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What Should be the Agenda of a Presidential Commission to Study the International Application of U.S. Antitrust Law?

*Douglas E. Rosenthal**

If the proposed Presidential Commission to study the International Application of the U.S. Antitrust Law (Commission)¹ is to complete its work within the one year period contemplated and is to achieve more than a superficial gloss of a large and complex area, I believe it will be necessary for the Commission to concentrate its attention on the conflicts between the four important goals of foreign economic policy.

The first of these goals is the promotion of open and competitive markets for both imports and exports. The second is the maintenance of amicable diplomatic relationships with the nations with whom we trade. The third is the assistance of American workers and enterprises when they suffer sudden, substantial, and sometimes unfair, but remediable hardship in international competition. The fourth goal—no less important for being only recently recognized—is the facilitation of export opportunities for U.S. goods and services.

The first goal is embodied in our antitrust laws, which represent not only rules for proper conduct in the marketplace, but also an ex-

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¹ The Commission will be established by the Commission on the International Application of the United States Antitrust Laws Act, which was denoted as S.1010 on the Senate side. For the text of the bill as it was passed by that chamber, see 126 CONG. REC. S13,814-15 (daily ed. Sept. 30, 1980).

pression of America's commitment to a system of economic freedom.² The second goal is reflected in our diplomatic policy, that is, in our commitment to resolve disputes with other nations with due regard for the fact that not every sovereign people approves of all of our rather idiosyncratic legal institutions or accepts the validity of our laws—especially our laws of economic ordering.³ The third goal is embodied in our trade laws which attempt to delineate the sometimes necessary departures from free market principles. The final goal will be advanced by pending legislation seeking to reduce, if not eliminate existing or perceived impediments to the aggressive marketing of U.S. exports.⁴

It is becoming increasingly apparent that these goals may conflict in particular policy applications. The primary task of the Presidential Commission should be to consider the apparent conflicts between the first goal—that of maintaining and increasing the competitiveness of international markets—and each of the other three goals.⁵ To the extent that significant conflicts are deemed to exist, the Commission should recommend practical compromises that will, to the fullest extent possible, express a continuing commitment to and preservation of all four goals of U.S. foreign economic policy. The Commission should also be committed to fostering free markets; to seeking accommodations with our trading partners; to assisting those Americans injured in the international marketplace when they have been significantly victimized by unfair foreign practices or when temporary relief from for-

² Free enterprise is fundamental to American society, and American businesses are subject to far fewer controls than many of their foreign counterparts. Some government regulation is necessary, however, to ensure that entrepreneurial freedom is not constrained by private activities. As Justice Marshall said: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

³ In any ordering of America's economic regulatory goals, the maintenance of competition must come first. As was said by Commissioner Eleanor M. Fox, with regard to the National Commission for the Review of Antitrust Laws and Procedures: "Our general approach was as follows: we expressed our belief that 'free market competition, protected by the antitrust laws, should continue to be the general organizing principle for our economy.' We would make exceptions from the competition principle only in the case of 'compelling evidence of the unworkability of competition or a clearly paramount social purpose.'" *Antitrust and Foreign Export Cartels: The National Commission Review of the Webb-Pomerene Exemption*, 12 N.Y.U.J. INT'L L. & POL. 59, 60 (1979) (introductory letter by Eleanor M. Fox).

⁴ The most important pending legislation is the Export Trading Companies Act of 1980, S.2718, 96th Cong., 2d Sess., 126 CONG. REC. S11,935 (daily ed. Sept. 3, 1980), which passed the Senate unanimously on September 3, 1980. The House version of the Act, which was introduced May 1, 1980 as H.R.7230, 96th Cong., 2d Sess., has been reported on and recommended for passage. H.R. REP. NO. 1151, 96th Cong., 2d Sess. (1980). See generally Cole, *Establishing American Trading Companies*, 2 Nw. J. INT'L L. & BUS. 277 (1980).

⁵ Section 3(b) of S.1010 states that the Commission shall study:

eign competition can yield a higher degree of long-term U.S. competitiveness; and to the facilitation of U.S. exports. This exercise need not produce a fundamental reconstitution of U.S. policy or institutions. However, where sharp conflicts between two desirable objectives appear unavoidable, the precise nature and extent of such conflicts should be laid out so that further executive, legislative and judicial action may be considered.

THE CONFLICT BETWEEN THE ANTITRUST LAWS AND DIPLOMATIC POLICY

The most important conflict is between the effective enforcement of U.S. antitrust law and the maintenance of amicable relations with our trading partners, especially our closest and most important allies. The jurisdiction of U.S. antitrust law is broader than that of every other nation in the world, save perhaps the Federal Republic of Germany.⁶

(1) the application of the United States antitrust laws in foreign commerce, and their effect on—

(A) the ability of United States enterprises to compete effectively abroad; and

(B) the ability of United States enterprises to compete or deal effectively with foreign controlled or assisted enterprises in market and nonmarket economies;

(2) the effect of the application of the United States antitrust laws on United States relations with other countries;

(3) the jurisdiction and scope of the application of the antitrust laws to foreign conduct and foreign parties;

(4) the issue of reciprocity between nations with respect to mutual access to markets, equal opportunities for foreign investment, and enforcement of antitrust laws;

(5) the proper scope and effect of the following on the application of the United States antitrust laws:

(A) the rules governing sovereign immunity;

(B) the act of state doctrine;

(C) the defense of "foreign sovereign compulsion"; and

(D) the doctrine of comity;

(6) the application of United States rules of court relating to the enforcement of antitrust laws in the context of international transactions (for example, the "per se" and "rule of reason" doctrines); and

(7) the application of the United States antitrust laws to joint ventures, mergers, acquisitions, and distribution and licensing arrangements between and among the United States and foreign or foreign-based enterprises.

126 CONG. REC. S13,815 (daily ed. Sept. 30, 1980). Most of these topics will necessarily be addressed even by the narrow focus advocated by this article. Sovereign immunity may fall beyond the proper scope of the Commission's inquiry, however, because it is not a doctrine of particular controversy relative to antitrust. Most informed observers would agree that if a foreign sovereign state, acting for itself, engages in public anticompetitive conduct, it is and should be immune from prosecution in foreign courts. It is true that there is an important exception to this general rule—where a state is engaged in essentially commercial activities for a commercial purpose, in which case it may be subject to the jurisdiction of our courts as provided for in the commercial activities exception in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (1976). The legal scholar could hypothesize several potential problems in distinguishing commercial from political activity. The problems that arise here, however, are less urgent than other, more fundamental issues.

⁶ Art. 98(2) of the German antitrust statute specifically makes its provisions applicable to "all

U.S. antitrust investigations also involve procedures which contradict foreign ideas of fairness.⁷ What we in the U.S. accomplish through legal proceedings between private persons, other nations—even those with our common law heritage—accomplish only through diplomacy. These differences are drawing us into increasingly serious international economic confrontations.⁸ The Commission should seek ways to reduce these confrontations without unraveling the fabric of U.S. antitrust enforcement.

Extraterritorial Jurisdiction and the Effects Doctrine

The U.S. today is virtually alone in granting domestic courts the jurisdiction to adjudicate extraterritorial private conduct by foreign persons that has a direct and substantial adverse effect on competition within the U.S.⁹ This view of the appropriate reach of our law is a venerable one, dating from the Sherman Act,¹⁰ passed 90 years ago, and first applied by the Supreme Court more than 70 years ago.¹¹ There is no question that in appropriate circumstances the U.S. courts should continue to exercise jurisdiction consistently with this so-called “effects doctrine.”¹² In a world of increasing interdependency, the nul-

restraints of competition which have effect within the territory to which this Law applies, even if they are caused from outside the territory to which this Law applies.” Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen), [1957] Bundesgesetzblatt [BGBI], I 1080, as republished [1974] BGBI I 869, amended [1976] BGBI I 917.

⁷ The Commission will find that:

Difficulties arise where broad claims of jurisdiction coincide with material variations in substantive law. . . . [T]he very widest claims of jurisdiction have been made by the United States, which, generally speaking, are not matched by corresponding claims by other countries, and at the same time there are widely differing views from one country to another on what conduct is reprehensible

Willoughby, *Remarks by an English Solicitor* in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 56, 58 (1979).

⁸ One should especially note Britain’s retaliation in the form of the Protection of Trading Interests Act, 1980, c.11. See generally, Note, *The Protection of Trading Interests Act: Britain’s Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT’L L. & BUS. 476 (1980). A similar Canadian bill, introduced on July 11, 1980, is expected to pass. *Canadian Legislation Would Stymie Enforcement of U.S. Antitrust Judgments*, 973 ANTITRUST TRADE REG. REP. (BNA), at A-19 (July 17, 1980).

⁹ See Lever, *Aspects of Jurisdictional Conflict in the Field of Discovery*, in INTERNATIONAL ANTITRUST, FIFTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE 358, 378 (1979).

¹⁰ 15 U.S.C. §§ 1-7 (1973).

¹¹ The case of *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), was commenced on July 19, 1907.

¹² The use of the effects doctrine is most clearly appropriate in those situations where: (a) the foreign conduct damages domestic competitors or consumers; or (b) the foreign enterprise is freely operating in a manner forbidden to domestic enterprises. By way of illustration, suppose that four European pharmaceutical houses each with sales agencies in two U.S. cities, produce in Europe the only significant quantities of a heart medicine widely prescribed in the United States. Further

lification of such jurisdiction would cede to those foreign interests so inclined the opportunity to have an anticompetitive extraterritorial impact within U.S. borders, regardless of the clarity of the anticompetitive intent, the harm caused, the importance of the U.S. economic policies thereby undermined, or the contacts of those persons with U.S. domestic commerce. It would also open a loophole permitting U.S. multinational corporations to encourage their foreign subsidiaries to do what U.S. domestic corporations would be forbidden from doing.

Therefore, the critical inquiry for the Commission is not whether effects jurisdiction should be nullified, but whether in some situations its exercise is inappropriate. The most difficult and most important problem is whether U.S. antitrust jurisdiction should be exercised over extraterritorial acts that are incompatible with U.S. antitrust law and policy, but are nonetheless consistent with and in furtherance of the law or economic policy of a foreign sovereign. Until now, as most recently reflected in *In re Uranium Antitrust Litigation*,¹³ U.S. federal courts have been relatively unconcerned as to whether the enforcement of U.S. antitrust laws undermines the sovereign policies of foreign governments. The one exception has been where a U.S. antitrust defendant can demonstrate that its anticompetitive conduct abroad was strictly and literally compelled by the foreign sovereign.¹⁴

The doctrine of foreign sovereign compulsion demands review. One of the main problems with the foreign sovereign compulsion doctrine as presently enunciated is that it fails to account for the undoubted fact that many foreign sovereigns—and the U.S. itself in other legal areas—often have absolutely vital legal and policy interests, strongly expressed within their jurisdiction, yet not absolutely compelled. For example, the British, Australian and Canadian defendants which defaulted in the *Uranium* litigation, *supra*, had a motive to do so that was grounded in their own national laws relating to the enforcement of judgments. It is arguable that under their laws any appearance before the U.S. court, even if only to challenge the court's jurisdiction, would enable the plaintiff to enforce a money judgment against the defendants if the plaintiff ultimately prevailed. Since these defendants were not compelled by their national laws to avoid the jurisdiction of the U.S. court, the U.S. judge was quite unresponsive to this argument.

suppose that they jointly agree to raise prices by 50% thereby pricing many impoverished senior citizens with heart disease out of the market. This would be a clear case for use of the effects doctrine.

¹³ 617 F.2d 1248 (7th Cir. 1980).

¹⁴ The doctrine of foreign sovereign compulsion is most clearly stated in *United States v. Watchmakers of Switz. Info. Center, Inc.*, [1963] Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962).

The court held the defendants in default and was prepared to hold a prompt hearing on the damages resulting from their alleged misconduct, even before the question of jurisdiction and liability against the non-defaulting defendants was litigated.¹⁵ This example suggests an ethnocentric arrogance in the overriding application of U.S. law as if our idiosyncratic ideas of antitrust were universally accepted by foreign nations.

I would like to see the Commission give serious consideration to the development of choice-of-law principles that can be applied by U.S. courts in an international conflict-of-law situation. These principles may be analogous to the principles applied by the state courts within our federal system. I believe that it is possible, and that it may well be a major improvement under the existing state of affairs for U.S. courts to develop criteria that could indicate when it is inappropriate to apply U.S. antitrust law to international activities. These criteria should demonstrate at what point the policy interests of, and the legal contacts with the foreign sovereign are weightier than the interests of the U.S. in deterring anticompetitive conduct having an admittedly more remote contact with our territory and institutions.¹⁶ Such a balancing would be no different than that done by U.S. state courts in determining whether the law of a foreign state is more properly applicable to a dispute than the law of the forum state.

Evidentiary Discovery Across International Borders

In addition to the question of jurisdiction, the Commission should give particular attention to another problem of extraterritorial conflict, namely, the lack of international standards for evidentiary discovery. The scope of permissible discovery in the U.S. is far broader than that of any other developed legal system in the world.¹⁷ Since there is no international mechanism for resolving disputes as to the appropriate breadth of national discovery, the Commission should consider what could be done to lessen the clash between what our courts require to be disclosed and what foreign courts deem an inappropriate inquiry.

¹⁵ *In re Uranium Antitrust Litigation*, 473 F. Supp. 382 (1978).

¹⁶ One possible precedent for such an approach is the case of *Lauritzen v. Larson*, 345 U.S. 571 (1953).

¹⁷ "[The] Federal Rules of Civil Procedure . . . give wide powers, wider than exist in England, of pre-trial discovery against persons not parties to a suit." *Rio Tinto Zinc Corp. v. Westinghouse*, [1978] 1 All E.R. 434, 441. See Rahl, *Enforcement and Discovery Conflicts: A View from the United States*, in *INTERNATIONAL ANTITRUST, FIFTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE* 343, 346-47 (1979).

Private Suits, Treble Damages, and Foreign Commerce

A third important aspect of the "extraterritoriality problem" is the potential mischief that can be caused by *private* antitrust treble damage lawsuits in foreign commerce. In such a situation, the U.S. is not a party, and there is no person with sufficient expertise to determine the relationship between the rulings sought and the foreign policy interests, practices and standards of the U.S. Executive Branch in its dealings with the implicated foreign sovereign. At the present time, no other developed nation has an actively functioning private right of antitrust action. Other nations are more aware than we that "private antitrust disputes" may involve significant issues of national economic policy and therefore, international diplomacy. They find it appalling that inexperienced and sometimes ethnocentric district court judges should possess the apparent power to decide fundamental issues of economic diplomacy without regard to the foreign policy of the U.S. Executive Branch. As many have noted, the private treble damage remedy, both domestically and internationally, has been greatly abused.¹⁸ This is one problem requiring the Commission's particularly urgent attention.

THE CONFLICT BETWEEN THE ANTITRUST LAWS AND COMPETITIVE
EXPORT MARKETING

Many American business executives perceive that the antitrust laws discourage aggressive export marketing—especially the exporting that would be enhanced by joint ventures among competitors. Do the antitrust laws discourage such aggressive marketing? If so, is it appropriate that they do so? If it is not appropriate, and if there is indeed a problem, how can these laws be modified so that they will not disadvantage American exporters?

The Sherman Act states that contracts, conspiracies and monopolies in restraint of trade or commerce *with foreign nations* are subject to the jurisdiction of United States federal courts.¹⁹ The legislative history of the Sherman Act, however, is silent as to whether that jurisdiction is to apply even as to restraints which have no adverse impact either in United States markets, or on enterprises engaged in export from the United States. Neither has this issue ever been addressed by

¹⁸ See generally Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329 (1974); Ferber, *The Effectiveness of the Private Treble Damages Action as an Antitrust Enforcement Mechanism*, 8 SW. U.L. REV. 505 (1976); Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CAL. L. REV. 1319 (1973).

¹⁹ 15 U.S.C. §§ 1, 4 (1973).

the Supreme Court. The Commission should consider amending the Sherman Act to clarify and finally resolve this question.

Joint Ventures

Most antitrust scholars have concluded that a joint venture among all the firms in a U.S. industry to build a dam only affecting the people of a foreign nation would not be a violation of the Sherman Act, even were such a combination illegal if undertaken within United States territory. For the moment, the Justice Department has agreed. A consortium of firms, including General Electric, Allis-Chalmers and Westinghouse, sought to bid on the construction of a Latin American hydroelectric power project, and in a 1976 favorable business review, the Justice Department granted clearance.²⁰ Later, in the *Antitrust Guide for International Operations*, the Department endorsed this review as a general enforcement policy.²¹

Nevertheless, a few commentators, most notably Professor James Rahl of Northwestern Law School, have argued that Sherman Act subject-matter jurisdiction applies to *any* restraints on competition in U.S. export trade, regardless of whether those restraints have any direct or substantial adverse effect on U.S. markets or U.S. export competitors. Rahl would then consider the competitive effect either on U.S. persons, or in U.S. markets before determining whether there had been a violation.²² While Rahl would apply an effects test as the second in a two-step analysis, others could read the Sherman Act literally to apply even absent an anticompetitive effect, concluding that the first step is sufficient for determining liability.

It is therefore understandable that some businessmen are inhibited from engaging in joint ventures involving the export of capital, services or goods, since there has never been a more authoritative resolution of this issue than the current enforcement policy of the Department of Justice. Attorneys General change. Neither the present nor future Attorneys General are bound by the view of the law articulated in 1977. Thus, American joint venturers remain vulnerable to legal attack.

The impermanence of the Justice Department's enforcement phi-

²⁰ 763 ANTITRUST TRADE REG. REP. (BNA), at A-14 (May 11, 1976). Authority for, and the format of the business review procedures employed by the Antitrust Division of the Justice Department may be found at 28 C.F.R. § 50.6 (1979).

²¹ DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 19 (1977) (Case C, at 19-22, deals with joint bidding).

²² See, e.g., Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 CORNELL INT'L L.J. 1, 6-8 (1974). This same issue over the reading of the Sherman Act may also arise over the reading of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1973).

osophy is demonstrated by a case brought by the Department 30 years ago—the *Minnesota Mining Case*.²³ There, the Department of Justice sought and obtained a holding that a joint venture by American manufacturers, controlling four-fifths of the United States export trade in coated abrasives, was a combination in restraint of U.S. foreign trade.²⁴ The companies jointly owned factories abroad from which they sold exclusively into foreign markets.²⁵ This foreign manufacturing and sales joint venture enabled them to earn greater profits than if they had tried to export from the United States, and yielded an improved U.S. balance of payments.²⁶ The most objectionable part of the arrangement was the agreement to jointly restrain exports as a precondition to undertaking the overseas production. This “restraint,” however, led to no apparent injury to any export competitor and led to no apparent restraint on competition in U.S. domestic markets. It is difficult, perhaps impossible, to square this holding with the Department of Justice’s current enforcement policy.

The Failure of the Webb-Pomerene Act

In 1918, Congress passed the Webb-Pomerene Act²⁷ to remove the uncertainty that already then existed about the application of the Sherman Act to export restraints having an effect on prices in U.S. markets and causing no injury to domestic export competitors.²⁸ The Webb-Pomerene Act has provided a mechanism for reporting an export joint venture among competitors where its purpose and effect is often to fix the prices at which exported goods will be sold in foreign markets. Such reported arrangements may not be challenged under the Sherman Act.²⁹ The House report accompanying the Webb-Pomerene Act explicitly disavowed any implication that the Sherman Act necessarily applied to such export joint ventures if not registered as Webb-Pomerene associations.³⁰ It noted that “professional opinion” at the time was divided on what the Sherman Act covered.³¹ Congress evidently believed that the passage of the Webb-Pomerene Act would provide a practical alleviation of exporter uncertainty. However, the Act has not

²³ *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

²⁴ *Id.* at 961.

²⁵ *Id.* at 961-62.

²⁶ *Id.* at 962.

²⁷ 15 U.S.C. §§ 61-65 (1973).

²⁸ K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 352 (1958).

²⁹ *Id.* at 105-06.

³⁰ *Id.* See H.R. REP. NO. 50, 65th Cong., 1st Sess. (1917).

³¹ BREWSTER, *supra* note 28, at 105-06.

resolved, as it could not have, the more fundamental question of whether the Sherman Act should apply to exports that have no effect on domestic commerce.

The Webb-Pomerene Act has not been a great success over the past 60 years.³² Few export joint venturers have relied upon it.³³ Moreover, it has the disadvantage of requiring public disclosure of arrangements one might prefer not to advertise. Inevitably, it has failed to resolve the uncertainty about the scope of the Sherman Act. One of its failures was demonstrated by the *Minnesota Mining Case* which held that a foreign joint venture could violate the Sherman Act even though it had registered as a Webb-Pomerene association.³⁴

Pending export trading company legislation laudably seeks to remove the uncertainty for exporters created by this open question about the scope of the Sherman Act.³⁵ However, like the Webb-Pomerene Act which it amends and supplements, the proposed legislation seeks a regulatory solution instead of clarifying the underlying antitrust statute itself. While the certification of trading companies against private antitrust liability removes some uncertainty, the intrusion of an administrative process with its regulations, technical procedures and executive branch discretion can only add new uncertainty of its own.

Today, there is a growing rift between those who support vigorous antitrust enforcement and those who seek to encourage American business productivity and marketing, especially in export trade. This rift is both unfortunate and unnecessary. Improved American production and marketing success is compatible with and furthered by the promotion of competition in the United States and world markets. A clarification of the scope of the Sherman Act by the Commission can close this rift without any compromise of either position.

Some may contend that specifying the limits of U.S. antitrust jurisdiction as to U.S. export trade will be seen as a weakening of the American commitment to competitive markets. On the contrary, the changes proposed here would only clarify what has in fact been U.S. law for 90 years. Such a clarification would reflect a rational self-restraint and

³² See *General Enforcement Policy in International Trade*, in INTERNATIONAL ANTITRUST, FIFTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE 328 (1978) (panel discussion).

³³ For a historical view, see FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW (1967) (staff report). In 1976, only about 1½ percent of all U.S. exports were attributable to export trade associations registered under Webb-Pomerene Act. FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: TEN YEARS LATER (1978) (staff report).

³⁴ 92 F. Supp. at 964.

³⁵ See note 4 and accompanying text *supra*.

would allow for the exercise of federal antitrust jurisdiction over only those export-related activities that cause injury to persons within our territory. Other nations, which fear our assertion of excessive antitrust jurisdiction, would welcome a clear statement of our law. The U.S., and especially the Commission, should recognize that there are limits to what U.S. law can accomplish by itself, and should acknowledge that if we are to promote greater competitiveness in world markets, as indeed we should, we must do it bilaterally and multilaterally, but not unilaterally.

THE CONFLICT BETWEEN THE ANTITRUST LAWS AND THE TRADE LAWS

There is an increasing perception of conflict between antitrust law and policy, on the one hand, and trade law and policy, on the other. The antitrust laws are hostile to international cartels. In certain limited instances, U.S. trade law promotes international cartelization through import limitations and orderly marketing agreements. Some suggest that the antitrust laws discourage U.S. industries from legitimately exercising rights conferred under the trade law. Others claim that the antitrust laws limit the ability of foreign industries to settle U.S. domestic trade actions. How true are these assertions and what should be done about the problems that generate them?

On the whole, U.S. trade law has been harmed by Congressional mistrust of executive bureaucracy—mistrust both of the bureaucracy's competence and of its motivation to reflect and be accountable to the popular will. The salient fact about U.S. trade law is that it alone among the trade regimes of our major trading partners does not permit our Chief Executive to factor public, consumer, or national security interest standards into relief determinations in the two vital trade areas of dumping and subsidies. No other nation's executive policymakers, so far as I have been able to determine, are similarly encumbered.

Limitations on Executive Branch authority in the most recent trade statute are attributable, I suspect, to this longstanding tension between Congress and the President, as exacerbated by recent events largely unrelated to any surge of protectionism. One such event is the failure of the trade law process to dispose of the Japanese color TV complaints³⁶ for ten years after an affirmative dumping finding was made.³⁷ This heightened Congressional disillusionment with the moti-

³⁶ *Television Receivers from Japan*, 36 Fed. Reg. 4597 (1971) (imposing antidumping duties).

³⁷ For a complete account of the Japanese color TV case, see *Multilateral Trade Negotiations: Hearings Before the Subcomm. on International Trade of the Senate Comm. on S.1376*, 96th Cong.,

vation and competence of executive bureaucrats.³⁸ Instead, it should have brought a reappraisal of the narrow, overly technical and inflexible approach of the trade law itself.

It is important for the Commission to consider ways of ameliorating potential conflict between antitrust and trade law enforcement. One proposal that I would urge the Commission to consider is that current dumping and subsidies liability standards be aligned with those of our major trading partners. Additionally, the Commission should consider making the dumping and subsidy laws accountable to a broader and more relevant range of U.S. economic, political, and strategic interests. For instance, a modified trade law could deny relief from foreign dumping to a domestic monopolist if such relief would injure U.S. industries that purchase the monopolist's goods. If antitrust concerns are imported into the trade law, the Justice Department may discover that participation in the trade adjudication process is less necessary. Business competitors will no longer be able to employ U.S. trade laws to form "legal" international cartels that are harmful to U.S. interests.

It may seem that the trade laws are beyond the bailiwick of the Commission, but I believe that the Commission's mandate should be interpreted to include an examination of those laws. If the Commission's purpose is to clarify the interrelationship between the antitrust laws and the trade laws, it should not assume that the trade laws are faultless, for this assumption could distort the Commission's recommendations and limit their usefulness.

CONCLUSION

If a Presidential Commission were to focus dispassionately on these issues, clarifying them and making realistic recommendations, its creation would be more than justified.

It would be long overdue.

1st Sess. 207-09 (1979) (statement of John Nevin, Chairman, Zenith Radio Corp.). The original complaint was filed in March 1968, but a dumping finding was not entered until March 1971. After assessing a mere one million dollars in dumping duties in the years between 1971 and 1978, the Customs Department discovered that its figures were erroneous, and it attempted to assess another 400 million dollars of duties. The enormity of the sum raised an outcry from the Japanese manufacturers, so the Treasury Department sought a settlement. The negotiations took several months, and gleaned only one-eighth of the duties owing. *Id.*

³⁸ See, e.g., the restrictive new antidumping procedures created by the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, §§ 731-36 (1979) (codified in scattered sections of 13, 19, 26, 28 U.S.C.), and the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1974) (codified in scattered sections of 5-8, 15, 19, 21-22, 26, 42, 45 U.S.C.). See generally Comment, *The New Anti-Dumping Procedures of the Trade Agreements Act of 1979: Does It Create a New Non-Tariff Trade Barrier?*, 2 Nw. J. INT'L L. 200 (1980).