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A Transnational Approach to Restrictive Business Practices

Introduction

Restrictive business practices are a natural result of commercial enterprise. "They represent nothing more than the attempts of intelligent men to interfere, to their own advantage, or that of the industry in which they are engaged, with the free working of supply and demand and the results of competition."¹ Such activities on the part of merchants and producers may work unfairly against the interests of their competitors, the consuming public, or society as a whole. To combat this, governments have intervened to regulate and prevent such practices for almost as long as there has been commerce itself.² Curiously, however, restrictive business activities are practiced on an international scale today, but no broadly effective legal means of regulating them or preventing them has been established.

There has been a strong trend toward the liberalization of international commerce through agreement among nations for the removal of state-imposed barriers and restraints. Private barriers and restraints have passed largely unscathed through this trend. This is not to intimate that international restrictive business practices have been ignored. Over forty years ago, there were proposals for a system of international controls. Later, the projected charter for the post-World War II International Trade Organization included provisions for the regulation of cartel activity and other restraints. Time and events have not favored such attempts, however. Today the prospects of an international régime are not discussed so often nor so optimistically as they once were, although to this author it seems that conditions warrant its instigation more — not less — than ever.

A short historical review is offered here as a perspective on the waxing and waning of efforts for an international system of controls over the last

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¹WILBERFORCE, CAMPBELL AND ELLES, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* 2 (2d ed., 1966).

²See, e.g., *id.*, 17-31.

four decades. This may demonstrate also that the problem is neither new nor likely to go away as the world moves inexorably toward a full-blown transnational economy. More recent literature has concentrated more on the conflicts or extraterritorial aspects of *national* restrictive business practices legislation, in particular that of the United States. Although undeniably a complex and interesting field offering ample challenge, this may be a short-sighted view which perpetuates improper mechanisms. This short discussion will attempt to touch on current thought in official international organizations (such as EFTA, the OECD, the GATT, the ECSC and EEC, and the UNCTAD) which remains preoccupied with finding international answers to an international question. Hopefully, this article will demonstrate why, along with the more specific objectives at issue and a summary of how they might be served.

Historical Perspectives

League of Nations: First Recognition of the Problem

The first formal discussions of international controls for regulating restrictive business practices came after World War I, in the League of Nations. During the period between the two wars, the League published innumerable reports and held frequent conferences, groping to explore and understand the phenomenon of a "free, world market economy" which had functioned before the first global conflict, but had apparently been a casualty of the war. In 1939, looking back over the efforts of the League, its Secretary-General stated:

When war broke out in 1914, there existed a system of economic organization in the world which functioned smoothly and which it was generally assumed would be re-established with necessary modifications once hostilities ceased. It never was fully re-established, and since the depression which began in 1929, there has been rather a state of quasi-permanent emergency than any general operative system. The problems of economic organization that will have to be faced after the termination of hostilities will therefore prove to be extremely complex and grave. . . .

Whatever the final outcome of the state of political tension may be . . . society will have to readapt itself sooner or later to a peacetime economy, and a difficult period of adaption must be foreseen . . .³

One of the problems recognized, reported, and pondered in the League of Nations Economic Committee was that of international cartels and industrial agreements. In 1926, preparatory to the World Economic Conference held in Geneva the following year under League auspices, William Oualid published *The Social Effects of International Industrial Agree-*

³Quoted in *Report to the Council on the Work of the Joint Session* 10-11 (C.52.M.52.1942.II.A.).

ments, *The Protection of Workers and Consumers*. On the basis of a review of the national laws of all those countries "in which the problem is at all acute," Oualid found substantial accord on the question of regulation and supervision of cartels. He found no country, not even the United States, which practiced flat prohibition of cartels and restrictive practices *per se*.⁴

Reasoning from his findings, Oualid urged that the moment was well-suited to the initiation of international regulations consistent with the common views of the more important industrial nations. Specifically, he proposed that the League of Nations work toward: (1) a multilateral convention for the unification of national laws on restrictive business practices; (2) a requirement that all international industrial agreements in restraint of trade be reported to, and recorded in the League of Nations, with a presumption of illegality attaching to any agreement not so filed; (3) the creation of "national joint institutions," all attached to a single "international institution," to carry out investigation and enforcement; and (4) the establishment of both national and international procedures and sanctions against improper restrictive agreements.⁵

First Divisions of Opinion: Geneva 1927

The Industrial Committee of the International Economic Conference considered the question of establishing a system of international controls on cartels as submitted by Oualid, but finally refused to recommend such action on the grounds (1) that the diversities in national attitudes were too great to admit the establishment of common norms, and (2) that many states objected to an international régime as contrary to the principles of national sovereignty and constitutional law.⁶ Instead, the Committee noted that publicity could be one of the most effective means of "securing the support of public opinion to agreements which conduce to the general interest and, on the other hand, of preventing the growth of abuses."⁷ Although it did not specify precisely how the requisite publicity was to be generated, the Committee also suggested that any national tribunal might take jurisdiction over international agreements "in so far as they involve operations within the national territory."⁸

It is not surprising that the original proposals for international controls were effectively rejected in Geneva in 1927. Oualid's report was followed

⁴Oualid, *The Social Effects of International Industrial Agreements* 18-19 (C.E.C.P. 94. 1926).

⁵*Id.*, 35.

⁶International Economic Conference at Geneva, 1927, *Final Report* 44 (C.E.I.44. 1927.11.46).

⁷*Id.*

⁸*Id.*

by numerous other reports and memoranda on the cartel question, all published by the League as working documents for the World Economic Conference.⁹ The consensus of these publications was favorable to cartels and industrial agreements, though usually with the reservation that they were susceptible to improper excesses and abuse.¹⁰ Further, the concept of "rationalization," which in the minds of most participating delegates apparently mean greater concentration and specialization of industrial resources for optimum efficiency, was thoroughly endorsed at the same conference.¹¹ Restrictive agreements were noted as a proper and desirable means to rationalization.¹²

Probably the most striking aspect of this first encounter with the subject of international restrictive business practices, in formal discussion at the international level, is that it framed the basic issues which have characterized debate on the matter ever since. The author was struck, in the research and writing of this study, with the consistency of the argument and its elements from inception to date. If this presentation does not fail the material, the reader, too, should be impressed with the fact that little progress has been made in this area in forty years, either by way of introducing new perspectives or of actually doing anything about the problem.

Economic Depression: Cartels as a Redemptive Hope

The rigors of the Great Depression shifted governmental attitudes even more radically in favor of cartel agreements. A study submitted to the

⁹These included Cassel, *Recent Monopolistic Trends in Industry and Trade* (1927.II.36); Grossman, *Methods of Economic Rapprochement* (1926.II.69.); Hirsch, *National and International Monopolies from the Point of View of Workers, Consumers, and Rationalization* (C.E.C.P.99.); Houston, *Memorandum on Rationalization in the United States* (1927.II.3.); MacGregor, *International Cartels* (1927.II.16.); de Rousiers, *Cartels and Trusts and Their Development* (1927.II.21.); Wiedenfeld, *Cartels and Combines* (1926.II.70.).

¹⁰The general tenor was perhaps best summarized in the Conference's Final Report, which stated that cartels and restrictive agreements could "secure a more methodical organization of production and a reduction in costs by means of a better utilization of existing equipment, the development on more suitable lines of a new plant, and a more rational grouping of undertakings, and, on the other hand, act as a check on uneconomic competition and reduce the evils resulting from fluctuations in industrial activity. By this means they may assure to the workers greater stability of employment and at the same time, by reducing production and distribution costs and consequently selling prices, bring advantages to the consumer. . . . Nevertheless, the Conference considers . . . that such agreements, if they encourage monopolistic tendencies and the application of unsound business methods, may check technical progress in production and involve dangers to the legitimate interests of important sections of society and of particular countries." International Economic Conference at Geneva, 1927, *Final Report* 41 (C.E.I.44.1927.II.46.).

¹¹*Ibid.*, at 38-40, including several resolutions concerning the proper use and application of rationalization; Journal of the International Economic Conference, May 4-27, 1927, *passim*.

¹²See, e.g., *id.*, May 13, 1927, at 136-37 (summarized statements of Keto of Finland, Lammers of Germany, Urban of Czechoslovakia); May 14, 1927, at 148 (summarized statement of Hunt of Scientific Organization of Labor).

League of Nations in 1930 by a committee of expert economists concluded that a number of specific international cartels had each been wholly beneficial in its economic, social and political effects.¹³ By 1932 the League was looking to cartels as one of the best true hopes for global economic recovery.¹⁴ European governments not only encouraged but required industrial agreements between competing enterprises. Characteristic of the period is the statement by the United Kingdom's Parliamentary Secretary of the Department of Overseas Trade, in Dusseldorf in 1939, to lend official support to negotiations for an anti-competitive agreement between British and German industrial associations, "that the day of the individual trader is over, that world markets should be divided and regulated by private agreement and that an agreement like that contemplated with Germany should be negotiated with other European countries."¹⁵

The United States and the War: Reversing World Opinion

The United States, after some early ambivalence toward government controls and business combinations, decided not to follow the Europeans' lead in fostering restrictive agreements as a means out of the Depression.¹⁶ Under Thurman Arnold,¹⁷ and later Wendell Berge,¹⁸ the Antitrust Division of the Justice Department mounted an enthusiastic campaign of prosecutions and antitrust publicity beginning in the later 1930s. In 1938, the Congress appropriated over one million dollars for studies on the concentration of economic power, funding the Temporary National Economic Committee,¹⁹ as well as holding its own hearings.²⁰

¹³St. Benni, *et al.*, *General Report on the Economic Aspects of International Industrial Agreements* (E.614.1930.II.41.). The authors of this report may have been less than totally objective in its preparation. See Gunther, *The Problems Involved in Regulating International Restraints of Competition by Means of Public International Law*, in II CARTEL AND MONOPOLY IN MODERN LAW 579, 582 n. 6 (1961). A review and comparison of national legislation on restrictive business practices was also submitted at this time. It noted the possible abuses and the problems of satisfactory control over international combines and agreements, but could offer no recommendation more constructive than that the problem was extremely complex and should have been studied by a mixed group of lawyers and economists to derive the best international policy in the area. DECUGIS, *et. al.*, *LEGAL ASPECTS OF INTERNATIONAL AGREEMENTS* 17-18 (E.529(I).1930.II.11.).

¹⁴See Economic Committee, *Report to the Council on the Work of the Thirty-Seventh Session* 3-4 (20.I.32.).

¹⁵Quoted in MASON, *CONTROLLING WORLD TRADE* 125 (1946).

¹⁶The definitive chronicle of the policy struggles on the way to the Roosevelt Administration's final position on antitrust in HAWLEY; *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966).

¹⁷See ARNOLD, *BOTTLENECKS OF BUSINESS* (1940). See also ARNOLD, *FOLKLORE OF CAPITALISM* (1937).

¹⁸See BERGE, *CARTELS: CHALLENGE TO A FREE WORLD* (1944).

¹⁹See *Final Report and Recommendations of the TNEC*, 77th Cong., 1st Sess., Doc. No. 35 (1941).

²⁰Popularly known as the Bone, Truman and Kilgore Hearings, these were, respectively: Committee on Patents, Hearings, Pts. 1-9, U.S. Sen., 77th Cong., 2d Sess., (1942); Special Senate Committee Investigating the National Defense Program, Hearings, Pt. 2, U.S. Sen.,

The ensuing investigations went into international as well as domestic restraints of trade, and World War II provided a unique opportunity for extensive discovery of business documents and other sources of information on the operations of international cartels. Congressional hearings in particular publicized the details of international agreements which had been used to perpetrate abuses not only for economic gain, but for the political and military objectives of Germany and Japan, and even Italy to a lesser extent. The very word "cartel," originally an innocuous economic term, became an epithet loaded with negative connotations.²¹

Such disclosures reversed Depression thinking on the beneficent nature of restrictive agreements and created in its place a preoccupation over what should be done to curb cartels at the end of the war. It was neither surprising nor atypical to find a distinguished American economist saying, early in 1945, that

... if the United States feels deeply and is prepared to move boldly and with conviction toward an international agreement outlawing cartels and restrictive patent devices and contracts through which cartel results are frequently gained, and toward a program for Germany which will remove that country as a source of cartel infection and eliminate her cartels as devices for the revival and perpetuation of German aggression, we have a fair chance to accomplish much that we set out to do.

Bear in mind that the United States does not come to this problem hat in hand, trembling, and as a suppliant. We are a powerful industrial and trading nation. We have a very substantial stake in the post-war world, and we are in a position, quite legitimately and without apology either to our neighbors or posterity, to make that world what we would like it to be. In the matter of cartels, at least, if we have convictions there is little excuse for subordinating them at this stage of the game to the inclinations of any other nation or group of nations in the world. We can move vigorously toward an international agreement to compete...²²

Post-War Efforts at International Controls: The ITO Charter

The United States had already given careful consideration to what its post-war foreign policy would be. It had been clear for some time that the American objective was a liberalized system of international commerce, as free as possible from both state and private restraints.²³ A select, high-level

77th Cong., 1st Sess., (1941-42); Subcommittee of the Senate Committee on Military Affairs, Hearings, U.S. Sen., 78th Cong., 1 Sess. (1943). Post-war literature on the operations and effects of international cartels was voluminous. A fair sampling can be gained from, e.g., EDWARDS, *ECONOMIC AND POLITICAL ASPECTS OF INTERNATIONAL CARTELS* (1944); MASON, *CONTROLLING WORLD TRADE* (1946); STOCKING AND WATKINS, *CARTELS IN ACTION* (1947).

²¹See MASON, *CONTROLLING WORLD TRADE* 29-32, 96 n. 1 (1946).

²²Lewis, *The Status of Cartels in Post-War Europe*, in Edwards (ed.), *A CARTEL POLICY FOR THE UNITED NATIONS* 25, 45 (1945).

²³General expressions to this effect had been included in Point Four of the Atlantic Charter in 1941, in the lend-lease agreement signed with Great Britain in 1942, in the 1943 amendments to the Trade Agreements Act of 1934, and in the Economic Charter of the Americas drawn in Mexico City in 1945. The latter also contained a specific anticartel

committee had worked since 1943 to draft the general objective into a comprehensive scheme published in 1945 as *Proposals for Expansion of World Trade and Employment*, with Great Britain as co-sponsor.²⁴ The *Proposals* devoted a chapter to restrictive business practices, and included other sections of employment, commodity agreements, state tariff and non-tariff barriers to international trade, and an international organization to coordinate and implement multilateral policies. The organization was to be called the International Trade Organization (ITO). With the United States' considerable prestige behind it, the ITO proposal was taken up at the first meeting of the new United Nations Economic and Social Council and a resolution was quickly adopted, calling for an international conference to discuss ratification of the plan.²⁵

Preparatory to the conference, the United States State Department released a draft charter giving concrete form to the program laid out in the *Proposals*.²⁶ The draft contained an unabashed statement of the American attitudes on restrictive business practices. Under the provisions of the draft charter, any activities "which restrain competition, limit access to markets, or foster monopolistic control in international trade" would have been presumed violations.²⁷ More specifically, the following were listed as *per se* violations wherever carried out by international combinations and/or agreements:²⁸

- (1) fixing prices or terms of sale,
- (2) dividing markets or territories,
- (3) limiting production or exports,
- (4) suppressing technology or invention,
- (5) boycott or discrimination against particular firms, or
- (6) abusing copyright, trademark, or patent rights.

The United States' draft did not meet with unanimous approval. The final conference on the proposed charter took place in Havana in 1948, after preliminary meetings in London²⁹ and Geneva³⁰ had raised and hammered out some of the more basic problems.

provision. See Final Act of the Inter-American Conference on Problems of War and Peace, Mexico City, February 1945, at 95 (Dept. State, 1945).

²⁴Dept. of State Pub. 2411, Commercial Policy Series 79 (1945).

²⁵Resolution 1/13 of 18 February 1946, ECOSOC Official Records 173, 1st Year, 1st Session (1946).

²⁶See Suggested Charter for an International Trade Organization of the United Nations, Dept. of State Pub. 2598, Commercial Policy Series 93 (1946) [hereinafter cited as US Draft].

²⁷*Id.*, art. 34(1).

²⁸*Id.*, art. 34(2).

²⁹See Preliminary Draft Charter for the International Trade Organization of the United Nations, Dept. of State Pub. 2728, Commercial Policy Series 98 (1946).

³⁰See Draft Charter for the International Trade Organization of the United Nations, Dept. of State Pub. 2927, Commercial Policy Series 106 (1947). The Geneva meeting actually

Economic Policy and Sovereignty Problems

One of the first, most basic problems throughout the deliberations on the ITO Charter was the fundamental difference in cartel policy manifested by the participants. There was general agreement about the broadest premise, that something should be done about abusive joint restraints on international commerce. But on the next most fundamental issue—whether cartels were *per se* harmful—the participants split. The United States maintained that restrictive business practices were inherently harmful to commerce, production and employment. Less developed countries (importers of cartel-restrained goods) tended to support the United States views, as did Canada. Delegates from the Benelux countries were equally insistent that combinations and cartels functioned as one of the more useful and effective means of intelligent economic planning, subject to abuses in a few isolated instances, but on the whole benevolent in their effects. A substantial bloc of other European countries, including Great Britain, tended to agree more with the Benelux countries' argument.³¹

The Benelux viewpoint clearly prevailed in the final draft, changing the restrictive-practices chapter from an indictment of such activities to an endorsement with reservations. The basic policy statement finally approved at Havana (and utilized in numerous other treaties and agreements since) read:

Each member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, and foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other [basic objectives of the Charter.]³²

The six specific practices listed as presumed violations in the United States draft were retained in the Havana Charter, not as *per se* violations, but merely as *prima facie* justification for an ITO investigation after a complaint from a state signatory to the Charter.³³

Another basic shift in approach involved protection of national sovereignty to an extent not contemplated by the United States' original draft. Although the debates on this issue were not so obvious nor so clearcut as

worked with a "New York Draft," on which further revisions had been made in New York following the London discussion. *Id.*, 3.

³¹For a summary of different countries' positions on this question, see, e.g., BROWN, *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* 125-28 (1950); WILCOX, *A CHARTER FOR WORLD TRADE* 105-07 (1949).

³²Havana Charter for an International Trade Organization, art. 46(1), Dept. of State Pub. 3117, Commercial Policy Series 113 (1947) [hereinafter cited as Havana Charter].

³³Compare Havana Charter, art. 46(2,3) with U.S. Draft, art. 34(2).

those over cartel policy, the ultimate changes were several, and run in a single direction.

Where the United States draft of 1946 would have permitted complaints to the ITO by Member States *or* private parties, the Havana Charter provided for complaints only by Member States.³⁴ Member states were encouraged to use the good offices of ITO for informal consultation when they felt uncertain about the validity of a potential complaint, or wished to utilize a less abrasive approach to a matter that might prove offensive to a sister nation.³⁵ Consultation was a compulsory first step when the activities in question were those of a state trading enterprise³⁶ and was the exclusive remedy whenever "services" were involved.³⁷

A notoriously weak section of the chapter on restrictive business practices was the part dealing with sanctions. Member States were obligated to "take full account" of all ITO decisions or requests, but only to the extent of completing "the action it [the state] considers appropriate" in any given case.³⁸ A *Definitions* article made it clear that an ITO "decision" could not bind Member States, but only signified that the ITO "had reached a conclusion."³⁹

The United States draft would have bound ITO Member States to "take action" against duly declared harmful restraints, but countries practicing direct governmental control of cartels feared that such language might render ITO findings self-executing in their jurisdictions while the United States, due to the role of the judiciary in its regulatory scheme, could have fulfilled the same obligation by simply instituting an antitrust suit in which the court was not bound to reach the same result as the ITO. Faced with an extremely difficult and touchy problem, the drafters finally agreed that any Member State would be obligated "to take all possible measures by legislation or otherwise, in accordance with its constitution or system of

³⁴*Compare* Havana Charter, art. 48(1) with U.S. Draft, art. 35(1.2). The complaint could be lodged, however, by a state on behalf of an affected party over whom it had jurisdiction. Havana Charter, art. 48(1).

³⁵*See id.*, arts. 47, 51.

³⁶*Id.*, art. 48(1). This inclusion of state trading enterprises within the jurisdiction of the ITO was in itself a broadening of the act, however. The US Draft had limited jurisdiction to the activities of private commercial ventures. *Compare* Havana Charter, art. 46(1) with US Draft, art. 34(1).

³⁷Havana Charter, art. 53. Services, defined as "transportation, telecommunications, insurance and the commercial services of banks," had been included in the restrictive business-practices section at the behest of India and other less developed countries. There was no comparable article in the US Draft.

³⁸Havana Charter, art. 50(2-5). Note that art. 50(3) further limited the state's obligation by providing, "any Member, on notification to the Organization, may withhold information which the Member considers is not essential to the Organization in conducting an adequate investigation and which, if disclosed, would substantially damage the legitimate business interests of a commercial enterprise."

³⁹*Id.*, art. 54(2.d).

law or economic organization, to ensure" that no restrictive practices in detriment of international commerce were carried out within their jurisdiction.⁴⁰

ECOSOC Draft

All questions concerning the ITO Charter became moot in late 1950 when the entire document—signed by the representatives of over fifty countries—died where it had been conceived, in the United States. The State Department publicly withdrew its request for ratification and let the matter drop.⁴¹ Other nations, waiting for United States ratification before committing themselves, did not attempt to revive the moribund issue.⁴²

However, the United States had not finished trying to establish a system of regulation for international restraints on trade. As ITO and the Havana Charter faded away, the State Department resurrected Chapter V as an independent issue before the Economic and Social Council of the UN.⁴³ It was there resolved that an *ad hoc* committee should formulate methods of international cooperation and controls for the implementation of the substantive provisions of the Havana Charter relating to restrictive business practices.⁴⁴

The *ad hoc* committee, instructed to proceed from the Havana Charter's provision, did precisely that. The first eight articles of the draft which the *ad hoc* committee submitted in 1953 were all but indistinguishable from the first eight articles of the nine-article Restrictive Business Practices chapter of the 1948 ITO Charter.⁴⁵ Thus all of the provisions on substantive law,

⁴⁰*Compare* Havana Charter, art. 50(1) with US Draft, art. 37(5).

⁴¹The Charter had not been submitted to Congress until 1949, and the House Foreign Affairs Committee had not opened hearings on it until 1950. Protectionist feelings against ratification were apparent in much of the testimony and questions throughout the hearings. *See* House Committee on Foreign Affairs, Hearings on H.J. Res. 236 "Membership and Participation by the United States in the International Trade Organization," 81st Cong., 2d Sess., (1950). Handicapped by its late start, the ITO Charter may also have suffered from an unenthusiastic effort even on the part of its strongest supporters, who may have felt that many of their world free-trade objectives had been served by the institution of GATT and other functioning programs. *See* Edwards, *Regulation of Monopolistic Cartelization*, 14 OHIO ST. L.J. 252, 271 (1953).

⁴²Liberia was the only nation to ratify the Charter unconditionally. Sweden and Australia agreed to ratification contingent upon favorable United States action. *See* House Committee on Foreign Affairs, Hearings, *supra* note 41 at 87.

⁴³ECOSOC Document E/2030 of 22 June 1951.

⁴⁴ECOSOC Resolution 375 (XIII) of 13 September 1951. The *ad hoc* committee named in the resolution included representatives from Belgium, Canada, France, India, Mexico, Pakistan, Sweden, the United Kingdom, the United States, and Uruguay. *Id.*, para 3.

⁴⁵*Compare* Havana Charter, arts. 46-53 with ECOSOC Document 2380, Annex II, *Draft Articles of Agreement*, arts. 1-8(1953) [hereinafter cited as ECOSOC Draft]. Further, article 20 of the ECOSOC Draft was the same as article 54 of the Havana Charter. Only one phrase was added to the substantive provisions, without any change in meaning. *Compare* Havana Charter, art. 46(3.f) with ECOSOC Draft art. 1(3.f). Three other paragraphs were added to the ECOSOC Draft, arts. 3(4), 5(7,8). One paragraph was dropped. Havana Charter, art. 53(4).

state obligations and general procedures were carried over intact into the "new" proposal. The ECOSOC Draft was notable for the expeditious and thorough procedures which it would have created for the implementation of the articles it borrowed from the Havana Charter.⁴⁶

Ironically, the ECOSOC Draft, so faithful to the Havana Charter, suffered the same fate: failure because the United States withdrew its support at the crucial moment. After the change in administrations in 1953, the State Department announced its decision not to support the proposal, stating that efforts in the area could be directed more meaningfully toward "achieving a greater degree of comparability in the policies of all nations in their approach to the subject."⁴⁷ Several other nations had filed statements favorable to the ECOSOC Draft and its accompanying report, urging adoption, but did not push the matter when the United States came out *en contra*.⁴⁸

Final disposition of the matter in ECOSOC was a simple declaration of continuing concern over restrictive business practices' potential for harm to international trade efforts, coupled with an expression of support for further study and legislation in the area on the national and regional level. The UN Secretary-General was instructed to keep gathering data for the purpose of suggesting further action on the subject at a "later session."⁴⁹

The GATT

One of the key questions posed but unanswered by the *ad hoc* committee on the ECOSOC was as to which existing international organization could best have administered the proposed scheme of cartel regulation. The two bodies specifically mentioned were the UN and the Contracting Parties to the GATT, with responsibility for the final recommendation delegated to the Secretary-General of the UN. When the latter found it impossible to submit his reasoned recommendation by the agreed-upon date,⁵⁰ several of the Contracting Parties availed themselves of the 1954 (Ninth Session) discussions on revisions of the GATT to propose that a section on control of trade restraints should be included in the new agreement.⁵¹

⁴⁶See ECOSOC Draft, arts. 9-17. A complete discussion of the reasoning behind these articles and a description of the way they should have worked in practice is found in ECOSOC Document 2380 at 8-20 (1953).

⁴⁷ECOSOC Document E/2612, Add. 2 at 5 (1955).

⁴⁸Those nations on the record as in favor of the proposal included France, Turkey, Pakistan, Norway, and Germany. The Council of Europe and the International Cooperative Alliance had likewise expressed their official support. Those who filed adverse comments, in addition to the United States, were the Union of South Africa, the International Chamber of Commerce, and the United States Chamber of Commerce. See EDWARDS, *CONTROL OF CARTELS AND MONOPOLIES* 234-35 (1967).

⁴⁹ECOSOC Resolution 568 (XIX) of 26 May 1955.

⁵⁰See YEARBOOK OF THE UNITED NATIONS 337 (1953).

⁵¹The issue of sovereignty was again fundamental to the discussion. A joint proposal by *International Lawyer*, Vol. 4, No. 2

GATT approached the problem carefully, postponing the matter until ECOSOC had finished with it,⁵² then creating an intersessional committee to recommend whether any action at all was advisable.⁵³ Consequent upon a favorable report adopted in 1958,⁵⁴ a second group of experts was appointed to study the problem and recommend what precisely was the approach feasible within the structure of GATT.⁵⁵

The GATT Solution: Voluntary Independent Consultation Between Sovereign States

After some initial struggling to accommodate a problem not anticipated by the creators of the GATT mechanism,⁵⁶ the expert study group reached substantial agreement on a relatively timid solution. The group felt that Contracting Parties should consult privately on the harmful effects of any restrictive business practices to which they were a party or their residents were a party. After termination of discussion, the consulting nations should submit to the GATT Secretariat a report on the negotiations and the results reached. A standing group of experts would then evaluate the report, at the same time that it was conducting general inquiries into the effects of restraints upon international commerce and national development. The standing group was expected, at any propitious time, to recommend whatever further action GATT should take on the general question. Four countries—Norway, Sweden, Denmark and France—would

Norway, Sweden and Denmark straightforwardly urged the ECOSOC Draft on the GATT Contracting Parties. GATT Document L/283 (1954). This proposal did include some minor changes in the draft then before ECOSOC, but so minimal as to be of no consequence. West Germany, however, took a new tack. While it was amenable to the substantive provisions on restrictive business practices, the German proposal would have eliminated the possibility of a direct complaint to the international body, requiring consultation between involved nations as the preliminary step in all cases. Only when the conciliatory procedure failed to satisfy the Contracting Parties concerned would the issue have been proper for consideration before the plenary session. The ultimate action in such case would have been a non-binding recommendation, reached by majority vote. See GATT Document L/261, Add. 1 at 41 ff. (1954).

⁵²GATT, 3rd Supp. BISD 239 (1955); See GATT Documents L/551, L/568 (1955).

⁵³The intersessional committee asked the GATT Secretariat for a *de novo* analysis of the whole question of restrictive business practices and their regulation. A memorandum was prepared and afterwards printed for sale to the public as GATT, *Restrictive Business Practices*, GATT/1959-2 (1959).

⁵⁴GATT Resolution of 5 Nov. 1958, 7th Supp. BISD 29 (1959).

⁵⁵*Id.*

⁵⁶The basic problem is fully developed in JACKSON, *WORLD MARKETPLACE LAW: GATT AND THE INTERNATIONAL REGULATION OF INTERNATIONAL TRADE* § 20.3 notes 14-17 and accompanying text (to be published). Essentially, the question was one of how to adapt mechanisms created to control government actions to the task of controlling the activities of private enterprise. The language of article XXIII of the General Agreement, while it appeared at first glance to be appropriate, was not truly applicable. Nor was article XXV, for the same reason. All proposals for anything beyond mere consultation ran into the same insuperable obstacle: the nature of the institution. See GATT Document L/1301 at 7-8 (1960).

have expanded the powers of the permanent group of experts to include direct participation in all consultations between nations, but that proposal failed to gain the approval of a majority of the countries drafting the GATT plan.⁵⁷

The Contracting Parties quickly adopted the proposal when it came before them in 1959, but not without paring away most of its potential impact. They acted through a formal "decision" that GATT member states should submit reports on all consultations after the fact.⁵⁸ The preamble to the official act recommended the consultation procedure to the Contracting Parties but in no way attempted to make it mandatory.⁵⁹ The erstwhile standing group of experts was not mentioned, either in the text of the decision or elsewhere.

Summary

With the decision of the Contracting Parties in 1960, the post-war effort to institute comprehensive international cartel controls came to rest, clearly evolved out of the United States' sweeping proposals of fourteen years before, but scarcely recognizable and withered almost away. Where the original project of 1946 had been supranational in character, proposing *per se* violations and providing for private complaints to a central investigating agency, the GATT measure did no more than proffer the mild suggestion that sovereign nations should consult on the best manner of avoiding the harmful effects of international business restraints, whenever a nation was moved by the effects of such restraints to initiate negotiations with another.

Current Discussion of the Problem

The issue of international restrictive business practices and what to do about them is still very much alive in 1970. Both the OECD and the Council of Europe have recently devoted fresh consideration to the problem, and still have it under advisement. On a more limited regional scale, the EEC rules on competition are a well-known fact of business life, a supranational control régime. The European Free Trade Association (EFTA) has also taken a regional approach to the problem, though from

⁵⁷See the committee's final report, including both majority and minority views. GATT, 9th Supp. BISD 170 (1961).

⁵⁸GATT, 9th Supp. BISD 28 (1961).

⁵⁹*Id.* To date no reports on such negotiations have been submitted to the GATT Secretariat. See EDWARDS, CONTROL OF CARTELS AND MONOPOLIES 238 (1967) [hereinafter cited as CONTROL]; Markert, *Recent Developments in International Antitrust Cooperation*, XIII ANTITRUST BULL. 355, 356 (1968) [hereinafter cited as Markert]. Unreported informal consultations between nations do occur, however; apparently with some frequency. See e.g., EFTA Bulletin for December, 1968, at 9; Senate Subcommittee on Antitrust and Monopoly, Hearing, *International Aspects of Antitrust*, 90th Cong., 1st Sess. at 68, 205 (1967).

the international (as opposed to supranational) view. The Central American Common Market (CACM) Treaty contains provisions which could be invoked against restraints.⁶⁰ UNCTAD is currently conducting studies "of restrictive business practices adopted by private enterprises of developed countries, with special reference to the effects of such practices on the export interests of the developing countries, especially on the least developed."⁶¹

Perhaps the longevity of the debate and its currency are the best indications that the considerations which sparked the original discussions remain as valid today as they appeared at the height of the postwar paranoia against cartels, or even more so.⁶²

OECD Action

The OECD Committee of Experts on Restrictive Business Practices, whose best-known contribution has been the simple collection and comparison of the relevant legislation in the various western industrialized nations,⁶³ has also worked since 1963 studying the concrete effects of existing international cartels and the possibility of instigating cooperation among OECD members on the issue.

In early October, 1967, the OECD Council issued a recommendation to Member States recognizing the possible "adverse effects [of international restraints on commerce] on achievement of trade-expansion and economic-growth aims of Member countries as set out in Article 1 of the Convention" and the need for "closer cooperation between Member Countries in this field."⁶⁴ To those ends, the Council specifically recommended that: (1) Member Countries notify and inform each other in advance when undertaking "an investigation or a proceeding involving important interests of another;"⁶⁵ (2) where two or more Member Countries simultaneously proceed against an international trade restraint, "they should endeavor to coordinate this action in so far as appropriate and practicable under nation-

⁶⁰General Treaty of Central American Economic Integration, arts. XI and XIII (signed at Managua, Nicaragua, 13 December 1960).

⁶¹UNCTAD, *Restrictive Business Practices*, UN Doc. TD/B/C.2/54 (2 October 1968) at 1.

⁶²See, e.g., Senate Subcommittee on Antitrust and Monopoly, Hearings, *International Aspects of Antitrust*, Pt. 1, 89th Cong., 2d Sess. (1966) *passim*; Markert, 356-59; CONTROL 321-23.

⁶³The OECD maintains a five-volume looseleaf service called *Guide to Legislation on Restrictive Business Practices*, which includes section on the EEC and ECSC laws. The OECD also published a 17-point comparison of existing national legislation, *Restrictive Business Practices: Comparative Summary of Legislations [sic] in Europe and North America* (1964).

⁶⁴OECD Document C(67)53 Final of 10 October 1967, reprinted in Markert, 370-72.

⁶⁵*Id.*, para. 1(a).

al laws;"⁶⁶ (3) Member Countries should tender general information to each other and "cooperate in developing or applying mutually beneficial methods of dealing with restrictive business practices in international trade."⁶⁷

OECD and GATT Actions Compared

The OECD's recommendation is modest in its demands on the Member Countries, as was the GATT decision. It is manifestly clear that all cooperation in both should be "on a fully voluntary basis."⁶⁸ The primary aim of the OECD's measure in fact may be no more ambitious than formally to endorse a method now employed on an informal basis between the United States and Canada and some other countries, with a degree of apparent success in soothing sovereign egos at the same time as it controls harmful restraints.⁶⁹

The OECD Council's recommendation does not, of course, have any substantive provisions that the GATT decision did not. The former is somewhat more specific in setting out what the consultation procedure shall consist of, but it does not request nations to report to the body at large on the circumstances and results in each negotiation. The OECD continues to keep the topic of substantive provisions under active study.

Council of Europe Efforts: The Reciprocity Approach to Conflicts

The nineteen-member⁷⁰ Council of Europe has shown a continuing interest in the problem of regulation of international restrictive business practices. Its activities in the field date from 1949, when it proposed an agreement which would have created an independent, supranational agency for the regulation of cartels in most of Europe. That plan, very similar in procedure to the present scheme for the enforcement of the European Convention on Human Rights, proved too radical.⁷¹ It was finally abandoned in 1958.⁷²

⁶⁶*Id.*, para. 1(b).

⁶⁷*Id.*, para. 3.

⁶⁸*Id.*, introduction.

⁶⁹See Vernon, *Antitrust and International Business*, HARV. BUS. REV. 78, 86-87 (Sept. Oct., 1968); and authority cited for the second part of note 56 *supra*.

⁷⁰The Council of Europe now includes representatives of all EEC and the seven original EFTA Member States plus Cyprus, Greece, Iceland, Ireland, Malta and Turkey.

⁷¹See Memorandum on the Recommendation of the Consultative Assembly for the Preparation of a European Convention for the Control of International Cartels and Draft Convention Prepared by the Secretariat, SG/R (51) 15, 28 Nov. 1951. See also discussion in Wiebringhaus, *Le Droit des Ententes dans le Cadre de la C.E.E. et de l'E.F.T.A.*, REV. DE MARCHÉ COMMUN 755, 756 (Oct., 1966) [hereinafter cited as Wiebringhaus]; Markert, 364.

⁷²See Focsaneanu, *Les Pratiques Commerciales Restrictives et le Droit International*, ANNUAIRE FRANCAISE DE DROIT INTERNATIONAL 266, 286-88 (1964).

In 1965 the Council of Europe took up a simpler, but no less controversial proposal aimed at resolving the conflict between national sovereignty and extra-territorial enforcement of municipal decisions concerning international restrictive practices.⁷³ The proposal was made in the form of a report submitted to the Legal Committee of the Consultative Assembly.⁷⁴ The report observed a "manifest contradiction . . . between two generally accepted principles: objective exercise of territorial jurisdiction and refusal of its extraterritorial coercive consequences."⁷⁵ It suggested that the discrepancy might be resolved by means of a reciprocity convention which would have bound all signatory parties to enforce the subpoenas, injunctions and other court orders issuing from the municipal courts of any other signatory party in a valid suit against a restrictive business practice. This approach was rationalized in terms of the "legitimate tendency of all industrial states to defend their economy, through appropriate legislative dispositions and regulations, against business practices which restrict competition and, more generally, distort normal market conditions."⁷⁶

Coming at a time when the EFTA and the OECD were both discussing solutions more in keeping with the generally accepted legal theory and the vindication of national territorial sovereignty, the Council of Europe report encountered strenuous objections. In the first place, it asked states to honor precisely the extra-territorial reach which many had so resisted when it was attempted unilaterally by the United States.⁷⁷ In matters of restrictive business practices, all other nations have remained faithful to what one scholar calls "that distribution of state jurisdiction and to that idea of international forbearance without which the present international order cannot continue,"⁷⁸ and have not attempted extraterritorial enforce-

⁷³See Consultative Assembly Document 1997 of 22 Nov. 1965.

⁷⁴The report, prepared by the Frenchman M. de Grailly, is printed as Consultative Assembly Document 2023 of 25 January 1966. The best concise, yet comprehensive discussion of it is in Wiebringhaus.

⁷⁵Consultative Assembly Document 2023 of 25 January 1966, para. 26. The report argued that general principles of Private International Law recognized the right of municipal courts to exercise trial and decisional jurisdiction over matters taking place or producing a direct effect within the national territory of the court in question. *Id.*, para 20-22. The obvious problem was the countervailing Private International Law Doctrine which, beyond the limits of comity and good will, did not command foreign courts to enforce coercive orders issued to implement the fact-finding process or the decision originating in the original municipal court, thus rendering the judgment of that court practically nugatory in many cases involving international commercial enterprises. *See Id.*, para. 23-25.

⁷⁶Wiebringhaus at 757.

⁷⁷See BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 45-51 (1958); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, XXXIII BRITISH YEARBOOK OF INTERNATIONAL LAW 146 (1957); Mann, *The Doctrine of Jurisdiction in International Law*, III REC. DE COURS 9, 100-09, 150,53 (1964); Oliver, *The Range of the Effect of the Antitrust Laws of the United States*, Rep. of 51st Conf. of the Int'l Law Ass'n 511 (1964).

⁷⁸Mann *supra*, note 77 at 149.

ment of their laws.⁷⁹ In fact, other countries have refused to enforce judgements of the United States in antitrust cases against aliens⁸⁰ and have passed laws expressly prohibiting compliance with discovery proceedings under the United States antitrust laws.⁸¹

It is hard to imagine how the adoption of the proposed reciprocity convention could have avoided aggravating precisely the problem area which the GATT and OECD measures were at such pains to leave unriled: the whole question of national sovereignty and existing rules of jurisdiction in International Law. At least in the area of international restrictive business practices, which would involve extensive discovery of business records in other countries as well as enforcement of court orders against practices which may have been acceptable or even encouraged by the host country, the potential consequences are so incredible that one wonders if the idea or a reciprocity convention is posed in complete seriousness.⁸²

Secondly, as described below, both the EEC and EFTA treaties include provisions dealing with restraints on commerce between their respective member states. Thus the convention might have conflicted not only with international law practice and doctrine generally, but with existing systems within the specific membership of the Council of Europe. *E.g.*, which rule prevails as between two EEC states? As between two EFTA states? Between an EFTA state and an EEC state? Between a state which is a member of neither EFTA nor the EEC and a member state of either organization?

Thirdly, while reciprocity conventions are an acknowledged and useful means of resolving conflicts in many areas of the civil law, the proposal of such a convention in the public area of restrictive business practices seems particularly inappropriate.⁸³ If countries cannot agree to an international

⁷⁹In most cases and until more recently, this had been a simple enough matter since other countries had no such laws to enforce.

⁸⁰Most notably in *British Nylon Spinners v. Imperial Chemical Industries, Ltd.* [1953] Ch. 19 (C.A. 1952).

⁸¹*See Mann supra*, note 77 at 154 n. 109. Ratification of the new *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 16 AM. J. COMP. L. 594 (1969); 8 Int'l Leg. Materials 37 (1969), would probably not change the existing prohibitions, since that document applies only to "civil and commercial matters" (art. 1), and no evidence "incompatible with the internal law of the State of Execution" will be required (art. 9.2). *See Amram, The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651, 654, 655 (1969).

⁸²Essentially the same plan had been proposed before, however, by Plaisant in 1954 in an unpublished Report to the Fourth Comparative Law Congress. This plan is criticized in W. Friedmann & van Thematt, *International Cartels and Combines*, in ANTITRUST LAWS 469, 485-86 (W. Friedmann, ed.) (1956). The Council of Europe report is discussed at some length in the already-cited articles by Markert and Wiebringhaus.

⁸³*See Jennings, supra*, note 77; Friedmann & van Thematt, *supra*.

régime of controls because of basic differences in philosophy, how can they be expected to enforce the "political notions"⁸⁴ of other countries? Or, conversely, if their internal rules are substantially in accord, why not establish an international régime?

The Council of Europe's Consultative Assembly finally decided that the Legal Committee should continue studying the problem and present its "final" conclusions "in due course."⁸⁵

The EEC: Supranational Rules of Competition

The most effective controls on international restrictive business practices are those in the European Economic Communities. The system employed there is a topic of such wide-spread interest and so many existing publications have already treated it at length, that little exposition is necessary here. Suffice it to say that it imposes a supranational régime directly applicable to legal and natural individuals resident within the Member States.⁸⁶ The EEC legislation creates a new scheme of prohibitions, subject to exception in certain circumstances. In implementation of its substantive articles, it includes provisions for registration of restrictive agreements,⁸⁷ and vests powers of investigation, decision and sanction in the EEC Commission.

The drafters of the Rome Treaty apparently adopted a policy of competition because they were impressed with the performance of the United States' competitive economy, and because the dimensions of the six-country Common Market made such a policy more salable than it might have been in any single state other than West Germany.

The EFTA: Effective Consultation

The approach of the European Free Trade Association is much closer to that of GATT and the OECD, although it is more nearly complete in its

⁸⁴Application of this term to antitrust laws is from Jennings, *supra*, note 77, at 175.

⁸⁵Consultative Assembly Directive No. 247 of 27 January 1966. The matter apparently is still under active study in the Council of Europe, but has not advanced to the committee stage. Krüger, *The Council of Europe and Unification of Private Law*, 16 AM. J. COMP. L. 127, 148 (1968).

⁸⁶See EEC Treaty, arts. 85-90; Council Reg. No. 17/62, as amended by Council Reg. No. 59/62; Council Reg. No. 19/65; Council Reg. No. 27/62; Council Reg. No. 153/62; Council Reg. No. 67/67/ All in STEIN & HAY, DOCUMENTS FOR LAW AND INSTITUTIONS IN THE ATLANTIC AREA 1967.

⁸⁷Notifications of agreements to the EEC Commission have run high. Edwards reports that about 37,500 restrictive agreements were registered by 31 March 1965 and many more existed but were not reported. CONTROL at 292-93. However, MacLachlan & Swann, state that 38,154 agreements had been notified to the Commission twelve months earlier, on 31 March 1964. COMPETITION POLICY IN THE EUROPEAN COMMUNITY 142 (1967).

provisions.⁸⁸ Article 15 of the Stockholm Convention provides that restrictive business practices or dominant enterprises are improper "in so far as they frustrate the benefits expected from the removal or absence of duties and quantitative restrictions on trade between Member States."⁸⁹ Enforcement is to be carried out under the procedure of article 31 of the EFTA Convention, which—as in the case of corresponding articles in GATT⁹⁰—was set up to deal with barriers created or imposed by direct state, not private, action. The drafters of the Stockholm Convention foresaw that the restrictive trade practices article might be a special problem, however, and provided for Council consideration of "further or different" provisions for dealing with the issue, beginning no later than December, 1964.⁹¹ The Council's first formal action under this enabling provision was the Copenhagen Agreement promulgated in October, 1965.⁹²

The Copenhagen Agreement did not change the article 31 procedure, but did make an effort to clarify the manner in which it should apply to the special exigencies of dealing with restraints of trade. As outlined in the Agreement, any Member State may initiate consultation with another on the simple complaint of a private firm or the *prima facie* showing of a possible infringement of article 15. Other Member States are bound to help in the investigation of the complaint to the extent that their respective "legislation and practices will allow." All consultations are to be informal and confidential, with due care "not to disclose business secrets." In the event of failure to reach agreement through negotiation,⁹³ recourse to the formal complaint procedure before the EFTA Council is available. The Council is empowered to investigate and issue a recommendation. When the recommendation is not complied with, the Council's only sanction is the authorization of retaliatory measures by others against the recalcitrant Member.

⁸⁸See generally European Free Trade Ass'n, *Building EFTA* 100, 106-11 (1966); Gammelgard, *The Regulation of Private Restraints on Competition in the Convention of the EFTA and its Significance*, in *I CARTEL AND MONOPOLY IN MODERN LAW* 151 (1961).

⁸⁹Convention Establishing the European Free Trade Association (signed at Stockholm, 20 Nov. 1959), 370 UNTS 5 (1960).

⁹⁰See note 56 *supra*.

⁹¹EFTA Convention, art. 15(3.a).

⁹²The Copenhagen Agreement was reprinted in the EFTA Bulletin for November, 1965. A good, official exposition of the Agreement in *Restrictive Business Practices: The Copenhagen Agreement Explained*, EFTA BULL. 4 (July, 1967); *Progress on Restrictive Business Practices*, ETA BULL. 8 (Dec. 1968).

⁹³If Member States are successful in reaching an accord through their negotiations, they must still coerce the private parties involved into honoring the resolution. Often no legal remedy would be possible against the firms or individuals involved; they would have to resort to administrative measures. However, planned legislation for both England and Portugal would create direct means for applying the decisions of the EFTA Council under article 15. *Id.*, 8.

So that a body of experience in the area may be collected, general reports are to be submitted to the EFTA Secretariat after each inter-state discussion, including the points of consideration and the final action taken.⁹⁴ The effectiveness of the EFTA system is under continuing review by a special committee, raising the possibility of more radical changes in the future.⁹⁵

Synthesis of Past Experience And Current Efforts

The above discussion, though relatively lengthy, by no means exhausts the material.⁹⁶ Only the more important proposals and measures have been treated in this study, for the purpose of illustrating the three basic trends in the area of international controls on restrictive business practices:

(1) The supranational system of control through a central agency empowered to operate directly on individuals, established in the European Community by the ECSC Treaty of 1951 and the EEC Treaty of 1957;

(2) Non-binding consultation between sovereign states, officially adopted in varying forms by the Contracting Parties to GATT, the OECD and the EFTA, and practiced unofficially by the United States and several other nations;

(3) Regulation through a reciprocity agreement binding the states party to it to enforce the valid orders of other parties' municipal courts in application of national restrictive business practices legislation, as proposed before the Council of Europe.

The Case For International Controls On International Restrictive Business Practices

International Trade is Bigger than National Sovereignty

It does not require exceptional acumen or a bold spirit to venture the opinion that world commerce in 1969 moves to its own global rhythm, somewhat inconvenienced by national controls perhaps, but essentially undaunted. Trade today is no respecter of the nation state, save insofar as it must conduct itself as a well-behaved resident in return for the right to do business within a given state. On the other hand, political boundaries just

⁹⁴Some four cases of bilateral consultation have occurred thus far. In two, the practice in question was curtailed shortly after negotiations began. In another, the issue became moot when one of the private parties involved dropped his claim. In the last case, negotiations were carried through to an agreement that article 15 was being infringed. The authorities of the country directly involved pointed this out to the private party imposing the restraint and it was discontinued. *Id.*, 9.

⁹⁵*Id.*

⁹⁶The most comprehensive review is probably found in Focsaneanu, *supra*, note 72.

as often provide the means of avoiding the surveillance, imposts or sanctions of outside authority. As long ago as 1947 Sigmund Timberg characterized the new challenge and its impact:

It has become apparent that the obligations and duties which are generated by international combines and similar business associations are on an economic plane different from, and frequently contradictory to, the political loyalties and allegiances implicit in the concepts of nationality or citizenship. The law, however, is still in the difficult process of being weaned away from the proposition that these international entities are nationals of some state or other, or that their "citizenship" has other than purely domiciliary implications.

These shortcomings of international law are but reflections of the disparity between the territorially fragmented nature of legal systems and the integrated nature of business organizations and economic practice. Businessmen have recognized (or at least have institutionalized without recognizing) the international interdependence of economic life and have, accordingly, developed international frames of organization for international economic activity. (Lawyers, on the other hand, have adhered to rigidly compartmentalized national legal systems, which are unable to cope with an economic order of international dimensions.)⁹⁷

The phenomena remarked by Timberg have not gone unremarked by other lawyers in the years since. The period since 1947 has rather seen the growth of a new area of the law, which might be labeled "International Economic Law."⁹⁸ The commercial impetus to this legal interest has been described by a number of writers, most recently by Professor Raymond Vernon in a trio of articles on the unabated trend toward "internationalization" of business enterprise.⁹⁹ Vernon notes the current tendency of all relatively large United States companies (rather than only the select few) to engage in international ventures from which a substantial portion of total income may be derived: "a figure of one fourth or one fifth is fairly common."¹⁰⁰ Companies no longer regard their foreign operations as a separate, vertically-organized division but as another component of their integral, horizontally-structured program.¹⁰¹

⁹⁷Timberg, *International Combines and National Sovereigns*, 95 PENN. L. REV. 575, 576-77 (1947). See David, *The Methods of Unification*, 16 AM. J. COMP. L. 13 (1968).

⁹⁸For example, the Hague Lectures in recent years have included a number of presentations concerned with this new area of international law. See Feliciano, *Legal Problems of Private International Business Enterprises*, 118 REC. DE COURS 213 (1966); Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 REC. DE COURS 5 (1966); van Hecke, *Le Droit Antitrust: Aspects Comparatif et Internationaux*, 106 REC. DE COURS 253 (1962); Hyde, *Economic Development Agreements*, 105 REC. DE COURS 271 (1962); Sereni, *International Economic Institutions and the Municipal Law of States*, 96 REC. DE COURS 133 (1959); Röpke, *Economic Order and International Law*, 86 REC. DE COURS 207 (1954).

⁹⁹*Antitrust and International Business*, HARV. BUS. REV. 78, (Sept.-Oct., 1968); *Economic Sovereignty at Bay*, 47 FOREIGN AFFAIRS 110 (Oct., 1968); *The Role of U.S. Enterprise Abroad*, DAEDALUS 113 (Winter, 1969).

¹⁰⁰*The Role of U.S. Enterprise Abroad*, *supra*, note 99 at 113, 116.

¹⁰¹*Antitrust and International Business*, *supra* note 99 at 78, 83.

Everyone who reads the news media knows that "American" firms have utilized their capital to purchase control of large sectors of the European economy at the same time that they have continued to expand their investments in new enterprises all over the free world. By the same token, business capital that could be called "Japanese," "German," "Italian" or any of several other nations', ranges worldwide in search of investment opportunities.

Though it hardly needs repeating in the jet age, the world is shrinking. Communications and transport effectiveness have radically increased the potential for world trade over what it was a generation ago. Interaction between the components of the commercial milieu is correspondingly high. Such international expansion may create market power which is capable of abuse. Where there are competitors there may be fewer of them and the communications better between them, thus the restrictive arrangements easier to negotiate and enforce. Even the patent laws and certain promotional incentives offered by less developed countries to lure foreign capital may also be turned to anti-competitive purposes by private international enterprise.

Current efforts to liberalize international commerce and foment economic integration may be both a cause and an effect of the existing situation. With the notable exception of the European Community's supranational politico-economic approach, efforts are usually directed at negotiations between national governments for the removal of national government-imposed barriers to free trade.

This sort of economic integration is hardly infallible.¹⁰² The component parts of international trade and industry do not make a neat bundle. They are rather a congeries of disperse elements and considerations which seem to pop out unhindered by the efforts of nations to wrap them up in a coordinated consistent policy package. In many cases, such as tariffs and currency exchange, nations seem to evolve new compensatory mechanisms to reinstate the same effects as fast as they concede them away within structures such as GATT or the IMF (*e.g.*, tariffs are replaced with border taxes or ad valorem "dues" paid to import associations). Bilateral treaties, such as in the tax field, may attempt more effective coordination of policies, but a third-party nation may at least partially negate the desired effect by providing a tax haven.

Wholly apart from the foibles of governments, private enterprise may

¹⁰²Even the EEC is experiencing the problems caused by recalcitrant national governments. The French have admitted Algerian meal imports duty-free, in apparent contravention of the EEC Treaty. The French courts have upheld the national law. There is virtually no way to enforce Common-Market law that would not jeopardize the entire EEC structure. See CCH Common Market Reports 8513, para. 9245 (1968).

counter efforts at economic integration through countervailing agreements. International cartels still function vigorously, "characterized by division of markets, production and sales quotas, agreements as to prices and conditions of delivery, and common uses of patents, to name only the most important devices."¹⁰³ The staggering number of registrations in the EEC Commission testifies to the high incidence of international restrictive agreements today.¹⁰⁴

As Professor Vernon observed, "enterprises that are global in scope do seem to deserve a régime in which they are responsible to authorities whose scope is just as broad."¹⁰⁵ Nonetheless, it is probably a fair assessment that to date no legal mechanisms have evolved which are capable of operating satisfactorily within the same broad spheres of influence in which private international economic interests have functioned so competently for so long.

New National Legislation

Perhaps one of the best indicia of world-wide popular sentiment for regulation of restrictive business practices is the continuing vigorous legislative activity in the field by national legislatures. The "burst of post-war national legislation"¹⁰⁶ continues unabated. Professor Corwin Edwards lists thirteen industrial countries of western Europe which, within the last fifteen years, have either passed new legislation curbing restrictive business practices and their harmful effects or have passed amendments strengthening existing legislation.¹⁰⁷ He points out that virtually all of the non-communist modern industrial states now have such legislation and that only Japan, in mitigation of the strict provisions imposed by occupation legislation, has shown a tendency to weaken her regulatory scheme. All other countries have tended to move in the direction of more and stricter controls.¹⁰⁸

¹⁰³Fulda, *Book Review*, 16 AM. J. COMP. L. 285 (1968). Further, the United States Antitrust Division of the Justice Department has recently begun prosecution of an international quinine and quinidine cartel, involving three domestic and twelve foreign firms. See JOURNAL OF COMMERCE, 28 October 1968, p. 2.

¹⁰⁴See note 85 *supra*.

¹⁰⁵Vernon, *The Role of U.S. Enterprise Abroad*, DAEDALUS 113, 132 (Winter, 1969).

¹⁰⁶The phrase is Edwards'. CONTROL, Title to Chapter I.

¹⁰⁷The countries are Austria, Belgium, Denmark, Finland, France, Germany, Ireland, The Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom. See CONTROL, 337-68. Two other countries, Italy and Luxembourg, are also bound to the articles of the EEC Treaty regulating restrictive business practices, although neither state has municipal legislation in the field yet. Edwards goes more deeply into the national legislation and practice of individual countries in another recent book, TRADE REGULATION OVERSEAS (1966).

¹⁰⁸CONTROL, Chapter I. Apart from the European nations, the United States, Canada, Japan, South Africa, Australia, Brazil, Argentina, Mexico and New Zealand have such laws. Other countries continue to consider their enactment. See Fulda & Till, *An Antitrust Policy for India*, XIII ANTITRUST BULL. 373 (1968).

These recent developments may mean that one of the strongest criticisms leveled against early efforts at international controls in this field is no longer valid. The U.S. State Department's major criticism of the ECOSOC Draft of 1953 was that the "substantial differences which exist in national policies and practices" were of "such magnitude that the proposed international agreement would be neither satisfactory nor effective."¹⁰⁹ Today United States officials might put less stock in such an analysis.¹¹⁰

There have been two more commonly recognized schools of thought in the various national approaches to restrictive business practices, with the United States and Canada on one side of the issue and the European states on the other. The dichotomy is usually drawn on the basis of how a country feels about the basic acceptability of restrictive business practices and dominant market position. The United States is often characterized as pursuing a prohibitive policy toward most trade restraints and monopolization *per se*, while western Europe is supposedly tolerant of the forms so long as they do not lead in fact to abuses and harmful effects.

Not all commentators see such a gulf between the two attitudes today. Professor Edwards, perhaps the most widely experienced scholar in the field of comparative antitrust legislation, has observed: "One conclusion emerges clearly—that the foreign laws are not uniformly more permissive toward restriction than the American law."¹¹¹ Edwards finds that the United States exercises strictest control against horizontal arrangements (common price levels, division of markets, production quotas, uniform terms of sale and discount, etc.), while European laws tend to concentrate more on the regulation of vertical restraints (refusal to sell, resale price maintenance, etc.). Where such practices as boycott, blacklisting, and other methods of discrimination against competitors or consumers are involved both the United States and the Europeans usually will prohibit the restraint.¹¹²

Any comparison of the laws of so many nations must be suspect for the mere fact that it must proceed at such a general level to cover the ground.¹¹³ Acknowledging the somewhat artificial nature of the endeavor, however, the author still feels that it may be worthwhile in the present context, given that the argument is already met on those dangerously broad grounds. Undertaking the analysis at the most general level, then, perhaps

¹⁰⁹Quoted in Montague, *The Proposed UN Program on Restrictive Business Practices*, in University of Michigan Summer Institute on International and Comparative Law, *INTERNATIONAL LAW AND THE UNITED NATIONS* 485, 496 (1957).

¹¹⁰See Senate Subcommittee on Antitrust and Monopoly, Hearings, *International Aspects of Antitrust*, 89th Cong., 2d Sess., Pt. I, at 16-17, 304, 495 (1966).

¹¹¹CONTROL, 202.

¹¹²*Id.*, 202-08.

¹¹³As Edwards is the first to acknowledge. *Id.*, 202.

the discrepancies in municipal legislation can be explained in a way meaningful for international efforts at control of restrictive business practices.

Many reasons have been offered for the differences in the United States and European philosophies of antitrust. They are probably more valid in total than any one singly. The "peculiarly American political notions,"¹¹⁴ may proceed from a belief in the fundamental healthiness of self-policing competitive marketplace.¹¹⁵ Americans may have a deep-seated distrust of any and all unchecked concentrated power wherever it occurs, in government or business.¹¹⁶ The United States simply may have been blessed with the size, resources, consumer population and (perhaps most important) the sunshine of history's smile to permit the country to afford a wasteful luxury: a trade regulation system that strikes down restraints for potential as well as actual effects.

European states may be too small geographically and economically to make domestic competition a viable policy.¹¹⁷ (Isn't a Belgian "monopoly" subject to Common Market competition most analogous to a Rhode Island "monopoly" subject to United States competition?) Europeans may be less suspicious of concentrations in business, and more confident of government's capacity to control possible abuses as they arise.¹¹⁸ European concern for the consumer may be greater, while United States regulation may aim more at control of suppliers' practices on the theory that thereby the consumer is automatically served at the same time the field of enterprise is kept open for new entries.¹¹⁹

Regardless of the ultimate explanation, the point most germane to the present discussion is that virtually all of the non-communist modern industrial nations do have legislation regulating restrictive business practices for the purpose of reaching a common objective: economic efficiency tempered with socio-political values.

Another development, much more relevant in the present context than the study of what European nations do individually, are the substantive provisions of the Treaty of Rome.¹²⁰ Articles 85 and 86 are closer to the United States law than any of the European municipal legislation with the possible exception of Germany's. The EEC law was directly inspired by

¹¹⁴Application of this term to the antitrust laws of the U.S. is in Jennings, *supra*, note 75 at 175.

¹¹⁵See Report of the Attorney General's National Committee to Study the Antitrust Laws 1-2 (1955).

¹¹⁶See NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 421-22 (1962).

¹¹⁷BLAKE & PITOFKY, *CASES AND MATERIALS ON ANTITRUST LAW* 56 (1967).

¹¹⁸See *id.*, 56-57; CONTROL, 210-11.

¹¹⁹CONTROL, *id.*

¹²⁰*Id.* 319-20.

the Sherman Antitrust Law and other United States legislation,¹²¹ and it begins by prohibiting restrictive practices as such, rather than merely the harmful effects of such practices.¹²² The EEC law on competition is still in the developing stage, but has thus far moved to positions remarkably close to those of the United States laws on many issues.¹²³ If and when the EFTA nations or other countries were admitted to membership in the Common Market, the degree of accord between the United States and the European antitrust philosophies could be very high.

There is a most notable and relevant moral to be drawn from the EEC's adoption of a group competitive policy when only one (West Germany) of the six individual nations was even close to a similar domestic policy. This fact erodes the argument that where individual states do not embrace a policy domestically, neither will they honor an international expression of it. The "substantial differences which exist in national policies and practices," rather than rendering an international agreement "neither satisfactory nor effective,"¹²⁴ may be largely irrelevant. In any case, disunity of national legislation, substantial or *de minimis*, probably has much less bearing on this issue than has been thought. Indeed, where we have unity in restrictive business-practices legislation today, it has been as much hindrance as help, as we shall see.

Inadequacy of National Answers

Mere similarities in national restrictive business-practice policies, or even total uniformity, will not automatically bring international harmony to controls. Ironically, the proliferation of municipal legislation almost certainly has complicated—rather than allayed—the problem. Almost all national statutes steadfastly ignore activities which have their effect outside

¹²¹See, e.g., GERVEN, *PRINCIPES DU DROIT DES ENTENTES DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE* 3-4 (1966); GRAUPNER, *THE RULES OF COMPETITION IN THE EUROPEAN ECONOMIC COMMUNITY*, 8-9 (1965). It seems clear that the goal of the drafters was to create competition within the EEC. As one of them said afterwards, "It is . . . no exaggeration to state that economically, the Rome Treaty is basically a Treaty for more competition. . . . [Competition] has been considered as one of the principal pillars on which our building rests." Quoted in MACLACHLAN & SWANN, *COMPETITION POLICY IN THE EUROPEAN COMMUNITY* 71 (1967). For a more detailed discussion of the role of competition in the Common Market, see *id.*, 71-87.

¹²²Article 85(3) of the EEC Treaty provides an escape clause for benign restrictions, which may prove to be interpreted in a manner similar to the "Rule of Reason" as expounded in United States case law. See JOLIET, *THE RULE OF REASON IN ANTITRUST LAW* (1967).

¹²³One salient exception is the area of mergers, generally prohibited in the United States when they create too powerful an entity. These may be allowed in the Common Market as a means of creating firms capable of competing on an "equal footing" with the larger United States firms. See Deringer, *EEC Antitrust Laws and Industrial Property Rights—Latest Developments*, XIII *ANTITRUST BULL.* 341, 353 (1968).

¹²⁴See note 109 *supra* and accompanying text.

the national territory. In fact, many national laws—following the example of the Webb-Pomerene Act—encourage export cartels to engage in practices and restraints which would be prohibited if their effects were domestic.¹²⁵

By definition, every restrictive trade practice in international commerce raises a potentially insoluble conflict in sovereignty: states may feel a duty to defend their citizens against restraints imposed by foreigners which affect, in a manner contrary to the legally-stated national policies, the trade within their national territory.¹²⁶ On the other hand, the same sovereign states may not relish the obverse idea, that the acts of their citizens within their national boundaries should be subject to the constraints imposed by another state's legislative will.¹²⁷ These are the two horns of a dilemma, and the very definition of our problem is a situation with at least one state on either side of the issue.

Since the Second World War the United States has been most aggressive in pushing its judicial control over extraterritorial restraints which redound upon the United States market.¹²⁸ Under the well-known rule of the *Alcoa* case, restrictive business practices can be held "unlawful, though made abroad, if they were [both] intended to affect imports and did affect them."¹²⁹ The reach of American courts is of course limited by the constitutional requirements for obtaining personal jurisdiction, and the practical problems of enforcement abroad. For many years, however, this country was the only jurisdiction with strong legislation vigorously enforced. It could impose its judgments as a condition precedent to doing business here, often against foreign firms to whom the American market was sufficiently important to persuade them to comply with court orders

¹²⁵See OECD, *Restrictive Business Practices: Comparative Summary of Legislations [sic] in Europe and North America* 33-35 (1964).

¹²⁶See *id.*, 109-113. This is in keeping with the classic territorial theory of jurisdiction. See, e.g., the exposition by F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 REC. DE COURS 9, 23-43, 100-108 (1964); van Hecke, *Le Droit Antitrust: Aspects Comparatifs et Internationaux*, 106 REC. DE COURS 257, 302-328 (1962); Jennings, *Extra-territorial Jurisdiction and the United States Antitrust Laws*, XXIII BRIT. YRBK. OF INT'L LAW 146, 148-52 (1957).

¹²⁷E.g., United States attempts at discovery and enjoinder of foreign business operations under the antitrust laws of this country have engendered strong reactions from a number of foreign governments and courts on various occasions. These are recounted in several places, most recently summarized in Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 104-106 n. 18 (1967). This is again in keeping with general theories of nonapplication of foreign public law. See, e.g., F.A. Mann, *supra*, note 126, 127-58; van Hecke, *supra*, note 126, 329-39; Jennings, *supra*, note 126.

¹²⁸See authority cited *supra*, note 75.

¹²⁹*United States v. Aluminum Corp. of America*, 148, F.2d 416, 444 (2 Cir., 1945). The rule of *Alcoa* has never been endorsed specifically by the Supreme Court, but it has been given additional credence by the more recent case of *United States v. Watchmakers of Switzerland Information Centre, Inc.*, CCH Trade Cases, para. 70,600, p. 77,414 (1963).

for the continued privilege of doing business within the United States borders.¹³⁰

All of this does not mean that the unusual and exorbitant jurisdictional claims pressed by the United States have escaped adverse comment. Both foreign governments and legal scholars have manifested their chagrin and dismay at the American practice, which stirs up a veritable hornets' nest of international conflicts-of-laws issues. This has all led to a spate of writing on the propriety of extraterritorial application, clarifications of the United States position, defenses to it, the nature of restrictive business-practices legislation (penal? administrative? "public economic"?), considerations of comity and sovereignty as applied to it, and any number of equally interesting questions growing out of the unique problems inherent in national control of international restrictive business practices.¹³¹ Despite the discussion, no useful solutions which would simultaneously vindicate and reconcile the national laws have been forthcoming. The 1965 proposal of a simple reciprocity convention before the Council of Europe, though in keeping with a current trend favoring the use of such conventions generally,¹³² appears singularly miscast as a solution to the problem of international enforcement of national cartel law. The summary dismissal of the proposal should have proved as much.¹³³

Bilateral treaties, which have been fruitfully employed in the field of tax law to coordinate national policies,¹³⁴ also have been utilized for purposes of agreement on anti-cartel provisions. These provisions have been uniformly innocuous in substance¹³⁵ and have been ignored in practice.

¹³⁰Other nations, neither so self-sufficient nor so attractive a market as the United States, could not exercise such power over importing firms. See PROCEEDINGS, University of Chicago Graduate School of Business, International Conference on Control of Restrictive Business Practices 162 (1960).

¹³¹See e.g., the bibliography appended to van Hecke, *supra*, note 126 at 351-54.

¹³²The Council of Europe in particular has waged a vigorous campaign for the harmonization of law through reciprocity conventions and other means. See Krüger, *The Council of Europe and the Unification of Private Law*, 16 AM. J. COMP. L. 127 (1968).

¹³³See text accompanying note 85 *supra*.

¹³⁴See, e.g., OECD, Draft Double Taxation Convention on Income and Capital 23-25 (1963); OECD, Draft Double Taxation Convention on Estates and Inheritances 21-24 (1966).

¹³⁵Such provisions have appeared in treaties of friendship, commerce and navigation in the form of the following clause;

The two parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

The clause appears in treaties now effective between the United States and Denmark, art. VIII.1, TIAS 4797; Greece, art. XV.1, TIAS 3057; Ireland, art. XV, TIAS 2155; Italy, art. XIII.3, TIAS 1965; Japan, art. XVIII.1, TIAS 2863; Korea, art. XVIII.1, TIAS 3947;

Unlike the tax treaties, they have been utilized only in agreements to which the United States was a party.

Thus far, then, we have no consensus on most of the problems in this area, ranging from the basic definitional problem to where "international cartel law" fits in the "existing categories of conflicts of laws"¹³⁶ to the more practical problem of how best to allay the conflicts engendered by extraterritorial reach of national laws—through uniform national legislation, reciprocity conventions, and bilateral treaty arrangements have all been proposed or attempted. This is neither the time nor the place in which to supply answers to these questions—if in fact such answers exist. It seems to this author, however, that enough scholarship has been expended on national answers to an international problem. The United States will probably continue to exercise extraterritorial jurisdiction in this area, perhaps joined by Germany and the Common Market Commission. But this fact of life is in itself no solution, nor does it appear to lend itself to satisfactory accommodation.

It seems appropriate at this point to put aside consideration of the problem on the *national* level and move, as the ITO Charter did originally, and some governments have more recently, to *international* or *supranational* criteria. In doing so, we may readily admit that the issues involved in the extraterritorial application of national restrictive business-practices legislation form a mind-bending area of the law which appears far from resolved today despite extensive discussion of it in the recent past. Admit that it is in sum an important problem which—in the interests of world commerce—should be resolved at some point. But admit also that it is a problem earthbound in the classical concepts of national sovereignty and territorial frontiers, concepts which already may have lost much of their currency vis-à-vis international commerce and industry.¹³⁷ Then abandon this most diverting and interesting concern for what has proved an almost

Nicaragua, art. XVIII.1, TIAS 4024; Pakistan, art. XVIII.1, TIAS 4683; West Germany, art. XVIII.1, TIAS 3593. Substantially the same provision is also included in treaties with France and Israel. See France, art. XI, TIAS 4625; Israel, art. XVIII.1, TIAS 2948. Similar provisions have been written into any number of loan agreements and other formal agreements with the governments of other nations. See, e.g., Edwards, *Regulation of Monopolistic Cartelization*, 14 OHIO ST. L. J. 252, 265-71 (1953). More recently, the Trade Expansion Act of 1962 provided for cancellation of negotiated benefits where the recipient country "engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce. . . ." P.L. 87-794, 87th Cong., H.R. 11970, Oct. 11, 1962, 72 Stat. 872, § 252(b) (2).

¹³⁶Ficker, *Remarks*, in II CARTEL AND MONOPOLY IN MODERN LAW 973, 975 (1961); and see authority cited *supra*, notes 126-127.

¹³⁷E.g., Professor René David notes that businessmen have found means of avoiding national law in their international business transactions by writing standard-form contracts with arbitration clauses, thus assuring that disputes will not be decided in national courts applying national law. David, *Methods of Unification*, 16 AM. J. COMP. L. 13, 22-24 (1968).

irresistibly attractive intellectual nuisance and turn to a more practical approach: multilateral—supranational or international—solutions to the problem, which ask not extraterritorial application of national law but national application of international norms.

Objectives of Controls on International Cartels

It seems to this observer that discussions treating proposed programs of control on international restrictive-business practices have not made adequate distinctions between the objectives at issue. It is one objective to work for the "nationalization of transnational legal relationships,"¹³⁸ i.e., for the imposition of a single state's legal order upon legal relationships which are connected with several, often many, different states. It is quite another objective to work toward the possibility of international cooperation for the purpose of reaching solutions which may not conform to the national legislation of any or all of the participants. Failure of the latter objective to serve the interests of the former has often been used to refute efforts at the latter, a patent *non sequitur*.¹³⁹ Reaching the first objective is neither necessary nor relevant to achieving the second.

Thus, the supranational competitive régime effective in the European Economic Community supersedes national legislation—none of the Inner Six has legislation which coincides perfectly with that of the Rome Treaty, nor does the Rome Treaty defer to national legislation. It demonstrates the feasibility of different rules employed by a given country for different contexts. This general lesson should not be lost, even granted that Europe's Common Market depends upon a comprehensive socio-politico-economic plan of integration for an especially homogeneous group of nations, a far more ambitious scheme and a more limited membership than might be necessary for the sole purpose of instigating controls of international cartels.

Informal consultations between states are functioning with some success already,¹⁴⁰ but do not conform to any standard procedure, nor do they create precedents which might serve as guidelines for subsequent con-

¹³⁸Ernst Steindorf's phrase, quoted in Wengler, *The Significance of the Principle of Equality in the Conflict of Laws*, 28 L & CP 822, 844 (1963).

¹³⁹A good example are the arguments by Gilbert Montague in rebuttal to Sigmund Timberg's defense of the ECOSOC Draft at the University of Michigan's Summer Institute in 1955. Compare Timberg, *Restrictive Business Practices as an Appropriate Subject for United Nations Action*, with Montague, *The Proposed UN Program on Restrictive Business Practices*, in University of Michigan Summer Institute on International and Comparative Law, *INTERNATIONAL LAW AND THE UNITED NATIONS* 443, 485 (1955). The same sort of argument is set out in the Minority Report, and Montague's answer to it, in Report of the Attorney General's National Committee to Study the Antitrust Laws 98-108 (1955).

¹⁴⁰See notes 59, 69, and 94 *supra*.

sultations. Neither do they generate information available generally to other potentially interested governments. In short, if consultation functions at present, there is no reason it should not be given some formal and substantive basis and utilized to begin creating a uniform body of law and practice in the field.

Further impetus to structured controls over international business restraints may come from international feelings, growing simultaneously with international trade and popular awareness of the "shrinking-world" phenomenon, analogous to the sort of "populist" sentiment against business concentrations and market power which was a prelude to domestic enactment of the Sherman Antitrust Law in 1890.¹⁴¹ Anti-American expressions may be one manifestation of this feeling, since a high percentage of the largest international concerns are either subsidiaries or branches of United States firms or carry strong connotations of American big-business influence.¹⁴² Many Europeans might be pleased at the creation of institutions which would permit official European interests to participate in discussions concerned with the international conduct of the biggest United States firms. Less developed countries of the "third world" might be interested in anything which would provide them some potential means of regulation against the international cartels that sell them imported goods and the oligopsonies that buy their raw materials.¹⁴³ Perhaps to a lesser degree, there may be a growing sense of the socio-political function of trade regulation, its potential as a means of introducing non-economic policy considerations in an area where private initiative is seldom concerned with matters extraneous to economics.

Drawing upon current needs and past efforts, as discussed above, it seems that the following are practical and valuable objectives for a multilateral scheme of controls over international restrictive business practices in 1969: (1) a statement of substantive law, (2) a formal complaint-processing procedure, (3) discovery procedures, (4) official recommendations in specific cases, (5) a broad, yet relatively homogeneous group of participating states, (6) mechanisms for change in the system.

These are the same objectives that have been discussed in most of the multilateral proposals since that of William Oualid in 1926.¹⁴⁴ Certainly these were the issues in the ITO Charter's Chapter V and again in the ECOSOC Draft of 1953. In varying degrees they have been present in all

¹⁴¹The author first came across this concept in the testimony of economist Stephen Hymer of Yale before the Senate Subcommittee on Antitrust and Monopoly, Hearings, *International Aspects of Antitrust*, 89th Cong., 2d Sess., Pt. 1 at 23-24 (1966).

¹⁴²*Id.* at 206.

¹⁴³See note 61 *supra* and accompanying text.

¹⁴⁴See notes 4 and 5 *supra* and accompanying text.

serious considerations since: in GATT, the ECSC and the EEC, the EFTA and the OECD. Yet no system incorporating these elements exists on the international scale of modern trade; and perhaps none is likely in the foreseeable future.¹⁴⁵

The world is building up a backlog of international problems that chafe at the old concepts of sovereignty and nation states: space law, fishing and other economic operations on or in the high seas, mining or other activities on and under the deep ocean floor, transportation, and communications, to name a few of the more salient examples. To most of these problems international solutions are the only practical ones and the question becomes: will the solution catch up with the problem in time? With this in mind, a brief outline of a proposal is appended here for purposes of demonstrating what might be feasible in logic if not in current fact.

Summary Thoughts on the Form and Substance of a Possible Multilateral Scheme of Controls on International Restrictive Business Practices.

Substantive Law

The substantive law of articles 85 and 86 of the EEC Treaty of 1957 could serve as the basis for whatever final draft provisions were prepared. The Treaty of Rome provisions might prove acceptable both to the United States, whose law they are derived from, and to the European nations now applying them or contemplating membership in the EEC, where they would have to apply them in the future.

The substantive statement in the Rome Treaty is not remarkably different from that contained in article 46 of the Havana Chapter in 1948, but symbolically there may be value in turning to a fresher statement which is proving itself workable on a supranational scale. For purposes of a multilateral agreement, the EEC Treaty's § 85 (2) and use of the word "prohibited" as applied to international cartel activities probably would have to be dropped in favor of a more precatory term, such as the EFTA Convention's "improper."¹⁴⁶

Membership and Form

At a minimum, any agreement should try to include the members of the OECD.¹⁴⁷ These countries comprise the industrial powers of the western world and thus include within their jurisdictions a large percentage of the

¹⁴⁵Vernon, *supra* note 105.

¹⁴⁶See note 89 *supra* and accompanying text.

¹⁴⁷The OECD presently includes Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

producers and distributors likely to enter into international restrictive business agreements or other practices. Other countries could be admitted upon invitation or request, and hopefully the less developed nations would recognize their interest in any proposal of this sort and participate. Since the OECD has the problem under discussion now and all but three of its members have affirmed the value of trade regulation by passing national legislation, it might be possible to initiate the proposal before that group.

The real stumbling block to effective international controls is the difficulty of instigating permanent institutions responsible for their application. No better proposals exist than that placed before the ECOSOC in 1953: an assembly (annually or more frequently) of national representatives, a standing board of independent experts selected by the assembly, and a secretariat established in the same way. Reliance on, and coordination with, existing international agencies and offices could be maximized. For example, the secretariat could function in cooperation with GATT, UNCTAD, the OECD, or all three, depending upon participating states.

Information Gathering

All participating states could agree to full enforcement and cooperation in discovery matters.¹⁴⁸ The board of independent experts, rather than any foreign nation, could be charged with the collection and correlation of data. The board could carry out general fact-finding functions at its own discretion, certified by the secretary, and specific investigations in connection with any pending controversy, or upon the request of any state or private individual.

For purposes of the control system, no public disclosure of the data collected would be necessary. It could serve as a check in the manner of a bank audit, permitting official action where improper practices were discovered in specific instances, but even more important serving a vital purpose in providing an overview of broader trends and potential problem areas for drafting future policy. The board of experts could prepare an annual report to the assembly presenting existing information in this way. The annual report, including the particulars of any specific controversies considered during the year, should be confidential—classified and circu-

¹⁴⁸The collection of information is key to any effort in this area. The lack of current data is crippling. As Professor Edwards recounts:

I went to one man who had written a memorandum between the wars as to the character of cartels in Europe and asked him if there was any comparable statement about cartels after World War II, and he said no. Then I said, "Can you give me your impression? Is the situation as you described it between the wars any different now?" He said, "There is one great difference. I can no longer find out." Senate Antitrust and Monopoly Subcommittee, Hearings, *supra* note 141 at 312-13.

lated only internally—in all but exceptional circumstances as designated by the assembly.

Formal Controversy Procedure and Official Recommendations

Consultations, agreed to by consent among the nations involved in an alleged international restrictive business practice, could be a compulsory first step in all cases. Although a private complaint would not compel consultations, it could serve as sufficient cause for a fact-finding process by the standing group of experts.

All participating states should agree that representatives of the board of experts shall participate, with voice but no vote, in any and all consultations between them regarding international restrictive business practices. The board of experts could then prepare a report on the issues and decisions involved in each negotiation, relieving the states of doing so but not preventing them from adding anything to the report which they felt was pertinent.

Upon failure to resolve the controversy in consultation between states, the issue could be taken before the international cartel authority on the request of any state participant in the unsuccessful negotiation. The board of experts could then consider the circumstances and draft a recommendation. Final consideration of the board's recommendation could take place in the assembly, which could adopt the recommendation by majority vote. In event of adoption, any such recommendation would not be binding upon the states to which it was directed.¹⁴⁹

Provision for Future Change

It is anticipated that great changes will occur in International Law in the near future. Provisions for modification could be included in the cartel control scheme to keep it consistent with these changes. The board of experts might propose such changes at any time, but could be required to include an assessment and proposals for change in its annual report at least every three years. At any time the assembly agreed to them, changes could be proposed for formal ratification by member state governments.

¹⁴⁹Sanctions are not absolutely necessary to a proper legal régime, particularly in international-trade matters. The GATT, the IMF, and the EEC should have demonstrated this. Thus the Catalan canonist, San Ramón of Peñafort, long ago added a fifth function—*recommending*—to the classic maxim which is still too often limited to four:

Quatuor ex verbis virtutem collige legis: Permittit, punit, imperat atque vetat. (Understand you the value of the law from these four words: permitting, punishing, commanding and forbidding.)—cited in VAN KEEFFENS, *HISPANIC LAW* 28 (1968).

Conclusion

Discussion of legal controls on private restraints of international trade has been misdirected in recent years, tending to concentrate on the *national* aspects of a problem which wants international solution. Almost unremarked, international organizations have instigated a system of consultation among states to reach international agreement in specific cases. EFTA has been the most advanced in this effort, although GATT and the OECD have formally endorsed similar arrangements. The United States, long the aggressor in the controversy over extraterritorial jurisdiction over restraints, has also utilized consultations with other countries in lieu of domestic judicial proceedings on several occasions.

It seems a propitious time to direct attention back to the possibility of international institutions for the control of international restrictive business practices, especially when one realizes that within the last few years changes have taken place which bear closely on the problem. No radical steps are proposed here, but simply a non-binding procedure which would give more formality and substance to a current trend toward informal consultation. Such a consolidation of present potential would not be an ultimate solution, but merely a step forward on the way to an international régime. It should provide experience and information that could serve us well as we begin to move toward legal answers to the private issues raised by global trade.