

# Northwestern Journal of International Law & Business

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Volume 10  
Issue 1 *Spring*

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Spring 1989

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### Recommended Citation

Mark R. Joelson, Harmonization: A Doctrine for the Next Decade, 10 Nw. J. Int'l L. & Bus. 133 (1989-1990)

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# Harmonization: A Doctrine for the Next Decade

*Mark R. Joelson\**

## I. INTRODUCTION

It is a great pleasure to participate in this Symposium honoring Professor James Rahl and to comment on his statement, "An International Antitrust Challenge." As usual, Professor Rahl is asking the right question at the right time. His approach, again as usual, is cohesive, progressive, and necessarily global in its outlook.

Some time ago, in response to the bugles first sounding the retreat for U.S. antitrust, Professor Rahl asked whether it was consistent with U.S. antitrust policies to express a disinterest in the competitive injury that might be wrought by U.S. firms in their export trade.<sup>1</sup> Now, more in sorrow than in anger, he chides all of the developed nations for being willing to apply competition and antitrust proscriptions to protect only their domestic economies and businessmen, while turning their backs to the carnage inflicted by their citizens in foreign markets. I share much of Professor Rahl's assessment of the present situation and his desire for a resolution that will recognize the interdependence of the world's economies and give to everyone the benefits of competition. The last forty years or so of experience in international antitrust instruct us, however, that there is no "quick fix" in this regard and, indeed, that we antitrust lawyers cannot impose any system, whether it be a Havana Charter<sup>2</sup> or an unbridled national doctrine of extraterritoriality, on a world that is

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\* Morgan, Lewis & Bockius, Washington, D.C.

<sup>1</sup> Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 Nw. J. INT'L L. & BUS. 336, 343-46 (1980).

<sup>2</sup> HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, U.N. Doc. E/Conf.2/78 (1948).

not economically or politically ready for it. We will just have to be patient and be grateful for modest gains for a while.

## II. PAST EFFORTS TO ACHIEVE AN INTERNATIONAL ANTITRUST REGIME

In an international economy, the scope of competition law must have corresponding breadth if it is to have any relevance and effectiveness. This principle was recognized in the admirable Havana Charter effort in the 1940s to create an international organization for the coordination and implementation of antitrust policy.<sup>3</sup> This effort foundered, as Professor Rahl notes. Although representatives of fifty nations signed the Havana Charter, the United States failed to ratify it, due to apprehension over a loss of national sovereignty and, more tangibly, over the threat of liberalized trade from abroad.

The international climate for the adoption of a strong, centrally enforced antitrust regime has not greatly improved in the forty years since the Havana Charter effort. It is true that economic interdependence is now an unquestioned tenet of world affairs and also that much progress in trade liberalization has taken place under the auspices of the General Agreement on Tariffs and Trade.<sup>4</sup> However, antitrust has not become a universal religion (even in the United States, the number of the faithful has diminished), and nations remain generally unwilling to relinquish their authority over economic matters to international organizations. The time is not ripe for another Havana Charter effort, whether in Havana or anywhere else.

## III. THE APPLICATION OF U.S. ANTITRUST LAW TO FOREIGN CONDUCT

The U.S. antitrust scheme, although still one of the pillars of the U.S. economic system, continues to manifest some discomfort in coming to terms with its international role. Of course, these statutes are of comparatively old vintage, and although Congress expressly included commerce with foreign nations within the ambit of the Sherman Act and a number of the other antitrust statutes, the legislators' attention was on domestic commerce, not on the international ramifications of the matter. At one time, the standard for international commerce seemed to be straightforward enough under Judge Learned Hand's enunciation of the

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<sup>3</sup> See, e.g., Kintner & Joelson, *Groping for a Truly International Antitrust Law*, AN INTERNATIONAL ANTITRUST PRIMER, ch. 12 (1974).

<sup>4</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948).

“effects” doctrine in the *Alcoa* case: “Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”<sup>5</sup> This test had the benefits of simplicity and predictability (not inconsiderable benefits), but it ignored the fact that in an interdependent world, one country cannot ignore the interests of other countries in implementing its economic policies.

The result was a U.S. jurisprudence which subjected foreign firms and individuals to possible criminal prosecution and huge treble damage awards for conduct which was often lawful in their own countries and which was sometimes even encouraged by the governments of the “perpetrators.” Not surprisingly, the trading partners of the United States reacted hostilely to this jurisprudence. Reactions took the form of diplomatic protests, *amicus curiae* briefs, “blocking” statutes rebuffing U.S. discovery, and “claw back” statutes enabling foreign firms to recover in their own courts the awards rendered against them in private U.S. anti-trust cases.

The mid 1970s brought on a spirit of accommodation in the United States. The United States realized that just as limitations had emerged on its exercise of political and economic influence around the globe, the United States had to curb the reach of its antitrust writ in the interest of international comity. The U.S. Court of Appeals for the Ninth Circuit fashioned a “jurisdictional rule of reason” in the *Timberlane* decision to deal with situations where “the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.”<sup>6</sup> The Antitrust Division of the Department of Justice hailed the new approach and announced that it too would give adequate consideration in exercising prosecutorial discretion to the special factors inherent in the international context.<sup>7</sup> Interest balancing tests for determining whether U.S. antitrust jurisdiction existed or should be exercised in various situations involving international transactions flourished in this new era of conciliation.<sup>8</sup>

Unfortunately, the impact of the new doctrine has fallen far short of

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<sup>5</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

<sup>6</sup> *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 609 (9th Cir. 1976), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

<sup>7</sup> See, Shenefield, *The Perspective of the U.S. Department of Justice*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 24 (J. Griffin ed. 1979).

<sup>8</sup> See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3rd Cir. 1979); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *National Bank of Canada v. National Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

what its proponents had hoped, especially in its most important context of the private treble damage proceeding. As Judge Malcolm Wilkey pointed out in the *Laker* decision, the judiciary is not qualified to assess and resolve the critical political factors often involved in the balancing exercise.<sup>9</sup> Moreover, while the Antitrust Division continues to take into account issues of international comity in exercising its discretion on matters involving U.S. government antitrust action, the Antitrust Division has steadfastly maintained that the courts have no business in weighing foreign policy concerns, "since the conduct of foreign relations is constitutionally reserved to the Executive Branch."<sup>10</sup> Indeed, a review of the various U.S. court decisions applying any of the interest balancing approaches indicates that jurisdiction has never been declined where the U.S. interest in the challenged activity was more than *de minimis*.

On the export side, the antitrust retreat has produced a series of statutes that effectively neutralize the Sherman Act's broad foreign commerce clause.<sup>11</sup> In 1982, U.S. business finally won its battle in support of the proposition that the breadth and uncertainty of U.S. antitrust proscriptions were impairing U.S. firms' export efforts and their competitiveness with foreign firms. Unable to choose between two remedial approaches, a pre-activity screening program, and an outright amendment of the substantive law, Congress enacted both pieces of legislation in the form of the Foreign Trade Antitrust Improvements Act and the Export Trading Company Act.<sup>12</sup> The main thrust of these statutes, particularly the Foreign Trade Antitrust Improvements Act, was to make it clear that the U.S. antitrust laws could not be invoked on behalf of foreigners who were being injured by U.S. parties in foreign markets. These statutes, along with the ineffectual but still surviving Webb-Pomerene Act,<sup>13</sup> proclaim that while the United States still loves antitrust for itself, it does not mind home-grown export cartels as long as it can be assured that they will not adversely affect the U.S. economy.

Foreign export cartels, even those encouraged by foreign governments, remain the subject of vigorous U.S. antitrust action where their activities have a direct, substantial, and reasonably foreseeable effect on

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<sup>9</sup> *Laker Airways, Ltd. v. Sabena*, 731 F.2d 909, 953-55 (D.C. Cir. 1984).

<sup>10</sup> Department of Justice, *Antitrust Enforcement Guidelines for International Operations*, 4 Trade Reg. Rep. (CCH) ¶ 13,109.10 at 20,592-97, n. 171 (Nov. 10, 1988)[hereinafter *1988 Antitrust Guidelines*].

<sup>11</sup> See, Rahl, *Applicability of U.S. Antitrust Laws to Export Commerce*, 1986 FORDHAM CORP. L. INST. 131 (1987).

<sup>12</sup> The Foreign Trade Antitrust Improvements Act is codified at 15 U.S.C. §§ 6a, 45(a)(3) (1982), and the Export Trading Company Act is codified at 15 U.S.C. §§ 4001-4021 (1982).

<sup>13</sup> 15 U.S.C. §§ 61-65 (1982).

U.S. import trade, unless particular defendants are protected by sovereign immunity, foreign sovereign compulsion, or special considerations of comity.<sup>14</sup>

The United States is not alone in this attitude. European Economic Community ("Community") competition policy, for example, concerns itself only with restraints affecting trade between member states and thus is disinterested in export restraints by Community firms that have an impact only outside of the Community. However, where export cartels are fashioned by producers outside of the Community who "concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the Common Market within the meaning of Article 85 of the Treaty [of Rome]."<sup>15</sup> The illegality pertains even where U.S. participants are operating under the blessing of the Webb-Pomerene Act, since the U.S. law does not mandate the export cartels.<sup>16</sup>

#### IV. STEPS TOWARDS AN INTERNATIONAL ANTITRUST FRAMEWORK

This prevailing attitude of "your export cartels are bad" and "my export cartels are good" makes no sense in a world whose leaders proclaim the need for trade liberalization and painstakingly negotiate reciprocal tariff concessions and other mutual eliminations of trade barriers. The negotiation and adoption by the industrialized nations of a common approach toward export cartels would be a step toward "international antitrust" which would be far more modest than the visions of the Havana Charter, but would be very constructive and remedial of the present anomalous situation that Professor Rahl has highlighted. In such a negotiated framework, I see room for exculpatory doctrines such as sovereign compulsion, because it is likely that various countries will insist, at least in the short run, on their need for a national coordinated export scheme to assist particular industrial sectors which are dear to their hearts and national welfare.

Professor Rahl observes that the present situation is especially dangerous for the less developed countries which have no effective antitrust laws of their own. This issue goes directly to the question whether U.S. antitrust law should extend to protect foreigners in foreign markets. As

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<sup>14</sup> 1988 *Antitrust Guidelines*, *supra* note 10, at 20,610-14.

<sup>15</sup> A. Ahlström Osakeyhtiö v. Commission, 4 Common Mkt. Rep. (CCH) ¶ 14, 491 (Sept. 27, 1988)(Wood Pulp case).

<sup>16</sup> *Id.*

has been noted, the recent answer of the Congress to this question has been "no." It seems to me that this makes good sense as a matter of *antitrust* policy. The United States should not distort the purposes of its national antitrust policy by using it as an instrument of international economic or social policy designed to protect foreign economies. The developing nations can and will adopt their own antitrust laws when they are ready, and the United States can offer them the benefit of its knowledge and experience. Their present focus is on development and trade, not on competition policy. This difference in focus between the developed and the developing nations has already given rise, in the context of the United Nations Conference on Trade and Development ("UNCTAD") and other global fora, to a manifested schizophrenia between competition and development objectives, which is reflected in such negotiated documents as the UNCTAD Restrictive Business Practices Code,<sup>17</sup> as well as in the failure of negotiations such as those involving the proposed code of conduct on the transfer of technology.

#### V. CONCLUSION

While, in my view, an "extraterritorialized" U.S. antitrust policy is not the proper vehicle, I certainly agree that as a matter of *national* policy, the United States should continue its campaign against cartelization, wherever it occurs. The fruits of competition are necessary for the economic (and therefrom, the social) betterment of human life in both the industrialized and developing nations. There seems to be universal recognition that a "beggar your neighbor" trade policy invites retaliation and cannot work for anyone, and that a nation's exports will not flourish if it maintains unjustified barriers to imports. The same recognition should emerge with respect to state support of export cartels and other anticompetitive arrangements. Codes of conduct on these subjects will be attained and strengthened in their own good time if the United States pushes the process intelligently and noncoercively. There obviously will be special problems presented in reaching accord on competition philosophy with socialistic states. Nonetheless, international competition is in their interest as well. The United States should continue to try to develop regimes that promote competition policy through bilateral and multilateral efforts. Such a promotion of competitive regimes cannot be fostered by one nation imposing them on another, but only through mutually accepted approaches that are in harmony with the various national institutions and aspirations. This slow and modest, but realistic, path to

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<sup>17</sup> *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF/10/Rev. 1 (1980).

*Harmonization*  
10:133(1989)

the day when competitive ideals hold greater sway in the world is the path that holds the most promise.