongly indicated that foreign licensing of unpatented know-how by U.S. firms would be significantly diminished were it not for the fact that U.S. law permits some restrictions on licensees abroad for a "reasonable" period of time against export to the United States of products embodying the know-how. The study also indicated that a greater time than the "reverse engineering" period now suggested by the Justice Department is needed for adequate protection of licensors. American firms, the study found, consider territorial protection in such licenses to be more important than field-of-use restrictions, but prohibitions of the latter also would affect licensing by a substantial number of firms.

The study also produced fairly clear answers to questions concerning foreign laws. Policies against territorial restrictions in know-how licensing within the European Economic Community have not significantly affected licensing into the EEC by American firms. On the other hand, license registration laws in Latin American countries and India appear to have had a major adverse effect on technology flows from the United States to those countries.

Although this study did not fully examine alternatives pursued by firms where antitrust rules have had a "prohibitive" effect on licensing, this could be done where the subject matter calls for it. The study, by two persons devoting much less than full time to it, required about a year. Gaining the necessary background to ask the right questions, formulating questions, obtaining answers and collating and analyzing results were all very time-consuming. But such an approach can provide better information and guidance for policy than simply obtaining general opinions by testimony. Several such studies could enhance the value of a national commission's work in this area.

Balancing Benefits and Injuries

Benefits in individual business situations have been illustrated, but there are broader values to be considered. The main point to antitrust policy is "faith in the value of competition," not protection of either

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63 Mailings were sent to 196 American companies. Id. at 456.
64 Id. at 458-64, 482.
65 Id. at 464-68, 482.
66 Id. at 477-80.
67 Id. at 468-71, 483.
68 Id. at 471-77, 483.
69 Manufacture abroad and export, of course, are sometimes alternatives to licensing.
particular businesses or consumers. In the Sherman Act, Congress has dictated that our international commerce should be conducted according to that faith, on the theory that this will provide the best environment for such commerce and best serve the interests of our society. These are long-run considerations which cannot be tested alone in terms of complaints of individual injury; competition frequently arouses opposition. Nor can they be tested alone by reference to short-term shifts in the balance of trade.

Perspective may be gained by asking what would happen were we to repeal the antitrust laws entirely, or arrange that they are to have no application to any matters of foreign commerce. History strongly suggests that before long a great deal of American foreign trade and investment would fall into the hands of cartels who would allocate markets and quotas, determine prices and production policies, and seek to control who might engage in the business. In some cases, monopolies would result.

With American antitrust gone, foreign antitrust law would have difficulty surviving. If our firms can now argue that weaker law abroad should justify weakening our own laws, imagine the argument which foreign firms could make if the tables were turned! In any event private international cartels would certainly thrive with no American law to prevent American firms from participating in them.

A study of international cartels which I completed last year found, from published sources alone, that immediately prior to World War II, international cartels controlled from 30% to 50% of world trade. A Justice Department study supervised by Corwin Edwards noted, as the war began, existence of 179 international cartels, with American participants in 109 of them.

Several factors contributed to the post-war demise of these cartels, but no factor had such a direct bearing as did enforcement of the American antitrust laws. Global cartels can seldom operate without applying controls to the huge American market, nor can they succeed in controlling other markets if American firms are free to compete in them. Between 1940 and 1949, about 60 antitrust cases involving international cartels were filed by the Justice Department. As American firms left the cartels and as foreign firms whose cartel activities had

72 Id. at 8.
73 Id. at 20-22.
74 Id. at 22.
affected American markets also dropped out or curtailed their restrictions, the big cartels literally fell apart. The whole climate of international business changed. With it, American foreign trade and investment underwent great expansion, an expansion which is continuing though perhaps slowing in pace.

It is unlikely that a return to cartelization in world trade would be advantageous to American business or to the American public. A living example of the problems this would create is provided by today's foreign-government operated or protected cartels, principally in raw materials such as oil. These are only a sample of what could happen if private cartels were again free to operate.

Few would argue now for wholesale abandonment of what has thus proved to be an extremely valuable American policy, one that is steadily growing among the nations. Proposals for change tend to be more in the direction of curtailing the outer scope of American law, loosening some of its substantive prohibitions, and providing limited exemptions for some activities. In considering these proposals, one should always ask whether the injury can be cured without too much damage to the broader values. Finely-tuned changes may be possible. But history argues that we must proceed with great care.

The story of the Webb-Pomerene exemption of 1918 for export trade associations is instructive.\(^7\) One of the very few exemptions ever arranged for non-regulated businesses, it allows restraints of trade by associations registered under the Act and engaging exclusively in export trade, provided there is no adverse effect on competition or prices in the U.S. domestic market.\(^6\) As stated above, it has been little-used, and is at low ebb today; there are less than 30 such associations, accounting for only 1.5% of U.S. exports.\(^7\) Strict application of the Sherman Act to activities falling outside the scope of the exemption is often given as one of the main reasons for non-use.\(^8\) What this refers to is that domestic restraints or "spillovers" are prosecuted, that exempt associations may not have foreign members (i.e., may not join or become "international" cartels), and that parties may not agree to curtail export


\(^{77}\) Note 34 supra.

activities in favor of foreign joint ventures or other investments.\textsuperscript{79}

Webb-Pomerene should be studied by Congress, as the National Commission recommended.\textsuperscript{80} Its lesson may be that exemptions of this kind from the Sherman Act, intended to promote the formation of export associations and trading companies, will not be popular unless some restraints of competition in the domestic market are allowed and some cooperation with foreign cartels is permitted. Is that a price we wish to pay?

Similar questions should be considered in balancing pros and cons on any proposed changes in the law.

**Laws and Policies of Foreign Governments**

Foreign nations, individually and sometimes also through international organizations, often have antitrust laws of their own. These sometimes have greater impact on American business activities abroad than American law, and must be taken into account in any serious study of injury due to antitrust. Foreign governments also sometimes have interests which conflict with American antitrust policy, and occasionally take actions which positively interfere, and this too must be considered.

**Foreign Antitrust Laws**

One hears with amazing frequency that antitrust laws reflect techniques of the 19th Century and should be abolished or greatly curtailed.\textsuperscript{81} As a description of domestic law this claim is uninformed, and is outlandish in light of recent actions in many parts of the world. Antitrust policy has been growing recently by leaps and bounds in the free world, and almost every judgment about international policy in this area must take account of this.

Since World War II, over 20 nations comprising most of the developed countries have enacted laws to control restrictive trade practices, cartels, and abuses of dominant power.\textsuperscript{82} In the midst of the current objections by the United Kingdom to some American antitrust actions affecting British firms, one might miss the fact that that nation, beginning in 1948, has adopted eight major antitrust statutes, including the

\textsuperscript{79} Id. at 346-48.

\textsuperscript{80} 2 Report to the President and the Attorney General, supra note 47, at 295.

\textsuperscript{81} E.g. L. Thurow, Let's Abolish the Antitrust Laws, N.Y. Times, Oct. 19, 1980, § 3, at 2, col. 3; see letters replying to this article, id., Nov. 2, 1980, § 3, at 2, col. 5.

\textsuperscript{82} Davidow, International Antitrust Codes of Conduct: A Progress Report, in Fifth Fordham Antitrust, supra note 19, at 405, 408.
Competition Act of 1980 sponsored by the Thatcher Government now in power. Together, these laws give the United Kingdom a system of antitrust measures which are almost as comprehensive as the American laws, although the remedies are not always as strict.

West Germany has a fairly strong antitrust law, adopted in 1956, that has recently been amended to increase controls over mergers, along with continued strict treatment of cartels and other restrictive arrangements. France also has a substantial set of laws, which have recently been strengthened. Although enforcement and interpretation of the French laws tend to be lenient, they are still of major significance. Even Japan has a broad antitrust law, although for years it was given only mild enforcement and in the foreign trade area it was relatively ineffective. There are signs worth studying that Japanese antitrust is becoming more significant, however. Smaller developed nations in Europe, as well as Canada, have antitrust laws which are less strict either in substance or as a practical matter than those already mentioned, but which nonetheless represent increasing reliance upon a policy favoring more competition. Many developing countries have recently adopted such laws as well.

Rivaling the U.S. antitrust laws in importance are those of the European Economic Community (EEC), presently comprising nine member nations including all the major powers of Western Europe, i.e., France, Italy, the United Kingdom and West Germany, along with Belgium, Denmark, Ireland, Luxemburg and the Netherlands. Launched in 1957 by the Rome Treaty, the EEC has major antitrust provisions modeled largely after the Sherman Antitrust Act and serving as one of the cornerstones of development of the Common Market. These laws substantially prohibit both horizontal and vertical agreements in restraint of trade, subject to certain exemptions, and single-firm abuses of dominant market positions anywhere in the area of the Common Market are also prohibited if interstate commerce is affected. The laws have been implemented by regulations, and numerous en-

83 1980, c. 21.
85 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, [1978] 1 ANNUAL REPORTS ON COMPETITIVE POLICY IN OECD MEMBER COUNTRIES 42.
86 Id. at 61; [1979] 1 id. at 51.
87 See generally OECD GUIDE, note 6 supra. On Canada, see Bertrand, Recent Developments in Canadian Competition Law, in FIFTH FORDHAM ANTITRUST, supra note 19, at 103.
88 Davidow, supra note 82, at 409.
89 HAWK, supra note 5, at 411-775.
Enforcement actions and court decisions have established them as a major matter to be reckoned with by all who do business in the Common Market.

These laws are overlaid on the national laws of the member states of the European Communities in much the same way that American federal antitrust laws operate with reference to state laws in this country. Thus, Common Market antitrust law is part of the governing law of each member nation, is binding on its citizens, is enforcible in its courts, and is supreme over national law in cases of inconsistency. In considering what is the antitrust policy of Italy, which has no national antitrust statute, and the United Kingdom, which has several laws, for example, one must remember that both have the same supra-national (Community) antitrust law, which provides a uniform antitrust policy for a great many major transactions.

Inevitably, this large and growing number of national and regional antitrust laws occasionally overlap. Enforcement of given laws often affects business activity outside the jurisdiction of the particular nation. Conversely, international business activities invariably affect more than one nation, and where antitrust problems arise, more than one set of laws becomes involved. Both cooperation and conflict are possible in these circumstances. Within the Organization for Economic Cooperation and Development, of which the United States is a member, a procedure has been adopted to encourage consultation and cooperation among the nations in such cases. OECD has also adopted guidelines for multinational enterprises, which include provisions on avoidance of restrictive practices and abuse of dominant power. In addition, the United States has bilateral agreements for consultation with Canada, and West Germany, and an informal working relationship with the European Communities.

All of this activity still falls far short of covering many parts of the world, of course, and there is no truly world law on the subject. The first successful steps toward eventual world law, however, are now being taken. Earlier post-World War II efforts to adopt an international approach, principally the Havana Charter of 1948 and the United Na-

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90 Id. at 476-83.
91 Id. at 808.
93 See Rahl, supra note 5, at 441-48.
tions ECOSOC proposal of 1953, failed for lack of support by different governments, including the United States.\textsuperscript{95}

In May, 1980, however, many nations from all parts of the globe, including developed, developing and Communist-bloc countries, after years of meetings under United Nations auspices, agreed in Geneva to support a set of "Equitable Principles and Rules for Control of International Restrictive Business Practices."\textsuperscript{96} These principles and rules state that enterprises should refrain from specified restrictive practices and cartel arrangements in international trade,\textsuperscript{97} and from abuses of a dominant market position.\textsuperscript{98} Although the principles and rules are "recommendations" to states and enterprises, are not "binding" either

\textsuperscript{95} Rahl, \textit{supra} note 5, at 417-39.


\textsuperscript{97} 3. Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries: (a) agreements fixing prices including as to exports and imports; (b) collusive tendering; (c) market or customer allocation arrangements; (d) allocation by quota as to sales and production; (e) collective action to enforce arrangements, e.g., by concerted refusals to deal; (f) concerted refusal of supplies to potential importers; (g) collective denial of access to an arrangement, or association, which is crucial to competition.

\textit{Id.} § D(3).

\textsuperscript{98} 4. Enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries: (a) predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors; (b) discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises; (c) mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature; (d) fixing the prices at which goods exported can be resold in importing countries; (e) restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e., belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices; (f) when not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service: (i) partial or complete refusals to deal on the enterprise's customary commercial terms; (ii) making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods; (iii) imposing restrictions concerning where, or to whom, or in what form or quantities goods supplied or other goods may be re-sold or exported; (iv) making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

\textit{Id.} § D(4).
on the nations or on their subjects, and have no enforcement machinery, they form a basis for consultation, persuasion, and action on the part of nations and persons. Such first steps should not be ignored in the United States, which has done more than any other nation to stand for antitrust laws to support a free competitive enterprise system. At this writing, efforts are continuing in the U.N. to adopt a code governing transfers of technology which also will contain provisions of an antitrust nature.

Treatment of the issues which the United States faces concerning international antitrust policy must take account of this massive worldwide movement toward more antitrust. Arguments for further Webb-Pomerene type exemptions, for relaxation of antitrust rules because of objections by a few foreign nations, and for the proposition that American business suffers a great disadvantage in competing abroad because of our antitrust laws all are short of the mark unless they calculate the effects of this much foreign and international antitrust development.

It would be equally wrong to intimate that the state of world antitrust law is anywhere near providing a uniform environment, however. There is no escape from complex analysis of this multi-faceted area.

**Foreign Non- and Anti-Antitrust Policies**

The most difficult matter in this whole area is that of how to approach policies and actions of foreign nations which overlap and differ with, clash with, and sometimes block American antitrust action. An increasing amount of cartel-like activity is engaged in or sponsored by foreign governments. The United States on occasion acts in a similar way. Some foreign nations, as noted above, object to American enforcement efforts affecting their citizens and territory, and a few have taken steps to interfere with such enforcement.

Diplomacy may solve some of these problems, and inter-governmental arrangements such as provided by GATT, OECD and the United Nations may help. But a number of direct legal issues arise under American law itself with respect to the effect to be given to foreign actions and interests. Workable rules are needed, and in some instances the state of the law is most unsatisfactory. The principal problems are discussed below.

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99 Id. Annex.
101 International Cartels and Their Regulation, supra note 67, at 2-4, 35.
Defense of Sovereign Immunity. Although suits against foreign governments and their enterprises are relatively infrequent, they can be troublesome when they occur. The Foreign Sovereign Immunities Act of 1976 recognizes immunity, but also codifies earlier practice in making an exception for suits based upon a "commercial activity" of the foreign nation. Conduct abroad having "direct effect" in the United States is included within the exception, thus providing recent Congressional approval of the "effects" test of jurisdiction (without an intent requirement).

As the dismissal of the private suit against the OPEC oil cartel last year shows, the commercial activity exception may be too simplistic. Although the OPEC nations are engaging in what to purchasers certainly is the commercial activity of selling oil, the court found that the exception to immunity should not apply because what is involved is governmental control by these foreign nations over one of their principal natural resources. The court also held that foreign sovereigns may not be made defendants in Sherman Act suits.

Antitrust law certainly is not designed to dictate policy to foreign governments. But cartels are a plague in international commerce. What approach will satisfy the imperatives of antitrust policy and at the same time accommodate the realities of foreign relations?

Defenses of Act of State and Foreign Government Compulsion. These related defenses may bar antitrust suits against private defendants if the latter show that the conduct complained of is the result of foreign state action. The theory may be that the conduct is actually an "act of state" which cannot be questioned in American litigation, or it may be that the foreign state has compelled private action and that the defendant ought not to be held responsible for that.

These defenses have received judicial recognition. It is obvious that they must have some qualifications, however. Thus, the Justice Department Guide accepts applicability of the defenses for conduct in

104 Timberg, note 103 supra.
106 HAWK, supra note 5, at 111; see Mathias, Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform, 12 L. & POL. INT'L BUS. 369 (1980).
the territory of the foreign state, but not for conduct in the United States, while the status of acts in third countries is in doubt. Other qualifications are mentioned in the Guide and are being developed in the courts.

Two corollary questions of great importance merit study. One is whether strong encouragement or persuasion by a foreign state which falls short of provable compulsion should ever be given status as a defense. Under present case law, it is not a defense, but the distinction is somewhat dubious in some cases.

A second question is whether the *Noerr-Pennington* doctrine will be recognized, *i.e.*, the principle of domestic antitrust law that inducing a governmental body to take restrictive action is immune from antitrust liability. The Guide agrees that the doctrine should be allowed in cases of communications with foreign sovereigns where the conduct is genuine and not a "sham." Some doubt arises because the domestic doctrine is based on First Amendment freedom of petition principles which our Constitution does not provide as to foreign governments. Although the Constitutional explanation for the doctrine is popular, based upon some language of Justice Black in the *Noerr* case, the main point is simply that a private individual is not responsible under the antitrust laws for the actions of a government. This is the same theory that supports the "act of state" and "foreign government compulsion" defenses themselves. It is both unrealistic and unsound to treat communications made in reliance upon those defenses differently from the acts giving rise to the defenses themselves.

**Blocking and Anti-Antitrust Laws.** A dilemma arises in connection with the defenses last-mentioned above. A few foreign governments have acted directly to prohibit compliance with our antitrust laws and those of other nations. The recent United Kingdom Protection of Trading Interests Act of 1980 does that, and also provides that judgment-debtors in American and other foreign treble damage suits may recover ("claw back") the punitive portion of the damages in a U.K. court.

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107 INTERNATIONAL ANTITRUST GUIDE, *supra* note 30, at 54.
110 For various laws, see HAWK, *supra* note 5, at 315-42.
111 1980, c. 11, §§ 6, 7. Australia has enacted a similar, but less drastic Foreign Antitrust Judgments (Restriction of Enforcement) Act, 1979, No. 13 (Austl). Canada is considering such legislation. 973 ANTITRUST TRADE REG. REP. (BNA) at A-19 (July 17, 1980).
The dilemma is that these laws are acts of state and matters of foreign government compulsion. Being largely carried out in the territory of the foreign nation, the laws would qualify as defenses under our own rules. The British "claw back" provision evidently would apply to judgments based upon illegal activity in the United States, however, and thus might not meet requirements of the defense. It is difficult to see how this provision could come up as a defense to an American antitrust action anyway, unless the American plaintiff, having lost two-thirds of his judgment in an English court, sues in the United States to get it back. This could be a never-ending process.

Foreign blocking laws are often not implementations of policies different from our own. The United Kingdom, Canada and Australia all have antitrust laws which, though different in various ways, generally seek the same broad goals. The blocking statutes sometimes seem to be more calculated to shelter activity which is illegal under U.S. law than to carry out a positive policy. They most often operate to interfere procedurally rather than substantively—to block investigation and discovery, the obtaining of documentary evidence, the compelling of testimony and the carrying out of judgments.

Present case law does not, and probably should not, accord these laws the status of providing a full defense or immunity. The rule on production of evidence located abroad defers rather strongly to foreign command, however, in that the party concerned may be excused if a good faith effort has been made, though unsuccessful, to obtain foreign government consent to comply with the American court order. One must sympathize with such a party, caught between opposing jaws of sovereignty. But how can American policy be adequately protected against the growing number of foreign laws which rely on our own precepts of due process and then are specifically tailored to frustrate American law?

The Comity Principle. Recently, several courts have endorsed the use of a principle of international comity in cases involving extraterritorial application of American antitrust law, as a factor in determining whether to assert or exercise subject matter jurisdiction. Under this

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112 See generally OECD GUIDE, note 6 supra.
113 See HAWK, supra note 5, at 321.
114 Id.
principle, the court will weigh the interests of American public policy against a foreign nation's interests in accordance with a variety of factors—ten in number in the latest cases. So far the balance has yet to tip in favor of dismissal, but this could be the result. The Supreme Court has not as yet passed on this matter.

Comity is a laudable and indeed essential idea in international relations. As a ground for outright dismissal of a cause of action otherwise authorized by Congress, however, it gives rise to some problems. First is the issue of legitimacy itself. Absent Congressional approval, by what right may a court exercise such discretion? A verbal device is sometimes used to support such judicial action, by calling this a "jurisdictional rule of reason." The traditional rule of reason in antitrust cases gives the courts a great deal of discretion. But that discretion is exercised with reference to carrying out the policy of the Act in accordance with a single standard—against undue or unreasonable restriction of competition. The rule of reason is not a defense to otherwise illegal conduct. But the comity doctrine would operate as such a defense, and with numerous different criteria.

This raises the second question of whether a court can satisfactorily administer such a test. How can it adequately inform itself of the nature of, and weight to be given to, foreign nation interests—a task which our best-informed foreign relations agencies have difficulty enough doing through more flexible non-judicial action?

Third, what procedures should be designed to implement such a doctrine? Great difficulties will arise in connection with private suits, where no party is likely to be qualified to reliably inform the court on these questions. Should the United States and the foreign government both be asked to appear? What if they do, but disagree? What if one or both do not appear?

In antitrust suits filed by the Government, the problems may not be as great. A responsible executive department will have made a determination, presumably in consultation with the State Department,


116 E.g., Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1977). The phrase was used in K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958) in connection with factors to be considered by officials in deciding whether to prosecute, and by judges in determining liability "within the limits of their discretion." Brewster did not analyze the legal basis for such discretion.

117 See Blair, The Canadian Experience, in PERSPECTIVES, supra note 1, at 71, asking "how it is" that a judge "can decide what is the proper balance of international interests."
that U.S. interests should prevail, and the foreign nation may be consulted.

But private suits are sometimes awkward in the foreign commerce area. Many of the modern cases in which the courts have been asked to assert broad extraterritorial jurisdiction have been private actions. Plaintiffs are not so concerned with the rightness of government policies or niceties of international relations as with winning. All of the reported cases to date in which the comity principle has been endorsed by the courts have been private suits, perhaps reflecting an exercise of judicial caution against what may seem to be potentially extreme cause of action theories.\(^{118}\)

It is sometimes suggested that for these reasons private litigation in the foreign commerce area should be cut back. This would be a drastic change, but it should probably be an area for study.

**Conclusion**

The topics suggested above are only a partial list. Almost any issue known to antitrust has a foreign commerce aspect, and the international setting adds many unique questions of its own.

A national commission for study of the problems of this area will have to choose its topics judiciously to avoid seeming to over-emphasize some things of importance to the neglect of others. Perhaps it should announce at the outset an intention to deal with selected issues and to recommend additional phases for study in the future according to some time-table.

As I have suggested above, it would seem wise to commission a number of studies of certain questions. These may include reference to the best of the large literature. They might well also include empirical projects to obtain more solid information than can be gained from opinion testimony on such questions as the benefits and injuries of antitrust in different types of activity.

Few of these questions have a simple answer. In such circumstances, legislation may be the wrong approach. The commission may find it better in some cases to make recommendations to the courts and agencies, leaving much to their discretion. The Attorney General's National Committee to Study the Antitrust Laws in the 1950's had a very beneficial effect on development of the law through such an approach. A few statutory changes may be worth considering, however, and some possible areas for legislative action have been suggested above.

\(^{118}\) See note 115 *supra*.