EXTRATERRITORIAL EFFECTS OF TRADE REGULATION *

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I. BASIC PROPOSITIONS

In order to bring the discussion quickly into focus and provide a readily identifiable target for analysis and criticism, at the outset the staff of the Conference supplied each participant with a statement of propositions believed basic to the problems to be discussed. These propositions received surprisingly few challenges. Comments were directed principally to their clarification and amplification, although a few participants did raise objections of a fundamental nature. I have re-drafted the propositions in light of this criticism, and present them here in the belief that they are helpful to any further discussion. They serve both to identify the nature of the problems with which we are here concerned and to suggest the area of possible solutions.

(1) International trade is best regulated by competition. As this condition does not now everywhere exist, studies should be undertaken to identify the impediments to competition, their causes and effects, and the extent to which governments, through unilateral and cooperative action, can and should remove distortions of competition.

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No one conference can provide either a complete understanding of the nature and extent of the problems caused by the extraterritorial effect of trade regulations or a catalogue of adequate solutions to those problems. But like the conference held in Chicago in 1958 and the International Conference on Restraints of Competition at the University of Frankfurt in 1960, the 1962 Washington Conference has served the very worthwhile purpose of providing a forum for the candid and challenging exchange of information and ideas by legal and economic experts from several nations of the world who are appreciative of the problems that exist and warrant serious study and conscientious effort to obtain solutions.

The discussions at Washington were sufficiently successful to encourage us to invite the participants to continue the dialogue through responses to this Report and participation in another international conference to be held, in all likelihood, in Europe in 1964.

This Report has been prepared by the general reporter of the conference and is published on his sole responsibility. It is not to be understood as representing the views of any other participant in the Washington conference. The comments of participants who wished to express their views on the report are set out after this Article.

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(2) Enforceable rules of competition are socially desirable and necessary to promote and maintain fair competition and the freedom of individuals to trade, by assuring access to markets, labor, supplies, credit, technology, and means of communication and transportation.

(3) Unilateral acts of governments directed to their own domestic or foreign trade, and restrictive trade practices arising from cartels—agreements among competitors—in the foreign or domestic trade of one or more countries may have an extraterritorial effect and, consequently, may restrain or prohibit international trade.

(4) All governmental action, whether permissive, regulatory, or prohibitive in nature, which applies to the foreign trade of a country or which applies to any important segment of the economy of a country may have an extraterritorial effect. Governmental nonaction in these areas may also have an extraterritorial effect.

(a) Where foreign trade is involved, the effect is direct and ordinarily intended.

(b) The complexity and interdependence of the economies of modern nations is such that an extraterritorial effect may be anticipated from actions which apply to any important segment of the domestic economy, although such effects may be indirect and not the purpose of the actions.

(c) The failure of any nation to legislate as to cartels has a result similar to that brought about by permissive legislation. Cartels are thereby allowed to play a part in the foreign and domestic trade of that country, with a resultant extraterritorial effect.

(5) To the extent that governmental or private conduct in one country has an adverse effect upon the economic interests of a second country, the latter has a proper interest in the control or prohibition of such conduct.

(6) Governmental action which has such extraterritorial effects is not invalid or unlawful under public international law for that reason alone.

(a) Each country has power to undertake whatever measures it deems appropriate insofar as its domestic economy and foreign trade are concerned. However, the cooperation and assistance of other countries may be essential to the effectiveness of certain of these measures.

(b) A country's right to exercise that power, and the extent to which it may exercise that power, may also be limited by out-

standing treaty obligations and other international contractual commitments.

(c) In the absence of a treaty or other international contractual limitation, international law, as it exists today, has not been worked out in detail as to the right of a country to take the measures it deems appropriate insofar as its foreign trade is concerned. This situation may lead to conflicts resulting from the assumption and exercise of jurisdiction and sovereign power by individual countries.

(7) As cartels—often composed of or utilizing combines¹—operate within the framework of existing governmental laws and regulations, they may experience at a given time complete freedom, regulation, or prohibition.

(a) Cartels are restrained by regulatory or prohibitory laws only to the extent to which such laws are enforced.

(b) Export or import cartels may be permitted by a country that opposes restraints of trade at the domestic level, when the activities of the cartels are not contrary to the “public interest,” despite the fact that they may bring about adverse economic effects in other countries.

(c) Cartels may seek to evade government regulation and prohibition by resort to the law of countries which do not regulate cartels or which regulate them only slightly. Among the measures which may be employed by cartels in their own self-interest are the following:

(i) Cartels seeking to regulate competition in international trade may provide in their contracts for the application of the law of a country most favorable to their agreement.

(ii) Cartels may seek to evade the laws of countries which prohibit or regulate them by employing flexible international arbitration machinery to settle their disputes.

(iii) Cartels may seek to evade the laws of the countries which prohibit or regulate them by keeping their records in other countries which will not require or permit their production upon request of the regulating country.

(8) Where the activities of cartels or the domestic effects of their activities bring them within the jurisdiction of a country regulating or

¹ A combine is here defined as a single enterprise, under one common management, which has subsidiaries, affiliates, plants, or other facilities in different countries.

prohibiting them, the cartel agreement gives way to the laws and regulations of that country to the extent that the government of that country is able to apply them. This is so even where the cartel agreement provides that the law of another country will be applied to determine the legality of the agreement and the nature and extent of obligations under it.

(9) Cartel agreements calling for restrictive trade practices in international trade are undesirable and should be regulated. Agreements fixing prices, dividing markets, setting quotas, boycotting competitors, or requiring exclusive dealing should be abolished, and, where not abolished, should be allowed only under rigorous supervision by the governments of the countries concerned.

(10) Effective governmental control of the restrictive trade practices of cartels in international trade is not possible at present because of the existence of numerous regulatory gaps arising from lack of cooperation between the countries concerned. These gaps make it difficult or impossible for a country adversely affected to obtain access to necessary data and jurisdiction over persons and property, or to compel action by or impose sanctions on the cartel or its members.

(11) It is in the common interest of the countries concerned to undertake cooperative action to reduce these regulatory gaps insofar as possible, consistent with proper procedures and safeguards of both public and private rights.

(12) In those cases in which a government determines that joint economic activity by competitors in international trade is desirable, important interests being served thereby, appropriate measures should be taken by that government to assure that such activities are consistent with general policies under which restrictive trade practices are regulated, and duly recognize the proper interests of the other countries concerned.

(13) Available national and international means for regulating restrictive trade practices in international trade—such as the investigatory functions of national trade regulation agencies, and treaties of friendship and commerce—are not being fully utilized in dealing with these problems.

These propositions quite obviously do not end the discussion. But, by their generality, they provide an adequate threshold from which to enter upon analyses and resolutions of the problems. The structure which has yet to be built can only be limned at this time. Its realization will require detailed study and enormous cooperative effort.

II. CASE STUDIES

The extraterritorial effects of trade regulations can be examined from many viewpoints. One could, for example, limit the discussion to a consideration of governmental actions having a direct and substantial effect on exports and imports, such as tariffs, food and drug regulations, and exchange controls. The problem might also be viewed solely from the aspect of private enterprises, acting alone or as members of cartels. Again, an analysis might sensibly be restricted to a single industry, the trade between two countries or continents, or patents, trademarks, and copyrights. As imagination takes wing, it becomes obvious that, if the discussion is to be meaningful, it must take place within a frame of reference recognizable to the participants and sufficiently limited to allow adequate study and discussion.

The Washington Conference established its terms of reference on three case studies which provide examples of certain types of difficulties now being encountered in the area of discussion. Each involves the interplay of private and public regulation.

The first case is hypothetical; the other two are recognizable as problems which are now exasperating diplomatic and commercial relations between the United States and other countries.

Space does not allow a full recital here of all facts relevant to each case. Nor is such an account, with its diverting details, necessary to an understanding of the issues raised by these and similar fact situations.

A. The Joint Venture

1. The Facts

Companies domiciled in Germany, Japan, and the United States enter into a joint venture to exploit the pharmaceutical business in Latin America through a company organized in Switzerland. Each participating company has previously engaged independently in that business in Latin America, relying upon its own patents and trademarks. But lawsuits have arisen among them in certain countries, and one of the principal purposes of the joint venture is the termination of such litigation by licensing exclusively to the Swiss firm the present and future rights of the partners to all patents and trademarks in Latin America. The three firms also agree not to compete with the Swiss firm in Latin America.

The American partner is record owner of one hundred percent of the stock of the Swiss corporation, holding fifty percent of the shares in trust for the German firm and twenty-five percent in trust for the Japanese firm. Incoming orders and profits are to be shared in the same proportions.

The partners also enter into another agreement providing for the exchange of all technological information related to the business of the Swiss firm and for the assignment to each other of existing and future patent and trademark rights secured in their respective countries.

The agreement among the partners providing for the above arrangements is governed by the law of Switzerland. Any disputes are to be settled by arbiters appointed by the International Chamber of Commerce in Paris, France.

2. The Issues

(1) Are joint ventures in international trade necessary or desirable? If so, within what limits?

(2) Should any country directly and substantially affected by the activities of a joint venture attempt to determine its legality, or design remedial measures against it, without giving as much consideration to the effect of such action on other affected countries as it gives to the effect of the venture on its own domestic and foreign trade?

(3) Should countries make any distinction in their trade regulation between joint ventures made up entirely of their own nationals engaged in foreign trade and similar ventures in international trade made up of nationals of different countries?

(4) In determining the legality of a joint venture, should decisive weight be given to the nature of the market which it is organized to exploit—whether it is underdeveloped or highly developed?

(5) Should a country in which a joint venture establishes a corporation through which it will operate recognize as a valid ground for dissolution of the corporation a request for such relief on the part of a member who is under compulsion of an antitrust order of a court or agency of the country of which the member is a national?

(6) Should a joint venture or cartel be permitted to escape, by means of arbitration, the application of the trade regulations of countries whose trade it directly and substantially affects?²

² As originally conceived, this case more closely traced an actual factual situation. However, as the matter was *pendente lite* at the time the Conference took place, the facts were altered in hopes that a realistic situation could be molded. Instead, an inordinate amount of conference time was initially spent discussing the facts assumed. This experience leads me to believe that participants in future discussions will grapple more quickly and meaningfully with the issues if they can be shown to arise from actual factual situations.

The next two cases are more vivid because they are real. Each involved a self-regulating industry engaged largely in foreign trade and regulated by the country whose economy is most directly concerned by the operations of the industry. Other countries object to the effect on their economies of the industrial self-regulation, governmental regulation, or both.

B. The Swiss Watch Industry

1. The Facts

Most Swiss watches are manufactured in small plants located in the mountainous area of western Switzerland, where meager soil and poor communications severely limit the ways in which men may earn their livelihood. Because a large number of families have come to depend on this industry, the Swiss government has been unable to view its economic health with indifference.

Switzerland exports 95% of its watch production. Consequently, any regulation of this product, either by the members of the industry acting in concert or by the Swiss government, will have an impact upon the foreign trade in Swiss watches and upon the economies of those countries to which Swiss watches or watch parts are exported for resale.

The situation in Switzerland can be summarized briefly. The Swiss watch industry is bound by mutual agreement among manufacturers, assemblers, and marketers to limit the export of watch parts and components, and, with a few exceptions for industries already established, to refuse direct or indirect aid to foreign manufacturers. The industry also seeks to establish minimum prices for watch components. The purpose of this cartel is to assure the Swiss watch industry its precedence in the world-wide watch market by refraining from encouraging or aiding the establishment of competitors in foreign countries.

The role of the Swiss government has varied over the years, depending upon the nature and extent of the watch industry's problems. At first, the government participated only in a financial way. In the 1920's, during a time of overproduction, the government guaranteed losses due to devaluation of foreign currencies. In 1931, the government became the largest stockholder in a holding company set up by the industry, private banks, and the government itself to establish a monopoly in the production of certain essential watch parts in an effort to control their export to competitors abroad. In 1934, the government established a system of licenses in order to limit watch production in Switzerland and to curtail the export of watchmaking machinery, watch parts, and components. From 1936 to 1951, public price controls recognized and supplemented the pricing arrangements of the industry cartel.

At the present time,³ export licenses may be required for watches, watch components, and watchmaking tools and machinery. Manufac-

³ Federal Order on Measures Safeguarding the Existence of the Swiss Watchmaking Industry, June 22, 1951, [1951] *Receuil Officiel de Lois et Ordonnances de*

turing licenses are required which limit entry by newcomers into the industry, but they are to be abolished by December 31, 1965. As a complement to this easing of its regulation of the industry, which was authorized in 1961, the government is obliged to provide a quality control, to assure that no harm comes to the reputation of watches exported from Switzerland bearing the name "Swiss". This will be an important function, as 90% of the watches exported from Switzerland bear no other trade name. The watch statute also provides punishment for violations of its provisions.

Many countries are affected by this regulation of the Swiss watch industry. For example, the majority of watches purchased each year by consumers in the United States are manufactured in Switzerland. As recently as 1962, the United States District Court for the Southern District of New York held⁴ that various Swiss and American watch manufacturers and watch importers had violated the Sherman Act and the Wilson Tariff Act because of the impact of private regulation upon American interstate and foreign commerce.

It is the view of the Swiss government that its regulation of the watch industry represents an exercise of that government's sovereignty. Consequently, it argues that any action by American courts which interferes with the governmental regulation of the Swiss watch industry constitutes an interference with Swiss sovereignty in violation of public international law.

The United States view, by contrast, is that the activities in Switzerland, whatever their legality there, have an effect both direct and indirect on American interstate and foreign trade, and that the American antitrust suit is designed to "roll back" that effect. Even though that "roll back" might have an effect in Switzerland, it is not for that reason inappropriate, as that effect is ancillary to the right of the American government to remove restraints of trade in its interstate and foreign commerce.

2. The Issues

Despite their factual differences, this case and the next raise similar issues. For that reason, I shall state the issues after a summary of the shipping case.

1a Confederation Suisse 1239-46 (Swit.), translated in *Report on Current Legal Developments in the Field of Restrictive Business Practices*, U.N. EcoSoc COUNCIL OFF. REC. 19th Sess., Supp. No. 3, at 80 (E/2671) (1954).

⁴ *United States v. Watchmakers of Swit. Information Center, Inc.*, 1963 TRADE REG. REP. ¶ 70600 (S.D.N.Y. Dec. 20, 1962).

C. Ocean Shipping of Freight by Common Carrier

1. The Facts

The waterborne shipment of freight by common carrier in the foreign commerce of the United States is regulated by private agreements among competing steamship lines, known as "steamship conferences." These conferences first appeared in 1875, as an effort to stabilize an industry which had become highly competitive, with a surplus of capacity brought on by the development of the steamship and the introduction of scheduled sailings. These conferences do not include tramp steamers, which do not ply between specific ports on a specific schedule.

Over 100 steamship conferences are active in the foreign commerce of the United States. Some 24 American flag lines and 270 foreign lines belong to these conferences. Their basic purpose is to reach common agreement on transportation rates and other terms and conditions of carriage of goods or passengers.

The proponents of the conferences assert that they provide greater regularity and frequency of service, more stability and uniformity of rates, and better distribution of sailings.

The conference agreements are lawful under the laws of many countries. Although price-fixing agreements have been held to be per se unlawful under American antitrust laws,⁵ the United States Government, recognizing that there is some merit in the steamship conferences, has chosen to regulate them by special law, rather than to outlaw them entirely. Under the Shipping Act of 1916 and its subsequent amendments,⁶ conference agreements are immunized from the anti-trust laws, but only if such agreements are filed with and approved by a governmental agency—now the Federal Maritime Commission.⁷ This immunity exists only so long as governmental approval continues.

The fact that only ten percent of American shipping is carried in American flag ships, including tramps and tankers, is some evidence of the international impact of this legislation. About thirty percent of the shipping carried by liners regulated under the Shipping Act of 1916 is American. Thus, this legislation has a direct and immediate effect upon lines flying the flags of other countries in which their owners may or may not have their principal offices.

It has been suggested that the Shipping Act of 1916 has proven of more benefit to foreign flag lines than to American lines. The Act

⁵ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

⁶ 39 Stat. 728, as amended, 46 U.S.C. §§ 801-42 (1958), as amended, 46 U.S.C.A. §§ 801-42 (Supp. 1962).

⁷ 39 Stat. 733, as amended, 46 U.S.C. § 814 (Supp. III, 1962).

has permitted foreign lines, formerly denied access to the foreign trade of the United States by the existing conferences, to come to the Maritime Commission or its predecessors and request assistance in compelling the conferences to open their ranks to new competitors.

Because deferred rebates, and certain other practices, were outlawed by the Shipping Act of 1916,⁸ the conferences developed the so-called "dual rate" pricing system to attract business. Shippers who contract to patronize conference lines exclusively have their goods shipped at rates lower than those charged shippers who do not sign such a contract. The decision of the United States Supreme Court in *Federal Maritime Board v. Isbrandtsen Co.*⁹ raised doubts as to the legality of dual rate agreements, even when approved by the Commission. Extensive congressional hearings ensued. The effect of the *Isbrandtsen* decision was finally stayed by Congress. In October, 1961, the Shipping Act of 1916 was further amended¹⁰ to enable the Commission to approve dual rate agreements, provided specified safeguards, designed to protect the shipper and assure continuing Commission supervision, were written into the agreements.

Under the amended legislation, shipping lines subject to the act—including lines flying foreign flags—must file with the Commission copies of all agreements with other lines which affect rates and services. This includes the conference agreements themselves. All amendments and cancellations of such agreements must also be brought to the attention of the Commission. The Commission is empowered to disapprove, cancel, or modify agreements which are unjustly discriminatory or unfair, which operate to the detriment of the commerce of the United States, or which are contrary to the public interest or in violation of the act. It must approve all other agreements, modifications, or cancellations. The Commission may not approve any conference agreement which does not provide for reasonable and equal terms for admission to the conference or for withdrawal from it on reasonable notice without penalty. Tariffs must be filed with the Commission and made available for public inspection. Rate changes must also be filed before they can become effective.¹¹

The Commission has not been given the specific function of establishing just and reasonable rates. As in the past, the conferences of shipping lines establish the rates to be charged, without any government dictation. However, the Federal Maritime Commission may, after hearing, disapprove any rate or charge which it finds "so unreasonably

⁸ 39 Stat. 733, as amended, 46 U.S.C.A. § 812 (Supp. 1962).

⁹ 356 U.S. 481 (1958).

¹⁰ 75 Stat. 762 (1961), 46 U.S.C. § 813a (Supp. III, 1962).

¹¹ 75 Stat. 762 (1961), 46 U.S.C. §§ 813a, 814, 817 (Supp. III, 1962).

high or low as to be detrimental to the commerce of the United States." ¹²

The act gives the Commission power to subpoena persons, books, and records for the purpose of investigating alleged violations, and provides penalties for violations of the act. ¹³

Under the 1961 amendments, conferences are required to police the obligations under their agreements and to adopt and maintain reasonable procedures for prompt and fair hearings of shippers' complaints. If the conferences fail to do so, they may lose the Commission's approval and their antitrust immunity. .

Although Congress intended to regulate the conference agreements as early as 1916, effective regulation was not attempted until fairly recently. As a result, there are, at the present time, instances when foreign lines have, with the assistance of their governments, refused to provide the Maritime Commission with documents which the Commission believed necessary to determine whether a violation of the Shipping Act of 1916 had occurred. It is the view of the countries concerned that under public international law they, and they alone, have complete sovereignty within their territorial limits. No foreign court or agency, they argue, may compel the production of documents which are located within the territory of another country if that country refuses permission to export the documents.

On the other hand, it appears to be generally recognized that a country can close its ports to ships which refuse to comply with its laws. There are many historic examples of the use of this power.

The last two case studies are classic examples of a conflict of national interests. A cartel with headquarters in the territory of one country has an effect in a second country. This results in regulation by the government of the latter country, which the first country deems inimical to local interests.

2. The Issues

(1) Where a country undertakes to regulate, on a continuing basis, an industry substantially or entirely engaged in its foreign trade, is it required by public international law to provide machinery for reconciling such regulation with the interests of other countries and their nationals who are substantially affected thereby? In this connection, can satisfactory regulatory procedures be devised so as to assure proper consideration of all interests concerned, whether domestic or foreign?

¹² 75 Stat. 765 (1961), 46 U.S.C. § 817(b) (5) (Supp. III, 1962).

¹³ 39 Stat. 728 (1916), as amended, 46 U.S.C. §§ 826, 831 (1958).

(2) Can aliens lawfully be treated differently from nationals when a country undertakes continuous regulation of an industry substantially or entirely engaged in its foreign trade?

(3) Should cartels, by contracting to apply the law of a country favoring cartels, or by keeping their records in countries which will not assist in their removal on the basis of an order of a foreign court or agency, be permitted to escape some or all onerous regulations of their anticompetition agreements by countries whose trade they substantially and directly affect?

III. DISCUSSION

A. Joint Ventures, While Inherently Noncompetitive as Concerns the Participants, May Be Desirable or Even Necessary

The first case study illustrates an attempt by competitors who had been independently developing the Latin American market to eliminate burdensome litigation among themselves in portions of that market through a device which completely destroys any further competition among them. The subsidiary agreement serves to effect a further division of world markets by providing for the exchange of patents and trademarks among the members of the joint venture.

1. There Is No Consistent Treatment of Joint Ventures by Governments

Such agreements apparently would be lawful under Swiss law, where the new corporation has been organized. They are possibly lawful in Japan,¹⁴ but might well be unlawful under German law.¹⁵ They would clearly be unlawful under American law because they serve to foreclose the American member from competing in important world markets.¹⁶ Whether the agreements are lawful under the laws of each Latin American country, I am not prepared to say. But such a variegated reaction as can be identified sets the stage for conflicts between governments as well as for grave injury to the participants.

Assume that an American court found that the agreement not to compete in the Latin American market was an agreement in restraint of the foreign trade of the United States within the meaning of section 1 of the Sherman Act. Assume further that it ordered the Ameri-

¹⁴ See Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade, Law No. 54, April 14, 1947, art. 6, EHS LAW BULLETIN SERIES, JAPAN KA3; Fair Trade Commission Regulation No. 1, Sept. 1, 1953, *id.* at KE1.

¹⁵ See Act Against Restraints of Competition, July 27, 1957, 1 EUROPEAN PRODUCTIVITY AGENCY OF THE ORGANISATION FOR EUROPEAN ECONOMIC CO-OPERATION, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES D1.0 (Ger. Fed. Rep.).

¹⁶ United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. National Lead Co., 63 F. Supp. 513, 525 (S.D.N.Y. 1945).

can firm to cease carrying out its obligations under the agreements and, as a remedial measure, to undertake whatever measures were within its powers to dissolve the Swiss corporation. The other partners oppose the dissolution, and, when the American firm attempts to renew competition, they sue it in Latin American countries for breach of contract, demanding specific performance and damages. Each company and each country pulling its own way, with little regard for the others, could create a chaotic situation in the narrow sector of the world market encompassed by our case. A country fearful of this result might be forced to refrain from the enforcement of laws properly applicable to anti-competitive activities directly and substantially affecting its foreign trade.

The internationalization of enterprise is one of the causes of the difficulties resulting from governmental trade regulation. Through the use of subsidiaries, affiliates, and flags of convenience, enterprises can take on the guise of various nationalities in different parts of the world. Yet, the effects of their private trade regulation activities are felt throughout international trade. Whatever the practical economic reasons for these activities, when a country attempts to regulate such an enterprise or its activities because of their local effect, the impact of such action may flow back along the lines of communication and control into international commerce. While the effect is ancillary to that intended, other countries do feel the impact of such governmental regulation.

It is in this way that complaints arise against the enforcement of American antitrust laws. Yet the antitrust decisions of the United States courts contain no instance of an effort to regulate international trade as such. The courts have acted only when there was evidence that the agreements, conspiracies, or actions complained of had a direct and substantial effect on the American economy. *United States v. Aluminum Co. of America*¹⁷ provides no exception.

Modern international trade has been built up by private corporations which are in a position to engage in restrictive trade practices without serious governmental interference, even by those countries directly and substantially affected. United States antitrust suits in this area provide the principal, although perhaps uninfluential, exception. This has been due in large measure to the fact that until recently very few countries regulated this aspect of their foreign trade.

The last decade has witnessed an important evolution in this regard. Important trading countries like Germany and Japan have adopted stringent trade regulation laws, some of which have a material

¹⁷ 148 F.2d 416, 443 (2d Cir. 1945).

effect on international trade. Ordinarily these laws contain exceptions allowing cooperative action by nationals in foreign trade, a development which requires comment.

2. Some Governments Allow Joint Ventures by Nationals in Foreign Trade While Barring All Others.

An anomalous situation exists. The laws of the United States, Japan, and Germany authorize export trade associations in foreign trade—joint ventures by competing nationals—, despite a growing recognition of the social desirability of maintaining competition in domestic trade by governmental regulation. The export association might even come into being because of import restrictions imposed by the country of destination. Nonetheless, agreements among competing nationals may injure international trade as much as similar agreements among nationals and non-nationals.

As yet, there has been insufficient recognition of the responsibility of each country for the creation and maintenance of competition in international trade. Export associations are cartels which may be lawful in the country where established, but possibly illegal under the antitrust laws of other countries directly affected by them. Within the Common Market, for example, export associations engaged in trade with member countries come under the regulations adopted pursuant to articles 85 and 86 of the Rome Treaty,¹⁸ while the same export associations would not be so regulated if engaged in trade with a non-member country.

When export trade associations were first sanctioned by the United States in 1918,¹⁹ it was alleged that because cartels were the prevalent mode of doing business in international trade, competing American firms had to combine to compete with European cartels. However, such need not be the situation today.

Countries which permit competing nationals to agree to restrain competition in international trade ought to consult each other as to how soon each might adopt a policy either of allowing legislation which authorizes export associations to fall into disuse or of limiting its application to trade with underdeveloped areas.

3. Foreign Policy May Call for the Encouragement of Joint Ventures in International Trade

Unregulated agreements among competitors which serve only to restrain trade by fixing prices, dividing markets, suppressing technology,

¹⁸ 298 U.N.T.S. 47, 48, 51 AM. J. INT'L L. 865, 895, 896 (1957), CCH COMMON MARKET REP. ¶¶ 2001, 2101.

¹⁹ 40 Stat. 516 (1918), 15 U.S.C. §§ 61-65 (1958).

and boycotting competition cannot be justified as part of a policy of fostering competition. But the question remains: Are all agreements among competitors so evil as to warrant their suppression, at the risk, possibly, of retarding the economic development of international trade, or of encouraging private monopoly or government enterprise? The first case raises the question whether joint ventures in international trade can ever be lawful in each and every one of the countries directly and substantially affected.

The Honorable Teodoro Moscoso, United States Coordinator of the Alliance for Progress, has maintained that joint ventures may be desirable if there are appropriate safeguards.

I hope you will think about some of the problems this poses. To me they are serious ones. For if the economies of Latin America, under the stimulus of the Alliance, are to mature, only to find themselves tied hand and foot by market restraints, then our whole program will be for naught. . . . I suggest to you that perhaps there is a real opportunity for creative and imaginative use of joint ventures and joint enterprises, mixing broad foreign equity participation, management techniques and technology with local resources.²⁰

Mr. Moscoso did not say, however, what these safeguards might be. This obviously is an appropriate area for further study and experiment.

One type of joint venture appears to have desirable features. A firm from a developed country and a local firm from an underdeveloped area join together to develop the local market. The former provides know-how, patents, capital, and technically trained personnel; the latter provides knowledge of the local market, untrained or slightly trained labor, and the sales distribution system. These firms might be considered potential competitors in the sense that the local firm might one day be able to compete with the outsider. But the joint venture may be able to accelerate the process, providing a social benefit in the form of earlier fruits of economic development.

We must expect some loss of competition in every joint venture involving potential competitors. But this should not be the sole criterion of legality at every stage of economic development. A joint venture may be necessary during the primitive stage of an economy, yet warrant dissolution into viable parts, owned by the partners individually, when it grows to a size where competition between the partners is possible as a practical matter.

In the areas of the world where economic development is obviously needed, there may be no alternative to reliance upon government enter-

²⁰ Address at the Conference on the Extraterritorial Effects of Trade Regulation, Washington, D.C., April 5-12, 1962.

prise. But apart from the ideological problems which this entails, commerce in the guise of government-in-business raises many unique problems. A government enterprise, whether local or foreign, may well be opposed to competition, insisting on a monopoly status. Moreover, an enterprise owned and controlled by a foreign government is not free from seizure by the local government. This possibility introduces additional friction and conflict into the relations between the nations concerned.

Private enterprise may also run a considerable risk of expropriation by newly founded governments which are fearful of foreign domination, whether by government or giant business. There is a tendency for nations experiencing newly won sovereignty to emphasize their internal prerogatives at the expense of the free flow of goods and services in international trade. But seizures of private property owned by aliens are less likely to occasion serious intergovernmental conflicts today than would seizure of the property of a foreign government. Perhaps this very development enhances the current risk of seizure of private property.

Under such circumstances, joint ventures have several virtues. They can serve to spread the risk, to reduce local fears of domination by an alien private or public monopoly, and to ward off some local hostility against foreign capital by providing for local participation in the venture.

Before imposing the sanctions of antitrust laws against a national who is a participant, each country should undertake studies to determine the desirability and necessity of joint ventures and the proper scope of their operations as a matter of good foreign policy. Equally importantly, once firms are permitted or encouraged by governments to participate in joint ventures, they should be advised, with some preciseness, of the scope of authorized activities, and allowed an opportunity to disengage, without serious harm, when the business has developed to the point where it is apparent to the governments concerned that actual competition between the partners is feasible and desirable.

*B. Private International Law Must Be Developed to Assist in
Reconciling the Conflicts Between Private and
Public Power in International Trade*

For purposes of the hypothetical case, the joint venture corporation was organized in Switzerland, a haven for cartels engaged in international trade. In a suit by the other participants to enforce the agreement, Swiss courts might well give no recognition to the Ameri-

can partner's defense of impossibility of performance based on violation of United States antitrust law. Nor is Switzerland the only country whose courts frustrate the competitive policies of other countries related to international trade.²¹ The fact is that such cases can and do arise, partly because of an inadequate appreciation of the necessity for cooperative action by nations in bringing about and maintaining competition in international trade.

Another significant reason for the inability of courts to cope with these difficulties is the primitive state of that part of private international law which deals with the extraterritorial effects of trade regulation. Those specializing in the discipline of private international law should give more consideration to the tangle caused by private and public regulation of international trade.

C. Arbitration Is Not an Appropriate Procedure for Determining the Applicability of National Antitrust Laws in International Trade

An important feature of the joint venture arrangement in the hypothetical case is the provision for arbitration. In this context, it is necessary to categorize arbitration as a device which may be used to escape national regulations intended to control anticompetitive activities. While it must be recognized that arbitration can often play an important and necessary role in international trade by facilitating the resolution of disputes arising out of contracts, nevertheless, a country is often as interested in the contents and purposes of such contracts as are the contracting parties. This is particularly true where the contract is between competitors, and has a direct and substantial effect upon the foreign and domestic trade of the very country whose regulatory jurisdiction the contracting parties are seeking to evade.

How can private corporations escape the applicability of antitrust laws by arbitration? This power springs from a recognition of the private right of contract. The present law of arbitration and the principles determining the choice of law applicable to contracts appears to be as follows: (1) the contracting parties can determine whether their cases are to be decided by regular courts or by arbitration tribunals; (2) the parties can agree where the arbitration tribunal shall be established; (3) they can agree as to the substantive law which will govern and which is to be applied by the tribunal; (4) to a lesser extent, the parties are free to determine the procedure to be applied by the tribunal.

Local law may determine the effect which an arbitral decision will have in the local courts. However, methods have been devised for

²¹ See *British Nylon Spinner, Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] 1 Ch. 19 (1952).

getting around even this—the parties need never go to court. To assure performance, provision may be made for establishment of a bond through the deposit of funds with a bank. The simple deposit of the arbitral decision with the bank is deemed to provide adequate authorization for the payment of the deposited amount to the injured party.

Certain developments in the field of arbitration may limit the possibility that anticompetitive contracts will be held unlawful as more countries enact antitrust laws. The rules on arbitration of the International Chamber of Commerce in Paris²² are an example of how arbitration tribunals can be separated—both as to substance and procedure—from the legal system of any country. No cartel case has been decided to date under these rules, and there may well never be a decision. However, because the mechanics of the rules could be employed in a cartel agreement—with an appropriate change in the identity of the arbitrators—, they are of interest to the discussion. The rules authorize an agency of the Chamber of Commerce, at the time a complaint is filed, to select the country in which the arbitration tribunal in the particular case shall sit and to appoint the arbitrator under the law of the country thus chosen. By this device, the seat of the tribunal remains ambulatory until a term or condition of the contract is to be enforced by arbitration. If, in addition, the contract does not specify the applicable law, then the substantive and procedural law applicable to the contract may be left undetermined until the moment of actual litigation.

Through a system of coordination between leading arbitration associations, a parallel attempt has been made to allow flexibility in the determination of the applicable law until the moment when enforcement through arbitration is required. At such time, if one or both of the parties object to carrying out the contract under the law specified in the contract, a commission is called together by the president of the standing arbitration commission for the purpose of choosing an applicable law, presumably taking into consideration the possibilities of carrying out the arbitral decision.

Private enterprise wields power in international trade. Competition provides some check to this power and, therefore, should be encouraged. But it is not proper to permit private enterprise to escape accountability to the countries whose trade it directly and substantially affects. Where arbitration serves that result, to that extent it is an abuse, and can serve only to bring all arbitration into disrepute.

²² INTERNATIONAL CHAMBER OF COMMERCE, ENFORCEMENT OF ARBITRATION AWARDS 12-14 (Brochure No. 174, 1953), discussed in Walker, *United States Treaty Policy on Commercial Arbitration—1946-1957*, in DOMKE, INTERNATIONAL TRADE ARBITRATION 49, 56 (1958).

A careful study of the present role of arbitration in evading public trade regulations ought to be made by each country concerned. Means should be sought by which ultimate accountability to governments and responsibility for actions can be assured. One of the principal difficulties in such a study, however, will be access to adequate records.

D. In the Case of Regulated Industries in Foreign Trade, Continuous Provision Should Be Made for Effective Consideration of the Rights and Interests Not Only of the Nationals and Aliens Engaged in the Industry But of Other Countries Directly and Substantially Affected by Such Regulation

Every country has experienced the fact that certain industries are so essential to its economy that the public interest requires their pervasive and continuing regulation. It is in this broad sense that I here employ the term "regulated industries." If the industry is directly engaged in the foreign trade of the regulating country, the effect on other countries of such regulation is direct and may be substantial.

1. Such Regulation May Well Be Lawful by Any Standards

The regulation of a country's domestic and foreign trade is an exercise of sovereignty. Any discussion of regulated industries should begin, therefore, with the assumption that regulation is undertaken on the basis of what is believed to be in the public interest of the regulating country.

In the case of the Swiss watch industry, the Swiss Government concluded that the national interest required the protection of that industry and the prevention of its migration abroad. Legislation—intended to be purely domestic in its application—was enacted to assure that the manufacture and export of watches, watch parts, and watch-making machinery would be in accordance with this governmental policy. No one could contend that Switzerland may not legislate as it wishes within its territory. But the effects of the legislation flow out of the country with the export of 95% of the annual watch production.

Ocean shipping serves as the "life line" of maritime countries. Even the United States, though less dependent on foreign trade than many other countries, cannot be indifferent to the terms, conditions, and adequacy of ocean shipping, particularly when there is evidence that rates have been unduly raised in the absence of competition.

Each nation has the right to determine the terms and conditions upon which ships may enter its ports. It can require the presentation of documents; it can require that a ship and its personnel act in a

responsible manner while in its ports. Should a ship be unwilling to comply with applicable regulations, it may, in the absence of a treaty limiting the exercise of that power, be denied access to the ports of that country.

The shipping industry is regulated by cartels of competing lines. Each country has reacted to this private power situation in its own way. In France, national flag lines may be compelled to join conferences. In the United States, conferences are tolerated, provided the lines do not abuse the suppression of competition inherent in the conference agreement. New lines are to be allowed access to the trade; the conference agreement and all its amendments are to be made public; certain provisions in the agreements believed inimical to American trade are to be suppressed; and provisions must be made in the agreements for the protection of the shipper.

Because the majority of American exports and imports are transported in ships flying foreign flags, regulation of all those participating in the American trade directly affects other countries.

2. Public International Law Provides No Adequate Solution

The problem of the extraterritorial effects of trade regulation has become a matter of international concern only in very recent times. Whether dealing with regulated industries or *ad hoc* public trade regulation, the difficulty is the same. No guidelines can be found in classical international law. The problem was so recently recognized that principles have not yet had time to develop. Nor has their development been encouraged by the fact that the community of nations is currently experiencing a weakening of its power to originate and maintain international legal principles. Experience shows that specialized rules of the sort necessary to resolve the problem of the extraterritorial effects of trade regulation are usually not developed in international law before the outbreak of an actual conflict; they follow conflicts.

Absent appropriate treaties, only a few generally recognized principles of international law cast light on the problem. A country is not to discriminate unreasonably between its nationals and aliens. Nor is a country to interfere in the internal affairs of another country. There appears to be general recognition of the principle of territorial power, and a certain jurisdiction of a country over its nationals. However, no state may establish legal rules which will be binding with regard to persons or things situated in the territory of another state except to the extent it has in personam jurisdiction.

These rules are so vague that they offer little help in a specific case. In the absence of clear cut rules, it does not appear feasible to turn to

international courts for assistance. Just as national courts cannot create international law, international courts can only apply that which is recognized to exist. There is no international administrative law, and consequently no ready machinery to avert or remedy the conflict between the policies and practices of countries in the field of trade regulation.

There is a lack of consensus at present as to what regulation of international trade by individual nations is proper. Even countries which have enacted effective antitrust laws sometimes have difficulty in finding common ground. These circumstances make the problem more difficult, but not insoluble.

New treaties might provide machinery for the resolution of these disputes between the signatories. They could require equal treatment of the nationals of both countries and encourage cooperative action for the purpose of eliminating trade restraints. But those existing bilateral treaties, which date from a time when such problems were not important, provide inadequate language to meet the situation. In the case of more recent treaties, where language may be adequate, lack of imagination and energy has resulted in their not being applied.

3. In This State of the Law, Countries Should Voluntarily Provide a Hearing to Other Countries Directly and Substantially Affected by Continuous Regulation of an Industry

The problem of the extraterritorial effect of trade regulation might arguably be approached by the execution of multilateral treaties. Whatever its merits, however, this solution has proved unattainable, as evidenced by the fate of the Havana Charter.²³ But even if such a formal solution is still a long way off, it ought to be possible to develop informal, flexible methods of dealing with the problem, which could be molded to the practicalities of the situation, providing information requisite to making practical judgments and the machinery to carry them out. The possibility of a greater role in this process for private persons under government supervision should not be ignored.

In addition, much can be done by the regulating country to avoid the conflicts *in limine*. In the case of industries whose regulation is so detailed as to come within the jurisdiction of a regulatory body, provision should be made for allowing foreign governments to present evidence and arguments, both when essential laws are to be adopted by

²³ The Havana Charter was a multilateral treaty attempting to establish the International Trade Organization. Although it was widely hailed at the time of its conception, the Charter failed because of the refusal of the United States Congress to approve United States entry into the agreement. See Gardner, *A Critique of the United States Foreign Economic Policy*, in PROEHL, *LEGAL PROBLEMS OF INTERNATIONAL TRADE* 121, 138 (1959); Sohn, *Proposals for the Establishment of International Tribunals*, in DOMKE, *INTERNATIONAL TRADE ARBITRATION* 63, 74 (1958).

the legislature and when the regulatory agency is about to adopt regulations or apply the law and regulations to a particular case. The Federal Maritime Commission recognized this need in inviting comments by foreign governments on its proposed regulations designed to assist in carrying out the 1961 amendments to the Shipping Act of 1916.

Existing treaties and agreements might provide adequate procedures and grounds for the resolution of disputes brought on by governmental regulation, but such methods may be cumbersome, insulated to a large degree from the governmental body effecting the regulation, and unrealistic in the case of a sector of the economy subject to continuing regulation. Where such conditions prevail, less formal procedures should be developed, permitting arguments to be addressed by one government directly to the regulating agency of the other government.

At first sight, it may seem demeaning for a government to appear in argument before a regulatory agency of another government. But this obstacle can be handled in a practical way which should avoid embarrassment. The representative of the foreign country could come from the branch of the foreign government concerned with the particular industry in question. An attempt should be made to create a situation in which peers are meeting in the administrative forum. If matters are not resolved adequately on this level, then it may be necessary to make official representations through the foreign offices of the respective governments.

It is important for the foreign country's interest at least to be heard, if not always as completely protected as that country might desire. It is a familiar American experience that statements of position perseveringly asserted have considerable persuasiveness in regulatory forums.

The legislature of each country should take a broad view of what is in the best interest of that country's foreign trade. Regulatory agencies, in turn, might well consider enlarging the concept of the "public interest" which they are protecting to embrace the public abroad which is substantially affected by the regulation.

E. Cartels Enjoying the Fruits of Anticompetitive Activities Ought Not To Be Allowed To Keep the Records Essential to Accountability for Such Actions Away From a Country Directly and Substantially Affected

Cartels, in effect, amount to private regulation of international trade. They seek a haven in those countries which will not hold them

criminally or civilly accountable for their actions. In some instances, their documents are protected from foreign courts and agencies by laws actually enacted to prevent the seizure of economic secrets by foreign governments during World War II. In other instances, the local government refuses its support to the requesting nation as a matter of policy, possibly fearful of "fishing expeditions," and loss of business secrets. Perhaps it is even persuaded by the cartel to adopt and persevere in this policy. Where the cartel is successfully immunized, the effect may be that no government knows with any precision how much injury to competition in international trade the cartel is able to effect. Emotion and imagination then fill the factual vacuum.

What may be needed is a disinterested analysis of records, but without public disclosure of business secrets, by representatives of the governments concerned or by independent persons. These should be individuals whose stature and position will enable them to report objectively and fully to the governments concerned their findings on the questions spelled out in the terms of reference established for their study.

The regulation of ocean shipping by the United States under the amended Shipping Act of 1916 is at present deadlocked by an inability to obtain access to essential documents located abroad. This particular dispute could be overcome by informal cooperation without jeopardy to the principle that each nation may exercise full sovereignty with regard to the regulation of its own trade and the disposition of documents within its physical power. In the interest of achieving a mutually beneficial end to the current disagreement in that industry, I suggest the following fact-finding procedure.

The disputing countries would agree (1) to the employment of compulsory processes to obtain necessary documents from sources within their respective jurisdictions, and (2) to the appointment of three judges of different nationality, meeting within a disinterested country, to inspect the documents which are in issue. These judges would certify a report answering questions of the Federal Maritime Commission which the disputing parties have agreed are pertinent. When necessary, the appointed judges might be assisted by experts in the field. On the basis of this report, the American authorities could then proceed to act under their own law. The report might also serve as a basis for further international negotiations. Similar solutions should and could be found for other disputes over documents.

IV. OBSERVATIONS AND ADDITIONAL RECOMMENDATIONS

The elimination of restraints on international trade should be a long-range objective; it is unreasonable to assume that such restraints

can be quickly eliminated. From this it follows that a broad, long-range program should be established which seeks to progress toward the ultimate goal by increments which experience and need make possible.

Achievement of this long-range objective is made more difficult when individual cases are decided without reference to it.

International cooperative action must be based on a realization that in some cases a country may be called upon to assist another country in carrying out its trade regulation policies even though the assisting country is not directly or substantially affected by the restraint of trade concerned. Indeed, cooperative action might require that a country suffer an economic disadvantage while assisting another country in this manner.

Elsewhere in this Article, I have made certain recommendations in the context of specific problems. The following proposals are of a more general nature.²⁴

A. Specific Case Studies by Cooperating Nations

Specific case studies should be jointly undertaken by the United States, the Common Market, the members of the Common Market, Great Britain, Canada, Japan, and appropriate international organizations. These studies would serve as a factual basis for cooperative action against restrictive practices in international trade. They should be designed to determine:

(1) The nature, extent, and effectiveness of private cartels and governmental regulations in the export and import trade;

(2) The existence and role of price fixing, division of markets, setting of quotas, boycotting of competitors, and exclusive dealing;

(3) The nature and extent to which practices restraining international trade are regulated or prohibited by existing law;

(4) The nature and extent to which regulatory gaps exist, as to the cartels concerned, especially insofar as they make it difficult or impossible for countries adversely affected by cartels to obtain access to necessary data, to obtain jurisdiction over persons and property, or to compel action by or impose sanctions upon the cartel or its members;

(5) The adverse economic and political effects of such regulatory gaps.

²⁴ These proposals were largely suggested to me by the committee reports prepared by those participating in the Conference.

B. The Industries To Be Studied

Such case studies could usefully be undertaken simultaneously in the following industries:

- (1) Waterborne freight by common carriers in international commerce, with particular reference to the conference agreements;
- (2) Wheat and flour;
- (3) One of the industries in which export trade associations operate under the protection of the American Webb-Pomerene Act;
- (4) Sewing machines;
- (5) Machine tools.

C. Abolition and Regulation of Restrictive Practices

On the basis of the facts developed through such case studies, as well as data and other pertinent information available from existing sources relating to other aspects of international trade, cooperative efforts should be made to abolish price fixing, division of markets, setting of quotas, boycotting of competitors, and exclusive dealing. Other restrictive trade practices which cannot or should not be abolished should be effectively regulated in international trade.

Analysis should be made of existing national and international facilities for cooperation and control of such practices to determine how they might be fully utilized in this endeavor.

Existing national and international agencies ought to be strengthened and more fully utilized to collect, coordinate, and disseminate information now publicly available. Agreement should be reached on a cooperative basis, through existing means of international cooperation, as to the practices which should be abolished or regulated in each part of international trade. Where studies demonstrate that regulatory gaps exist, steps should be taken on both bilateral and multilateral bases to close such gaps. To enable a country to carry out its program of regulation of restrictive trade practices, means of cooperative assistance should be developed by which it may seek the assistance of another country in obtaining documents, data, and other information available only by compulsory processes.

Consideration should also be given to the possibility of achieving international agreement in various areas, including the following:

- (1) Regulation of export cartels to prevent their use as economic weapons against other countries or their nationals;
- (2) Proscription of certain types of conduct by cartels which logic and experience show to be inimical to the public interest, such as

price fixing, division of markets, setting of quotas, boycotting, and exclusive dealing;

(3) Reconsideration of the ITO and UN proposals for international agreement on restrictive trade practices;

(4) Harmonization of the restrictive trade practice laws in the various countries insofar as practicable;

(5) Harmonization of the laws, regulations, and practices of a country regulating an industry so as to reduce to a minimum the adverse effects thereof on other countries;

(6) Development of effective consultation machinery—such as that provided for in the treaties of friendship and commerce—between the regulatory agencies of the countries concerned, to facilitate joint action in the respective countries in such matters as investigations and remedies, and to minimize conflicts between countries arising out of the regulation of trade, including regulated industries.

COMMENT

GEORGE W. HAIGHT †

It is with some hesitation that I submit the following rather detailed comments on Dr. Miller's Report. There is so much in this document that is useful and constructive that the criticisms below, standing alone, might suggest a lack of receptivity of new and challenging ideas. Such a suggestion, however, would be contrary to the fact. What prompts the following observations is, rather, a desire to qualify occasional statements that appear somewhat dogmatic, and to call attention to certain aspects that may have been overlooked.

I. THE UNQUALIFIED NATURE OF THE PROPOSITIONS

Dr. Miller has stated that the "Basic Propositions" included in his Report "received surprisingly few challenges"¹ at the Conference. It is my recollection, however, that there were many challenges. Moreover, the debate was mainly in general terms; it was not directed to these propositions in particular. As they are stated, it is apparent that many of the propositions are too broad and dogmatic. For example,

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¹ Page 1092 *supra*.

with reference to the first, it may be true in many instances that international trade may best be regulated by competition. But there are many industries—such as aviation, shipping, coffee, sugar, tin, and cocoa—where this is not the best method. These industries require other forms of regulation. Moreover, it is not clear what is meant by “international trade,” “regulated,” or “competition.” There is and always has been competition in the movement of goods across national boundaries in the sense of national and commercial rivalry. It is difficult to conceive of such rivalry ceasing to exist in some form or other. Whether competition should be regulated, however, and if so in what manner, must depend on the circumstances of each situation. Where commodity agreements or some other form of regulation are not available, is trade to fall into the hands of the strongest, or are the weak to be protected in some manner? And if so, in what manner? Who is to determine which traders are to survive and to what extent? Where “competition” is referred to, is it “fair competition” that is meant or any competition? These questions arise because of the unqualified nature of the propositions. Unfortunately, the answers cannot be found in them.

II. REGULATION OF CONDUCT IN FOREIGN COUNTRIES

In proposition five,² Dr. Miller states that a government has a “proper interest” in controlling or prohibiting adverse effects upon its economic interests caused by governmental or private actions in another country, and in proposition six that governmental action “which has such extraterritorial effects is not invalid or unlawful under public international law for that reason alone.”³ Of course, every government has a “proper interest” in preventing adverse effects on its internal or external trade. But a government is clearly not entitled under international law to regulate conduct in foreign countries. Such countries have their own interests to protect. They have a clear right under international law to prevent other governments from exercising control over *their own* proper interests. This is recognized in the amicus curiae brief of the United States in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, recently decided by the Supreme Court.⁴ The question whether one nation may apply its labor laws to the labor-management relations on board foreign flag vessels where the interests of the state of the flag in such relations are not nominal, but real and

² Page 1093 *supra*.

³ *Ibid*.

⁴ See Brief for United States as Amicus Curiae, p. 42, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 83 Sup. Ct. 671 (1963).

substantial, is discussed at considerable length. It is said that the "basic error" of the National Labor Relations Board

was its view that it need inquire only into the existence of "substantial United States contacts" which would bring the Empresa ships "within the jurisdictional coverage of the Act". . . . In determining whether, and to what extent, the Act may properly be applied to labor relations aboard foreign flag vessels, the crucial threshold question is not merely the extent of the United States contacts but, more-important, whether the vessels have sufficiently substantial connections with the flag country so that *Congress cannot fairly be said to have intended to overturn the established doctrine of international law and displace the foreign regulatory pattern by the American standards.*⁵

While the United States clearly is concerned with labor-management relations on board vessels entering United States territory—for otherwise it is hardly conceivable that the Board would have asserted jurisdiction over such relations—the brief states that, in the opinion of the responsible government officials, the assertion of NLRB jurisdiction over foreign flag vessels would embarrass the United States in the conduct of its international relations.⁶

The claim of jurisdiction over labor-management relations on foreign vessels entering American ports is not altogether unlike the claim in antitrust cases to the exercise of jurisdiction over the industrial and commercial conduct of foreign nationals in foreign countries. In both cases, the claim is founded on direct and substantial effects in the United States, in the one social and economic and in the other merely economic. In both cases, the claims are resisted on the ground that the exercise of jurisdiction would violate established principles of public international law. As a result, there are protests by foreign governments and embarrassment in the conduct of United States foreign relations. The exercise of jurisdiction by the United States in both situations would displace the foreign regulatory pattern by the American standards. Accordingly, I submit, the limitations imposed by customary international law upon the exercise of penal jurisdiction over the conduct of foreign nationals in foreign territory should have been recognized in Dr. Miller's Report.

In referring to limitations imposed by treaties and "other international contractual commitments,"⁷ the report ignores this aspect of international law. The reference to international law as not having

⁵ *Id.* at 51. (Emphasis added.)

⁶ *Id.* at 49-50.

⁷ Page 1094 *supra*.

been worked out "in detail" is related to the foreign trade of the state concerned and not to the internal or foreign trade of other states. The problem that arises is not what a state may prescribe for its own nationals, but how far it may go in regulating the conduct of foreign nationals, and hence the trade of their respective countries outside the territory of the regulating country. In such matters, international law is reasonably clear and does not need to be worked out "in detail." Interference with the extraterritorial conduct of foreign nationals requires justification under the objective territoriality or protective principles of international law. Those principles are clearly defined, and it only requires recognition of them by states in order to maintain harmony and stability in this area.

III. THE ROLE OF CARTELS IN INTERNATIONAL TRADE

In the propositions,⁸ there are frequent references to "cartels." These are not precisely defined, but the statement is made that they often are composed of or utilize "combines." The latter term is defined as "a single enterprise, under one common management, which has subsidiaries, affiliates, plants, or other facilities in different countries."⁹ Such a "single enterprise," however, is clearly not a "cartel" in the ordinary meaning of that term, and equally clearly it cannot "evade government regulation and prohibition" in the country where it is established or where it operates. The statements in the propositions relating to cartels and combines may or may not be true, depending upon the facts in particular cases. To put them forward as propositions when unsupported by facts, therefore, appears unwarranted.¹⁰

Moreover, it is apparent from article 85 of the Rome Treaty¹¹ that some restrictive arrangements among competitors affecting international trade may be useful and permissible. It is thus apparent that "cartels" may be good or bad, just as restrictive practices may be good or bad, according to whether they are harmful. In fact, in England, restrictive practices are not judged on a per se basis, but according to whether they are harmful to the public interest. There have been many cases before the Restrictive Practices Court in that country in which restrictive practices described in proposition nine¹² have been upheld, the most recent being the collective resale price maintenance scheme in

⁸ See particularly propositions 7, 9, 10, and 11, pp. 1094, 1095 *supra*.

⁹ Page 1094 n.1 *supra*.

¹⁰ No attempt was made at the Conference to examine actual cartel situations beyond the shipping and Swiss watch industries.

¹¹ 298 U.N.T.S. 47, 51 AM. J. INT'L L. 865, 895 (1957), CCH COMMON MARKET REP. ¶ 2001.

¹² Page 1095 *supra*.

the book trade known as the Net Book Agreement.¹³ This agreement is clearly a "cartel," but it is one that has been held to be beneficial.

While proposition seven¹⁴ gives recognition to diversity of treatment at the domestic level, Dr. Miller does not seem to appreciate that the absence of prohibitions relating to exports does not mean that governments are indifferent to the practices of exporters. On the contrary, as the debates on the 1956 English act¹⁵ show, a great deal of consideration was given to the question in that country. At this stage there appears to be an unwillingness on the part of many governments to impose prohibitions on exporters that may impede their trade relations in foreign markets. It also appears to be recognized that governments controlling foreign markets should be free to deal with such markets in a manner they think in their own best interest. The stage may not, therefore, have been reached where agreement is possible along the lines suggested in proposition nine.¹⁶

IV. THE PROPER DEFINITION OF A JOINT VENTURE

In the "Case Studies," a number of questions are put regarding "joint ventures." At the Conference, however, it was made abundantly clear that the hypothetical case proposed as the first study is a patent and trade mark pool, not at all a typical joint venture. This fact should have been brought out in Dr. Miller's Report by referring to "such joint ventures" or "such a joint venture," rather than to joint ventures generally. There are clearly many joint ventures that promote or develop trade rather than restrict it, and that are widely regarded as desirable and legitimate.

V. THE FIRST CASE STUDY

In section III of the Report, headed "Discussion," there is a statement that the first case study would be unlawful under American law because the American member would be foreclosed "from competing in important world markets."¹⁷ But under the *Imperial Chemical* and *National Lead* cases,¹⁸ illegality would not be per se but rather would depend on the extent to which American exports or imports are unrea-

¹³ *In re* Net Book Agreement, [1962] 1 Weekly L.R. 1347 (Restrictive Practices Ct.); cf. *Kores Mfg. Co. v. Kolok Mfg. Co.*, [1957] 1 Weekly L.R. 1012 (Ch.).

¹⁴ Page 1094 *supra*.

¹⁵ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68. See 551 H.C. DEB. (5th ser.) 2040-41 (1956); 552 H.C. DEB. (5th ser.) 234-38 (1956).

¹⁶ Page 1095 *supra*.

¹⁷ Page 1103 *supra*.

¹⁸ *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), 105 F. Supp. 215 (S.D.N.Y. 1952); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

sonably, directly, and substantially restrained. From the facts given in the first case study, it does not appear that there are any such exports or imports. If that is the case, American law would not apply. Nor is it likely that an American court would go so far as to order "dissolution" of a Swiss corporation. It might direct the American member to divest itself of its interest in the corporation and prohibit performance of the contracts, but any attempted direct interference with the internal order of a foreign country such as ordering dissolution would clearly be contrary to accepted principles of international comity.

VI. FLAGS OF CONVENIENCE

Dr. Miller has made reference to the employment of flags of convenience.¹⁹ The legitimacy of this practice is recognized in the amicus curiae brief of the United States referred to above.²⁰ There is nothing insidious or illegitimate about such flags. Moreover, the use of subsidiaries and affiliates in foreign countries is not really comparable to the use of such flags as Dr. Miller suggests. An enterprise does not take on the guise of a foreign nationality by employing such measures, except to the extent that the laws of such countries so provide. Nor can it be said that the effects of private trade regulation are "felt throughout international trade." They may be felt to some extent in such trade, but whether they are felt and, if so, to what extent must depend upon the facts of each case.

VII. AMERICAN ANTITRUST DECISIONS AND THE REGULATION OF INTERNATIONAL TRADE

In his Report, Dr. Miller states that American antitrust decisions contain no instance of an effort to regulate international trade as such. The orders of the district court in *Imperial Chemical* do, however, constitute just such an effort with respect to the international trade of the two defendant companies. They were ordered to break up joint subsidiaries in foreign countries and to transfer foreign patents. The reach of the decision in that case provoked the well known comments by the English court in *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*²¹ Moreover, the significant feature of the American decisions with respect to jurisdiction over the subject matter is not that the transactions complained of "had direct and substantial effect on the American economy," but that the arrangements in each case operated

¹⁹ Page 1104 *supra*.

²⁰ See note 4 *supra*.

²¹ *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] 1 Ch. 19.

within the United States. In all of these cases, *United States v. Aluminum Co. of America*²² included, the arrangements actually so operated. In *Alcoa*, for example, Aluminium Limited was shown to have worked closely with its American affiliate in the United States and to have been Alcoa's instrument for excluding imports. These facts were mentioned at the Conference, and may serve to explain the decision of the Court of Appeals which otherwise appears contrary to international law.

VIII. THE RELATIVE DESIRABILITY OF FREE COMPETITION

In the Report it is said that "insufficient recognition" has been given to "the responsibility of each country for the creation and maintenance of competition in international trade."²³ Foreign trade is, however, very much the concern of most governments; they are generally alive to the difficulties of establishing and maintaining the positions of their own nationals. Free competition in international trade, particularly when it is largely permeated with the activities of state trading agencies and government owned or subsidized entities, may not always be desirable. Exporters in small countries may be encouraged to combine in order to compete effectively with the nationals of large countries and with state agencies. In view of the many complexities involved, absolute competition may frequently be less desirable than some form of cooperation. Perhaps export combinations are no longer necessary for powerful American concerns, but they may well be for smaller countries. Even for American concerns, some form of combination may frequently be desirable in order to deal with the power of state-owned or -subsidized entities.

Accordingly, the stress should more appropriately be placed on international agreement as a means of minimizing conflicts and maintaining an equilibrium in which all interests are adequately and fairly represented and maintained. Governments should support their nationals in their efforts to achieve such equilibrium, and should help to defend their interests against predatory practices of foreign groups or entities.

IX. GOVERNMENT SEIZURE OF ALIEN PROPERTY

The statement in Dr. Miller's Report that "seizures of private property owned by aliens are less likely to occasion serious intergovernmental conflicts today"²⁴ appears to overlook the recent seizures in Cuba and Brazil, and particularly the possible impact of the Foreign

²² 148 F.2d 416 (2d Cir. 1945).

²³ Page 1105 *supra*.

²⁴ Page 1107 *supra*.

Assistance Act of 1962,²⁵ amending the act of 1961, which requires the suspension of aid to countries in which American interests are seized without adequate provision for prompt and effective compensation.

X. ARBITRATION

There is in Dr. Miller's Report an extensive discussion of arbitration "as a device which may be used to escape national regulations intended to control anticompetitive activities."²⁶ It is difficult for me to understand why so much is made of this subject. An agreement to arbitrate disputes arising under a cartel agreement in a country that recognizes the validity of such an agreement could hardly prevent a court having jurisdiction from applying a governing antitrust law to condemn the agreement. Under private law, such a provision would not prevent the application of public law. It is inconceivable, for example, that a court in the United States would hold that a reference to Swiss law or a provision for arbitration by the International Chamber of Commerce would prevent a contract that violated the Sherman Act from being held null and void. Although emphasis was placed at the Conference on the role of International Chamber of Commerce arbitration in cartel agreements, it has since become apparent that none of its arbitrations have arisen under cartel agreements. Even if such a question were to arise, however, there could be no doubt regarding the overriding effect of public law, subject, of course, to conformity with public international law.

XI. "EFFECTS" OF GOVERNMENT REGULATION

Dr. Miller also makes reference to "effects" in other countries of a government's regulation of an industry. This is a troublesome expression and one that is never defined. In some instances, it appears to be regarded as the direct and proximate result of an act; in others, mere repercussions appear to be contemplated. Thus, there is a reference to "the effects" that "flow out of" Switzerland with the export of ninety-five percent of its annual watch production. Swiss watches and parts are, as the Report demonstrates, cartel made and cartel priced. But does the export of these products produce such "effects" in the countries to which they are sent as to confer jurisdiction on the courts of those countries to apply domestic legislation prohibiting practices adopted with official sanction in Switzerland? Does export constitute such an impact on importing countries that it falls within the interna-

²⁵ 76 Stat. 260, 22 U.S.C.A. § 2370(e) (Supp. 1962).

²⁶ Page 1108 *supra*.

tional law doctrine justifying the exercise of jurisdiction, based on the territorial principle, over acts outside that produce direct and substantial effects—constituting an element of prohibited conduct—within the territory? If so, the effect of every decision made in the production of every product exported from one country to another might provide a basis for antitrust jurisdiction. Such a proposition would reduce the concept of jurisdiction to an absurdity. If Switzerland may legislate as it wills within its own territory, can this freedom somehow be curtailed by the mere fact that Swiss products are exported to other countries? Does the fact that labor legislation in the United States, permitting the establishment of wage scales by the exercise of union power, produces “effects” in foreign countries to which goods are exported permit such countries to regulate the effects of high wages because they are harmful to them? Dr. Miller provides no answers to such questions.

XII. APPLICABLE PRINCIPLES OF INTERNATIONAL LAW

At a later stage in the discussion Dr. Miller states that “No guidelines can be found in classical international law. The problem was so recently recognized that principles have not yet had time to develop.”²⁷ But public international law has developed clear limitations on the exercise by a state of its sovereign power with respect to the conduct and property of aliens outside its territory. It does not, for example, permit the exercise of power in any form within the territory of another state. The internal regulation of the manufacture and pricing of goods shipped to another country may not be interfered with by another state. At the same time, such internal regulation does not constitute the exercise of power in the territory of the state to which the goods flow. The entry of goods into the importing state can, in fact, only take place with its consent. To admit such goods and then to punish the foreign enterprises which have made or exported them for having acted in their own countries in accordance with their own laws would constitute an unreasonable and abusive exercise of sovereign power. It would also constitute an indirect exercise of power in the country of origin, as it would operate to impede the lawful exercise of power there by the local sovereign. In every case where a conflict arises which cannot be solved by negotiation, the matter should be submitted to an international tribunal for a determination of which regulation should prevail in the circumstances. The proper application of international law principles could thus be determined. But it would indeed be surprising if such a tribunal were to hold that the internal

²⁷ Page 1111 *supra*.

manufacture of goods for export could not be freely regulated by the sovereign of the territory where such manufacture takes place.

Dr. Miller has stated that there are only a few principles, apart from treaties, that cast light on the topic of his Report. I respectfully submit, however, that there are clear rules governing the relations among states, not embodied in treaties or other formal agreements, which define the legitimate exercise of state power over aliens. A state, for example, is internationally responsible for the abusive treatment of aliens and their property. It cannot deny to them the basic elements of due process, nor can it take their property without paying fair compensation promptly and in an effectively realizable form. In the area of jurisdictional competence, the practice of states in their dealings with each other has resulted in a series of rules that are just as effective and operative as the rules governing denials of justice. It is universally accepted, for example, that the mere personal presence of an alien within the territory of a state does not give that state a right to punish him for acts performed abroad. Under the protective and objective territorial principles of jurisdiction, a limited extension of power over foreign conduct is permitted, but the very existence and acceptance of these principles demonstrate the fact that power cannot be exercised without restraint.

This is also apparent from the fact that even if the United States should have jurisdiction in personam over a foreign national, it would have no right to punish him for having traded in his own country with the Soviet bloc. Nor would international law recognize the prosecution of an alien on the grounds of race or religion. Far from customary international law dwindling to small dimensions, the broad development of "human rights," the expansion of trade and investment, and the growth of direct relations between governments and private business is compelling a growth and broadening of old concepts. Customary law is thus an active, living force in international relations.

The rules governing the exercise of jurisdiction over the conduct of aliens both within and without the territory of a state are currently being studied and formulated by the American Law Institute.²⁸ Reference to these rules may also be found in the decisions of international courts, of municipal courts, and in the writings of authorities on public international law. While there may be difficulty in applying these rules in particular cases, their existence cannot be denied. They arise from the basic fact that the sovereignty of every state is limited by the sovereignty of every other state. This interrelationship among sovereigns compels a mutual regard for the rights of others and a consequent lim-

²⁸ See generally *RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES* § 18 (Proposed Official Draft 1962).

itation on the power of the individual state. It is not correct, therefore, to say that the rules are so vague as to offer little help in a specific case. While there is admittedly no consensus regarding the right of any individual nation to regulate international trade, it is clear that no such nation can regulate the domestic trade of other nations. If its attempt to regulate international trade results in such an interference with the internal affairs of another state, it may be directed by an international tribunal to cease such interference. Until states can agree on the situations in which one state may assert a regulatory control over activities in another state, the mutual restraint that has long governed the behavior of states in the economic sphere should continue.

XIII. THE NEED FOR IMPARTIAL TRIBUNALS

Dr. Miller's suggestions that representatives of one state be allowed to appear before regulatory bodies in another state may serve to ameliorate some of the conflicts and frictions that arise from attempts by one nation to apply its penal legislation to the activities of foreign nationals in foreign countries. However, it may be unrealistic to expect a government to appear before a foreign state's tribunals in matters affecting the conduct of its own nationals within its own territory. Unless some means of enabling all governments affected to participate in the appointment of members of the tribunal can be devised, a nationalistic outlook is likely to predominate. It is to be hoped that municipal tribunals will become more and more international in their outlook and behavior, but some statutory direction might be required before this can come about. The ideal forum for the settlement of international problems is thus an international tribunal. Moreover, as the *amicus curiae* brief of the United States in *McCulloch v. Sociedad Nacional de Marineros de Honduras* indicates,²⁹ an act of Congress should not be construed to cover the conduct of foreign nationals in matters that properly and customarily fall within the regulatory competence of a foreign sovereign. As was there said, a "failure to recognize, and give proper weight to, the conflicting and competing interests of the foreign nations involved"³⁰ might lead to adverse consequences upon the international relations of the United States. As in the case of labor relations on foreign flag vessels, the regulatory jurisdiction of the territorial sovereign in trade matters is paramount. Conflicts only arise when jurisdiction is asserted over the conduct of foreign nationals outside the territory. Effects within the territory from such extraterritorial conduct are not by them-

²⁹ Brief for the United States as *Amicus Curiae*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 83 Sup. Ct. 671 (1963).

³⁰ *Id.* at 31.

selves sufficient to confer jurisdiction; the conduct outside the territory must be a "constituent element" of conduct prohibited within the territory.

XIV. ACCESS TO RECORDS IN FOREIGN COUNTRIES

In his discussion of access to records in foreign countries, Dr. Miller cites no instance of a cartel investigation that has been frustrated by inability to obtain information regarding facts essential to a prosecution apart from the current investigations of the shipping industry. If there are instances in which cartels have defied investigation by storing their records in search-free havens, the facts have not been presented. Even if there are such instances, however, they would not justify a general license to governments to obtain information from business entities in foreign countries regarding their activities in such countries. In the case of the shipping investigation, official statements by British officials in the House of Commons in the summer of 1962 show how strong the objection is in that country to the unilateral assertion by the United States of a right to regulate an industry that is predominantly non-American.³¹

XV. "BENEFICIAL" RESTRICTIVE TRADE PRACTICES

Dr. Miller has recommended studies on the basis of which "co-operative efforts should be made to abolish price fixing, division of markets, setting of quotas, boycotting of competitors, and exclusive dealing."³² He seems to assume that these practices will generally be regarded as requiring abolition. However, such is not the case today. Some of these practices, as noted above, may in certain circumstances—such as price fixing, setting quotas, and exclusive dealing—be regarded as beneficial. It would be difficult to obtain agreement that they should be per se offenses. Smaller states may benefit by having their nationals participate in international arrangements that provide benefits for them in return for economic concessions on their part. Even larger states, such as the United Kingdom, may consider price fixing in international trade of benefit to their nationals. In the case of the rubber tire industry, for example, the Monopolies Commission found that price fixing arrangements with the United States and French companies were not contrary to the public interest of the United Kingdom.³³ On the contrary, the Commission found that having a domestic tire industry which

³¹ See 659 H.C. DEB. (5th ser.) 400-08 (1962).

³² Page 1116 *supra*.

³³ *Report on the Supply and Export of Pneumatic Tyres*, 3 MONOPOLIES & RESTRICTIVE PRACTICES COMM'N REP. 134 (1955).

could be policed internally in accordance with British law would enable British companies to obtain fair prices for their products abroad, and that the alternative might be ruinous competition with the far more powerful American companies. In particular instances, therefore, these practices may benefit rather than harm the public. Even the German anti-cartel law and the Rome Treaty recognize that such practices may be justified.

Before any recommendations are made, therefore, there should be a showing that these particular practices in the particular studies undertaken are harmful, and that there is a lack of cooperation among governments in dealing with them. For example, studies are now being made by the EEC Commission of various types and aspects of exclusive dealing. There are indications that certain categories of exclusive dealing arrangements will be exempted as a class under article 85(3) of the Rome Treaty,³⁴ and that certain others will not be considered as falling under article 85(1).³⁵ In view of the complex nature of international trade, particularly in an area as highly developed as the European Common Market, it would appear unwise to be too dogmatic on this subject. There may also be situations, as the conference agreements in the shipping industry demonstrate, in which price fixing and the setting of quotas may be acceptable. In these respects, it seems to me, Dr. Miller's Report is too dogmatic and doctrinaire.

COMMENT

JOSEPH J. A. ELLIS †

I have been invited to submit my comments on Dr. Miller's Report, which deals with a wide variety of subjects. It is my intention to limit myself to such general observations as will reflect the difference in approach to the problems connected with extraterritorial application of trade regulation legislation as viewed by Dr. Miller and by myself.

I. INTERNATIONAL LAW AND JURISDICTION

Dr. Miller, although recognizing the existence of certain principles of international law which limit the power of a state to apply its laws unilaterally to acts which have been performed outside its national ter-

³⁴ 298 U.N.T.S. 48, 51 AM. J. INT'L L. 865, 895, CCH COMMON MARKET REP. ¶ 2051.

³⁵ 298 U.N.T.S. 47, 51 AM. J. INT'L L. 865, 895, CCH COMMON MARKET REP. ¶ 2011.

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ritory, does not always seem to give full credit to the existence of those principles.

It cannot be denied that jurisdiction is an aspect of sovereignty, and that the exercise of jurisdiction can never go beyond the limits of sovereignty itself. Jurisdiction over aliens in criminal matters, unless based on the protective principle, must be grounded upon the commission of a crime in the national territory. The mere fact that an act radiates effects upon foreign territory is not sufficient basis for an assumption of jurisdiction by the foreign state unless, in the words of the Permanent Court of International Justice, "one of the constituent elements of the offense, and more especially its effects, have taken place there."¹ In order to vest jurisdiction in the foreign state, therefore, the effects must be a constituent element of the crime. Moreover, the *Case of the S.S. "Lotus"*² dealt with clearly defined physical effects and with an act that was considered criminal in both states. None of those elements can be found in the case of economic offenses which involve acts performed outside the territory.

This limitation applies not only to jurisdiction in criminal cases, but generally to jurisdiction in all matters of public law. The exception recognized by states applying the protective principle is limited to a small and well defined category of cases.

Let us suppose that under Netherlands law it is forbidden to build houses within ten kilometres of an airport. Let us further assume that there is an airport in the Netherlands in the immediate vicinity of the Belgian border. On the Belgian side of the border, buildings are being constructed well within the distance of ten kilometres of the airport. The existence of those buildings would endanger the safety of the approaches to the airport, and the state of the Netherlands would certainly be interested in having those buildings removed. Nevertheless, it is absolutely clear that the Netherlands would lack jurisdiction to punish the Belgian builders for having built within ten kilometres of an airport. This result would not be changed if the Belgian constructors were apprehended in the Netherlands. The direct effect of the establishment of the buildings upon the safety of the Netherlands airport is insufficient to give such jurisdiction. With still more reason, the Netherlands government would not be entitled under international law to order the Belgian constructors to stop building or to demolish the buildings which they have already completed. Nobody could seriously contend that such assumption of jurisdiction by the Netherlands would not constitute a most serious infringement of Belgian sovereignty. The

¹ *Case of the S.S. "Lotus,"* P.C.I.J., ser. A, No. 9, at 23 (1927).

² *Ibid.*

way for the Netherlands government to proceed would be to address itself to the Belgian government, asking that government's cooperation in keeping the lanes of approach to the Netherlands airport free. If this wish of the Netherlands government is consistent with the policy of the Belgian government, the Belgian government would decide, of its own free will, to take appropriate measures. But the Belgian government would only take such measures if they were in fact consistent with Belgian policy. If the Belgian government refuses to act, the Netherlands government would have to meet the situation in some other way, even possibly by moving the airport away from the border.

II. UNITED STATES V. ALUMINUM CO. OF AMERICA ³

Dr. Miller accepts the *Alcoa* case as a correct statement of international law. This view, however, has not been generally accepted by European jurists. Reference may be made to the authoritative statements by Professor R. Y. Jennings:

This is, indeed, a startling projection of the objective test of territoriality; for in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners, provided only that the agreement was intended to have repercussions and did in fact have some repercussions upon American imports or exports; and this though it is acknowledged in the judgment that such repercussions may be the result of "almost any limitation on the supply of goods" in countries trading with the United States.⁴

Professor Jennings continues:

[I]t may, with respect, be submitted that the *Alcoa* pattern of case goes too far when "jurisdiction" is assumed over foreigners' foreign agreements, merely because it has been possible to allege some "effects" on United States imports or exports, and because the agreement would have been illegal if made in the United States. This kind of jurisdiction seems to offend in two ways. First, since this jurisdiction is rested by the court on the objective test of *territorial* jurisdiction, it must be kept within the confines of that concept. But to extend that concept to cover effects in the sense of mere repercussions—sometimes repercussions ancillary to the purpose of the scheme as in the *Alcoa* case—is not only to extend it beyond the limits covered by authority but also to reduce it to an absurdity. Practically unlimited extraterritorial juris-

³ 148 F.2d 416 (2d Cir. 1945).

⁴ Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, [1957] BRIT. YB. INT'L L. 146, 165-66 (1958).

diction cannot reasonably be founded on a territorial principle. Secondly, even allowing a most liberal view of the limits of *extraterritorial* jurisdiction, these cases still offend against the ultimate limit because they are an attempt to export into other countries and to make operate there what are after all peculiarly American political notions.⁵

Professor J. N. W. Verzijl states:

The judicial order to Aluminium Ltd. itself was therefore, in my opinion, simply an "international nullity." And how could *that* order ever be directly enforced without a clear infringement of Canada's territorial sovereignty? Indirect attempts to enforce it, for instance by bringing a criminal prosecution against, or taking into custody, any officials of Aluminium Ltd. who might enter the territory of the United States are so unlikely and in such flagrant violation of the delimitation of criminal jurisdictions under international law, that such a measure scarcely enters into the discussion, even though it seems exceptionally and quite wrongly to have occurred.⁶

To this should be added the comment of Dr. Rudolf Mueller that "acts of foreigners are subject to the penal provisions only where they are committed in the state," and that "there is hardly any doubt that the territorial principle applies" in international administrative law.⁷

III. LACK OF A UNIFORM PHILOSOPHY ON RESTRICTIVE BUSINESS PRACTICES

Another basic fact to which insufficient weight is attached by Dr. Miller is that there is amongst civilized nations no uniform philosophy on restrictive business practices. He proceeds from the supposition that such practices are necessarily bad and, therefore, goes on to say that governments should cooperate to put an end to those practices in international trade.

Dr. Miller does not sufficiently take into account that such co-operation can only be asked in those cases in which national policies coincide. If in any given case the policies would not coincide, but would be completely different—as often happens to be the case—the guiding principle should be that each state should have full respect for the other state's sovereignty. A state should not, in those circumstances,

⁵ *Id.* at 175.

⁶ Verzijl, *The Controversy Regarding the So-Called Extraterritorial Effect of the American Antitrust Laws*, 8 NETHERLANDS INT'L L. REV. 3, 17 (1961).

⁷ Mueller, *Antitrust Problems in Connection With Dealing With Common Market Countries*, Address at the Edinburgh Conference, 1962.

endeavor to apply its own laws unilaterally to acts committed outside its national boundaries by non-nationals. Let us take an example concerning price-fixing arrangements. In the United States, horizontal price fixing is considered illegal *per se*;⁸ in the Netherlands it is not. This cannot be construed as a failure by the Netherlands to enact prohibitory legislation in the field. The system which is laid down in the Netherlands law is the result of a positive policy decision. As an indication of how this policy operates, reference may be made to the 1961 yearly report of the Netherlands government to Parliament concerning the application of the Netherlands Economic Competition Law:

Cartel policy was again last year directed largely toward maintaining the policy of price stabilization. In this connection mention should first of all be made of the fact that, after the revaluation of the guilder, a letter was sent to 168 price cartels enquiring into the effect of the revaluation of the level of the fixed cartel prices. Only where it was certain that the cartel price level could not be affected by the revaluation was the letter not sent to the cartel concerned.

In all, twenty-seven price cartels had lowered their cartel prices as a result of the revaluation. In all these cases the full advantage of the revaluation proved to have been passed on in the lower cartel prices. The other cartels to whom the letter was sent replied that for the time being the revaluation would not occasion any lowering of cartel prices.

Failure to lower cartel prices following the revaluation was held to be acceptable on the basis of, *inter alia*, one or more of the following arguments: a) no imported base and or ancillary materials are used to manufacture the product whose price is regulated by the cartel; b) in so far as such materials are imported, they come solely from Western Germany, so that no advantage has accrued from the revaluation; c) the import contracts are expressed in guilders, and the foreign suppliers have seen no occasion to revise the guilder price; d) following the revaluation, the foreign suppliers have increased their prices—expressed in their own currencies—to such an extent as to offset the advantage accruing from the revaluation; e) the advantage accruing from the revaluation is offset for the members of the cartel by a recent increase in external costs which has not been passed on. In these cases, therefore, the revaluation has meant that a price increase can be dispensed with; f) the advantage accruing from the revaluation has merely helped to make production less unprofitable than hitherto.

In the case of each arrangement, the reasons given for not applying a price reduction were examined to see whether

⁸ United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

they were acceptable in the light of the price stabilization policy. In six cases a further investigation proved necessary. At the end of the year under review, no decision had yet been taken in three cases.

Quite apart from the concern with price cartels from the point of view of the revaluation, many changes in cartel prices were tested against the criteria of the price stabilization policy during the year under review. In sixty cases these changes proved to be unobjectionable. In a few cases the proposed cartel price increases were not put into effect because the cartel concerned had ascertained in advance that the increase would be open to objection from the price policy point of view. In a few other cases, increases which had already been put into effect were cancelled in the light of the objections raised.⁹

Further, it is of interest to note that a study had been made of horizontal minimum price arrangements and exclusive dealing arrangements, with a view to deciding whether it would be advisable to issue a general declaration of non-binding with regard to such arrangements.¹⁰ As a result of this study, the Netherlands government decided not to issue such a declaration concerning those two types of contracts because the admissibility of such arrangements cannot be decided upon otherwise than on a case-to-case basis, depending on the concrete circumstances in each case. A general declaration of non-binding would, therefore, necessarily have to be accompanied by provision for exemptions, which would have to be granted in a relatively large number of cases.

It is clear that if the United States were to request the Netherlands to take action against price-fixing arrangements in the Netherlands for the reason that they have an effect in America which the American Government deems unfavorable, such interest of the American Government would have to yield to the national policy established by the Netherlands government. Any attempt by the United States to punish Dutch subjects for having entered into horizontal price fixing arrangements would be a clear interference with Netherlands sovereignty.

IV. OBJECTION TO UNILATERAL APPLICATION OF AMERICAN ANTITRUST LAWS

Dr. Miller makes mention of protests made by foreign governments to the American Government in connection with the unilateral application of American antitrust law to acts committed by non-

⁹ THE NETHERLANDS GOVERNMENT, 1961 ANNUAL REPORT TO PARLIAMENT (translated by the author).

¹⁰ *Ibid.*

Americans outside of the American national territory. These protests are clear evidence that among a great number of nations the extraterritorial application of American antitrust laws is considered to be inconsistent with accepted principles of international law.

If any government believes that its interests require international cooperation in the field of restrictive business practices, the first step would seem to be to ascertain how far its national policy coincides with the national policy of the other states involved. As far as those policies coincide, the other governments involved might be asked to take such measures within their own territories as would be consistent with their national policies. Only if mutual respect is shown for the sovereignty of other states can an atmosphere be created in which efficient and beneficial cooperation can take place. An attempt by any one state to try to push the extraterritorial application of its national law to the limits and to try to enforce such law to the point that other states, either through legislation as is the case with section 39 of the Netherlands Economic Competition Law,¹¹ or through the judiciary as has been the case in England,¹² take measures to forbid compliance with orders given by that state would hardly provide an adequate basis for creating sufficient confidence to attain the ends of international cooperation.

An example from actual practice is the attitude of the Netherlands government—and its attitude is almost identical with that of many other governments—as evidenced by its protest in the third of the cases mentioned under the case studies in Dr. Miller's Report.¹³ This protest includes the following:

In his Note of March 7, 1960, the Netherlands Ambassador already expressed the grave concern of the Netherlands Government about a similar action by a Grand Jury of the United States District Court for the District of Columbia. The State Department replies of March 25 and July 6, 1960, did not remove this concern.

For the same reasons as those contained in the Ambassador's note of March 7, the Netherlands Government is greatly concerned about the above mentioned Order of the Federal Maritime Board. Again it appears that proceedings are being instituted against Netherlands companies in connection with activities essentially falling within the jurisdiction

¹¹ Economic Competition Act, June 28, 1956, as amended by the Act of July 16, 1958, § 39, 2 EUROPEAN PRODUCTIVITY AGENCY OF THE ORGANISATION FOR EUROPEAN ECONOMIC COOPERATION, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES NL1.0 (Neth.).

¹² *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] 1 Ch. 19 (1952).

¹³ Page 1100 *supra*.

of their home country and that production is being required of documents concerning those activities. The Netherlands Government would be unable to accept jurisdiction of a United States Court or agency in this matter and reserves its right to hold its own laws applicable.¹⁴

V. THE NEED TO ASCERTAIN POINTS OF COMMON INTEREST

The recent history of European integration shows that even among nations so closely connected as the six Common Market countries the establishment of common rules on competition in trade between the member states is a very complicated and delicate task. The Rome Treaty contains in articles 85 to 90¹⁵ only the most basic rules applicable to enterprises. So far, the implementing Regulations which have been issued contain mainly rules on form and procedure; the substantive rules which will give shape to the European Commission's competition policy must be developed on a case-by-case basis in the years to come. It would be unrealistic to expect in a larger international field that general agreement among nations can be founded on the basis of the broadly worded assumptions set forth in Dr. Miller's Report. This is particularly true in the case of joint ventures which promote rather than restrain trade, of exclusive dealing, and even of price fixing and quota arrangements that are not abusive. I submit that the first condition for achieving international cooperation, therefore, would seem to be to ascertain the existence of points of common interest between states and to formulate uniform policies, those being the only bases on which international cooperation can exist.

¹⁴ Note From the Netherlands Ambassador to the Secretary of State, November 1, 1960.

¹⁵ 298 U.N.T.S. at 47-50, 51 AM. J. INT'L L. at 895-97, CCH COMMON MARKET REP. ¶¶ 2001-2737.