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THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS: A RETROSPECTIVE

*Thomas E. Kauper**

In 1955, the third year of the Eisenhower administration, the *Michigan Law Review* published what I believe to be the only symposium on antitrust law ever to appear in its pages.[1] The occasion was the release in March of that year of a Report of the Attorney General's National Committee to Study the Antitrust Laws,[2] a nearly four-hundred-page examination of virtually all facets of federal antitrust doctrine and enforcement. The pages of the symposium led me of course to revisit the Report itself, a visit a little like seeing an old high school friend long forgotten some forty years later. For those of us who were law students in the late 1950s, the Report was an old friend. It was our antitrust hornbook and many of us knew it well. With the discovery of an old friend, conversation is likely to turn, after an initial period of reminiscences, to how things have changed in the interval since parting. How have we fared, and how are things now as compared to then? These are the same questions that arise in revisiting the Report. How has it fared? What influence did it have? And how does the antitrust world it describes compare with the antitrust world of today?

The Report was prepared by a committee of fifty-nine lawyers, law professors and economists (the latter being a relatively small fraction of the group). The Committee was co-chaired by the Assistant Attorney General in charge of the Antitrust Division, Stanley N. Barnes and Professor S. Chesterfield Oppenheim of the University of

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1. The articles comprising the symposium are Kenneth S. Carlston, *Basic Antitrust Concepts*, 53 MICH. L. REV. 1033 (1955); John T. Chadwell, *Antitrust Administration and Enforcement*, 53 MICH. L. REV. 1133 (1955); Kendall B. DeBevoise, *Antitrust Policy in Distribution*, 53 MICH. L. REV. 1073 (1955); Bartholomew Diggins, *The Patent-Antitrust Problem*, 53 MICH. L. REV. 1093 (1955); Robert A. Nitschke, *The Antitrust Laws in Foreign Commerce*, 53 MICH. L. REV. 1059 (1955); Russell A. Smith, *Antitrust and Labor*, 53 MICH. L. REV. 1119 (1955). My comments will not deal with patents nor with issues of antitrust exemptions.

2. REPORT OF THE U.S. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (Mar. 31, 1955) [hereinafter REPORT]. The National Committee will be referred to simply as "the Committee."

Michigan Law School. Members of the Committee were appointed by Attorney General Brownell, who in turn had reviewed the tentative list of appointees with President Eisenhower. The Committee's charge from the Attorney General was to undertake "a thoughtful and comprehensive study of our antitrust laws."[3] President Eisenhower expected the Committee to "provide an important instrument to prepare the way for modernizing and strengthening our laws to preserve American free enterprise against monopoly and unfair competition."[4] Clearly this was a major undertaking, and expectations for the Committee's report were high.

The Report's release came in the midst of the cold war and its resulting international tensions. It was also a time of American economic strength. American firms did not yet face strong competition from European and Asian rivals, rivals whose strength would steadily increase over the next three decades but who in 1955 were still in the process of rebuilding following the ravages of World War II. American firms were eager to sell and invest outside the United States. Many national markets were effectively closed by tariffs, quotas, and other protectionist barriers. The European Community was as yet unborn. Few countries other than the United States had antitrust laws and enforcement in some of those who did was lax. Antitrust was largely an American phenomenon, taken seriously here but not so seriously abroad. Even in the United States, antitrust had had a somewhat checkered history.[5] But by 1955 there had been ten years of relatively steady and consistent enforcement. Private actions seeking treble damages, relatively uncommon before World War II, were increasing, although far from the numbers of three and four decades later. It was a propitious time to look at where American antitrust law had been and where it was, and should be going. It was also a time far different from today.

Today, terrorism has replaced the cold war. American firms face more competitive markets at home and abroad. As a result of the General Agreement on Tariffs and Trade ("GATT") and, more recently, the World Trade Organization ("WTO"), tariff and other gov-

3. REPORT, *supra* note 2, at iv.

4. *Id.*

5. A number of early cases brought by the Justice Department were against labor unions, not the major trusts. There followed a period of active enforcement, a period in which cases against Standard Oil Co. and a number of other major trusts were initiated, and the Clayton Act and Federal Trade Commission Acts were enacted. The period from World War I to 1937 has been characterized as "the era of neglect," with few prosecutions during the pro-business twenties and following the enactment of the National Industrial Recovery Act, an act that permitted industry cooperation through use of the N.R.A. ("Blue Eagle") codes, in the first Roosevelt administration. The more modern phase of active enforcement can be said to have begun in 1937. *See* RICHARD HOFSTADTER, *What Happened to the Antitrust Movement*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 196-98 (1965).

ernment boundary-related barriers have fallen and globalization is the order of the day. The European Union now represents an integrated market as large as, or larger than, the United States. In the antitrust world, over eighty countries now have antitrust or competition policy legislation, in many cases actively enforced and in some, like the United States, applicable on an extraterritorial basis.[6] Antitrust is now international in scope. Enforcement officials today are concerned about cooperation among themselves and whether some form of multilateral agreements on antitrust matters is either necessary or desirable. Antitrust in the 80s and 90s was an export, with the United States and European authorities actively promoting the enactment of their own version by other nations. In this new world, the Report may seem quaint or so out of date as to be classified as antique or a no longer relevant piece of history. Yet in some respects the Report seems as current as if it were released today.

The Attorney General's Report had some influence, although not as much as the Committee undoubtedly would have liked. A number of its recommendations were followed in legislative enactments and policy developments, although sometimes in circuitous ways. The Report was relied upon by the Supreme Court as recently as 1990.[7] Other recommendations and suggestions were ignored or, in some cases, simply rejected. Today, the Report and the commentary on it provide a benchmark against which nearly fifty years of antitrust development can be measured.

The Report was a remarkable exercise in consensus building. While there are dissents from some of its recommendations, it reflects unanimity throughout most of its eight chapters. The achievement of a consensus in a committee of fifty-nine members obviously required compromises, some of which are clear in the Report. It is also clear that a readily identifiable group of members simply did not agree with the general thrust of the Report, feeling that the Report overall would unduly relax both antitrust doctrine and enforcement.[8] These members and others felt that the decision of the Committee to provide a detailed examination of case law in some areas and not to provide an empirical analysis of the impact of antitrust on the economy fell short of the kind of study contemplated when the Committee was commis-

6. *See* UNITED STATES DEPARTMENT OF JUSTICE, INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST: FINAL REPORT 1 (2000) [hereinafter ICPAC FINAL REPORT]; *see also infra* notes 121-122.

7. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 559-63 (1990).

8. There were both signed dissents and other dissents that are simply noted. Five members — Walter Adams, John M. Clark, Alfred E. Kahn, Eugene V. Rostow and Louis B. Schwartz — dissented from the Report as a whole. Professors Rostow and Schwartz also dissented from a number of specific parts of the Report. Walter Adams did likewise, although less frequently. *See* REPORT, *supra* note 2, at 388-93.

sioned. This is a fair criticism, although it is also true that such empirical analyses have not been done since. Perhaps the task is too daunting or simply not doable at all. American antitrust rests heavily on what in the end is an act of faith, faith that markets work and are in large part self-correcting. Antitrust rules have reflected more an exercise in building a superstructure of logic upon a base of that faith. Seldom has doctrine been built on empirical data. The Attorney General's Report and the consensus it manifests therefore stand firmly in antitrust's tradition. Substantively, the Report analyzes existing case law in detail, a far easier task than would be the case today because there were far fewer cases to talk about. The discussion, particularly the discussion of sections 1 and 2 of the Sherman Act in chapter 1, is generally without criticism. The focus is on what the law is, not what the law should be. It is more hornbook than critique. Hence its appeal to law students at examination time.

The structure of the Report itself says much about the antitrust of 1955. Distribution issues, including refusals to deal, tying, exclusive dealing, resale price maintenance, and the Robinson-Patman Act, comprise eighty pages. (The Robinson-Patman Act alone takes over fifty pages). The discussion of horizontal relationships — price fixing, territorial divisions, conscious parallelism, monopolization and attempt to monopolize — is done in less than sixty pages. In the chapter on administration and enforcement, forty-five pages are devoted to the Justice Department and FTC, while only eight deal with private actions. Mergers merited their own chapter, fourteen pages in all. On the other hand, and somewhat surprising perhaps to those who believe problems of extraterritoriality and competitive problems of international trade are something that have come with globalization, nearly fifty pages are given over to these subjects. Finally, the Report's next to last chapter (preceding only the chapter on administration) is devoted to economic analysis, particularly the concept of "workable competition." All of this can simply be gleaned from the Table of Contents.

The framework of the Report suggests a preoccupation with distribution issues and particularly with the Robinson-Patman Act. While their numbers were increasing, treble damage actions had not yet achieved the significance of later years.[9] Mergers were not a major issue, although the Report recognized that they could become a major matter in years ahead. In 1955, however, there had been virtually no cases under section 7 of the Clayton Act as amended in 1950. Foreign

9. In the period from 1941 through 1945, 297 private cases were filed. From 1951 through 1955 (the year of the Report), a total of 1,045 such cases were filed. In the single year of 1977, there were 1,611 private cases filed. The numbers then dropped slightly, with 1,100 such cases filed in 1984. *See* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1002 (1986).

commerce concerns were already a reality, even at a time when few countries other than the United States had antitrust laws. Economics was still working only at the margins of antitrust decisionmaking. The placement of the economics chapter suggests an afterthought, or at least not a perception that economic analysis was central either in the development of antitrust policy or litigation.

If such a Report were written today, I believe it would look far different. Distribution issues would be a minor element. The Robinson-Patman Act would get scant attention. Tying arrangements would undoubtedly be more directly addressed. Mergers and joint ventures (the latter not even alluded to in the Report) would take many pages. Section 2 of the Sherman Act would require more discussion and would be more controversial. Analysis and critique of government guidelines, a phenomenon that was nonexistent in 1955, would be significant. Economic analysis would be given a preeminent, if not predominant, role. A committee of the type that drafted the 1955 Report would undoubtedly have less patience with simple case analysis and would be more prone to criticism of established doctrine, making far heavier use of economics to do so.

I. The Report and Its Consequences in General

Before turning to a more detailed consideration of selected sections of the Report and the symposium commentary, several additional general observations are in order. The Report overall, to the consternation of some of its dissenters, pronounces that the health of antitrust is good and that little change is necessary.[10] As to substantive doctrine, no legislative changes are proposed except with respect to the Robinson-Patman Act. This is not to say that all existing substantive analysis was thought correct. The Committee majority was obviously confident that the federal enforcement agencies and courts would be the agencies of change without legislative help. This confidence has continued through the present time. The Sherman Act has long been analogized in its generality and flexibility to the Constitution, and it has proven to be at least as difficult to amend. While the Clayton Act has proven somewhat more amenable to amendment, it has seen no substantive amendment since 1950. Even today, the desire for flexibility has trumped attempts to amend these statutes. It is hardly surprising that the Committee saw no need to do so, even where court decisions may have appeared to be wrong.

The general thrust of the Report is clear. It contemplates an antitrust world virtually free of per se rules. Apart from the existing and well-established per se rules with respect to horizontal and vertical price fixing, relatively harsh treatment of tying arrangements, and an

10. *See* REPORT, *supra* note 2, at 3.

ambiguity as to whether concerted refusals to deal should be per se illegal (they are to be viewed as "routine unreasonable restraints"), *Standard Oil*'s[11] rule of reason is to govern cases under section 1 of the Sherman Act. This will require proof of market power and an assessment of competitive effects taking a wide variety of industry factors into account. Monopolization cases under section 2 should rest on a careful assessment of monopoly power, based upon market definition and some use of market shares, as well as other factors that might indicate such power. Only where monopoly power is deliberately acquired or maintained and not simply the result of the defendant's "skill, foresight and industry"[12] should liability attach. Analysis of mergers under section 7 of the Clayton Act should take into account of wide variety of factors, with no single factor determinative. The Robinson-Patman Act should not be read to permit a finding of secondary line injury simply upon proof that the disfavored purchaser was disadvantaged vis à vis its rivals. Professor Alfred Khan in lamenting the general direction of the Report, a direction he characterized as "a substantial weakening of the antitrust law," observed that "[i]t is possible to find almost every section reasonable and moderate, only to discover at the end that the whole leans — albeit only moderately and reasonably — heavily in one direction."[13] One need not accept his assertion that the Report would "weaken" the antitrust laws to agree that the touchstone of the Report is "reasonableness."

A reader familiar with the state of antitrust today would likely conclude that, apart from some moderation of the Report's severe approach to tying arrangements and today's much more complex analysis with respect to concerted refusals to deal, the description given in the preceding paragraph seems to be a relatively accurate exposition of the antitrust world of 2001. This is not, however, to attribute much influence to the Report. To do that, one would have to ignore the immediate aftermath of the Report and trace its influence along what would be an almost tortured and circuitous route. For the 1960s brought about a proliferation of per se rules, an expansion of Robinson-Patman Act enforcement and interpretation,[14] and an almost mathematical approach to mergers that a majority of the Report's draftsmen would find horrific. The Supreme Court in that period adopted per se rules against maximum resale maintenance[15] and

11. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

12. REPORT, *supra* note 2, at 56.

13. REPORT, *supra* note 2, at 393.

14. *See, e.g.*, Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967); Fed. Trade Comm'n v. Sun Oil Co., 371 U.S. 505 (1963); United States v. Borden Co. and United States v. Bowman Co., 370 U.S. 460 (1962); Fed. Trade Comm'n v. Henry Broch & Co., 363 U.S. 166 (1960).

15. Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968).

vertical territorial restrictions,[16] expanded the reach of the per se rules against minimum vertical price fixing,[17] horizontal market allocations,[18] and concerted refusals to deal,[19] and condemned horizontal mergers based on relatively low market shares and little else.[20] These rulings had little, if any, basis in economic analysis, resting instead on concerns over the straits of small entrepreneurs[21] or, in one instance, the property law rule against undue restraints on alienation.[22] The sixties gave us a body of antitrust rules based upon protection of independent judgment, individual initiative, and equality of opportunity that was more consistent with civil rights thinking than economic analysis.[23] It was an antitrust based more on infringement of individual rights than on any concept of consumer welfare.

The retrenchment of antitrust doctrine beginning in the mid-1970s has been dramatic. Most of the per se rules adopted in the previous two decades have disappeared, and the decisions of the Supreme Court adopting them now overruled.[24] Merger analysis is no longer simply a matter of market definition and adding up market shares. The approach to mergers today may start with such data, but a far more complex analysis must be done before liability can be established.[25] We are well on the way to a full-blown efficiencies defense in

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16. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967).

17. Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964).

18. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972). This decision, while decided in 1972, is reflective of the expansionary tendency of the sixties.

19. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

20. *See, e.g.*, United States v. Von's Grocery, 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966). This general numerical approach, relying heavily on relatively low market share, is also reflected in the Justice Department's 1968 merger guidelines. UNITED STATES DEPARTMENT OF JUSTICE, MERGER GUIDELINES (1968), *reprinted in* 4 CCH TRADE REG. REP ¶13,101 (Mar. 18, 1998). While trying to remain faithful to the Supreme Court decisions of the time, the 1968 guidelines do attempt to include some other elements in the analysis. They were still, however virtually mathematical.

21. *See, e.g.*, Simpson v. Union Oil Co., 377 U.S. 13 (1964).

22. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

23. *See* Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 334 (1968).

24. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), was overruled by *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977). *Albrecht v. Herald Co.*, 390 U.S. 145 (1962), was overruled by *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997).

25. *See* U. S. DEPT. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992), *reprinted as amended in* 4 CCH TRADE REG. REP. ¶13,104 (Apr. 17, 1997) [hereinafter HORIZONTAL MERGER GUIDELINES]. For cases illustrating today's more complex analysis, see *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); and *Hospital Corp. of America v. Fed. Trade Comm'n*, 807 F.2d 1381 (7th Cir. 1986). The Supreme Court moved away from what had appeared to be a virtually mathematical approach in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), its last significant merger decision.

merger cases,[26] in sharp contrast to the view expressed by the Supreme Court in merger decisions of the sixties that because efficiencies strengthened the merged parties against their competitors, they might afford a basis for a finding of illegality.[27] The Federal Trade Commission ("FTC") has brought but one Robinson-Patman Act case in the past twelve years, a case that it utilized to set out a less restrictive standard of competitive harm than that of an earlier time.[28] While private Robinson-Patman cases continue to be brought, the Act has been significantly curtailed through judicial interpretations contracting expansionary decisions of the sixties.[29]

While the drafters of the Report would be far more comfortable with today's antitrust than with what followed hard on the heels of the Report's issuance, the changes of the eighties and nineties had little to do with the Committee's efforts. The changes of the past twenty-five years in antitrust doctrine, changes usually thought to have begun in the Supreme Court in its 1977 *Continental T.V.* decision,[30] may be attributed to a number of factors, but the Attorney General's Report is not one of them, at least not in any significant sense. As noted above, the Supreme Court's decisions in the sixties moved directly away from the Report's recommendations. In this sense the Report was a failure.

A number of explanations may be offered for the modern antitrust revolution, none of which can be said to reflect the Report and not all of which can be fully developed here. The Court's own explanations for a number of its decisions in the sixties were simply inadequate, leaving readers and lower courts, which often resisted the lead of the Court, both dissatisfied and increasingly cynical about what the Court was doing. The Court had left a kind of intellectual vacuum. I suggested in a 1968 *Michigan Law Review* article that there was "some danger that [the Court] may become a Pied Piper with an unheeded tune."[31] And so it became.

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26. The U.S. Horizontal Merger Guidelines were amended in 1997 to deal more fully with efficiency claims. HORIZONTAL MERGER GUIDELINES, *supra* note 25, at § 4. A number of lower court cases have now recognized a limited efficiencies defense. *See* Fed. Trade Comm'n v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997); Fed. Trade Comm'n v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd per curiam*, 121 F.3d 708 (6th Cir. 1997).

27. *See, e.g.*, Fed. Trade Comm'n v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967).

28. McCormick & Co., Inc., FTC Complaints & Orders, [1997-2001 Transfer Binder] Trade Reg. Rep. (CCH) ¶24,711 (April 27, 2000) (applying the so-called *Morton Salt* presumption only where respondent was a dominant firm and secondary line discrimination threatened competitive injury to seller's own competition).

29. *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (curtailing, if not overruling, Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967)); Falls City Ind., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

30. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

31. Kauper, *supra* note 23, at 342.

Some would attribute many of the changes in antitrust doctrine over the last two and a half decades to the economic analysis identified today with the Chicago School.[32] The views of people like Professors Ward Bowman, Robert Bork and Richard Posner[33] were more compelling than the rationale of a number of Supreme Court cases and, with their emphasis on economic efficiency, found ready listeners in the legal and business community at a time when American businesses were threatened *in their home markets* by a dramatic increase in imports and found it more difficult to compete in foreign markets. While antitrust teachings of the Chicago School have never been accepted in their entirety (to the extent it is fair to speak of them as a single set of views at all), they led the debate over antitrust's goals and to the general acceptance of the view that the sole goal of antitrust is the achievement of economic efficiency and that neoclassical price theory is the best tool for arriving at proper outcomes. Antitrust reform was also a part of the broader deregulation movement, a movement well under way by the late seventies. As individuals who were, at least to some extent, sympathetic to Chicago School thinking came to head the major enforcement agencies, those agencies themselves played a major role in cutting back antitrust regulation.[34] The agencies in turn had considerable influence on the judiciary, particularly during the eighties as Reagan and Bush appointees became an ever growing percentage of federal judges. While a variety of elements converged to bring about shifts in doctrine, there is no reason to believe they are in any sense attributable to the Report.

This is not to say that the Report was without influence. A number of its proposals for new legislation, many in the procedural area, were enacted within a relatively short time of the Report's release. The Antitrust Civil Process Act,[35] which granted the Department of Justice authority to use civil investigative demands to compel the production

32. For a succinct summary of the views of the Chicago School, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 60-62 (2d ed. 1999).

33. For representative writings, see ROBERT H. BORK, THE ANTITRUST PARADOX (rev. ed. 1993); RICHARD A. POSNER, ANTITRUST LAW (1976); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); and Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

34. Perhaps the greatest single influence on the development of modern merger law was the issuance, under the direction of Assistant Attorney General William Baxter, of the Department of Justice Merger Guidelines in 1982. These guidelines introduced a far greater degree of economic analysis, moved away from the simple mathematical approach of the sixties and, contracted the expansionist approach of that period. *See* Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311 (1983). More recent guidelines are simply modifications of those of 1982, which therefore have continued to impact public merger enforcement to the present day. They have also heavily influenced courts in litigated cases. *See, e.g.*, Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); United States v. Waste Mgmt., Inc., 743 F.2d 976 (2d Cir. 1984).

35. 15 U.S.C. §§ 1311-1314 (1994)

of documents in civil investigations prior to the filing of a complaint, was enacted substantially as proposed in the Report.[36] The Committee's recommendation rested largely on the need to give some form of compulsory process in civil cases in order to avoid what at least some members perceived as a history of abuse of the grand jury process. Members of the Committee might well have been disturbed, however, when in 1976 this authority was extended to demands for written interrogatories and the taking of testimony concerning documents, and removed the limitation that such demands could be directed only at potential targets.[37]

The most immediate legislative response came within three months, when three of the Report's recommendations were enacted at the same time.[38] For the first time, private treble damage actions were made subject to a federal statute of limitations.[39] Suits by the United States to recover single damages where it was an injured party were authorized.[40] The Report also recommended an increase in maximum criminal fines under the Sherman Act from $5,000 to $10,000, rejecting the increase to $50,000 sought by some members. Reciting a long history of fines ranging from $100 to $500, the Committee expressed the belief that the existing maximum was generally adequate. An increase to $10,000 was justified by the need "to take some account of inflation."[41] Given the fact that the maximum fine had been $5000 from 1890 to 1955, the proposed increase was hardly adequate even as an inflation adjustment. Just three months after publication of the report Congress raised the maximum to $50,000.[42] The Committee's recommendation was given more effect than it wanted. All of this seems almost amazingly antique today when fines have ranged as high as half a

36. Antitrust Civil Process Act, Pub. L. No. 87-664, 26 Stat. 548 (1962).

37. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1384-85 (1976).

38. Act of Jul. 7, 1955, Pub. L. No. 137-583, 69 Stat. 283 (amending the Clayton Act) (codified as amended at 15 U.S.C. § 15 (1994)) [hereinafter Public Law 137].

39. 15 U.S.C. § 15b (1994).

40. The 1955 legislation authorized recovery of single damages by the United States. As the result of further amendment, the United States may now recover treble damages. 15 U.S.C. § 15a (1994)

41. REPORT, *supra* note 2, at 352.

42. Public Law 137, *supra* note 38, at ch. 282. The maximum statutory fine in the Sherman Act today is $10 million for corporations and $350,000 for individuals. Individuals may also be sentenced to a maximum of three years in prison, an increase over the maximum of one year as the Act was originally enacted. 15 U.S.C. § 1 (1994). Today most sentencing is under the Criminal Fines Enforcement Act of 1984, which sets a maximum of double the pecuniary gain derived or double the pecuniary loss imposed. 18 U.S.C. § 3623 (1986) (repealed in 1987); Criminal Fine Improvement Act of 1987, 18 U.S.C. 3571 (1994) (reauthorizing the potentially significant fine).

billion dollars.[43] In 1955, it apparently did not occur to anybody on the Committee to refer to jail sentences. No consideration was given to any increase in the maximum of up to one year. Given the extraordinary emphasis on the use of criminal processes and sanctions today, the recommended fine levels and inattention to jail sentences may seem surprising; it is an indication that antitrust of 1955 was far more gentlemanly than it is now, when the use of leniency programs,[44] FBI agents, search warrants and consensual eavesdropping[45] are commonplace.[46]

II. THE REPORT AND THE SUBSTANCE OF ANTITRUST

As already noted, chapter 1 of the Report deals generally with the substance of sections 1 and 2 of the Sherman Act. The chapter consists almost entirely of case analysis of horizontal and vertical price fixing, trade association statistical activities, horizontal and vertical market division, monopolization and attempts and conspiracies to monopolize. The text is bland, the analysis is careful and for the most part unexceptional. Criticism of doctrine (and therefore of the courts) is virtually nonexistent. What is striking in this chapter is its simplicity and the relatively few cases (by today's standards) that are discussed. It is as though all section 1 problems were in one of the categories just described. And, in 1955, there was some truth to that. These *were* the issues most cases dealt with, although it is hardly so today. The draftsmen of chapter 1 were satisfied with the law as it stood and did not use the Report as a vehicle to speculate about issues that might arise in the future.

There are some oddities in this general analysis. Horizontal and vertical price fixing (resale price maintenance) are discussed together

43. This was the fine paid by F. Hoffman-La Roche Ltd. in the Vitamins cartel case. BASF paid a fine of $225 million in the same case. Both eclipsed the previous record fines, $110 million paid by UCAR International in the Graphic Electrodes case and $100 million paid by Archer Daniels Midland Co. in the Citric Acid cartel prosecution. *See* Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 715, 720-21 (2001).

44. *See* U.S. DEPARTMENT OF JUSTICE, CORPORATE LENIENCY POLICY (Aug. 10, 1993), *available at* http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.

45. The Justice Department has publicly released a videotape, entitled "The International Lysine Cartel at Work," containing excerpts from both video and audio surveillance in the Lysine Cartel case.

46. The Report also recommended that the granting of treble, as opposed to single, damages should be put in the trial judge's discretion, rather than the mandatory trebling required in private antitrust actions for damages. REPORT, *supra* note 2, at 378-80. The Congress has never been willing to make such a change. Mandatory trebling is still required today. 15 U.S.C. § 15a (1994). The small section in the Report where this recommendation appears is at its very end and is virtually the only place where private actions are even mentioned.

as though they were without significant differences.[47] Yet horizontal and vertical market division agreements are treated as wholly separate from each other, with the former condemned outright and the latter requiring analysis under the ancillary restraint doctrine.[48] Horizontal and vertical price fixing are to be "conclusively presumed" illegal.[49] Interestingly, these conclusions reflect the state of the law today (although the Supreme Court's treatment of vertical territorial and customer restraints has hardly been one of its finer performances).[50] We now know, however, that vertical and horizontal arrangements are sharply different in effect. Resale price maintenance is not simply a variation of horizontal price fixing, either in terms of purpose or effect.[51]

Only two issues relating to horizontal agreements received special attention. They were obviously particularly vexing questions of the day. One — the treatment of so-called conscious parallelism — still is. The other — the question of intra-enterprise conspiracy — has largely been laid to rest. The evidentiary relevance of uniform pricing in highly concentrated industries — pricing that is interdependent with the pricing of one's rivals — has long been debated.[52] Economic theory

47. REPORT, *supra* note 2, at 12-16.

48. *Id.* at 26-27.

49. *Id.* at 12. The Report here uses the language of the *Standard Oil* case, *supra* note 11. In this chapter the Report carefully avoids using the label "unreasonable per se." More curious is that its discussion of horizontal price fixing omits any reference to footnote 59 in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940), perhaps the most famous footnote in antitrust history. The footnote recites that in a price-fixing case, the plaintiff need not show market power, actual effect, or even any overt act. Proof of the agreement is itself sufficient. The omission of these points suggests the Committee was uneasy about the contents of the footnote.

50. The Court rejected an argument that such restraints were per se illegal in *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963), asserting that it did not know "enough of the economic and business stuff out of which these arrangements emerge" to condemn them out of hand. Only four years later it had apparently learned what it needed, ruling in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967) that all such restraints were per se illegal because they violated "the ancient rule against restraints on alienation." *Schwinn* was in turn overruled in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977).

51. Horizontal price fixing is condemned because of its adverse price and output effects, effects that result from aggregating the market power of otherwise independent competitors. This interbrand effect is to be contrasted with the adverse intrabrand effect of vertical price fixing, price fixing that on its face sets the price only on a given brand. Vertical price fixing is far more akin to vertical territorial and customer restrictions in effect. Both types of practices may enhance interbrand competition in some cases. *See generally* HOVENKAMP, *supra* note 32, at 441-58. In a few cases, vertical price and non-price restraints can be used to facilitate collusion and thus reduce interbrand competition but this horizontal effect is far less obvious than with horizontal price fixing. *See* Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988).

52. The classic articles in the debate are Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969), and Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

teaches that without overt collusion firms in highly concentrated markets may achieve cartel-like prices.[53] Does the proof of such pricing constitute price fixing, the agreement being inferred from an invitation to collude and a uniform response in circumstances when it is in the interest of each firm only when others behave in parallel fashion? The Report concludes that while evidence of uniformity is relevant to proof of agreement, it is normally not in and of itself sufficient, absent other factors also suggestive of collusion. No inference of agreement is appropriate where the conduct has independent justification.[54] The Report is based primarily on the Committee's reading of the *Interstate Circuit*[55] and *Theatre Enterprises*[56] cases, the same cases that bound the inquiry today. The Supreme Court has now pronounced that oligopoly pricing is not itself unlawful.[57] The standard formulation today — that interdependence alone does not establish agreement and that some "plus" factor indicative of collusion must be shown[58] — would please the members of the Committee. The law remains basically the same as its Report describes.

The Committee is remarkably cautious about the intra-enterprise conspiracy doctrine. In its simplest form, the Supreme Court cases from which the doctrine evolved seemed to hold that a parent and its wholly owned subsidiaries or two subsidiaries of the same parent are legally capable of conspiracy.[59] The Report specifically recommended that the Supreme Court reconsider the doctrine to the extent that it required competition among such subsidiaries, but rather timidly suggests that section 1 "may be transgressed" where a parent and subsidiary act to exclude a rival.[60] This conclusion is indicative of the Report's desire to stay within the bounds of decided cases. Confronted with a doctrine devoid of economic sense, the Committee read the decided cases restrictively but was unprepared to press for elimination of the

53. *See* HOVENKAMP, *supra* note 32, at 156-63.

54. REPORT, *supra* note 2, at 39-40.

55. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

56. Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954).

57. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993).

58. This formulation is found in literally scores of cases. For recent examples, see Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1042-43 (8th Cir. 2000); and In re Baby Food Antitrust Litig., 166 F.3d 112, 121-22 (3d Cir. 1999).

59. The early cases from which this doctrine allegedly derived are *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). These are the primary cases analyzed in the Report.

60. REPORT, *supra* note 2, at 35.

doctrine altogether. It took the Supreme Court another thirty-nine years finally to lay the doctrine to rest.[61]

The Report's treatment of monopolization under section 2 of the Sherman Act[62] is relatively brief, and the Committee appeared to be satisfied with the law as it then stood. The Report had relatively few cases to work with, but among them were both *Alcoa*[63] and *United Shoe*,[64] cases still heavily relied upon today. The impression left after reading the Report's monopolization segment is that the law of section 2 today has not developed much beyond 1955. The Report asserts that the two elements of the offense are the possession of monopoly power and the use of deliberate and exclusionary conduct either in its acquisition or maintenance. As to the first, the starting point is market definition and computation of market share. The determination of the existence of monopoly power requires the drawing of inferences from market share and a variety of performance factors. Consideration must also be given to entry factors. Judge Hand's magical numbers from *Alcoa* are said to be helpful.[65] The report deals with the conduct element in little more than five pages. Beyond talking generally about conduct that drives competitors out of the market or deliberately impairs them, the Report makes little effort to identify specific types of conduct proof of which could satisfy plaintiff's burden. More attention is paid to the so-called "thrust upon" defense, but the Report does little beyond setting forth lengthy quotations from the *Alcoa* and *United Shoe* cases.[66]

Why was the Report not more specific? The simple answer is that with a statute that defines an offense in one word — "monopolize" — and a methodology relying on decided cases, greater specificity was not possible without venturing into a wide variety of conduct that might be deemed exclusionary about which there had been no litigation.

Despite the Report's generality, the general section 2 standards it sets forth are little different than those applied today. Juries are still instructed in these broad terms.[67] Some progress towards fleshing out

61. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-74 (1984), the Court finally rejected any contrary implication in earlier cases and held that a parent and its wholly owned subsidiaries were incapable of conspiracy in violation of the Sherman Act.

62. 15 U.S.C. § 2 (1994).

63. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

64. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

65. In a famous passage, Judge Hand states that a ninety-percent market share was indicative of monopoly, that sixty percent was doubtful and thirty-three percent clearly was not. United States v. Aluminum Co. of Am., 148 F.2d at 424.

66. REPORT, *supra* note 2, at 56-60.

67. See the jury instruction set forth in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 595-97 (1985).

the statute has been made, if for no other reason than the much larger number of decided cases from which greater precision can be drawn. Today, for example, there are more specific standards dealing with leveraging[68], essential facilities[69] and predatory pricing.[70] A monopolist may price to meet competition[71], but cannot utilize sham litigation to exclude rivals or raise their costs.[72] In short, as more and more concrete cases are decided, the rules governing the conduct of monopolists have become more specific. Yet the very broad "deliberate and exclusionary" conduct remains in place, supplemented by a new standard pursuant to which courts have been relatively quick to shift to the defendant the burden to come forth with a legitimate business justification for its actions. Made explicit by the Supreme Court in its *Aspen Ski* case,[73] this burden shifting has become commonplace in major section 2 cases such as *Kodak*[74] and *Microsoft*.[75] Today, then, once a court is satisfied that the conduct at issue is "deliberate and exclusionary," a standard that often seems easily met, the burden of explanation falls on the defendant. The drafters of the Report would be entirely comfortable with such an approach, so long as care is taken in finding conduct that is in fact exclusionary. While economic analysis has been useful in these cases, it has not predominated as it has, for example, in merger cases where the Merger Guidelines have considerable impact in court decisionmaking. We have no such guidelines for section 2 cases. Perhaps the time has come that we should.

68. Derived from *United States v. Griffith*, 334 U.S. 100 (1948), the leveraging doctrine applies where a monopolist uses its monopoly power, even if lawfully acquired, to foreclose competition or gain a competitive advantage in a second market. There is currently a controversy about whether such conduct is itself a violation of section 2 or whether an attempt to monopolize the second market must be shown. *Compare* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992) (not a separate offense) *with* Kerasotes Michigan Theatres, Inc. v. Nat'l Amusements, Inc., 854 F.2d 135 (6th Cir. 1988) (separate offense), *and* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (separate offense). The Second Circuit has since described its statement in *Berkey* as dictum. AD/SAT v. Associated Press, 181 F.3d 216, 230 (2d Cir. 1999).

69. The essential facility doctrine requires a monopolist to provide competitors access to a facility it controls that is essential to their ability to compete and which they cannot reasonably duplicate, if such access is feasible. *See, e.g.*, Fishman v. Wirtz, 807 F.2d 520 (7th Cir. 1986). The doctrine has been severely criticized. *See generally*, Phillip Areeda, *Essential Facilities: an Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

70. *See* Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993).

71. *See* Telex Corp. v. Int'l Bus. Machs. Corp., 510 F.2d 894, 927-28 (10th Cir. 1975).

72. The standards with respect to "sham litigation" are set forth in *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993).

73. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 583 (1985).

74. Image Technical Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1212 (9th Cir. 1996)

75. United States v. Microsoft Corp., 253 F.3d 34, 46-47 (D.C. Cir. 2001).

III. DISTRIBUTION AND THE ROBINSON-PATMAN ACT

The Report's chapter on distribution issues was clearly done by a different subcommittee. It is both more vigorous and emphatic in endorsing existing law in some areas and more willing to be critical in others (perhaps because it had more to be critical about). The Report "subscribes to vigorous condemnation of concerted and conspiratorial refusals to deal" that coerce outsiders,[76] finds little or no virtue in tying arrangements[77] and views simple refusals to deal by non-monopolists as virtually sacrosanct.[78] In each of these instances, the Report's view is based upon and is satisfied with what it views as existing law. While several Committee members found some virtue in resale price maintenance, a practice they felt assisted small businessmen by eliminating loss leaders and irresponsible price cutting,[79] the majority of the Committee urged repeal of the Sherman Act amendments authorizing resale price maintenance, and a return to the underlying prohibition of the practice that would otherwise govern.[80] The Congress did ultimately repeal the amendments, but not until 1975.[81]

The Report is sharply critical of the Supreme Court's decision in *Standard Stations*,[82] a case involving exclusive dealing. It is described as "a perplexing opinion whose rationale is not clear."[83] The Report characterizes the holding as one finding competitive injury in exclusive dealing cases upon a simple showing that the contracts at issue involved a "substantial number of outlets" or volume of trade.[84] This "quantitative substantiality" test is the target of the Report's criticism. But what to do with *Standard Stations*? As Kenneth Debevoise put it, "[t]he [C]ommittee resorts to a not altogether successful *tour de force*,"[85] noting that the Federal Trade Commission in several subsequent proceedings did not apply the test of *Standard Stations*. It obviously hoped that subsequent judicial interpretations would eliminate the problem (an approach that permeates the Report). Its hope turned

76. REPORT, *supra* note 2, at 137.

77. *Id.* at 145.

78. *Id.* at 134.

79. *Id.* at 154-55.

80. *Id.* at 154. Under the so-called Fair Trade amendments to the Sherman Act, resale price maintenance (vertical price fixing) was exempt from the Sherman Act if practiced in a state where state law authorized it. Without such an exemption resale price maintenance is per se illegal.

81. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

82. Standard Oil Co. of Cal. v. United States (Standard Stations), 337 U.S. 293 (1949) (Standard Stations is a wholly-owned subsidiary of Standard Oil).

83. REPORT, *supra* note 2, at 141.

84. *Id.*

85. DeBevoise, *supra* note 1, at 1077.

out to be justified. The Committee's "actual foreclosure" test, and the manner in which the Committee would apply it, is fully consistent with the law as it stands today, where most exclusive dealing by non-monopolists is viewed as efficiency enhancing.[86] The Committee's criticism may well have had a significant impact in the development of today's standards.

The Committee's Report had far less immediate effect on the interpretation and enforcement of the Robinson-Patman Act,[87] even though it is the focus of some of the harshest criticism in the Report. The Committee had little to say about the application of the Act in cases where price discrimination allegedly injured competition at the primary level (the level of the seller and its rivals). The primary concern of the Robinson-Patman Act is with injury at the level of the favored and disfavored buyers. It is logical therefore that the Report is directed at these so-called secondary line cases.

The Report's consideration of the Act begins with the observation that it is difficult to reconcile the economic theory on which the Robinson-Patman Act rests with that underlying the Sherman Act, and that the judicial process has resolved every statutory doubt in favor of the antitrust directives of the Sherman Act.[88] The Committee does the same. As put by Kendall Debevoise:

> The committee members, too, are chronological in their thinking. In the beginning was the Sherman Act, and it was good. Later came the Clayton Act, and it was good, but no matter what additional purposes it may have had, it should be read in the full light of the Sherman Act. Later came the Robinson-Patman Act, hard after a tragic depression and, on a different economic theory, addressed to different economic problems. The committee had to fish or cut bait.
>
> I submit that it cut bait. But the choices were difficult.[89]

Those choices, as put by Mr. Debevoise, were to disapprove of the Act as unwise, recommend substantial legislative overhaul, read the act strictly without regard to legislative inconsistencies, or try to harmonize all antitrust legislation through interpretation. He correctly observes that the Committee took the last course. In so doing, it may have missed a golden opportunity for meaningful reform.

Nowhere is the Committee's harmonization approach more clear than in its treatment of proof of competitive injury in cases of price discrimination among competitive buyers. The original version of sec-

86. See HOVENKAMP, *supra* note 32, at 430-39 for a summary of the prevailing standards.

87. The Robinson-Patman Act was a 1936 amendment to § 2 of the Clayton Act, now codified at 15 U.S.C. §§ 13, 13a, 13b, 21a (1994).

88. REPORT, *supra* note 2, at 131-32.

89. Debevoise, *supra* note 1, at 1073-74.

tion 2 of the Clayton Act prohibited price discrimination where the effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce,"[90] the language used throughout the Act's substantive provisions. Concerned with the rise of large chain stores, stores that received large discounts to their advantage over smaller stores, Congress in the Robinson-Patman Act added to the injury standard an alternative standard prohibiting discrimination where the effect was to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[91] Congress clearly meant to put the focus on injury at the buyer ("secondary") level and to do something in terms of injury that was not the same as the existing standard. The question for the Committee is what that was, a question still debated today. For the Committee, the conclusion drawn from a handful of cases was that the courts were both free and under a duty to construe this language in accord with the broader antitrust policies of the Sherman Act. This, in turn, would focus the injury requirement not on harm to individual disadvantaged competitors but on "the health of the competitive process."[92] The net effect of the Committee's view, as Mr. Debevoise notes, was that Congress in fact "did not add anything new."[93]

The Committee's view of the injury requirement may make perfectly good sense in economic terms, but the law did not develop as it recommended. Even today, the injury to competition at the secondary level can be inferred where substantial price differences exist between competing purchasers operating in otherwise competitive markets. The Supreme Court's latest pronouncement is simply that injury may be inferred where some purchasers pay "substantially more for their goods than their competition had to pay. "[94] The focus is on injury to disadvantaged competitors, not on the market's structure or process, a standard that makes no pretense of reconciling the Sherman and Robinson-Patman Acts. This inference of harm is drawn, as everyone who has ever dealt with Robinson-Patman cases knows, from the Supreme Court's 1948 decision in *Federal Trade Commission* v. *Morton Salt Co.*,[95] a decision mentioned only once in the Report, and then in a footnote.[96] The Report tries to limit the decision to allowing permissive inferences to be drawn in administrative proceedings. The

90. Act of October 15, 1914, ch. 323, § 2, 38 stat. 730, S 2 (1914).

91. 15 U.S.C. § 13(a) (1994).

92. REPORT, *supra* note 2, at 165.

93. Debevoise, *supra* note 1, at 1082.

94. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 559 (1990).

95. 334 U.S. 37 (1948).

96. REPORT, *supra* note 2, at 165 n.118.

Committee seems satisfied that FTC cases subsequent to *Morton Salt* confirm its view both of that case and of what it believes the law should be. This treatment of what is still the leading case on secondary injury may be characterized as a good try. It failed. But as a result of its analysis (hope?), the Committee did not urge substantial legislative revision of the Act. And its recommendation on this point did not gain judicial acceptance.[97] The Committee labored, but in the end for naught.

The Committee was no more successful in trying to put life into the Act's cost justification defense, a defense it characterized as "largely illusory in practice." The legislative text of the defense is characterized by the Report as "prolix and perplexing,"[98] as indeed it is. The Report calls for the FTC to adopt "realistic" cost accounting standards, that it avoid "precise and mechanical rules" and that "reasonable approximations" be sufficient.[99] As put by Mr. Debevoise, "the [C]ommittee has conceded, in effect, that it doesn't exactly know what to do about [it], except that the Federal Trade Commission ought to be 'reasonable' about it."[100] In the end, the FTC and the courts made little change in the defense's standard. Without legislative change, which the Report again did not urge, the defense is as illusory today as it was in 1955.

The Report's discussion of the meeting competition defense is a further reflection of the Committee's emphasis on reconciliation of the Robinson-Patman Act with what it views as the core antitrust statutes. It begins with a lengthy discussion of what was then a very sensitive issue, namely, whether the defense is absolute, applicable without regard to whether competition is injured. The ability of a firm to respond to a competitor's prices is viewed as the essence of competition, and to hold the defense other than absolute "would move the price discrimination statute into irreconcilable conflict with the Sherman Act."[101] This is a point long ago settled in accord with the Committee's view.[102] The Report contains a number of other then debatable inter-

97. The closest any court has come to acceptance of the Committee's view is in *Boise Cascade Corp. v. Federal Trade Commission*, 837 F.2d 1127 (D.C. Cir. 1988), where the court concluded over a vigorous dissent that the Commission erred when it rejected evidence of the health of competition in the buyer's market. The dissent stressed that the court's approach was inconsistent both with *Morton Salt* and the Act's legislative history. Subsequent cases have rejected the approach of *Boise Cascade*. *See* Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653, 655 (9th Cir. 1997), *cert. denied*, 522 U.S. 943 (1997); George Haug Co. v. Rolls Royce Motor Cars, 148 F.3d 136 (2d Cir. 1998).

98. REPORT, *supra* note 2, at 172.

99. REPORT, *supra* note 2, at 174-75.

100. DeBevoise, *supra* note 1, at 1084.

101. REPORT, *supra* note 2, at 181.

102. The issue was settled in *Standard Oil Co. v. Federal Trade Commission (Indiana)*, 340 U.S. 231 (1951), a decision the Report enthusiastically endorses, although there seems to be no need to stress the point.

pretations of the defense, as follows. While there are circumstances where a seller may be denied the defense because the price it is meeting is unlawful, the seller should be deemed to have met a lawful price unless it knew or should have known otherwise. The defense should not be limited to meeting only temporary or sporadic price offering of rivals. Undercutting of a rival's price should be permitted if the seller has acted in a good faith belief that it was simply matching the price offered. The defense should not be limited to retaining existing customers but should be equally available in seeking new customers. The Commission saw no need for legislative change to accomplish these ends, believing the statute would likely be interpreted as it proposed. It turned out to be right on all of these points, but only after the Supreme Court removed much of the muddle created by the FTC and courts in the 1960s with its 1983 decision in the *Falls City Industries* case.[103]

At a time when there had been little litigation and few rulings on the treatment under the Act of functional discounts, the Committee took the subject on directly, one of the few places where it ventured into new territory. To take the simplest case, assume a manufacturer sells to wholesalers that in turn sell to a reseller. The manufacturer also sells direct to some retailers. When it grants the wholesaler a discount in recognition of its performance of wholesale functions, that discount generally causes no adverse effect at the buyer level, even though direct buying retailers receive no discount, since the wholesalers and retailers do not compete for the same customers. But suppose the manufacturer sells to a wholesaler with a wholesale discount and the wholesaler also functions as a retailer. A competing retailer buying direct from the manufacturer receives no such discount. The Committee's answer is that, where the integrated wholesaler-retailer actually performs wholesale functions, it is lawfully entitled to a wholesale discount. If the integrated firm elects to charge a lower price to its retail buyers than its direct buying competitors, that is its own decision. Suppliers should not be held responsible for their purchasers' pricing tactics. The Committee believed that the statute could be so interpreted without legislative intervention.

Over the ensuing years, the legality of functional discounts remained something of a puzzle to lawyers and businesspeople, with the result that pricing decisions were often turned over to lawyers who were supposed to have answers under the Act. Like many of its recommendations, the Report's functional discount proposals found little

103. Falls City Indus. v. Vanco Beverage, Inc., 460 U.S. 428 (1983). In *Falls City*, the Court held that the defense is unavailable if the plaintiff, which has the burden, can prove that the prices that were met were actually met, resolving some of the ambiguity on the point created by the *Standard Oil* case, 340 U.S. 231 (1951). It further held that the defense could be used where the seller discriminated in gaining a new customer.

immediate following.[104] The Supreme Court finally addressed the functional discount issue thirty-five years after the Report's release in *Texaco, Inc.* v. *Hasbrouck*,[105] a case involving a refiner who sold to wholesalers at a price significantly below its price to retailers that in turn competed with purchasers from the favored wholesalers, purchasers that were charged less by those wholesalers than the prices at which the refiner sold direct to retailers. The Court quotes the Committee's recommendations in full and states its general agreement with them. But having said that, the Court holds in essence that because the refiner's price to its wholesalers was in excess of either the supplier's savings in not performing wholesale functions or the wholesalers costs in doing so, the wholesale discount was unreasonable and in violation of the Act. In short, the refiner was found to have simply passed an advantage through the wholesaler to its customers. The Report was recognized, but its analysis was found somewhat wanting. The Committee, dealing with a set of complex and unresolved questions, may simply not have perceived all the subtleties the future would bring.

Today's reader of the Report's treatment of the Robinson-Patman Act will undoubtedly conclude that it met with only modest success. Many of its recommendations fell on deaf ears. Those recommendations for change that did ultimately work their way into today's legal standards did so many years after the Report, only after the FTC and courts retreated from very strict standards adopted during a period of very zealous Robinson-Patman enforcement throughout the sixties. This is perhaps in part because the Report's recommendations rest on reconciliation of the Act with the broader competition standards of the Sherman Act. The courts, however, came for the most part to the conclusion that what the Report sought to reconcile was irreconcilable, that these pieces of legislation are predicated on policies that do in fact conflict, but that this is what the Congress intended. A number of the Report's recommendations are calls for flexible or "reasonable"

104. For example, the FTC, even after 1955, held that where a wholesaler is controlled by a retailer it could not receive a wholesale discount even if it actually performed wholesale functions. *In re* Nat'l Parts Warehouse, 63 F.T.C. 1692 (1963), *aff'd sub nom.* Gen. Auto Supplies v. Fed. Trade Comm'n, 346 F.2d 311 (7th Cir. 1965), *cert. dismissed*, 382 U.S. 923 (1965). A wholesaler that sold some of the purchased good *to* retailers and some *as* a retailer could not receive the wholesale discount on the portion of the goods it received as a retailer. *In re* Boise Cascade Corp., 107 F.T.C. 76 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). Only if the seller could establish that such a wholesale discount was no more than the cost savings to the *seller* of not performing the wholesale function itself, thus satisfying the cost justification defense in section 2(c) of the Act, was the discount legitimate. *In re* Mueller Co., 60 F.T.C. 120, 127-28 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). In so holding, the FTC in *Mueller* rejected its own earlier decision in *In re* Doubleday & Co., 52 F.T.C. 169 (1955), holding that such a discount was lawful if it reflected no more than the costs to the *buyer* of any wholesale functions it actually performed, a standard in accord with the Report.

105. 496 U.S. 543 (1990).

administrative interpretations of the Act by the Federal Trade Commission. But in the sixties, the FTC went in a totally different direction. Moreover, the Committee's assumption that change would come from the FTC virtually ignores the fact that, like it or not, that agency was not then, and is not now, the only enforcer of the Act. Here, as elsewhere in the report, the Committee virtually ignores private enforcement, a process in which the FTC has little or nothing to say. Its views may carry slight weight in courts deciding cases to which it is not even a party.

The Report's treatment of the Robinson-Patman Act was an excellent study guide and source book for lawyers and law students, but it had only a modest influence on the development of the law. This prompts the obvious question whether when it "cut bait" it should have recognized the clear inconsistencies between the Robinson-Patman Act and the rest of our antitrust laws and pushed for significant legislative change. To those of us who believe, as the Committee did, that the Act often stifles competition and unnecessarily raises both compliance costs and prices, and who look back on this portion of the Report with the benefit of hindsight, that would have been the preferable course. But we would also have to admit that despite persistent criticism and recommendations for change, at no time during the ensuing forty-six years has the Congress shown the slightest willingness to amend the Act. The small business community has always opposed change. The Act has achieved virtual icon status. This may be lamentable but it is the reality. The Committee may have sensed this and opted for what it thought it could get. That turned out to be relatively little.[106]

IV. THE REPORT AND FOREIGN COMMERCE

Some will be surprised to learn that the 1955 Report dealt with the antitrust laws and foreign commerce at all, and even more to know that the Report spent nearly fifty pages on the subject. Because international cartel prosecutions seem a phenomenon of the past decade, at least to those with short memories, it may seem hard to imagine that

106. The Report also criticized both the language and prevailing interpretations of sections 2(c)(d) and (e) of the Act, provisions dealing with payments of brokerage and provision of promotional and advertising allowances and services. These provisions contain no explicit requirement of any injury to competition, leading the Committee to conclude that these sections should be reconciled at least with the remainder of the Act. The Committee did not urge legislative reform of these sections other than section 2(c), believing that interpretive reform could itself remedy what it saw as the deficiencies in section 2(d) and (e). If the Committee meant that either the FTC or courts could engraft some standards based on competitive harm onto these sections, it is hard to imagine that this could be done without statutory amendment. The Committee also urged statutory repeal of section 3 of the Act, its only criminal provision. None of the changes urged in these sections by the Report has occurred.

the Report embraced a full-blown concept of extraterritoriality in terms varying little from the same principle applied today, recognized that American antitrust law applies not only to restraints originating abroad that impact American domestic markets but to our export trade as well, and expressed concern over international cartels. It did all of these things in terms familiar today. At the same time, the Report contains much that is unfamiliar, raising issues that today have no currency.

In its approach to extraterritoriality, the Report once again relies heavily on a detailed analysis of existing cases with little policy commentary.[107] Agreements among U.S. firms, or U.S. firms and *foreign* firms, even when entered into abroad, are within the substantive jurisdiction of the Sherman Act if they have "substantial anticompetitive effects"[108] on American commerce. This proposition seems unexceptionable today.[109] Agreements among only foreign firms can be reached only where "they are intended to, and actually do, result in substantial anticompetitive effects on our foreign commerce."[110] This was a debatable proposition at the time.[111] In terms of jurisdiction today, no distinction is drawn among conspiracies based on the citizenship of the actors,[112] although it may have some bearing on application of comity doctrines.[113] It is sufficient that there is a substantial effect

107. In working its way through a number of decided cases, the Report puts to one side the baffling decision of the Supreme Court in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), which can clearly be read as rejecting the whole concept of extraterritoriality in antitrust cases, and relies instead on the "effects" test set forth in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Given the fact that the Supreme Court had not then clearly stated a simple "effects" standard, the Committee here was pushing the law more than it did in some other areas.

108. REPORT, *supra* note 2, at 76.

109. In *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993), the Court concluded that while "the proposition was perhaps not always free from doubt [citing *American Banana*], it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." It had said much the same in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 705 (1962). In *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998), the court, relying on *Hartford*, concluded that criminal jurisdiction under the Sherman Act extended to price fixing by a Japanese defendant in Japan, where the product at issue was to be shipped to the United States.

110. REPORT, *supra* note 2, at 76.

111. Debatable if for no other reason than the fact that virtually all significant decided cases until 1955 in some way involved participation by at least one American firm. This was true in all of the cases discussed in connection with the issue of extraterritoriality in the Report.

112. *Hartford* draws no such distinction. *See also* UNITED STATES DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (1995) [hereinafter INTERNATIONAL OPERATIONS GUIDELINES], *reprinted in* 4 CCH TRADE REG. REP. ¶ 13,107 (Apr. 5, 1995).

113. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608 (nationality of firms one of a number of factors to be considered in comity analysis). For a similar approach, see

on American commerce or, in cases covered by the Foreign Trade Antitrust Improvements Act,[114] that there is "a direct, substantial and reasonably foreseeable effect."[115] The Committee's commitment to a relatively broad principle of extraterritoriality suffers from a lack of any real policy discussion, but that is true of much of a report focused heavily on decided cases.

The history of extraterritorial enforcement by the United States is checkered with objections from foreign governments, with claims of conflicting sovereignty, assertions of immunity, and arguments about appropriate remedies.[116] Foreign governments reacted angrily when their own nationals were subjected to the jurisdiction of American courts, a jurisdiction asserted in an increasing number of cases. In some cases, foreign sovereigns took measures to counter the ability of American courts to proceed[117] or to ameliorate the effects of treble damages.[118] The Committee was aware that what it characterized as "international complications" were likely to arise. It specifically included the intent element in cases involving only foreign nationals taking action abroad to ameliorate some of these "complications." It anticipated today's "sovereign compulsion" defense when it concluded

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Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979), and INTERNATIONAL OPERATIONS GUIDELINES, *supra* note 112, at § 32.

114. 15 U.S.C. § 6a (1994), referred to as "FTAIA."

115. The Act does not cover conduct involving direct imports into the United States, but does extend to conduct involving foreign nations that has an indirect effect on import trade or impacts export trade with foreign nations. Conduct abroad that affects American exports thus is within the subject matter jurisdiction of the Sherman Act. The Report, without specific discussion assumed this was so. In its 1988 International Operations Guidelines (reproduced as amended at 4 CCH TRADE REG. REP. ¶13,109 (Nov. 10, 1988)), the Department of Justice in footnote 159 indicated that regardless of the FTAIA, it was concerned as an enforcement matter with adverse effects on American consumers and, this implies, not with restraints having an effect only on American exporters. This footnote was ultimately superseded by a new statement of policy by the Department that it will, in some cases, take enforcement actions against foreign restraints on American exports, a position reiterated in the current International Operations Guidelines, *supra* note 112, at § 3.31.

116. A number of these protests and claims are discussed in detail in I WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.16 (4th ed. 1991).

117. So-called "blocking" statues were passed in a number of countries. These statutes vary in content but typically bar citizens of the country in question from turning over documents pursuant to a foreign court order if such production would be contrary to an order of the appropriate government agency. *See*, e.g., Protection of Trading Interests Act, 1980, ch. 11 (Eng.). Similar statutes were enacted in Australia, Canada, France, the Netherlands, New Zealand and South Africa. *See* 1-A BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 718-36 (rev. 2d ed. supp. 1993). Such statutes may also block enforcement of foreign (read U.S.) antitrust judgements in some circumstances. *Id.* at 780-82.

118. The United Kingdom and Canada both enacted "clawback" statutes, authorizing citizens of their countries to recover the punitive portion of a foreign multiple damage award, as in a treble damage suit under U.S. antitrust laws, in an action brought in the courts of their own countries. Protection of Trading Interests Act, 1980, ch. 11 (Eng.); Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 9 (1984).

that a firm should not be found in violation of the Sherman Act for doing what another sovereign required of it.[119] Yet it made no attempt to set forth the principles of comity, principles indicating that a court should defer to the interests of foreign governments in some circumstances, that are of major import today.[120] It is probably fair to say that the Committee contemplated conflicts with foreign sovereigns when extraterritorial jurisdiction was asserted but was somewhat unsure of how to deal with them.

While conflicts created by American assertions of extraterritorial jurisdiction intensified through the sixties, seventies, and early eighties, enactment of the Foreign Trade Antitrust Improvements Act, the fuller development of concepts of comity, the early stages of bilateral cooperation arrangements,[121] and the further development of competition policies and antitrust standards in the European Community and elsewhere all tended to reduce conflicts and to give the United States' position on extraterritoriality a more moderate cast. The effects test also gained greater acceptability as other nations perceived that their nationals were also injured by conduct outside their territory. With the decision of the European Court of Justice to apply the Treaty of Rome's competition policy on an extraterritorial basis in a manner similar to that of the United States,[122] the countries of the Community, followed ultimately by others, have decided that if you cannot fight them, join them. This in turn created a new set of conflicts, as a number of countries, many of whom have relatively new antitrust legislation, now may be left to assert jurisdiction over conduct that occurred in none of them but had effects in each.[123] Part of the current calls for

119. REPORT, *supra* note 2, at 83. For the modern version of the sovereign compulsion defense see INTERNATIONAL OPERATIONS GUIDELINES, *supra* note 112, at 3.32.

120. For application of comity principles today, see, in addition to the cases cited *supra* note 113, *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 954 F. Supp. 733 (S.D.N.Y. 1997); *Eskofot A/S v. E.I. Du Pont de Nemours & Co.*, 872 F. Supp. 81 (S.D.N.Y. 1995); *Rivendell Forest Products, Ltd. v. Canadian Forest Products, Ltd.*, 810 F. Supp. 1116 (D. Colo. 1993).

121. The first bilateral cooperation agreement entered into by the United States was with Germany. Since entry into that agreement in 1976, the United States has signed antitrust cooperation agreements with Australia, Canada, Israel, Japan, Brazil and Mexico. The texts of all of these agreements may be found in 4 CCH TRADE REG. REP. ¶13,500 (Jun. 23, 1976).

122. Joined Cases 89, 104, 114, 116, 117, & 125-129/85, A. Ahlstrom Osakeyhtio v. Comm'n ("Wood Pulp"), 1988 E.C.R. 5193, 4 C.M.L.R. 901.

123. This is particularly true with respect to mergers, where a number of countries now have merger notification procedures similar to those of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a (1994). The number of nations with pre-merger notification procedures has risen from about twelve in 1990 to about sixty now. *See* ICPAC FINAL REPORT, *supra* note 6, at 48. Most of these countries require notification of mergers having effects within their countries. Just as the United States takes the position that a merger of two foreign firms that has an adverse effect on the U.S. domestic market, the European Commission has done the same with respect to its domestic market. *See* INTERNATIONAL OPERATIONS GUIDELINES,

increased coordination among national enforcement agencies and for the adoption of some kinds of international competition policy standards are the direct result of this overlapping extraterritoriality.[124]

The Committee's view of the antitrust world was a more modest one. As Robert Nitschke observes in his symposium commentary, there were "few countries other than the United States which [had] any effective antitrust policies or enforcement programs."[125] A number of countries opposed antitrust in any form, preferring nationalization and ultimately the destruction of the free market system. Antitrust was an almost peculiarly American phenomenon and the Committee so viewed it. In its view, the Sherman Act and Clayton Act were to be interpreted to provide protection of American domestic import and export markets from international cartels, recognizing that they would never be wholly adequate to the task, and to protect and encourage American investment abroad, both for its own sake and as a means of increasing productivity in the economics of other nations (in part to help fend off the spread of communism). Because American antitrust was virtually unique, there was no talk of cooperation among national antitrust enforcement agencies or development of international standards and dispute settlement mechanisms. These are among the most significant matters today. The Committee can hardly be faulted, however, for not envisioning the modern international antitrust world.

The Report's concern over the ability of American firms to invest and produce abroad is reflected in 1) its criticism of a then common interpretation of two leading cases that suggested that creation by American competitors of joint manufacturing facilities abroad would be unlawful because it would reduce American exports,[126] a notion

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supra note 112, at § 3.12, Example H; General Electric/Honeywell, Case No. COMP/M.2220, Jul. 3, 2001. Other countries may be expected to do the same.

124. *See* Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 301-02. A variety of proposals for international cooperation and harmonization of antitrust standards have been advanced over the past fifteen years. The European Union has advocated the adoption of competition standards through the World Trade Organization, a proposal the United States has opposed. For views of the EU, see Mario Monti, *European Competition for the 21st Century*, *in* 2000 FORDHAM CORPORATE LAW INSTITUTE INTERNATIONAL ANTITRUST LAW & POLICY 257, 265 (B. Hawk ed., 2001) and Karel van Miert, *European Competition Policy: A Retrospective and Prospects for the Future*, *in* 1999 FORDHAM CORPORATE LAW INSTITUTE INTERNATIONAL ANTITRUST LAW & POLICY, 1, 6-8 (B. Hawk ed., 2000). *Cf.* Joel I. Klein, Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century, Address Before the Fordham Corporate Law Institute 24th Annual Conference on International Antitrust Law & Policy (Oct. 16, 1997), *at* http://www.usdoj.gov/atr/public/speeches/1233.htm. For a detailed discussion of the WTO proposal and a variety of other forms of multilateral cooperation and standardization, see Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000).

125. Nitschke, *supra* note 1, at 1070.

126. *See supra* text accompanying notes 59-61; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 603-04 (1951); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 962 (D. Mass. 1950).

that today we would view as bizarre, 2) its rejection of the intra-enterprise conspiracy in cases involving parents and their wholly owned subsidiaries[127] and 3) its conclusion that joint manufacturing or distribution undertakings abroad between American and foreign firms, or American firms alone should be permissible unless American commerce is restrained. None of these propositions is debatable today, although they were debatable in 1955. The greater concern for companies now may be the legality of these arrangements under the law of the countries where American firms operate.

A major part of the Report's foreign commerce section is entitled "Relation of Antitrust to United States Programs Abroad,"[128] a discussion in which the Committee sets forth little of its own thinking but quotes extensively from comments made by a number of other government agencies in response to an invitation by the Committee. The Committee itself is reticent, observing that it was not charged with evaluating foreign programs of other government agencies, that the relationship between these programs is "delicate" and may involve decisions beyond the authority of the enforcement agencies to make. In the end, it simply calls for advanced discussion about projected antitrust proceedings with agencies whose foreign programs may be involved. Such consultations might provide valuable information the relevance of which must be determined by the antitrust agencies themselves. Resolution of inter-departmental conflicts, however, may be up to the President. The Report treads very carefully here, dealing with what is still a very contemporary issue, namely the role of government policy makers outside the Justice Department in the decisionmaking processes of the antitrust enforcement agencies.[129]

The quoted comments of other agencies are illuminating. The Department of Commerce, Department of State, and Foreign Operations Administration all expressed concern that uncertainties about antitrust matters may discourage foreign investment. The Department of Defense commented on the possible adverse effect of major antitrust actions involving the foreign operations of large American corporations on its programs to serve the national defense. There is a contemporary ring to these comments. Anyone who has spent time at the Antitrust Division would expect these same comments from the same sources today.

The most intriguing comment to today's readers would likely be the following from the Department of State, suggesting that the policies that led to the adoption of our antitrust laws:

127. *See supra* text accompanying notes 59-61.

128. REPORT, *supra* note 2, at 92-114.

129. For a discussion of these issues, see Thomas E. Kauper, *Politics and the Justice Department: A View From The Trenches*, 9 J.L. & POL. 257 (1993).

also indicate the desirability of developing some means of international cooperation in dealing with restrictive practices affecting international trade. While it is not yet clear what form such cooperation might best take, progress along these lines is important because other countries, which are smaller than the United States and more dependent upon international trade, cannot take effective action in curbing restrictive business practices unless countries with whom their trade is tied do likewise. It is also important because no country by itself has jurisdiction to deal with these practices in their entirety. International cooperation in dealing with them would avoid frictions and harm to business interests that may flow from the unilateral action of any single country.[130]

In an antitrust world where cooperation among national enforcement agencies and harmonization of competition policy standards on an international basis is the order of the day, this comment has a distinctly contemporary ring. Today there are more than eighty countries with competition policy legislation and agencies with whom cooperation could occur, cooperation made necessary by globalization and overlapping jurisdiction. In 1955, with only a handful of countries having and enforcing such legislation, it is not clear what the Department of State meant by cooperation. The fact that other countries might not alone be able to deal with restrictive business practices in international trade was the result, at least in part, of the absence of such legislation. Nevertheless, the call for cooperation surely is an appropriate precursor of things to come.

The State Department comments were made shortly after the rejection by the Congress of the Havana Charter,[131] the charter for a new International Trade Organization ("ITO") that would administer the GATT. The Havana Charter included competition policy provisions that could be applied through the ITO's dispute resolution mechanism. The State Department's comments may simply be a lament over the Havana Charter's demise. They may also be a cautious commentary on draft articles of a proposed international code on restrictive business practices promulgated by the Economic and Social Council of the United Nations in 1953.[132] The draft code's substantive standards were patterned on those in the Havana Charter. The code also called for a central dispute resolution mechanism through which government to government complaints and recommendations could be made. At the time the Report was prepared, the United States had taken no position on the proposed code.[133] The Committee did likewise, stating

130. REPORT, *supra* note 2, at 94.

131. For a brief discussion of the birth and death of the Havana Charter, see Wood, *supra* note 124, at 281-85.

132. *See id.* at 284-85.

133. The Eisenhower administration ultimately opposed the code and the effort was brought to an end.

that consideration of international means for dealing with anticompetitive restraints was beyond the scope of the Report,[134] was primarily an international relations question and called for factual judgments the Committee could not make. The Committee knew a political hot potato when it saw one and simply ducked.

While the Committee remained silent on the U.N. proposal, a minority position authored by Eugene Rostow asserted that given the scope of the international cartel problem, the inability of most countries to deal with them, the scope of the cartels, the lack of antitrust laws and/or enforcement in most countries, the lack of interest in cartels of particular interest to the United States, and the fact that, even with the assertion of extraterritorial jurisdiction, the Sherman Act could be applied to but a fraction of the problem, the time had come to consider a solution based on international cooperation.[135] There followed a detailed analysis of the U.N. draft. Some members felt obliged to reply, doing so in a separate statement by Gilbert Montague.[136] The debate set forth in these two statements could just as well have been addressed to current proposals to place competition standards in the WTO, utilizing its existing dispute settlement procedures. Montague makes many of the points critics of the WTO proposal make today. The Sherman Act is itself adequate to protect American interests. The U.N. proposal discriminates against countries with highly developed antitrust systems and will provoke harassing complaints by smaller, anticapitalistic nations; those deciding complaints are not judges but political representatives; the proposal, if adopted, could override our domestic law and, in Montague's final flourish, will imperil the national security of the United States, thereby performing "a potent service for the Kremlin."[137] The Rostow statement, much calmer in tone, refutes much of this in terms that could endear him to present day supporters of current WTO proposals. Perhaps the most contemporary response of all came from Robert Nitschke in the pages of the *Michigan Law Review*. Noting that in 1955 few countries had antitrust laws and that there was a worldwide lack of consensus about both the desirability and substance of antitrust, he concludes that proposals like the U.N. draft are premature. And in language that could have been taken from Clinton Administration statements about the effort to utilize the WTO in competition policy matters,[138] he asserts:

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134. REPORT, *supra* note 2, at 98.

135. *Id.* at 98-105.

136. *Id.* at 105-08.

137. REPORT, *supra* note 2, at 107.

138. Compare these remarks with the following remarks of Joel I. Klein, then the Assistant Attorney General in Charge of the Antitrust Division:

> Perhaps a better international cartel program, designed to promote antitrust objectives as well as to eliminate friction regarding extraterritorial application, would be step-by-step bilateral agreements with those nations, such as Canada, which have laws and policies similar to ours. Such agreements could establish procedures for dealing with restrictive practices that have an impact in both countries and can be dealt with satisfactorily by neither alone and could provide experience for further progress in this field.[139]

The international antitrust world has changed dramatically since 1955. Over eighty countries have antitrust laws in one form or another. There is a growing consensus over substance and over the need for some form of harmonization of standards and procedures. The past twenty or so years have been the bilateral agreement stage suggested by Mr. Nitschke. How and when we will move beyond is at this moment anybody's guess.[140]

V. CONCLUSION

Reading the Report now forty-seven years after its release is in one sense comforting. It confirms that there is a constancy to the core of antitrust. Having detoured and experimented with new per se rules in the sixties and seventies, we have confined the use of such rules today to what they were in 1955. The rule of reason governs under section 1 of the Sherman Act. The general standards under section 2 remain the same, although in some cases somewhat more precise standards have developed. Exclusive dealing cases today are decided much as the Report contemplated. Resale price maintenance is just as

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> As should be absolutely clear by now, the United States places a very high value on the practical law enforcement value of developing bilateral mutual assistance agreements and other cooperative efforts among antitrust agencies. I would hate to see our energy and attention diverted from these practical efforts at improving enforcement, particularly against international cartels, diminished by an unwieldy and theoretical WTO exercise. Indeed, a premature effort to negotiate rules at the WTO is fraught with risk . . . .

Klein, *supra* note 124, at 9.

139. Nitschke, *supra* note 1, at 1071.

140. In its final paragraphs of its foreign commerce section, the Report noted that the Webb-Pomerene Act, which authorizes, *inter alia*, export cartels, had been severely criticized, but concluded that it was of limited practical significance and should be retained until there were changes in the pattern of state buying agencies, state monopolies and existing cartel policies. Eugene Rostow in dissent urged repeal, characterizing the Act as representing "a philosophy antithetic to that of the Sherman Act." REPORT, *supra* note 2, at 114. He might have added that it is an embarrassment to U.S. efforts to prosecute foreign cartels and should have been repealed years earlier. It is however not only still with us, 15 U.S.C. § 61, 66 (1994), but was supplemented in 1982 by the Export Trading Company Act, 15 U.S.C. §§ 4001-4021 (1994). It has also been emulated by other nations that have exempted export cartels from competition policy restrictions. *See* A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571 (1992). Export cartel exemptions are of limited utility, since countries that feel the effects of such cartels may apply their own antitrust statutes to them whether they are exempted in their home country or not. *See* A. Ahlstrom Osakeyhtio v. Comm'n "Wood Pulp," 1988 E.C.R. 5193, 4 C.M.L.R. 901 (EU).

per se illegal as it was in 1955. Vertical nonprice restraints are subjected to analysis under the rule of reason. The courts continue to struggle with "conscious parallelism," much as the Report did. While it took a number of years, we can now safely conclude that parent corporations and their wholly owned subsidiaries are legally incapable of conspiracy.

The Report met with some legislative successes and some failures. The most striking failure, however, was the Committee's valiant but ultimately unsuccessful effort to work major changes in the interpretation or language of the Robinson-Patman Act. As it turned out, the Report's starting premise — that the Act should and would be harmonized with the broader standards of the Sherman Act — has not been accepted by the courts to any substantial degree. As a result, the Report's recommended "interpretations" have met with little success over the years, except as they related to the meeting competition defense. Nor has the Robinson-Patman Act seen legislative change. It has proven to be an implacable foe.

The real measure of change from the Report's date until now is found not in what it covers, but in what it does not cover. The Report discusses exemptions for certain activities of railroads, motor carriers and airlines, exemptions that disappeared with the deregulation movement; there is not a single word about the state action and *Noerr-Pennington* doctrines, the frequent subjects of antitrust litigation today. Tying arrangements and concerted refusals to deal are treated as virtual per se violations with little or no analysis; today the law on both subjects is far more complex. Joint ventures are not discussed at all. Mergers get scant attention, while today they take a major part of the enforcement resources of both federal agencies. There were of course no guidelines, no pre-filing settlements, and no pre-merger notification processes. The explanation for all of these omissions and virtual omissions is to be found in the absence of decided cases since, after all, the Report rests primarily on cases the Committee had available. Nor did the Committee try to anticipate future issues that would arise as the law was pushed further, or as business practices changed and economic analysis became both more sophisticated and an integral part of antitrust doctrine.

Also missing is any significant recognition of either criminal enforcement or the impact of private actions, particularly treble damage actions. The Report reads as though virtually all antitrust cases were civil actions initiated by either the Justice Department or the FTC. This is not so easily explained. By the mid-1950s, criminal prosecution was hardly a rarity, even though it had not taken on the significance it has today. The Committee's lack of attention, except for its very weak penalty recommendation and concerns about grand jury abuse, suggests the Committee was simply not enamored of criminal cases at all. The lack of discussion of private actions is more startling. The Report does contain several specific procedural recommendations in connection with what it describes as the "burgeoning" number of private cases. Beyond that, there is little recognition of the fact that such cases play a major role in shaping the law, without the participation of the government enforcement agencies. The federal courts ultimately control the development of antitrust doctrine, primarily in cases in which the parties may care little about anything but winning or losing.

A number of the Report's recommended "interpretations" seem directed primarily to the agencies. This is particularly true of its treatment of the Robinson-Patman Act, where its proposed treatment of a number of issues appears to be directed at the FTC. The FTC's enforcement decisions are important and have helped shape legal analysis. But private cases, where agency discretion and deference are not in play, may have greater impact. This is certainly the case today, as the FTC initiated only one Robinson-Patman proceeding in the past twelve years. Private cases, however, have continued at a regular, if somewhat diminished pace. Nevertheless, the Report seems remarkably insensitive to the substantive effect of private litigation. While "burgeoning," private actions had not taken on the significance that they have today.

Finally, the Committee's at-the-rear treatment of economic analysis and its relevance is both unsatisfying in itself and speaks clearly to how different the antitrust of today is from that of 1955. The development of the concept of "workable competition" is not wrong; it certainly is based on many of the factors that are recited in economic analysis today. The Committee was not sure, however, that it was relevant to the substance of antitrust. While the role of economic analysis, data, theory and testimony has continued to be the subject of debate for the past forty-seven years, there can be no doubt of its primacy in both enforcement policy and judicial decisionmaking today. It shaped the antitrust revolution of the eighties and nineties. And while debates over Chicago and Post-Chicago continue to provoke commentary, and economists differ in a variety of other ways, it would be hard to deny that antitrust is becoming an economist's world.

Antitrust in 1955 was far simpler than it is today. Fewer cases, no guidelines, and little economic analysis cluttered things up. But for all of that, the core of antitrust has worked its way back to that which the Report describes. If Committee members reviewed the antitrust world of 2002 they would be pleased, even though if candid they would admit that their Report probably had little to do with it. They sought a world governed primarily by the rule of reason. And that is where we are today. Today's rule of reason may be truncated, structured or quick look, but it is still the rule of reason.[141] And it dominates much of antitrust analysis today.

141. *See* California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 779-81 (1999); Thomas E. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 905-15 (1987).