Michigan Law Review

Volume 53 | Issue 8

1955

The Antitrust Laws in Foregin Commerce

Robert A. Nitschke
Member, Michigan Bar

THE ANTITRUST LAWS IN FOREIGN COMMERCE

*Robert A. Nitschke**

THE Sherman Act applies to trade or commerce "with foreign nations."[1] Are there differences in the act's application to foreign trade compared with its application to domestic commerce? The Attorney General's National Committee to Study the Antitrust Laws was constituted at a time when this question was pressing for an answer.

During the 1920's and 1930's, the international cartel movement was in full flood. American companies participated in some of these international arrangements, often in the belief that they were a necessary condition for world trade and upon the legal premise that restrictions adjunctive to patent and know-how licenses were lawful. During the 1940's, a barrage of antitrust cases struck at these agreements.[2] Cartels were criticized as economically and politically harmful.[3]

Out of these many cases grew certain special problems which had not appeared in the cases involving domestic restraints. One was the problem of extraterritorial jurisdiction. How far over foreign persons and conduct could the arm of antitrust reach? Secondly, did the difficulties of foreign trade in the modern world warrant a different test of Sherman Act liability? Should consideration be given to the impossibility of doing business in certain countries due to exchange and tariff restrictions? Were restrictions ancillary to patent, know-how and trade-mark licenses necessary and permissible? Could a parent conduct its foreign business lawfully through foreign subsidiaries? What joint foreign activities with competitors would be permissible? Thirdly, how could antitrust policy be coordinated with the requirements of the cold war? And, lastly,[4] should the United States partici-

* Member, Michigan Bar.—Ed.

1 26 Stat. L. 209 (1890), 15 U.S.C. (1952) §§ 1, 2.

2 CCH, THE FEDERAL ANTITRUST LAWS (1952) See also cases cited in Carlston, "Antitrust Policy Abroad," 49 N. W. UNIV. L. REV. 569 (1954), and Hale and Hale, "Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas," 31 TEX. L. REV. 493 (1953).

3 For a bibliography on cartels, extraterritorial application of United States antitrust laws, etc., see ABA Section on Antitrust Law, Proceedings at the Spring Meeting, Washington, D. C., April 1 and 2, 1954, p. 225 et seq.

4 One minor problem was the Webb-Pomerene Act of 1918, 40 Stat. L. 517, 15 U.S.C. (1952) §§62, 63, 65, permitting certain restrictive activities by export associations. The committee took the view that, although the act is not much used, it does help some small businesses to compete against combinations authorized under foreign law, and, moreover, previous abuses have been corrected by United States v. United States Alkali Export Assn., Inc., (D.C.N.Y. 1949) 86 F. Supp. 59, and United States v. Minnesota Mining & Mfg. Co., (D.C. Mass. 1950) 92 F. Supp. 947. A minority dissent took the view that it represented an exemption contrary to the philosophy of the Sherman Act and should be repealed. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE

pate in the United Nations proposal for international control of restrictive business practices? Coupled with the strong public conviction that cartels were bad was the growing apprehension that uncertainties in the application of antitrust to foreign trade might be retarding business enterprise and investment abroad and hindering cold war objectives at a time when the United States was assuming leadership in the free world.[5] It was most timely, therefore, to have these issues examined by a committee composed of outstanding authorities in the antitrust field, reflecting all shades of liberal and conservative points of view.

In its *Report*, the committee rejects, at the outset, any proposal for general exemptions of foreign commerce from the antitrust laws or for substantial revision to define specific legal and illegal conduct in foreign trade transactions.[6] The committee states its belief that the generality of the Sherman Act provides the necessary flexibility for its adaptation to any problems peculiar to foreign trade. With these principles as a guide, the committee proceeds to deal with each of the particular problems which has come to the fore in connection with antitrust and foreign trade.

Extraterritorial Jurisdiction

The recent investigatory and enforcement activities against cartels have had an impact upon foreign nationals and indeed upon international relations, raising serious questions as to the extent to which the United States should attempt to enforce antitrust consequences upon persons or conduct outside of its territorial jurisdiction.[7]

ANTITRUST LAWS, March 31, 1955, pp. 109-114 (hereinafter referred to as REPORT, followed by the page number).

[5] United States Department of Commerce, Foreign Commerce Bureau, FACTORS LIMITING UNITED STATES INVESTMENT ABROAD, Part 2, p. 32 (1954); ABA Section on International and Comparative Law, REPORT OF THE COMMITTEE ON INTERNATIONAL TRADE REGULATION, "Impact of Antitrust Laws on Foreign Trade," Aug. 6, 1953; "Study of the Financial Aspects of International Trade and of the Export-Import Bank and World Bank," REPORT OF THE CITIZEN'S ADVISORY COMMITTEE TO THE COMMITTEE ON BANKING AND CURRENCY pursuant to S. Res. 25 and S. Res. 183, 83d Cong., 2d sess., p. 19 (1954); President's Message to Congress, March 30, 1954, N.Y. TIMES, March 31, 1954, p. 18:1.

[6] REPORT 66.

[7] E.g., in United States v. National Lead Co., (D.C.N.Y. 1945) 63 F. Supp. 513, affd. 332 U.S. 319, 67 S.Ct. 1634 (1947), the court cancelled contracts made abroad which prohibited sales by American concerns in certain European countries. The European parties at one time threatened suit against the American firms for breach of these contracts claiming they had invested capital in their businesses on the assumption they would be free from competition from the American concerns.

In the Newsprint investigation, In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Co., (D.C.N.Y. 1947) 72 F. Supp. 1013, subpoenas duces tecum for documents located in Canada, issued against Canadian subsidiaries of American

After analyzing all of the important cases[8] in the field, the committee concludes that the Sherman Act should be applied in foreign commerce with due regard for its effect on another nation's sovereignty or the customary comity between nations. The committee adds, however, that it is not improper to impose liabilities, even upon foreign nationals, for conduct outside the United States that has intentional consequences within the United States which United States laws forbid. Consequently, two standards are adopted:

1. Insofar as arrangements between American firms alone or acting in concert with foreign firms are concerned, the Sherman Act applies not only to conduct in the United States but also to acts performed abroad with sufficiently substantial anticompetitive effects on our trade and commerce as to constitute unreasonable restraints.[9]

2. Insofar as arrangements between foreign competitors alone are concerned, the Sherman Act should apply only where they are intended to and actually do result in substantial anticompetitive effects on our foreign commerce.[10]

firms found to be doing business in the United States, stirred up such adverse public opinion that a provincial statute was enacted prohibiting removal of business records from Canada without legislative approval. The Business Records Protection Act, 1 Ont. Rev. Stat., c. 44 (1950).

In the Oil investigation, upon the intervention of a foreign government, grand jury subpoenas were quashed against a foreign corporation in which the foreign government had a substantial interest. In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, (D.C.D.C. 1952) 13 F.R.D. 280.

In United States v. Imperial Chemical Industries, Ltd., (D.C.N.Y. 1951) 100 F. Supp. 504, decree granted (D.C.N.Y. 1952) 105 F. Supp. 215, the court ordered I.C.I., a British company, to reassign certain patents to the American party so as to preclude those patents from being used to prevent exports by the American party into Great Britain. I.C.I. had in the meantime granted an exclusive license to a second British company. This second British company, suing in English courts, secured an injunction preventing I.C.I. from complying with that part of the American decree. The British court held that it would grant performance as against interference by the courts of another land of a lawful English contract made between English nationals and to be performed in England. British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., 2 All E. R. 780 (1952); British Nylon Spinners v. Imperial Chemical Industries, Ltd., 3 All E. R. 88 (1954).

[8] United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632 (1911); United States v. Sisal Sales Corp., 274 U.S. 268, 47 S.Ct. 592 (1927); United States v. Pacific & Arctic Railway and Navigation Co., 228 U.S. 87, 33 S.Ct. 443 (1913); United States v. National Lead Co., (D.C.N.Y. 1945) 63 F. Supp. 513, affd. 332 U.S. 319, 67 S.Ct. 1634 (1947); United States v. Timken Roller Bearing Co., (D.C. Ohio 1949) 83 F. Supp. 284, affd. 341 U.S. 593, 71 S.Ct. 971 (1951); United States v. General Electric Co., (D.C.N.J. 1949) 82 F. Supp. 753; United States v. Aluminum Co. of America, (2d Cir. 1945) 148 F. (2d) 416; United States v. Imperial Chemical Industries, (D.C.N.Y. 1951) 100 F. Supp. 504, decree granted (D.C.N.Y. 1952) 105 F. Supp. 215.

[9] REPORT 76. See United States v. Timken Roller Bearing Co., (D.C. Ohio 1949) 83 F. Supp. 284, affd. 341 U.S. 593, 71 S.Ct. 971 (1951); United States v. National Lead Co., (D.C.N.Y. 1945) 63 F. Supp. 513.

[10] REPORT 76; United States v. Aluminum Company of America, (2d Cir. 1945) 148 F. (2d) 416. Neither of these standards apparently deals with "potential" restraints

The committee recommends that where a foreign party attempts to enforce abroad against an American party a contract declared illegal under the Sherman Act, the State Department or other appropriate federal agency should endeavor to protect the American party. With respect to foreign nationals, decrees should include a provision that the judgment shall not operate as against any action taken in compliance with the laws of a foreign government to which the defendant is subject.[11] Conversely, the committee recommends that an American company should not be held liable for participating in arrangements in another country (otherwise illegal under the Sherman Act) which are required by the laws of that country.[12]

Different Reasonableness Test for Foreign Trade

In its discussion of the Sherman Act generally, the *Report* concludes that divisions of markets, or agreements not to compete in specified territories, are to be treated as conclusively unreasonable.[13] While recognizing that the same standards of reasonableness apply to foreign and domestic commerce alike,[14] the committee adopts as its view the statement of Justice Frankfurter in his dissent in the *Timken* case that "circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint."[15] Thus, the *Report* says that evidence may be offered to show that, even without any specific agreement not to export from the United States, export to a particular area was virtually impossible because of tariffs, import controls, dollar shortages, etc.[16]

The usual argument against "impossibility" as a justification for restraints has been that if there is no possibility of trade, why is it necessary for the parties to agree not to trade? Furthermore, foreign

or restraints "in their incipiency," but it would seem doubtful that the committee intended to approve agreements which would necessarily result in the prescribed anticompetitive effects. Nor do the standards distinguish between civil and criminal suits, although the latter have certainly much less application to foreign nationals and foreign conduct.

[11] REPORT 76; United States v. General Electric Co., (D.C.N.J. 1949) 82 F. Supp. 753; British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., 2 All E. R. 780 (1952).

[12] REPORT 83. The *Report* refers to "price-fixing solely in that country." This could hardly have the requisite effect on our foreign commerce. The doctrine would seem more reasonably to apply to foreign quota restrictions on exports or imports.

[13] See REPORT 26, dealing with domestic restraints and citing cartel cases.

[14] The committtee supports the view that foreign commerce should include, "as in domestic commerce," capital investment, financing, property rights in patents, trademarks, trade secrets and know-how. REPORT 80.

[15] Timken Roller Bearing Co. v. United States, 341 U.S. 593 at 605, 71 S.Ct. 971 (1951).

[16] REPORT 83. This does not mean it is enough merely to show that the arrangement was a more profitable way of doing business.

trade conditions change, and consonant with the rejection of economic justification for price fixing in the *Trenton Potteries* case, the government should not have the burden of "ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions."[17] Another argument—paralleling the "strict construction" rule given to exemptions under the Sherman Act, which rule holds illegal anticompetitive conduct in any area not clearly regulated by statutory exemption[18]—is that when foreign trade conditions make difficult enough what little trade is left, there is all the more reason for not allowing that small amount to be shut off by private restraints.

The *Report*, however, does not say that "impossibility" by itself justifies restraints in foreign trade.[19] It says, rather, that "impossibility" is merely a basis for demonstrating that the restrictive conduct was a *prerequisite* for trade. The *Report* again quotes Justice Frankfurter's opinion in *Timken*:

> "When as a matter of cold fact the legal, financial and governmental policies deny opportunity for exportation from this country and importation into it, *arrangements that afford such opportunities* to American enterprise may not fall under a ban of a fair construction of the Sherman Law because comparable arrangements regarding domestic commerce come within its condemnation."[20]

The real test, therefore, is not impossibility alone, but whether or not the agreements produced more trade than they restrained. Such a test might not be permissible in domestic commerce where, presumably, Congress can control the area of desirable competition and freedom to trade, e.g., states cannot impose restrictions upon interstate shipments.

But as a practical matter in foreign commerce, limited restraints can produce trade. For example, the importation of certain finished products from the United States may be virtually prohibited by import controls and dollar shortages, but if these finished products are manufactured in the foreign country and contain a sufficiently high percentage of local content, the foreign government may permit the import by the local manufacturer of raw materials, semi-finished products and all the components and accessories of a higher technology

[17] United States v. Trenton Potteries Co., 273 U.S. 392 at 396-398, 47 S.Ct. 377 (1927).

[18] United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182 (1939).

[19] REPORT 83.

[20] Timken Roller Bearing Co. v. United States, 341 U.S. 593 at 605-606, 71 S.Ct. 971 (1951). Italics added.

which the foreign country is not capable of producing.[21] Local manufacture can be undertaken only with American know-how, designs, drawings, technical assistance and perhaps license under foreign patents. The American manufacturer may not be willing to part with these and undertake to establish a potential competitor without securing a promise from the recipient not to sell in the United States or other territory covered by the American company.[22] Similarly, the foreign licensee may be unwilling to undertake the manufacture of the finished product, involving capital investment in plant and machinery and long-term expenditures for sales promotion, if he cannot secure the promise from the American manufacturer not, in effect, to destroy what has been transferred by competing in the foreign manufacturer's area. Thus, such limited agreements not to compete in certain territories may create the opportunity for the only trade possible under the circumstances.[23]

This principle also operates the other way. Foreign firms may have patents or know-how which American firms may desire to obtain and which could develop entire industries in the United States, some of them essential to our defense, and expand substantially the foreign trade of the United States. The American firms may be able to acquire these patents and know-how only by agreeing not to compete with the foreign company in certain territories which the foreign company considers its natural areas.

Such restraints would, of course, have to be reasonably ancillary to a lawful main purpose. As the committee has stated more particularly in connection with its discussion on patent licensing agreements and agreements transferring know-how, the agreements would have to be limited in scope to the products made possible by the know-how and be reasonably limited in time, or, if based on patents, be within the scope of the patent grant, limited in time, and otherwise conform

[21] Or the foreign government may permit importation of certain items, such as bearings, only if there is first establishd locally the manufacture of standard sizes and types used in that country. Then it may permit importation of the balance of sizes and types, i.e., those used in quantities too small to warrant profitable local manufacture.

[22] ". . . we are constantly up against the question of whether there is any satisfactory basis for an American company to furnish technical assistance and information to a foreign concern without exposing itself or other licensees to the risk of loss of their established markets either at home or abroad. It is quite apparent that, if the answer is flatly negative, there is a very limited opportunity to increase the flow of technology to foreign countries through private channels." Letter from Foreign Operations Administration to the Attorney General's National Committee to Study the Antitrust Laws, REPORT 96.

[23] "Out of such situations evolves a principle favoring transactions where the resource of patents or 'know-how' is used with the primary purpose of increasing the inflow and outflow of commerce and enhancing the well-being of the economies of the United States and friendly foreign countries." REPORT 86.

to the rules applicable generally to lawful patent licensing under the Sherman Act.[24]

Such agreements could not be excuses for cartels or for general arrangements to divide markets or restrain international trade. Here, of course, lies the real problem for the businessman and his lawyer. What starts out as an ancillary restraint, lawful in purpose, almost inevitably becomes, with the passage of time and the effectuation of the agreements not to compete, a complex of activity very little different in its restrictive effect from a nonancillary agreement not to compete. The foreign licensee wants to continue to receive new developments and improvements. The American firm feels it should get the benefit of any improvements the foreign firm makes on the products or processes which it has transferred. The question of how new territorities shall be developed arises. In all of such transactions protection may be desired by both parties. How can the businessman be sure that, when scrutinized by the Department of Justice ten years later, his once valid agreement will not have become coated with all the indicia of what is considered to be a general agreement not to compete in each other's markets—a conclusively unreasonable type of restraint?[25]

The doctrine, therefore, permitting reasonable restraints in foreign trade is really not a doctrine which insulates international business from antitrust risks or which opens up foreign trade to business restraints. It is rather a doctrine in favor of a limited promotion of foreign trade under present world conditions and in the public interest.

The status of the law, as interpreted by the committee, thus will permit restrictions which will yield increases in our foreign trade, but because of the inevitable risks of undertaking such restrictions under the Sherman Act, it can be expected that businessmen will not enter into such restrictions except in situations where other business

[24] It should be pointed out that restraints ancillary to patent grants would generally be too limited in scope to meet the practical needs of the situation. The patent-antitrust cases hold any restraints which extend the monopoly beyond the grant to be either illegal per se or unenforceable. Hence, what might be reasonable in the broader sense in connection with transfers of know-how might be illegal if tested under the laws with respect to patents. In general, however, securing patent licenses is a minor part of any such arrangements with foreign concerns. The foreign firms desire patent immunity to the extent it is necessary, but the important thing is to secure the know-how and technical assistance without which, despite patent immunity, they would be incapable of producing the goods.

[25] Compare the judicial reactions to the "ancillary restraint" defenses in United States v. Timken Roller Bearing Co., (D.C. Ohio 1949) 83 F. Supp 284, affd. 341 U.S. 593, 71 S.Ct. 971 (1951); United States v. National Lead Co., (D.C. N.Y. 1945) 63 F. Supp. 513, affd. 332 U.S. 319, 67 S.Ct. 1634 (1947); United States v. General Electric Co., (D.C. N.J. 1949) 82 F. Supp. 753.

alternatives are not available and where, in fact, the business cannot be done without some such restrictive arrangements.[26]

Parent-Subsidiary

With respect to agreements between parent and subsidiary to divide markets or establish prices, or otherwise eliminate competition between the parent and subsidiary, the *Report* applies the same doctrine for foreign commerce as for domestic. The cases are interpreted as holding that concerted action solely between the parent and subsidiary or subsidiaries, which restrains no trade of outsiders but solely that between the parent and its subsidiary, does not violate section 1.[27] The committee rejects any implication to the contrary which might be construed from some of Justice Jackson's dissenting language in the *Timken* case.[28]

The argument for this rule, especially as applied to foreign trade, is that in most cases business cannot be done abroad without separate incorporation and that it is unrealistic to require the parent and subsidiary to compete when, if the parent were operating through plants located abroad, the same restriction on trade would be lawful. The *Report* defines a subsidiary as one which is wholly-owned or where minority foreign stockholders are not competitors but merely investors.[29]

The committee appears to deal only with the problem of subsidiaries established abroad by American companies and not with those acquired. The *Report* does state that section 7 of the Clayton Act, as amended, would appear to cover mergers of American and foreign companies where there is the specified effect on commerce within the United States.[30] Hence, the acquisition of a foreign subsidiary which had previously been engaged in exporting to the United States in competition with the parent, or where the parent had previously been engaged in exporting to the territory of the competitor, might provide the requisites for violation of section 7. The argument, of course, can be made that if a foreign company is a true subsidiary of an American

[26] In many fields of world trade today, restrictions may have no business validity. Agreements on territories cannot keep pace with changes in dollar availability, exchange and tariff restrictions, and the shifting currents of world trade. Nor do American firms in many low-cost, mass-production industries need protection in the American market against foreign competition. Compare the recommendation of the REPORT (p. 342) for antitrust as a justification for and objective of unilateral and negotiated tariff reductions.

[27] REPORT 33-34.

[28] REPORT 88-89. See Timken Roller Bearing Co. v. United States, 341 U.S. 593 at 606-607, 71 S.Ct. 971 (1951). The committee also rejects any implication in United States v. Minnesota Mining & Mfg. Co., (D.C. Mass. 1950) 92 F. Supp. 947, that mere investment abroad which results in a diminution of United States exports is an antitrust violation.

[29] REPORT 30, n. 106.

[30] REPORT 65, n. 1.

corporation, there is no need for agreements in restraint of trade since the controlled operation of the subsidiary itself would provide against undesirable competition.[31]

In elaborating on its viewpoint that competition between parent and subsidiary should not be required, the committee points out that the result of the *Timken* case has been in fact to require competition between a parent and subsidiary, while at the same time the Supreme Court decision approved eventual acquisition of control over a competitor found to be, for many years previously, engaged in illegal cartel agreements with the now American parent. The committee suggests that the proper remedy should have been the dissolution decreed by the lower court.[32]

Joint Activities Abroad

The *Report* expresses the view that manufacturing or distribution activities carried on abroad jointly by American competitors[33] alone, or combined with foreign competitors, should not be illegal per se since they may encourage trade by affording means for sharing risks of sometimes hazardous foreign operations. Such joint activities should be deemed legal if, first, they involve no restrictions on American imports or exports, and second, do not unreasonably restrain competition in the American domestic market.[34]

To meet these qualifications will prove a very difficult task for any joint manufacturing operation despite a desirable and legitimate purpose. The activities of any joint manufacturing operation among competitors will produce effects and results which will be difficult to distinguish from traditional objectionable cartel consequences. For example, the amount of goods that the new joint subsidiary will produce in foreign markets and the consequent extent to which export from the United States by the American partners will be curtailed will ordinarily be decided by agreement among the partners since they would hardly be likely to invest capital abroad and continue to export competitively to that area in derogation of their investment. Also, to the extent certain goods are exported from the United States rather than manufactured abroad by the joint subsidiary (or exported by a

[31] Perhaps this would not be true where a strong minority interest existed since, without agreements which could be turned to as evidence of the relationship, the parent might be accused of operating the subsidiary solely for the benefit of the parent and to the detriment of the interest of minority stockholders.

[32] REPORT 36; United States v. Timken Roller Bearing Co., (D.C. Ohio 1949) 83 F. Supp. 284.

[33] Joint manufacturing activities by noncompetitors would ordinarily create no antitrust problems.

[34] REPORT 90.

foreign partner), agreement between the parent companies will probably be required to determine how much each member will export and the selling prices, particularly if the joint subsidiary, as is usually the case, will handle the distribution of exported materials. Furthermore, since the purpose of such a joint manufacturing subsidiary is to get business abroad which would otherwise not be obtainable, and since it will inevitably be operating in competition with exports from nonmember firms, it will be very difficult for such operations to be conducted without creating the appearance that they constitute an enterprise to eliminate and restrict competition.[35]

It would seem that any jointly-owned manufacturing or distributing organization inherently involves some division of markets and price-fixing, and a division of markets and price-fixing among competitors is per se illegal. The committee really sidesteps this important issue. Yet such joint ventures are the basis for many foreign operations of American businesses.[36]

Coordinating Cold War Activities

Since strict antitrust enforcement may, at times, have damaging effects on the cold war activities of our government and on other aspects of its foreign policy, the committee recommends the extension of the Defense Production Act,[37] at least with respect to programs for preserving the supply of critical and strategic materials from abroad.[38] This act permits the President to request competitors to enter into voluntary agreements upon a finding that the action is vital to the national defense. The agreements are subject to the approval of the attorney general and may involve activities which would otherwise be illegal under the Sherman Act.[39]

The committee also recommends that the immunity under this act cover conduct for a designated period of time beyond the act's expiration where the needs of national defense require it and where no alternative method less restrictive on competition appears possible. Such agreements could be terminated by the President if no longer in the national interest.[40]

[35] Cf. Associated Press v. United States, 326 U.S. 1 at 15, 65 S.Ct. 1416 (1945).

[36] Note the committee's lame treatment of United States v. Minnesota Mining & Mfg. Co., (D.C. Mass. 1950) 92 F. Supp. 947 at 962, 963 on this issue. REPORT 91.

[37] 64 Stat. L. 798 (1950), 50 U.S.C. App. (1952) §2061 et seq., as amended, 67 Stat. L. 129 (1953), 50 U.S.C.A. App. (Cum. Supp. 1954) §2062 et seq.

[38] REPORT 109.

[39] REPORT 108.

[40] REPORT 109.

The *Report* also recommends advance discussion on projected antitrust proceedings by the Department of Justice with other affected government agencies where the proceedings may involve national defense or other government foreign programs. This is stated to be a continuation of existing procedures followed in certain cases where the Justice Department has consulted with the State and Defense Departments as well as the National Security Council.[41] In addition to avoiding antitrust litigation in conflict with foreign policy, such procedures might enable the Justice Department to obtain additional facts regarding the substance of the charges. It might provide desirable information as to the form of the suit, the relief, and the timing of proceedings.

One member comments that antitrust litigation, so modified or discontinued by means of executive consultation, would not result in protection against private damage suit for such conduct, thus nullifying the effect of such executive action on foreign policy and penalizing conduct encouraged by the government.[42] Only legislation could provide immunity against such private suits. Such deprivation of compensation for loss to private parties caused by otherwise illegal acts, it may be argued, requires executive proceedings which would guarantee that exemptions of restrictive conduct would be limited to what was strictly necessary in the national interest, would not be granted if alternative less restrictive means would achieve the results, would be limited in time, and would be subject to periodic review.

Another member of the committee, while approving Executive action in this area, expresses the view that Congress should define the exemption power and place as much as possible of the fact-finding and decision-rendering in "normal deliberative tribunals" as a safeguard against what he believes to be a tendency of the executive in the past unnecessarily to waive antitrust in favor of other considerations of national interest.[43]

UN Proposal[44]

The committee does not pass on the UN proposal for regulating international restrictive business practices. It maintains that the prob-

[41] REPORT 97-98.
[42] REPORT 98.
[43] REPORT 293.
[44] See generally Carlston, "Antitrust Policy Abroad," 49 N.W. UNIV. L. REV. 713 at 723 (1955); Domke, "The United Nations Draft Convention on Restrictive Business Practices," 4 INTL. & COMP. L. Q. 129 (1955); Edwards, "Regulation of Monopolistic Cartelization," 14 OHIO ST. L. J. 252 (1953); Edwards, "Inadequacy of National Regulation of Cartels and Proposed Control by United Nations," 14 GEO. WASH. L. REV. 626

lem is primarily one of international relations rather than of antitrust policy.[45] Nevertheless, the *Report* does contain two discussions of the proposal, one, a dissent from the committee's decision not to comment, which supports the UN's draft articles of agreement,[46] and a rejoinder opposing the UN proposal.[47] It would have been the better course, perhaps, for the majority to have examined the proposal or at least to have set forth its analysis of the problem, showing its relation to international relations rather than antitrust.

The UN proposal cannot be viewed simply as a program for international, as distinguished from national, enforcement of antitrust policy. International law is founded upon mutual objectives and policies in fields which extend outside the effective jurisdiction of any single country, e.g., maritime rules, regulation of narcotics and white-slave traffic, etc. In the field of antitrust, however, there are few countries other than the United States which have any effective antitrust policies or enforcement programs. Moreover, there are nations in the UN whose policies are opposed to antitrust. Some countries, less devoted to private enterprise as an economic institution, may view antitrust as a means by which private enterprise can be discredited in the eyes of the public so as to facilitate nationalization. Such countries are unlikely to be interested in using antitrust to increase competition among private firms. The communist countries not only are disinterested in antitrust but are instead dedicated to destroying free enterprise throughout the world. They can be expected to exploit any UN program for political purposes against free enterprise and the capitalistic free world. It would seem, therefore, that these are problems as much for diplomats and our State Department experts as for antitrust lawyers and professors.[48] Our idealism and enthusiasm for the achievements of antitrust in this country should not lead us into a program which could set back rather than further the cause of antitrust in the rest of the world.

(1946); Kopper, "The International Regulation of Cartels—Current Proposals," 40 VA. L. REV. 1005 (1954); Lockwood and Schmeisser, "Restrictive Business Practices in International Trade," 11 LAW & CONTEM. PROB. 663 (1946); Lubin, "U. S. Proposes U.N. Action on Cartels," 25 Dept. of State Bul. 590 (1951); Timberg, "Restrictive Business Practices," 2 AM. J. COMP. L. 445 (1953); RESTRICTIVE BUSINESS PRACTICES, UNESCO Official Records, 16th Sess., Supp. 11, 11A and 11B (1953).

[45] In connection with the committee's views as to its qualifications for appraising the UN proposal, it should be noted that the government liaison groups attached to the committee did not include personnel from the Department of State. REPORT viii.

[46] REPORT 98-105.

[47] REPORT 105-108.

[48] The Attorney General's National Committee itself may be regarded as a good precedent for appointment by the President of a committee of qualified experts to evaluate and make recommendations regarding the UN proposal.

It would be unfortunate, nonetheless, if the United States should turn its back upon efforts to promote antitrust in the free world.[49] It is in our trading and political interest abroad to encourage the growth of antitrust philosophy as the key to a successful and expansionist private enterprise economy. For restrictive and nonexpansionist private enterprise is not likely to succeed in preserving the world's people from communism. The wide difference between public attitudes toward business in the United States and in Europe stems from the expansionist philosophy of American business, nurtured by antitrust, with its resultant prosperous economy and high standard of living, as compared with the nonexpansionist, market-dividing, restrictive theories of European business.

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.

Conclusion

Considering the different shades of opinion represented on the committee, the Foreign Trade Section of the *Report* is remarkable for the degree of unanimity attained. The conclusions and recommendations agreed upon constitute a consensus which cannot be cast aside or ignored. In an area vexed by confusion and extreme positions, the *Report* provides a foundation for the clarification and solution of antitrust problems in the foreign trade field.[50]

The *Report* reminds us that, in a world of economic restriction and political tyranny, the United States remains the example *par excellence* throughout world history of a free enterprise system. We do not need to despoil the Sherman Act nor need we fear that business will be, in turn, despoiled by the act. Modifications of the statutory

[49] It should be noted that our antitrust enforcement against cartels has in itself destroyed many international cartels through the elimination of the participation of American firms, in many cases the leading members of their respective industries. It is doubtful that major international cartels can effectively control world markets in the face of competition and noncooperation from American industry. BERGE, CARTELS: CHALLENGE TO A FREE WORLD 18 (1944).

[50] Criticism will undoubtedly be made that the *Report* does not provide "do and don't" solutions to each specific problem. This quest for certainty, desirable as it may be, is unfortunately not the destiny of man under the antitrust laws or any other laws. See Levi, "An Introduction to Legal Reasoning," 15 UNIV. CHI. L. REV. 501 (1948).

provisions are not needed. We can continue on a case-by-case basis, recognizing that within the Rule of Reason there is sufficient flexibility for maintaining strict enforcement consonant with the special problems and difficulties besetting foreign trade today. We can enforce the act but with due regard for the rights and liabilities imposed by the laws of other countries.

As a means for providing expert and competent enlightenment on difficult national problems, and as an aid to Congress in resolving difficult and sometimes technical public issues, the Attorney General has provided a procedure which should be used more often. It is a method for approaching difficult problems that is truly in the democratic tradition. Even if the conclusions produce further controversy and discussion, it can only be helpful to have had this careful, exhaustive study of an important public issue by this group of outstanding professionals.