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The Multinational Corporation as a Challenge to the Nation-State: A Need to Coordinate National Competition Policies

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NOTES

The Multinational Corporation as a Challenge to the Nation-State: A Need to Coordinate National Competition Policies

The recent growth and development of the multinational corporation presents the international community with a unique challenge. For the first time man has an instrument which enables him to use the world's resources with maximum efficiency. He is no longer restricted by national boundaries, but is able to allocate resources on a world wide basis. In addition, the multinational enterprise provides a means for linking the developing countries to an international productive scheme. These countries are now able to undertake production of goods in which they have a comparative advantage and more rapidly increase their rate of economic development.

Since the multinational enterprise trains the manpower of nations, develops their resources, and permits a cross fertilization of ideas and cultures, it may also be an important element in reconciling the diverse peoples of the world. Indeed, some observers believe that the multinational corporation will be more than merely an instrument for production; it will be "a stabilizer in a world full of tensions,"[1] and provide "a means of unifying and reconciling the aspirations of mankind. . . ."[2]

The internationalization of the activities of the modern corporation is, however, challenging the legal and political monopoly of the nation state. Since the subsidiary of a multinational concern can never, no matter how much autonomy is granted it, be the equivalent of an independent enterprise, national policies based entirely on domestic conditions may no longer be valid where an affiliate of one or more multinational firms is located within a country. The tremendous financial and technological resources and the wide geographical diversification of the multinational corporation enable it to challenge the sovereignty of the nation-state. Since it is often intimately involved in the economic growth and development of the countries in which it operates, it can directly affect the nature and extent of local governmental control.

Finally, since it operates simultaneously in many different

1. *Special Report, Multinational Companies*, BUSINESS WEEK, April 20, 1963, at 68 [hereinafter cited as *Special Report*]. *See also The Promise of the Multinational Corporation*, FORTUNE, June 1, 1967, at 80.

2. Brown, *Note From the Editor*, 4 COLUM. J. WORLD BUS. 5 (Mar.-Apr. 1969).

countries, the enterprise may also be the source of international tension and conflict as nations exert their control over the multinational corporation to influence its activities in foreign countries.

National laws touch the multinational corporation in virtually every important aspect of its behavior. In every country where it operates, the multinational company is affected by national restrictions on trade. Every state has its own complex tax structure, local company laws, commercial and penal codes, and laws relating to employment, property rights, patents, trademarks, and copyrights. This note will, however, be limited to an examination of the effect of the multinational corporation on national competition policies. It will focus on the impact of internationalization of production on the ability of the nation state to regulate competition.

Although until now, each nation has been able to develop its own competition policy[3] in light of its own goals and objectives and on the premise that its horizons were limited by its own national boundaries, it is becoming increasingly evident that the nation-state may no longer be the optimum political organization for the regulation of competition. Since the nation state is strong and is not apt to wither away in the near future, however, a means must be found to resolve the conflict which has arisen between the multinational corporation and national sovereignty.

Although a number of solutions have been recommended, the wide variety of national approaches to restraints on competition and the resulting diversity of governmental attitudes with respect to the same restrictive business practices suggests that the most realistic approach under existing circumstances would be the creation of an international organization to coordinate existing national competition policies. Since a detailed description of such an organizational mechanism is beyond the scope of this note, an attempt will be made to present general guidelines for the adoption of such an approach (Part V). The note will first examine the multinational corporation (Part I) and the challenge it presents to the nation-state (Part II). It will then outline the main problem which must be faced in developing a system of international control—the wide variation in national competition policies (Part III). Finally, it will look briefly at previous attempts to regulate restrictive business practices on an international basis (Part IV).

3. Although not all countries have enacted specific statutory measures concerning the regulation of competition, the term "competition policy" will be used throughout this note because all nations have a policy with regard to the regulation of restraints on competition.

I. THE MULTINATIONAL CORPORATION

International trade has existed since the beginning of time, and the ownership of foreign operations by businessmen is not a new phenomenon.[4] Until very recently, however, few of these foreign ventures were "integral units of a larger, parent entity in the sense that they were responsive to a broad strategy developed by the parent."[5] Prior to World War II a number of these so called "multinational corporations" did maintain manufacturing facilities abroad as part of a wide, integrated commercial strategy, but the movement toward internationalization succumbed to cartels, price-setting agreements, and divided markets among the producing giants.[6] The movement, however, reappeared in the post-war period, and in the last decade the trend toward internationalization has become a major industrial development.

A. The Movement Toward Internationalization

The universality of the move to international production can be gauged by the tremendous increase in the amount of direct foreign investment.[7] By 1957 United States investment abroad had reached 25.1 billion dollars[8] and by 1966 the total had more than doubled to 54.6 billion dollars.[9] As a percent of total assets, foreign direct

4. Professor Sidney E. Rolfe concludes in his report on the international corporation that the internationalization of production is not new. "The international corporation started its outward march at about the turn of the century." S. ROLFE, THE INTERNATIONAL CORPORATION 11 (XXIInd Congress of the International Chamber of Commerce 1969) [hereinafter cited as THE INTERNATIONAL CORPORATION]. It should be noted that the term "international corporation," as used throughout Professor Rolfe's report, corresponds to the term "multinational corporation," which will appear throughout this note.

5. Vernon, *Antitrust and International Business*, 46 HARV. BUS. REV. 78, 79 (Sept.-Oct. 1968). Most of these earlier foreign interests were "either inconsequential branches of the parent enterprise or units akin to portfolio investments operated at the discretion of local expatriate managers." *Id.*

6. For example, during the period from 1929 to 1946 direct United States foreign investment actually decreased from $7.5 to $7.2 billion. THE INTERNATIONAL CORPORATION, *supra* note 4, at 22, 147 table 3.

7. It is important to note that one of the major difficulties associated with the analysis of the multinational corporation is the fact that the statistics, except those emanating from the United States, are less than adequate. Existing statistics are, however, sufficient for the purpose of this paper as they clearly indicate the significant trend toward the internationalization of production. The most complete collection of data to date is set forth in Professor Rolfe's report. *Id.* at 20-28.

8. United States direct investment amounted to only $7.2 billion in 1946. *Id.* at 147 table 3.

9. *Id.*

investment for all United States manufacturing industries increased from 2.7 percent in 1950 to 5.0 percent in 1964.[10]

Despite the lack of foreign data, international investment is not a phenomenon unique to America. Similar movements toward international production are underway in other countries. For example, direct investment from France increased some 300 percent from 1962 to 1966,[11] while Germany also increased its overseas assets threefold during this period.[12] In addition, Swedish capital abroad doubled between 1960 and 1965 from Kr. 2.5 to Kr. 4.5 billion.[13] Total direct foreign investment as of 1966 was estimated to be about 90 billion dollars.[14] While an overwhelming share of this is American,[15] European and Japanese foreign investment accounted for approximately 31 billion dollars.[16]

The movement toward internationalization can also be gauged by the number of foreign production facilities and the percentage of "foreign content" in a corporation's make-up. For example, 62 of the largest 100 American firms have production facilities in six or more foreign countries, while 39 of the largest 100 non-American firms do also. If the cut-off point is reduced from six to four countries, then 64 of the largest non-American firms may be considered "multinational."[17]

An alternative means for determining the importance of international investment is the percentage of foreign content in a

10. Vernon, *supra* note 5, at 82 exhibit II.

11. French direct investment abroad increased from .52 billion Fr. in 1962 to over 1.3 billion Fr. in 1966. THE INTERNATIONAL CORPORATION, *supra* note 4, at 26, 167 table 16.

12. In Germany the net amounts invested abroad rose from 3.8 billion DM in 1961 to over 12 billion DM in 1967. *Id.* at 26-27, 173 table 18a.

13. *Id.* at 27, 173 table 19.

14. *Id.* at 20, 145 table I.

15. United States direct foreign investment as of 1966 amounted to approximately $55 billion. *Id.* at 146 table 2.

16. Rose, *The Rewarding Strategies of Multinationalism*, FORTUNE, Sept. 15, 1968, at 100. *See also* THE INTERNATIONAL CORPORATION, *supra* note 4, at 146 table 2. Prior to the imposition of the mandatory controls on capital outflows, the National Industrial Conference Board predicted that "by 1975 about 25% of the approximately $1-trillion G.N.P. of the rest of the free world would come from the branches and subsidiaries of U.S. corporations, and some 35% would be 'U.S.-tinged'—that is, would be associated with either direct or portfolio investment by Americans. Moreover, the N.I.C.B. estimated that nearly 20% of the projected G.N.P. of the U.S. in 1975—also about $1 trillion—would be 'European-or Japanese-tinged.' In contrast, U.S. exports to the rest of the free world were expected to amount to only about $42 billion by 1975, and world sales to the U.S. about $29 billion." Rose, *supra* at 100.

17. THE INTERNATIONAL CORPORATION, *supra* note 4, at 23. For a listing of United Kingdom companies with six or more production facilities abroad, see *id.* at 155 table 10.

company's make-up.[18] The term "foreign content" is defined to include "the percentage of a company's total assets abroad, the percentage of its sales, of its income or of its labor force."[19]

Most of the early United States foreign investment was concentrated in Canada and Latin America and the bulk of it was in only a few extractive industries.[20] For example, nearly two-thirds of United States foreign investment in 1957 was concentrated in these areas, and the largest single investment was in petroleum.[21] By 1966, however, American investment in Canada doubled and in Europe quadrupled, while United States investment in Latin America rose only about fifteen percent. During this same period, manufacturing had replaced petroleum as the prime industry.[22]

Although the bulk of United States capital has been directly invested in other industrialized nations, an increasing amount has been directed at the underdeveloped areas as well. Lately these figures have begun to show some significant increases, and as of 1960, Americans had invested over thirteen billion dollars in less-developed countries outside of Canada and Western Europe.[23] Although most of this large stake is in just a few countries[24] and the bulk of it is in only a few extractive industries,[25] the shift to manufacturing investment is visible.[26]

Many factors have led to the development of the multinational corporation.[27] Although in most instances positive considerations, such

18. For a listing of United States multinational companies in which the foreign content is more than 25%, see BRUCK & LEES, FOREIGN INVESTMENT, CAPITAL CONTROLS, AND THE BALANCE OF PAYMENTS 83-85 (1968). For a listing of European international companies in which the foreign content is more than 25%, see THE INTERNATIONAL CORPORATION, *supra* note 4, at 154 table 9.

19. THE INTERNATIONAL CORPORATION, *supra* note 4, at 23.

20. For an indication of the trend of United States direct investment between 1929 and 1966, see THE INTERNATIONAL CORPORATION, *supra* note 4, at 147 table 3. *See generally* Vernon, *The American Corporation in Underdeveloped Areas*, in THE CORPORATION IN MODERN SOCIETY 242 (E. Mason ed. 1960).

21. THE INTERNATIONAL CORPORATION, *supra* note 4, at 147 table 3.

22. *Id.* Similar data are not available for other countries.

23. Vernon, *supra* note 20, at 242.

24. "For example, of the $1,234 million which American direct investors sent to countries outside of Canada and Western Europe in 1957, about 65% went to Venezuela and another 18% to four other countries in Latin America; the rest of the underdeveloped world received only $222 million." *Id.* at 246-47.

25. In 1957, some 83% of United States foreign investment was directed to mining and petroleum ventures, while only $205 million went to manufacturing and other activities. *Id.* at 247.

26. THE INTERNATIONAL CORPORATION, *supra* note 4, at 22.

27. For an extensive discussion of the factors influencing the trend toward internationalization, see THE INTERNATIONAL CORPORATION, *supra* note 4, at 61-66; Rose, *supra* note 16, at 101-02; *Special Report, supra* note 1, at 68, 70.

as reduced costs and increased sales, have been the primary motivation for the movement abroad, in some cases international investment has resulted from defensive motives or external pressures. There is no doubt that economic forces have influenced the growth of the multinational corporation. As Professor Sidney E. Rolfe notes:

> the basic motivation of the international corporation in expanding abroad is the same as that for a national corporation's expansion, to wit, the quest for profits, as profits may be earned within the constraints imposed by prevailing and foreseeable competitive conditions.[28]

The classic motive, then, is to penetrate a market more effectively. The growth of foreign markets, "the desire of companies to be near their markets so that they can supply inventories quickly, or tailor products to local needs, or otherwise participate with greater efficiency, and without the added cost of freight, has been the predominant reason for the development of production facilities abroad."[29]

In addition, since a multinational firm operates in many different markets, it is able to take advantage of varying labor conditions, market demands, money-market rates and tax laws. As a result, when it can closely coordinate all the parts of its operation, the multinational corporation is able to minimize costs and maximize profits on a world-wide basis.[30] Carrying multinationalism to the logical extreme, then, a corporation is able to concentrate its production in the area where costs are lowest, and build up its sales where the market is most profitable.

A number of companies have embarked on foreign operations with a clearly perceived strategy of linking their own competitive advantage, which may be in technology, reputation, cheap capital, brand name, or highly trained management, with the advantage peculiar to another region, such as cheap labor.[31] For example, a French aluminum company came to the United States because it saw a profitable linkage between its own technology and the relatively low-cost capital and low-cost energy available in this country.[32]

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28. THE INTERNATIONAL CORPORATION, *supra* note 4, at 62.

29. *Id.* at 63.

30. For example, resourceful companies can "use their multiple bases to keep money costs down by . . . taking advantage of low interest rates in one country to supply the working-capital needs of operations in high-interest areas. The procedure is simple when money can be borrowed, either in the international capital market or various local markets, and easily shifted from country to country. But sometimes the movement of money is subject to local governmental restriction; in such cases, a principal method is to delay or accelerate payment on the sale of raw materials, components, and finished goods within the corporate family . . . ." Rose, *supra* note 16, at 101. *See generally id.* at 102-03.

31. THE INTERNATIONAL CORPORATION, *supra* note 4, at 62; Rose, *supra* note 16, at 102.

32. Rose, *supra* note 16, at 102. Many foreign companies also locate in the United States to take advantage of American technology.

Although the advantages of international operations are clear in retrospect, they were not nearly so apparent when corporations began investing abroad. Defensive motives sometimes provided the impetus for international investment. The existence of tariffs is the primary defensive reason for the internationalization of production.[33] In many instances, as happened to the farm machinery manufacturers in Mexico,[34] a foreign government will raise prohibitive barriers against imports of a product, making local manufacture the only means of serving the market. Other corporations have moved production facilities abroad because of a fear that their competitors, who were going overseas, would get a head start in a potentially rich market,[35] or would acquire a cheap source of supply for possible re-import into the United States, thus threatening their domestic market position. Still others moved in order to be near their customers.[36]

Other major reasons for the internationalization of production include the impact of United States antitrust laws, the reduction of risks inherent in "foreign operations," and the external persuasion and inducements offered by the host country. Under United States antitrust laws, cartels are illegal, at least for American corporations, and the prosecution of such arrangements has been vigorous.[37] At the same time that international agreements were being prohibited in the United States, the risks that were once associated with foreign investment were being greatly reduced.[38] With the gradual elimination of restrictions on capital movements in Europe and the rapid growth and greater stability of the Continental economies, corporations became more willing to make investment decisions on a pure cost-return basis.[39] Finally, international investment has occurred in response to persuasion and pressures offered by the host country.[40] In many instances host governments will offer either direct or indirect incentives, such as promises of tax benefits or greater access to credit, in order to provide

33. THE INTERNATIONAL CORPORATION, *supra* note 4, at 63-64.

34. Rose, *supra* note 16, at 101.

35. This has been termed by Professor Rolfe as "follow the competitor's" strategy. THE INTERNATIONAL CORPORATION, *supra* note 4, at 64.

36. *Id.*; Rose, *supra* note 16, at 101-02.

37. THE INTERNATIONAL CORPORATION, *supra* note 4, at 10-11.

38. Rose, *supra* note 16, at 101.

39. This is evidenced by the fact that in a recent survey 39 of 92 United States companies with substantial direct investments said that, "in making up their capital budgets, they made no distinction between foreign and domestic investment alternatives." *Id.* at 101.

40. THE INTERNATIONAL CORPORATION, *supra* note 4, at 64-65; Vernon, *supra* note 5, at 84-85.

local production as a substitute for imports or to further their industrialization plans.

B. The Multinational Corporation Defined

A multinational corporation[41] "is one in which, structurally and policy-wise, foreign operations are co-equal with domestic" operations.[42] Despite the fact that ownership and management remain uninational and, therefore, decisions remain nationally-biased, "management is willing to allocate company resources without regard to national frontiers to achieve corporate objectives."[43] Accordingly, in order to be considered "multinational," a corporation must meet two tests.[44] First, it must have a manufacturing base or some other form of direct investment that gives it roots in at least one foreign country. Second, it must have a genuinely global perspective. A corporation has a global perspective if "its management makes fundamental decisions on marketing, production, and research in terms of the alternatives that are available to it anywhere in the world."[45] Thus, a multinational firm's management sees its enterprise as a global entity; it sees its foreign and domestic interests interwoven into a web of carefully integrated parts. Consequently, it will allocate its capital, manpower, and other resources on a global basis.

A transnational corporation "is a multinational firm managed and owned by persons of different national origins."[46] Carrying the process one step further, a supranational corporation "is a transnational firm legally denationalized by permitting it exclusively to register with, be controlled by, and pay taxes to, some international

41. There is no wide-spread agreement on a precise definition of the term "multinational." Obviously, there are degrees of multinationalism, and the terms international, multinational, and transnational are used interchangeably, each connoting to the user a different concept of the degree of internationalization of power. The following discussion of the multinational corporation will rely heavily on Professor Richard Robinson's set of definitions as set forth in THE INTERNATIONAL CORPORATION, *supra* note 4, at 12. *See also* EDITORS OF BUSINESS INTERNATIONAL, THE CONCEPT OF THE INTERNATIONAL CORPORATION (1964); THE INTERNATIONAL CORPORATION, *supra* note 4, at 11-16; Perlmutter, *The Tortuous Evolution of the Multinational Corporation*, 4 COLUM. J. WORLD BUS. 9 (Jan.-Feb. 1969).

An international corporation "is one in which international operations are consolidated in a line office on the division level and, as a matter of policy, is willing to consider all potential strategies for entering foreign markets—up to direct investment." THE INTERNATIONAL CORPORATION, *supra* note 4, at 12.

42. THE INTERNATIONAL CORPORATION, *supra* note 4, at 12.

43. *Id.*

44. *See Special Report*, *supra* note 1, at 63.

45. *Id.*

46. THE INTERNATIONAL CORPORATION, *supra* note 4, at 12.

body established by multinational convention."[47] Thus, a corporation could be properly termed supranational only if a registration process existed in some authority independent of nation-states, such as an office of the United Nations. With such an independent authority, the multinational enterprise would be free of the law and, necessarily, the influence of a nation-state.[48]

By the above standards, most of the firms with foreign branches today are multinational. They are identifiable, for example, as American, German, or Swiss because ownership and management is localized in the country of their origin.[49] As firms increasingly recruit both money[50] and managers[51] in areas other than their country of origin, they will become transnational, and national bias will gradually play a lesser part in the decision making process.[52] As for supranational corporations, Professor Rolfe notes that "the legal basis for their evolution is not yet at hand, and the corporate move would require still more time."[53] The evolution to a supranational firm, however, seems a bit less remote when the possibility of some true international mergers are taken into account.[54] Should international mergers begin to come about, the prospects for the internationalization of power in the corporations becomes vastly enhanced.[55]

C. Economic Consequences of the Movement Toward Internationalization

Although the economic benefits derived from direct investment defy measurement, such investment clearly contributes to the growth of underdeveloped areas.[56] The advantages normally attributed to the

47. *Id.*

48. A set of definitions based on the psychological attitude of managers has been suggested by Professor Howard Perlmutter. He distinguishes "attitudes [which] may be described as ethnocentric (or home-country oriented), polycentric (or host-country oriented) and geocentric (or world-oriented). While they never appear in pure form, they are clearly distinguishable." Perlmutter, *supra* note 41, at 11.

49. THE INTERNATIONAL CORPORATION, *supra* note 4, at 12.

50. *See* text accompanying notes 80-83 *infra.*

51. *See* text accompanying notes 75-80 *infra.*

52. A few firms, such as I.B.M., Shell and Unilever, are beginning to become transnational. Rolfe, *Updating Adam Smith,* INTERPLAY, Nov. 1968, at 19.

53. THE INTERNATIONAL CORPORATION, *supra* note 4, at 13.

54. For a discussion of the barriers to international mergers, see *id.* at 89-93.

55. At least one observer indicates that "[s]ome important European transnational mergers appear on the verge of realization." Knoppers, *Transferring Technology: A New Situation,* INTERPLAY, Nov. 1968, at 27.

56. For an extensive discussion of the benefits derived from direct foreign investment in underdeveloped areas, see Vernon, *supra* note 20, at 242; Vernon, *Foreign-Owned Enterprise in the Developing Countries,* in XV PUBLIC POLICY 361 (J. Montgomery & A. Smithies eds. 1966).

installation of foreign firms are that they bring with them a stimulation of competition, an influx of capital, a contribution of duties to the budgets of the countries where they are installed, and the development of new techniques of production and management. Foreign operations also train and upgrade local labor and management and have a significant impact on production, marketing, and labor practices of local businessmen.[57] While stimulating further growth by reinvesting profits,[58] multinational corporations also provide consumers with more efficiently made and better serviced products.

In addition to these economic benefits, such private investment has two advantages over public finance as a source of growth:

> First it is free of political strings, often attached to government transactions. Second it is equity capital and not debt, which must be amortized according to fixed schedules in bad times and good, in periods of foreign exchange availability or dearth.[59]

The dominant pattern of manufacturing investment, however, has been to provide import substitutes.[60] Due to lack of demand and consequent short production runs, the manufacture of completed goods abroad has resulted in inefficient and high-cost production. For example,[61] automobile companies in Latin America are producing small lots in small plants at increased cost. Accordingly, a home-made vehicle produced in Argentina at a cost of 4,000 dollars and in Brazil at a cost of 3,000 dollars might have cost only 1,660 dollars if it had been made in Detroit. Consequently, local production of completed consumer goods not only results in inefficient use of the country's resources, but also deprives the government of a source of tariff revenue.

Thus it has been suggested that multinational corporations should begin allocating the manufacture of specialized components for use in their global operations according to the comparative advantage of the particular country.[62] In other words, in many industries the

57. Improved labor relations can often be added to the list of benefits, especially where United States based companies are concerned. This is hard to pin down precisely, but it is significant that I.B.M.'s French workers did not participate in the general strike during the spring of 1968. Rose, *supra* note 16, at 182.

58. In many instances, however, multinational corporations are unable to reinvest their profits in less developed areas. Since investors expect to receive a return on their investment in repatriated profits and dividends, eventually, the counterflow of profits and dividends can exceed the current flow of investment to the underdeveloped area. Vernon, *supra* note 20, at 248.

59. THE INTERNATIONAL CORPORATION, *supra* note 4, at 29.

60. For a discussion of the import substitution policy, see *id.* at 35-39.

61. The example cited is taken from J. BARANSON, AUTOMOTIVE INDUSTRIES IN DEVELOPING COUNTRIES 44-45 (1968). *See also* Baranson, *Will There Be An Auto Industry In the LDC's Future*, 3 COLUM. J. WORLD BUS. 49 (May-June 1968).

62. For a discussion of the principle of "complementation," i.e., the allocation of tasks

multinational enterprise is uniquely able to link developing countries to a world wide system of component production. Without the multinational firm the developing countries are unlikely to undertake the production of components in which they may have a comparative advantage.

D. The Future of the Multinational Corporation

For the immediate future, the foreign movement of United States companies appears to be slowing and changing directions.[63] Although total United States investment will continue to rise through 1970, the annual increase in international investment has been declining steadily since 1965[64] and will continue to do so.[65] United States companies are planning to reduce their rate of investment in Canada and the Common Market countries in the years ahead and at the same time increase mining and oil outlays in developing countries.[66]

These changes are a reflection of the underlying economic conditions. Overcapacity has begun to appear in Europe, while expansion of domestic markets in the United States is making investment at home as profitable as that in Europe.[67] If the United States companies are pausing, European multinational corporations seem to be doing the opposite, although similar projections are not available. The movement of plant and investment from Europe and especially Japan seems to be gathering momentum.[68]

Although in most instances minority interests in foreign countries are unable to cause legal trouble, the present trend has been toward 100 percent ownership of foreign subsidiaries.[69] Since there is the chance that a disgruntled minority partner will have enough local influence to

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according to the comparative advantage of the country, see J. BARANSON, AUTOMOTIVE INDUSTRIES IN DEVELOPING COUNTRIES 63-65 (1968); THE INTERNATIONAL CORPORATION, *supra* note 4, at 40-41.

63. THE INTERNATIONAL CORPORATION, supra note 4, at 27-28; *The Rush to Europe Slows to a Crawl*, BUSINESS WEEK, Aug. 3, 1968, at 82 [hereinafter cited as *Rush to Europe*].

64. *Rush to Europe*, *supra* note 63, at 82-84.

65. THE INTERNATIONAL CORPORATION, *supra* note 4, at 27.

66. *Rush to Europe*, *supra* note 63, at 82-84. Although it is estimated that United States investment in Canada and the Common Market amounted to $4.4 billion in 1967, plans show a reduction to some $3.5 billion for 1970 for these two regions. In the aggregate, however, United States corporate investment abroad will have risen from $8.7 billion in 1967 to some $10.3 billion by 1970 as a result of an increased flow of investment to the less developed nations. *Id.* at 82.

67. THE INTERNATIONAL CORPORATION, *supra* note 4, at 28; *Rush to Europe*, *supra* note 63, at 82.

68. Rolfe, *supra* note 52, at 17.

69. *Special Report*, *supra* note 1, at 84; *cf.* W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 23-24 (1964); Vernon, *supra* note 56, at 374 n.19.

cause trouble for the major partner, the simplest way for a multinational corporation to control all its parts—thus to maintain the greatest flexibility—is plainly for it to own its empire 100 percent. But in parts of the world where countries have begun to assert their claims to legal, political and economic control, a shift from majority-foreign control to minority participation is beginning to take place.[70] These nations are persuading companies to include local partners in operations already set up, particularly in new ventures.[71] Although a strong minority interest, coupled with technological know-how and managerial skill, can still insure effective control, this shift signifies on the whole an increasing transfer of weight and control from the parent to the host country.[72]

It has been noted, however, that as international corporations begin to rely on locally produced components, "share participation in local subsidiaries no longer appears feasible. . . . [A]s manufacturing industries shift to a more inter-dependent pattern . . . they must control the product from component manufacture through assembly and final marketing."[73] Accordingly, if the multinational corporation is going to maintain a totally integrated operation and, at the same time, meet the demands for local participation, this participation will have to take the form of shareholding in the multinational enterprise.[74]

While multinational companies will undoubtedly continue to reach out for greater expansion in those countries where they operate and to move into new territories, it is by no means certain that they will evolve into institutions that are truly international in spirit. Indeed, at present it appears that few companies have gone very far toward achieving international integration of management. Most multinational firms

70. FRIEDMANN, *supra* note 69, at 24. *See Special Report, supra* note 1, at 84.

71. "In some countries such as India and Japan, local partnership is mandatory for almost all industries." *Special Report, supra* note 1, at 84. Professor Friedmann contends that the last stage in the gradual transfer of ownership from the foreign to the home country is "the complete expropriation, or in extreme cases confiscation, of the foreign interests." He points out that this trend is "illustrated by such major international events as the Iranian nationalisations of British oil properties, the Argentinian nationalisations of British-owned railways, the Egyptian nationalisation of the predominantly French- and British-owned Suez Canal, or the Indonesian nationalisations of Dutch tobacco interests." FRIEDMANN, *supra* note 69, at 24.

72. FRIEDMANN, *supra* note 69, at 24. There are two potential advantages in a multinational corporation holding only minority interest in foreign subsidiaries. On the one hand, "[i]t helps avoid the stigma sometimes associated with being a 'foreign company,'" while, on the other, it is "good business insurance to share ownership with a number of small local investors whose return from their investment will seep through the local economy." *Special Report, supra* note 1, at 84.

73. THE INTERNATIONAL CORPORATION, *supra* note 4, at 42.

74. *See* notes 82-83 *infra* and accompanying text.

employ local citizens, either voluntarily or involuntarily, in the lower rungs of management in their foreign subsidiaries,[75] but when it comes to the top jobs in the subsidiaries, the picture is mixed.[76]

There are several reasons for the failure to create a truly international managerial structure. First, there are relatively few qualified executives, especially in many underdeveloped countries, and the competition for those available is tremendous.[77] Second, since men's lives are rooted in national customs, habits, and values which they have accepted from childhood, executives are frequently unwilling to transfer across national boundaries.[78] Finally, companies fail to adequately prepare the local executive manager for the hard climb up the corporate ladder.[79] Running a subsidiary may not be good training for top corporate responsibilities. If the tend toward greater centralization of control continues,[80] the top men in the subsidiary will be less managers than national representatives of the corporation, and thus may not be adequately prepared to take on the responsibilities of a corporate-headquarters position.

Like management, it is uncertain whether the capital base of multinational corporations will become truly international. Capital has its own nationality. Under present conditions, it is unlikely that shareholders in a multinational company in one nation would accept a national of another as the chief executive officer and caretaker of their investments. Likewise, politicians, statesmen, and government civil servants would probably object to a foreigner holding billions of dollars worth of local industrial power.[81] The heads of some large multinational companies have, however, suggested that eventually the

75. FRIEDMANN, *supra* note 69, at 29; Rose, *supra* note 16, at 180.

76. A survey of 150 United States industrial corporations revealed that although "20.7 percent of all their employees were foreign, only 1.6 percent of their corporate executives were non-Americans." Rose, *supra* note 16, at 180. A number of executives contend, however, that they no longer have a rigid policy that key people in units abroad must be American. For example, the vice-president of Proctor & Gamble stated that they "never appoint a man simply because of his nationality. A Canadian runs [their] French company, a Dutchman runs the Belgian company, and a Briton runs [their] Italian company. In West Germany, an American is in charge; in Mexico, a Canadian." *Special Report*, *supra* note 1, at 76. *See* Rose, *supra* note 16, at 180, 182. One observer feels that the Procter & Gamble experience represents a discernible trend. THE INTERNATIONAL CORPORATION, *supra* note 4, at 76.

77. *See* Rose, *supra* note 16, at 180.

78. Thackray, *Not So Multinational, After All*, INTERPLAY, Nov. 1968, at 23.

79. *See* Rose, *supra* note 16, at 180, 182.

80. For a discussion of the movement toward centralized control of international operations, see Rose, *supra* note 16, at 104. *But see* THE INTERNATIONAL CORPORATION, *supra* note 4, at 66-72.

81. Thackray, *supra* note 78, at 23.

stock of the parent should be widely held in nations where the company has subsidiary operations.[82] Local ownership of shares in the foreign parent company makes

> for widespread financial participation in international corporate affairs, without raising the problems of multi-direction which participation through joint ventures or subsidiary share-issue might, and move the international companies further away from uninational status. Most large international corporations, and particularly those with a high degree of interdependence among their component parts, have urged share buying in the parent as the most efficient method of financial participation in their activities.[83]

It is apparent that the movement toward internationalization will continue, especially in the developing countries. Corporations will move into new areas as opportunities are discovered that will reduce costs and increase profits.

The benefits derived from international production suggest that the movement abroad should be encouraged. As populations increase and national resources become more limited, the multinational corporation will play a significant part in not only maintaining but increasing the standard of living for all persons. Even at the present time many nations are no longer self-sufficient, and the multinational concern provides a means of linking these nations with the more economically developed areas of the world.

Encouragement should be tendered the internationalization of the corporation as well as the internationalization of production. The goal should be a truly international operation both from the standpoint of management and ownership. In the former instance the burden lies with the corporations. A continuous effort must be made not only to adequately train but also to promote executives of all nationalities, especially in the countries in which the corporation is located.

II. THE MULTINATIONAL CORPORATION AND THE NATION STATE

The development of the multinational corporation raises doubt as

82. *Special Report, supra* note 1, at 86. Since the multinational company is already an international resource in interests and ambitions, in investments, in employees, and in customers, there is no reason why its benefits should not flow to owners as well as to workers and customers without regard to individual nationalities.

83. THE INTERNATIONAL CORPORATION, *supra* note 4, at 114-15. Although it has been suggested that the multinational corporation might get a friendlier reception around the world if it "denationalized" its ownership, the opposite reaction might, in fact, result. If the multinational enterprise sold its shares on national exchanges, "it would stand to be accused—perhaps fairly—of fostering . . . [capital] flows from the less rich to the very rich." In addition, since "the impression has gotten around that the subsidiary is a superefficient branch of a superpowerful international system, its shares might sell at a premium and the corporation could be accused of harvesting a windfall." Rose, *supra* note 16, at 182.

to whether the nation-state is any longer the optimum political organization for the regulation of restraints on competition. The multinational firm's tremendous resources, as well as its widespread contacts and activities, not only make it difficult for nations to develop truly effective competition policies but also enable the enterprise to challenge the sovereignty of the nation-state. Since it often plays an important role in the economic growth of the nations in which it operates, the multinational company can have a significant impact on the nature and extent of local governmental control. Attempts to regulate the multinational enterprise by means of the extraterritorial application of national competition policies have not only proved ineffective but have resulted in increased international tension and conflict.

A. The Validity of National Competition Policies

Although the affiliate of a multinational firm may control only a relatively small portion of the domestic market, national competition policies must take into consideration the fact that the affiliate is part of a much larger international operation and thus may have distinct advantages over domestic companies. For example, a multinational firm with a wide geographical diversification may employ massive price cuts in one country in order to eliminate domestic competitors and thus assure itself of a monopoly position.[84] Although there is nothing unusual about this technique, the structure of the multinational concern permits it to absorb, without serious effect, losses which might prove fatal for domestic companies. Similarly, since the subsidiary of a multinational firm has access to the world's financial resources at the lowest possible cost, it has a distinct advantage over local firms in the competition to purchase other domestic operations.

Accordingly, when affiliates of one or more multinational companies are located within a nation's boundaries, the government cannot realistically establish its competition policy on the premise that the subsidiary is an independent entity unable to rely on the vast resources of its parent.[85] Thus, before a nation will be able to develop a truly effective system of regulation, it must take into consideration the impact of the entire international operation on competition within its own boundaries.

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84. Uri, *Multinational Companies and European Integration*, INTERPLAY, Nov. 1968, at 21.

85. This fact is particularly true in the case of many foreign nations where the problem of size and monopolization has not prevailed and present policies are based on the premise that the government is dealing with relatively small firms, none of which by itself is able to exercise a disproportionate influence on the market. *See* note 161 *infra* and accompanying text.

Since the competition policies of nations may differ both in approach and extent of application, the multinational corporation may be faced with a dilemma. If the foreign subsidiary conforms to the interdictions to which the home office is subject, it does not behave like a domestic company of the host country: it places a foreign sovereignty above that of the country in which it is installed. If, on the other hand, it follows the rule of the host country, it risks circumventing the interdictions of the home government.[86] Since the corporation will in most instances adopt the policies of the parent government, a realistic competition policy must reflect an awareness that policies in other nations will have an effect on the activities of the affiliate in the host country. Conversely, a nation must also consider the impact of its actions on the activities of the multinational firm in other nations. By adopting a specific approach to the regulation of restraints on competition or by taking certain affirmative action, a nation will affect the way in which the multinational firm carries on its activities in other nations. Since the enterprise may be closely linked to the economy of the foreign countries in which it operates,[87] such action may have an adverse economic effect on other countries and thus conflict with the nation's foreign policy objectives.[88]

Given these considerations, and present conditions, it is doubtful that a nation can develop an effective national competition policy. At present, nations are often unable to determine either the impact of foreign competition policies on domestic activities or the effect of national action on foreign economies. Although there has been some multinational communication on an informal basis,[89] there is no formal means by which a nation-state can obtain such information. Accordingly, a forum should be established in which it would be possible for nations to consider the varying competitive policies, the reasons for their adoption, and the extraterritorial effects of their application.[90]

86. THE INTERNATIONAL CORPORATION, *supra* note 4, at 78-81; Uri, *supra* note 84, at 19-20.

87. *See* notes 93-94 *infra* and accompanying text.

88. *See generally* note 118 *infra.*

89. *See* note 199 *infra* and accompanying text.

90. Such a forum would encourage multinational cooperation and thus better enable governments to obtain the relevant industrial facts essential to the development and application of their competition policies. At present, nations are frequently unable to obtain such information because of the multinational character of the enterprise's operation. In addition, in order to make a government's task more difficult, a corporation can adopt defensive measures such as shifting the location of directors, records, and main offices in foreign lands. Timberg, *International*

B. *The Effectiveness of National Regulation*

Assuming that the nation-state could develop an appropriate competition policy, it is doubtful that it would be able to effectively apply it to the anti-competitive activities of the multinational firm. Since multinational firms usually have well-established bases in more than one country, they are not only able to transfer resources into a country and out again, but also are able to use their knowledge of existing national competition policies to choose to operate in those countries which will apply favorable legal doctrines to the activities in which they plan to engage.[91] The relative ease with which the enterprise is able to make and implement such choices, impervious to all but the most overt commands of the local economy, negates the effectiveness of national control.[92]

This flexibility takes on added significance when it becomes apparent that many of these enterprises are closely linked with the economies of their host countries.[93] In many instances the multinational company may be a large employer of national labor and consumer of national materials and may account for a significant percentage of the country's exports. In addition, these firms often carry on many activities in the host countries which would be regarded in the United States as governmental.[94]

Since not only the economies but the futures of many countries rely heavily on the presence of the multinational enterprise, nations, for practical reasons, may be unwilling to regulate restraints on competition. Governments may be hesitant to enforce existing regulations or to take affirmative action to prohibit harmful business practices. Similarly, the enterprise is able to use its tremendous financial and technological resources to obtain concessions or at least the assurance that it will be able to carry on its activities free of governmental restrictions. For

Combines and National Sovereigns, 95 U. PA. L. REV. 575, 592 (1947). This strategy has become extremely effective since countries have begun to enact measures prohibiting the furnishing of information to foreign officials. *See* note 119 *infra* and accompanying text.

91. Timberg, *supra* note 90, at 590-91.

92. Vernon, *Conflict and Resolution Between Foreign Direct Investors and Less Developed Countries*, in XVII PUBLIC POLICY 333, 336-37 (J. Montgomery & A. Hirshman eds. 1968).

93. *See* Ball, *Cosmocorp: The Importance of Being Stateless*, 2 COLUM. J. WORLD BUS. 25, 27 (Nov.-Dec. 1967); Timberg, *supra* note 90, at 581; Vernon, *Foreign-Owned Enterprise in the Developing Countries*, *supra* note 56, at 375.

94. For example, at the time the United Fruit Company agreed to divest itself of its Panamanian subsidiary, the subsidiary not only accounted for more than half of the value of the total exports of the country, but also carried on innumerable governmental activities. United States v. United Fruit Co., 1958 CCH Trade Cas. ¶ 68,941 (E.D.La. 1958); Folsom, *Toward a Rule of Reason in The Extraterritorial Application of Antitrust Laws*, in PRIVATE INVESTORS ABROAD 149, 164-65 (1967).

example, the multinational corporation may threaten to move its operation to a more cooperative country or merely to reroute its subsidiary's purchases through another country. It may also threaten to use its financial network to pull money out of a country in balance-of-payments trouble or to move money into one struggling to damp down inflation.[95]

It has been argued that the fears of host governments are unjustified because "corporate executives are genuinely apolitical in their pursuit of business affairs. They are concerned with reasonable profits and not power."[96] Such an argument, however, is not relevant to the underlying issue, and nation-states will continue to "sense that the locus of their power is challenged by an open international system in general and by multinational enterprises in particular."[97] The concern of the latter for profits will cause them to seek the most favorable legal climate in which to operate, and they will use their resources, consciously or unconsciously, to influence local governmental action.

It is clear, then, that the nation-state is no longer able to cope with the multinational corporation which "has, to a large extent, wrested the substance of sovereignty from the so-called sovereign state."[98] If the states are going to be able to meet the challenge of the multinational corporation and, at the same time, maintain their identities, they must coordinate their efforts. Only by acting collectively can nations eliminate the effect of the enterprise's ability to shift its operations into a country and out again. Such cooperation could be extremely effective, especially in those instances where, because of the nature of its operation, a corporation can only operate effectively in a limited number of countries.

C. *The Multinational Corporation As A Source of International Tension and Conflict*

Since it provides individual governments with an instrument through which they can affect activities in foreign nations, the multinational corporation has also been a source of increased international tension and conflict. While the home government may use its control over the parent company to influence activity in the host country, the host government may provide direct or indirect incentives

95. *See* Rose, *supra* note 16, at 182.
96. THE INTERNATIONAL CORPORATION, *supra* note 4, at 125.
97. Vernon, *Economic Sovereignty at Bay*, FOREIGN AFFAIRS, Oct. 1968, at 122.
98. Timberg, *supra* note 90, at 578.

to influence activity which may not only adversely affect the economy of the home government but may also violate its regulations concerning restraints on competition.

Although these conflicts are most often given publicity when court proceedings are involved, there are many situations that arise which may not be publicized at all but which nevertheless give rise to frictions and other difficulties.[99] Indeed, in most instances the impact of governmental policies on foreign branches and subsidiaries is indirect and not always readily apparent. Instructions or guidelines issued by government officials to a head office or subsidiary are normally passed on in the ordinary course of internal multinational corporation coordination. Through its control of the parent company, the home government can influence the company's activity in other countries, and thereby interfere with the host government's traditional right to regulate competition within its national boundaries.[100] From the standpoint of thc latter, "there is a challenge to its sovereignty by the home government through the multinational enterprise, which is legally under the jurisdiction of both governments."[101]

There are no apparent international legal limitations which affect a parent government's determination concerning its appropriate role in indirectly commanding company behavior. With regard to the direct extraterritorial application of national competition policics, it appears that a state may exercise jurisdiction in its own territory over acts which have taken place abroad. *The Lotus*[102] is the leading case in international law that stands for the proposition that "States may . . . extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory. . . ."[103] Indeed,

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99. THE INTERNATIONAL CORPORATION, *supra* note 4, at 78.

100. Behrman, *Multinational Corporations, Transnational Interests and National Sovereignty*, 4 COLUM. J. WORLD BUS. 15 (March-April 1969).

101. *Id.* Professor Jack Behrman contends, however, that "[a] nation does not lose sovereignty . . . if it can exercise the ultimate power of destroying the particular entity which presents the challenge." He feels that this "[u]ltimate power resided in the governments" and continues "to reside there today." *Id.* at 15-16. There is, of course, no doubt that theoretically each nation has the power to destroy, alter, or control any affiliate of a multinational corporation within its boundaries. However, as noted, if the economy of the country is dependent upon the presence of the affiliate, practically speaking the government may not have the opportunity to take such action.

102. Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9.

103. *Id.* at 19; *see* J. WILLIAMS, CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS 209 (1929); Brierly, *The "Lotus" Case*, 44 L.Q. REV. 154 (1928); 37 YALE L.J. 484 (1928). In this case there was a collision, on the high seas, between a French and a Turkish vessel, causing the loss of the latter and the death of eight Turkish nationals. When the French ship arrived at Constantinople, its officer in charge of the watch was tried and convicted

international law leaves a state "a wide measure of discretion which is only limited in certain cases by prohibitive rules. . . ."[104] Otherwise, "every State remains free to adopt the principles which it regards as best and most suitable."[105]

The only generally recognized "prohibitive rule" of international law which applies in this case is that a state may not exercise its power on the territory of another state.[106] This territorial principle is based on the duty of all countries to respect one another's sovereignty. As such, this limitation prohibits the enforcement of the acts of a state, such as judgments, administrative decisions, and statutory orders or prohibitions, in foreign countries.[107] Such acts can become effective only with the consent of the foreign sovereign. There is, however, no obligation that an act be recognized by the foreign state; this determination is governed solely by the law of the recognizing state.[108]

Even though "courts and authorities must not carry out any confiscation or search or any other official act in another country," there is no objection to obtaining facts in foreign countries "without the exercise of sovereign powers."[109] As long as there is no threat of legal action, officials may be sent abroad to collect voluntary information, to inspect any records voluntarily made available to them, or to carry out other investigations.[110]

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of involuntary manslaughter. The French and Turkish governments agreed to submit to the Permanent Court of International Justice the question whether Turkey had acted in conflict with the principles of international law in prosecuting the French officer. The Court decided in favor of Turkey on the ground that the crime had been committed in Turkish territory (the Turkish vessel) notwithstanding the fact that the French officer had at all times remained on board the French vessel.

104. [1927] P.C.I.J. ser. A, No. 9, at 19.

105. *Id.*

106. The Apollon, 22 U.S. (9 Wheat.) 362, 370-71 (1824); 2 MOORE, A DIGEST OF INTERNATIONAL LAW 236 (1906); Haight, *International Law and Extraterritorial Application of the Antitrust Law*, 63 YALE L.J. 639 (1954); Schwartz, *Applicability of National Law on Restraints of Competition to International Restraints of Competition*, in 11 CARTEL AND MONOPOLY IN MODERN LAW 701, 723 (1961).

107. Schwartz, *supra* note 106, at 724.

108. *Id.* at 724-25. It appears that this limitation will be applied to the extratcrritorial enforcement of antitrust decisions. In United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), *final order entered*, 105 F. Supp. 215 (S.D.N.Y. 1952), the court commented that "[i]t is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States." However, "the effectiveness of the exercise of that power depends upon the recognition which will be given to our judgment as a matter of comity by the courts of the foreign sovereign . . . ." *Id.* at 229.

109. Schwartz, *supra* note 106, at 706.

110. As will be noted, however, some countries have enacted measures which prohibit the submission of documents to foreign officials where antitrust proceedings are involved. *See* note 119 *infra* and accompanying text.

There is only one United States case that has applied national antitrust laws to agreements made by foreigners in foreign countries. In *United States v. Aluminum Company of America*,[111] Judge Learned Hand held that the agreements,[112] notwithstanding their completely foreign nature, were unlawful because "they were intended to affect imports and did affect them."[113] He also noted that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[114] It is important to note, however, that this application of the objective territorial principle[115] has been criticized from the point of view of international law,[116] and other countries have been reluctant to recognize the extraterritorial application of American antitrust laws.[118]

There are also practical limitations on the exercise of the authority of the parent government over the affairs of the multinational corporation arising out of conflicts with foreign economic objectives.[117]

111. 148 F.2d 416 (2d Cir. 1945). In this case the court had to decide whether a cartel agreement between a British company, two German companies, a Swiss and a Canadian company made in Switzerland and lawful under Swiss law, was in violation of § 1 of the Sherman Act because of its effect on the aluminum imports into the United States.

112. The agreements referred to were: first, an agreement made in Paris in 1931 to which all parties were foreign companies and which did not take imports into the United States into account in fixing production and distribution quotas; second, a 1936 agreement, also made abroad between the same parties, which provided for the payment of royalties in respect to production exceeding free quotas. There was no referenee in the 1936 agreement to imports into the United States, and the district court found that only the Canadian company counted shipments to that country as part of its production quota. United States v. Aluminum Co. of America, 44 F. Supp. 97, 279 (S.D.N.Y. 1941). Judge Hand held, however, that the general restriction on production outside the United States, at which the 1936 agreement was directed, evidenced a clear intent to affect imports into the United States and that the burden was on the defendants to prove that there was no such effect. As they failed to sustain this burden, the agreement of 1936 was found to violate § 1 of the Sherman Act.

113. 148 F.2d at 444.

114. *Id.* at 443.

115. The objective territorial principle holds that an offense is committed also in a place where the effect of the unlawful act has materialized.

116. Professor Haight contends that "[i]t is . . . clear from the opinions in *The Lotus* that an objective application of the territorial principle is only permissible when not only is the consummation of 'effect' inseparable from the act committed abroad but the offense is one which the community of civilized nations has come to regard as justifying a modification of the strict territorial principle. In the case of antitrust violations, there are several features which distinguish such offenses from those so regarded by the community of civilized nations." Haight, *supra* note 106, at 644. *See also* Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L.J. 655 (1954).

117. Behrman, *supra* note 100, at 17-18.

118. *See* Linowitz, *Antitrust Laws: A Damper on American Foreign Trade?* 44 A.B.A.J. 853 (1958). *Contra*, Fugate, *Damper or Bellows? Antitrust Laws and Foreign Trade*, 45 A.B.A.J.

Since situations do exist in which the exercise of power produces results which are contrary to other objectives of the government, the government will refrain from the exercise of its power when the potential costs are high or the gains are uncertain. For example, the pursuit of antitrust objectives, without modification or amelioration for overall foreign policy purposes, may well prevent the achievement of other, high-priority foreign goals.

The host government might also move to reduce the level of foreign interference by imposing penalties on the parent government, directly or indirectly, economically or politically. Host governments have the means of imposing such counter-restrictions since they have a unit of the multinational concern within their boundaries. For example, the response to the extraterritorial application of United States antitrust laws has been both clear and critical. Legislation prohibiting compliance with foreign antitrust measures has now been enacted in Demark, Finland, India, Holland, Norway, Panama, Sweden, Switzerland, the United Kingdom, and the provinces of Ontario and Quebec.[119] Like the parent government, however, the host government will impose countervailing restrictions only when it can do so without endangering other objectives which are equally or more important.[120]

The host government may also encourage or pressure the affiliate of a multinational corporation into carrying on specific activity.[121] Governments now offer various incentives in order to shape industrial policy. Enterprises that behave in an agreeable way in foreign countries often find that they have greater assurances of licenses, better access to credit, readier promises of tax exemptions, and better likelihood of government purchases than do recalcitrant fellow enterprises.[122] The critical question in this instance is how much coercion or pressure must

947 (1959). *See also* Becker, *The Antitrust Law and Relations with Foreign Nations*, 1959 ANTITRUST LAW SYMPOSIUM: HOW TO COMPLY WITH THE CLAYTON ACT 51; Note, *The Role of the American Corporation in the Economic Development of Latin America: A Study of the Conflict Between the Extra-territorial Application of United States Antitrust Laws and United States Foreign Policy*, 19 VAND. L. REV. 757 (1966).

119. THE INTERNATIONAL CORPORATION, *supra* note 4, at 81. Such legislation prohibits compliance with foreign antitrust measures either generally or merely in relation to the submitting of documents.

120. Behrman, *supra* note 100, at 18.

121. Vernon, *supra* note 5, at 84-85. It is not uncommon for the host government to make an unofficial request of the parent company to control the behavior of a subsidiary in a given way. Behrman, *supra* note 100, at 20-21.

122. This is especially true since successful international agreements are now more likely to include governments either as sponsors or as direct parties. Vernon, *supra* note 5, at 84.

a host government exert before the parent government will agree that a multinational enterprise has acquired immunity from charges of acting in violation of the parent government's competition policy.[123] In the United States, it appears that no real problem would exist for the multinational enterprise if the foreign government unambiguously directed a subsidiary to pursue a course that appeared to violate United States competition Policy.[124] As long as there was no conspiracy between the enterprise and the government leading to the issuance of that direction,[125] the enterprise could behave as directed without fear of legal action by the United States. Problems arise, however, as the host government's activity becomes more ambiguous. "Now that governments are so actively in the business of purposeful intervention, the more ambiguous situations are likely to arise with considerable frequency."[126]

It is apparent that as long as the interests of the government and the parent of the multinational firm diverge, or as long as governments can induce affiliates to act against the wishes of the host government, interference by governments through the multinational corporation in the affairs of other national sovereignties is likely to continue. There is no evidence that governments will act unilaterally to remove their own contribution to the conflict, and it is unrealistic to expect them voluntarily to accept a limitation on the exercise of their power. Consequently, it is mandatory that some formal means of international communication be established so that nations can discuss and coordinate their various approaches to the regulation of restraints on competition. The existence of such a forum would not only encourage the joint resolution of existing problems and make more effective the application of national regulations, but, more importantly, it would tend to reduce the tension which presently exists among nations.

III. National Competition Policies

Although some cooperation and even concentration of resources, both in production and trade, is obviously inevitable in modern

123. *Id.* at 85.

124. *See* K. Brewster, Antitrust and American Business Abroad 93 (1958); 1955 Rep. of the Att'y General's Nat'l Comm. to Study the Antitrust Laws 83.

125. A conspiracy to restrain American commerce which was successful in obtaining favorable foreign legislation was condemned in United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

126. Vernon, *supra* note 5, at 85.

industrial conditions,[127] it is generally acknowledged that "no society, however organized, can do without competition."[128] It is also generally conceded that there are certain restrictive business practices that are almost universally regarded as reprehensible while, at the other extreme, certain practices are, even in the "purist" systems, condoned or approved as necessary to the maintenance of a competitive economy. Despite this agreement and the fact that many countries of the free world believe that a competitive free enterprise society is the most satisfactory social pattern,[129] nations approach the task of regulating restraints on competition in different ways.[130] In order to fully comprehend the differences which must be reconciled, a brief discussion of the various national approaches to regulation and the reasons for their adoption is necessary.[131]

A. Various Approaches to the Regulation of Restraints on Competition

In the United States and Canada, regulation of competition is premised on the basic assumption that the competitive mechanism is the best means of assuring economic growth, and there is, in theory, an absolute prohibition against all restraints on competition. Other

127. "Cooperation and concentration may . . . be demanded by technological needs, by minimum efficiency of standardized production, by the need to keep prices to a reasonable level." Friedmann, *A Comparative Analysis*, in ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM, 3 U. OF TORONTO COMPARATIVE LAW SERIES, at 521 (W. Friedmann ed. 1956).

128. *Id.* "[T]he way in which Soviet Russia has encouraged competition between its different public enterprises shows that a socialist society cannot evade this problem any more than a capitalist society." *Id.*

129. ABA INTERNATIONAL AND COMPARATIVE LAW SECTION, 70, 81 (1963-64).

130. *See generally* ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM, 3 U. OF TORONTO COMPARATIVE LAW SERIES (W. Friedmann ed. 1956) [hereinafter cited as ANTI-TRUST LAWS]; C. EDWARDS, TRADE REGULATIONS OVERSEAS, THE NATIONAL LAWS (1966); MONOPOLY AND COMPETITION AND THEIR REGULATION (E.H. Chamberlin ed. 1954); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1954) [hereinafter cited as GUIDE TO LEGISLATION]; Bennett, *Comparison of United States and Foreign Antitrust Laws*, 3 INT'L & COMP. L. BULL. 14 (1958); Carlston, *Antitrust Policy Abroad* (pts. 1,2) 49 NW. U.L. REV. 569, 713 (1954); Timberg, *European and American Antitrust Laws—A Comparison*, 7 ANTITRUST BULL. 131 (1962); Timberg, *Restrictive Business Practices, Comparative Legislation and the Problems that Lie Ahead*, 2 AM. J. COMP. L. 445 (1953). An extensive survey of the literature on the subject of United States and foreign antitrust laws governing international business transactions appears in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 673-92 (W. Surrey & C. Shaw eds. 1963).

131. It should be noted that it is extremely difficult to categorize the various national competition policies, and generalizations often result in partial inaccuracies. Where national legislation does exist in this field, it differs in broadness of legal scope, detail of administrative articulation, extent of economic activity covered, intensiveness of enforcement, and animating public policy objectives.

nations, however, have adopted a regulatory approach and examine on an ad hoc basis all combinations and restraints on competition in order to determine whether they may be beneficial or fulfill a constructive function. At the other extreme are the less developed countries that have no express policy concerning competition and have adopted what may be termed a laissez faire approach.

1. *Prohibitory Approach.*—Since the basic assumption in the United States and Canada has been that the dynamism of business progress and economic growth springs from a free and expanding market,[132] these nations have adopted the approach of "prohibiting comprehensively and in principle all forms of restrictive actions and agreements tending to eliminate competition."[133] Accordingly, practices restricting competition are "considered illegal as such, or at least are seriously suspect."[134] Although these countries acknowledge that in certain situations violent competition might be crippling,[135] the prevailing belief is that industrial progress and economic development is best assured by tapping the competitive instincts of the individual businessman. Industry collaboration and restrictive practices, on the other hand, are thought to supply a protective haven for technological, production, and market laggards, who would otherwise be reformed into efficiency or eliminated by the purging process of competition.[136]

Accordingly, the United States relies on competition and free market structure to prevent arbitrary and unreasonable prices, limitations on production, and industrial stagnation and inefficiency. "Productivity, the fair treatment of consumers and the equitable and full utilization of resources are assumed to be best achieved, not by government dirigism (sic) and the continuing official supervision of industry, but by the competitive energies of businessmen."[137] The

132. *See* ABA INTERNATIONAL AND COMPARATIVE LAW SECTION 70, 81 (1963-64); Bennett, *supra* note 130; Carlston, *supra* note 130, at 734; Timberg (United States), in ANTI-TRUST LAWS, *supra* note 130, at 403.

133. Friedmann, *supra* note 127, at 525.

134. Bennett, *supra* note 130, at 14.

135. Despite their belief in the unqualified good of competition, these countries recognize that there are certain restrictive practices that are necessary for the maintenance of an effective competitive economy. Accordingly, in order to "provide a satisfactory compromise between the demand for a healthy competitive economy, and the recognition of the need for certain forms of cooperation and restriction on competition in an industrial and business society that is subjected to constantly changing challenges and pressures," the United States and Canada have developed what, in practice, is generally referred to as "workable competition" or effective competition. Friedmann, *supra* note 127, at 532.

136. Carlston, *supra* note 130, at 734.

137. Timberg (United States), in ANTI-TRUST LAWS, *supra* note 130, at 424.

government's role, therefore, is that of an occasional intervenor to liberate business from ill-advised private restraints on competition.

After the Second World War, the prohibitory approach was exported to Japan and Germany.[138] Although the United States's influence in Japan is virtually at an end,[139] United States competition policy did play an important part in the formulation of the new German Cartel Law.[140]

The main reasons for the enactment of an express competition policy in the United States and Canada were the existence of unreasonable market power and unfair practices.[141] In these nations, laws were originally framed in fear of and in reaction to "big" business.[142] The policy has since developed, however, into one designed to preserve competition.[143] United States competition policy is aimed in part at protecting small business from large business.[144] This preference for the small enterprise at the expense of large business and more efficiency can be indulged in because of the success of large firms in the United States.[145]

American competition policy also recognizes that all contending economic and political factions are not equally articulate and well-represented.[146] This recognition has tempered the original laissez faire

138. Friedmann, *supra* note 127, at 525.

139. This is indicated by the fact that the Antitrust Law of 1947 has been effectively paralyzed by increasing numbers of exemptions and lack of public support. *See generally* Ariga & Rieke, *The Antimonopoly Law of Japan and Its Enforcement*, 39 WASH. L. REV. 437 (1964); Osakadani (Japan), in ANTI-TRUST LAWS, *supra* note 130, at 238; Yamamura, *The Development of Anti-Monopoly Policy in Japan: The Erosion of Japanese Anti-Monopoly Policy, 1947-1967*, 2 J. L. & ECON. DEVELOP. 1 (1967).

140. *See generally* Shapiro, *The German Law Against Restraints on Competition—Comparative and International Aspects* (pts. 1,2) 62 COLUM. L. REV. 1, 201 (1962); Schwartz, *Antitrust Legislation and Policy in Germany—A Comparative Study*, 105 U. PA. L. REV. 617 (1957).

141. C. KAYSEN & D. TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS xiii (1965). For a general discussion of the origins of United States antitrust policy, see D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 139-57 (1959).

142. *See* Bennett, *supra* note 130, at 20-21; Timberg, *European and American Antitrust Laws—A Comparison*, 7 ANTITRUST BULL. 131, 135-36 (1962).

143. The tendency to regard the Sherman Act as an instrument to maintain competition was first indicated in United States v. Addyston Pipe & Steel Corp., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

144. United States v. Pabst Brewing Co., 384 U.S. 546, 552-53 (1966); United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341-42 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954); KAYSEN & TURNER, *supra* note 141, at 16-17.

145. Americans already enjoy the benefits of the large firm and do not have to promote it. Bennett, *supra* note 130, at 21.

146. Timberg, *Industrial Organization and Regulation in the Netherlands and United*

attitude towards business and conditioned legal attitudes towards restrictive practices. Having regard for the unprotected position of consumers or others who must deal with business groups, the law allows less room for business activity which might tend to restrain competition.

Finally, United States competition policy stems in part from a pessimistic view of human nature. Americans do not trust the individual's capacity or desire to use economic power wisely for the general good. As a result, there is a much greater reliance on the impersonal, automatic operation of the free competitive market mechanism.[147] "Competition in this context is desirable because it substitutes an impersonal market control for the personal control of powerful business executives, or for the personal control of government bureaucrats."[148]

2. *Regulatory Approach.*—Many nations that have enacted measures to regulate restraints on competition also believe that competition may be ruinous and wasteful[149] and that excessive economic freedom may be harmful to national prosperity.[150] Since these countries feel that "cooperation may 'rationalize' competition by making it more efficient,"[151] there is "a stronger preference for freedom of contract and [a] lesser belief in the value of competition."[152]

States: Some Comparative Reflections, 106 U. PA. L. REV. 525, 533 (1958); Timberg (United States), in ANTI-TRUST LAWS, *supra* note 130, at 407.

147. C. KAYSEN & D. TURNER, *supra* note 141, at 14-16; Timberg *Industrial Organization and Regulation In the Netherlands and United States: Some Comparative Reflections*, 106 U. PA. L. REV. 525, 531-32 (1958). "This reliance has not in any fundamental way been shaken by the economists' demonstration that the market mechanism is not as impersonal and automatic as we had thought, and is inapplicable to certain large industrial areas." *Id.* at 532.

148. C. KAYSEN & D. TURNER, *supra* note 141, at 14. In the United States "[a]ntitrust, like corporation law and patents, is based on the principle of the minimal governmental interference with economic affairs that is necessary to preserve the economic liberty of the individual. In fact, it proceeds on the premise that business firms possessing illegal monopoly power, or the power to fix prices, are illict 'private governments.' If such powers are needful in the public interest, they cannot be confided to the interested parties but must be entrusted to government as the objective arbiter of the public good." Timberg (United States), in ANTI-TRUST LAWS, *supra* note 130, at 405-406.

149. ABA INTERNATIONAL AND COMPARATIVE LAW SECTION 70, 81 (1963-64); Bennett, *supra* note 130, at 14; Verloren van Themaat (Netherlands), in ANTI-TRUST LAWS, *supra* note 130, at 264.

150. For a general discussion of the social, economic, political, and legal environment in which such attitudes toward competition developed, see Thorelli, *European Antitrust Policy*, 8 U. CHI. L.S. REC. 1 (1959).

151. Bennett, *supra* note 130, at 14.

152. ABA INTERNATIONAL AND COMPARATIVE LAW SECTION 70, 81 (1963-64). The difference between national competition policies depends largely on the balance (or lack thereof)

Accordingly, these nations have adopted the general attitude that restrictive agreements, cartels, or even monopolies are not inherently bad,[153] "but . . . are suspect, and subject to inquiry and possible prohibition."[154] These countries condone restrictive practices which promote the public welfare through industrial efficiency, and a restriction will be considered bad only if it is "abusive."[155] A practice is "abusive" when it "is actually detrimental to the public by promoting *excessive* prices or *undue* underproduction, limits on technology or exclusion of competitors."[156] Restrictions which have no effect or do not adversely affect the public interest are normally not considered unlawful.

In France, for example, where a greater emphasis is put on economic effect, the government encourages those restrictive practices that result in price reductions, technical progress, and higher productivity and eliminates those that do not.[157] Likewise, in the Netherlands, the government retains the power to encourage industrial combinations and restrictive agreements where they are favorable and to repress them where they are contrary to the public interest.[158]

Since in most nations which have adopted the "abuse approach" the validity of combines and restrictive practices usually depends upon their purpose and effect in light of the general economic policy, a

which individual countries have drawn between the two following principles: (1) freedom of trade and competition and (2) freedom of contract and association. In France and Sweden, for example, the general principle of freedom of contract has been given preference over the principle of free trade. Bolin (Sweden), in ANTI-TRUST LAWS, *supra* note 130, at 321; Castel (France), in ANTI-TRUST LAWS, *supra* note 130, at 91-92. For a general discussion of these two principles and their relation to national competition policies, see Timberg, *Restrictive Business Practices, Comparative Legislation and the Problems That Lie Ahead*, 2 AM. J. COMP. L. 445-51 (1953).

153. Although all the European antitrust laws deal primarily with cartel arrangements, there is an increasingly widespread interest in the regulation of specific restrictive practices, whether engaged in by cartels or by single firms. Thorelli, *Antitrust in Europe: National Policies After* 1945, 26 U. CHI. L. REV. 222 (1959). In France, for example, there are flat prohibitions of conduct applicable to certain kinds of tying arrangements, discrimination, and refusal to sell, and to fixation of minimum prices upon goods not specifically exempted. C. EDWARDS (France), *supra* note 130, at 20-32.

154. Friedmann, *supra* note 127, at 527.

155. ABA INTERNATIONAL AND COMPARATIVE LAW SECTION 70, 81 (1963-64); Bennett, *supra* note 130, at 14; *see, e.g.*, IV GUIDE TO LEGISLATION (Netherlands), *supra* note 130, § 0, at 6-7; Bolin (Sweden), in ANTI-TRUST LAWS, *supra* note 130, at 323; Castel (France), in ANTI-TRUST LAWS, *supra* note 130, at 93-94.

156. Bennett, *supra* note 130, at 14.

157. Castel (France), in ANTI-TRUST LAWS, *supra* note 130, at 93-94; C. EDWARDS (France), *supra* note 130, at 37.

158. IV GUIDE TO LEGISLATION (Netherlands), *supra* note 130, § 0, at 3-4; Verloren van Themaat (Netherlands), in ANTI-TRUST LAWS, *supra* note 130, at 271-72.

neutral attitude exists with regard to competitive restraints.[159] Accordingly, the government relies upon a case-by-case inquiry into the purposes of the combination or restrictive practice and its possible impact on the market. In most instances all the good and bad aspects of the combination, agreement or practice are evaluated, and a determination is made as to which aggregate outweighs the other. If on balance the added gain to commerce outweighs the loss caused by a restriction of competition, and if the loss was necessary to permit the gain, it is likely that the restriction will be upheld for lack of public injury.[160]

Since outside the United States and Canada, size and monopolization, as such, have not been serious threats to competition, most foreign competition policies implicitly assume relatively small firms with relatively equal bargaining power.[161] Consequently, those policies have been developed primarily to prevent restrictive business practices which are abusive or contrary to public policy. In these nations it is not felt that competition is the only means of assuring industrial development and economic growth; competition is preserved only upon a determination that it will be in the best interest of the public.

Many of the nations which have adopted the regulatory approach also believe that an informed public opinion causes interested industry groups to relax their selfish pressures.[162] Consequently, many of these nations have adopted comprehensive laws which provide for the public registration of certain restrictive business practices.[163] These laws

159. Bennett, *supra* note 130, at 14; *see* IV GUIDE TO LEGISLATION (Netherlands), *supra* note 130, § 9, at 1; Bolin (Sweden), in ANTI-TRUST LAW, *supra* note 130, at 319; Castel (France), in ANTI-TRUST Law, *supra* note 130, at 91.

160. Bennett, *supra* note 130, at 17. In the United Kingdom, however, although broadly speaking no restrictive practice is condemned outright (collective resale price maintenance is an exception), there is a presumption in the case of certain restrictive trade practices that the practices concerned are contrary to the public interest. The burden of proof is, therefore, placed on the parties concerned to satisfy the government to the contrary. III GUIDE TO LEGISLATION (United Kingdom), *supra* note 130, § 0, at 7-9. *See also* Grunfeld & Yamey (United Kingdom), in ANTI-TRUST LAWS, *supra* note 130, at 340.

161. Bennett, *supra* note 130, at 17-20. Indeed, since in most of these countries there are large numbers of relatively small firms, a general feeling has grown up that increased size will increase efficiency and therefore only the abuses of size must be curbed. Timberg, *supra* note 142, at 135-36.

162. Timberg, *supra* note 147, at 531-34.

163. *See generally* Friedmann, *supra* note 127, at 548-49; Thorelli, *supra* note 153, at 227-28; Timberg, *supra* note 152, at 457-59. Professor Friedmann notes that although "the publicity principle constitutes, to a large degree, the answer to the legality principle on the part of those countries which believe that restrictive practices and cartel agreements are not inherently bad, but should be exposed to the light of publicity," these nations "are not content with registration

generally require commercial enterprises and trade associations to report restrictive agreements and other practices as defined by statute and to file data relating to the agreements or understandings. The laws are premised on the notion that publicity is a powerful preventive of harmful restrictive practices in that it not only supplies the government with information enabling it to remedy abusive practices but also subjects undesirable business practices to the strong sanction of an adverse public opinion.[164]

3. *Laissez Faire Approach.*—The competition policy adopted by the majority of countries that have no specific legislation concerning competition has been characterized as a "do nothing"[165] or laissez faire approach. The absence of an express statute in a foreign country is an indication of the national attitude with regard to economic activity in the sense that the public policy of such a country does not oppose restrictive business practices.

Such an approach usually results from a simple reliance upon the fundamental principles of freedom of contract and association and from a belief that combinations and restrictive practices are valid since they are the outcome of free trade, free contract, and free association. In some instances, however, this policy has also developed from a fatalistic belief that although restraints on competition are usually undesirable, it is impossible to stem such developments.[166] Accordingly, these countries rely on their courts to invalidate or condemn a particular transaction or practice that happens to come before it. Transactions that are contrary to *boni mores* or public policy may be nullified, while other transactions, such as fraud or blackmail, are considered crimes.[167]

It is extremely difficult to determine the competition policy of a foreign nation that adopts this attitude. Although the government has made no formal pronouncement of its public policy regarding competition by statute or decree, it is possible that the government may

alone. In different ways, they provide for adjudication by an independent tribunal." Friedmann, *supra* note 127, at 548-49.

164. For a general discussion of the weaknesses of registration, see G. STOCKING & M. WATKINS, CARTELS OR COMPETITION? 427 (1948); Timberg, *supra* note 152, at 459-60.

165. Friedmann, *supra* note 127, at 522. The nearest approach to the "do nothing attitude" was, until recently, the position adopted by the English. *Id.*; A. HUNTER, COMPETITION AND THE LAW 15 (1966).

166. Friedmann, *supra* note 127, at 522.

167. Devine, *Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle Forms of Investment by American Corporations in Foreign Markets*, 57 NW. U.L. REV. 400, 451 n.279 (1962).

attempt to act as a catalyst in the development process and either directly or indirectly encourage activity that restricts free competition.[168] Thus, a government may require cooperation or a combination of independent business interests or may give legal protection to the means utilized or enforce restrictive arrangements by the provisions of their contract, patent, or trademark laws.

B. Reasons for the Different Approaches

There are two primary reasons for the existence of different approaches to the regulation of restraints on competition. First, there are among nations varying degrees of reliance upon the competitive process as a means for achieving economic efficiency and progress.[169] While some countries believe that competition is the best means for assuring economic development, other nations believe that concentration of economic power or restraints on competition may be necessary to achieve this end. Second, depending upon the circumstances of its national economy, a particular country may choose to emphasize the attainment of one goal over another.[170] For example, a debate of world-wide significance presently exists over the relationship between individual freedom and economic efficiency. While highly industrialized nations have indicated a willingness to sacrifice economic progress for individual freedom, other less-developed nations seem convinced that the problems of subsistence come first.

IV. PREVIOUS ATTEMPTS AT INTERNATIONAL REGULATION OF RESTRICTIVE BUSINESS PRACTICES

There have been several unsuccessful attempts to regulate restrictive business practiees on an international level.[171] Although past efforts have been primarily concerned with the harmonization of

168. *Id.*; Vernon, *supra* note 5, at 84-85.

169. "The outstanding economic goal with bears on competitive policy is the desire to promote the growth of the economy and to raise standards of living." M. MASSEL, COMPETITION AND MONOPOLY, LEGAL AND ECONOMIC ISSUES 22 (1962).

170. Although the primary objectives of competition policies are economic, social and political goals also affect competition policy. Some of the more important social and political aims are the assurance of personal freedom and equality of opportunity, the maintenance of a standard of business conduct that is considered fair, the avoidance of concentrated economic power, and the limitation of economic concentration and governmental interference. *See generally* A. HUNTER, *supra* note 165, at 17-21; C. KAYSEN & D. TURNER, *supra* note 141, at 11-22; M. MASSEL, *supra* note 169, at 15-41.

171. *See* Gunther, *The Problems Involved in Regulating International Restraints of Competition by Means of Public International Law*, in 11 CARTEL AND MONOPOLY IN MODERN LAW 579 (1961).

national cartel laws, an examination of these attempts will point up the key problems that must be resolved before international regulation will become feasible and will demonstrate why a more moderate approach, such as the coordination of national competition policies, may be the only realistic solution to the problem at the present time.

The problem of international regulation of restraints on competition was considered as early as 1927. At that time a committee of the World Economic Conference held under the auspices of the League of Nations considered reports recommending the harmonization of national cartel laws and the adoption of an international convention for this purpose, together with measures designed to establish international control over cartels. Although the Conference decided that the League of Nations should cooperate with governments and publish studies on matters of general interest, no positive action resulted since it was concluded that "the adoption of international rules of law would be impracticable owing to differences in national cartel policies."[172]

In 1946 the United States, through the Havana Charter for an International Trade Organization,[173] sponsored an international agreement looking to the prevention and control of restrictive business practices in international trade. The Charter was never adopted, however, largely because the United States Government announced in 1950 that it could not secure its ratification by Congress.[174]

In 1951 the Economic and Social Council of the United Nations passed a resolution establishing an ad hoc committee to prepare proposals for implementing the principles set out in the Havana Charter.[175] This effort to develop a means for regulating cartels at the international level was also abandoned because of a general disagreement over the approach adopted and a feeling that it would be impossible to reach agreement on whether certain restrictive practices had a harmful effect on competition.

172. *Id.* at 581-82.

173. United Nations Conference on Trade and Employment held in Havana, Cuba, from November 21, 1947, to March 24, 1948. *Final Act of the United Nations Conference on Trade and Employment, March 24, 1948.* U.S. DEPT. OF STATE, PUB. NO. 3117, COMMERCIAL POLICY SERIES 113.

174. Gunther, *supra* note 171, at 586.

175. Ad Hoc Comm. on Restrictive Business Practices, Report, 16 U.N. ECOSOC, Supp. 221, at 12, U.N. Doc. E/2380 (1953) [hereinafter cited as U.N. Report]. *See generally* Carlston, *supra* note 130, at 723-33; Domke, *The United Nations Draft Convention on Restrictive Business Practices*, 4 INT'L & COMP. L.Q. 129 (1955); Gunther, *supra* note 171, at 586-89.

A. Proposals of the Ad Hoc Committee on Restrictive Business Practices

While the attempt of the Havana Charter was part of a comprehensive approach to free international trade of governmental policies and other burdens, the proposals of the Ad Hoc Committee (Agreement) were limited to the single problem of restrictive business practices. Both instruments, however, contemplated the establishment of agreed rules for the conduct of business organizations in the sphere of international trade and means for the application of such rules to the entire business community of the member nations or parties to the Agreement.[176]

The primary aim of the Agreement was "the attainment of . . . higher standards of living, full employment and conditions of economic and social progress and development."[177] In order to achieve this goal it recognized the need "[t]o promote the reduction of barriers to trade, . . . to promote on equitable terms access to markets, products, and productive facilities" and "[t]o encourage economic development . . . particularly in under-developed areas."[178] A further objective was the promotion of "mutual understanding and cooperation in the solution of problems arising in the field of international trade."[179]

The activities of the proposed organization (Organization) would have been directed toward the prevention of business practices adversely affecting international trade.[180] According to the Agreement, it was not sufficient for these practices merely to "restrain competition, limit access to markets, or foster monopolistic control," but it was required that they "have *harmful effects* on the expansion of production or trade, in light of the objectives set forth in the Preamble . . . ."[181] The fact that the practice was engaged in by a public as distinguished from a private commercial enterprise did not affect the jurisdiction of the Organization,[182] but the Agreement did not apply if "the practice in

176. Since the Havana Charter and the proposal of the Ad Hoc Committee on Restrictive Business Practices have essentially the same purpose and follow the same format, the following discussion will be confined to an examination of the latter.

177. Preamble, U.N. Report, *supra* note 175, at 12.

178. *Id.*

179. *Id.* The purpose of listing these objectives was to provide an over-all criterion for dealing with each case. Any government lodging a complaint could determine for itself which objectives were to be considered as relevant, and any objective not so cited need not be considered by the Organization. Gunther, *supra* note 171, at 587.

180. Art. 1, ¶ 1, U.N. Report, *supra* note 175, at 12-13.

181. Art. 1, ¶ 1, U.N. Report, *supra* note 175, at 13 (emphasis added). A series of restrictive practices is defined in art. 1, ¶ 3, U.N. Report, *supra* note 175, at 13.

182. *Id.* art. 3, ¶ 1.

question [had] been specifically required by governmental measures existing prior to the complaint . . . ."[183]

Each member agreed to "take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization" to insure that commercial enterprises did not engage in any of the specified practices and to "assist the Organization in preventing these practices."[184] The obligation of a member to carry out decisions of the Organization was limited, however, to taking the action it considered appropriate in the particular case "having regard to its obligations under this Agreement."[185] The Agreement further provided that the member was not required to take action other than that which would be "in accordance with its constitution or system of law and economic organization."[186]

The Agreement provided for consultation and investigation of written complaints[187] and authorized the Organization to conduct studies and to publish the results either on its own initiative or at the request of any member.[188] Decisions on the issues presented by complaints were made by the Organization itself acting by majority vote and not by a separate judicial body.[189]

If the Organization found that a particular business practice had a harmful effect in light of the purpose of the Agreement, the scope of its remedial power was confined to the making of a "request" to "each Member concerned to take every possible remedial action."[190] The Organization could also recommend to the members concerned remedial measures to be carried out in accordance with their respective laws and procedures. If the government failed to act, it was required to "inform the Organization of the reasons therefor and discuss the matter further with the Organization if it so requests."[191]

Since the Agreement refrained from suggesting any punitive measures, the Organization's powers were limited to publication of reports, recommendations for remedial action, and the publication of

183. *Id.* art. 3, ¶ 4..
184. *Id.* art. 5, ¶ 1, at 14.
185. *Id.* art. 5, ¶ 4, at 14.
186. *Id.*
187. *Id.* art 3, at 13-14.
188. *Id.* art. 4, ¶ 1, at 14.
189. *Id.* art. 10, ¶ 3, at 15. The Agreement has been criticized for creating a procedure of an essentially litigious character without an adequately defined body of law to be applied, without a judicial organ to apply such body of law and with only a most nebulous authority for enforeement of the decisions reached. Carlston, *supra* note 130, at 730.
190. Art. 3, ¶ 8, U.N. Report, *supra* note 175, at 14.
191. *Id.* art. 5, ¶ 5, at 14.

its conclusions. The investigation procedure provided for publication of detailed reports "showing fully the decisions reached, the reasons therefor and any measures recommended to the Members concerned."[192]

B. Effectiveness of the Proposals

It is apparent that the Agreement created a system of obligations to prevent restrictive business practices which were binding upon member nations only to the extent that each member permitted them to be. Thus, the system had no real substance except as any one member might have so organized its constitution or system of law and economic organization that a decision of the Organization would become an obligation binding it to performance. Those nations which have developed a strong system of internal law controlling restrictive business practices would have a duty to carry out their obligations under the Agreement, while a nation which lacks such a system of law might plead that very lack as an excuse for not carrying out the decisions of the Organization.[193]

It is apparent, then, that the effectiveness of the Agreement relied upon the publicity which is necessarily involved in any activity of an international agency. The authors of the Agreement expected that such publicity would have a far-reaching and lasting effect on elimination of restrictive business practices. It was thought that the publicity given complaints and subsequent recommendations would cause governments and interested business circles to give more thought to the prevention of such practices.

C. The Problem of Varying Competition Policies

The main problem which must be faced in developing a system of international control is the wide variety of national approaches to restraints on competition and the resulting diversity of governmental attitudes with respect to the same restrictive business practices. Thus, for example, "one or two governments might make mandatory a practice which other governments might prohibit, ignore, approve of, or subject to different degrees of regulation or sponsorship. Also, governments have different principles and procedures governing the way in which they require or approve restrictive business practices."[194]

192. *Id.* art. 3, ¶¶ 8-10.
193. *See* Carlston, *supra* note 130, at 728-32.
194. Domke, *supra* note 175, at 133 n.31.

Since it was generally believed that agreement on effective legal standards for determining harmful restrictive practices was impossible, the Ad Hoc Committee on Restrictive Business Practices adopted the approach of requiring remedial action only upon a showing that the restrictive business practices had a harmful effect upon trade. Accordingly, there was no presumption in the Agreement that the various restrictive practices listed in it were harmful per se, and the Organization would have to make a case-by-case evaluation to determine whether the specific practice had "harmful effects on the expansion of production or trade, in light of the objectives set forth in the Preamble" of the Agreement.[195] The effectiveness of the regulations in providing a solution would, therefore, have depended entirely on the inclinations of the various member countries.

The failure to implement the Agreement was in large part due to this approach since many of the countries involved felt that with the large difference in national competition policies it would have been virtually impossible for the Organization to determine in a concrete case whether a given restrictive practice was harmful to international trade.

As a result of the failures to adopt either the Havana Charter or the Proposals of the Ad Hoc Committee, it has been generally concluded that the control of international restraints on competition will depend for its success on the criteria for such restraints being standardized and binding in international law.[196] If this is not done, the only valid criterion for judging international restraints on competition is their harmful effect on international trade.

It is clear that agreement on effective legal standards appears impossible in the near future. However, as a result of the emergence of the multinational corporation, it is no longer feasible to await the development of similar multinational competition policies in order to achieve such agreement. An alternative or intermediate solution must be found.

V. An International Organization for the Coordination of National Competition Policies

Some individuals have suggested that the activities of multinational corporations can be regulated only by a supranational organization.[197] Since nations are hesitant to relinquish national

195. Art. 1, ¶ 1, U.N. Report, *supra* note 175, at 13.
196. Gunther, *supra* note 171, at 586-89.
197. Ball, *supra* note 93.

sovereignty and since there is a wide variety of viewpoints with regard to the regulation of competition, it is likely that such an approach is unrealistic at the present time.

At the other extreme, many American businessmen have suggested that the application of antitrust laws be limited by national boundaries.[198] The wisdom of such an approach is doubtful, however, in light of the increase in international investment. Since the regulation of a multinational firm may affect the trade of other nations, a nation by adopting such an approach would simply be throwing away the right to protect itself from public as well as private foreign arrangements that it thought harmful to its national interests.

A more realistic approach is the use of prior consultation and coordinated action among sovereigns on issues that affect more than one of them. This approach is, to some extent, already being applied by the United States. For instance, the United States now makes it a practice to conduct consultations with Canada and with a number of other countries before instituting antitrust action that affects their interests.[199] Likewise, the Council of Ministers of the Organization for Economic Co-operation and Development has recommended that member states consult one another on matters concerning restrictive practices.[200]

As international business grows and spreads, national economies will become more interdependent and the problems of competition and monopoly will cross international boundaries with increasing frequency. Accordingly, "[a]n agreement among governments to hold informal consultations for every case as it arises . . . [will be] clearly inadequate. If tension is to be kept within tolerable limits, a more explicit form of coordination will be needed."[201] Thus, it is recommended that an organization be established to sponsor negotiations, settle disputes, and provide a forum for the continuous investigation and analysis of restrictive practices in which it would be possible to set forth fully the economic philosophies and legal assumptions that are prevalent in all countries. The primary aim should be to promote the growth of the world economy and to raise standards of living throughout the world by promoting mutual

198. Vernon, *supra* note 5, at 86.

199. *Id.* For an example of recent consultations between the United States and the British Government, see N.Y. Times, Oct. 9, 1969, at 69, col. 3 (city ed.).

200. THE INTERNATIONAL CORPORATION, *supra* note 4, at 84.

201. Vernon, *supra* note 5, at 87.

understanding and co-operation in the solution of problems arising in the field of international trade.

The organization should not only provide a forum for consultations, but should require member states, prior to taking any action with regard to the regulation of competition that would affect international trade, to notify those nations which would be affected by such action and, if the affected nations so desire, to consult with them. By requiring prior consultation, the organization would force a nation to consider not only the effect of its proposed action on foreign countries, but also the conflicting antitrust laws and economic policies of those nations. Such a determination can only be made by communicating with the other members of the world community.

Whenever possible an attempt should be made to obtain a mutually satisfactory solution by means of negotiation. In order to achieve this end more effectively, business representatives should be included as participants in the negotiations. Since corporations may be willing to alter their activities to meet national demands, this may make it easier to obtain a mutually satisfactory solution. Perhaps more importantly, by permitting business to participate in the decision making process, the organization will demonstrate its acceptance of business as a responsible partner in the international community and thereby encourage it to cooperate and voluntarily refrain from agreements and activities detrimental to the public good. As populations increase and national resources become more limited, multinational corporations will play an even more significant part in maintaining and increasing the standard of living for all persons. Thus, it is only reasonable that nations should urge their cooperation and seek their advice in attempting to develop an integrated world economy.

By providing a means for consultations, the organization would also tend to reduce the use of the multinational corporation as a means for interfering in the activities of other nations. It would provide countries with an opportunity to accomplish diplomatically what they have heretofore attempted to achieve through private channels. It would also provide a public forum to which nations could direct complaints concerning such private interference. Thus, nations would be forced to weigh carefully the advantages of indirect interference against the cost of subjecting themselves to the sanction of an adverse public opinion.

Increased cooperation would also make the application of national competition policies more effective. Through mutual cooperation,

nations would not only have greater access to essential industrial facts, but would also have greater assurance that their decisions would be enforced. Such an organization would hopefully reverse the trend toward national legislation which prohibits the compliance with foreign antitrust legislation.

Finally, such an international mechanism would better enable the less developed countries of the world to meet the challenge of the multinational corporation. By acting collectively, these nations would be able to limit the effect of the multinational enterprise's ability to shift the location of its operations and thus reduce the influence of the enterprise on any one country. The less developed countries must come to realize that the most rapid way to increase their rate of economic development is to become part of a fully integrated international productive scheme. They must be more willing to take advantage of the benefits that flow from the multinational corporation. By putting these countries in a stronger bargaining position vis-a-vis the multinational firm they will have less reason to fear the loss of their sovereignty and, therefore, will be more willing to judge benefits that flow from the multinational concern in terms of a purely cost-benefit analysis. The development of such a forum would also help reduce the tendency of these nations to expropriate or confiscate affiliates of multinational corporations in an attempt to develop a self-sufficient national economy.

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