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REFORMING AMERICAN ANTITRUST IN FOREIGN COMMERCE

*James A. Rahl**

ANTITRUST AND AMERICAN BUSINESS ABROAD (Second Edition). By *James R. Atwood* and *Kingman Brewster*. Colorado Springs: Shepard's/McGraw-Hill. 1981. Two volumes and 1982 Supplement Pp. xxxix, 359, 411. $120.

American antitrust law today is undergoing broad reexamination, comparable in importance to the events leading to the Clayton and Federal Trade Commission Acts of 1914, and to the great growth of the immediate pre- and post-World War II years. The present movement goes in other directions, however, toward less strict rules and more relaxed enforcement.

Antitrust applied to foreign trade is especially vulnerable. The argument is always present that the rules for American business abroad should be less demanding than at home because of foreign competition and differing foreign laws, and the argument — always plausible in extreme cases — is especially popular in times of economic recession. Even during the boom period after World War II, foreign commerce enforcement, despite great successes against an array of seriously damaging international cartels,[1] underwent repeated attacks at home and, of course, abroad. These attacks were largely unsuccessful at the time, but they left their mark. With the domestic boom gone, antitrust applied to foreign commerce is losing ground. The exemptions that became law in October 1982[2] are a drastic

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1. In the period 1940-1949, about 60 cases were filed by the United States against international cartels, all of which had American members, or members who were controlled by American interests. The Government won or settled almost all of the cases. The result of taking U.S. firms out of the cartels, as well as enjoining some foreign firms, was to destroy the cartels or greatly curtail their operations. *See* Rahl, *International Cartels and Their Regulation,* in COMPETITION IN INTERNATIONAL BUSINESS 240 (O. Schachter & R. Hellawell eds. 1981). *See also* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 507-25 (2d ed. 1973). As Atwood and Brewster recognize, the cases were a natural result of the general revival of antitrust policy in the later 1930's and were only in part associated with economic warfare during World War II. P. 32.

2. The Foreign Trade Antitrust Improvements Act amended the Sherman Act and the Federal Trade Commission Act to exempt restraints of competition involving U.S. exports, subject to certain qualifications. Act of Oct. 8, 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1233, 1246-47. Title III of the same legislation, known as the Export Trading Company Act, provides a complex procedure for issuance of certificates by the Secretary of Commerce which give antitrust exemption for export activities. Act of Oct 8, 1982, Pub. L. No. 97-290, tit. III, 96 Stat. 1233, 1240-45 (to be codified at 15 U.S.C. §§ 4011-4021). The two provisions were originally competing bills, and an impasse was resolved in conference by enacting both of them, reminiscent of a similar occurrence as to the Robinson-Patman Act, Sections 2 and 3. *See* S.734, 97th Cong., 2d Sess., CONG. REC. (1982); H.R. 5235, 97th Cong., 2d Sess., CONG. REC. (1982); Robinson-Patman Act, ch. 592, §§ 2, 3, 49 Stat. 1526, 1527-28 (1936) (codified at 15

step, and there may be more legislation of this kind.

THE TREATISE IN GENERAL — PRESCRIPTIONS FOR CHANGE

The second edition of Kingman Brewster's influential first edition of 1958 thus comes on the scene at a critical point. The co-authors, James R. Atwood and Mr. Brewster,[3] have entered the controversy in a two-volume effort to influence reform of the law. The first edition itself had made some important suggestions. The Preface to this edition states that these volumes are "more forthrightly prescriptive than the prior book" (p. iii), and indeed they are.

The treatise — almost double the size of the first — is devoted throughout to an effort to revise the approach, largely through changes in the way prosecutors, administrators and judges exercise their discretion (p. iii). Principal among the problems, the authors believe, are the aggravation caused to foreign governments by some of our doctrines and procedures, thus damaging our international relations, and the harm to American business interests believed to be caused by too much uncertainty in the law and by the excessive extraterritorial scope of some of its doctrines. The authors are not hostile to the basic purposes of antitrust in domestic markets. But the book is negative as to antitrust in foreign commerce, except where harm to domestic consumers or "export opportunities" of U.S. traders is shown. The proposition that competition is itself the main force to be guarded for its own value in export-import commerce, as well as domestic commerce, is neither accepted not rejected. Explicit analysis of the concept is not given. In important ways, the authors think that antitrust has been going too far internationally and, with some exceptions, their specific recommendations are for pulling in the horns.

In addition to policy, these volumes also undertake to state existing rules and principles for the benefit of judges and practitioners. In the middle of the work, roughly Chapters 5 to 12, the preponderance of discussion is expository, although interwoven with policy arguments as well. The serious reader will find a good discussion of significant doctrines, supported by excellent research and citations, often followed by useful advice. Complex and technical areas such as personal jurisdiction over foreign parties, discovery abroad, foreign government involvement, restrictions in foreign licensing of industrial property rights,[4] and foreign mergers and joint

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U.S.C. §§ 13, 13a (1976)). The two laws have similar objectives and would provide partially overlapping exemptions. For general discussion, see Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment,* 51 FORDHAM L. REV. 201 (1982).

3. The Preface to the second edition written by Mr. Brewster while he was still United States Ambassador to the United Kingdom, states that this edition is "in every sense the work of James Atwood." The format follows Brewster's first edition, and some of the analysis, phraseology, and ideas are from that edition. Mr. Brewster read and commented on the various chapters. P. iii.

4. The discussion of industrial property licensing is good, subject to a small correction in that it says that trademark licensing under U.S. law is limited by a provision in the Lanham Act, to "related companies." vol. 2, P. 53 n.199. Trademark licensing is broadly permitted under the case law, however, subject to the requirement that the licensor control the nature and quality of the product or service. *See* B. PATTISHALL & D. HILLIARD, TRADEMARKS, TRADE IDENTITY AND UNFAIR TRADE PRACTICES § 3.5 at 3-56 (1974).

ventures are helpfully treated, as well as other traditional areas. There is also a useful chapter on antitrust and regulation of foreign trade (ch. 3). Mr. Atwood's practical experience is doubtless reflected here, just as the foreign policy observations of the book reflect both Mr. Brewster's diplomatic experience in London and Mr. Atwood's former service as a State Department lawyer.

Combining policy views with doctrinal statements has some risks. It is difficult to avoid relying on one's statements of what the law ought to be in defining what the law is on some matters. For example, in the discussion of export cooperation, it is said that there is serious doubt that the legal rules prohibit otherwise very risky horizontal price fixing in export sales (vol. 1, pp. 185, 282). This is based on the authors' repeated policy contention that the Sherman Act should not reach arrangements which, under their analysis, have impact only in foreign markets. That contention could be what the law should be, but it falls quite short of being an established rule on which clients can safely rely and is contrary to the rationale of several leading cases. At the end of the book in their conclusions and recommendations, the authors acknowledge that this is not established law by arguing that it should become established as such (vol. 2, p. 351). Another example is the *Alcoa* intent-plus-effect test for subject matter jurisdiction over foreigners acting abroad.[5] The tone of the discussion seems sufficiently critical that one might believe the decision to be no longer a reliable guide (vol. 1, pp. 146-56). In the end, however, the authors endorse it in tightly stated form, but coupled with the qualifications of the *Timberlane* "comity" principle (vol. 2, p. 349).[6]

In view of such hazards, readers would find it useful to read the last pages of the second volume first (Chapters 18 and 19), where the authors' recommended policy approaches are summarized, before going to the beginning; there is no need to treat the work as one would a mystery story.

THE AUTHORS' SPECIFIC RECOMMENDATIONS

The final recommendations (vol. 2, pp. 348-55) are well-stated, and in this reviewer's opinion are sensible as far as they go, with two major exceptions — those pertaining to comity and to export jurisdiction. They are discussed below in the order in which they appear in the book.

Personal Jurisdiction. The authors endorse the present broad approach to personal jurisdiction and even would strengthen it somewhat. Rules governing discovery abroad, however, are not dealt with in the recommendations, although they are discussed earlier in the text (Chapter 15). The recommendations thus omit the most frequent cause of foreign government umbrage and protest, and of practical difficulty for American litigants, as the history of the recent Uranium Cartel proceedings shows.

5. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443-45 (2d Cir. 1945).

6. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). This case adopted the comity principle as one of three steps to be taken in determining the existence of subject matter jurisdiction over conduct abroad. Another case relied upon by Atwood & Brewster is Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). Vol. 1, p. 162. This decision used comity to determine whether to exercise jurisdiction after it was found to be present, a distinction not emphasized in the book.

Comity. The treatise fully endorses use of comity principles in decisions to prosecute and in judicial determination of jurisdiction, liability, and remedy, laudably reducing to six the number of factors to be weighed. Earlier in the text discussion, the comity approach is explored fully, and its virtues as well as some of the questions involved in its use are outlined (vol. 1, p. 159). The first edition argued for such an approach,[7] and the authors are understandably pleased that several federal courts recently have adopted it. Both editions have used a rather unfortunate phrase, "jurisdictional rule of reason," to describe a flexible comity approach.[8] We have enough difficulty with the meaning of the rule of reason in substantive law without loading the quite different jurisdictional issues upon it as well. The treatise derives some support for it from Section 40 of the A.L.I. *Restatement (2d) of Foreign Relations Law of the United States*, but does not note that section 40 is addressed to exercise of enforcement jurisdiction, not determination of subject matter jurisdiction.

Others should take a more critical look at comity. It is almost ungentlemanly to say so, but there are serious problems. Two objections are not fully faced by the authors. One is the difficulty of justifying such an exercise of judicial discretion to rob a plaintiff of a cause of action in the face of the language of Section 4 of the Clayton Act, which unequivocally gives a right of action. If that can be rationalized — it would seem to this reviewer that a statutory change would be necessary — one still faces another problem of how a court can competently administer such a complex and wide-ranging discretion, involving the weighing of different foreign and American interests. As a Canadian judge has said on this question, "I feel that this is not a good area for the judiciary."[9]

The main argument for comity, of course, is that it is good international relations. Yet it is doubtful that those nations which protest our present policies and practices will be properly impressed. Comity fails to meet the trenchant objection to alleged invasion of sovereignty in the mere act of bringing foreign defendants into court to be dealt with in the discretion of an American judge. It also fails to meet the criterion of greater certainty in the law which the authors set for good antitrust policy in foreign commerce (vol. 1, pp. 14-15). The doctrine obviously brings more uncertainty.

Alcoa and the Effects Test. Subject to comity requirements, the authors support use of the *Alcoa* test for conduct by foreigners abroad, without use of the inflammatory case-name. It is carefully stated, but not really changed. It is cast in the role of a test which must be met as a *sine qua non* after comity is practiced, rather than as a positive and embracing assertion. Perhaps this newer context will diminish slightly the foreign emotional response, but it is doubtful that the intellectual bombardment against *Alcoa* will be much affected. The authors would not absolutely require conduct in U.S. territory by the foreigners to be prosecuted, and thus the key requisite

7. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 301-06 (1958).

8. P. 336; K. BREWSTER, *supra* note 7, at 446.

9. Blair, *The Canadian Experience,* in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAW 65, 67 (J. Griffin ed. 1979) (originally delivered as an address to the International Law Section at the 1978 Annual Meeting of the American Bar Association).

in the British view of international law on this subject is not provided for.[10]

Continued allowance for an *Alcoa*-type effects test, despite the strong objections to it of a number of our closest English-speaking friends and allies, has support in the finding of an OECD study that most of the restrictive practice laws of the Western world rely to some extent on an "effects" test.[11] The test is a main element in the formulation of section 18 of the A.L.I. *Restatement (2d) of Foreign Relations Law of the United States*, although the latter requires only that the effect in the territory be "foreseeable," rather than "intended" as *Alcoa* requires. The authors, without explanation, do not discuss section 18; it is hardly mentioned. Perhaps this is because the American Law Institute is now working on a draft of a Third Restatement, and the current draft contains a substantial revision of section 18. The draft offers tests which seem to combine the *Alcoa* doctrine and comity considerations as the authors would do, with somewhat different terminology. Mr. Atwood has stated that he elected not to attempt discussion of this while it is only in a draft stage (1982 Supp. to vol. 1, p. iii).

Argument about *Alcoa* would be more enlightened if those engaging in it would have in mind that Judge Hand's opinion does not rest on effects alone. He notes the "effects" doctrine as a proposition of international law, but goes on to make proof of "intent" to restrain American trade the key element in the Sherman Act violation, coupled with actual effect as well. In other words, the Sherman Act, as interpreted in *Alcoa*, requires specific intent to injure American commerce on the part of foreigners acting abroad plus the effect of doing so — not merely effect. Foreign objectors should be asked to address themselves to the full formula, not to the much weaker straw man of effect alone.

The only approach fully likely to meet foreign objections, however, would be statutory change requiring proof of significant conduct within U.S. territory before jurisdiction over foreign persons could be claimed. There appears to be little inclination among serious students and policymakers in this country to go that far. It would seem to paralyze American defense against the most serious kind of foreign cartels, which would meet abroad and deliberately aim agreed-upon restraints at the American market, carefully designing them so as to avoid "conduct" in the United States. No jurisdiction which relies on a serious antitrust policy can be indifferent to such actions.

There is a way possibly to settle the problem, not mentioned by the authors. The key is the meaning of "conduct." Most arguments on "conduct" and "effects" proceed on a highly abstract plane, as if the two are mutually exclusive. But why is the intended effect of a foreign cartel in American territory not conduct in the territory? Divorcing the conspiracy from its effect is completely artificial. The effect is the ultimate action, while the conspiracy is merely a first step. The law is full of instances in

10. *See* British *Aide-Memoire* to the Commission of the European Communities (Oct. 20, 1969), *reprinted in* 1967 BRIT. PRAC. INTL. L. 58, *and in* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 311 (3d ed. 1979).

11. COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, ORG. FOR ECONOMIC CO-OPERATION AND DEV., RESTRICTIVE BUSINESS PRACTICES OF MULTINATIONAL ENTERPRISES 37 (1977).

which the effect of an act is treated as part of the act and is determinative of its legal significance. Let the criterion be conduct, provided conduct is given a realistic meaning which embraces its effect, at least where the effect is the ultimate purpose which motivates the act. This may not satisfy British objectors; their position is probably too hardened to be satisfied by that. But is it not a sensible position?

Export Restraints. At many places in the treatise and in their recommendations the authors argue that "export cooperation and the voluntary export restraint are lawful except insofar as they unreasonably restrain domestic competition or the export opportunities of other American firms" (vol. 2, p. 351). In this, they are in complete accord with the Department of Justice Antitrust Guide.[12] Horizontal price-fixing, market allocation and other restraints applied to distribution abroad, should not fall within the law, as long as American domestic markets are not affected and American exporters are not themselves injured in their export opportunities. The authors seem to feel more strongly about this than almost any other issue and are doubtless pleased that Congress has taken this approach by amending the Sherman and FTC Acts in 1982 along these lines. (The legislation was pending when the book was published and is not discussed in the book.) This is not because there is a convincing case that the present law has seriously hurt American exports; they concede that such evidence is weak (vol. 2, pp. 308-09). Nor do they argue that application of the law to activities having impact in foreign markets is particularly offensive to foreign governments (vol. 2, p. 324). The latter may welcome American prosecution of export cartels which raise prices in their markets.

Their main reasons appear to be that the theory that the law applies to export cooperation and to restraints having impact in foreign markets creates uncertainty as to the scope and application of the law, and extends it to the protection of foreigners abroad. American business should not be burdened with risks not substantially serving American interests. The argument is unabashedly tolerant of restraints of competition in exports so long as the restraint is not seen to be hurting Americans. Yet selfish and parochial as it may be, the argument would be persuasive if it correctly characterized the interests involved. But it does not do that. It repeatedly mischaracterizes them.

The difficulty begins with ignoring the implications of the fact that the Act has a foreign commerce clause, unlike most other nations' antitrust laws. The treatise does not analyze the meaning of the clause as such, and accords little role to it. The book's view of the scope of the Act could largely be implemented without a foreign commerce clause, as in other nations and the EEC. Restraints of competition in exports which affect domestic commerce can be reached by the interstate commerce provisions of the Sherman Act. Import restraints also almost inevitably have a domestic commerce effect and the foreign commerce clause adds little of importance there. It is as to exports where the clause is potentially most significant. Only one function for it remains under the authors' recommendation — that of applying the Act where restraints injure the "export opportunities"

12. *See* ANTITRUST DIV. U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 4-9 (1977).

of other American exporters. I agree that the Act would still do that, but this is a very limited role for a clause which stands parallel to the broad interstate commerce clause in the statute.

But a larger point should be made. The authors understate or overlook the basic policy of the Act itself as one which prescribes competition (or prohibits the elimination of competition) for the trade and commerce that Congress has power to regulate, *i.e.*, both interstate commerce and foreign commerce. This is not, as the book calls it, an attempt to regulate foreign markets for the protection of foreigners aboard. It is to gain the assumed benefits of competition for the markets with which American interests are identified. These include not only the domestic market but also trade in exports. The assumption that competition among American exporters is beneficial may be a mistaken one, but that is not the authors' argument; they do not discuss the value of competition in exports. But that value underlies the foreign commerce clause as much as the interstate commerce clause. The book concedes that its approach may mean reduced volume and higher prices in exports, but this is thought to be only bad for foreign purchasers, while it is good for the profits of Americans as exporters (vol. 1, pp. 280-83).

But this monopoly view of trade is not the antitrust view at all. Competitive prices are good not only for the customers, but they are good for the trade itself and thus for the more efficient allocation of resources sought through the competitive system.

It genuinely appears that the authors do not perceive this. Perhaps they have been influenced by the popular claim that the policy of the Act is simply to serve the consumer's interest, a theory which draws attention away from competition as the desired force. Coupled with that is a tendency to talk of who it is that is meant to be "protected" by the Act. But the Act is not designed to "protect" people — but rather to keep them subject to competition and thereby serve all kinds of interests. Of course, the Act was not passed especially to protect foreign consumers. But was it not passed to promote competition in our foreign trade in the interest of Americans?

A contrary interpretation also overlooks the basic construction of the Sherman Act's "restraint of trade" phraseology developed by the Supreme Court from *Standard Oil* to the present.[13] In the foreign trade context, the authors along with other writers, continually talk of "who is restrained" by a given activity, using "restraint" in its literal sense as meaning "interfering with," or "injuring." With this concept, one can readily say that the Act is not meant to apply to conduct which restrains foreign consumers in foreign markets. On the other hand, under the same concept it does apply to restraint of American exporters by other exporters. This literal usage would also make the Act applicable to airplane hijackers; they also are restraining commerce.

The Act does not mean that. Dozens of Supreme Court decisions have made the phrase "restraint of trade" mean "restraint of competition." When the interstate and foreign commerce clauses are connected to that meaning, what we have is a law against (undue or unreasonable) restraint

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

of competition involving the domestic and foreign commerce of the United States which Congress has the power to regulate.

I dwell on this even though the 1982 amendments to the anti-trust laws have taken the same approach as that urged by the authors.[14] The issue may be thought "academic." But it is quite important nevertheless to try to keep straight the processes of interpretation of the Sherman Act, and it is also important to understand what this new legislation really does. It is said that it does little more than remove some uncertainty and conform the statute to what the law already was.[15] But the law was not really that way, in my opinion. The authors really have argued for what in substance is repeal of the significant role of the foreign commerce clause, and that is what Congress has done.

Per Se Rules in Foreign Transactions. The rule of reason, it is recommended, should be given broad scope and *per se* rules should play a relatively minor role. To the extent that the 1982 amendments leave something to which to apply reasonableness tests, I would agree with that general idea. The content of such tests, however, requires careful scrutiny. The "rule of reason" is not a general catchall for public interest arguments. The Supreme Court has rather carefully confined it to use in analyzing and weighing competitive factors, and has held over and over that it does not let in arguments of expediency that in given cases some policy other than competition (safety, good morals, etc.) is preferable. Contrary to what the authors seem to suggest, the "rule of reason" should not be asked to take account in some way of "special business considerations, the attitudes of foreign governments, and local policies and practices" (vol. 2, p. 352).

Act of State Doctrine. The book recommends that the doctrine should not be a defense in antitrust litigation. It has tended to go well beyond its original function of avoiding passing on the legitimacy of acts of a foreign government, and is often confused with the defense of foreign government compulsion. To that extent, I would strongly agree with the spirit of the recommendation. But the courts should nevertheless be wary about trying to determine whether a foreign state has acted legally within its own system, if that should become an issue.

The recommendation does not extend to what should be done with the governmental doctrines which remain, but Chapter 8 contains extensive discussion and many good ideas.

Administration of the Law. The authors recommend consultation with the State Department before any government case involving foreign elements is filed. I assume that this is now the general practice, and am surprised by any implication that it might not be. In any event, it certainly should be. Also, though the book does not say so at this point, there should be notice and an offer of consultation with foreign states — at least those who are OECD members — whenever possible.

A further recommendation is made that the Secretary of State be given express power to request the President to waive, postpone, or modify a gov-

14. *See* note 2 *supra* for a description of the 1982 Acts.

15. *See* Garvey, *The Foreign Trade Antitrust Improvements Act,* 14 LAW & POLY. INTL. BUS. 1, 38-39 (1982).

ernment action where highly important to U.S. foreign policy or national security interests. The President is indeed the Chief Executive and is as responsible for the actions of the Justice Department as for any other department, and that certainly should include the power to act in this manner. It is not suggested, however, that the President be given formal exemption or advance clearance power.

The Federal Trade Commission, it is recommended, should defer to the Justice Department in foreign commerce enforcement. In practice, the FTC has not been terribly active in the foreign field, and this seems to be sensible.

Private Treble Damage Suits. In the only major statutory change proposed, the authors would legislatively create a presumption against trebling of damages where foreign conduct is involved, if the conduct is substantially by foreigners, lawful under the laws of the jurisdiction where it occurs, and not directed from within the United States. There is little doubt that treble damage suits have been a prime source of annoyance to foreign governments. Even though they were invented by the English Statute of Monopolies of 1623, the United Kingdom and some other nations strongly object to their current use.[16] Coupled with the class action, they have become monsters in some cases at home as well.

Drawing the kinds of lines proposed here will be difficult to do, and more difficult for courts to administer. A better solution might be to solve the problem as part of an overhaul of the entire treble damage remedy. If that cannot be, the recommendation should probably be considered. But one should not be sanguine that this will eliminate most of the aggravation. The most frequent objections by foreign nations are to our personal jurisdiction and discovery methods, and these are not dealt with in the recommendations.[17]

Seriousness of the Problems of Foreign Application

We have noted that the primary problems at which Messrs. Atwood and Brewster are aiming are damage to foreign relations and difficulties for American businesses arising from uncertainties in the law and excessive claims of extraterritorial scope. There is no doubt that these are important,

16. It is interesting to note that the British treble damage provision, though evidently not used in modern times, remained in the statutes until 1969, when the relevant section was repealed. *See* Statute of Monopolies, 24 Halsbury's Stat. of England 542 (3d ed. 1970) (reprinting 21 Jac. I C.3).

17. The book indicates that generally foreign rules on discovery are more restrained than those of the United States (Vol. 2, p. 227). While this is doubtless the case as to many national laws, the investigatory powers of the EEC Commission under Council Regulation 17 (11) and (14) are very great in antitrust matters. The Commission has broad power to compel document production and to make on-the-spot examination of evidence as to parties and third persons. (It may require oral explanation of such materials, but it does not have a general power to compel depositions.) It may also call upon Member States to assist it through their laws. U. Toepke, EEC Competition Law 725-27 (1982); Common Market and American Antitrust: Overlap and Conflict 139-45 (J. Rahl ed 1970); B. Hawk, United States, Common Market and International Antitrust: A Comparative Guide, ch. 7 (1979); V. Korah, An Introductory Guide to EEC Competition Law and Practice (2d ed. 1981).

but how is their importance to be measured? Before deciding upon ideas for change, one should try to weigh their seriousness.

Foreign Government Reaction. As to foreign reaction, the authors describe it in the most grave of terms — "outrage" and "resentment" are used over and over, and an impression of a large volume of official protests is given. Anyone who has worked in this field has encountered this; it is quite real. But it would be helpful if there were more analysis of the types of reaction and the underlying motivations for them. In some instances known to this writer, foreign govenment protests have been generated by private interests as tactical moves. This is to be expected, and our own Government has probably acted similarly in other matters. But we ought to try to be informed because it may make a difference in how we should respond.

For example, there would always be merit if there were a lack of reasonable consultation, or of other kinds of international good manners. Normally, however, a foreign government will contend that the United States has overstepped the boundaries of sovereignty. Invasion of sovereignty, according to the British position at least, is a much more serious offense, and cannot be cured without adherence to their version of international law, which requires abandonment of jurisdiction based on effects. The recommendations, as we have seen, do not go quite that far, although the comity principles recommended would enable the American court to take into account the question of where conduct occurred. But comity may not be enough because it is discretionary with the American court.

Should we not be concerned with the underlying motivations? The authors urge greater recognition of foreign interests, but what are the most weighty interests and what are they based on? Suppose it appears that a foreign government is actuated primarily by a desire to carry out the representation of private interests in a given matter? We need to evaluate how much that weighs in the balance, as against loftier national concepts like sovereignty. To what extent is sovereignty a make-weight or a too-superficial claim? This is not a simple matter in today's interdependent world, especially where international markets are involved. The book notes at the beginning how governments increasingly seem to be involved in arrangements that raise antitrust questions. The United States may be justified in questioning whether some of the protests are not a new form of cartel activity rather than an old nation-state reaction-tendency.[18]

Injury to American Business. On the second issue of injury to American

18. Of course, our standing to complain is reduced by the 1982 legislation, which conforms to the authors' views, and which, with some qualifications, lifts the ban of the Sherman Act on U.S. cartels formed to raise prices, allocate markets and otherwise restrain competition in export trade. The authors and legislators suggest that foreign governments protect their own markets by using their antitrust laws to attack such cartels. This, of course, is a prescription for extraterritorial application of their laws under something like the *Alcoa* doctrine, to which some of them strongly object. While attacks and counter-attacks of this nature would cause the collapse of many export cartels, it is not at all likely to occur. Almost every nation has an exemption or immunity for such arrangements, *see* Rahl, *International Application of American Antitrust Laws: Issues and Proposals,* 2 NW. J. OF INTL. L. BUS. 336, 345 (1980), and the United States has just provided them with a new example to follow. With such pro-cartel activity by the nations, who will be so two-faced as to attack the same activity by others?

business from the uncertainties and extraterritorial claims of the law, we should look to modern business-economic methods of analysis, coupled with some legal realism. A cost-benefit analysis seems imperative. First, we need to define the injuries — what kinds and how much? That is a difficult task, but claims need to be evaluated, not simply accepted at face value. Business spokesmen sometimes complain a great deal about antitrust, but the complaints must be sorted out. Business people are also practical people, and are always considering alternative ways of doing things. A legal problem here and there is likely to be met by pursuing some other approach. Determining how much the net harm is may be impossible, but severe harm cannot be assumed. Furthermore, although there will always be some uncertainties in a field such as this, practical legal advice usually can provide adequate guidance in antitrust foreign commerce matters, in my experience. It is to be doubted that the uncertainties are any more serious than with antitrust at home.

The largest question remains, and the treatise does not really ask it.[19] How should the *benefits* of antitrust policy in foreign commerce matters be weighed? To what extent do benefits outweigh injuries? This is a complex question, since the concept of benefit, like that of injury, includes not only individual trader benefit, but also larger public benefit. Further, which benefits directly cancel out what injuries, and which ones are mutually exclusive with injuries?

Antitrust policy directly keeps open trade opportunities for some traders. This kind of benefit is recognized by the authors in their recommendation on the law pertaining to export restraints. The larger public benefit from maintaining a competitive system in our foreign trade is far more difficult to perceive, but it is also more important. Seeming failure to perceive this in concrete terms underlies the book's recommendation to curtail the application of the Act to export cartels, and it accounts for the serious mistake made by Congress in adopting the 1982 amendments.

On the other hand, there may not be much loss in curtailing application of the Act to vertical restraints carried out in exports, provided they have an impact only in foreign markets, because such restraints may not harm competition in exports.

Efficacy of the Recommendations

Will the recommended approaches solve the problems? Overall, they will certainly contribute to reducing tensions and lightening somewhat the impact of the law on private business. Foreign government aggravation is not likely to cease, however. The basic problems of extraterritorial substantive and procedural application of our law will remain in the form of some continued reliance on the effects test, and continuation of our enforcement procedures, except for possible reduced use of treble damages. The most effective way to please some foreign governments would be simply to stop bringing proceedings in the international area where their interests are concerned. That would be much too costly, and Atwood and Brewster do not

19. I have written more about this in *International Application of American Antitrust Laws: Issues and Proposals*, 2 Nw. J. of Intl. L. & Bus. 336, 348-55 (1980).

recommend it. Comity and other approaches suggested by the treatise will help, but they will not go far enough, it seems.

Business problems of uncertainty are not readily solved either. Comity where practiced by courts in proceedings already brought will bring greater uncertainty, both for judges who must apply the principle, and for lawyers who must try to predict what judges will do with it. Uncertainty will also be increased, not reduced, by the recommendation that there be greater use of reasonableness tests in the law; the main idea of a *per se* rule is certainty. On the other hand, the recommendation to reduce the scope of the law with respect to export restraints does bring increased certainty through partial withdrawal from the field, as Congress has done in the 1982 exception. It is very doubtful that this is worth the cost in the form of allowing monopoly practices to supplant competition in our export activities.

These remarks should in no way diminish appreciation of the achievement which the treatise represents. It is a major contribution, and it will be important both to practitioners and to policy-makers. Along with countless others, I will resort to it for ideas and guidance on many kinds of problems. Although the book politely disagrees several times with some things I have written (and in that respect of course is considered by me to be wrong), I have learned much from reading and analyzing it. Since it is essentially a policy treatise it would be inconsiderate not to address it in policy terms, which I have done. Inevitably, that leads to differences of opinion, which will be no surprise to the authors.

Most of their recommendations, as I have said, with two exceptions, seem to me good, and it is to be hoped that they are followed. One of "the exceptions" — on exports — has largely been taken out of our hands for the time being by Congress. The other, on comity, a noble idea, I do with the utmost respect continue to doubt.