Vanderbilt Law Review

Volume 11
Issue 1 *Issue 1 - A Symposium on Trade Regulation and Practices*

Article 2

12-1957

Antitrust Laws and the Territorial Principle

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ANTITRUST LAWS AND THE TERRITORIAL PRINCIPLE

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PUBLIC INTERNATIONAL LAW

During the past few years there has been extensive discussion regarding the extraterritorial application of antitrust laws and some attempts have been made to consider the matter in the context of public international law principles.[1] Notwithstanding objections raised by foreign governments to court orders and subpoenas directed to foreign corporations in relation to their activities abroad, some commentators still appear to consider that there are few, if any, limitations imposed by law upon such assertions of penal power. This position requires re-examination, and in undertaking a review it will be relevant to consider the nature and effect of new antitrust legislation in Europe.

So long as the resources and peoples of the world are organized in the form of nation states and these are independent and sovereign, certain overriding considerations apply. It would be difficult to find these better put than in the following extracts from Story:

> The first and most general maxim or proposition is that . . . every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, . . . and also all contracts made and acts done within it. A state may therefore regulate the manner and circumstances under which property . . . within it, shall be held, transmitted, bequeathed, transferred, or enforced; . . . the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice. . . .
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> Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind

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1. Addresses by Judge Hansen, Sir Hartley Shawcross, Q.C., Arthur Dean, Professor Kahn-Freund, Professor Kingman Brewster and Sigmund Timberg, London Meetings of Sections of the American Bar Association, July 1957. These are being published. Remarks of Mr. Timberg, and the addresses of all the others except Professor Kahn-Freund, appear in 11 ABA ANTITRUST SECTION REPORT 65-116 (1957). See also NATIONAL SECURITY AND FOREIGN POLICY IN THE APPLICATION OF AMERICAN ANTITRUST LAWS TO COMMERCE WITH FOREIGN NATIONS (N.Y. City Bar Ass'n 1957); Timberg, Emmerglick and Whitney, *Antitrust Problems in Foreign Commerce* (Record of N.Y. City Bar Assn. March 1956); Friedmann and van Themaat, *International Cartels and Combines,* in ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 469 (Friedmann ed. 1956); Oliver, *Extraterritorial Application of United States Legislation against Restrictive or Unfair Trade Practices,* 51 AM. J. INT'L. L. 380 (1957); Jennings, *International Monopolies and International Law,* The Listener (London), April 5, 1956; Carlston, *Antitrust Policy Abroad,* 49 NW. U. L. REV. 569-93, 713-36 (1954-55); Whitney, *Sources of Conflict Between International Law and the Antitrust Laws,* 63 YALE L. J. 655 (1954); Haight, *International Law and Extraterritorial Application of the Antitrust Laws,* 63 YALE L. J. 639 (1954).

> persons not resident therein, whether they are natural-born subjects or others. . . . for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory. It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules which none were bound to obey. The absurd results of such a state of things need not be dwelt upon.[2]

The basic principle of exclusive territorial sovereignty was more recently affirmed by the Permanent Court of International Justice in *The Case of the S.S. "Lotus":*

> [T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—*it may not exercise its power in any form in the territory of another State.* In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. (Emphasis added.)[3]

Speaking in the same case, John Bassett Moore, the United States Judge, said:

> It is an admitted principle of international law that a nation possesses and exercises within its own territory *an absolute and exclusive jurisdiction,* and that any exception to this right must be traced to the consent of the nation, either express or implied . . . (Emphasis added.)[4]

In the *Lotus* case all of the judges accepted the overriding limitation of exclusive territorial jurisdiction. While much has transpired during the thirty years since this judgment was rendered, the community of nations still consists, as Judge Loder said "of a collection of different sovereign and independent States"[5] and the consequence of this must be that each has exclusive control over the regulation of the society that exists within the limits of its own territory.

Where the judges divided in the *Lotus* case was on the question whether, on the facts, the offense of criminal negligence could be regarded as having been committed within the territory of the prosecuting State. Because the acts of the French officer on board the French vessel produced effects on board the Turkish vessel with which it collided, and because these effects caused the death of Turkish

2. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (8th ed. 1883) quoted in Cook, *The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction,* 40 W. VA. L.Q. 303, 304 (1934).
3. P C.I.J., Ser. A, No. 9, at 18 (1927).
4. *Id.* at 68.
5. *Id.* at 34. "Public international law is governed by the principle of territoriality. This principle is universally recognized in the practice and legal literature of all civilized nations." Friedmann and van Themaat, *supra* note 1, at 486.

nationals, a majority of the judges held that the offense had been committed within such territory. It was said that the "effects . . . felt on board the *Boz-Kourt*" were, "legally, entirely inseparable" from the act of "negligence or imprudence" which had its origin on board the *Lotus*. In fact, these effects were so much a part of the act that produced them "that their separation renders the offence non-existent."[6] A minority of the judges disagreed that in this case the offense could be said to have been committed where the effects were produced.[7]

Although the decision of the majority as to the *locus* of the crime would have sufficed to establish the jurisdictional competence of Turkey, views were expressed regarding the freedom of a State to apply its laws and to extend the jurisdiction of its courts to persons, property and acts outside its territory. It was said that international laws does not contain any general prohibitions against a State exercising jurisdiction in its own territory over acts which have taken place abroad. On the contrary, international law leaves a State "a wide measure of discretion which is only limited in certain cases by prohibitive rules." Otherwise, "every State remains free to adopt the principles which it regards as best and most suitable."[8]

A majority of the permanent members of the court disagreed that "everything which is not prohibited is permitted"[9] and it is perhaps significant that these members comprised the American, British, French, Dutch, Danish and Spanish judges. As one of the judges put it:

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6. P.C.I.J., Ser. A, No. 9 at 30 (1927).

7. See Judge Loder (Netherlands): "The criminal law of a State . . . *cannot* extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned. . . ." *Id.* at 35; Judge Weiss (France): "[E]very State has jurisdiction to sentence and punish the perpetrators of offences committed within its territory. . . . But, outside the territory, the frontier having once been traversed, the right of States to exercise police duties and jurisdiction ceases to exist. . . ." *Id.* at 44; Lord Finlay (Great Britain): "A country is no more entitled to assume jurisdiction over foreigners than it would be to annex a bit of territory which happened to be very convenient for it." *Id.* at 56; and Judge Nyholm (Denmark): "The present case, which concerns the fact of a nation having extended its jurisdiction to a foreigner in regard to acts committed by the latter in his own country, supplies an example of an *actual infringement* of the principle of territoriality . . . [I]t cannot be maintained—as the judgment sets out—that, failing a positive restrictive rule, States leave other States free to edict their legislations as they think fit and to act accordingly, even when, in contravention of the principle of territoriality, they assume rights over foreign subjects for acts which the latter have committed abroad." *Id.* at 60. In its Commentary on proposed articles concerning the law of the sea, the International Law Commission says that this judgment "was very strongly criticized and caused serious disquiet in international circles." The Commission concurred with the decisions of the conference held at Brussels in 1952, which were embodies in the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, Brussels May 10, 1952. REPORT OF THE INTERNATIONAL LAW COMMISSION, General Assembly, Official Records, Eleventh Session, Supplement No. 9 (A/3159), 1956, at p.27.

8. P.C.I.J., Ser. A, No. 9 at 19 (1927).

9. Judge Loder, *id.* at 34.

> [T]he freedom which, according to the argument put forward, every State enjoys to impose its own laws relating to jurisdiction upon foreigners is and must be subject to limitations. In the case of competing claims to jurisdiction . . . this freedom is conditioned by the existence of the express or tacit consent of other States and particularly of the foreign State directly interested. As soon as these States protest, the above-mentioned freedom ceases to exist. . . . The necessity for consent is just as much a fundamental principle of international law, which is entirely based on the will of States, as the principle of the protection of nationals or of the freedom to legislate internally. . . . To accept the contrary view would, in my opinion, be to neglect one of the fundamental conditions of the international community and would result in opening the door to continual conflicts which might involve most undesirable consequences.[10]

It thus appears that in the view of all the judges there is an outer limit to any assertion by a State of the right to prosecute foreigners for their acts abroad and this is set by the overriding *prohibition* of international law against the application by a State of its power *in any form within* the territory of another State.

In antitrust cases this may prove to be the governing limitation, but the narrower limits recognized by the dissenting judges may also be relevant, particularly if protests and conflicts are to be avoided. That this is recognized by our courts is evident from the emphasis placed on "effects" and "consequences" in cases involving acts beyond the territorial limits of the United States.[11] In this way attempts are made to bring such cases within the objective principle that the place where an offense is committed is the place where the criminal act takes effect, so that a State may, in accordance with the territorial principle, punish acts performed abroad which produce prohibited effects within its territory. It is not always apparent from these cases, however, that the test of inseparability referred to in the court's judgment in the *Lotus* case is met; namely, that the acts abroad "are, legally, entirely inseparable" from the effects "so that their separation renders the offence non-existent."[12] Apart from this, however, is the broader question whether the limitations imposed by international law upon the exercise of penal jurisdiction over foreigners permit the test of objectivity to be applied to the antitrust "crime" so as to enable any State to contend that acts wherever committed may be punished wherever they produce "effects."

Unless international law imposes some limits to the extraterritorial

10. Judge Altamira, *id.* at 103.
11. See, *e.g.*, United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945).
12. Thus, there does not appear to have been any proof in United States v. Aluminum Company, *supra* note 11, that the foreign cartel arrangements had produced direct and material effects on American commerce. The district court held that the burden was on the Government to establish such effects and that they had failed to do so. 44 F. Supp. 97 (S.D.N.Y. 1941). The appellate court reversed, holding that, intent to restrain imports having been established, the burden was on the defendants to prove the absence of such effects.

application of penal legislation, States could devise their own lists of crimes and then punish foreigners as they see fit without regard to the places where acts were performed.[13] Thus, a State could make it a crime to criticize its politicians and then punish the editors of foreign newspapers who express such criticism. Or it could prohibit dealings in its currency and then punish foreign bankers who buy and sell such currency abroad. If this were permitted, journalists and bankers would travel from one jurisdiction to another at their peril and their governments would have no grounds to protest against their imprisonment for having produced harmful effects within the territories of the offended States.[14]

Essentially the enforcement of antitrust laws is a method of regulating trade. Americans are by no means alone in their conviction that a competitive free enterprise society is the most satisfactory social pattern, but other nations approach the task of removing competitive restraints in different ways. As will appear from the latter part of this article, prohibitory legislation is not always the fashion, and even where it does take this form broad considerations of public policy continue to apply. The States that are actively and vigorously tackling this problem today recognize that not all combinations, not all restrictive practices are bad, nor are bad ones always bad. The emphasis is frequently on the removal of abuses; sometimes participants are required to show that their arrangements promote rather than fetter the public good; sometimes the burden is on some state agency to establish that particular practices are harmful.

These alternative approaches are due to a variety of circumstances. Every legislature dealing with this subject is required to reconcile the demands of consumers, workers, producers, distributors, exporters, importers and other social groups, and to give effect to the theories of economists, sociologists, lawyers and other experts. Where agriculture predominates, the emphasis may be on combinations of small and large producers who seek to offset the hazards of cultivation by col-

13. In his comment on Joyce v. Director of Public Prosecutions [1946] A.C. 347, Sir Hersch Lauterpacht says that this case "cannot be adduced in support of the proposition that a State has unlimited jurisdiction over an alien for acts which have been committed abroad and which it considers to be prejudicial to its safety. There is no warrant in international law for a rule of such alarming comprehensiveness. An individual in one State cannot be expected to exhibit scrupulous care in respecting the interests of other States or to incur the dangers of criminal prosecution in case he should, voluntarily or involuntarily, come into the power of those States." Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens,* 9 CAMB. L.J. 330, 347 (1947). "[T]he power of the State with respect to foreigners . . . . with respect to the determination of the existence of what is a crime . . . . is never unlimited . . . ." International law "forbids the punishment of any acts which merely constitute the exercise of a right guaranteed and protected by the State in whose territory they have been carried out . . . ." Bourquin, *Crimes et Délits contre la Sureté des Etats Etrangers,* I(1927) Recueil des Cours de l' Academie de Droit International 188.

14. See BRIERLY, THE LAW OF NATIONS 185 (3d ed. 1942).

lective price maintenance and production quotas, particularly in the area of exports. On the other hand, in countries which are mainly industrial vigorous competition may be accepted as an essential spur to progressive development and a healthy economy.

Whatever the circumstances may be and whatever the method adopted to deal with them, it is apparent that antitrust laws are by their very nature in a class apart from ordinary legislation relating to crime. Offenses against the person, such as murder, manslaughter, assault, or against property, such as theft procuring property by false pretenses, fraud, embezzlement, and even offenses such as libel, sedition, treason and counterfeiting, are commonly regarded as disruptive of the common good and basically evil. Restrictive business practices fall into an entirely different category. There is nothing inherently evil in two competitors agreeing to eliminate competition between themselves.[15] Our own rule of reason recognizes this. Moreover, what might be unreasonable in the form of an agreement between independent business units may be acceptable when accomplished by means of a merger. Similarly, price fixing may be a social evil in one community or line of business but justified elsewhere.[16] Limitations on production may be reprehensible in times of scarcity but essential in times of overabundance.[17] Boycotts and restrictions on newcomers may be condemned as regards internal trade but countenanced when they take the form of tariff barriers or quota restrictions designed to exclude foreigners.[18] Free trade may be the rule for some, but not for all. Competition may be the key to and the safeguard of free enterprise or it may be the law of the jungle where only the large and strong can survive.

In view of these essential divergencies of an antitrust law from a statute dealing with a common crime, what principle of international law should govern the application of the former to the nationals of another country? Should a showing of "effects" justify a claim of

15. See Holmes J., Northern Securities Co. v. United States, 193 U.S. 197, 404-05 (1904); note 28 and 29 *infra.*

16. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 270-77 (1955). See also conclusions of the British Monopolies and Restrictive Practices Commission concerning price fixing arrangements relating to the supply of electric lamps, insulated electric wires and cables, semi-manufacturers of copper, pneumatic tires and linoleum; summarized in WILBERFORCE, CAMPBELL AND ELLIS, THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES, 573, 578, 599, 604, 609 (1957).

17. *Cf.* Appalachian Coals Inc. v. United States, 288 U.S. 344 (1933).

18. Domestic opposition to imports of foreign watches, bicycles, motorcycles and wool has been particularly noticeable in recent years. It was reported in London in August, 1957, that seven petitions for relief under the escape clause provisions of the Reciprocal Trade Act were awaiting action by the Tariff Commission and that the list included bicycles, stainless-steel flatware, spring clothespins, nonwoven wool felt, umbrella frames, garlic and clinical thermometers. THE FINANCIAL TIMES (London), Aug. 19, 1957. See Eckhoff, *Norway*, in ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 281 (Friedmann ed. 1956).

jurisdiction by analogy to the cases dealing with bullets flying across a border or the theft of property? Wholly apart from the difficulties involved in defining "effects" and a lack of international consent to an extension of the common crime case to that of trade regulation, is there not a more serious objection to any such claim? In applying its antitrust law to activities within the territory of another, is not a State exercising a power of regulation over such activities and by the use of subpoenas, orders and decrees compelling the observance of such exercise in such territory? Is this not such an intrusion into the affairs of another State as requires the consent of that State in order to avoid an abusive exercise of sovereign power?

It is submitted that it is, and that the governing principle is and must be that each State is free to regulate the conduct of trade and commerce within its own borders as it sees fit and without interference by other States except to the extent that it has given its consent thereto. Surely it is a perversion of the territorial principle to stretch objectivity to the point of permitting such regulation where such consent has not been obtained. No one questions the exclusive right of each nation to regulate its own tariffs, to incorporate its own companies, to establish its own currency and to deal with the myriad of activities that comprise the commercial structure of a society. Nevertheless, if any nation were free to deal with acts performed in another State on the ground of "effects," there is hardly anything in this age of interdependence and rapid communication that would not be caught. It is just such pretensions that have led in recent years to protests by foreign governments.[19]

19. Protests and counter measures by foreign governments are noted in JESSUP, TRANSNATIONAL LAW 72-75 (1956). The British Government took a strong stand in November, 1952, on the attempts by a Washington grand jury to obtain documents from British companies: "Her Majesty's Government considers it contrary to international comity that British companies should be required to produce documents which are not only not in the United States, but which do not even relate to business in that country. . . . With regard to acts arising in this country, the normal view . . . would be that they should be investigated under the British law. . . ." HANSARD, H.C., November 17, 1952, col. 1384. In commenting on this and the enforced breakup of the duPont-I.C.I. partnership in Canada, The Economist observed that "these recent manifestations of the international consequences of antitrust procedure are alarming." *Comity and the Oil Companies,* Nov. 22, 1952. The Economist, p. 556. More recently official protests have been made in connection with the issuance of subpoenas to English and French companies in a grand jury investigation in the Southern District of New York into possible violations of the antitrust laws in the radio-television industry. In connection with motions for the production of documents in United States v. Standard Oil Co., Civil No. 86-27, S.D.N.Y., the Netherlands Ambassador in Washington has stated in a letter that the Netherlands Government is "very disappointed at the actions of the United States Attorney General" directed to "a search of the foreign files of . . . companies . . . which are under Netherlands jurisdiction" and that it views such action "with grave concern." It is said: "The fundamental principles of the Netherlands legal system imply that Netherlands cartel legislation, together with specific decisions by the Netherlands Authorities on questions of cartel policy, must in principle be decisive in this matter as regards the conduct of business and industry in Netherlands

Recently our State Department has affirmed its recognition of the absence of any right to interfere in the internal commercial activities of another country. In connection with recent attempts to persuade foreign buyers of American scrap to eliminate restrictive and discriminatory practices, it has said:

> The measures which can be taken to implement our policy of discouraging restrictive business arrangements and encouraging competitive enterprise are subject to two important limitations. First, rapid and dramatic results cannot be expected in this field, because we are dealing with methods of doing business and a whole pattern of thinking that has become engrained over scores of years. The process of change can therefore only be gradual. Second, we cannot interfere in the internal affairs of other sovereign nations, and it would certainly defeat our aims to do so. We can only encourage and assist where this is desired.[20]

Any other approach, if persisted in, would surely cause chaos. In the circumstances with which the State Department was here dealing, the European Coal and Steel Community had, in the one case, authorized private consumers to combine for purposes of foreign buying and imports of iron and steel scrap and Japan had, in the other, authorized a private group to handle virtually all buying of scrap for import into Japan. In both cases there were antitrust laws in effect which would prohibit restrictive combinations among competitors.[21] In the case of the European Coal and Steel Community however, the joint buying was expressly authorized as an exception to the antitrust prohibitions and in the other presumably some similar exemption was granted.

But even if such combinations were not expressly authorized by foreign governments, it is hardly conceivable that they could be prosecuted in this country without opening the door to serious conflicts. The mere fact that such conflicts can arise demonstrates the existence of territoriality and the force of Judge Altamira's observation in the *Lotus* case that to accept the right of every State to apply its own penal law extra-territorially without obtaining the consent of other States concerned,

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territory and that decisions of other states, including decisions by courts, shall not apply. . . . The Netherlands has its own legislation controlling economic competition, which are suited to Netherlands economic conditions . . . . The Netherlands Government has taken and will take such action as it deems proper to insure that its own laws and policies are carried out with respect to economic competition within the sovereignty of the Netherlands." *Id.*, Attachment IV, second supplemental affidavit of John F. Sonnett, 27 September, 1957.

20. Kalijarvi, *Problems Relating to Export of Iron and Steel Scrap* 122-27, DEP'T STATE BULL. (July 15, 1957).

21. Treaty Establishing the European Coal and Steel Community, arts. 65-66, I EUROPEAN YEARBOOK 397-405 (Council of Europe, 1955); Osakadani, *Japan*, ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 238-57 (Friedmann ed. 1956).

> would in my opinion, be to neglect one of the fundamental conditions of the international community and would result in opening the door to conflicts which might involve most undesirable consequences.[22]

The confusion and disorder that would come about were every antitrust law of the world, and every law allowing freedom from antitrust restraints, to operate within the territories of all nations wherever effects or consequences could be shown is obvious. As Story would say, "The absurd results of such a state of things need not be dwelt upon."[23] No such obliteration of territoriality can have been contemplated by the court in the *Lotus* case either in recognizing an objective application of the territorial principle in that case or the absence of international law restraints on extraterritorial applications of penal law that do not encounter prohibitive rules. On the contrary the *exclusive* right of each State to regulate its own internal affairs was expressly affirmed.

FOREIGN ANTITRUST LEGISLATION

No attempt will be made here to review all foreign legislation on this subject. What follows is limited to the laws of European countries and to the attitude of these countries in regard to extraterritorial applications.

A variety of circumstances has led to an active development in Europe since the war. The impact of American occupation authorities, the competition of American business and post-war American antitrust decisions have undoubtedly stimulated interest, but the main impetus has come from the intense struggle of the European economies to restore and modernize their own production and trade. Restrictive practices that had operated unchallenged for long periods have been and are being tested against drives for efficiency and greater productivity. Business itself sees the need for greater freedom and recognizes that dynamic competitive enterprise is the strongest bulwark against socialism.[24]

It has long been the policy of our government to encourage these developments and to assist other nations in their efforts to deal with problems of restrictions on production and trade. Missions from abroad to study our antitrust laws and their administration, the constitution of the European Productivity Agency and the opportunities which this has afforded for exchanges of ideas and experience, the negotia-

22. See note 10 *supra.*
23. See note 2 *supra.*
24. HUTTON, WE TOO CAN PROSPER 194-96 (1953); PRODUCTIVITY REPORT, INDUSTRIAL ENGINEERING 11, 84 (British Productivity Council 1954); BRITAIN'S INDUSTRIAL FUTURE 11 (British Employers' Confederation 1955); van Themaat, *Netherlands,* ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 268 (Friedmann ed. 1956). Similar evidence is available in respect of other countries.

tion of treaty provisions, and occasional diplomatic action have all contributed to the greater understanding of this subject.[25]

At the same time, not one of the recent laws in Europe has followed the pattern of our Sherman Act. The nearest approaches are the new German law and the Common Market Treaty, but basic prohibitions are extensively qualified in the former by exceptions and in the latter by provisions for exemptions. Here and in other communities administrative agencies are established to investigate and evaluate the harm that restrictive practices or monopolies may do to the common good. The emphasis is on removing harmful effects rather than on the application of legal norms. Only in the United Kingdom has it been decided to leave the application of the law to judges, but even there they are assisted by lay experts and on questions of fact their votes may be outnumbered. Despite long and thorough study of our methods, the British parliament rejected penal legislation of the Sherman Act type and evolved an approach all its own. This will first be briefly considered.

THE LAW IN GREAT BRITAIN

As the British law is dealt with elsewhere in this symposium,[26] it is enough here to contrast its general approach with that of the Sherman Act and to consider briefly its territorial limitations.

In its Report on Collective Discrimination in June 1955 the Monopolies Commission proposed that the restrictive practices there considered should be generally prohibited and a new criminal offence created.[27] In moving the *Report* generally as a basis for formulating legislative proposals, the Lord Chancellor objected as follows to this particular aspect:

> I do not think that the establishment of new criminal offences is a suitable or right method of dealing with this sphere of activity . . . [M]any of the practices which are condemned in the Majority Report came into existence at a time when they could be justified on economic grounds, to protect the industries from the difficulties of the slump . . . It may well be . . . that they have been continued into times when the economic justification no longer applies, but the point I am making . . . is that *there is nothing inherently criminal in this* . . . [I]t is clearly better to deal with [these practices] as a civil matter, by injunction, rather than as a criminal offence. . . . [*T*]*hese are essentially economic and commercial problems,* and . . . *questions of ethics arise only incidentally.* . . . I believe that *every country should evolve its own method of dealing with these difficulties.* . . . I believe that the British method, the method that suits our country best, is that of inquiry into the facts of the practices,

25. KALLIJARVI, *supra* note 20, at 126.
26. See Morrison, *Commercial Restrictions in English Law,* 11 VAND. L. REV. 1 (1957).
27. A REPORT ON EXCLUSIVE DEALING, COLLECTIVE BOYCOTTS, AGGREGATED REBATES AND OTHER DISCRIMINATORY TRADE PRACTICES 86, cmd. 9504 (1955).

> as to whether or not they are in the public interest, and after that, for practicable action to be taken to deal with them. (Emphasis added.)[28]

This view was also expressed in the House of Commons[29] and was adopted by Parliament in passing a law which, except in the case of agreements for the collective enforcement of conditions as to resale prices, avoids prohibiting particular practices as such, and even in the case excepted expressly provides that no criminal proceedings shall lie against persons who do what is declared to be unlawful.[30] The Sherman Act appoach was expressly rejected.[31]

The Labor Party's forceful plea for a lay tribunal responsible to a Government Minister or to Parliament was also rejected[32] and the

28. PARLIAMENTARY DEBATES, HOUSE OF LORDS, 193 HANSARD No. 23, July 27, 1955, cols. 1090-91, 1096. These reports are cited as "HANSARD, H.L." and the corresponding reports for the House of Commons as "HANSARD, H.C."

29. Thorneycroft, the President of the Board of Trade, said: "These practices in one form or another are all practices in restraint of trade, and as such they are of their nature liable at any rate to operate against the public interest. The answer seems to me not to declare them crimes or fix an arbitrary date at which all practices must stop . . . but to place the onus of showing that they are in the public interest in a particular case fairly and squarely on the shoulders of the men who wish to use them." HANSARD, H.C., July 13, 1955, col. 1946. Sir Lionel Heald added "We dislike the multiplication of criminal offences . . . [and] the creation of anything which might be described as an absolute or automatic offence" and he referred to the "strange conception" of the Monopolies Commission "that one should establish a certain course of action as a crime and afterwards allow people to apply for exemption." He said the rule of reason under the Sherman Act had "produced the most magnificent lawyers' jamboree in the whole of history." *Id.* at cols. 1971, 1973. In concluding the debates in the House of Lords a year later, the Government spokesman (Lord Mancroft) said: "I should like to emphasise again that there is no odour of criminality attaching to restrictive practices." HANSARD, H.L., July 26, 1956, col. 335. The Opposition spokesman (Douglas Jay) said that the Government "made a profound mistake in rejecting the main proposal of the Monopolies Commission that there should be a general prohibition of the worst type of practices." HANSARD, H.C., June 14, 1956, col. 896.

30. Restrictive Trade Practices Act, 1956, 4 & 5 ELIZ. 2, c.68, § 24(6).

31. At an early stage a spokesman for the Labor Party, Harold Wilson, said: "The approach of the Labour Government to this problem is well known to the House. We rejected the American approach and the Conservative Party joined with us." His proposal was to follow the Swedish pattern: "Let us have these associations registered. . . . Let us show up these men who '. . . loved darkness rather than light because their deeds were evil.' Let us bring them into the daylight." He urged that certain practices be banned. The Government rejected this: "The American Sherman Act procedure would be bitterly controversial in all parties." HANSARD, H. C., February 24, 1955, cols. 1472, 1486-87, 1499.

32. The Party's spokesman on this issue said: "The Bill hands over to this court governmental and parliamentary power. All judgments are founded upon law or upon facts, but in this case the decision which really matters will be a decision founded neither upon law nor upon fact. It will be a political and economic decision. The true place of public interest in law is as the foundation and reason for a general rule, which the law then applies. It is not for a judge to conceive what, in all the circumstances, he considers the public interest to be. That is not law; it is the negation of law. . . . What the court has to do . . . is, without limitation and without definition, to decide whether or not the agreement is in the public interest. That is not a function of the court at all. That is a decision of economic policy which should be taken by the Minister, or by the Executive, and for which they should be responsible to Parliament. . . . There is no definition of public interest—

more American pattern of having legal issues decided by professional judges adopted. What are innovations of the greatest importance are, first, the combination of two lay experts and one judge, each of whom has an equal vote on questions of fact, in a court having the dignity and standing of the High Court of Justice[33] and, second, the duty of this court to decide ultimately whether or not particular arrangements which come before it are reasonable having regard to the "balance" between the circumstances stated in the Act, and established by the parties, and any detriment to the public or others resulting or likely to result from their operation.[34]

In view of these and other characteristics of this law, it must surely be improper for any other country to apply its own antitrust law to the operation of restrictive practices in the United Kingdom. It is conceivable that an agreement among British companies to fix prices or limit production might produce harmful effects on the foreign commerce of such other country and that it might be argued that the case thus falls within the objective territorial theory; but it would be unthinkable that such companies should be prosecuted under the foreign law in regard to arrangements which did not operate in such other country and which were found by the British court to be in the interests of the public in the United Kingdom where they did operate.[35]

The greatest care has been exercised in the provisions of the new law and by the Monopolies Commission in its own proceedings to observe the limitations of territoriality. Thus, the law itself applies only where at least two of the parties are carrying on business in the United Kingdom in the production or supply of goods or in the application to goods of a process of manufacture.[36] Although neither of these parties have to be bound by the restrictions binding other parties

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there is no general rule laid down, and no law laid down that a court of law can apply. . . . What this is dealing with is a decision under an oak tree—the judge dealing with each case separately, without a general rule of law to apply at all. Therefore, that fundamental consideration that law must be general and impartial is missing. . . . We do not by submitting what are essentially political matters to the decision of a court turn them into legal matters. . . . It is in fact the height of folly to drag the judges into these matters." Sir L. Ungoed-Thomas, HANSARD, H. C., March 6, 1956, cols. 2042-45.

33. Restrictive Trade Practices Act, 1956, 4 & 5 ELIZ. 2, c.68, § 2, schedule, para. 5. The decision of the court on a question of fact is final but an appeal will lie on any question of law, in the case of England, to the Court of Appeal. When sitting in public in London, the court sits at the Royal Court of Justice. *Id.*, schedule, para. 2, 7.

34. Restrictive Trade Practices Act, 1956, 4 & 5 ELIZ. 2, c.68, § 21.

35. In many of its investigations the Monopolies and Restrictive Practices Commission found that restrictive arrangements were not contrary to the public interest. For example, it approved a scheme operated by tea brokers' and tea producers' associations in London regulating sales of tea on the London Market, even though this might have some effect on prices. There was some evidence that "the present system benefits the smaller buyer." It considered the scheme "a reasonable and practical measure." REPORT ON THE SUPPLY OF TEA 40, 41 (September 20, 1956).

36. Restrictive Trade Practices Act, 1956 4 & 5 ELIZ. 2, c.68, §§ 6, 24.

abroad,[37] the fact that two of the parties are within British territory prima facie localizes the arrangement there. In reply to efforts by the Labor Party to provide that only one party need be carrying on business in the country for the law to attach, the Government said they did not wish in this way to fetter "a very normal trading practice" whereby individual traders in the United Kingdom might enter into arrangements with firms abroad "which are to some extent restrictive but which bring valuable returns to this country." He added that the American practice had been very harmful to business.[38]

Apart from the requirement that two parties must be carrying on business within the territorial limits of the United Kingdom, there are specific exclusions of restrictions which relate exclusively to exports, to production and manufacture abroad, to the acquisition of goods to be delivered abroad and not imported for home use and to the supply of goods to be delivered abroad otherwise than by export from the United Kingdom.[39] Moreover, where the new court finds that registered agreements are contrary to the public interest, its jurisdiction to restrain parties from giving effect to or enforcing the restrictions thus condemned only extends to parties who carry on business in the United Kingdom.[40] Finally, the provision relating to collective resale price maintenance relates specifically not only to persons carrying on business in the United Kingdom but also to the delivery of goods there and to "domestic proceedings."[41]

It is thus apparent that the greatest care has been exercised to confine the operation of this law, notwithstanding its non-criminal character, to the territory of the United Kingdom and, by the limitations imposed on the jurisdictional competence of the new court, to avoid conflicts with foreign jurisdictions.[42]

37. WILBERFORCE, CAMPBELL AND ELLES, *op. cit. supra* note 16, at 216-17.

38. "The American practice was cited, but it is pertinent to observe, that at this moment evidence is being given before a Senate committee in the United States showing the damage which she is suffering because these agreements . . . are subject to inquiry in America. *We do not want to fall into the same error.*" Thorneycroft, HANSARD, H. C., April 26, 1956, cols. 2040-41. (Emphasis added.) The President of the Board of Trade had in mind the hearings reported in A STUDY OF THE ANTITRUST LAWS, HEARINGS BEFORE THE SUB-COMMITTEE ON ANTITRUST AND MONOPOLY (1955). For the effects on American business abroad of current antitrust policies, see *id.* at 1851-1904; FOREIGN TRADE CONFERENCES, STAFF MEMORANDUM (1955); and THE AMERICAN ANTITRUST LAWS AND AMERICAN BUSINESS ABROAD (Am. Ch. of Commerce in London, 1955).

39. Restrictive Trade Practices Act, 1956, 4 & 5 ELIZ. 2, c.68 § 8 (8).

40. Restrictive Trade Practices Act, 1956, 4 & 5 ELIZ. 2, c.68 § 20 (3). "Members will remember that we agreed that purely overseas trading arrangements were not restrictions on exports and imports and should not be included." Thorneycroft, HANSARD, H. C., June 13, 1956, col. 711. "It is no good imagining that the Court can issue an injunction against a foreign person who has entered into restrictions . . ." *Id.* at col. 715.

41. Restrictive Trade Practices Act, 1956, 4 & 5 ELIZ. 2, c.68, § 24.

42. The English courts have criticized conflicts arising from the extraterritorial operation of American court orders. British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd. [1953] Ch. 19 (C. A.). See Kahn-Freund, *English Contracts and American Anti-Trust Law The Nylon Patent Case,*

NETHERLANDS LAW

The antitrust law recently adopted in the Netherlands[43] had its origin in a law of 1935[44] where the government had been given powers not only to nullify agreements which restricted competition and were found to be against the public interest but also to declare "generally binding" throughout an industry the terms of restrictive arrangements adopted by a predominant part of its members. This latter aspect has a parallel in our own NRA legislation, but the principle was not abandoned with the return of prosperity. As the Netherlands Government has recently said:

> The fundamental principle of the Act of 1935 is still accepted by the government as correct. This principle is that too much restriction of economic life and too great a freedom are both detrimental to the welfare. It is therefore essential that the authorities should have the authority to support cooperation between undertakings where it has a favorable effect and that it should be able to nullify such cooperation where it is harmful to the general interest. It certainly cannot be contended that all arrangements between undertakings which regulate competition are undesirable; on the contrary, they may be extremely useful, not only for those immediately concerned but for the general interest as well . . . they may counteract the squandering of capital and promote national production. They need not operate to the deriment of the consumer. But, equally, it cannot be contended that the Government must under all circumstances acquiesce in whatever the business world wishes to make binding on itself.[45]

During the war the law was superseded by the Cartel Decree of 1941, but there was little occasion to apply this Decree during the occupation and the period of controls, and for some time after the war the general dearth of goods obviated the need for restrictive arrangements.[46] With the reappearance of cartels from 1948 onwards, there was increasing pressure for more permanent and effective legislation.[47]

The 1956 law provides for the compulsory registration of "competitive arrangements," which are defined as agreements and decisions "regulating economic competition between owners of undertakings." This requirement is not new, but it is more comprehensive than the

18 MODERN L. REV. 65 (1955); cf. *Radio Corp. v. Rauland Corp.*, [1956] 1 All. E.R. 549.

43. Economic Competition Law, 28th June 1956, STAATSBLAD 1956 No. 401 (Netherlands).

44. Business Agreements Law, 24th May 1935, STAATSBLAD 1935 No. 310, amended STAATSBLAD 1939 No. 639-Y (Netherlands).

45. EXPLANATORY MEMORANDUM § 1, sub. 1, submitted by eight Ministers to the Second Chamber in explanation of the draft Economic Competition Bill, Session 1953-54, 3295, No. 3 [hereinafter EXPLAN. MEMO.].

46. Wijsen, *Cartel Legislation in the Netherlands.* 6 Cartel 110 (Oct. 1956).

47. For a review of proceedings from 1945 to 1955 see Annex II to the MEMORANDUM OF REPLY OF 13TH APRIL, 1955, submitted by eight Ministers of the Government to the Second Chamber, Session 1954-55, 3295, No. 7 [hereinafter MEMO. REPLY].

corresponding provision in the Cartel Decree, and the law may be declared applicable to arrangements which are not legally binding but which regulate competition or "exert an influence on such competition."

Although it is not expected that there will be much call for the exercise of the power to declare arrangements "generally binding," it is recognized that the economic situation may change and occasions may arise, as was the case before the war, where "uncontrolled competition" may lead to "economic dislocation" and "regulation of market relations may be necessary in order to avoid disastrous developments in a particular branch of industry."[48] Before this provision can be invoked, however, it must appear that the number or the combined sales of the parties involved in the arrangement is "considerably larger" than the number of sales of others in the same sector of industry, and, that the "general interest" requires, in the opinion of the Ministers, that the declaration be made.

Before any declaration of "generally binding" or "non-binding" can be made, the Minister is required to take the advice of the Economic Competition Committee, a body composed of not less than twelve members appointed by the Crown, each for a period of six years. It is not provided that the members of this Committee shall represent any particular groups or interests. On the contrary, it has been stressed that they are to act solely as "objective experts" and the function of the Committee is to advise the Minister of Economic Affairs.[49] Whenever the Committee is called upon for advice, it is required to hold a public hearing of all interested parties. Conduct tending towards conformity with an arrangement which has been declared non-binding is prohibited for a period of five years and a deliberate breach of such a prohibition is a criminal offense.

As in the case of the British law, the Government stressed the absence of any legal norms governing anti-competitive arrangements and took the position that this was not a fit subject for prohibitory or criminal legislation. It was said that the aim is not to punish, but to bring about "a change in the behavior of a cartel," thereby "removing the conflict with the general interest."[50]

> On the whole, the Government considers its task to be one of promoting healthy competition which will help economic expansion or combat economic stagnation . . . [T]he problem is always one of encountering conflicts between the aims or operation of the various forms of economic power and the aims of the Government's social and economic policy. . . . *It is not a question of punishing individual acts which are at variance with norms established by law, but of bringing arrangements which*

48. See note 45 *supra.*
49. REPORT OF ORAL DISCUSSION SESSION 1955-1956, 3295, No. 18, ans. to Q. 15.
50. EXPLAN. MEMO., *supra* note 45, § 2, sub. 3.

> *themselves frequently apply to a large number of individuals into line with the general interest.* (Emphasis added.)[51]

And at a later stage, the Ministers said:

> The Government's primary task is to create the conditions necessary for healthy competition to exist . . . [I]t is not intended that the present Bill should have the character of prohibitory legislation. . . .[52]

This is legislation "without fixed and clear legal norms" and in 99.5 percent of the cases decisions will be founded on the judgment of a Minister and he in turn will base his judgment "on his views concerning the organization and functioning of the economic process and on the economic policy as a whole."[53]

There are also provisions relating to "concentrations of economic power." After taking the advice of the Economic Competition Committee, which shall hear interested parties, the Ministers may publish relevant information, may impose obligations to refrain from certain conduct and to supply goods or render services on prescribed terms and may regulate prices and terms of goods and services. In the Explanatory Memorandum it was pointed out that such concentrations might take the form of a single undertaking or of informal, nonenforceable arrangements or of mere "interrelated conduct". Later, in the replies to questions, the Ministers emphasized:

> It is definitely not the case that every large concern constitutes a concentration of economic power simply because it is a large concern; everything depends on its strength in the market.[54]

Even more than in the case of the United Kingdom, the Netherlands approach to antitrust is pragmatic and there are not even presumptions created against particular practices. Moreover, not only is the application of the law left to Government departments, but decisions regarding the general interest are to be made by Ministers on the advice of the Committee.

Although the territorial scope of the law is not defined, it is subject to the overriding limitation of Section 2 of the Criminal Code which confines the "criminal law of the Netherlands" to criminal acts "within the Realm in Europe." The Government specifically rejected the approach of the American courts in applying the law to all arrangements abroad "which have consequences for the economic life of the Netherlands." It was considered that "this would involve an extension of the rule of Section 2 of the Criminal Code," which was considered undesirable, and would also conflict with article 34 referred to below:

51. MEMO. REPLY, *supra* note 47, General Observations, § 1.
52. REPORT, *supra* note 49, reply to Q. 4.
53. *Id.* reply to Q. 7.
54. *Id.* reply to Q. 5.

> For it to be possible to apply the Netherlands law there must, in our view, have been concrete acts on Netherlands territory.[55]

During the debates in the Second Chamber, however, the bill was amended to provide that competitive arrangements "which do not regulate economic competition in the Netherlands" may be exempted from registration and this has been interpreted to mean that in other respects the law may apply subject to the limitations of the Criminal Code and international law. The bill was also amended to define "concentration of economic power" as a concern "which involves a dominating influence on a market for goods or services in the Netherlands."[56]

Upon ratification of the Common Market Treaty the scope of this law will be substantially reduced. As pointed out below, there is confusion regarding the proper application of the Treaty during the period prior to the adoption of regulations. Whatever the proper interpretation may be, the mandate of the Treaty is clear that both the Netherlands law and the provisions of the Treaty itself are to apply to arrangements "likely to affect trade between Member States." In such cases, not only will the "general interest" of the Netherlands have to be considered but the effect also of the arrangements on the common market generally.[57]

The Government's concern with attempts by other States to interfere with its own efforts to regulate restrictive arrangements is evidenced by article 34 of the law. This forbids compliance "with measures or decisions taken by another state and relating to competitive arrangements, concentrations of economic power or conduct in restraint of competition" and appears to have had its origin in attempts by United States authorities to obtain adherence by Netherlands companies to court orders and subpoenas under the Sherman Act. As stated in the Explanatory Memorandum with reference to what was then designated section 30:

> Since the fundamental principles of Netherlands cartel legislation, together with concrete decisions by the Netherlands Authorities on questions of cartel policy, must in principle be decisive in this matter as regards the conduct of business and industry on Netherlands territory, it is laid down in Section 30 that decisions by other States on questions of cartel policy—including decisions by judicial bodies of such States—may not voluntarily be complied with. Even in cases where such decisions by other States, under which, for example, Netherlands undertakings on Netherlands territory might be compelled to perform certain acts, are in themselves lawful under international law, they may come into conflict with the laws of the Netherlands, which here too must be decisive. Cases are, however, conceivable in which there can be no question of any

55. MEMO. REPLY, *supra* note 47, General Observations, § 3.
56. First Chamber, Session 1955-56, 3295, No. 187a, pp. 2, 3. For a discussion in Holland of the territorial principle. See WEEBERS, CONTROLE OP INTERNATIONALE, KARTELS 29-41 (Zwolle).
57. Treaty establishing the European Economic Community, art. 88.

> conflict with international law or with substantive or adjective principles of Netherlands law, and in which at most there can be said to be a desirability of co-ordination between the cartel policy of the Netherlands and that of other Powers. In view of these possibilities, the Ministers are empowered to grant exemption from the ban. The question whether there are any grounds for making use of these powers will on the whole have to be reviewed from case to case.[58]

The law is not yet in operation as further legislation is required in regard to appeals from Ministerial declarations and orders. It is expected that this further legislation will be passed during 1958.

THE LAW OF FRANCE

In France basic prohibitions against concerted or individual manipulations of price by artificial or fraudulent means have long been in existence,[59] but these criminal provisions have been largely ineffective, partly because of the difficulties involved in proving the necessary intent of fraud, and partly because the authorities have not been supplied with adequate funds and other means of proper enforcement.[60] Notwithstanding the hostility of public opinion and official circles, measures were adopted by the legislature in 1953 and 1954 for dealing with the problem of restrictive practices, largely as the result of a growing conviction that these were an obstacle to the economic recovery of France. In the formulation of this legislation, there was, on the one hand, strong opposition to any attempt to import the Sherman Act into a country whose economic and social structures differed radically from that of the United States and, on the other, the Government opposed the criterion of public interest as too vague a yardstick for distinguishing bad practices from good ones.[61] Nor was

58. EXPLAN. MEMO., *supra* note 45, Comment on § 30. In the letter from the Netherlands Ambassador, referred to in note 19 *supra*, it is said:

"It is also the policy of the Netherlands Government that Netherlands companies do not comply with procedural matters relating to the enforcement of foreign economic competition laws in areas under Netherlands sovereignty. Specifically, Netherlands policy as codified in Section 34 of the Economic Competition Law above referred to, prohibits Netherlands companies in the absence of general exemption or specific authorization, from complying with procedural Orders of the type here requested by the United States Attorney General, calling for the exportation of documents or information from areas under Netherlands sovereignty in connection with attempted regulation of Netherlands economic competition by a foreign government. . . . In this connection the Netherlands Government has declared, in the Explanatory Memorandum accompanying the Economic Competition Law, that such general exemption or specific authorization are to be granted at most where there can be said to be a desirability of coordination of the cartel policy of the Netherlands and that of other Powers, always provided that there is no question of any conflict with international law or with the substantive and procedural principles of Netherlands law."

59. PENAL CODE, §§ 419, 420 (France). See Castel, *France*, ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM, 91 (Friedmann ed. 1956).

60. Castel, *supra* note 59 at 105, 106.

61. *Id.* at 119-25.

it possible in the stress of political and economic circumstances in 1953 to do more than tack provisions for the control of restrictive practices on to existing price regulations.

By the Decree issued on this subject in August 1953[62] all concerted actions, agreements (express or implied) and combinations under whatever form which have as their object or tend to have as their effect the restraint of the full exercise of competition by hindering the reduction of costs or sale prices or furthering an artificial increase in prices are prohibited, subject to exemption where it can be shown that the concerted action, agreement or combination has the effect of improving and increasing markets for production or of assuring economic progress by rationalization or specialization. All undertakings and agreements thus prohibited are null and void. A Technical Cartel Commission is established for the purpose of examining possible violations of these provisions and of determining whether satisfactory proof has been furnished of their justification. Although, this Decree thus takes the form of prohibitory legislation as in the case of the Sherman Act, the broad grounds for exemption have the effect of creating only a presumption of illegality more along the line of the new British law. The legislation is essentially directed at the removal of abuses.

The Decree also provides that certain restrictive practices shall be deemed to be "illicit practices". These include improper refusals to sell or provide services, unjustified discriminatory treatment, and minimum reseale price maintenance not authorized by the Government; they also include the concerted actions, agreements and combinations referred to in the last preceding paragraph above. "Antitrust" is thus treated as a part of a general system of price control.

As in the case of the Netherlands, the Cartel Commission is merely an advisory body. Composed of five persons chosen from the Council of State, the Court of Cessation and other tribunals and the Audit Office, four from professional organizations and two from the National Productivity Committee, and presided over by a Counsellor of State, the Commission is charged with the duty of examining possible violations and of considering justifications. The members are chosen by the Ministers of Economic Affairs, Commerce and Justice and the rapporteurs who prepare reports on cases for the Commission, by the first two of these three Ministers. The Secretary is the Director General of Prices and Economic Investigations or his representative. Investigations are undertaken by the Commission or by the Minister of Economic Affairs, who supplies all available information to the Com-

62. Decree No. 53-704 of 9 August 1953, Journal Officiel (France), August 10, 1953, p. 7045.

mission together with his own observations and those of interested parties. Proceedings before the Commission are secret. After considering available evidence, the reports of rapporteurs and the observations of interested parties, the Commission gives its opinion to the Minister who then makes the final decision whether or not to refer the matter to the public prosecutor.[63]

It is claimed by the French Government that this approach to the problem is unique as it does not outlaw all cartels but establishes procedures for dealing with harmful practices and influences on prices and refers the examination of cases to an independent body which has the duty to advise the Government on the measures required to restore competition.[64] This approach is not, however, dissimilar to that adopted in the United Kingdom in 1948 and later in the Netherlands, as in all these cases a commission of experts is established for the purpose of ascertaining the facts, formulating conclusions and giving advice to the appropriate Minister of the Government.

Such a method of dealing with restrictive practices proved unsatisfactory in England, however, as it failed to obtain the confidence of industry, and the examination of individual cases was slow.[65] Moreover, the British Government concluded that the task of deciding on the disposition of individual cases was too great for any Ministry and the only satisfactory solution was to put the matter into the hands of an independent court.[66] It will be interesting to see what the result will be of the French approach.

Although territorial limitations are not written into the French legislation, the Government's official circular on the provisions relating to combinations refers to the "territorial principle of the penal law and to principles of international law."[67] There is no indication in the Decree or the Penal Law that these provisions apply to arrangements made abroad which do not operate in France. Presumably, the position of France on this question is as stated by Judge Weiss in the *Lotus* case[68] and as indicated by protests against American grand jury subpoenas which attempt to reach documents in France.[69]

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63. *Id.*, art. 1, 2; Decree No. 54-97 January 27, 1954, Journal Officiel (France), January 28, 1954; Castel, *supra* note 59, at 128-31.

64. Circular No. 65, Secretary of State for Economic Affairs, March 31, 1954.

65. HANSARD, H. C., April 12, 1956, cols. 446, 487.

66. *Id.* cols. 411-12.

67. Circular No. 65, Secretary of State for Economic Affairs, March 31, 1954. "There is not space here to examine the principles of international law which can extend the application in space of penal provisions." Article 7 of the Code of Criminal Procedure provides that foreigners may be prosecuted in France for the commission abroad of crimes "prejudicial to the security of the State" or of counterfeiting. By inference other "crimes" committed by foreigners abroad are not within the reach of French law.

68. See note 7 *supra*.

69. The French Government forbade the production of documents in France

WEST GERMANY LAW

The new Cartel Law in West Germany[70] has been described as "one of the most controversial economic laws there has ever been."[71] The original bill was submitted in May, 1952, and has been the subject of intense study and debate ever since. The law was finally passed by the Bundestag on July 4, 1957, and becomes effective on January 1, 1958, superseding eleven Allied laws and ordinances and thirteen pre-war laws and ordinances.

Article I prohibits all agreements and resolutions "insofar as they tend to affect the production or the market conditions for trade in goods or commercial services by restricting competition." This basic prohibition, to which the Minister of Economics held fast through long periods of debate, was adopted in preference to a prohibition of cartel practices having harmful effects. At the same time the exceptions to this broad proscription are themselves so wide as to make it extremely uncertain what effect the law will have on cartel practices. Thus, agreements and restrictions are excluded which:

(a) are designed to establish the uniform application of general terms of business, supply and payment other than those having to do with price-fixing and price-calculation (Article 2);

(b) are concerned with supply rebates insofar as they represent genuine recompense for services rendered and will not lead to unjustified discriminations (Article 3);

(c) would otherwise fall under the general prohibition but which the Cartel Authorities permit production and processing enterprises to establish because of a drop in sales due to a long-term shift in demand (Article 4);

(d) the Cartel Authorities permit where the object is "the rationalization of industrial processes" and which are "likely to result in a considerable improvement in the productivity and/or profitability of the enterprises concerned from a technical point of view, from that of economy in operation or from that of organization, and thereby to bring about an improvement in meeting demand" (Article 5);

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in the grand jury investigation of the foreign oil industry. See *In re* Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, Misc. No. 19-52, D.D.C., Dec. 15, 1952, Tr. 730. A protest has also been made in connection with the recent issue of subpoenas in a grand jury investigation in the Southern District of New York of possible violations of the antitrust laws in the radio-television industry.

70. Law Against Restrictive Trade Practices of 28th July, 1957 (Gesetz gegen Wettbewerbsbeschrankungen) (Germany), Bundesgesetzblatt, No. 41, Aug. 9, 1957.

71. *The Main Provisions of the Cartel Bill,* HANDELSBLATT No. 73, June 26, 1957 (Germany).

(e) have for their purpose "securing and furthering the export trade if they are restricted to regulating competition in markets outside" the area of applicability of the law, but this is subject to overriding limitations in international agreements and to avoiding appreciable restrictions on domestic competition (Article 6);

(f) the Cartel Authorities permit in respect of imports into the area of applicability of the law where the importer encounters little or no competition on the part of domestic suppliers (Article 7); and

(g) the Federal Minister for Economic Affairs permits where the restriction on competition is necessary for the economy as a whole and for the common good and outweighs other considerations (Article 8).

It is apparent that there are broad avenues for escape and that much will depend upon the attitude of the Cartel Authority and of the Ministry of Economic Affairs. The Authority will be autonomous, but will operate under the auspices of the Ministry, and appeals from its decisions will lie to the courts.

Collective resale price arrangements are "null and void," but this provision does not apply to branded goods which are in competition with similar goods of other manufacturers or dealers nor to publications, but details of branded goods must be notified to the Federal Cartel Office. This Authority is required to nullify and prohibit resale price maintenance arrangements where it finds that the conditions justifying such maintenance no longer apply, or the maintenance is being abused, or it is likely to make the goods more expensive than market conditions justify or to prevent a drop in price or to limit their production or sale. Restrictions on the use, acquisition or supply of goods and services which are regarded as "unfair" by the Cartel Authority and for which there is "no reasonable compensating consideration" may be declared in valid and patent restrictions are invalid, with certain exceptions, which reach beyond the protective scope of the patent.

Where a business enterprise has no competitors or is subject to no appreciable competition it is deemed to dominate the market and thereby becomes subject to the powers of the Cartel Authority to prohibit practices and to nullify agreements which give rise to abuses. These provisions also apply to two or more business enterprises where there is no appreciable competition between them and which together dominate the market with respect to particular goods or services. Economic and professional associations are allowed to draw up rules of fair competition for their members so as to eliminate practices which are not in accord with principles of fair competition.

The Federal Cartel Office has jurisdiction over Emergency Cartels (Article 4), Export Cartels (Article 6) and Import Cartels (Article 7), resale maintenance agreements relating to branded goods (Article 16), enterprises dominating the market and mergers (Articles 22, 23 and 24), and all restrictions extending beyond a Land's territory; the Federal Minister of Economic Affairs over exemptions under Article 8; and in all other cases the competent Land Authority established by Land legislation. The Federal Cartel Office is an independent Federal higher authority but it forms part of the functional sphere of the Minister for Economic Affairs.

Although in form prohibitory legislation, this law contains so many exceptions and such broad powers are given to the authorities that it is in effect, like other European legislation, a measure for the control and regulation of abuses.

At this writing, the extraterritorial application of the law is not clear. Apparently it applies to foreign arrangements only if they are "effective" within German territory[72] and the *Report of the Parliamentary Committee* which accompanied the final version of the Bill said that action under this provision would depend upon whether foreign parties participated in such arrangements through representatives within Federal territory, whether such parties are subject to the jurisdiction in accordance with applicable principles of international law or whether German law is applicable.[73]

THE LAWS OF NORWAY, SWEDEN AND DENMARK

In all three of these Scandinavian countries the regulation of restrictive practices and monopolies is in the hands of Government commissions rather than the courts, and in both Norway and Denmark regulation is closely allied to price controls. In every case the standard is that of reasonableness and the public interest. Only in Norway is there penal legislation, but the law there is so comprehensive that it is more in the nature of a general control of business law than one specifically directed at cartels.[74]

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72. Note 70, *supra*, Art. 98.

73. Published by Verlag Handelsblatt G.m.b.H., Dusseldorf.

74. For a review of the legislation in Norway see Eckhoff, *Norway*, ANTITRUST LAWS, A COMPARATIVE SYMPOSIUM 281 (Friedmann ed. 1956). For the Swedish laws see Bolin, *Sweden, id.* at 319: these laws should be cited as the Law of 25 September 1953 to Counteract Certain Cases of Restraint of Trade Withm the National Economy and the Law of 1 June 1956 Respecting Duty to Furnish Information on Facts Regarding Prices and Competition, the latter replacing the law of June 29, 1946, referred to by Bolin as "the Act of 1946" (he refers to the former as "the Act of 1954"). The law in Denmark is Law No. 102 of 31st March 1955. On this law see Banke, *Restrictive Practices Danish Legislation*, 6 CARTEL 83 (July 1956).

In the administration of all three systems there appears to be a considerable degree of tolerance. While, in the case of Sweden, the threat exists that, if industry does not conform to a reasonable competitive pattern, stronger legislation may be introduced making certain practices crimes, there does not appear to be much difficulty in negotiating reasonable adjustments.[75] And even in Norway, where the law in terms is drastic and the Government has broad powers to impose further regulations, the emphasis has been on removing particular abuses rather than attempting to establish that certain types of practice are uniformly bad.[76]

In Sweden prohibitions are limited to those directed against resale price maintenance and collaboration in making tenders for the supply of goods or services, and they are subject to Free Trade Council approval. In Denmark, there are also prohibitions against resale price maintenance where the Control Authority does not give its consent, but in other cases the Control Authority must find that a particular practice results or may result in unreasonable prices or business terms or unreasonably restricts the freedom to do business. The more elaborate machinery in Norway is similar in this respect, as consents may be required for some forms of restrictive arrangements and in the absence of such consents they are void. There are also broad powers in Norway for the removal of restraints which are "likely to be harmful to production, distribution or other business conditions within the realm" or which "must be regarded as otherwise unreasonable or harmful to the public interest"; for the prohibition of forms of coercion and discrimination which are deemed "to harm the public interest or have an unreasonable effect"; for the quashing or reducing of private penalties which are "against the public interest" or are "unfair"; and for the issuance of "regulations governing prices, dividends and business conditions."[77]

Even in Norway, however, the administration of these laws appears to be marked by a temperate exercise of the powers granted. Thus, restrictions on new entries into a line of business have been upheld where they are based on professional competence and initial capital requirements but not where they are arbitrary; refusals by dominant enterprises to do business with particular dealers have not been interfered with; boycotts against dealers handling the products of foreign concerns have been given full support; and in the depression years the Price Board brought the members of one industry together for the purpose of negotiating restrictions on competition. At the same time, there have been controls of private pricing arrangements,

75. Bolin, *supra* note 74, at 324, 332, 339. This might be compared with our own procedure for negotiating consent decrees.
76. Eckhoff, *supra* note 74, at 282, 306.
77. *Id.* at 289-92, 294.

and in some cases prohibitions, refusals to sanction market divisions, and a large number of proceedings involving individual firms, associations and agreements.[78] In Denmark and Sweden, the emphasis is on making restrictive arrangements public and negotiating the removal of restraints. Except in the two instances already mentioned, the Swedish law does not provide for coercive measures where restrictions are found to have harmful effects. On the other hand, the Monopoly Control in Denmark is required to order the removal of harmful restraints which are not disposed of by legislation, even to the extent of directing sales to specified buyers on usual terms where restrictions on the freedom to do business have been found to be unreasonable.

In all three of these countries, therefore, restraints on competition and free trade are subject to active controls, the criterion in each case being what is reasonable in the particular circumstances for the community concerned. The method in each case is pragmatic rather than doctrinaire. Foreign law could no more deal with the matter of arrangements operating in these countries than the particular Price Board, Free Trade Council or Monopoly Control could determine what is the public interest in some foreign country. In each case *laissez faire* standards of free trade for many years survived, in varying degrees, various forms of control. There has been wide experience in dealing with depressions, wartime occupation, postwar shortages and current inflation. In each case the regulation of these matters is part of the larger subject of maintaining a vigorous and healthy economy within the territorial limits of the nation concerned.

The Danish law refers to competition in Denmark, excludes the Faroe Islands and stipulates that the law may be applied to Greenland, with appropriate modifications, by Royal Decree. Foreign concerns may be required to report their restrictive arrangements to the Norwegian authorities provided that they have Norwegian representatives or there are parties in Norway. It is not clear how far this or any of the other laws may reach out to foreign arrangements which have effects within the country. In Sweden the criminal code provides that it shall relate to crimes committed in Sweden and that its application to crimes abroad shall be left to the King in Council.[79] This recognizes that the extraterritorial application of penal law is a political matter to be conducted by the responsible officials of the nation in accordance with the law governing the relations among States.

THE EUROPEAN COMMON MARKET

The antitrust provisions of article 85 of the European Common

78. *Id.* at 299-305.
79. Criminal Law, C. 1.

Market Treaty are in some respects similar to those contained in Article 65 of the Treaty Establishing the European Coal and Steel Community.[80] In both cases there are broad prohibitions against agreements, decisions and concerted practices which prevent, restrict or distort the operation of competition within the market and particular practices are specified; and in both cases prohibited agreements are null and void ("nuls de plein droit"). It is doubtful that the nullity of such arrangements is intended to be more than a presumption, as the appropriate authority may in each case grant exemption where it is established that the management will contribute to an improvement in production or distribution but it is by no means clear how the provisions of the Common Market Treaty will be construed.[81] There is some resemblance to the laws in France and Germany. As in the case of the French law, the prohibitions are broad enough to cover arrangements which have as their object or possible effect the fettering of competition, but the Treaty goes further than this and attaches even to those which are "likely to affect trade between Member States." It will be difficult to find any arrangements among competitors within the six member States which do not fall within this broad reach. As this Treaty will become law in each member State (there is confusion as to whether the antitrust prohibitions are directives to the member States or are rules binding on all citizens of such States) local statutes may in time cease to have significance for any but those arrangements having a purely local effect. In the enumeration of offenses some are specified which are not mentioned in the Coal and Steel Community Treaty and proof of contribution to the promotion of technical or economic progress is added as a ground for granting exemption.[82]

80. For a French text of the former see NAUDIN, LE MARCHÉ COMMUN 127-239 (1957). An English translation has been published by the Coal and Steel Community. A French text and an English translation of the latter appears in I EUROPEAN YEARBOOK 359-429 (1955).

81. "Cartels are presumed guilty until proven 'innocent'; consequently they are *prima facie, forbidden.*" MASON, THE EUROPEAN COAL AND STEEL COMMUNITY 62 (1955). Note, however, the contrast between the prohibitory and nullity provisions of article 85 and the abuse provisions of article 86 of the Common Market Treaty. If no more than a presumption were intended by article 85 it is surprising that the nullity provisions of paragraph 2 were added to the prohibitions of 1. If 2 does not mean what it says, why was it included? If it does mean what it says, how can an agreement which is null and void be revived if a defense under paragraph 3 is established? A possible reconciliation of these three paragraphs might be a deferment of the operation of 1 and 2 until after final decision is taken under 3; but why does 3 refer back only to 1 and not also to 2? This and other ambiguities were pointed out in the Dutch Second Chamber, Session 1956-1957, 4725, Nos. 3 and 9. It is not unlikely that in practice the Commission will be less concerned with drafting difficulties than with arriving at a commonsense solution in each case which will command the support of the nations concerned. The trend is away from the traditional American antitrust view. See CAMPS, THE EUROPEAN COMMON MARKET AND AMERICAN POLICY, 27 (1956).

82. The following are additional: fixing purchase or sale terms other than price (paragraph 1(a)); limiting or controlling outlets as well as production,

In the Coal and Steel Community Treaty controls are provided over mergers. Any transaction which would have the effect of bringing about a concentration[83] must be submitted to the High Authority for authorization. That is to be granted if the transaction will not produce power to determine prices, control or restrict production or distribution or prevent effective competition in a substantial part of the market. As Article 86 of the Common Market Treaty, on the other hand, is directed only to the avoidance of abusive exploitation, there are no provisions for the approval of mergers.[84] It is possible, however, that merger agreements are covered by Article 85.

In the application of these provisions the Commission will be influenced by the possibility of appeals from its decisions by any person against whom a decision has been taken or by any person directly and individually concerned. In the case of the Coal and Steel Community appeals lie against decisions and "recommendations"; in the Common Market Treaty it is provided that the competence of the court relates to "the legality of the acts of the Council and of the Commission other than recommendations or opinions (avis)." Otherwise the grounds for appeal are the same: incompetence, violation of

technical development and investments (1(b)); applying unequal terms for equivalent benefits (1(d)); and tie-in arrangements not connected with the object of a contract (1(e)). The specification of particular practices is presumably not intended to limit the broad sweep of the general prohibitions. Until rules and directives are decreed under article 87, the validity of arrangements and questions regarding the abuse of dominant positions are left by article 88 to the authorities of the Member States "in conformity with the law of their country and the provisions of Articles 85, notably paragraph 3, and 86." This appears to leave the matter in a state of some confusion for the time being. In the Netherlands a law to implement Article 88 will provide that competitive arrangements shall be permitted, and there shall be deemed to be no abuse of a dominating position, so long as no action has been taken against them by the Netherlands authorities. Session 1956-1957, 4778, Nos. 2 and 3. Strong doubts have been expressed regarding the constitutionality of this measure in view of the constitutional provision (Art. 65) that legal provisions in force within the Kingdom shall not apply if application would be incompatible with an international agreement which has been published. See van Panhuys, *The Netherlands Constitution and International Law*, 47 AM. J. INT. LAW 537, 553-58 (1953). If the prohibitions contained in Article 85 of the Treaty are immediately effective and all arrangements thus prohibited are null and void and if these provisions have the force of law in each member State, the greatest uncertainties regarding the validity of restrictive arrangements will prevail. It is doubtless to avoid any such legal chaos that governments are officially taking the position that Articles 85 and 86 operate during the initial period only to the extent provided in implementing legislation and that it was not the "intention" of the Treaty that it should directly bind the citizens of member States. *Cf.* McDougal, *International Law, Power and Policy*, 82 RECUEIL DES COURS DE L' ACADÉME DE DROIT INTERNATIONAL 137, 152 (1953).

83. For a definition of "concentration" see MASON, *op cit. supra* note 81, at 61.

84. Mason points out that, in contrast to "cartels," concentrations under the Coal and Steel Community Treaty are "presumed innocent unless the HA finds that they disturb the market." *Id.* at 62. He points out that the framers of the Treaty considered that concentrations were "essential in many phases of expansion and modernization, and in general would serve to lower production costs." This philosophy is reflected in the simpler provisions of article 86 of the Common Market Treaty which "prohibits" only "abuses."

substantial procedural requirements, violation of the Treaty or of any rule of law relating to its application, and wrongful use of power, although the Common Market Treaty does not provide that the court may not review an evaluation of a situation based on economic facts and circumstances. As the granting of exemptions under paragraph 3 of Article 85 is discretionary, it may not be possible to appeal from the denial of an application. This and other procedural matters will be covered by regulations under Article 87 which will define, *inter alia*, "the respective responsibilities of the Commission and of the Court of Justice."[85]

Whether the Commission established under the Common Market Treaty will try to reach operations outside the Common Market which produce harmful effects on the trade among member States is a question which cannot now be answered. Such a step would clearly raise questions of international law, as it would involve the agency of one bloc of States attempting to impose its "law", derived from the treaty creating that bloc, upon the commercial activities abroad of the nationals of other States. Should any situation arise where, diplomatic negotiations having failed, some action is required against foreigu restraints, presumably simple measures would be taken, such as permitting counter combinations within the Common Market or dealing with the matter through tariffs. It is unlikely that any such question would ever reach the court.[86]

CONCLUSION

The seven countries of Europe whose antitrust laws have been examined may all be moving in the same direction of reducing restraints on competition, but it is obvious that they are not all moving in the same way or at the same tempo. Whether the leaps forward that have been taken in the Coal and Steel Community and Common Market treaties will serve to accelerate and consolidate these national pro-

85. The powers of the Court of Justice in respect of appeals are set out in Articles 170 to 174. As to the interpretation of corresponding provisions in the Coal and Steel Community Treaty see VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY 71-76 (1954).

86. In November, 1953, the High Authority of the Coal and Steel Community was asked whether it could take action in respect of price agreements among steel producers relating to exports. It was suggested that these arrangements, which appeared to be analogous to the pre-war International Steel Cartel, might produce unfavourable reactions, particularly in Anglo-Saxon countries. The High Authority replied that it had noted reactions from Anglo-Saxon countries and others and that it did appear that consumers in these countries feared that fixed prices might be higher than they would be in the absence of the agreement. Although it could, after consulting various bodies, fix maximum export prices, it said that the prohibitions against price fixing did not apply to export arrangements: "The provisions of Article 65 refer solely to all forms of concerted action of which the effect might be felt on the common market. Agreements relating to competition in the export trade which do not apply to the competitive conditions of the common market are not, however, covered by the general prohibition."

gressions is not presently clear. Certainly they should encourage stricter controls by local authorities, but in the operation of common markets national rivalries may tend to protect combinations which are designed to promote national economic interests. Until these regional controls are more fully established, enforcement will be left to national authorities. During the initial period, therefore, national interests may continue to influence decisions, but eventually the governing factor will undoubtedly be the regional interest and national antitrust laws will then be relegated to a position similar to that occupied by our own laws.

It is a characteristic of both regional and national laws that restrictive practices and economic concentrations are to be tested against the welfare of the relevant communities.[87] Prohibitions in general terms, and even declarations of nullity, will undoubtedly be construed as merely presumptive and operative only after particular situations are found to lack justification; they may even be construed as applicable only where harmful effects or abuses are established. As commercial prosperity is the life blood of every community, administrative agencies, whose task it will be to apply these laws will doubtless have regard to the effect which they will have upon general economic conditions in the community. Interferences by the authorities of other communities would hardly be compatible with the orderly administration of the governing law. Resistance to outside interferences is to be expected and the members of a community and their governments will resent any suggestion that commercial behavior within the relevant territorial limits is to be governed by any "foreign" law.

Where such a foreign law is intruded, by the issuance of subpoenas to produce witnesses or documents in relation to activities outside the territorial limits of the community whose law is asserted, or by the imposition of court orders or decrees, the parties affected inevitably protest against such an interference with their liberties. In view of the penalties which may be suffered if these court processes are ignored, and the consequences moreover of complying with orders of dissolution and reconstruction, is it not apparent that such intrusions constitute just such an exercise of State power as the court in the *Lotus* case said was "prohibited" by international law?

The justification claimed may be two-fold. First, it may be said that the application by a court of its own criminal law to the acts of a foreign national abroad does not constitute the exercise of power any-

87. *Cf.* Eckhoff, *supra* note 74, at 301, citing the case of a boycott by Norwegian tobacco dealers of hotels and restaurants handling the products of a foreign tobacco company; and the British REPORT ON THE SUPPLY AND EXPORT OF PNEUMATIC TYRES, 128 (June 24, 1955), where the Monopolies and Restrictive Practices Commission condemned price fixing on the domestic market but concluded, with reference to foreign markets, that "discussions and understandings about prices between Dunlop and the foreign associations and manufacturers . . . are not against the public interest."

where but within the territory of the State where the court is sitting. Second, it may be claimed that, even if such a foreign exercise of power does occur, the society of nations has agreed that this is permissible where the offence being punished is one against the security of the prosecuting State or its currency or it is established that the acts abroad have produced effects within the territory of such State.

As regards the first ground, it may well be that in the case of an ordinary crime the prosecuting State is doing no more than exercise its sovereign power within its own territory where the culprit is being punished. The degree of its interference with the affairs of a foreign State will depend on the nature of the crime, its objective and the connection between the act abroad and the effect within the territory of the prosecuting State.

In the case of the so-called economic crime, however, it is doing much more than this. It is punishing industrial and commercial enterprises abroad which are lawfully carrying on their businesses under the laws of their own countries. Antitrust decrees may enjoin such concerns from performing contracts lawfully made and operating abroad; they may require them to divest themselves of valuable property investments abroad; they may compel the licensing of patents or the transfer of property; or they may require the dissolution or reconstitution of foreign companies. Admittedly the aim of the prosecuting State is the reconstruction of foreign economic groupings, contracts and properties so as to dissipate harmful effects on its own economy. The institution of proceedings against foreign nationals designed to achieve such an objective clearly constitutes the exercise of State power within the territories of the other States where the decrees are to take effect. The protests of foreign governments relative to grand jury subpoenas evidences the concern of such governments at these penal thrusts into their territories.

As regards the other ground, it is evident from these protests that consent has not in fact been given to these extraterritorial applications.[88] Does the acceptance by the International Court of the principle of objective territoriality and the widespread acceptance of the protective principle evidence an overriding general consent? Wholly apart from the positive prohibition recognized by the Court and referred to above, it is submitted that no such consent can be extended to the prosecution of foreign nationals for the "crime" of antitrust any more than it could be implied in the case of any other form of economic control. No general consent can be found for the application of such controls to the activities of foreign nationals in territories where such activities are lawful.

For example, the United States would not tolerate the prosecution

88. See notes 19, 58 *supra*.

by European states of New York dealers in foreign exchange who buy and sell currencies in New York contrary to the prohibitions of European exchange control laws. Nor would it or any other nation tolerate foreign control over the imposition of tariffs on the admission of foreign goods. In both cases, however, the activities of private parties may produce harmful effects in the countries concerned. The run on sterling in August and September, 1957, is evidence of harmful effects in the former case and combinations of American watch manufacturers to raise the duty on imported watches is an instance of the latter. And yet, if Switzerland, for example, were to prosecute American watch manufacturers for having combined to keep out Swiss watches on the ground that their activities were directed at and produced harmful effects in Switzerland, could it be contended that the United States had consented to such an exercise of Swiss power because it accepted the objective territorial principle? If the answer to this question is in the negative, must it not follow that the United States cannot legitimately prosecute foreign manufacturers who combine abroad in a lawful manner even though the effect of such combination may be to restrain our own exports? Has the objective principle, or the doctrine of "effects", any relevance in this area?

However sound it may be as a matter of international law to localize the commission of a common crime at the place where acts abroad produce their effects or to prosecute aliens for plotting abroad to overthrow the State or destroy its currency, no consent on the part of any nation is apparent to the application of these concepts to the area of trade regulation. A variety of economic activities within a country may produce effects beyond its borders and the closer the peoples of different States are brought together by modern methods of travel and communication and the more dynamic their own economic systems become the greater these effects are bound to be.

If effects were enough to justify the regulation by one country of trade in another, there would be a large number of controls operating in each country. These would increase as barriers of distance and language separating nations disappear and the foreign effects of economic activities become more pronounced. There is no evidence that such a proliferation of economic controls would be acceptable to any nation.

On the level of antitrust it is enough to note that no restrictive or monopolistic practice is a common crime under any of the laws considered in this article. Not even in Great Britain, whose system of law comes closest to our own and with whom we share a common moral and ethical inheritance, is any such practice a crime. The people of that country have rejected the "odour of criminality".[89] To

89. See Lord Mancroft, HANSARD, H. L., July 26, 1956, col. 335.

permit any nation to denounce as a crime and to punish under its own law the business behavior of foreign nationals in countries where such behavior is lawful is to infect the business communities of such countries with the very odors that they have been at pains to avoid.

So fundamentally different are these economic offenses from the common or political crimes to which the objective and protective principles have been considered applicable that it is impossible to deduce from the recognition given by States to such principles any consent to their extension to antitrust or other laws regulating competition. In the absence of consent is not the governing principle that each community has an absolute and exclusive right to deal with this subject in its own territory, in its own way, or not to deal with it at all? If the customary rules of international law recognized in the *Lotus* case are to be observed and conflicts with other States are to be avoided, a recognition of this principle in antitrust cases would appear to be essential.