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# The Need for a Thoughtful Assessment of the Application of U.S. Antitrust Law to International Transactions

*Mark R. Joelson\**

It is commonly said that the United States antitrust laws are a cornerstone of our free enterprise system and our economic philosophy. It is another truism—one of more recent origin—that the most significant markets and arenas of competition today are the international ones. The daily business news bears out this conclusion. Yet one must also conclude that the relationship between these two indispensable features of our economic life—antitrust laws and international trade—is a troubled one which provides ample material for confusion, dispute and law review comment. Moreover, the debate over the application of United States antitrust law to international business transactions is inherently an international, rather than domestic, discussion. Even if we Americans could agree that there were no points of controversy, we would have our foreign friends reminding us that indeed there are.

Our nation's antitrust laws—the Sherman Act, the Clayton and Robinson-Patman Acts, and the Federal Trade Commission Act—each have, by their terms, some application to the foreign commerce of the United States, as well as to its interstate commerce. Neither the statutory language nor the legislative history of these laws offers significant guidance, however, as to how antitrust enforcement should operate in the distinctive and sensitive areas of international dealings and policy. This statutory ambiguity stems in part from the generality of all of our antitrust formulations. Also, these laws were designed many years ago,

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before the emergence of a fully international economy, and therefore passed with relatively little congressional attention given to their transnational implications. The result of this vague legislative mandate is that the enforcement agencies and the courts find themselves with little framework and much room to operate. The courts in particular have been left to fashion law with respect to such critical concepts as applicable scope of subject matter jurisdiction, the recognition of defenses where private activities abut those of foreign governments, and the role of foreign policy. While the courts and enforcement agencies have done a great deal to constructively shape the laws and their enforcement, significant controversies and uncertainties remain.

Judicial resolution may, it is true, eventually put to rest the remaining problems. But "eventually" also may prove to be a very long time off, especially if no coherent and thoughtful guidance is given to the judiciary, or to Congress in these areas. The Presidentially-appointed National Commission for the Review of Antitrust Laws and Procedures (Commission) submitted last year its recommendations on a number of the more important problems relating to antitrust enforcement.<sup>1</sup> However, because of the Commission's limited mandate and the severe time constraints under which it was operating,<sup>2</sup> it did little more than to touch on a few of the questions pertinent to the international context. Once again, the foreign commerce area was left on the back burner as primary attention was devoted to pressing issues in the traditional antitrust context, such as the management of complex litigation.

A Business Advisory Panel was appointed by the President to work with the Commission on export issues and was asked to concentrate its efforts on questions pertaining to the Webb-Pomerene Act.<sup>3</sup> The Panel observed in its report that other more significant antitrust export issues existed that the Panel did not have sufficient time to explore.<sup>4</sup> As to the Webb-Pomerene Act exemption,<sup>5</sup> the Panel recommended that it should be retained and extended to cover services.<sup>6</sup> The Commission itself recommended that the exemption should be reexam-

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<sup>1</sup> NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (2 vols. 1979).

<sup>2</sup> The Commission was created by Exec. Order No. 12022, 42 Fed. Reg. 61441 (1977). The order states that: "The Commission shall conclude its work not later than six months from the date the last member is appointed and shall submit a final report to the President and the Attorney General within thirty days thereafter." *Id.* at 61442.

<sup>3</sup> 2 REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, *supra* note 1, at 291-92.

<sup>4</sup> *Id.* at 305.

<sup>5</sup> 15 U.S.C. § 62 (1973).

<sup>6</sup> 2 REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, *supra* note 1, at 291.

ined by the Congress.<sup>7</sup> The Commission added that, if the exemption is retained, it should be amended in at least two ways: (a) the antitrust immunity for export associations should be made contingent on a showing of particularized need; and (b) services should be included within the Act's coverage.<sup>8</sup>

Just recently, the Senate passed the Export Trading Company Act of 1980<sup>9</sup> in an effort to "improve U.S. export performance by facilitating the creation of U.S. export trading companies which could perform export services for tens of thousands of small and medium-sized American producers."<sup>10</sup> Among other things, this bill contemplates the certification of antitrust exemptions for specified export trade activities of such companies and of export trade associations,<sup>11</sup> and it would make the provisions of the Webb-Pomerene Act explicitly applicable to the exportation of services.<sup>12</sup> Nonetheless, it is not clear that this legislation, if it is enacted, would significantly increase the nation's overall export performance or quell the debate over whether the antitrust laws inhibit the export and overseas business endeavors of U.S. firms. An in-depth study conducted by an objective body which is equipped to elicit the pertinent facts from business and government would do much to help us appraise the relationship of our antitrust laws to our export trade.

There are, of course, other important and pressing problems in the area of international antitrust. While our oldest antitrust law, the Sherman Act, is some ninety years of age,<sup>13</sup> there still exists significant disagreement and uncertainty as to its appropriate jurisdictional sweep in the international context. Under the "effects test," articulated by Judge Learned Hand in *United States v. Aluminum Co. of America*,<sup>14</sup> conduct abroad by foreigners is subject to the Sherman Act if it has a sufficient effect on the interstate or foreign commerce of the United States. A

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<sup>7</sup> 1 *id.* at xiii.

<sup>8</sup> *Id.*

<sup>9</sup> S. 2718, 96th Cong., 2d Sess., 126 CONG. REC. S11,935 (daily ed. Sept. 3, 1980).

<sup>10</sup> SENATE COMM. OF BANKING, HOUSING, AND URBAN AFFAIRS, REPORT TO ACCOMPANY S. 2718, THE EXPORT TRADING COMPANIES, TRADE ASSOCIATIONS, AND TRADE SERVICES ACT, S. REP. NO. 735, 96th Cong., 2d Sess. 3 (1980).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 14.

<sup>13</sup> c.647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

<sup>14</sup> 148 F.2d 416 (2d Cir. 1945). For early comment on the effects test, see generally RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1962); Note, *Extraterritorial Application of the Antitrust Laws*, 69 HARV. L. REV. 1452 (1956); Oliver, *Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices*, 51 AM. J. INT'L L. 380 (1957); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954).

number of foreign nations, however, maintain that the effects doctrine is inconsistent with international law, and since 1945, some twenty or more foreign governments have protested this "extraterritorial" assertion of jurisdiction by the United States.<sup>15</sup> American courts have continued to employ the doctrine and the result has been an escalating international furor, with antitrust and counter-antitrust laws arrayed against each other, protecting national frontiers and economic philosophies. Some foreign legislation has been designed to bar discovery arising in U.S. antitrust cases, while other legislation has sought to preclude the enforcement of U.S. treble damage antitrust judgments.<sup>16</sup>

Within the last few years, the Ninth Circuit and Third Circuit Courts of Appeals have held that the effects test "is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness."<sup>17</sup> These courts and others have said that this jurisdictional issue must henceforth be approached by weighing a number of relevant factors.<sup>18</sup> The Assistant Attorney General in charge of the Justice Department's Antitrust Division stated in 1978 that: "This new role for the district court is long overdue . . ."<sup>19</sup> Therefore, at least two jurisdictional tests are applied by the various circuits. While the Supreme Court is likely to pass on these issues at some point, it may not do so in the near future. Predictability is an important element in the effective rule of law. The law must be clarified if American and foreign businessmen are to know how to comply with it. Moreover, there is a special need to try to eliminate uncertainty and controversy here since the foreign relations of the United States are involved. This also is an area that a knowledgeable and objective commission could fruitfully study.

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<sup>15</sup> Flexner, *Foreign Discovery and U.S. Antitrust Policy—The Conflict Resolving Mechanisms*, in INTERNATIONAL ANTITRUST, FIFTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE 380 (B. Hawk ed. 1979).

<sup>16</sup> *E.g.*, Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 202 (Austl.); Protection of Trading Interests Act, 1980, c. 11 (U.K.). Among other things, the Protection of Trading Interests Act permits certain parties who have had multiple damages awarded against them abroad to recover in the United Kingdom courts on the excess over simple compensation. See generally Note, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT'L L. & BUS. 476 (1980); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

<sup>17</sup> *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir. 1976) (emphasis in original); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979).

<sup>18</sup> *E.g.*, *In re Uranium Antitrust Litigation*, [1980] 1 TRADE CAS. (CCH) ¶ 63,183 (7th Cir. 1980).

<sup>19</sup> Remarks of John H. Shenefield before the A.B.A. Section of International Law, *Extraterritorial Impact of U.S. Antitrust Laws* (Aug. 9, 1978), reprinted in [1978] 5 TRADE REG. REP. (CCH) ¶ 50,386.

A related topic for study is the extent to which governmental anti-trust policies and considerations of U.S. foreign relations should be brought to the attention of the courts and weighed by the judiciary when they are pertinent to private antitrust lawsuits. The members of the Executive Branch are inclined to shy away from embroiling themselves in the fiercer controversies, yet it is precisely in these cases that involvement may be appropriate and helpful to the courts.

There are a number of difficult pending questions relating to the operation of our antitrust laws on activities that have been conducted, compelled, encouraged, or approved by foreign governments:<sup>20</sup>

(1) The Foreign Sovereign Immunities Act of 1976<sup>21</sup> provides that the sovereign immunity defense does not extend to the "commercial" activity of a foreign state or of an entity owned by it.<sup>22</sup> But when are a government's actions in connection with the marshalling of its national resources "commercial" and when are they "governmental" in nature? Moreover, is a foreign government a "person" subject to the prohibitions of the antitrust laws?<sup>23</sup>

(2) The proper scope of the "sovereign compulsion" defense deserves objective study. There seems to be relatively broad agreement that it should operate neither as a "loophole" to protect improper private business conduct, nor as an unduly formalistic doctrine that fails to take into account the realities for businessmen operating overseas.<sup>24</sup>

(3) The scope of the "act of state" defense in antitrust cases is also the subject of debate and litigation today. At what point do the actions of foreign governments attain the level of "sovereign" acts for purposes of invoking the defense? Does the act of state doctrine preclude the U.S. courts from inquiring into the "validity" of the actions of foreign governments but permit scrutiny of the "purposes" underlying

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<sup>20</sup> Enterprises owned or controlled by governments have themselves been emerging as major factors in world trade, representing phenomena which warrant additional study in the context of our antitrust philosophies. For recent articles discussing state enterprises, see Cranston & Puri, *Government as Entrepreneur and Planner: Aspects of Recent Industrial Strategy in Britain*, 9 CAL. WEST. L.J. 78 (1979); Kostecki, *State Trading in Industrialized and Developing Countries*, 12 J. WORLD TRADE L. 187 (1978).

<sup>21</sup> 28 U.S.C. §§ 1602-11 (1976).

<sup>22</sup> *Id.* § 1605.

<sup>23</sup> See, e.g., *International Ass'n of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries (OPEC)*, [1979] 2 TRADE CAS. (CCH) ¶ 62,868 (C.D. Cal. 1979); see generally Comment, *Suing a Foreign Government Under the United States Antitrust Laws: The Need for Clarification of the Commercial Activity Exception to the Foreign Sovereign Immunities Act of 1976*, 1 NW. J. INT'L L. & BUS. 657 (1979).

<sup>24</sup> See generally Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100 (1967).

ing those actions?<sup>25</sup>

(4) Is the "Noerr-Pennington" doctrine,<sup>26</sup> which insulates from antitrust attack collective private activity designed to obtain government action (unless it is "sham" activity), applicable to efforts to induce foreign governments to act, or is it solely applicable to activity directed to U.S. federal and local sovereignties? If it extends to activity abroad, is it nonetheless limited to lobbying directed to "democratic" foreign governments? And what level of political freedom is to be deemed "democracy" for this purpose?

There are other issues that warrant review in the context of the ability of U.S. industries to compete abroad. It is sometimes suggested that the strictures of the federal antitrust laws and the suspicions of the federal enforcement agencies, that follow U.S. businesses abroad, inhibit joint ventures and technology licensing endeavors, as well as the export transactions already discussed. Information is needed and will only be supplied by the business community, if at all, to a trusted and high-level umpire that will maintain confidences. In this connection, the procedures available to a study commission should be as carefully considered as the body's makeup and mandate. There should be provision for *in camera* submittals to the commission.

In undertaking such a study, we must be balanced in our objectives. We cannot impose the United States' antitrust philosophy on the world because the world is not ready—and may never be ready—to accept it. On the other hand, antitrust is too important to our economic foundation to simply ignore when it becomes inconvenient. We must try to integrate our antitrust policy, the need to be competitive in an ever-changing world market, and our international relationships into a coherent whole. Among other things, we should take a hard look at the structure of our Executive Branch. Its present approach to these matters is highly decentralized in the sense that there are many departments and agencies charged with a piece of the international antitrust puzzle. Decentralization carries important benefits by virtue of its diffuse nature, but it also makes for fragmented and sometimes haphazard policymaking in this area.

Finally, the question of what policy should be pursued by the United States Government in considering and entering into interna-

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<sup>25</sup> See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. den.* 100 S. Ct. 1078 (1980); *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979).

<sup>26</sup> *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

tional conventions relating to restrictive business practices must receive more attention. Many of the pertinent considerations were raised in connection with the agreement reached earlier this year by the United States and the other nations on the United Nations Conference on Trade and Development (UNCTAD) Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,<sup>27</sup> but the significant debates as to whether this agreement was a desirable one for the United States were not broadly noted. Granting that an international antitrust code is an elusive goal,<sup>28</sup> there is a considerable argument that it is too early to achieve that goal meaningfully, for many of the world's nations—especially those in the third world and “socialist” camps—do not accept our philosophies, much less our formulations, of antitrust. Words are imprecise tools in agreements which lack common premises, and harmony is not the ineluctable result here.

These are pressing and yet subtle problems that deserve thoughtful and dispassionate review.

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<sup>27</sup> — U.N. Conference on Trade and Development —, U.N. Doc. TD/RBP/CONF/10 (1980).

<sup>28</sup> See Joelson, *The Proposed International Codes of Conduct as Related to Restrictive Business Practices*, 8 L. & POL'Y INT'L BUS. 837 (1976).